TEXAS REGISTER

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This month's front cover artwork:

Artist: *Joella Reid*
11th grade
Whiteface High School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

We will display artwork on the cover of each *Texas Register*. The artwork featured on the front cover is chosen at random.

The artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*. The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register*.

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GOVERNOR

ATTORNEY GENERAL

PROPOSED RULES

Texas Veterans Land Board

Texas Workforce Commission

THE GOVERNOR

As required by Texas Civil Statutes, Article 6252-13a, §6, the ***Texas Register*** publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for October 9, 2000

Appointed to the Sulphur River Basin Authority Board of Directors for terms to expire February 1, 2005, James Richard (Dick) Goodman of Clarksville (replaced John Howison of Bogata whose term expired) and Judy Wicker Lee of Mt. Pleasant (replaced Maxine Nanze of Atlanta whose term expired)

Appointed to the Texas State Affordable Housing Corporation Board of Directors for a term at the pleasure of the Governor, Karen S. Lugar of San Antonio. Ms. Lugar is being appointed pursuant to the Texas Government Code, §2306.554.

Appointments for October 10, 2000

Designated Dr. Louis B. Levy of San Antonio as presiding officer of the Teas Board of Licensure for Professional Medical Physicists for a term at the pleasure of the Governor. Dr. Levy replaced Dr. Paul H. Murphy of Houston as presiding officer. Dr. Murphy will continue to serve on the board.

Appointed to the San Jacinto Historical Advisory Board for a term to expire September 1, 2003, Nina J. Hendee of Houston (filled the unexpired term of Nell Hoover of Houston who is deceased).

Appointments for October 13, 2000

Appointed to the Crime Stoppers Advisory Council for terms to expire September 1, 2004, Janice C. Gillen of Rosenberg (reappointed), Juan F. Jorge of Tomball (reappointed), and Jimmy R. White of Arlington (replaced Lennie Sims of Wellington whose term expired).

Appointments for October 16, 2000

Appointed to the Angelina and Neches River Authority Board of Directors for terms to expire September 5, 2005, Carl Ray Polk, Jr. of Lufkin (replaced Henry Holubec of Lufkin whose term expired) and Julie Dowell of Bullard (replaced Janelle Ashley of Nacogdoches whose term expired).

Appointed to the Texas Ethics Commission for terms to expire November 19, 2003, Jerome W. Johnson of Amarillo (reappointed) and Mickey Jo Lawrence of Houston (replaced John E. Clark of San Antonio whose term expired).

TRD-200007487

George W. Bush, Governor

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OFFICE OF THE ATTORNEY GENERAL

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

Opinions

Opinion Number JC-0297.

Requested by The Honorable Delma Rios, Kleberg County Attorney, 700 East Kleberg, P.O. Box 1411, Kingsville, Texas 78364, concerning whether a county is authorized to pay one half of the health premiums of county retirees and their dependents for an indefinite period of time and related questions. (RQ-0244-JC)

Summary.

The Federal Consolidated Omnibus Budget Reconciliation Act of 1985 does not require or authorize a county to pay any portion of a retiree's health insurance premiums or to make health insurance coverage available beyond that statute's mandatory time periods for continued coverage. A county may not agree to pay half of county retirees' health insurance premiums unless the retirement plan is authorized by state law and is consistent with article III, section 53 of the Texas Constitution. A county may not agree to pay half of a county retiree's health insurance premiums if that payment would constitute unbargained-for, retroactive compensation.

Opinion Number JC-0298.

Requested by The Honorable Frank Madla, Chair, Intergovernmental Relations Committee, Texas State Senate, P.O. Box 12068, Austin, Texas, 78711, concerning whether a person who is employed outside the service area of a local workforce development board may represent the private sector on the board, and related question. (RQ-0240-JC)

Summary.

Under state law, a person who is employed outside the service area of a local workforce development board is not, for that reason alone, ineligible to serve as a private-sector representative on the board.

Opinion Number JC-0299

Requested by The Honorable Robert Junell, Chair, Committee on Appropriations, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning whether the qualification and granting of a youth-development-association-use tax exemption under §11.19 of the Tax Code constitute a "change of use" for purposes of §23.55 of the Tax Code such that the agricultural "rollback" tax is triggered. (RQ-0245-JC)

Summary.

Qualification of agricultural open-space land for a youth- development-association-use tax exemption under §11.19 of the Tax Code does not itself constitute a change of use for purposes of the rollback tax under §22.53 of the Tax Code, when the land continues to be used for agricultural purposes.

For further information, please call (512) 463-2110

TRD-200007523
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: October 25, 2000

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Request for Opinions

RQ-0292-JC.

Requested by Mr. Robert J. "Sam" Tessen, MS, Executive Director, Telecommunications Infrastructure Fund Board, 1000 Red River, Suite E208, Austin, Texas, 78701, concerning authority of Telecommunications Infrastructure Fund Board (TIF) to expend state appropriated funds for the purpose of informing the public of activities, accomplishments and opportunities of the Board, and related questions. (Request No. 0292-JC)

Briefs requested by November 18, 2000

RQ-0293-JC.

Requested by The Honorable Kip Averitt, Chair, Committee on Financial Institutions, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning whether chapter 62.003, Texas Property Code, which allows for the conversion of a lien securing a personal property loan on a manufactured home to a purchase money lien on homestead property, is constitutional. (Request No. 0293-JC)

Briefs requested by November 19, 2000

RQ-0294-JC.

Requested by The Honorable Mario Gallegos, Jr., Co-Chair, Committee on Redistricting, Texas State Senate, P.O. Box 12068, Austin, Texas, 78711-2068, concerning whether §143.006(b), Local Government Code authorizes municipality's chief executive officer to appoint a person to fill the vacancy of a member whose term has expired on the Fire Fighters' and Police Officers' Civil Service Commission, and related questions. (Request No. 0294-JC)

Briefs requested by November 19, 2000

For further information, please call (512) 463-2110.

TRD-200007494
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: October 24, 2000

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PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS
SUBCHAPTER D. VOTING SYSTEMS CERTIFICATION

1 TAC §81.60, §81.61

The Office of the Secretary of State, Elections Division, proposes amendments to §81.60 and §81.61, concerning voting system certification procedures.

Section 81.60 is amended to delete the requirement that voting systems be certified by the National Association of State Election Directors in order to be certified. The amendment is proposed to retain the requirement that applicants for certification or modification of a voting system in Texas include a summary report from a Nationally Recognized Test Laboratory (NRTL), declaring that the system meets the Federal Election Commission's minimum voting system requirements.

Section 81.61 is amended to delete the requirement that the NRTL at which a voting system is tested has been approved for testing of voting systems by the NASED.

Comments on the proposal may be submitted to Ann McGeehan, Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas, 78711-2060.

The amendments are proposed under the Code, Chapter 31, Subchapter A, §31.003, which provides the Secretary of State with authority to promulgate rules to obtain uniformity in the interpretation and application of the Code, and under the Code, Chapter 122, §122.001(c), which authorizes the Secretary of State to prescribe additional standards for voting systems.

The Texas Elections Code, Chapter 122, is affected by the proposed amendments.

§81.60. Voting System Certification Procedures.

In addition to the procedures prescribed by the Texas Election Code, Chapter 1322, compliance with the following procedures is required for certification of a voting system.

(1) (No change.)

(2) The applicant must deliver four copies of all relevant software and source codes, and six copies of any user and/or reference manuals, and six copies of the summary report(s) for all examinations conducted by a NRTL [~~and certified by the NASED, if applicable~~], declaring that the item meets the Federal Election Commission's minimum voting system requirements to the Office of the Secretary of State no later than 45 days prior to the examination.

(3)-(11) (No change.)

§81.61. Condition for Approval of Electronic Voting Systems.

For any voting machine, voting device, voting tabulation device and any software used for each, including the programs and procedures for vote tabulation and testing, or any modification to any of the above, to be certified for use in Texas elections, the system shall have been certified, if applicable, by means of qualification testing by a Nationally Recognized Test Laboratory (NRTL) and shall meet or exceed the minimum requirements set forth in the *Performance and Test Standards for Punch Card, Mark Sense, and Direct Recording Electronic Voting Systems,* or in any successor voluntary standard document developed and promulgated by the Federal Election Commission. [~~The NRTL must have been approved for testing of voting systems by the NASED.~~] This section applies only to systems and modifications to previously certified systems submitted after the effective date of this rule.

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

Filed with the Office of the Secretary of State, on October 19, 2000.

TRD-200007396

Jeffrey H. Eubank
Assistant Secretary of State
Office of the Secretary of State
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-5701

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.113

The Texas Health and Human Services Commission (HHSC) proposes new §355.113, concerning the reimbursement methodology for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays.

In conjunction with this new section the Interagency Council on Early Childhood Intervention is simultaneously proposing new §§621.151-621.153, concerning the General Provision for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays, elsewhere in this issue of the *Texas Register*.

Don Green, Chief Financial Officer, HHSC, has determined for the first five-year period the proposed section is in effect, the fiscal implications to state government will be a net savings of $4,738,809 for fiscal year 2001 and $4,707,514 for fiscal year 2002. There will be no fiscal implications for local government.

Steve Lorenzen, Director of Medicaid Ratesetting, HHSC, has determined that for each of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be reimbursement for developmental rehabilitation therapy services for infants and toddlers with disabilities or developmental delays. There will be no impact on local employment. There will be no adverse effect on small or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Questions about the content of this proposal may be directed to Glenn Hart at the Texas Interagency Council on Early Childhood Intervention, Division of Program Services, at (512) 424-6830. Written comments on the proposal may be submitted to Glenn Hart, Division of Program Services, Texas Interagency Council on Early Childhood Intervention, 4900 North Lamar, Austin, Texas 78751-2399, within 30 days of publication in the *Texas Register*.

The new section is proposed under Chapter 73 of the Human Resources Code, §73.0051 and §73.022, which provides the agency with the authority to administer public programs for developmentally delayed children.

No other statutes, articles or codes are affected by the proposed new section.

§355.113. Reimbursement for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays.

(a) The Texas Health and Human Services Commission (HHSC) determines a prospective uniform reimbursement rate for the Texas Early Childhood Intervention Program (ECI) Medicaid programs. ECI reimburses Early Childhood Intervention program providers according to the reimbursement methodology. HHSC determines the rate based on costs contained in the ECI providers' Time and Financial Information (TAFI) reports, which are reported on a quarterly basis. ECI staff develops the proposed statewide reimbursement rate and recommends it to HHSC. The recommended rate is determined in the following manner:

(1) Salaries and benefits for staff delivering developmental rehabilitation therapy services are added to allocated costs for ECI overhead and host agency administration costs. Allocations are made using time study information from the TAFI reports.

(2) These total costs for developmental rehabilitation therapy services are divided by the total direct service hours to calculate a cost per hour.

(3) The resulting total cost per hour for developmental rehabilitation therapy services is projected from the historical reporting period to the prospective rate period using the Personal Consumption Expenditures (PCE) Chain-Type Index.

(4) The projected total cost per hour for developmental rehabilitation therapy services is the proposed reimbursement rate. The reimbursement rate will be paid on an hourly basis, and will be prorated for 15-minute intervals.

(5) The providers' reported costs will be examined annually to determine if it is necessary to rebase the rate.

(b) Rate setting authority. HHSC establishes the reimbursement rate in an open meeting after consideration of financial and statistical information and public testimony. HHSC sets a rate that, in its opinion, is within budgetary constraints, adequate to reimburse the cost of operations for an efficient and economic provider, and justifiable given current economic conditions.

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

Filed with the Office of the Secretary of State, on October 23, 2000.

TRD-200007448
Don Green
Chief Financial Officer
Texas Health and Human Services Commission
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 424-6526

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT COMMISSIONER

SUBCHAPTER A. REGULATED LOAN LICENSES

DIVISION 2. APPLICATION FOR LICENSE AND TRANSFER OF LICENSE

7 TAC §1.30, §1.31

The Finance Commission of Texas (the commission) proposes the adoption of the amendment to §§1.30 and 1.31 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendment as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendment.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendment as proposed will be in effect, the public benefit anticipated as result of the amendment is the removal and replacement of incorrect citation with correct and appropriate citations to the statute. These is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendment is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.30. Definitions.

Words and terms used in this chapter that are defined in Texas Finance Code, Chapter 342, [~~Texas Civil Statutes, Article 5069, Chapter 3A,~~] have the same meanings as defined in Chapter 342 [~~Chapter 3A~~]. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Principal party--All proprietors and adult individuals with a substantial relationship to the proposed lending business of the applicant. Individuals with a substantial relationship to the proposed lending business of the applicant include but are not limited to:

(A) - (B) (No change.)

(C) corporate officers, to include the Chief Executive Officer or President, the Chief Financial Officer or Treasurer, and those with substantial responsibility for lending operations or compliance with [~~Texas Civil Statutes, Article 5069, or~~] the Finance Code;

(D) - (F) (No change.)

§1.31. Filing of New Application.

An application for issuance of a new consumer loan license must be submitted on forms prescribed by the commissioner at the date of filing and in accordance with the commissioner's instructions. The application shall include, but not be limited to, the following:

(1) (No change.)

(2) Other Required Filings.

(A) - (D) (No change.)

(E) Bond. The commissioner may require a bond under §342.102,Texas Finance Code, [~~Texas Civil Statutes, Article 5069-3A.202~~] when the commissioner finds that this would serve the public interest. When a bond is required, the commissioner shall give written notice to the applicant. Should a bond not be submitted within 40 calendar days of the date of the commissioner's notice, any pending application may be denied.

(3) (No change.)

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007411
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 936-7640

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DIVISION 6. LOANS MADE UNDER CHAPTER 342

7 TAC §§1.101, 1.102, 1.104 - 1.107

The Finance Commission of Texas (the commission) proposes the adoption of the amendment to §§1.101, 1.102, 1.104, 1.105, 1.106 and 1.107 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendment as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendment.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendment as proposed will be in effect, the public benefit anticipated as result of the amendment is the removal and replacement of incorrect citation with correct and appropriate citations to the statute. These is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendment is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.101. Purpose and Scope.

(a) Purpose. The purpose of this chapter is to assist in the administration and enforcement of Chapter 342 of the Texas Finance Code. [3A of the Texas Civil Statutes, Article 5069 ("Article 5069").]

(b) Scope.

(1) This chapter applies to all persons engaged in the business of making, transacting, or negotiating loans subject to Chapter 342 of the Texas Finance Code. [3A of Article 5069.] As such, this chapter only applies to lenders and brokers in the business of making, transacting or negotiating loans that:

(A) - (C) (No change.)

(2) This also includes a loan broker who arranges, negotiates, or brokers loans for a lender that funds the loan. This chapter does not apply to any loans made under Chapters 301-339 of the Texas Finance Code, [Chapters 1B-1H of Article 5069,] including, for example, commercial and agricultural loans.

§1.102. Definitions.

Words and terms used in this chapter that are defined in Chapter 342 of the Texas Finance Code [Chapter 3A of Article 5069] have the same meanings as defined in Chapter 342. [Chapter 3A.] The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Acquisition Charge--An interest charge authorized for making the cash advance under authority of §342.252, Texas Finance Code. [Article 3A.402 of Article 5069.]

(2) - (10) (No change.)

(11) Installment Account Handling Charge (IAHC)--An interest charge authorized for making a loan under §342.252, Texas Finance Code. [Article 5069-3A.402.]

(12) - (13) (No change.)

(14) Interpretation Letter--A formal interpretation of Title 4 of [Article 5069 and]the Texas Finance Code made by the Commissioner and approved by the Finance Commission under Texas Finance Code §14.108. [§14.408.]

(15) Licensee--Any person who has been issued a consumer loan license pursuant to Chapter 342 of the Texas Finance Code. [Chapter 3A of Article 5069.] Another name for a "consumer loan license" is "regulated loan license."

(16) - (23) (No change.)

(24) Regulated Loan--Loan made under the authority of Chapter 342, Texas Finance Code. [Article 5069-3A.101.]

(25) - (30) (No change.)

§1.104. Knowledge of Laws and Regulations Required.

Each officer, director, employee, and agent of a licensee shall have a working knowledge of Chapter 342, Texas Finance Code [Chapter 3A of Article 5069,]its implementing regulations, and other pertinent state and federal statutes and regulations that apply to their business.

§1.105. Attempted Evasion of Applicability of Chapter.

A "device, subterfuge, or pretense to evade the application of this title," as used in §342.051(b), Texas Finance Code [Article 5069-3A.101(b),] refers to any transaction:

(1) that in form may appear on its face to be something other than a loan, but in substance meets the definition of a loan as defined in §301.002(a)(10), Texas Finance Code; [Article 5069-1B.002(a)(10);] and

(2) (No change.)

§1.106. Multiple Licenses.

(a) Definitions. The words "make," "negotiate," "arrange," and "collect" as used in §342.052(b), Texas Finance Code [Texas Civil Statutes, Article 5069-3A.102(b)] are to be construed as follows.

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

(b) (No change.)

§1.107. Loans by Mail.

(a) Definitions. The words "make," "negotiate," "arrange," and "collect" as used in §342.053(b), Texas Finance Code [Texas Civil Statutes, Article 5069-3A.103(b)] are to be construed as follows.

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

(b) (No change.)

(c) License not required. National banks and federally-chartered thrifts and credit unions, wherever located, and federally-insured state banks, state thrifts and state credit unions with offices located outside of Texas may make loans by mail to Texas without obtaining any license under §342.051 et seq., Texas Finance Code [Texas Civil Statutes, Article 5069-3A.101] et seq. from the OCCC and are considered to be an authorized lender.

(d) Internet Loans. For purposes of §342.053(b), Texas Finance Code [Texas Civil Statutes, Article 5069-3A.103(b),] a loan made, negotiated, arranged or collected by or through the Internet is considered a "loan by mail."

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007412
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 936-7640

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SUBCHAPTER E. INTEREST CHARGES IN LOANS

7 TAC §§1.501, 1.502, 1.504, 1.505

The Finance Commission of Texas (the commission) proposes the adoption of the amendment to §§1.501, 1.502, 1.504 and 1.505 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendment as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendment.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendment as proposed will be in effect, the public benefit anticipated as result of the amendment is the

removal and replacement of incorrect citation with correct and appropriate citations to the statute. These is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendment is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.501. Maximum Interest Charge.

(a) Precomputed loans. An authorized lender may charge the add-on rates authorized by §342.201(a), Texas Finance Code [~~Art. 5069-3A.301(a)~~] or the alternative simple interest rate authorized by §342.201(d), Texas Finance Code [~~Art. 5069- 3A.301(d),~~] as calculated by the scheduled installment earnings method, for precomputed loans that are either unsecured or secured by personal property. Prepaid interest in the form of points is not permitted, unless expressly authorized by statute (e.g. an administrative loan fee).

(b) Interest-bearing loans. An authorized lender may charge any rate of interest that does not exceed the maximum rate authorized by §342.201(d), Texas Finance Code [~~Art. 5069-3A.301(d),~~] as calculated by the true daily earnings method or the scheduled installment earnings method for an interest-bearing loan that is either unsecured or secured by personal property. Prepaid interest in the form of points is not permitted, unless expressly authorized by statute (e.g. an administrative loan fee).

(c) Method of calculation. An authorized lender making loans under §342.201(d), Texas Finance Code [~~Art. 5069-3A.301(d)~~] may calculate the rate and amount of interest by any method of calculation as long as the amount of interest charged does not exceed the maximum rate or amount of interest set forth in §342.201(d), Texas Finance Code [~~Art. 5069-3A.301(d)~~] calculated using the specified earnings methods of §342.201, Texas Finance Code. [~~Art. 5069-3A.301.~~]

§1.502. Treatment of Periods Less Than a Full Month Before the First Installment Date.

(a) (No change.)

(b) An authorized lender may not charge more than the maximum authorized §342.201(a) or §342.201(d), Texas Finance Code [~~Art. 5069-3A.301(a) or 5069-3A.301(d)~~] effective rate in calculating the interest charge for the additional odd first period.

§1.504. Default Charges.

(a) Precomputed loans. Additional interest for default may be charged on a precomputed loans, whether regular or irregular, or on a precomputed loan contracted for on a scheduled installment earnings method, to the extent it is authorized by §342.203 or §342.206, Texas Finance Code. [~~Art. 5069-3A.303 or Art. 5069-3A.306.~~]

(b) Interest-bearing loans. No additional interest for default may be charged on an interest- bearing loan made pursuant to §342.201, Texas Finance Code [~~Art. 3A.301,~~] except for a loan contracted for on a scheduled installment earnings method.

(c) - (d) (No change.)

(e) Pyramiding prohibited. An authorized lender seeking to assess additional interest for default in a precomputed loan under §342.203 or §342.206, Texas Finance Code [~~Art. 5069-3A.303 or Art. 5069-3A.306~~] must comply with the prohibition on the pyramiding of late charges set forth in the Federal Trade Commission Credit Practices Rule at 16 C.F.R. §§444.4.

§1.505. Deferment.

(a) - (d) (No change.)

(e) Computation of deferment charge for a regular transaction. Each deferment charge on a regular loan transaction shall be computed in accordance with the method prescribed by the loan contract. If the loan contract does not provide for a deferment charge, then no deferment charge may be assessed or collected. A lender may employ any of the prescribed computational methods described herein so long as the computational method employed is consistently utilized throughout the term of the loan.

(1) (No change.)

(2) If any installment subsequent to the first installment is deferred, the deferred installment period will be determined by dividing the remaining precomputed balance owed on the account by the regular scheduled installment amount. The dollar amount associated with the deferred installment period must be rounded down to the nearest whole integer. Additionally, no deferred installment period may have a default charge assessed against the deferred installment period. After the determination of the deferred installment period, the additional interest for the deferment may not exceed the difference between the refund that would be required for prepayment in full for the determined deferred installment and the refund that would be required for the prepayment in full of the next succeeding installment. The resulting difference shall be multiplied by the number of months in the deferment period. For example, the terms of a precomputed §342.201(a), Texas Finance Code [~~Art. 5069- 3A.301(a)~~] loan are as follows: Date of loan: 09/01/1997; First payment due date: 10/01/1997; Cash Advance: $2,576.61; Finance Charge: $1,023.39; Total of Payments: $3,600.00; Term: 36 months; Monthly Installment: $100; Refunding method: Sum of the periodic balances; Annual Percentage Rate: 23.1935%. Assume a deferment is agreed to roughly six months into the contract, and at that time the remaining precomputed balance owed on the account was $3,095.00 and the regular scheduled installment amount was $100.00. The nearest whole integer for the dollar amount associated with the deferred time period would be 30 ($3,095.00 divided by $100 = 30.95; rounded down to the nearest whole integer = 30). If a default charge had already been assessed on the 30th remaining installment, the nearest whole integer would be 29. Assuming no default charge had been assessed on the 30th remaining installment, the additional interest charge for the deferment would be the difference between the interest refund of the 30th and the 29th installments. This difference would be $46.10 (Interest refund as of the 30th installment = $714.53; interest refund as of the 29th installment = $668.43; $714.53 - $668.43 = $46.10). A scheduled installment earnings refund method would yield a slightly different result of $44.49.

(3) (No change.)

(f) - (i) (No change.)

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

Filed with the Office of the Secretary of State, on October 20, 2000.

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Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 936-7640

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SUBCHAPTER F. ALTERNATE CHARGES FOR CONSUMER LOANS

7 TAC §1.601

The Finance Commission of Texas (the commission) proposes an amendment to §1.601 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendment as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendment.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendment as proposed will be in effect, the public benefit anticipated as result of the amendment is the removal and replacement of incorrect citation with correct and appropriate citations to the statute. There is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas, 78705-4207.

The amendment is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.601. Authorized Charges.

(a) An authorized lender may contract for, charge, or collect on a loan made pursuant to Subchapter F:

(1)-(5) (No change.)

(6) interest after maturity that does not exceed the Subchapter A, Chapter 303 [~~Chapter 1D~~] rate.

(b) (No change.)

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

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Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 936-7640

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SUBCHAPTER G. INTEREST AND OTHER CHARGES ON SECONDARY MORTGAGE LOANS

7 TAC §§1.701-1.706

The Finance Commission of Texas (the commission) proposes amendments to §§1.701-1.706 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendments as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendments.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendments as proposed will be in effect, the public benefit anticipated as result of the amendments are the removal and replacement of incorrect citation with correct and appropriate citations to the statute. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendments may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas, 78705-4207.

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.701. Maximum Interest Charge.

(a) Precomputed secondary mortgage loan. In a precomputed secondary mortgage loan, an authorized lender may contract for, charge, or receive an amount of interest that does not exceed the applicable simple interest rate authorized by Texas Finance Code, Chapter 303 [~~Tex. Rev. Civ. Stat., Article 5069-Chapter 1D~~], Subchapter A. Prepaid interest is not permitted unless expressly authorized by statute (e.g., an administrative loan fee).

(b) Interest-bearing loan. In an interest-bearing secondary mortgage loan, an authorized lender may contract for, charge, or receive any rate of interest that does not exceed the applicable amount authorized by Texas Finance Code, Chapter 303 [~~Tex. Rev. Civ. Stat., Article 5069-Chapter 1D~~], Subchapter A, as calculated under the true daily earnings method or the scheduled installment earnings method. Prepaid interest in the form of points, such as origination or discount points, may be contracted for, charged, or received by an originating lender, so long as the total amount of interest contracted for, charged, or received, when spread over the full term of the loan as

permitted by §302.101, Texas Finance Code [~~Tex. Rev. Civ. Stat., Art. 5069-1C.101,~~] does not exceed the applicable interest limit in Texas Finance Code, Chapter 303 [~~Tex. Rev. Civ. Stat., Art. 5069-1D~~], Subchapter A.

(c) Method of calculation. An authorized lender making loans under §342.301(c), Texas Finance Code [~~Article 5069-3A.501(c)~~] may calculate the rate and amount of interest by any method of calculation as long as the amount of interest charged does not exceed the maximum rate or amount of interest set forth in §342.301, Texas Finance Code [~~Article 5069-3A.501~~] calculated using the specified earnings methods contained in §342.301, Texas Finance Code [~~Article 5069-3A.501~~].

§1.702. Treatment of Periods Less Than a Full Month.

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

(c) An authorized lender may not contract for or charge more than the maximum rate authorized by Texas Finance Code, Chapter 303 [~~Art. 5069-Chapter 1D~~], Subchapter A in calculating the interest charge for the additional odd days in the first installment period.

§1.703. Default Charges.

(a) Precomputed loan. Additional interest for default may be charged in a precomputed secondary mortgage loan, whether regular or irregular, or on a secondary mortgage loan that employs the scheduled installment earnings method, to the extent it is authorized by §342.302 or §342.305, Texas Finance Code [~~Tex. Rev. Civ. Stat., Art. 5069-3A.502 or Art. 5069-3A.505~~].

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

(f) Pyramiding prohibited. An authorized lender seeking to assess additional interest for default in a precomputed secondary mortgage loan under §342.302 or §342.305, Texas Finance Code [~~Tex. Rev. Civ. Stat., Article 5069-3A.502 or Article 5069-3A.505~~] must comply with the prohibition on the pyramiding of late charges set forth in the Federal Trade Commission Credit Practices Rule at 16 C.F.R. §444.4 or in Regulation AA, 12 C.F.R. Part 227, promulgated by the Board of Governors of the Federal Reserve Board, as applicable.

§1.704. Deferment.

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

(d) Computation of deferment charge for a regular transaction. Each deferment charge on a regular loan transaction shall be computed in accordance with the method prescribed by the loan contract. If the loan contract does not provide for a deferment charge, then no deferment charge may be assessed or collected. A lender may employ any of the prescribed computational methods described in Chapter 342 [~~Chapter 3A~~] so long as the computational method employed is consistently utilized throughout the term of the loan.

(1) (No change.)

(2) If any installment subsequent to the first installment is deferred, the deferred installment period will be determined by dividing the remaining precomputed balance owed on the account by the regular scheduled installment amount. The dollar amount associated with the deferred installment period must be rounded down to the nearest whole integer. Additionally, no deferred installment period may have a default charge assessed against the deferred installment period. After the determination of the deferred installment period, the additional interest for the deferment may not exceed the difference between the refund that would be required for prepayment in full for the determined deferred installment and the refund that would be required for the prepayment in full of the next succeeding installment. The resulting difference shall be multiplied by the number of months in the deferment period. For example, the terms of a precomputed §342.301(a), Texas Finance Code[~~Art. 5069-3A.501(a)~~] loan are as follows: Date of loan: 09/01/1997; First payment due date: 10/01/1997; Cash Advance: $2,766.48; Finance Charge: $833.52; Total of Payments: $3,600.00; Term: 36 months; Monthly Installment: $100; Refunding method: Sum of the periodic balances; and Annual Percentage Rate: 18%. Assume a deferment is agreed to roughly six months into the contract and, at that time, the remaining precomputed balance owed on the account was $3,095.00 and the regularly scheduled installment amount was $100.00. The nearest whole integer for the dollar amount associated with the deferred time period would be 30 ($3,095.00 divided by $100 = 30.95, rounded down to the nearest whole integer, 30). If a default charge had already been assessed on the 30th remaining installment, the nearest whole integer would be 29. Assuming no default charge had been assessed on the 30th remaining installment, the additional interest charge for the deferment would be the difference between the interest refund of the 30th and the 29th installments. This difference would be $37.54 (interest refund as of the 30th installment = $581.96; interest refund as of the 29th installment = $544.42; $581.96 - $544.42 = $37.54). A scheduled installment earnings refund method would yield a slightly different result of $36.69.

(3) (No change.)

(e)-(h) (No change.)

§1.705. Amounts Authorized To Be Charged after Consummation.

(a) Generally. A secondary mortgage loan contract may provide for any one or more of the four listed categories of charges set forth in §342.307, Texas Finance Code [~~Tex. Rev. Civ. Stat., Art. 5069-3A.507~~]. These charges may then be assessed and collected by an authorized lender after consummation of the loan if appropriately included in the contract.

(b) (No change.)

§1.706. Amounts Authorized To Be Collected on or before Closing.

(a) Generally. On or before the closing of a secondary mortgage loan, an authorized lender may collect any one or more of the eight categories of charges set forth in §342.308(a), Texas Finance Code [~~Tex. Rev. Civ. Stat., Art. 5069-3A.508(a)~~].

(b) Administrative loan fee. An authorized lender may collect an administrative loan fee pursuant to §342.308(a)(9), Texas Finance Code [~~Acts 1997, 75th Legislature, Chapter 164~~] on interest bearing and pre-computed loans.

(1)-(2) (No change.)

(3) Interest may not be assessed, charged, or received on an administrative fee if the assessment causes the total amount of interest to exceed the maximum amount authorized under Chapter 342 [~~3A~~].

(c) (No change.)

(d) Cost of credit report. An authorized lender may collect the cost paid to a credit reporting agency to obtain a credit report pursuant to §342.308(a)(5), Texas Finance Code [~~Tex. Rev. Civ. Stat., Art. 5069-3A.508(a)(5)~~] but may not charge an additional fee for reviewing or evaluating a credit report.

(e)-(f) (No change.)

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

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TRD-200007415

Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
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For further information, please call: (512) 936-7640

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SUBCHAPTER H. REFUNDS IN PRECOMPUTED LOANS

7 TAC §§1.751, 1.756, 1.757

The Finance Commission of Texas (the commission) proposes amendments to §§1.751, 1.756 and 1.757 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendments as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendments.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendments as proposed will be in effect, the public benefit anticipated as result of the amendments are the removal and replacement of incorrect citation with correct and appropriate citations to the statute. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendments may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.751. Scope.

(a) Scope. This subchapter applies to all precomputed loan transactions made pursuant to subchapters E, F, and G of Chapter 342, Texas Finance Code [~~Article 5069, Chapter 3A~~]. This subchapter is inapplicable to interest-bearing loans made under the same subchapters.

(b) (No change.)

§1.756. Refund of Precomputed Interest in Regular Subchapter E and G Loans with the Term of the Loan More Than Sixty Months; Prepayment in Full after the First Installment Due Date and before the Final Installment Due Date.

An authorized lender may retain an interest charge after the first installment that does not exceed an amount calculated in accordance with §342.352, Texas Finance Code [~~Article 5069-3A.602~~].

§1.757. Refund of Precomputed Interest in Irregular Subchapter E and G Loans.

If prepayment in full is made by cash, renewal, or otherwise in an irregular Subchapter E or G loan, the lender shall refund or credit to the borrower all unearned interest. The amount of interest which may be retained by the lender as earned shall be determined by use of the accrual method as authorized by §342.352, Texas Finance Code [~~Article 5069-3A.602~~] and [~~7 TAC~~] §1.755 and §1.756 of this title.

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

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SUBCHAPTER I. INSURANCE

7 TAC §§1.801, 1.802, 1.804 - 1.806, 1.808, 1.811

The Finance Commission of Texas (the commission) proposes the adoption of the amendment to §§1.801, 1.802, 1.804, 1.805, 1.806, 1.808 and 1.811 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendment as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendment.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendment as proposed will be in effect, the public benefit anticipated as result of the amendment is the removal and replacement of incorrect citation with correct and appropriate citations to the statute. These is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendment is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.801. Definitions.

Words and terms used in this subchapter that are defined in Texas Finance Code, Chapter 342, [~~Texas Revised Civil Statutes, Article 5069, Chapter 3A,~~] have the meanings as defined in Chapter 342 [~~Chapter 3A~~]. The following words and terms, shall have the following meanings unless the context clearly indicates otherwise.

(1) Personal property insurance--coverage to insure tangible personal property offered as security for a loan made under Chapter 342 [~~Chapter 3A~~] .

(2) Property insurance--coverage to insure either an interest in real estate or tangible personal property offered as security for a loan made under Chapter 342 [~~Chapter 3A~~].

(3) - (6) (No change.)

§1.802. Authorized Property Insurance.

(a) Property insurance written in connection with a loan made under Chapter 342 [~~Chapter 3A~~] must be written at rates not in excess of the rates fixed or approved by the Texas Department of Insurance if a rate structure has been fixed or approved for that particular type of coverage.

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

(e) Property insurance written in connection with a Chapter 342 [~~Chapter 3A~~] loan must be provided by a company authorized to do business in this state.

§1.804. Claim Provisions for Property Insurance Other Than Insurance Covering Automobiles.

(a) Personal property insurance other than insurance property covering automobiles written on a loan subject to Chapter 342, [~~Chapter 3A~~] should provide a procedure for determining and adjusting the value of insured items in the event of loss. If a licensee does not utilize a formula submitted to and approved by the commissioner for adjusting the value of the items insured and if a loss occurs, the value initially stated is presumed to be the actual replacement cost of each insured item throughout the life of the policy.

(b) (No change.)

§1.805. Authorized Credit Insurance.

(a) Credit insurance written in connection with a Chapter 342 [~~Chapter 3A~~] loan shall be decreasing term insurance.

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

§1.806. Provision of Policy or Certificate.

If a Chapter 342 [~~Chapter 3A~~] loan provides for the purchase of insurance by the borrower from the lender, the lender shall furnish to the borrower, within 30 days of the date of the loan, a properly executed policy or certificate of insurance. The policy or certificate of insurance shall clearly set forth:

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

§1.808. Termination and Refund.

(a) Upon discharge of an indebtedness by prepayment, renewal, or refinancing, any insurance, other than nonfiling insurance, written under the authority of Subchapter I of Chapter 342, Texas Finance Code, §342.401 through §342.416, [~~Chapter 3A of the Credit Code, Texas Revised Civil Statutes, Articles 5069-3A.701 through 5069- 3A.716,~~] shall be automatically terminated. At the option of the borrower, dual-interest automobile insurance may be retained without cancellation. If a policy of insurance is terminated prior to scheduled maturity, a credit of the unearned premium shall be applied to the borrower's account or a refund of the unearned premium shall be paid by the lender to the borrower.

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

§1.811. Nonfiling Insurance.

If a Chapter 342 [~~Chapter 3A~~] loan is renewed and a charge was assessed for nonfiling insurance in the original loan, a new charge for nonfiling insurance may not be assessed or contracted for in the renewed loan unless the term of the renewed loan extends more than five years after the date of the original loan. If different collateral is substituted or added to a loan, then a new charge for nonfiling insurance may be assessed.

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

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Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
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For further information, please call: (512) 936-7640

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SUBCHAPTER J. AUTHORIZED LENDER'S DUTIES AND AUTHORITY

7 TAC §1.827, §1.828

The Finance Commission of Texas (the commission) proposes the adoption of the amendment to §1.827 and §1.828 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code,* Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendment as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendment.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendment as proposed will be in effect, the public benefit anticipated as result of the amendment is the removal and replacement of incorrect citation with correct and appropriate citations to the statute. There is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendment is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.827. Bilingual Disclosure.

(a) Each licensee shall fully disclose the terms of a loan contract subject to Chapter 342 [~~Chapter 3A~~] to the borrower. If all or a majority of the negotiations between the licensee and the borrower are conducted in the Spanish language, disclosure of the terms of the contract shall be in writing in the Spanish language as well as in English.

The disclosure shall be deemed to have been made properly if the borrower is furnished a completed form prescribed by the commissioner for this purpose and the borrower acknowledges receipt thereof or if the lender provides the borrower with a written disclosure of equivalent information.

(b) (No change.)

§1.828. Return of Instruments to Borrower.

Upon discharge of an indebtedness by payment, renewal, or refinancing, a lender shall return an original or true and correct copy of the instrument creating the indebtedness marked "PAID" or, in lieu of a marked original or copy, provide a discharge and release of all obligations under the loan to satisfy the requirements of §342.454, Texas Finance Code. [~~Texas Revised Civil Statute Article 5069-3A.804.~~] In addition, if a loan has been paid off, a lender shall give the borrower, in a recordable form, a release of the lien, including a lien on an automobile title or real estate, or shall provide documentation for the release to the borrower, at the option of the lender whose loan has been paid a copy of an endorsement, with or without recourse, representation or warranty, and assignment of the lien to a lender that is refinancing the loan. A lender shall comply with the requirements of this section within a reasonable time not to exceed 30 days after receipt of collected funds by the lender.

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

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For further information, please call: (512) 936-7640

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SUBCHAPTER K. PROHIBITIONS ON AUTHORIZED LENDERS

7 TAC §1.851, §1.857

The Finance Commission of Texas (the commission) proposes the adoption of the amendment to §§1.851 and 1.857 pertaining to the technical correction of legal citations as a result of the recodification by the 76th Legislature of the *Texas Credit Code*, Texas Civil Statutes, Article 5069, into the Texas Finance Code.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period of the amendment as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the amendment.

Ms. Pettijohn also has determined that for each year of the first five-year period the amendment as proposed will be in effect, the public benefit anticipated as result of the amendment is the removal and replacement of incorrect citation with correct and appropriate citations to the statute. These is no anticipated cost to persons who are required to comply with the amendment as proposed. There will be no adverse economic effect on small businesses.

Comments on the proposed amendment may be submitted in writing to Leslie L. Pettijohn, Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207.

The amendment is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

§1.851. Duplication of Loans.

(a) A licensee may have more than one loan contract under Chapter 342 [~~Chapter 3A~~] with the same borrower at the same time; however, in such an event the total interest charges assessed on the several cash advances shall not exceed the total interest charges that could be legally imposed on one cash advance of an amount equal to the total of the several separate cash advances. The commissioner may require refunds of interest charges in excess of that which could be legally charged under the chapter. The commissioner shall prescribe the method of determining any excess charges.

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

§1.857. Full Disclosure Requirements Other Than Open End or Revolving Loan Plans.

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

(d) For purposes of this section, compliance by an authorized lender with the Federal Truth- In-Lending Act and regulations promulgated thereunder relating to closed-end transactions shall constitute compliance with §342.505, Texas Finance Code [~~the Texas Credit Title, Article 3A.855~~] and these administrative rules.

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

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Finance Commission of Texas
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PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER B. ORGANIZATION PROCEDURES

7 TAC §91.210

The Texas Credit Union Commission proposes amendments to §91.210 relating to certificate of authority to do business in the State of Texas.

Two new subsections are proposed. The first deals with field of membership expansion requests from foreign credit unions. If adopted, a foreign credit union could add new occupational or associational groups to their fields of membership provided that reciprocity exists between Texas and the credit unions' home state or country and the proposed group can be conveniently served from the foreign credit union's office. The second subsection adds an enforcement and penalty provision that can be invoked by the Commissioner should a foreign credit union fail to comply with any applicable statute or administrative rule.

Lynette Pool, Deputy Commissioner, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule amendment.

She has also determined that for each year of the first five years the proposed amendment is in effect, the public benefits anticipated as a result of enforcing the rule will be that foreign credit unions operating in Texas will have clearly defined requirements for adding groups to their fields of membership, and parity between them and Texas state-chartered credit unions will be ensured. The enforcement provisions will allow the Department to more readily address problems with foreign credit unions to the benefit of the latter's Texas members. There is no anticipated effect on small businesses as a result of adopting the new amendment. There is no economic cost anticipated to entities that are required to comply with the new amendment as a result of its future adoption.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Lynette Pool, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendment is proposed under the provisions of §122.013 of the Texas Finance Code that is interpreted as authorizing the Credit Union Commission to adopt rules that govern foreign credit union operations in this state.

The specific section affected by this proposed rule is Texas Finance Code §122.013.

§91.210. Certificate of Authority to Do Business in the State of Texas.

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

(i) Field of membership. A certificate of authority to do business in this state is specifically issued to allow a foreign credit union to provide services to its existing field of membership. However, the commissioner may approve a foreign credit union's request to expand its field of membership to include distinct, definable single occupational and/or associational communities of interest within the state of Texas that can be conveniently served from its office(s) if it is organized in a state or country that allows a credit union organized under the act to expand its field of membership to at least the same extent. The commissioner shall use, in making a determination on the expansion request, the same criteria and the same procedures as used when a Texas credit union seeks to expand its field of membership. The commissioner shall make a reasonable effort to coordinate this determination with the foreign credit union's primary regulator to assure that each agency's material interests, authorities and responsibilities are fulfilled.

(j) Enforcement; penalty. The commissioner has grounds to issue a cease and desist order to an officer, employee, director, and/or the foreign credit union itself, if the commissioner determines from examination or other credible evidence that the credit union has violated or is violating any applicable Texas law or rules of the commission. If the foreign credit union does not comply with an order, the commissioner may assess an administrative penalty as authorized by §122.260, Finance Code, as well as suspend or revoke the certificate of authority.

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

Filed with the Office of the Secretary of State, on October 23, 2000.

TRD-200007442
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 837-9236

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SUBCHAPTER C. MEMBERS

7 TAC §91.301

The Texas Credit Union Commission proposes amendments to rule §91.301 relating to field of membership. The first amendment conforms the terminology used in the rule to that contained in the enabling statute, specifically the term "common bond" has been changed to "community of interests. Another change describes what constitutes a recognizable community with regards to a geographic community of interest. The third amendment inserts language addressing the treatment of overlaps resulting from a proposed field of membership change. Lastly, there is an amendment that would allow credit unions the ability to add underserved communities regardless of location to their fields of membership provided certain criteria are met.

The Government Code and the General Appropriations Act require each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. After conducting a preliminary review of §91.301, the Commission determined that several modifications and additions are necessary to bring the field of membership rule more in line with today's competitive marketplace.

The Department received letters from Texas Dow Employees Credit Union, Mid-County Teachers Credit Union, GTX Credit Union, Pollock Employees Credit Union, and Forth Worth City Employees Credit Union in response to the Commission's notice of intention to assess the need for the rule. All of the commenters addressed the need for enforcement of field of membership (FOM) provisions, including exclusionary language to protect against overlaps, through assessment of a penalty. One commenter addressed the continued need for a multiple group FOM. Another commenter stated the belief that bigger is not necessarily better with respect to total assets, and FOM expansions should be based on the resulting benefits to the credit unions' members/owners. Another comment was made recommending that use of exclusionary language designed to provide overlap protection should be limited or done away with completely on the basis of giving potential members the greatest flexibility as possible. Two commenters disagreed with that position, however, and stated that overlap protection still has a place in protecting the smaller credit unions.

Lynette Pool, Deputy Commissioner, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed new rule.

Lynette Pool has determined that for each year of the first five years the rule is in effect, the public benefit anticipated will be that a greater number of Texas citizens will have access to credit union membership. Furthermore, credit unions will have a clearer understanding of the requirements for expanding their fields of membership, as well as the Commission's procedures for addressing potential overlaps. There is no anticipated economic cost to entities that will be required to comply with this section as a result of its adoption.

Written comments on the proposal must be submitted within 35 days after its publication in the *Texas Register* to Lynette Pool, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendment is proposed under the provisions of §15.402 of the Texas Finance Code, which is interpreted as authorizing the Credit Union Commission to reasonable rules necessary for administering Chapter 15 and Subtitle D, Title 3, of the Texas Finance Code.

The specific sections affected by these proposed amendments to this rule are §122.001 and §122.051 of the Texas Finance Code.

§91.301. Field of Membership.

State credit unions will be allowed to have, as a minimum, at least as much flexibility as federal credit unions in the regulation of fields of membership. The following guidelines and standards shall be considered by the commissioner in evaluating field of membership requests.

(1) Occupational community of interest [~~Common Bond~~].

(A) This community of interest [~~common bond~~] is based on an employment relationship with a specified employer. Persons sharing this community of interest [~~common bond~~] may be geographically dispersed. Employees of a parent corporation and its subsidiaries and persons under contract to work regularly for an enterprise may be considered under a single occupational community of interest. Each category to be served (e.g., subsidiaries, contractors) should be separately listed in section 3.01 of the credit union's bylaws, if practical. Persons employed by different entities, even if closely related geographically, persons working at a single shopping center, industrial park, or office building, for example, are not treated as having an occupational community of interest [~~common bond~~].

(B) All occupational communities of interest [~~common bonds~~] should include a geographic definition: e.g., "employees, officials, and persons who work under contract regularly for ABC Corporation or any of its subsidiaries, who work in Houston, Texas." Other acceptable geographic definitions are "employees ... who are paid from .... "or "employees ... who are supervised from ...."

(C) The employer may also be included in this community of interest [~~common bond~~] -- e.g., "ABC Corporation and its subsidiaries."

(D) Some examples of occupational group definitions are:

(i) "employees of the Scott Manufacturing Company who work in El Paso, Texas ...;"

(ii) "employees and elected and appointed officials of municipal government in Tyler, Texas ...;"

(iii) "employees of Sharp Drillbit Company and its subsidiary, Drillbit Salvage Company, who work in Midland or Houston, Texas ...;"

(iv) "personnel of fleet units of the United States Navy home port at Ingleside, Texas ...;"

(v) "civilian and military personnel of the United States Government who work or are stationed at, or are attached or assigned to Fort Hood, Texas, or those who are retired from, or their dependents or dependent survivors who are eligible by law or regulations to receive and are receiving benefits or services from that military installation ...;"

(vi) "employees of these contractors who work regularly at United States Naval Shipyard in Ingleside, Texas ...;"

(vii) "employees, doctor, medical staff, technicians, medical and nursing students who work at Galveston Medical Center at the locations stated: ...;"

(viii) "employees, and teachers who work for the Fort Worth Independent School District in Fort Worth, Texas...."

(E) Some examples of insufficiently defined occupational groups are:

(i) "employees of engineering firms in Houston, Texas;" (No common employer; names of firms must be stated; however, may be the basis for a multiple group.)

(ii) "persons employed or working in Dallas, Texas;" (No common employer; names of firms must be stated.)

(iii) "persons working in the entertainment industry in Texas." (No common employer; names of firms should be stated.)

(2) Associational community of interest [~~Common Bond~~].

(A) This community of interest [~~common bond~~] is generally based on groups consisting primarily of natural persons who participate in activities developing common loyalties, mutual benefits, and mutual interest. Qualifying associational groups must hold meetings open to all natural person members at least once a year, must sponsor other activities providing for contact among natural persons members, and must have an authoritative definition of who is eligible for membership -- usually, this will be in the associations's constitution and bylaws. The clarity of the associational group's definition and compactness of its membership will be important criteria in reviewing the application. The department policy is to organize associational charters at the lowest organizational level which is economically feasible.

(B) Students constitute an associational community of interest [~~common bond~~] and may qualify for a credit union charter.

(C) Associations formed primarily to obtain a credit union charter do not have a sufficient associational community of interest [~~common bond~~]; nor do associations based on a client or customer relationship[~~;~~] (e.g., an insurance company's customers or a buyer's club) [~~, for example~~].

(D) The department normally charters associational credit unions consisting of natural person members. The department will allow nonnatural persons (e.g., corporate sponsor or organizations of members) to be eligible for membership.

(E) Moreover, the community of interest [~~common bond~~] usually would extend to the association's members and their employees. However, situations may exist where the employees of a member of an association do not have a sufficiently close tie to the association to be included.

(F) Homeowner associations, tenant groups, electric co-ops, consumer groups, and other groups of persons having an interest in a particular cause and certain consumer cooperatives may be eligible to receive a charter, however, they must make a strong showing of common activities and economic viability. Newly-organized associations must make similar showing; experience has shown that a new group's efforts are best focused on solidifying member interest before attempting to offer credit union service.

(G) All associational communities of interest [~~common bonds~~] will include a definition of the group and a geographic or operational area limitation, unless the constitution or bylaws of the associational group limit the geographical area -- e.g., "Members of the Small Businessmen Association living or working in Dallas, Texas who qualify for membership in accordance with its constitution and bylaws in effect on January 21, 1989."

(H) The association itself may also be included in the field of membership; e.g., "ABC Association."

(I) Some examples of associational group definitions are:

(i) "regular members of Locals 10 and 13, IBEW Union, Houston, Texas, who qualify for membership in accordance with their constitution and bylaws in effect on May 20, 1989;"

(ii) "members of the Texas Farm Bureau who live or work in Williamson or adjacent counties, who qualify for membership in accordance with its constitution and bylaws in effect on March 7, 1990;"

(iii) "members of the Catholic Church who live or work in Del Rio, Texas;"

(iv) "members of the First Baptist Church in Georgetown, Texas;"

(v) "regular members of the Corporate Executives Association, located in Dallas, Texas, who live or work in Dallas, Texas, who qualify for membership in accordance with its constitution and bylaws in effect on December 1, 1985;"

(vi) "members of the Lower Colorado River Authority located in Austin, Texas."

(J) Some examples of insufficiently defined association group definitions are:

(i) "members of military service clubs in the State of Texas." (No single associational tie; specific clubs and locations must be named; may be considered as multiple group.)

(ii) "veterans of United States military service."

(K) Some examples of unacceptable associational communities of interest [~~common bonds~~] are:

(i) "ABC Buyers Club." (An interest in purchasing only does not meet associational standards.)

(ii) "customers of ABC Insurance Company." (Policyholders or customer/client relationships do not meet associational standards.)

(3) Geographic community of interest Community common bonds.

(A) This community of interest [~~common bond~~] is based upon employment, or residence within a clearly defined and specified geographic area(s). Business entities within the specified geographic area(s) may also qualify for membership. Given the diversity of community characteristics throughout the state and the department's goal of making credit union service available to all eligible groups who wish to have it, the department has established the following [~~community common bond~~] guidelines:

(i) The geographic area(s) must be clearly specified.

(ii) The [~~charter~~] application must establish that the area(s) is recognized as a distinct neighborhood, community, or geographic area(s). For the purposes of this section a recognizable community is a geographical area which possesses such characteristics that the residents of the area share a definable community of interest or sense of identification with each other which may be based upon mutual interests, goals, community pride or other similar elements.

(B) A typical definition of a geographic community of interest [~~community-based common bond~~] is: "Persons who live, work or are located in ABC, the area of XYZ City bounded by Fern Street on the north, Long Street on the east, Fourth Street on the south, and Elm Avenue on the west."

(C) Additional criteria may be considered for an application to convert to or expand an existing community [~~common bond~~] and may include, but not be limited to, providing for a protective exclusion for honoring existing credit unions in the proposed area(s).

(D) Some examples of geographic community of interest [~~common bond~~] definitions are:

(i) "persons who live, work or are located in Brown County, Texas;

(ii) "persons who live or work in and business entities located in Spring Branch Independent School District, Houston, Texas;"

(iii) "persons who live or work are located within a ten-mile radius of El Campo, Texas".

(E) Some examples of insufficiently defined geographic community of interest [~~common bond~~] definitions are:

(i) "persons who live or work in East Texas;"

(ii) "persons who live or work in the ship channel section of Houston, Texas."

(4) Multiple-group charters.

(A) The department may charter a credit union to serve a combination of definable occupational, associational and/or geographical [~~community~~] groups.

(B) In addition to general chartering requirements, special requirements pertaining to multiple-group applications may be required before the department will grant such a charter.

(i) Each group to be included in the proposed field of membership of the credit union must have its own community of interest [~~common bond~~].

(ii) Each group must individually request inclusion in the proposed credit union's charter.

(5) Overlap protection.

(A) The commissioner will consider the [~~extent and~~] financial effect of an overlap proposed by an application to expand a credit union's field of membership or when a charter application proposes an overlap. Generally, the department will not charter or otherwise authorize two or more credit unions to serve the same single occupational or associational group. An overlap is permitted when the expansion's beneficial effect in meeting the convenience and needs of

the members of the group proposed to be included in the field of membership outweighs any adverse effect on the overlapped credit union(s).

(B) The commissioner will weigh the information in support of the application and any information provided by a protesting or affected credit union. If the applicant has the financial capacity to serve the financial needs of the proposed members, demonstrates economic feasibility, complies with the requirements of this rule, and no protestant reasonably establishes a basis for denying the request, it shall be approved.

(C) If a finding is made that overlap protection is warranted, the commissioner shall reject the application or require the applicant to limit or eliminate the overlap by adding exclusionary language to the text of the amendment, e.g., "excluding persons eligible for primary membership in any occupation or association based credit union that has an office within a specified proximity of the applicant credit union at the time membership is sought." Generally, overlap protection will not be considered warranted unless the financial effect on the overlapped credit union will present a safety and soundness concern. Exclusionary clauses are rarely appropriate for inclusion in a geographic community of interest credit union.

(D) Generally, if the overlapped credit union does not submit a notice of protest form, and the department determines that there is no safety and soundness problem, an overlap will be permitted. If, however, a notice of protest is filed, the commissioner will consider the following in performing an overlap analysis:

(i) whether the overlap is incidental in nature, ie., the group(s) in question is so small as to have no material effect on the overlapped credit union;

(ii) whether there is limited participation by members of the group(s) in the overlapped credit union after the expiration of a reasonable period of time;

(iii) whether the overlapped credit union provides requested service;

(iv) the financial effect on the overlapped credit union;

(v) the desires of the group(s); and

(vi) the best interests of the affected group(s) and the credit union members involved.

(E) Where a sponsor organization expands its operations internally, by acquisition or otherwise, the credit union may serve these new entrants to its field of membership if they are part of the community of interest described in the credit union's bylaws. Where acquisitions are made which add a new subsidiary or affiliate, the group cannot be served until the entity is included in the field of membership through the application process.

(F) Credit unions affected by the organizational restructuring or merger of a group within its field of membership must apply for a modification of their fields of membership to reflect the group to be served.

(6) Underserved communities.

(A) All credit unions may include in their fields of membership, without regard to location, communities satisfying the definition for underserved areas. More than one credit union can serve the same underserved area.

(B) Once an underserved area has been added to a credit union's field of membership, the credit union must establish and maintain an office or facility in the community. For the purposes of this subsection service facility is defined as a place where shares are accepted for members' accounts, loan applications are accepted and loan proceeds are disbursed. This definition includes a credit union owned branch, a shared branch, a mobile branch, and an office operated on a regularly scheduled weekly basis, or a credit union owned electronic facility that meets, at a minimum, these requirements. This definition does not include an atm.

(C) A credit union desiring to add an underserved area must document that the community meets the definition. In addition, the credit union must develop a business plan specifying how it will serve the community. The business plan, at a minimum, must identify the credit and depository needs of the community and detail how the credit union plans to serve those needs. The credit union will be expected to regularly review the business plan to determine if the community is being adequately served. The commissioner may require periodic service status reports from a credit union pertaining to the underserved area to ensure that the needs of the area are being met, as well as requiring such reports before allowing a credit union to add an additional unserved area.

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

Filed with the Office of the Secretary of State, on October 23, 2000.

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Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 837-9236

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SUBCHAPTER H. INVESTMENTS

7 TAC §91.802

The Texas Credit Union Commission proposes republication of the proposed amendments to rule §91.802 relating to other investments for credit unions. The first request for comments was published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3889).

One of the amendments requires a credit union's board of directors to establish and annually review a written investment policy; however, that policy may be part of a broader asset-liability management policy. Another amendment adds a restriction for investments in mutual funds, municipal bonds, and asset-backed securities, as well as limits investment in commercial paper to those issued by corporations domiciled within the United States. A third amendment mandates that credit unions document their due diligence in selecting a particular investment. A fourth amendment requires credit unions to classify any security in accordance with generally accepted accounting principles. In addition, the reporting requirements of the existing rule are removed from this rule and are placed into a new rule addressing only reporting requirements. Finally, certain language that is outdated or no longer used in the financial industry has been updated.

The amendments to the rule are proposed as a result of the general rule review mandated by the Government Code and General Appropriations Act. (Both contain provisions requiring state

agencies to review and consider for readoption each of their rules every four years). Notice of Intention to Review Chapter 91 rules was published in the *Texas Register* on February 4, 2000, (25 TexReg 823) for the purpose of accepting public comment. No comments were received in response to the Notice of Intention. However, the Commission has determined from its review of Chapter 91 that a need continues to exist for this rule as amended.

No comments were received in response to the first publication of the proposed amendments. However, based upon further review and recommendation by Department staff, the Commission has determined that additional changes are needed to update the rule to reflect today's current investment market.

Lynette Pool, Deputy Commissioner, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amended rule.

She has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarification as to credit unions' ability to invest excess funds not used for loans, as well as improved safety and soundness given the additional restrictions relating to investment quality. There is no anticipated effect on small businesses as a result of adopting the proposal. There is no economic cost anticipated to entities that are required to comply with the amendment as a result of its future adoption.

Written comments on the proposal must be submitted within 35 days after its publication in the *Texas Registerexas Register* to Lynette Pool, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under the provisions of §124.351of the Texas Finance Code that are interpreted to authorize the Credit Union Commission to adopt rules authorizing other investments permissible for credit unions that are responsive to changes in economic conditions or competitive practices and to the need for safety and soundness of credit union investments.

The specific section affected by this proposed amendments is Texas Finance Code §124.351.

§91.802. Other Investments.

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

(1) Bailment for hire contract -- A contract whereby a third party, bank, or other financial institution, for a fee, agrees to exercise ordinary care in protecting the securities held in safekeeping for its customers.

(2) Bankers' acceptance -- A time draft that is drawn on and accepted by a bank, and that represents an irrevocable obligation of the bank.

(3) Cash forward agreement -- An agreement to purchase or sell a security with delivery and acceptance being mandatory and at a future date in excess of 30 days from the trade date.

(4) Eurodollar deposit -- A deposit denominated in U. S. dollars in a foreign branch of a United States financial institution.

(5) Federal funds transaction -- A short-term or open-ended transfer of funds to a financial institution.

(6) Financial institution - An insured depository institution as defined under the Federal Deposit Insurance Act (12 USC Section 1813(c)(2)), [~~bank, or similar entity savings and loan association, savings association, or mutual savings bank insured by an agency of the federal government, or~~] a federal or state-chartered credit union or the National Credit Union Central Liquidity Facility.

(7) Repurchase transaction -- A transaction in which a credit union agrees to purchase a security from a counterparty [~~vendor~~] and to resell the same or any identical security to that counterparty [~~vendor~~] at a later date and at a specified price. [~~A repurchase transaction may be one of the three following types.~~]

[~~(A) An investment-type repurchase transaction is a repurchase transaction where the credit union purchasing the security takes physical possession of the security, or receives written confirmation of the purchase and a custodial or safekeeping receipt from a third party under a written bailment for hire contract, or is recorded as the owner of the security through the Federal Reserve book-entry system.~~]

[~~(B) A financial institution-type repurchase transaction is a repurchase transaction with a financial institution.~~]

[~~(C) A loan-type repurchase transaction is any repurchase transaction that does not qualify as an investment-type or financial institution-type repurchase transaction.~~]

(8) Reverse repurchase transaction -- A transaction whereby a credit union agrees to sell a security to a counterparty [~~purchaser~~] and to repurchase the same or any identical security from that counterparty [~~purchaser~~] at a future date and at a specified price.

(9) Investment [~~Security~~] -- Any security, obligation, account, deposit, or other item authorized for investment by the Act or this section other than an investment authorized by §124.351(a)(1) of the Act [~~the Act, §8.01(1)~~].

(10) Settlement date -- The date originally agreed to by a credit union and a vendor for settlement of the purchase or sale of a security.

(11) Trade date -- The date a credit union originally agrees, whether orally or in writing, to enter into the purchase or sale of a security.

(12) Yankee Dollar deposit -- A deposit in a United States branch of a foreign bank licensed to do business in the state in which it is located, or a deposit in a state chartered, foreign controlled bank.

(13) Mortgage related security -- A security which meets the definition of mortgage related security in United States Code Annotated, Title 15, §78c(a)(41).

(14) Nationally recognized statistical rating organization (NRSRO) -- A rating organization recognized by the Securities and Exchange Commission.

(15) [~~14~~] Asset-backed security -- A bond, note, or other obligation issued by a financial institution, trust, insurance company, or other corporation secured by either a pool of loans, extensions of credit which are unsecured or secured by personal property, or a pool of personal property leases.

(b) Policy. A credit union may invest funds not used in loans to members, subject to the conditions and limitations of the written investment policy of the board of directors. The investment policy may be part of a broader, asset-liability management policy. The board of directors must review the investment policy at least annually to ensure that the policies adequately address the following issues:

(1) The types of investments that are authorized by the board of directors.

(2) A specific limit on the amount that may be invested in any single investment or investment type.

(3) The delegation of investment authority to the credit union's officials or employees, including the person or persons authorized to purchase or sell investments, and a limit of the investment authority for each individual or committee.

(4) A list of authorized broker-dealers or other third-parties that may be used to purchase or sell investments, and an internal process for assessing the credentials and previous record of the individual or firm.

(5) An assessment of the interest-rate risk, credit risk, and liquidity risk for any investment or concentration of similar investments that exceeds 25% of the credit union's reserves and undivided earnings.

(6) A list of authorized third-party safekeeping agents.

(7) If the credit union operates a trading account, the policy should specify the persons authorized to engage in trading account activities, trading account size limits, stop loss and sale provisions, time limits on inventoried trading account investments, and internal controls that specify the segregation of risk-taking and monitoring activities that related to trading account activities.

(c) [~~(b)~~] Authorized activities.

(1) General authority. A credit union may contract for the purchase or sale of an investment [~~a security~~] provided that delivery of the investment is by regular-way settlement [~~security is to be made within 30 days from the trade date~~]. Regular-way settlement means delivery of an investment from a seller to a buyer within the time frame that the securities industry has established for that type of investment. All purchases and sales of investments must be delivery versus payment (i.e., payment for an investment must occur simultaneously with its delivery).

(2) Cash forward agreements. A credit union may enter into a cash forward agreement to purchase or sell a security, provided that:

(A) the period from the trade date to the settlement date does not exceed 90 [~~180~~] days;

(B) if the credit union is the purchaser, it has written cash flow projections evidencing its ability to purchase the security;

(C) if the credit union is the seller, it owns the security on the trade date; and

(D) the cash forward agreement is settled on a cash basis at the settlement date.

(3) Repurchase transactions. A credit union may enter into a [~~an investment-type~~] repurchase transaction [~~or a financial institution-type repurchase transaction~~] provided:

(A) the purchase price of the security obtained in the transaction is at or below the market price;[~~.~~]

(B) the repurchase securities are authorized investments under Texas Finance Code §124.351 or this section;

(C) the credit union has entered into signed contracts with all approved counterparties;

(D) the counterparty is rated no lower than BBB by Standard & Poor's or an equivalent rating by another NRSRO; and

(E) the credit union receives a daily assessment of the market value of the repurchase securities, including accrued interest, and maintains adequate margin that reflects a risk assessment of the repurchase securities and the term of the transaction. [~~A repurchase transaction not qualifying as either an investment-type or financial institution-type repurchase transaction will be considered a loan-type repurchase transaction subject to the Act.~~]

(4) Reverse repurchase transactions. A credit union may enter into a reverse repurchase transaction, which [~~. A reverse repurchase transaction~~] is a borrowing transaction subject to the Act, provided:

(A) any securities received are authorized investments under Texas Finance Code §124.351 and this section;

(B) the credit union has entered into signed contracts with all approved counterparties; and

(C) the credit union receives a daily assessment of the market value of the securities received, including accrued interest, and maintains adequate margin that reflects a risk assessment of the securities and the term of the transaction.

(5) Federal funds. A credit union may enter into a federal funds transaction with a financial institution, provided that the interest or other consideration received from the financial institution is at the market rate for federal funds transactions and that the transaction has a maturity of one or more business days or the credit union is able to require repayment at any time.

(6) Yankee Dollars. A credit union may invest in Yankee Dollar deposits.

(7) Eurodollars. A credit union may invest in Eurodollar deposits.

(8) Bankers' acceptance. A credit union may invest in bankers' acceptances.

(9) Open-end Investment Companies (Mutual Funds). A credit union may invest funds[~~, not used in loans to members,~~] in an open-end investment company established for investing directly or collectively in any authorized investment, including money market mutual funds meeting the requirements set forth in 17 CFR 270.2a-7. [~~A credit union shall record each investment in an open-end investment company at the lower of its cost or market value, determined at the end of each month, and net of all purchase and load fees.~~]

(10) Government-sponsored enterprises. A credit union may invest in government-sponsored enterprise obligations such as Federal Home Loan Banks, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association and the Student Loan Marketing Association.

(11) Commercial paper. A credit union may invest in commercial paper issued by corporations domiciled within the United States and having a rating of no less than A1 or P1 by Standard & Poor's or Moody's, respectively, or an equivalent rating by a NRSRO [~~rating service~~].

(12) Corporate bonds. A credit union may invest in corporate bonds which are rated in one of the three highest rating categories by a NRSRO (e.g. Standard & Poor's ratings AAA, AA, and A) [~~that have a rating "A" or better by Standard & Poor's or Moody's rating service~~] and remaining maturities of five years or less.

(13) Municipal bonds. A credit union may invest in municipal bonds which are rated in one of the three highest rating categories by a NRSRO and remaining maturities of five years or less.

(14) [~~(13)~~] Mortgage related securities. A credit union may invest in mortgage related securities, except not in the "accrual bond" (or Z-bonds) or the residual interest of the mortgage related security which are rated in one of the three highest rating categories by a NRSRO.

(15) [~~(14)~~] Asset-backed securities. A credit union may invest in asset-backed securities rated in one of the two highest rating categories by a NRSRO provided the underlying collateral is domestic- and consumer-based. [~~AA or better by Standard & Poor's or having an equivalent rating from another nationally recognized rating agency~~].

(d) Documentation: A credit union shall maintain files containing credit and other information adequate to demonstrate evidence of prudent business judgement in exercising the investment powers under the Act and this rule. Except for investments that are insured or fully guaranteed as to principal and interest by the U.S. Government or its agencies, enterprises, or corporations or fully insured (including accumulated interest) by the National Credit Union Administration or the Federal Deposit Insurance Corporation, a credit union must conduct and document a credit analysis of the issuing entity and/or investment before purchasing the investment. The credit union must update the credit analysis at least annually as long as the investment is held. Credit and other due diligence documentation for each investment shall be maintained as long as the credit union holds the investment and until it has been both audited and examined.

[~~(c) Reporting investment activities to the board of directors. The president shall provide the board of directors a monthly comprehensive report of investment activities, including:~~]

[~~(1) investments purchased and sold during the month;~~]

[~~(2) unrealized market gains or losses compared to book value at month's end;~~]

[~~(3) calculated yield to maturity (current yield on mutual funds) on each outstanding investment as of month's end;~~]

[~~(4) net asset value (NAV) or market value of each marketable investment;~~]

[~~(5) total book value of investments outstanding at month's end;~~]

[~~(6) the total amount of investments having maturities exceeding three years and the ratio of the investments to total reserves and undivided earnings;~~]

[~~(7) unrecorded and unreported obligations to buy or sell investments; and~~]

[~~(8) amounts of investments, other than designated depositories, in other institutions which are not fully insured by the Federal Deposit Insurance Corporation, National Credit Union Share Insurance Fund, or federal or state governments or their agencies.~~]

(e) Classification. A credit union must classify a security as hold-to-maturity, available-for-sale, or trading, in accordance with generally accepted accounting principles and consistent with the credit union's documented intent and ability regarding the security.

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

Filed with the Office of the Secretary of State, on October 23, 2000.

TRD-200007432

Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 837-9236

♦ ♦ ♦

7 TAC §91.803

The Texas Credit Union Commission proposes republication of the proposed amendments to §91.803 relating to investment limits and prohibitions. The proposal was first published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 3892).

The amendments, if adopted, will impose new, more stringent limitations on the maximum investments in any one security and specifically prohibits credit unions from engaging in certain types of investment activities. The amendments also provide a specific exception for investments in domestically-issued federal funds, banker acceptances, certificates of deposit, and operating accounts at financial institutions meeting certain safety and soundness standards, as well as for loan participations purchased from other credit unions. Lastly, the rule, while listing prohibited investments, gives the commissioner the ability to authorize a pilot investment program which could result in a credit union engaging in otherwise prohibited investments if a need and expertise to do so is demonstrated.

The amendments to the rule are being proposed as a result of the general rule review mandated by the Government Code and General Appropriations Act (Both contain provisions requiring state agencies to review and consider for readoption each of their rules every four years). Notice of Intention to Review Chapter 91 rules was published in the *Texas Register* on February 4, 2000 (25 TexReg 823) for the purpose of accepting public comment. No comments have been received. However, the Commission has determined from its review of Chapter 91 that a need continues to exist for this rule as amended.

No comments were received in response to the first publication of the proposed amendments. However, based upon further review and recommendation by Department staff, the Commission has determined that additional changes are needed to update the rule to reflect today's current marketplace.

Lynette Pool, Deputy Commissioner, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amended rule.

Ms. Pool has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be increased flexibility for credit unions in dealing with their primary repository institution without compromising the safety and soundness of those investments. Credit union management will also have a comprehensive list of prohibited investments for easier reference. There is no anticipated effect on small businesses as a result of adopting the proposal. There is no economic cost anticipated to entities that are required to comply with the amendment as a result of its future adoption.

Written comments on the proposal must be submitted within 35 days after its publication in the *Texas Register* to Lynette Pool, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

The amendments are proposed under the provisions of §124.351 of the Texas Finance Code that are interpreted to

authorize the Credit Union Commission to adopt rules authorizing other investments permissible for credit unions that are responsive to changes in economic conditions or competitive practices and to the need for safety and soundness of credit union investments.

The specific section affected by this proposed amendments is Texas Finance Code §124.351.

§91.803. Investment Limits and Prohibitions [~~in Other Financial Institutions~~].

(a) Limitations. A credit union may not invest an amount that is greater than 50% of its reserves and undivided earnings in any obligor or related obligors except for investments issued by or fully guaranteed as to principal and interest by the United States or an agency or instrumentality of the United States, or in any trust or trusts established for investing directly or collectively in such securities, obligations, or instruments. For the purposes of this section, obligor is defined as an issuer, trust, or originator of an investment, including the seller of a loan participation. [~~A credit union may invest in certificates of deposit and passbook type accounts issued by an insured state or national bank or other similar institution, provided that the total investments in any one institution shall not exceed 10% of the capital and surplus of that institution, unless such investments are 100% secured by securities issued or guaranteed by the United States or any agency or instrumentality thereof.~~]

(b) Notwithstanding subsection (a) of this section, a credit union may invest in:

(1) Domestically-issued federal funds, banker acceptances, certificates of deposit, and operating accounts at financial institutions, approved by the board, subject to the following limits:

(A) Amounts may exceed the maximum limits of deposit insurance by up to 10% of the credit union's reserves and undivided earnings at any single financial institution having total assets less than $10 billion and by up to 50% of the credit union's reserves and undivided earnings at an institution having total assets greater than $10 billion provided that any such financial institution's ratio of nonperforming assets to primary or core capital does not exceed 25%.

(B) As a single exception to this subsection, a credit union's board of directors will be allowed to establish the aggregate credit-risk exposure to a single financial institution approved by the board as the credit union's designated depository based on the credit union's liquidity trends and funding needs as documented by the credit union's asset/liability management policy, provided that the institution's ratio of nonperforming assets to primary or core capital does not exceed 20% and that the credit union has appropriately documented its due diligence to ensure that the investments in this financial institution does not pose a safety and soundness concern.

(2) Loan participations purchased from other credit unions provided the loan complies with the purchasing credit union's loan policy and credit risk standards.

(c) Prohibited Activities.

(1) Definitions.

(A) Adjusted trading--Selling an investment to a counterparty at a price above its current fair value and simultaneously purchasing or committing to purchase from the counterparty another investment at a price above its current fair value.

(B) Collateralized mortgage obligation (CMO)--A multi-class bond issue collateralized by mortgages or mortgage-backed securities.

(C) Fair value--The price at which a security can be bought or sold in a current, arms length transaction between willing parties, other than in a forced or liquidation sale.

(D) Real estate mortgage investment conduit (REMIC)--A nontaxable entity formed for the sole purpose of holding a fixed pool of mortgages secured by an interest in real property and issuing multiple classes of interests in the underlying mortgages.

(E) Residual interest--The remainder cash flows from a CMO/REMIC, or other mortgage-backed security transaction, after payments due bondholders and trust administrative expenses have been satisfied.

(F) Short sale--The sale of a security not owned by the seller.

(G) Stripped mortgage-backed security (SMBS)--A security that represents either the principal-only or the interest-only portion of the cash flows of an underlying pool of mortgages or mortgage-backed securities. Some mortgage-backed securities represent essentially principal-only cash flows with nominal interest cash flows or essentially interest-only cash flows with nominal principal cash flows. These securities are considered SMBSs for the purposes of this rule.

(H) Zero coupon investment--An investment that makes no periodic interest payments but instead is sold at a discount from its face value. The holder of a zero coupon investment realizes the rate of return through the gradual appreciation of the investment, which is redeemed at face value on a specified maturity date.

(2) A credit union may not:

(A) Purchase or sell financial derivatives, such as futures, options, interest rate swaps, or forward rate agreements;

(B) Engage in adjusted trading or short sales;

(C) Purchase stripped mortgage backed securities, residual interests in CMOs/REMICs, mortgage servicing rights, commercial mortgage related securities, or small business related securities;

(D) Purchase a zero coupon investment with a maturity date that is more than 10 years from the settlement date;

(E) Purchase investments whereby the underlying collateral consists of foreign receivables or foreign deposits; or

(F) Purchase securities used as collateral by a safekeeping concern.

(d) Investment pilot program. The commissioner may authorize a credit union to engage in other types of investment activities under an investment pilot program. In approving a credit union's request to participate in a pilot program, the commissioner, in the exercise of discretion, may condition or limit the investment activity to be conducted. A credit union wishing to participate in an investment pilot program shall submit a request that addresses the following items:

(1) Board policies approving the activities and establishing limits on them;

(2) A complete description of the activities, with specific examples of how the credit union will conduct them and how they will benefit the credit union;

(3) A demonstration of how the activities will affect the credit union's financial performance, risk profile, and asset-liability management strategies;

(4) Examples of reports the credit union will generate to monitor the activities;

(5) A projection of the associated costs of the activities, including personnel, computer, audit, etc.;

(6) A description of the internal systems to measure, monitor, and report the activities, and the qualifications of the staff and/or official(s) responsible for implementing and overseeing the activities; and

(7) The internal control procedures that will be implemented, including audit requirements.

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

Filed with the Office of the Secretary of State, on October 23, 2000.

TRD-200007439
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 837-9236

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7 TAC §91.808

The Texas Credit Union Commission proposes new §91.808 relating to reporting investment activities to the board of directors. This rule will incorporate the reporting requirement provisions of existing §91.802(c) which the Commission has proposed to be deleted from that rule.

The new rule is proposed as a result of the general rule review mandated by the Government Code and General Appropriations Act. (Both contain provisions requiring state agencies to review and consider for readoption each of their rules every four years). Notice of Intention to Review Chapter 91 rules was published in the *Texas Register* on February 4, 2000, (25 TexReg 823) for the purpose of accepting public comment. No comments have been received. However, the Commission has determined from its review of Chapter 91 that a need exists for this proposed rule.

Lynette Pool, Deputy Commissioner, has determined that there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule.

She has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be that credit union management and the boards of directors will be able to more readily identify the information that must be monitored for proper management of investments and associated risks. There is no anticipated effect on small businesses as a result of adopting the new rule. There is no economic cost anticipated to credit unions for complying with the new rule if adopted.

Written comments on the proposal must be submitted within 45 days after its publication in the *Texas Register* to Lynette Pool, Deputy Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The new rule is proposed under the provisions of §15.402 of the Texas Finance Code that is interpreted to authorize the Credit Union Commission to adopt reasonable rules necessary for administering Subtitle D, Title 3, Texas Finance Code (Texas Credit Union Act).

The specific section affected by this proposed rule is Texas Finance Code §124.351.

§91.808. Reporting Investment Activities To The Board Of Directors.

A credit union shall provide its board of directors a monthly comprehensive report of investment activities, including:

(1) Investments purchased and sold during the month;

(2) Unrealized market gains or losses compared to book value at month's end;

(3) Calculated yield to maturity (current yield on mutual funds) on each outstanding investment as of month's end;

(4) Net asset value (NAV) or market value of each marketable investment;

(5) Total book value of investments outstanding at month's end;

(6) The total amount of investments having maturities exceeding three years and the ratio of the investments to total reserves and undivided earnings;

(7) Unrecorded and unreported obligations to buy or sell investments; and

(8) Amounts of investments, other than designated depositories, in other institutions that are not fully insured by the federal deposit insurance corporation, national credit union share insurance fund, or federal or state governments or their agencies.

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

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TRD-200007441
Harold E. Feeney
Commissioner
Credit Union Department
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For further information, please call: (512) 837-9236

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER F. REGULATION OF TELECOMMUNICATIONS SERVICE

16 TAC §26.127

The Public Utility Commission of Texas (commission) proposes an amendment to §26.127 relating to Abbreviated Dialing Codes.

The proposed amendment designates the 211 dialing code for community information and referral services and the 511 dialing code for traffic and transportation information. Project Number 22939 is assigned to this rulemaking proceeding.

On June 8, 2000, the Texas Health and Human Services Commission, on behalf of the Texas Information and Referral Network (petitioners) filed a petition for rulemaking requesting that the commission assign the 211 dialing code for use by the public to access services providing free information and referrals regarding community resources. This Petition for Rulemaking was assigned Project Number 22643, *Petition by the Texas Information & Referral Network for Assignment of 211 Dialing Code for Use by the Public to Access Health and Human Service Information and Referral.* Petitioners indicated that the assignment of the 211 code would alleviate congestion on 911 calling by providing a source to access information regarding available community resources in circumstances involving immediate needs for social services. In addition, petitioners believed that the assignment would allow for better coordination of a state-network that provides local and state access points for health and human services information.

The commission published notice of the petition in the *Texas Register* on June 23, 2000 (25 TexReg 6225). Comments on the petition were received from Southwestern Bell Telephone Company and GTE Southwest Incorporated. Both commenters opined that the commission should defer granting the petition until all interested parties were provided an opportunity to discuss the provisioning of the 211 dialing code. In addition, both commenters believed that technical problems would be avoided if the commission coordinated its efforts with those of the Federal Communications Commission (FCC).

On July 21, 2000, in its Third Report and Order and Order on Reconsideration (FCC 00- 256/ FCC00-257), the FCC announced its decision to assign the 211 code for community information and referral services and the 511 code for traffic and transportation information. At its Open Meeting on August 10, 2000, based on the mandate given by the FCC and the compelling reasons offered by the petitioners, the commission granted the petitioners' request to proceed with a rulemaking to amend §26.127.

John Mason, Attorney, Legal Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for the commission as a result of enforcing or administering this section. However, there may be fiscal implications for state and local governments as a result of enforcing or administering this section. Specifically, the petitioners have indicated that implementation-related costs will be incurred. Petitioners have indicated an intention to request approximately seven to ten million dollars in state funds over the first five-year period the proposed section is in effect to cover half of these costs.

Mr. Mason has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be increased public safety as a result of having a centralized number to obtain local and state health and human services information and the alleviation of congestion on 911 calling. There will be no effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

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

The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 in the Commissioners' Hearing Room on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, January 9, 2001 at 9:30 a.m.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. All comments should refer to Project Number 22939.

In addition, the commission has set up an implementation docket, Project Number 23150, *Implementation of Project Number 22939, Relating to Unabbreviated Dialing Codes,* to address any implementation issues regarding the provisioning of 211. The commission plans to address implementation issues through collaborative workshops involving all interested parties. Notification of dates, times, and agenda will be provided by the commission under Project Number 23150.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (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, including rules of practice and procedure.

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

§26.127. Abbreviated Dialing Codes.

(a) Code assignments. The following abbreviated dialing codes may be used in Texas:

(1) 211 - Community Information and Referral Services;

(2) [~~(1)~~] 311 - Non-Emergency Governmental Service;

(3) [~~(2)~~] 411 -

(A) Directory Assistance; and

(B) Directory Assistance Call Completion;[~~,~~]

(4) 511 - Traffic and Transportation Information;

(5) [~~(3)~~] 611 - Repair Service;

(6) [~~(4)~~] 711 - Telecommunications Relay Service;

(7) [~~(5)~~] 811 - Business Office; and

(8) [~~(6)~~] 911 - Emergency Service.

[~~(b) The following N11 dialing codes are not assigned for use in Texas:~~

~~(1) 211; and~~

~~(2) 511.~~]

(b) [~~(c)~~] Use only as directed. A certificated telecommunications utility (CTU) within the State of Texas may assign or use N11 dialing codes only as directed by the commission.

(c) [~~(d)~~] Unassigned codes. An unassigned N11 dialing code may be used by a CTU for internal business and testing purposes such as inspector ringback, line opener, dual tone multifrequency testing (DTMF Test), automatic number announcement, and 911 system cutover.

(d) [~~(e)~~] Limitations. The following limitations apply to a CTU's use of N11 dialing codes for internal business and testing purposes:

(1) - (2) (No change.)

(e) 211 service.

(1) Scope and purpose. This subsection applies to the assignment, provision, and termination of 211 service. Through this subsection, the commission intends to enhance the ability of the public to access services that provide free information and referral to community resources in situations that are not immediately life-endangering, but still represent a serious but less urgent threat to basic human needs and individuals' health or welfare.

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

(A) Alliance of Information and Referral Systems (AIRS) - A professional organization whose mission is to unite and serve the field and to advance the profession of information and referral as a vital means of bringing people and services together. AIRS has developed national quality standards and methods of evaluating information and referral services.

(B) Area Information Center (AIC) - An entity that serves as regional coordinator for health and human services information for a specified geographical area or region.

(C) Community resources - A for profit or nonprofit resource that provides health or human services in a designated geographic area.

(D) Information and referral service - A service whose primary purpose is to maintain information about human service resources in the community and to link people who need assistance with appropriate service providers and/or to supply descriptive information about the agencies or organizations which offer services.

(E) Selective routing - The feature provided with 211 service by which 211 calls are automatically routed to the 211 answering point for serving the place from which the call originates.

(F) Texas Information and Referral Network (Texas I & R Network) - A program of the Health and Human Services Commission (HHSC) that is responsible for the development, coordination, and implementation of the statewide information and referral network.

(G) 211 answering point - An AIC that:

(i) provides 24 hour, seven day a week operations;

(ii) is assigned by HHSC the responsibility to receive 211 calls;

(iii) serves the area or region designated by HHSC; and

(iv) performs the roles and responsibilities of an AIC.

(H) 211 service - A telecommunications service provided by a certified telecommunications provider to a designated area information center through which the end user of a public phone system has the ability to access services providing free information and referrals regarding community service organizations.

(3) Role and responsibilities of the Texas Health and Human Services Commission (HHSC).

(A) To designate an AIC as a 211 provider for a particular geographical area;

(B) HHSC and the AICs educate the populace about the use of 211 service from its inception through termination;

(C) HHSC is responsible for dispute resolution should a conflict regarding the selection of an AIC occur; and

(D) HHSC may terminate an AICs designation for good cause and is responsible for ensuring prompt and efficient selection of a new AIC for continuation of service.

(4) Use of the 211 system.

(A) 211 calls may not be completed over the 311 or 911 networks or use the 311 or 911 databases.

(B) The 211 network shall not be used for commercial advertisements.

(5) Privacy policy. To preserve the privacy of callers who wish to use the 211 service anonymously, an AIC which uses Automatic Number Identification (ANI), Automatic Location Identification (ALI) service or other equivalent non-blockable information-gathering features for the provision of 211 service must establish an in-house procedure that is consistent with the AIRS national standards and the standards set forth by HHSC that allows access to the 211 service while honoring caller's call and line-blocking preferences and/or caller anonymity.

(6) Fee. An AIC may not charge its citizens a fee on a per-call or per-use basis for using the 211 system.

(f) 311 service.

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

(4) Requirements of application by certificated telecommunications utility.

(A) Applications, tariffs, and notices filed under this subsection shall be written in plain language, shall contain sufficient detail to give customers, governmental entities, and other affected parties adequate notice of the filing, and shall conform to the requirements of §26.209[~~§23.26~~] of this title (relating to New and Experimental Services) or §26.211[~~§23.27~~] of this title (relating to Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges), whichever is applicable.

(B) - (D) (No change.)

(5) Notice. The presiding officer shall determine the appropriate level of notice to be provided and may require additional notice to the public.

(A) (No change.)

(B) The proposed notice shall include the identity of the governmental entity, the geographic area to be affected if the new 311 service is approved, and the following language: "Persons who wish to comment on this application should notify the commission by (specified date, 30 days after notice is published in the *Texas Register*). Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's [~~Office of~~]Customer

Protection Division at (512) 936-7120 or toll free at (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136."

(6) - (9) (No change.)

(10) To preserve the privacy of callers who wish to use the governmental entity's non-emergency service anonymously, a certificated telecommunications utility which uses Automatic Number Identification (ANI) service, Automatic Location Identification (ALI) service or other equivalent non-blockable information-gathering features[~~feature~~] for the provision of 311 service must establish a non-abbreviated phone number that will access the same non-emergency police and governmental services as the 311 service while honoring callers' call- and line-blocking preference. When publicizing the availability of the 311 service, the governmental entity must inform the public if its 311 service has caller or number identification features, and must publicize the availability of the non-abbreviated phone number that offers the same service with caller anonymity. When a certificated telecommunications utility uses Caller Identification (Caller ID) services or other equivalent features[~~feature~~] to provide 311 service, relevant provisions of the commission's substantive rules and of the Public Utility Regulatory Act apply.

(11) - (14) (No change.)

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007420
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 936-7308

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PART 8. TEXAS RACING COMMISSION

CHAPTER 321. PARI-MUTUEL WAGERING SUBCHAPTER C. SIMULCAST WAGERING DIVISION 2. SIMULCASTING AT HORSE RACETRACKS

16 TAC §321.234

The Texas Racing Commission proposes an amendment to §321.234. The amendment would delete the requirement that a pari-mutuel horse track set aside and pay to the breed registries 10% of the gross amount the track receives from exporting its simulcast races to out-of-state locations.

The amendment was presented to the Commission as a petition for rulemaking by representatives of Lone Star Park at Grand Prairie, Retama Park, and Sam Houston Race Park. Based on the petitioners' oral testimony before the Commission, the racetracks seek to have any future payments set by a negotiated agreement between the breed registries and the racetracks. Therefore, subsections (c) and (d) would no longer be necessary. The amendment would also capitalize the word "commission" to conform to rule style.

Paula C. Flowerday, Executive Secretary, for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for local government. There will be fiscal implications for state government in that the amount of revenue to the Equine Research Advisory Account Committee pursuant to Texas Civil Statutes, Art. 179e §6.08(f) will be reduced. Under the current rule, the revenue paid by the racetracks to the breed registries is to be distributed in accordance with §6.08(f). Under that section, 2.0% of the revenue received by the breed registries is to be paid to the Equine Research Advisory Account Committee Fund created by Education Code §88.522. Therefore, assuming revenues from exporting simulcasts are similar to 1999 levels, in each of the first five years the proposed amendment is in effect the racetracks will retain approximately $21,250 that would otherwise have been paid to the ERAAC fund.

According to the representations of the petitioners, for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that governmental regulation in this area would be minimized and the racetracks will remain financially stable. There is no anticipated economic cost to an individual required to comply with the amendments as proposed. The proposal has no effect on the state's agricultural, horse training, greyhound breeding, or greyhound training industries.

However, the proposal will have an economic effect on pari-mutuel horse racetracks and the horse breeding industry. Under the proposal, the racetracks would retain the full amount received by the racetracks for exporting their simulcast races to out-of-state locations. Assuming revenues from exporting simulcasts are similar to 1999 levels, the Commission estimates the racetracks will retain approximately $900,000 per year for each of the next five years which under the current rule would have been paid to the breed registries.

Comments on the proposal may be submitted on or before December 1, 2000, to Judith L. Kennison, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §6.06 which authorizes the Commission to adopt rules on all matters relating to the operation of racetracks.§11.011, which authorizes the Commission to adopt rule to regulate pari-mutuel wagering

The proposed amendments implement Texas Civil Statutes, Article 179e.

§321.234. Allocation of Purses and Funds for Texas Bred Incentive Programs.

(a) Purses.

(1) An association shall recommend the percentages by which it will divide the purse revenue generated from simulcasting among the various breeds of horses. The percentages are subject to the approval of the Commission [~~commission~~].

(2) Before recommending the percentages, the association shall receive information from the organizations recognized by the Commission [~~commission~~] or in the Act as representatives of horse owners, trainers, and/or breeders.

(3) When requesting Commission [~~commission~~] approval of the percentages, the association shall present studies, statistics, or other documentation to support its proposed allocation of funds.

(b) Texas Bred Incentive Program Funds.

(1) The commission shall determine the percentages by which Texas Bred Incentive Program funds generated from simulcasting are divided among the various breeds of horses.

(2) Before determining the percentages, the commission shall receive information from the official breed registries designated in the Act and the associations.

(3) In determining the percentages the commission shall consider the effect of the proposed percentages on the state's agricultural horse breeding and horse training industry.

~~[(c) Effective January 1, 2001, an association shall set aside for the Texas Bred Incentive program at least 10% of the gross amount paid by an out-of-state receiving location to receive simulcasts of the association's races. An association shall allocate funds set aside under this subsection to the various breed registries in accordance with subsection (a) of this section. A breed registry shall distribute funds received under this subsection in the same manner as funds received pursuant to the Act, §6.08(f).]~~

~~[(d) Prior to January 1, 2001, the funds described by subsection (c) of this section shall be allocated between the association exporting the simulcast signal and purses at the association in the percentages specified in §321.233(a) of this title (relating to Purses), provided the association can demonstrate to the commission a continuing financial need for such funds. An affected breed registry may petition the commission to have a racetrack receiving funds under subsection (c) of this section demonstrate such financial need. If an association cannot demonstrate such financial need to the commission, the funding described by subsection (c) of this section shall revert to the distribution called for effective January 1, 2001.]~~

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007423
Judith L. Kennison
General Counsel
Texas Racing Commission
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 863-6699

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 203. LICENSING AND ENFORCEMENT-SPECIFIC SUBSTANTIVE RULES

22 TAC §203.4

The Texas Funeral Service Commission proposes an amendment to §203.4, concerning Transfer of Licenses Prohibited.

The Texas Funeral Service Commission proposes an amendment to draw attention to the necessity of the fixed place being one certain location, the physical address, in regards to licensing requirements, and establish uniformity in related Administrative Rules and statutory licensing requirements.

O.C. "Chet" Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for each year of the first five years the public benefit will be that it will expedite all correspondence that may be initiated by the consumer so that due process may be served. There will be no effect on small businesses. There is an anticipated economic cost to persons who are required to comply with the proposed section. This cost will be based upon the annual fee schedule.

Comments on the proposal may be submitted to O.C. "Chet" Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress Avenue, Suite 206, Austin, Texas 78704, (512) 936-2474 or 1-888-667-4881. Comments may also be submitted electronically to crob@tfsc.state.tx.us or faxed to (512) 479-5064.

The amendment is proposed under Section 651.152 of the Texas Occupation Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provisions of this Section.

No other statutes, articles, or codes are affected by the proposed amendment.

§203.4. Transfer of Licenses Prohibited.

(a) No license issued under the provisions of Texas Occupation Code 651.351 [~~Texas Civil Statutes, Article 4582b, §4~~], is transferable as to ownership or location.

(b) If a funeral establishment changes ownership, it must obtain a new establishment license by reporting the change on a commission form that must be filed with the commission within 30 days of the date of the change and must be accompanied by a fee established by the commission and copies of all required price lists, purchase agreements, and embalming case report forms to reflect change of new ownership [~~if these are changed under the new ownership~~]. The executive director may require the funeral establishment to pass an inspection by a commission representative before approval of a new license under this rule.

(c) The funeral establishment may continue to operate under its current license until it has been either issued a new license or notified that a license has been refused because of a failure to meet the requirements of subsection (b) of this section or under the provisions of Texas Occupation Code 651.351 [~~Texas Civil Statutes Article 4582b, §4(D)(1)~~]. An establishment shall be deemed as notified once written notice has been placed in the regular United States mail to the physical address of the fixed place of the physical plant.

(d) A change of establishment name or fixed place requires the issuance of a new establishment license.

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

Filed with the Office of the Secretary of State, on October 16, 2000.

TRD-200007273
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 936-2474

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22 TAC §203.10

The Texas Funeral Service Commission proposes an amendment to §203.10 concerning Services Provided Without Prior Approval.

The Texas Funeral Service Commission proposes an amendment to establish the requirement for full disclosure of who will perform embalming as well as the location the embalming is to be performed.

O.C. "Chet" Robbins, Executive Director, Texas Funeral Service Commission, has determined that for the first five-year period this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Robbins, Executive Director, Texas Funeral Service Commission, has determined that for each year or the first five years the public benefit will be to insure the prospective customer understands that embalming may be performed at a location other than the location they have selected for the funeral ceremony or service. This type of disclosure prevents deception and in some instances could effect the type of service selected. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposed amendment may be submitted to O.C. "Chet" Robbins, Executive Director, Texas Funeral Service Commission, 510 South Congress Avenue, Suite 206, Austin, Texas, 78704, (512) 936-2474 or 1-888-667-4881. Comments may also be submitted electronically to crob@tfsc.state.tx.us or faxed to (512) 479-5064.

The amendment is proposed under Section 651.152 of the Texas Occupation Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the provisions of this Section.

No other statutes, articles, or codes are affected by the proposed amendment.

§203.10. Services Provided Without Prior Approval.

(a) (No change.)

(b) Preventive Requirement[~~requirement~~]. To prevent the[~~these~~] unfair or deceptive acts or practices, funeral directors[~~providers~~] must :

(1) include on the itemized statement of funeral goods and services selected, [~~required by §203.7(b)(5) of this title (relating to Statement of funeral goods and services selected,~~] the statement: "If you selected a funeral that may require embalming, such as a funeral with viewing, you may have to pay for the embalming. You do not have to pay for embalming you did not approve if you selected arrangements such as [~~a~~] direct cremation or immediate burial. If we charged for embalming, we will explain why below."

(2) disclose the location the embalming has been performed and whether the funeral establishment has performed the service or utilized a third party.

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

Filed with the Office of the Secretary of State, on October 16, 2000.

TRD-200007287
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 936-2474

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TITLE 25. HEALTH SERVICES

PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER G. DEVELOPMENTAL REHABILITATION THERAPY (DRT) SERVICES

25 TAC §§621.151-621.153

The Texas Interagency Council On Early Childhood Intervention proposes new §§621.151-621.153, concerning the General Provision for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays.

The purpose of the proposal is to establish procedures for Developmental Rehabilitation Therapy providers to deliver (1) developmentally appropriate individualized skills training and support to foster, promote, and enhance child engagement in daily activities, functional independence, and social interaction; (2) assistance to caregivers in the identification and utilization of opportunities to incorporate therapeutic intervention strategies into daily life activities that are natural and normal for the child and family; and (3) continuous monitoring of child progress in the acquisition and mastery of functional skills to reduce or overcome limitations resulting from disabilities or developmental delays.

In conjunction with these new sections, The Health and Human Services Commission is simultaneously proposing new §355.113, concerning the reimbursement methodology for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays, elsewhere in this issue of the *Texas Register*.

Donna Samuelson, Deputy Executive Director, ECI, has determined that for the first five-year period the proposed sections will be in effect, there will be fiscal implications to state government. There will be a net savings of $4,738,809 for fiscal year 2001 and $4,707,514 for fiscal year 2002. There will be no fiscal implications for local government as a result of enforcing or administering the rules.

Ms. Samuelson also has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the implementation of developmental rehabilitation therapy services for infants and toddlers with disabilities or developmental delays. There will be no impact on local employment. There will be no adverse effect on small or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Questions about the content of this proposal may be directed to Glenn Hart at the Texas Interagency Council on Early Childhood Intervention, Division of Program Services, at (512) 424-6830. Written comments on the proposal may be submitted to Glenn Hart, Division of Program Services, Texas Interagency Council on Early Childhood Intervention, 4900 North Lamar, Austin, Texas 78751-2399, within 30 days of publication in the *Texas Register*.

The new sections are proposed under Chapter 73 of the Human Resources Code, §73.0051 and §73.022, which provides the agency with the authority to administer public programs for developmentally delayed children.

No other statutes, articles or codes are affected by the proposed new sections.

§621.151. General Provision for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays.

(a) Developmental Rehabilitation Therapy (DRT) Services are reimbursable to Medicaid providers who meet the conditions for provider participation as specified in §621.153 of this title (relating to Conditions for Developmental Rehabilitation Therapy Provider Participation). Developmental Rehabilitation Therapy Services are diagnostic, evaluative, and consultative services for the purposes of identifying or determining the nature and extent of, and rehabilitating an individual's medical or other health-related condition. They are medical and/or remedial services that integrate therapeutic interventions into the daily routines of the child and family in order to restore or maintain function and/or to reduce dysfunction resulting from a mental or physical disability or developmental delay. DRT services are designed to enhance development in the physical/motor, communication, adaptive, cognitive, social or emotional and sensory domains, or to teach compensatory skills for deficits that directly result from medical, developmental or other health-related conditions. Developmental Rehabilitation Therapy Services are provided as specified in the active Individualized Family Service Plan (IFSP) developed in accordance with §621.23(5)(A)-(K) of this title (relating to Service Delivery Requirements for Comprehensive Services). The services include, but are not limited to:

(1) developmentally appropriate individualized skills training and support to foster, promote, and enhance child engagement in daily activities, functional independence, and social interaction;

(2) assistance to caregivers in the identification and utilization of opportunities to incorporate therapeutic intervention strategies into daily life activities that are natural and normal for the child and family;

(3) continuous monitoring of child progress in the acquisition and mastery of functional skills to reduce or overcome limitations resulting from disability or developmental delays.

(b) The services listed in subsection (a)(1)-(3) are performed by or under the supervision of a licensed physician, registered nurse, licensed physical therapist, licensed occupational therapist, or licensed speech language pathologist acting within their scope of practice. Supervision in this section means participation in the initial and annual comprehensive assessment of the child as well as participation in the initial and annual development of the IFSP and any subsequent revisions of the plan that result in service changes.

(c) Developmental Rehabilitation Therapy Services are not reimbursable as Medicaid services when:

(1) provided to children with a diagnosis of mental retardation or developmental disability; or

(2) the services are guaranteed under the provisions of IDEA Part B.

§621.152. Recipient Eligibility for Developmental Rehabilitation Therapy Services (DRT).

In order to receive DRT services, the recipient:

(1) must be enrolled in the Texas Medical Assistance Program;

(2) must be age 21 and under;

(3) must demonstrate the need for these services as documented in an active Individualized Family Service Plan (IFSP) developed in accordance with §621.23(5)(A)-(K) of this title (relating to Service Delivery Requirements for Comprehensive Services).

§621.153. Conditions for Developmental Rehabilitation Therapy (DRT) Provider Participation.

(a) In accordance with the regulations at 42 CFR §431.51, all willing and qualified providers may participate in this program.

(b) In order to be reimbursed for developmental rehabilitation therapy services as specified in §621.151 of this title (relating to Reimbursable Services), a provider must:

(1) meet applicable state and federal laws governing the participation of providers in the Medicaid Program;

(2) sign a provider agreement with the single state agency;

(3) be certified by the Texas Interagency Council on Early Childhood Intervention, the state program for infants and toddlers with disabilities or developmental delays;

(4) provide services under the supervision of a licensed physician, registered nurse, licensed physical therapist, licensed occupational therapist, or licensed speech language pathologist acting within their scope of practice who are employed as agency or contract staff. Developmental rehabilitation therapy services may be provided by:

(A) Licensed Therapists;

(B) Licensed Counselors;

(C) Licensed Social Workers;

(D) Registered Nurses;

(E) Certified Early Intervention Specialist (EIS) professionals certified through the ECI Competency Demonstration System;

(F) Certified Teachers certified through the ECI Competency Demonstration System or certified in early childhood, special education, or elementary education;

(5) provide services to all eligible children; and

(6) deliver services in accordance with the scope and duration of the Individualized Family Service Plan (IFSP).

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

Filed with the Office of the Secretary of State, on October 23, 2000.

TRD-200007449
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 424-6750

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION
SUBCHAPTER C. MAINTENANCE TAXES AND FEES

28 TAC §1.414

The Texas Department of Insurance proposes an amendment to §1.414, concerning assessment of maintenance taxes and fees for payment in the year 2001. The amendment is necessary to adjust the rates of assessment for maintenance taxes and fees for 2001 on the basis of gross premium receipts for calendar year 2000 or on some other designated basis. Section 1.414 sets rates of assessment and applies those rates to life, accident, and health insurance; motor vehicle insurance; casualty insurance, and fidelity, guaranty and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; title insurance; health maintenance organizations; third party administrators; and corporations issuing prepaid legal services contracts.

Karen A. Phillips, Chief Financial Officer, has determined that for the first five-year period the proposed section is in effect, the anticipated fiscal impact on state government is estimated income of $42,165,670 to the state's general revenue fund. There will be no fiscal implications for local government as a result of enforcing or administering the proposed amended section, and there will be no effect on local employment or local economy.

Ms. Phillips has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the section will be facilitation in the collection of maintenance tax and fee assessments. The cost in 2001 to an insurer receiving premiums in 2000 for motor vehicle insurance will be .057 of 1.0% of those gross premiums; for casualty insurance, fidelity, guaranty and surety bonds, .186 of 1.0% of those gross premiums; for fire insurance and allied lines, including inland marine, .352 of 1.0% of those gross premiums; for workers' compensation insurance, .060 of 1.0% of those gross premiums; and for title insurance, .086 of 1.0% of those gross premiums. The cost in 2001 for an insurer receiving premiums in 2000 for life, health, and accident insurance, will be .040 of 1.0% of those gross premiums. In 2001, a health maintenance organization will pay $.37 per enrollee if it is a single service health maintenance organization or a limited service health maintenance organization, and $1.11 per enrollee if it is a multi-service health maintenance organization. In 2001, a third party administrator will pay .237 of 1.0% of its correctly reported gross amount of administrative or service fees received in 2000. In 2001, for a corporation issuing prepaid legal service contracts, the cost will be .02 of 1.0% of correctly reported gross revenues for 2000. There will be no difference in rates of assessment between micro, small and large businesses. Based on the department's experience, the actual cost of gathering the information required to fill out the form, calculate the assessment and complete the form will be the same for micro, small and large businesses. Generally a person familiar with the accounting records of the company and accounting practices in general will perform the activities necessary to comply with the section. Such persons are similarly compensated by small and large insurers. The compensation is generally between $17-$30 an hour. The actual amount of time necessary to complete the form will vary depending on the number of lines of insurance written by the company. For a company that writes only one line of business subject to the tax, the department estimates it will take two hours to complete the form. If a company writes all the lines subject to the tax, the department estimates it will take six hours to complete the form. The department does not believe it is legal or feasible to waive or modify the requirements of the proposed section for small and micro businesses because the assessment is required by statute and makes no provision for waiving or reducing assessments for small or micro-businesses.

To be considered, comments on the proposal must be received in writing no later than 5:00 p.m., on December 4, 2000. All comments should be submitted to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comments should be simultaneously submitted to Karen A. Phillips, Chief Financial Officer, Mail Code 108-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. A request for public hearing should be submitted separately to the Office of the Chief Clerk.

The amendment is proposed under the Insurance Code Articles 4.17, 5.12, 5.24, 5.49, 5.68, 9.46, 21.07-6 §21, 23.08A, and 20A.33 and §36.001. These articles provide authorization for the Texas Department of Insurance to assess maintenance taxes and fees for the lines of insurance and related activities specified in amended §1.414. Article 4.17 establishes a maintenance tax based on insurance premiums for life, accident, and health coverage and the gross considerations for annuity and endowment contracts. Article 5.12 establishes a maintenance tax based on insurance premiums for motor vehicle coverage. Article 5.24 establishes a maintenance tax based on insurance premiums for casualty insurance and fidelity, guaranty and surety bonds coverage. Article 5.49 establishes a maintenance tax based on insurance premiums for fire and allied lines coverage, including inland marine. Article 5.68 establishes a maintenance tax based on insurance premiums for workers' compensation coverage. Article 9.46 establishes a maintenance fee based on insurance premiums for title coverage. Article 21.07-6 §21 establishes a maintenance tax based on the gross amount of administrative or service fees for third party administrators. Article 23.08A establishes a maintenance tax based on gross revenue of corporations issuing prepaid legal service contracts. The Texas Health Maintenance Organization Act, Section 33 (Article 20A.33), establishes an annual tax based on the gross amounts of revenues collected for the issuance of health maintenance certificates or

contracts. Section 36.001 authorizes the commissioner of insurance to adopt rules for the conduct and execution of the duties and functions of the department as authorized by statute.

The following articles of the Insurance Code are affected by this rule: Articles 4.17, 5.12, 5.24, 5.49, 5.68, 9.46, 21.07-6 §21, 21.46, 21.54, and 23.08A, and the Texas Health Maintenance Organization Act, §33, (Article 20A.33).

§1.414. Assessment of Maintenance Taxes and Fees, 2001 [~~2000~~].

(a) The following rates for maintenance taxes and fees are assessed on gross premiums of insurers for calendar year 2000 [~~1999~~] for the lines of insurance specified in paragraphs (1)-(5) of this subsection:

(1) for motor vehicle insurance, pursuant to the Insurance Code, Article 5.12, the rate is .057 [~~.055~~] of 1.0%;

(2) for casualty insurance, and fidelity, guaranty and surety bonds, pursuant to the Insurance Code, Article 5.24, the rate is .186 [~~.200~~] of 1.0%;

(3) for fire insurance and allied lines, including inland marine, pursuant to the Insurance Code, Article 5.49, the rate is .352 [~~.358~~] of 1.0%;

(4) for workers' compensation insurance, pursuant to the Insurance Code, Article 5.68, the rate is .060 [~~.055~~] of 1.0%;

(5) for title insurance, pursuant to the Insurance Code, Article 9.46, the rate is .086 [~~.144~~] of 1.0%.

(b) The rate for the maintenance tax to be assessed on gross premiums for calendar year 2000 [~~1999~~] for life, health, and accident insurance, pursuant to the Insurance Code, Article 4.17, is .040 of 1.0%.

(c) Rates for maintenance taxes are assessed for calendar year 2000 [~~1999~~] for the following entities:

(1) pursuant to the Texas Health Maintenance Organization Act, §33 (codified at the Insurance Code, Article 20A.33), the rate is $.37 [~~$.36~~] per enrollee for single service health maintenance organizations, $1.11 [~~$1.08~~] per enrollee for multi-service health maintenance organizations and $.37 [~~$.36~~] per enrollee for limited service health maintenance organizations;

(2) pursuant to the Insurance Code, Article 21.07-6, §21, the rate is .237 [~~.218~~] of 1.0% of the correctly reported gross amount of administrative or service fees for third party administrators; and

(3) pursuant to the Insurance Code, Article 23.08A, the rate is .02 [~~.03~~] of 1.0% of correctly reported gross revenues for corporations issuing prepaid legal service contracts.

(d) The taxes assessed under subsections (a), (b), and (c) of this section shall be payable and due to the Comptroller of Public Accounts, Austin, TX 78774-0100 on March 1, 2001 [~~2000~~].

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007428
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-6327

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CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER I. VARIABLE LIFE INSURANCE

28 TAC §3.803

The Texas Department of Insurance proposes an amendment to §3.803, concerning variable life insurance. The proposal is necessary to streamline the requirements of insurers authorized to issue variable life insurance contracts in this state. The proposed amendment to §3.803 eliminates the requirement of filing with the commissioner, prior to any distribution, all variable life insurance sales, advertising and descriptive material. The proposed amendment also eliminates the requirement of filing with the commissioner any revised versions of such sales, advertising and descriptive material already filed with the commissioner. This proposal will facilitate the issuance and distribution of variable life insurance sales, advertising and descriptive material by eliminating the prior filing requirement, while keeping in place all other regulatory requirements and consumer protections. The need to file variable life insurance sales, advertising and descriptive material with the commissioner prior to distribution is no longer necessary for the effective and efficient administration and regulation of variable life insurance.

Audrey Selden, Senior Associate Commissioner, Consumer Protection Program, has determined that for each of the first five years the proposed section will be in effect, there will be no measurable fiscal impact on state government. There will be no fiscal impact on local government as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or local economy.

Ms. Selden also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administration and enforcement of the section will be the more efficient administration of the regulation of variable life insurance advertising and the more effective utilization of public resources by streamlining the processing requirements prior to the distribution of sales, advertising and descriptive material for variable life insurance. While the requirement for prior filing of sales, advertising and descriptive material will be eliminated, variable life sales, advertising and descriptive materials will continue to be subject to other applicable requirements of Chapter 3 and Chapter 21, Texas Insurance Code and related rules. There is no anticipated economic cost to persons who are required to comply with the proposal. Instead there should be a cost savings to an insurer by the removal of the requirement of filing advertising material prior to use and ultimately the variable life insurance purchaser, while keeping in place all other regulatory requirements and consumer protections. Since there is no anticipated cost of compliance, there will be no adverse economic impact on small or micro businesses.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 4, 2000 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, MC 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comments must be simultaneously submitted to Jack Evins, Director of Advertising, Consumer Protection Program, MC 111-1A, P. O. Box 149104,

Austin, Texas 78714-9104. A request for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed pursuant to the Insurance Code Articles 3.75 and 21.21 and §36.001. The Insurance Code Article 3.75, §8 provides that the commissioner may establish such rules or limitations which are fair and reasonable as may be appropriate for the augmentation and implementation of this article, including disclosure requirements. Article 21.21, §13 authorizes the commissioner to promulgate and enforce reasonable rules as necessary to accomplish the purpose of Article 21.21, the regulation of trade practices in the business of insurance. Section 36.001 authorizes the commissioner of insurance to adopt rules for the conduct and execution of the duties and functions of the department.

The proposed amendments affect regulation pursuant to the following statutes: Insurance Code Articles 3.75 and 21.21.

§3.803. Qualifications of Insurer to Issue Variable Life Insurance.

The following requirements are applicable to all insurers either seeking authority to issue variable life insurance in this state or having the authority to issue variable life insurance in this state.

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

(4) Use of sales material. An insurer authorized to transact variable life insurance business in this state shall not use any sales material, advertising material, or descriptive literature or other materials of any kind in connection with its variable life insurance business in this state unless it complies with §§21.101 - 21.122 [~~21.121~~] of this title (relating to Insurance Advertising, Certain Trade Practices, and Solicitation [~~Rules on Certain Trade Practices, Insurance Advertising, and Insurance Solicitation and Required Filing Respecting Advertising and Solicitation Material of Individual Retirement Annuity Products~~]).

[~~(A) All variable life insurance sales material, advertising material, and descriptive material shall be filed with the commissioner prior to any distribution to prospective applicants. Revised versions of such materials containing changes from versions on file with the commissioner shall be filed with the commissioner. A failure to object to such material by the commissioner shall not be construed as acceptance.~~]

[~~(B)~~] An insurer issuing flexible premium variable life contracts shall provide, to all prospective purchasers, an illustration of cash surrender values prior to or at the time of delivery of the contract. Any illustration of cash surrender values delivered to an applicant or prospective applicant pursuant to this subsection shall:

(A) [~~(i)~~] include a hypothetical gross investment return of 0.0%, and when other hypothetical gross investment returns are included, the current gross investment return must, to the extent permitted by federal law, be included;

(B) [~~(ii)~~] give equal prominence to both guaranteed and non-guaranteed aspects of the contract if guarantees are included in the contract;

(C) [~~(iii)~~] prominently display, by way of written statement, the hypothetical nature of the illustration as it relates to investment returns;

(D) [~~(iv)~~] prominently state that a contract may terminate due to insufficient premiums and/or poor investment performance; and

(E) [~~(v)~~] prominently show, by way of written statement, that excessive loans or withdrawals may cause the contract to lapse due to insufficient cash surrender value and, at the option of the insurer, prominently display the effects of loans or withdrawals on contract values.

(5) - (8) (No change.)

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

Filed with the Office of the Secretary of State, on October 17, 2000.

TRD-200007305
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-6327

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CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER J. EXAMINATION AND EXPENSES AND ASSESSMENTS

28 TAC §7.1012

The Texas Department of Insurance proposes an amendment to §7.1012 concerning assessments to cover the expenses of examining insurance companies. Assessments will be levied against and collected from each domestic insurance company based on admitted assets and gross premium receipts for the 2000 calendar year, and from each foreign insurance company examined during the 2001 calendar year based on a percentage of the gross salary paid to an examiner for each month or part of a month during which the examination is made. The assessments made under authority of this proposed amended section will be in addition to, and not in lieu of any other charge which may be made under law, including the Insurance Code Article 1.16.

Karen A. Phillips, Chief Financial Officer, has determined that for the first five-year period the section is in effect, the anticipated fiscal impact on state government is estimated income of $12,418,193 to the state's general revenue fund. There will be no fiscal implications for local government as a result of enforcing or administering the section, and there will be no effect on local employment or the local economy.

Ms. Phillips has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the section will be the adoption of assessment rates to defray the expenses of examinations and administration of the laws related to examinations during the 2001 calendar year. Ms. Phillips has determined that the direct economic cost to individuals who are required to comply with the proposed section will vary. In the case of domestic companies, the amount of the assessment in 2001 will be .00458 of 1.0% of the domestic company's admitted assets as of December 31, 2000 (excluding pension assets specified in subsection (b)(2)(A)) and .01406 of 1.0% of a domestic company's gross premium receipts for 2000 (excluding pension related premiums specified in subsection (b)(2)(B) and premiums related to welfare benefits described in subsection (b)(3)). In the case of foreign companies examined in 2000, the amount of the assessment in

2001 will be 32% of the gross salary paid to each examiner for each month or partial month of the examination in order to cover the examiner's longevity pay; state contributions to retirement, social security, and the state paid portion of insurance premiums; and vacation and sick leave accruals. There will be no difference in rates of assessments between micro, small and large businesses, except that a minimum charge of $25 is assessed domestic companies in §7.1012(b)(3). The actual cost of gathering the information required to fill out the form, calculate the assessment and complete the form will be the same for micro, small and large businesses based on the department's experience. Generally a person familiar with the accounting records of the company and accounting practices in general will perform the activities necessary to comply with the section. Such persons are similarly compensated by small and large insurers. The compensation is generally between $17-$30 an hour. The department estimates that the form can be completed in two hours to comply with this section. The department does not believe it is legal or feasible to waive or modify the requirements of the proposed section for small and micro businesses because the assessment is required by statute and makes no provision for waiving or reducing assessments for small or micro-businesses.

To be considered, comments on the proposal must be received in writing no later than 5:00 p.m., on December 4, 2000. All comments should be submitted to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comments should be simultaneously submitted to Karen A. Phillips, Chief Financial Officer, Mail Code 108-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. A request for hearing should be submitted separately to the Office of the Chief Clerk.

The amendment is proposed under the Insurance Code Articles 1.16 and §36.001. The Insurance Code Article 1.16(a) and (b) authorizes the commissioner of insurance to make assessments necessary to cover the expenses of examining insurance companies and to comply with the provisions of the Insurance Code, Articles 1.16, 1.17, and 1.18, in such amounts as the commissioner certifies to be just and reasonable. In addition, Article 1.16(c) provides that expenses incurred in the examination of foreign insurers by Texas examiners shall be collected by the commissioner by assessment. Section 36.001 authorizes the commissioner of insurance to adopt rules for the conduct and execution of the duties and functions of the department as authorized by statute.

The following articles of the Insurance Code are affected by this rule: Articles 1.16, 1.17, 1.17A, 1.18, 1.19, 1.28, 4.10 and 4.11.

§7.1012. Domestic and Foreign Insurance Company Examination Assessments, 2001 [~~2000~~].

(a) Foreign insurance companies examined during the 2001 [~~2000~~] calendar year shall pay for examination expenses according to the overhead rate of assessment specified in this subsection in addition to all other payments required by law including, but not limited to, the Insurance Code, Article 1.16. Each foreign insurance company examined shall pay 32% of the gross salary paid to each examiner for each month or partial month of the examination in order to cover the examiner's longevity pay; state contributions to retirement, social security, and the state paid portion of insurance premiums; and vacation and sick leave accruals. The overhead assessment will be levied with each month's billing.

(b) Domestic insurance companies shall pay according to this subsection and rates of assessment herein for examination expenses as provided in the Insurance Code, Article 1.16.

(1) The actual salaries and expenses of the examiners allocable to such examination shall be paid. The annual salary of each examiner is to be divided by the total number of working days in a year, and the company is to be assessed the part of the annual salary attributable to each working day the examiner examines the company during 2001 [~~2000~~]. The expenses assessed shall be those actually incurred by the examiner to the extent permitted by law.

(2) An overhead assessment to cover administrative departmental expenses attributable to examination of companies, which shall be paid and computed as follows:

(A) .00458 [~~.00503~~] of 1.0% of the admitted assets of the company as of December 31, 2000 [~~1999~~], upon the corporations or associations to be examined taking into consideration the annual admitted assets that are not attributable to 90% of pension plan contracts as defined in Section 818(a) of the Internal Revenue Code of 1986 (26 U.S.C. Section 818(a)); and

(B) .01406 [~~.01271~~] of 1.0% of the gross premium receipts of the company for the year 2000 [~~1999~~], upon the corporations or associations to be examined taking into consideration the annual premium receipts that are not attributable to 90% of pension plan contracts as defined in Section 818(a) of the Internal Revenue Code of 1986 (26 U.S.C. Section 818(a)).

(3)-(5) (No change.)

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007429
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-6327

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CHAPTER 21. TRADE PRACTICES
SUBCHAPTER M. MANDATORY BENEFIT NOTICE REQUIREMENTS

28 TAC §§21.2101-21.2103, 21.2105, 21.2106

The Texas Department of Insurance proposes amendments to §§21.2101-21.2103, 21.2105, and 21.2106, concerning mandatory benefit notice requirements. The proposed amendments are necessary to implement legislation enacted by the 76th Legislature in House Bill 1764 (HB 1764) which redesignated Insurance Code Article 21.53D as Article 21.53I and amended the law to comply with the notice requirements under the federal Women's Health and Cancer Rights Act of 1998 (Act). The federal law was effective January 1, 1999, and requires that a notice regarding coverage for reconstructive surgery be sent to each enrollee of a health benefit plan that provides medical or surgical benefits with respect to a mastectomy, upon enrollment,

and annually thereafter. The notice provides information to individuals who have had a mastectomy or may have a mastectomy concerning the benefits available under their health benefit plans for reconstructive surgery. The proposed amendment to §21.2101 specifies the effective date for the notice and requires providing a notice to the enrollee concerning health coverage for reconstructive surgery after mastectomy. The proposed amendment to §21.2102 adds nonprofit health corporation and reciprocal exchange to the definition of carrier, broadens the definition of enrollee, addresses documents concerning multiple employer welfare arrangements and clarifies that the definition of health benefit plan that pertains to reconstructive surgery after mastectomy does not include certain plans. The proposed amendment to §21.2103 advises the carrier as to which notices are required to be issued concerning reconstructive surgery after mastectomy. The proposed amendment to §21.2105 sets forth the occasions upon which the carrier is to send the notices. The proposed amendment to §21.2106 sets forth the language of the prescribed notices and renumbers existing forms. The proposed amendments also make other clarifying changes for consistency and readability.

Kim Stokes, Senior Associate Commissioner, Life, Health and Licensing, has determined that for each year of the first five years the proposed amendments are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments. There will be no effect on local employment or the local economy.

Ms. Stokes has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit as a result of the proposed amendments will be that affected enrollees are notified on a timely basis of benefits for reconstructive surgery after mastectomy. It is estimated that the majority, if not all, of the costs to comply with these proposed amendments are the result of the federal enactment of the Act and the legislative enactment of HB 1764, which amended Article 21.53I to comply with the Act. To the extent that any cost is imposed upon carriers by the proposed amendments, such cost is attributed to the inclusion of the prohibition section in the enrollment notice, which may add an additional page. It is estimated that the time to prepare, copy and mail an additional page to the notice would cost approximately $1.25 per notice. The actual total cost to each carrier will vary depending on the number of enrollees to whom the enrollment and/or annual notice must be sent, and, for group health benefit plans, whether the notice is sent to the group master contract holder, or directly to the enrollees. In an effort to minimize costs, carriers may deliver the enrollment and/or annual notice with other plan documents rather than in a separate mailing. It is the department's position that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses. The costs to a small business and a large business depend upon the number of enrollees who will be provided with the enrollment and/or annual notice. Assuming that a small business and the largest business administered health benefit plans with approximately the same number of enrollees who will be given the enrollment and/or annual notice, the cost per hour of labor would not vary between the small and large businesses. Regardless of the fiscal effect, the enrollment and annual notices are mandated by federal and state statutes, and considering the statutes' purposes, it is neither legal nor feasible to waive or modify the requirements of the amendments for small and micro businesses, as doing so would allow differentiation of enrollment and/or annual notices between the insureds/enrollees of small businesses or micro-businesses compared to those enrollment and/or annual notices provided to the insureds/enrollees of large businesses.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m., on December 4, 2000 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comment must be submitted simultaneously to Diane Moellenberg, Chief Director, Regulatory Development, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed under the Insurance Code Articles 21.53I, 3.51-6, 3.70-1, 3.95-15, 20A.22, 26.04 and §36.001. Article 21.53I provides that the commissioner may adopt rules to implement the article and to meet the minimum requirements of federal law. Article 3.51-6, §5 authorizes the department to issue such rules as may be necessary to carry out the various provisions of the article. Article 3.70-1(D) authorizes the department to issue such reasonable rules as may be necessary to carry out the various purposes and provisions of the article. Article 3.95-15(a) directs the commissioner to adopt rules as necessary to carry out the provisions of the subchapter and meet the minimum requirements of federal law and regulations. Article 20A.22(c) authorizes the commissioner to promulgate such reasonable rules as are necessary and proper to meet the requirements of federal law and regulations. Article 26.04 directs the commissioner to adopt rules as necessary to meet the minimum requirements of federal law and regulations. Section 36.001 provides that the commissioner may adopt rules for the conduct and execution of the powers and duties of the department only as authorized by statute.

The following articles are affected by this proposal: Insurance Code Articles 21.53I, 3.51-6, 3.70-1, 3.95, Chapters 20A and 26

§21.2101. Scope.

The purpose of this subchapter is:

(1) to require notice to enrollees in a health benefit plan of coverage and/or benefits for prostate cancer examinations; [,] minimum inpatient stays for maternity and childbirth; [,] minimum inpatient stays for mastectomy or lymph node dissection; and reconstructive surgery after mastectomy. With the exception of notice for reconstructive surgery after mastectomy, §§ [~~and/or mastectomies. Sections~~] 21.2102 through 21.2106 of this subchapter apply to all carriers issuing, delivering, or renewing health benefit plans as defined in this subchapter as of January 1, 1998. For state notice requirements pertaining to reconstructive surgery after mastectomy, §§21.2102 - 21.2106 of this subchapter apply to all carriers issuing, delivering, or renewing health benefit plans as defined in this subchapter as of June 18, 1999.

(2) (No change.)

§21.2102. Definitions.

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

(1) Carrier--An insurance company, a group hospital service corporation, a fraternal benefit society, a stipulated premium insurance company, a health maintenance organization, [~~or~~] a multiple employer welfare arrangement that holds [~~has~~] a certificate of authority under Insurance Code [,] Article 3.95-2, or an approved nonprofit health corporation that holds a certificate of authority issued by the commissioner under Insurance Code Article 21.52F. In addition, for

the purposes of paragraph (3)(B) of this section, the term also includes a reciprocal exchange operating under Insurance Code Chapter 19.

(2) Enrollee--A person [~~An individual who is~~] enrolled in and entitled to coverage under a health benefit plan, including covered dependents.

(3) Health benefit plan--Subject to subparagraphs (A), (B), [~~and~~] (C), and (D) of this paragraph, a plan that is offered by a carrier and provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness including an individual, group, blanket or franchise insurance policy or insurance agreement, a group hospital service contract, [~~or~~] an individual or group evidence of coverage, or any similar coverage document. The term does not include a plan that provides coverage only for accidental death or dismemberment, disability income, supplement to liability insurance, Medicare supplement, workers' compensation, medical payment insurance issued as a part of a motor vehicle insurance policy or a long-term care policy.

(A) For the inpatient mastectomy coverage notice required by subsection (a)(1) of §21.2103 of this title (relating to Mandatory Benefit Notices), the definition of health benefit plan includes a plan that provides coverage only for a specific disease or condition for the treatment of breast cancer or for hospitalization. The term does not include a small employer health benefit plan issued under the Insurance Code[~~,~~] Chapter 26, Subchapters A-G.

(B) For the reconstructive surgery after mastectomy notices required by subsection (a)(2) of §21.2103 of this title, the definition of health benefit plan does not include a plan that provides coverage for a specified disease or other limited benefit except for cancer, a plan that provides only credit insurance, a plan that provides coverage only for dental or vision care, or only for indemnity for hospital confinement.

(C) [~~(B)~~] For the prostate cancer examination notice required by subsection (a)(3) [~~(a)(2)~~] of §21.2103 of this title [~~(relating to Notices)~~], the definition of health benefit plan does not include a small employer health benefit plan written under the Insurance Code Chapter 26, Subchapters A-G, a plan [~~or plans~~] that provides [~~provide~~] coverage only for a specified disease or other limited benefit, or only for indemnity for hospital confinement [~~hospitalization~~].

(D) [~~(C)~~] For the inpatient maternity and childbirth coverage notice required by subsections (a)(4) and (5) [~~(a)(3) and (4)~~] of §21.2103 of this title [~~(relating to Notices)~~], the definition of health benefit plan does not include a plan that provides only credit insurance, a plan [~~or plans~~] that provides [~~provide~~] coverage only for a specified disease or other limited benefit [~~benefits~~], only for dental or vision care, or only for indemnity for hospital confinement.

(4)-(5) (No change.)

§21.2103. Mandatory Benefit Notices.

(a) Prescribed mandatory benefit notices consist of the following:

(1) For a health benefit plan that provides coverage and/or benefits for the treatment of breast cancer, a carrier shall issue a notice which includes the language provided in Figure 1 of subsection (b) of §21.2106 of this title (relating to Forms, Form Number 349 Mastectomy).

(2) For a health benefit plan that provides coverage and/or benefits for a mastectomy, a carrier shall issue:

(A) an enrollment notice which includes the language provided in Figure 2 of subsection (b) of §21.2106 of this title (relating to Forms, Form Number 1764 Reconstructive Surgery After Mastectomy-Enrollment); and

(B) an annual notice, which includes either:

(i) the language provided in Figure 3 of subsection (b) of §21.2106 of this title (relating to Forms, Form Number 1764 Reconstructive Surgery After Mastectomy-Annual); or

(ii) the language provided in Figure 2 of subsection (b) of §21.2106 of this title (relating to Forms, Form Number 1764 Reconstructive Surgery after Mastectomy-Enrollment).

(3) [~~(2)~~] For a health benefit plan that provides coverage and/or benefits for diagnostic medical procedures, a carrier shall issue a notice which includes the language provided in Figure 4 [~~2~~] of subsection (b) of §21.2106 of this title (relating to Forms, Form Number 258 Prostate).

(4) [~~(3)~~] For a health benefit plan that provides coverage and/or benefits for maternity, including benefits for childbirth, a carrier shall issue a notice which includes the language provided in Figure 5 [~~3~~] of subsection (b) of §21.2106 of this title (relating to Forms, Form Number 102 Maternity).

(5) [~~(4)~~] If the health benefit plan described in paragraph (4) [~~(3)~~] of this subsection includes benefits and/or coverage for in-home postdelivery care, the following language, or substantially similar language, shall be inserted immediately before the "Prohibitions" portion of the notice language at Figure 5 [~~3~~] of subsection (b) of §21.2106 of this title (relating to Forms): "Since we provide in-home postdelivery care, we are not required to provide the minimum number of hours outlined above unless (a) the mother's or child's physician determines the inpatient care is medically necessary or (b) the mother requests the inpatient stay."

(b) In lieu of the prescribed notices outlined in subsection (a) of this section, a carrier may opt to provide notices with substantially similar language rather than the notices contained in subsection (b) of §21.2106 of this title. The substantially similar language must be in a readable and understandable format, and must include a clear, complete, and accurate description of these items in the following order:

(1) a heading in bold print and all capital letters indicating the information in the notice relates to mandated benefits;

(2) a statement that the notice is being provided to advise the enrollee of the appropriate coverage and/or benefits [~~coverage(s)/benefit(s)~~], including the carrier's complete licensed name;

(3) a heading in bold print describing the coverage and/or benefits [~~benefit/coverage~~] being provided, for example, Examinations for Detection of Prostate Cancer;

(4) a description of the coverage and/or benefits [~~benefit/coverage~~] for which the notice is being provided. [~~;~~] For a carrier who issues a health benefit plan that provides coverage and/or benefits for a mastectomy, the following shall also apply:

(A) the enrollment notice required by subsection (a)(2)(A) of this section shall disclose that the coverage and/or benefits shall be provided in a manner determined to be appropriate in consultation with the attending physician and the enrollee and shall state the specific deductibles, copayments and/or coinsurance, which may not be greater than the deductibles, copayments and/or coinsurance applicable to other benefits under the health benefit plan; and

(B) the annual notice required by subsection (a)(2)(B) of this section shall at a minimum describe that the health benefit plan provides coverage and/or benefits for reconstructive surgery after mastectomy, surgery and reconstruction of the other breast for symmetry,

prostheses and treatment of complications resulting from a mastectomy (including lymphedema).

(5) for the notice required by subsection [~~subsections~~] (a)(1), (2)(A) and (4) [~~(3)~~] of this section, the heading "Prohibitions" in bold print, followed by a summary of the prohibited acts by a carrier in providing the coverage and/or benefits [~~benefit/coverage~~] for which the notice is being provided; and

(6) a statement identifying the carrier, and providing a phone number and address to which an enrollee may direct questions regarding the coverage and/or benefits [~~coverage(s)/benefit(s)~~] for which the notice is being provided.

(c) If a health benefit plan provides coverage and/or benefits of more than one of the required notices described in subsection (a) of this section, the carrier may combine the language of the required notices into one notice.

(d) If, before the effective date of the amendments to this subchapter relating to reconstructive surgery after mastectomy [~~these rules~~], a carrier has provided to its enrollees notice(s) [~~to its enrollees~~] that contains the information concerning reconstructive surgery after mastectomy as required by §21.2103(a)(2) or (b) of this subchapter [~~required by the notices described in this subchapter~~], such notice(s) [~~notices~~] shall be deemed to comply with the requirements of this subchapter as to those enrollees.

§21.2105. Delivery of Mandatory Benefit Notices.

(a) The notices required by §21.2103(a)(1), (3) and (4) of this title (relating to Mandatory Benefit Notices) shall be issued to enrollees of a health benefit plan that is delivered, issued for delivery, or renewed on or after January 1, 1998, and shall be provided according to the following paragraphs:

(1) The notice shall be provided:

(A) within 60 days of March 29, 1998 [~~the effective date of this subchapter~~] to enrollees whose plans were renewed or issued between January 1, 1998 and March 29, 1998 [~~the effective date of this subchapter~~];

(B) within 60 days of enrollment to new enrollees, whether in a newly issued or newly delivered health benefit plan, or an existing plan which is renewed after March 29, 1998 [~~the effective date of this subchapter~~]; or

(C) within 60 days of renewal date to existing enrollees of an existing plan which is renewed after March 29, 1998 [~~the effective date of this subchapter~~].

(2) Except as specified in paragraph (6) of this section, the notices shall be delivered to enrollees through the U.S. Postal Service.

(3) The notice may be delivered with other health benefit plan documents as long as the time frames set forth in paragraph (1) of this section are met. For example, the notice may be delivered with the policy, certificate, evidence of coverage, or enrollment/insurance card.

(4) If the notices are provided to the primary enrollee's last known address, the requirements of this section are satisfied with respect to all enrollees residing at that address.

(5) If a covered spouse or dependent's last known address is different than the primary enrollee, separate notices are required to be provided to the spouse or the dependent at the spouse's or dependent's last known address.

(6) For group health benefit plans, the notice may be provided to the group master contract holder for distribution to enrollees if the carrier has an agreement with the group master contract holder that the notice will be delivered in accordance with the timelines specified in paragraph (1) of this section; however, the carrier will be held responsible for ensuring that notice is provided to the enrollees.

(b) The notices required by §21.2103(a)(2) of this title shall be issued to enrollees of a health benefit plan and shall be provided according to the following paragraphs.

(1) The enrollment notice required by §21.2103(a)(2)(A) of this title shall be issued to each enrollee upon enrollment in the health benefit plan.

(2) The annual notice required by §21.2103(a)(2)(B) of this title shall be issued to each enrollee annually.

(3) Notwithstanding §21.2103(a)(2) of this title, a carrier may elect to issue the enrollment notice required by §21.2103(a)(2)(A) of this title to satisfy the annual notice requirements set forth in §21.2103(a)(2)(B) of this title.

§21.2106. Forms.

(a) The forms identified in §21.2103 of this title (relating to Mandatory Benefit Notices) for notices of mandatory benefits are included in subsection (b) of this section in their entirety and have been filed with the Office of the Secretary of State. The forms can be obtained from the Texas Department of Insurance, Life/Health Division [~~Group~~], MC 106-1A, P.O. Box 149104, Austin, Texas 78714-9104 , or from the department's Web site, www.tdi.state.tx.us.

(b) The forms referenced in this chapter are as follow:

(1) Figure Number 1: Form Number 349 Mastectomy:
Figure: 28 TAC §21.2106(b)(1)

(2) Figure Number 2: Form Number 1764 Reconstructive Surgery After Mastectomy-Enrollment:
Figure: 28 TAC §21.2106(b)(2)

(3) Figure Number 3: Form Number 1764 Reconstructive Surgery After Mastectomy-Annual:
Figure: 28 TAC §21.2106(b)(3)

(4) [~~(2)~~] Figure Number 4 [~~2~~]: Form Number 258 Prostate:
Figure: 28 TAC §21.2106(b)(4) [~~(2)~~]

(5) [~~(3)~~] Figure Number 5 [~~3~~]: Form Number 102 Maternity: [~~.~~]
Figure: 28 TAC §21.2106(b)(5) [~~(3)~~]

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

Filed with the Office of the Secretary of State, on October 23, 2000.

TRD-200007445
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-6327

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CHAPTER 25. INSURANCE PREMIUM FINANCE

SUBCHAPTER E. EXAMINATIONS AND ANNUAL REPORTS

28 TAC §25.88

The Texas Department of Insurance proposes an amendment to §25.88 concerning an assessment which will be used to cover the general administrative expense assessment of insurance premium finance companies. The amendment is necessary to adjust the rate of assessment which is sufficient to meet the expenses of performing the department's statutory responsibilities for examining, investigation, and regulating insurance premium finance companies. Under §25.88, the department levies a rate of assessment to cover the department's 2001 fiscal year's general administrative expense and collects the assessment from each insurance premium finance company on the basis of a percentage of total loan dollar volume for the 2000 calendar year.

Karen A. Phillips, Chief Financial Officer, has determined that for the first five-year period the proposed section will be in effect, the anticipated fiscal impact on state government will be income estimated at $328,608 to the state's general revenue fund. There is no fiscal implication for local government or employment or the local economy as a result of enforcing or administering the proposed section.

Ms. Phillips has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the section will be the facilitation in the collection of a minimum assessment to cover the general administrative expense connected to the regulation of insurance premium finance companies. The cost of the assessment to a premium finance company in 2001 will be .01684 of 1.0% of calendar year 2000 total loan dollar volume of the insurance premium finance company. The minimum cost for compliance based on assessment under the section is $250. There will be no difference in rates of assessment between micro, small and large businesses. Based on the department's experience, the actual cost of gathering the information required to fill out the form, calculate the assessment and complete the form will be the same for micro, small and large businesses. Generally a person familiar with the accounting records of the company and accounting practices in general will perform the activities necessary to comply with the section. Such persons are similarly compensated by micro, small and large insurers. The compensation is generally between $17-$30 an hour. The department estimates that the form can be completed in two hours to comply with this section. The department does not believe it is legal or feasible to waive or modify the requirements of the proposed section for small and micro businesses because the assessment is required by statute and makes no provision for waiving or reducing assessments for small or micro-businesses.

To be considered, all comments on the proposal must be received in writing no later than 5:00 p.m., on December 4, 2000. All comments should be submitted to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comments should be simultaneously submitted to Karen A. Phillips, Chief Financial Officer, Mail Code 108-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. A request for hearing should be submitted separately to the Office of the Chief Clerk.

The amendment is proposed under the Insurance Code Articles 24.06(c), 24.09, and §36.001. Article 24.06(c) provides that each insurance premium finance company licensed by the department shall pay an amount assessed by the department to cover the direct and indirect cost of examinations and investigations and a proportionate share of general administrative expense attributable to regulation of insurance premium finance companies. Article 24.09 authorizes the department to adopt and enforce rules necessary to carry out provisions of the Insurance Code concerning the regulation of insurance premium finance companies. Section 36.001 authorizes the Commissioner of Insurance to adopt rules for the conduct and execution of the duties and functions of the department.

The following articles of the Insurance Code are affected by this section: Articles 24.05, 24.06, 24.08, 24.09, and 24.10.

§25.88. General Administrative Expense Assessment.

On or before April 1, 2001 [~~2000~~], each insurance premium finance company holding a license issued by the department under the Insurance Code, Chapter 24, shall pay an assessment to cover the general administrative expenses attributable to the regulation of insurance premium finance companies. Payment shall be sent to the Texas Department of Insurance, Examinations Division, Mail Code #305-2E, 333 Guadalupe, P. O. Box 149104, Austin, Texas 78701-9104. The assessment to cover general administrative expenses shall be computed and paid as follows.

(1) The amount of the assessment shall be computed as .01684 of 1.0% [~~0.0%~~] of the total loan dollar volume of the company for the calendar year 2000 [~~1999~~].

(2) (No change.)

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007427
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-6327

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PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 143. DISPUTE RESOLUTION--REVIEW BY THE APPEALS PANEL

28 TAC §143.3, §143.4

The Texas Workers' Compensation Commission (the commission) proposes amendments to §143.3, concerning requesting the appeals panel to review the decision of the hearing officer, and §143.4 concerning responding to a request for review by the appeals panel. Specifically, §143.3(b) establishes the format for the statement certifying that a copy of the request for the Appeals Panel to review a decision has been served on the other party and §143.4(b) establishes the format for the statement certifying that a copy of the response to the request has been served on the appellant.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

The proposed amendments to §143.3 and §143.4 change the form for the certification of service by deleting "19__" and replacing it with "_____" for use in years on or after January 1, 2000.

Heidi Jackson, Director of Hearings, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule. The purpose of this rule is for clarification and to maintain the effect that has always been intended within the statute.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Ms. Jackson has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be that all system participants should benefit from a clear understanding of the format to be used for the certification of delivery.

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed and there will be no adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., December 4, 2000. You may comment via the Internet by accessing the Commission's website at www.twcc.state.tx.us and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by e-mailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Cherie Zavitson at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas, 78704-7491.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

The amendments are proposed under the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act, Texas Labor Code, §410.004, which gives the division of hearings the authority to conduct benefit review conferences, contested case hearings, arbitration, and appeals within the commission related to workers' compensation claims, Texas Labor Code, §410.202, which states that a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party, and Texas Labor Code, §410.204, which provides that the appeals panel shall issue a decision not later than the 30th day after the date on which the written response to the request for appeal is filed.

The amendments are proposed under the Texas Labor Code §§2.061, 410.004, 410.202, and 410.204.

This amendments affect the following statutes: Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; Texas Labor Code §410.004, which gives the division of hearings the authority to conduct benefit review conferences, contested case hearings, arbitration, and appeals within the commission related to workers' compensation claims, Texas Labor Code §410.202, which states that a party shall file a written request for appeal with the appeals panel not later than the 15th day after the date on which the decision of the hearing officer is received from the division and shall on the same date serve a copy of the request for appeal on the other party, and Texas Labor Code §410.204, which provides that the appeals panel shall issue a decision not later than the 30th day after the date on which the written response to the request for appeal is filed.

§143.3. Requesting the Appeals Panel to Review the Decision of the Hearing Officer.

(a) (No change.)

(b) The request shall contain a statement certifying that a copy has been served on the other party. A certificate in substantially the following form shall be used: "I hereby certify that I have on this ____ day of _____, _____ [~~19~~__] , served a copy of the attached request for appeal on _____ (state the name of the other party on whom a copy was served) by _____ (state the manner of service)." _____ Signature

(c) (No change.)

§143.4. Responding to a Request for Review by the Appeals Panel.

(a) (No change.)

(b) The response shall contain a statement certifying that a copy has been served on the appellant. A certificate in substantially the following form shall be used: "I hereby certify that I have on this ____ day of _____, _____ [~~19~~__], served a copy of the attached response on _____ (state the name of the appellant on whom a copy was served) by _____ (state the manner of service)." _____ Signature

(c) (No change.)

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007397
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 804-4287

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CHAPTER 144. DISPUTE RESOLUTION
SUBCHAPTER A. ARBITRATION

28 TAC §144.3

The Texas Workers' Compensation Commission (the commission) proposes an amendment to §144.3 concerning delivery of copies of documents. Specifically, §144.3 establishes that a party who sends a document to the commission or the arbitrator and the other parties shall include a statement certifying delivery. The rule also prescribes the form of such certification.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

The proposed amendment to §144.3 changes the form for the certification of service by deleting "19___" and replacing it with "____" for use in years on or after January 1, 2000.

Heidi Jackson, Director of Hearings, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule. The purpose of this rule is for clarification and to maintain the effect that has always been intended within the statute.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Ms. Jackson has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be that all system participants should benefit from a clear understanding of the format to be used for the certification of delivery.

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed and there will be no adverse economic impact on small businesses or micro-businesses.

Comments on the proposal must be received by 5:00 p.m., December 4, 2000. You may comment via the Internet by accessing the Commission's website at www.twcc.state.tx.us and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by e-mailing your comments to RuleComments@twcc.state.tx.us or by mailing or delivering your comments to Cherie Zavitson at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas, 78704-7491.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The Commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for Commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

The amendment is proposed under the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act, and Texas Labor Code §410.112, which states that a party to the arbitration proceeding must timely file an exchange with the Arbitrator, or be subject to an administrative violation for failure to comply with this subsection.

The amendment is proposed under the Texas Labor Code §402.061 and §410.112.

This amendment affects the following statutes: Texas Labor Code §402.061, which authorizes the Commission to adopt rules necessary to administer the Act, and Texas Labor Code §410.112, which states that a party to the arbitration proceeding must timely file and exchange with the Arbitrator, or be subject to an administrative violation for failure to comply with this subsection.

§144.3. Delivery of Copies of Documents.

A party who sends a document relating to the arbitration proceeding to the commission or the arbitrator shall also deliver copies of the document to all other parties, or their representatives or attorneys. Delivery shall be accomplished by presenting in person, mailing by certified mail, return receipt requested, or transmitting by telephonic transmission. The document sent to the commission or the arbitrator shall contain a statement certifying delivery using the following format: "I hereby certify that I have on the ____ day of _____, _____ [~~19~~__], delivered a copy of the attached document to _____ by _____ (state manner of delivery)."

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

Filed with the Office of the Secretary of State, on October 20, 2000.

TRD-200007398
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 804-4287

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 375. CLEAN WATER STATE REVOLVING FUND
SUBCHAPTER B. PROVISIONS PERTAINING TO USE OF CAPITALIZATION GRANT FUNDS
DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §375.212

The Texas Water Development Board (the board) proposes amendments to 31 TAC §375.212, concerning the Clean Water State Revolving Fund. The amendments will correct punctuation and add a new paragraph to §375.212 to update the rules.

Section 375.212 is proposed for amendment to add new paragraph (29), adding Davis-Bacon Act requirements to a list of federal requirements applicable to all projects receiving assistance from the Clean Water State Revolving Fund which are constructed in whole or in part with funds directly made available by capitalization grants. The U.S. Environmental Protection Agency has proposed that a condition be added to all capitalization grant agreements entered into between E.P.A. and the states under Title VI of the Clean Water Act on or after January 1, 2001, requiring the states to ensure that the requirements of Section 513 of the Clean Water Act, which relates to Davis-Bacon Act requirements, will be applied to publicly owned treatment works receiving Clean Water State Revolving Fund assistance under those agreements. The applicable Davis-Bacon Act provisions relate to payment of prevailing wage rates. Pursuant to a proposed settlement agreement between the E.P.A. and the Building and Construction Trades Department, AFL/CIO, such requirements will also be applied to all capitalization grant agreements entered into between E.P.A. and the states under Title VI of the Clean Water Act on or after January 1, 2001. The proposed amendment will bring Board rules into compliance with this proposed E.P.A. requirement. Amendments are also proposed to correct punctuation in paragraphs §375.212(25) through §375.212(28).

Ms. Pam Gulley, Director of Accounting and Finance, has determined that for the first five-year period the section is in effect there will not be fiscal implications on state and local government as a result of enforcement and administration of the section. This determination is based upon the fact that Texas law already requires payment of prevailing wage rates as determined by the Davis-Bacon Act or through a wage rate survey conducted by the public entity calling for bids on a public works contract.

Ms. Gulley has also determined that for the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to bring certain provisions of the Clean Water State Revolving Fund program into compliance with new federal requirements and to provide notice to applicants of such requirements. Ms. Gulley has determined there will not be economic costs to small businesses or individuals required to comply with the section as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Gail L. Allan, Director, Administration and Northern Legal Services, Texas Water Development Board , P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to gail.allan@twdb.state.tx.us or by fax @ 512/463-5580.

The amendments are proposed under the authority of the Texas Water §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State including specifically the SRF program.

The statutory provisions affected by the proposed amendments are Texas Water Code Chapter 15, Subchapter J and Chapter 17, Subchapter C, E, and F.

§375.212. Capitalization Grant Requirements.

(a) All projects which receive assistance from the fund and will be constructed in whole or part with funds directly made available by capitalization grants shall satisfy the following federal requirements:

(1) National Environmental Policy Act of 1969, PL 91-190;

(2) Archeological and Historic Preservation Act of 1974, PL 93-291;

(3) Clean Air Act, 42 USC 7506(c);

(4) Coastal Barrier Resources Act, 16 USC 3501 et seq;

(5) Coastal Zone Management Act of 1972, PL 92-583, as amended;

(6) Endangered Species Act, 16 USC 1531, et seq;

(7) Executive Order 11593, Protection and Enhancement of the Cultural Environment;

(8) Executive Order 11988, Floodplain Management;

(9) Executive Order 11990, Protection of Wetlands;

(10) Farmland Protection Policy Act, 7 USC 4201 et seq;

(11) Fish and Wildlife Coordination Act, PL 85-624, as amended;

(12) National Historic Preservation Act of 1966, PL 89-665, as amended;

(13) Safe Drinking Water Act, §1424(e), PL 92-523, as amended;

(14) Wild and Scenic Rivers Act, PL 90-542, as amended;

(15) Demonstration Cities and Metropolitan Development Act of 1966, PL 89-754, as amended;

(16) Clean Air Act, §306 and Clean Water Act, §508, including Executive Order 11738, Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans;

(17) Age Discrimination Act, PL 94-135;

(18) Civil Rights Act of 1964, PL 88-352;

(19) PL 92-500, §13; Prohibition against sex discrimination under the Federal Water Pollution Control Act;

(20) Executive Order 11246, Equal Employment Opportunity;

(21) Executive Orders 11625 and 12138, Women's and Minority Business Enterprise;

(22) Rehabilitation Act of 1973, PL 93-112 (including Executive Orders 11914 and 11250);

(23) Uniform Relocation and Real Property Acquisition Policies Act of 1970, PL 91-646;

(24) Executive Order 12549, Debarment and Suspension;

(25) The Wilderness Act, 16 USC 1131 et seq.; [~~and~~]

(26) Environmental Justice, Executive Order 12898;[~~.~~]

(27) Clean Water Act, PL 92-500, as amended;

(28) Section 129, Small Business Administration Reauthorization and Amendment Act of 1988, PL 100-590; and[~~.~~]

(29) Davis-Bacon Act, 40 U.S.C. §§276a-276a-5, as amended, to the extent required by §513 of the Clean Water Act, 33 U.S.C. §1372, as amended.

(b) (No change)

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

Filed with the Office of the Secretary of State, on October 18, 2000.

TRD-200007370
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: December 13, 2000
For further information, please call: (512) 463-7981

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER B. NATURAL GAS PRODUCTION TAX

34 TAC §3.11

The Comptroller of Public Accounts proposes an amendment to §3.11, concerning penalty and interest. Because the state must pay credit interest on overpayments made on taxes due after January 1, 2000, taxpayers will no longer be authorized to keep prepayment accounts. Also, these accounts were originally authorized to simplify procedures and minimize penalty concerns at a time when prices of gas were regulated. Those concerns no longer exist since federal price controls are no longer imposed. Therefore, Subsection (b) is being deleted to eliminate these accounts.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in providing new information regarding tax responsibilities. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements Tax Code, §111.064.

§3.11. Penalty and Interest.

[(a) Imposition of tax, penalty, and interest.]

(a) [(1)] Penalty and interest will not apply to additional value that results [resulting] from retroactive price increases or retroactive adjustments to value, provided that the additional tax is remitted on or before the 20th [20] day of the second month that follows [following] the month in which such price or value was determined. The taxpayer must notify [has the burden of notifying] the comptroller of any tax that is not subject to penalty and interest. [If notification is not provided, the prepayment procedure, if applicable, will be followed.]

(b) [(2)] The gas purchaser is [will be held] responsible for any tax, penalty, and interest that accrues [accruing] on gas that the purchaser takes [taken by the purchaser] whenever the proceeds are not disbursed to the interest owners, unless the producer is solely liable for the tax.

[(b) Prepayment procedure.]

[(1) Any natural gas taxpayer may voluntarily prepay the amount of tax that may become due as the result of filing amended reports after the due date.]

[(2) If the prepayment is sufficient to cover the additional tax and the postmark for the prepayment is on or before the due date for the period being amended, no penalty and interest will be assessed.]

[(3) If the prepayment is insufficient to cover the additional tax, or if the prepayment postmark date is not timely, the prepayment will be applied in such a manner that the maximum amount of penalty and interest will be eliminated based upon the account balances at that time]

[(4) A prepayment will be applied only when a payment is received along with the amended report and only if the application would eliminate or reduce penalty and interest. A prepayment will not be automatically applied against penalty and interest. Any prepayment used will be replaced with the payment received with the amended reports. The replacement will then be available for use as a prepayment under the actual postmark date that it was sent to the comptroller.]

[(5) Any taxpayer electing to use the prepayment procedure may not designate the application of payments. The application will be made by the comptroller and will be made in such a manner that the maximum amount of penalty and interest will be eliminated based upon the balances at the time of receipt of the amended reports and payments.]

[(6) A prepayment will not automatically be applied against a liability reflected on an original report or against a liability established by audit of the taxpayer's records.]

[(7) The comptroller may apply a prepayment to any unpaid natural gas tax, penalty, and interest existing in the taxpayer's account, unless the deficiency is included in a redetermination hearing.]

[(8) A taxpayer may increase the amount of the prepayment at any time.]

[(9) A taxpayer may request a refund of the unused prepayment, or any part of it, at any time. The granting of the unused prepayment, or any part of it, at any time. The granting of the refund is subject to existing law and rules of the comptroller.]

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

Filed with the Office of the Secretary of State, on October 19, 2000.

TRD-200007383
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-4062

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SUBCHAPTER GG. INSURANCE TAX

34 TAC §3.809

The Comptroller of Public Accounts proposes an amendment to §3.809, concerning the taxpayer election in instances of overpayment of premium liability. The amendment specifically addresses the penalty and interest applicable to late payments and underpayments to conform with changes in interest calculation in the Tax Code, Title 2.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in providing new information regarding tax responsibilities. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Insurance Code, Article 4.10, §6(b), Article 4.11, §13, and Article 9.59, §3(b), and the Tax Code, Title 2, Subtitles A and B.

§3.809. Due Dates, Penalty and Interest, and Overpayments.

(a) Premium and Maintenance Tax Return due date. The premium tax and maintenance tax return for each taxable year ending the preceding December 31st shall be filed and the total amount of tax due shall be paid on or before the 1st day of March of each year or if a company is required to file an annual statement after March 1, the premium tax and maintenance tax report is required to be filed at that time.

(b) Premium tax prepayments.

(1) A semiannual prepayment of premium tax must be made on March 1, or at the same time that the annual statement is required to be filed, and August 1 by all insurers with a net tax liability for the pervious calendar year in excess of $1,000. The prepayment shall equal the lesser of one-half of the total premium tax paid for the previous calendar year, or one-half of the current year's tax liability. If no premium tax was paid during the previous calendar year, the prepayment will be based on the tax which would be owed on the aggregate of premium receipts for the two preceding calendar quarters based on the minimum tax rate specified by law. If the premium tax liability for the previous year was between $.01 and $1,000, no prepayment is due.

(2) The amount due is the lesser of the total annual premium tax liability from the previous year, or the actual tax liability for the current year multiplied by 50%.

(c) Penalty and interest. Any taxes due prior to September 1, 1993, including prepayments, are subject to the Insurance Code in effect at that time. Therefore, any assessments issued by the comptroller for additional taxes which were originally due prior to September 1, 1993, fall under the penalty and interest provisions contained within the Insurance Code, Article 4.13 and Article 4.14, in effect through August 31, 1993. Refer to paragraph (1) of this subsection. The comptroller does not have the authority to waive penalty or interest on assessments made for periods prior to September 1, 1993.

(1) Prepayments and tax returns due prior to September 1, 1993.

(A) Late payment.

(i) Penalty. A penalty equal to 5.0% of the amount of taxes due shall be assessed for each month or portion of a month for which such payment is late. The penalty shall not exceed 20%.

(ii) Interest. Interest shall accrue at an annual rate of 9.0% from the due date until the date paid.

(B) Underpayment.

(i) Penalty. Insurance carriers failing to satisfy the provisions of subsection (a) or (b)(1) of this section will be assessed penalty, as prescribed in subparagraph (A)(i) of this paragraph, on the difference between the amount of quarterly prepayment tax liability actually paid and the amount due.

(ii) Interest. Insurance carriers failing to satisfy the provisions of subsection (a) or (b)(1) of this section will be assessed interest, as prescribed in subparagraph (A)(ii) of this paragraph, on the difference between the amount of quarterly prepayment tax liability actually paid and the amount due.

(2) Prepayments and tax returns due on or after September 1, 1993.

(A) Late payment. Failure to file and pay taxes, assessments, and fees by the due date as provided under the Insurance Code will subject a taxpayer to penalty and interest under the Tax Code, Title 2, Subtitles A and B.

~~*[(i)* A penalty of 5.0% will be assessed on all payments which are received 1-30 days after the due date. An additional 5.0% penalty will be assessed on tax payments received more than 30 days after the due date.]~~

~~*[(ii)* Interest will be assessed on payments received more than 60 days after the due date at the rate of 12% per annum. Interest will begin to accrue on the 61st day from the due date and continue through date of the tax payment. The interest will be in addition to the 10% penalty assessed in clause (i) of this subparagraph.]~~

(B) Underpayment. Failure to file and pay taxes as provided under the Insurance Code, Article 4.10, §6(b), Article 4.11, §13(a), and Article 9.59, §3(b), will subject a taxpayer to penalty and interest under the Tax Code, Title 2, Subtitles A and B, on the difference between the amount of semi- annual prepayment tax liability actually paid and the amount due.

~~*[(i)* Penalty. Insurance carriers failing to satisfy the provisions of subsection (a) or (b)(2) of this section will be assessed penalty, as prescribed in subparagraph (A)(i) of this paragraph, on the difference between the amount of semiannual prepayment tax liability actually paid and the amount due.]~~

~~*[(ii)* Interest. Insurance carriers failing to satisfy the provisions of subsection (a) or (b)(2) of this section will be assessed interest, as prescribed in subparagraph (A)(ii) of this paragraph, on the difference between the amount of semiannual prepayment tax liability actually paid and the amount due.]~~

(d) Overpayment of tax liability. Commencing with the tax return due on March 1, 1995, if the sum of the semiannual prepayments exceeds the actual tax due as determined by the accurate and correct filing of the original or amended annual tax return, the overpayment will be automatically refunded to the taxpayer unless the taxpayer notifies the comptroller to apply the overpayment to another period. The notification should be written on the face of the tax return.

(e) Interest on refunds. Under the Tax Code, Title 2, a refund granted for a report period due on or after January 1, 2000, for an amount found to be erroneously paid, will include interest at the same variable interest rate charged on delinquent taxes. Interest accrues beginning the later of 60 days after the date of payment or the due date of the tax report and ending on either the date of allowance of the credit on account or a date not more than 10 days before the date of the refund warrant. A refund for a report period due before January 1, 2000 does not accrue interest. Interest does not accrue on a credit taken on a taxpayer's report.

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

Filed with the Office of the Secretary of State, on October 19, 2000.

TRD-200007384
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-4062

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34 TAC §3.823

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

The Comptroller of Public Accounts proposes the repeal of §3.823, concerning surplus lines insurance premium tax trust funds. The section is being repealed because the statute has now been changed to eliminate the requirement for maintaining a separate bank account for the deposit and payment of surplus lines premium tax. The current statutory provisions state that surplus lines taxes are trust funds in the hands of the agent and agents must make prepayments of taxes by the 15th day of the month following the month in which accrued taxes meet $70,000.

James LeBas, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. LeBas also has determined that there will be no cost or benefit to the public from the repeal of this rule. This repeal is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This repeal is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The repeal implements the Insurance Code, Article 1.14-2, §12 and Title 2, §101.252.

§3.823. Surplus Lines Insurance Premium Tax Trust Funds.

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

Filed with the Office of the Secretary of State, on October 19, 2000.

TRD-200007385
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-4062

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34 TAC §3.831

The Comptroller of Public Accounts proposes an amendment to §3.831, concerning gross premium definitions for property and casualty, and title insurance companies. The amended section adds the gross premium definition for life, accident, and health insurance companies and health maintenance organizations including changes to the statute as a result of Senate Bill 530, 76th Legislature, 1999. The legislative change expands the gross premium exemptions to include coverage for employees of hospital districts and employees of county or municipal hospitals where the premiums are paid from a single non- profit trust for the sole purpose of funding such benefits.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in providing new information regarding tax responsibilities. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Insurance Code, Article 4.10, Article 4.11, §2, Article 4.17, Article 9.59 and Article 20A.33.

§3.831. Gross Premium Definitions for Property and Casualty; Life, Accident, and Health; Health Maintenance Organizations;[,] and Title Insurance Companies; and Clarification of the Taxation on the Distribution of Title Premiums.

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

(1) Gross premium definition for property and casualty companies--

(A) Gross premiums are the total gross amount of premiums, membership fees, assessments, dues, and any other considerations for the taxable year on insurance written on each and every kind of property or risk located in the state, with no deduction for premiums paid for reinsurance, and excluding:

(i) return premiums (i.e., unearned premiums returned to policyholders);

(ii) dividends paid to policyholders;

(iii) [~~(i)~~] [~~excluding~~] premiums received from other licensed companies for reinsurance [~~premiums~~]; and

(iv) [~~and~~] premium finance charges clearly identified in a premium note or other evidence of premium payable that are [~~is~~] separately stated to the policyholder (i.e., invoice, billing, contract).[~~; and~~]

(B) The following non-taxable premiums are deducted from gross premiums in order to calculate taxable premiums:

(i) crop insurance reinsured by the Federal Crop Insurance Corporation under Federal Crop Insurance Act (7 U.S.C. §1508), §508;

(ii) premiums for the Property Protection Program for Underserved Areas under Insurance Code, Article 5.35-3.

~~*f(ii)* deducting return premiums (i.e., unearned premiums returned to policyholders) and dividends paid to policyholders, with no deduction for premiums paid for reinsurance].~~

(C) [~~(B) The~~] Gross [~~gross~~] premium defined [~~definition described~~] in subparagraph (A) of this paragraph applies to every insurance carrier, including Lloyds, reciprocal exchanges, and any other organization or concern writing gross premiums from the business of fire, marine, inland marine, accident, credit, livestock, fidelity, guaranty, surety, casualty, employers' liability, or any other kind or character of insurance. However, the definition does not apply to:

(i) title insurance companies;

(ii) premium receipts from the business of life insurance, personal accident insurance, life and accident insurance, or health and accident insurance for profit, or health maintenance organization coverage [~~written by life insurance companies, life and accident insurance companies, or health and accident insurance companies~~];

(iii) fraternal benefit associations or societies in this state, non-profit group hospital service plans, stipulated premium companies, mutual assessment associations, companies or corporations regulated by the Insurance Code, Chapter 14, as amended; and

(iv) cooperative or mutual fire insurance companies administered by the members thereof solely for the protection of their own property and not for profit.

(2) Gross premium definition for life, health, and accident insurance companies and health maintenance organizations--

(A) Gross premiums are the total gross amount of all premiums, including internal rollover premiums, membership fees, assessments, dues and any other consideration received during the taxable year, with no deduction for premiums paid for reinsurance, on each and every kind of life, accident, or health insurance policy or contract that covers persons who are located in the State of Texas, or the gross amount of revenues for the issuance of health maintenance organization certificates or contracts, and excludes:

(i) return premiums (i.e., unearned premiums returned to policyholders);

(ii) dividends applied to purchase paid-up additions to life insurance or to shorten the endowment or premium payment period for life insurance policies;

(iii) premiums that an insurance carriers receives from another insurance carrier for reinsurance (a stop-loss or excess-loss insurance policy issued to a health maintenance organization is considered reinsurance);

(iv) premium finance charges that are clearly identified in a premium note or other evidence of premium payable, and that are separately stated to the policyholder (i.e., invoice, billing, contract);

(v) premiums received from the State Comptroller or from the Treasury of the United States for accident and health insurance or health maintenance organization coverage for which the state or federal government contracts for the purpose of providing welfare benefits to designated welfare recipients, or for insurance for which the state or federal government contracts in accordance with, or in furtherance of the provisions of the Human Resource Code, Title 2, or the Federal Social Security Act; and

(vi) premiums paid on group health, accident, and life insurance policies or health maintenance organization coverage in which the group covered has established a single non-profit trust to provide coverage primarily for employees of:

(I) a municipality, county, or hospital district in this state; or

(II) a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or another entity that operates the hospital on behalf of the county or municipality.

(B) The following non-taxable premiums are deducted from gross premiums in order to calculate taxable premiums:

(i) group benefits provided under Insurance Code, Articles 3.50-2, 3.50-3, and 3.50-4;

(ii) premiums for the Texas 65 Health Insurance Plan under Insurance Code, Article 3.71; and

(iii) premiums for the Federal Employees Health Benefit Program under United States Code, Title 5, §8909.

(C) The definition of gross premiums does not include annuities or annuity considerations. Therefore, annuities and annuity consideration are not subject to premium taxation under Article 4.11. However, annuities and annuity considerations are included for purposes of Article 4.17, Maintenance Tax on Gross Premiums, and are taxed accordingly. Maintenance taxes are assessed when annuities are purchased from insurance companies (at the time of annuitization), which is typically known as *back-end* reporting.

(D) The gross premium definition in subparagraph (A) of this paragraph applies to every insurance carrier that receives premiums from the business of life insurance, accident insurance, health insurance, life and accident insurance, life and health insurance, health and accident insurance, or life, health and accident insurance, including variable life insurance, credit life insurance, and credit accident and health insurance for profit or otherwise or for mutual benefit or protection in the State of Texas, and to every health maintenance organization

that receives revenues for the issuance of certificates or contracts in the State of Texas.

(3) [~~(2)~~] Gross premium definition for title insurance companies--Gross premiums are the total gross amount of premiums, membership fees, dues, and any other considerations received by the title insurer or its agent for the taxable year on title insurance written on property located in this state with no deduction for premiums paid for reinsurance, and excludes:

(A) [~~excluding~~] premiums received from other licensed title insurance companies for reinsurance; and

(B) [~~deducting~~] return premiums paid to policyholders[~~, with no deduction for premiums paid for reinsurance~~].

(4) [~~(3)~~] Taxation on distribution of title insurance premiums--

(A) Premium and maintenance taxes are levied on all amounts defined to be title premiums whether paid to the title insurance company or retained by the title insurance agent.

(B) The collection of the title premium tax and maintenance fee [~~taxes~~] remitted to the comptroller on the premium retained by the title agent is incorporated in the division of the premium between insurer and agent so that the insurer receives the premium tax and maintenance fee [~~taxes~~] due on the agent's portion of the premium.

(C) Title insurers and title agents are both subject to the premium and maintenance tax on their proportional share of the premiums and are separately liable for the tax if the insurer fails to remit the tax due on the agent's portion.

(D) [~~(C)~~] The insurer is required to remit to the comptroller the total title premium and maintenance taxes due.

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

Filed with the Office of the Secretary of State, on October 19, 2000.

TRD-200007386
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-4062

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34 TAC §3.832

The Comptroller of Public Accounts proposes an amendment to §3.832, concerning the assessment for the Office of Public Insurance Counsel (OPIC) under Insurance Code, Article 1.35B. The amendment changes the assessment for life, health, and accident insurers and health maintenance organizations from $.03 per policy or certificate of coverage to $.057 per policy in compliance with statutory changes, and revises the interest calculations under the Tax Code, Title 2.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendment will be in effect there will be no significant revenue impact on the state or local government.

Mr. LeBas also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in providing new information regarding tax responsibilities. This amendment is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Insurance Code, Article 1.35B.

§3.832. Assessment for the Office of Public Insurance Counsel (OPIC).

(a) Property and casualty insurance. Each property and casualty insurer authorized to do business in this state must pay an annual assessment of $.057 on each property and casualty insurance policy or each certificate of insurance evidencing coverage under a group policy covering property and/or risks located in Texas which is in force on December 31.

(b) Life, health and accident insurance. Each life; health; accident; life and accident; accident and health; or life, accident and health insurer; and each health maintenance organization authorized to do business in this state must pay an annual assessment of $.057 [~~$.03~~] on each individual policy or each certificate of insurance evidencing coverage under a group policy placed in force in this state with an initial premium paid during the year. For the purpose of determining this assessment, a certificate of insurance includes subscriber certificates issued under a group policy. A subscriber certificate may be for an individual or the individual and his/her family. Individual policy renewals or certificate of insurance renewals are not to be included in calculating the assessment. A term life policy which is converted to a whole life or universal life policy will be considered a new policy for purposes of the assessment unless the term life policy specifically contains a conversion option.

(c) Title insurance. Each title insurer authorized to do business in this state must pay an annual assessment of $.057 on each owner policy and each mortgage policy written during the year for property located in Texas for which the full premium is charged. In instances where two or more companies co- insure a portion of the risk, each policy is subject to the assessment. For the purpose of determining this assessment, any policies on which discounted premiums are charged will not be included.

(d) Purchase of a block of business. In instances where a block of business is purchased by another company, the following will apply.

(1) Property and casualty insurance policies--The acquiring company is responsible for the assessment on each of the policies in force on December 31.

(2) Life, accident, and health insurance policies--The original insurer is responsible for the assessment on the new policies which were ceded.

(3) Title insurance policies--The original insurer is responsible for the assessment on the policies written on which full premium is charged.

(e) Due date of report and payment. The assessment must be reported and paid on or before March 1 following the end of the tax year for which the assessment is due.

(f) Penalty and interest. Failure to file and pay the assessment as provided under the Insurance Code, Article 1.35B, will subject the taxpayer to penalty and interest under the Tax Code, Title 2, Subtitles A and B. [~~Penalty. A penalty equal to 5.0% of the assessment due, or any portion of the assessment not paid, shall be assessed on all payments received 1-30 days after the due date. An additional penalty equal to 5.0% of the assessment, or any portion of the assessment not paid, shall be assessed on payments received more than 30 days after the due date.~~]

(g) Interest on refunds. Under the Tax Code, Title 2, a refund granted for a report period due on or after January 1, 2000, for an amount found to be erroneously paid, will include interest at the same variable interest rate charged on delinquent taxes. Interest accrues beginning the later of 60 days after the date of payment or the due date of the tax report and ending on either the date of allowance of the credit on account or a date not more than 10 days before the date of the refund warrant. A refund for a report period due before January 1, 2000 does not accrue interest. Interest does not accrue on a credit taken on a taxpayer's return. [~~Interest. Interest will accrue at the rate of 12% beginning on the 61st day following the due date of the assessment on any portion of the assessment not paid and will continue through the date of payment.~~]

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

Filed with the Office of the Secretary of State, on October 19, 2000.

TRD-200007387
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-4062

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PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.10

The Texas County and District Retirement System proposes new §107.10 concerning the treatment of an ineligible benefit payment made to a recipient, as those terms are defined in the rule. Under the proposed rule, an ineligible benefit payment is a receivable of the retirement system, and will be charged to the general reserves account of the endowment fund after the board of trustees determines that the ineligible benefit payment is not recoverable. The rule specifically authorizes the system to offset the amount of an ineligible benefit payment against future benefit payments otherwise due a recipient.

Joseph Froh, Deputy Director of the Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local governments as a result of administering the rule.

Mr. Froh has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the preservation of trust assets (standing to the account of a participating subdivision) for the exclusive benefit of members and annuitants of that subdivision to the extent that such persons are entitled to benefits under the provisions of the Texas County and District Retirement System Act. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted to Joseph Froh, Deputy Director, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees of the Texas County and District Retirement System with the authority to adopt rules necessary or desirable for efficient administration of the system.

The Government Code, §845.310 is affected by this proposed rule.

§107.10. Treatment of Ineligible Benefit Payments.

(a) In this section the term "ineligible benefit payment" means that portion of a payment or distribution, other than a supplemental death benefit payment, made by the retirement system to, or on behalf of, a living or deceased person who was not legally entitled to the payment at the time it was made. An ineligible benefit payment is a receivable of the system.

(b) In this section the term "recipient" means the person or persons who, directly or indirectly, received an ineligible benefit payment.

(c) If a repayment of an ineligible benefit payment is not received by the retirement system, the system may offset the amount of the ineligible benefit payment against future benefit payments otherwise due the recipient.

(d) If the board determines that an ineligible benefit payment is not recoverable, the receivable shall be charged against the general reserves account of the endowment fund.

(e) In making its determination, the board may consider the amount of the ineligible benefit payment, the likelihood of repayment, the costs of recovery, and any other fact or circumstance which the board considers to be relevant in finding that further efforts for the recovery of the payment are not in the best interests of the retirement system, its members and annuitants.

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

Filed with the Office of the Secretary of State, on October 18, 2000.

TRD-200007337
Joseph Froh
Deputy Director
Texas County and District Retirement System
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 328-8889

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 81. INTERACTION WITH THE PUBLIC

37 TAC §81.34

The Texas Youth Commission (TYC) proposes new §81.34, concerning Notice of Youth Confessions of Child Abuse. The new section will provide guidelines according to Chapter 261 of the Texas Family Code that require any person having cause to believe that a child has been abused or neglected by any person (including by another child) to report it to the appropriate agency, including the Department of Protective and Regulatory Services (DPRS), a law enforcement agency, or the Texas Youth Commission (TYC).

Terry Graham, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Graham also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be greater protection for TYC staff and the general public. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The new section is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to adopt policies and make rules appropriate to the proper accomplishment of its functions.

The proposed rule implements the Human Resource Code, §61.034.

§ 81.34. Notice of Youth Confessions of Child Abuse.

(a) Purpose. The purpose of this rule is to provide guidelines according to the Texas Family Code (TFC), chapter 261, for Texas Youth Commission (TYC) supervisors to report information given to them by TYC staff members or volunteers regarding a TYC youth's confessing to abusing or neglecting a child or children before being admitted to TYC.

(b) Applicability. This rule does not apply to suspected abuse or neglect of youth in TYC programs. See (GAP) §93.33(d) of this title (Alleged Mistreatment).

(c) Reporting. A TYC staff member or volunteer who has cause to believe, based on information provided by a youth under TYC's supervision, that the youth is responsible for abusing or neglecting a child or children before being admitted to TYC may report that information to the person's TYC supervisor.

(d) Referral of Report for Investigation. The TYC supervisor receiving a report made pursuant to subsection (c) shall refer the report immediately to Department of Protective and Regulatory Services (DPRS) or to the appropriate state agency or to a law enforcement agency for investigation if:

(1) the report is of injuries inflicted within the previous twelve months that required prompt medical attention or hospitalization and that endangered the alleged victim's life or could have caused permanent functional impairment or disfigurement; or

(2) the report is or oral, anal, or genital intercourse that occurred within the previous twelve months and that was without consent under the law or was with a member of the TYC youth's same household; and

(3) the report, considered in the context of the TYC youth's current circumstances, presents a real and significant likelihood that the alleged victim (if the alleged victim is still a child at the time of the report) will be abused or neglected by the TYC youth in the foreseeable future.

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

Filed with the Office of the Secretary of State, on October 23, 2000.

TRD-200007443
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 463-5569

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 3. TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

CHAPTER 143. FUNDING

40 TAC §§143.1 - 143.3, 143.11 - 143.15, 143.17, 143.21, 143.22

The Texas Commission on Alcohol and Drug Abuse proposes amendments to §§143.1, 143.2, 143.3, 143.11, 143.12, 143.13, 143.14, 143.15, 143.17, 143.21, and 143.22 concerning Funding. These sections contain information regarding applicability, allocation of funds, service procurement plan, selection criteria, notice, request for proposals, application process, application criteria, funding decisions, and alternative competition.

These amendments are proposed to update the funding rules, to state them more clearly and concisely and to eliminate unnecessary procedural details. Changes from Chapter 143 include: reference to an overall funding methodology instead of a formula; acceptance of input regarding the annual service procurement plan from all interested parties; the inclusion of service goals in the annual service procurement plan; compliance from all applicants with the Texas Review and Comment System (TRACS) requirements; the requirement for all treatment providers to be appropriately licensed and in good standing by the first effective service day they proposed in their applications; the elimination of unnecessary details regarding contract negotiations and funding decisions; the inclusion of a timeframe for notification of successful applicants; a new streamlined alternative funding process; and updated rules for other funding processes.

Jay Kimbrough, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of the proposed amendments.

Mr. Kimbrough has also determined that for each year of the first five years the amendments are in effect the anticipated public

benefit will be elimination of unnecessary rules. There will be no effect on small businesses. There is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Tamara Allen, Rules Coordinator, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments must be received no later than 30 days for the date the proposal is published in the *Texas Register*.

These amendments are proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission when funding services and §461.0141 which provides the commission with authority to adopt rules regarding purchase of services.

The code affected by the proposed amendments is the Texas Health and Safety Code, Chapter 461.

§143.1. Applicability.

The rules in this chapter apply to actions [~~occurring after the date of adoption that pertain to funds allocated for client services in Fiscal Year 1999 and beyond~~] that have not been exempted through an executive order identifying the reason for the exception and the procedures to be applied.

§143.2. Allocation of Funds.

(a) Funds available for regional services are allocated for [~~to~~] each of the 11 Health and Human Services Commission (HHSC) regions through a statewide funding methodology [~~formula~~] approved by the board of commissioners. The commission may apply the methodology [~~formula~~] to identified subregions to ensure more equitable distribution of funds.

(b) Funds for specific categories of service are allocated regionally or subregionally unless exempted through an executive order.

(c) The commission establishes terms and conditions needed to fulfill state and federal funding mandates.

(d) The commission may request input from [~~notifies~~]the Regional Advisory Consortia (RAC) [~~of estimated available funds and any terms and conditions. The Regional Advisory Consortia have an opportunity to make recommendations~~]regarding regional service needs and priorities[~~unless the funds must be dispersed immediately~~].

(e) The commission develops goals and identifies services to be purchased based on its statewide service delivery plan as well as input from RACs and other interested parties[~~and RAC recommendations for regional services~~].

§143.3. Service Procurement Plan.

(a) The commission develops an annual service procurement plan to implement the Statewide Service Delivery Plan. The plan includes service goals and supporting funding goals for the state overall and for each region.

(b) The service procurement plan identifies what services are needed, where the services are needed, and the priority order of the services to be purchased.[~~It may also specify the desired level of funding for each service.~~]

§143.11. Selection Criteria.

(a) The commission develops selection criteria for each request for proposals that reflect the identified goals and applicable state and federal mandates. Selection criteria are designed to select applications that provide the best overall value to the state and provide the best outcome for service recipients[~~the client(s)~~].

(b) The selection criteria include:

(1) program quality[~~as determined by the peer review process~~]; and

(2) the cost of the proposed service.

(c) The commission may consider additional factors in determining best value as specified in Texas Government Code §2155.144, including:

(1) financial ability to perform services;

(2) total long-term cost to the agency of purchasing services from the applicant[~~state investment in the applicant~~];

(3) regional service needs and priorities;

(4) access for underserved areas and populations;

(5) ability to fit within a regional continuum of services;

(6) past performance, outcomes, and compliance; and

(7) results of on-site reviews.

(d) Selection criteria include the scoring system(s) to be used, the weight assigned to each factor, and the minimum score required for funding.

(e) Selection criteria are approved by the board of commissioners and listed in the request for proposals.

§143.12. Notice[~~Advertisement~~].

(a) The commission publishes a notice that a Request for Proposal has been issued[~~of the intent to purchase services through a competitive process~~] on the commission's website and[~~,~~] on the state's electronic business daily[~~, and in the *Texas Register*~~]. The notice includes:

(1) the service to be purchased;

(2) the geographic area to be served;

(3) funding availability[~~limitations~~];

(4) method(s)[~~method~~] of payment;

(5) contract period;

(6) any limitations on eligibility[~~who is eligible~~] to submit an application;

(7) the requirements and deadline for submitting an application[~~a letter of intent~~]; and

(8) the location and availability of the Request for Proposal[~~procedure the commission will use to award the contract~~].

(b) The commission has the right to reject all offers and/or cancel a solicitation. [~~In order to be eligible to compete, applicants who are not already funded by the commission must submit specified information and documents with the letter of intent. These documents must be received at the commission by the specified deadline. Requested information may include, but is not limited to:~~]

[~~(1) identifying information;~~]

[~~(2) documentation of legal basis for operation;~~]

[~~(3) ownership or control information;~~]

[~~(4) information on business transactions and relationships;~~]

[(5) information on financial status; and]

[(6) information on persons convicted of crimes.]

[(c) An applicant shall also disclose to the commission in writing any pending or threatened litigation that might prevent the applicant from meeting contract requirements, if funded. This includes but is not limited to:]

[(1) an action, suit, or proceeding before any court or governmental body, including environmental and civil rights matters; and]

[(2) employee labor disturbances.]

[(d) The commission will issue a request for proposals if at least two eligible applicants submit a letter of intent by the specified deadline.]

[(e) The commission notifies applicants eliminated through the screening process within 45 days of the submission deadline.]

§143.13. Request for Proposals (RFP).

(a) The request for proposals includes:

(1) goals describing the purpose of the funds;

(2) a clear and accurate description of the services to be purchased;

(3) all requirements that must be met for an application to be considered (application criteria);

(4) an estimate of the funds available;

(5) applicable priorities and restrictions;

(6) application forms, formats, instructions, procedures, and timeframes;

(7) the selection criteria and the process used to evaluate proposals and select award recipients; and

(8) the availability of technical assistance.

(b) Information requested from the applicant may include, but is not limited to:

(1) identifying information;

(2) documentation of legal basis for operation;

(3) ownership or control information;

(4) information on business transactions and relationships;

(5) information on financial status; and

(6) information on persons convicted of crimes.

(c) An applicant shall also disclose to the commission in writing any pending or threatened litigation that might prevent the applicant from meeting contract requirements, if funded. This includes but is not limited to:

(1) an action, suit, or proceeding before any court or governmental body, including environmental and civil rights matters; and

(2) employee labor disturbances.

§143.14. Application.

(a) An organization shall apply for funding using forms, formats, instructions, timeframes, and procedures specified by the commission in the RFP and shall provide all requested information.

(b) The application shall be signed by the organization's authorized official.

(c) Applicants [seeking financial assistance from the commission]shall comply with the Texas Review and Comment System (TRACS) as described in the request for proposal. A favorable Texas Review and Comment System recommendation is not required for applicants to submit proposals to the commission.

(d) Applications shall be submitted by mail or in person. The commission does not accept applications by facsimile or electronic transmission.

(e) Applications shall be received at the commission by the date and time stated in the request for proposal. Late applications will not be accepted under any circumstances.[The commission will not consider any material related to an application (except for Texas Review and Comment System comments) that is received after the due date during the competitive process.]

§143.15. Application Criteria.

(a) An application shall not be considered for competitive funding unless the applicant meets the following criteria on the application due date and continues to meet them throughout the selection and funding process.

(1) The applicant shall be established as a legal entity under state or federal statutes and regulations.

[(2) Applicants seeking funding for treatment services shall be licensed to provide the requested services (detox, residential, or outpatient) to the proposed target population.]

(2) [(3)] The applicant shall be in compliance with any commission agreed order.

(3) [(4)] The applicant shall be registered to do business in Texas and shall have a Texas address. A post office box address may be used when the application is submitted, but the applicant must be able to conduct business out of a physical location in Texas before funds will be released.

(4) [(5)] Staff members, including the executive director, of a public or nonprofit entity shall not serve on their employer's governing board.

(5) [(6)] The applicant shall be in good standing with any State or Federal agency that has a contracting relationship with the applicant. If a State or Federal agency has suspended or terminated an applicant's contract for deficiencies in performance of the contract, that applicant is not eligible to apply through a request for proposals unless all issues have been satisfactorily resolved as demonstrated by written documentation from the State or Federal agency. Additionally, an applicant is not eligible if it is debarred from participation in any federal assistance program.

(6) [(7)] Applicants who have previously been funded by the commission shall be in compliance with the following requirements:

(A) if the applicant has been suspended or terminated by the commission at any time in the past all issues shall be satisfactorily resolved (demonstrated by written documentation from the commission);

(B) if the applicant owes a refund to the commission, the applicant shall be on schedule with the terms of the repayment agreement;

(C) the applicant shall have submitted an annual audit as required by the grant agreement or contract and either corrected all deficiencies or submitted and maintained compliance with a corrective action plan that the commission has accepted.

(b) The commission may establish additional application criteria[~~eligibility standards~~] in a request for proposals or other form of solicitation.

(c) Providers shall continue to meet application criteria after funds are awarded or be subject to sanctions.

(d) Treatment providers must be appropriately licensed and in good standing on the first effective service day proposed.

(e) [~~(d)~~] The commission may deny funding to an applicant if any person who has an ownership or controlling interest in the applicant organization, or who is an agent or managing employee of the applicant, has been convicted of a criminal offense related to involvement in any program established under Medicare, Medicaid, or the Title XX block grant.

(f) [~~(e)~~] The commission may refuse to fund an applicant who cannot demonstrate that the location where services will be provided is in compliance with all applicable local and state zoning, building, health, fire, and safety standards.

§143.17. Funding Decisions.

(a) Funding decisions are made in compliance with criteria established in the Request for Proposals and communicated to the commission's board.[~~An internal panel of commission staff applies the selection criteria to determine which applications will be funded. The panel also recommends the level of funding for each application.~~]

[~~(b) The panel's recommendations are reviewed by the commission's executive management team and approved by the executive director.~~]

[~~(c) The commission sends successful applicants written notice within 30 days of the funding decision.~~]

(b) [~~(d)~~] The commission may negotiate with selected applicants to determine the terms of the contract.[~~To receive a contract, the applicant shall accept any additional or special terms and conditions listed in the funding notice and any changes in the funding application. Terms and conditions shall be limited to items required to ensure compliance with requirements stated in the request for proposals and applicable commission rules.~~]

[~~(e) A provider shall not enter into a contract with the commission if legal action that might impact the provider's ability to meet the requirements of the contract is pending or threatened.~~]

(c) [~~(f)~~] The commission notifies successful and unsuccessful applicants in writing within 30 days of the funding decision. Upon written request, the commission will provide an applicant with written feedback on the applicant's own proposal.

(d) [~~(g)~~] Applicants shall not make public announcements about receipt of commission funds until they have received written notification from the commission.

(e) [~~(h)~~] If the commission does not receive a fundable application for a desired service, it may choose an alternative process to procure the service.[~~, including:~~]

[~~(1) the quarterly funding process described in §143.21 of this title (relating to Quarterly Funding);~~]

[~~(2) the developmental funding process described in §143.25 of this title (relating to Developmental Funding); or~~]

[~~(3) noncompetitive renewal described in §143.24 of this title (relating to Noncompetitive Renewal).~~]

(f) The commission may renew a competitive award if it determines that the best value will be achieved without further competition. Renewal of an award is not automatic. The commission may renew an award when:

(1) the provider maintains required performance standards;

(2) the commission finds a continuing need for the services (relative to other services);

(3) the provider continues to meet application criteria; and

(4) funds are available to continue the award.

§143.21. Alternative Competition.[~~Quarterly Funding.~~]

(a) The commission may use the alternative competition [~~quarterly funding~~]process to:

(1) purchase additional services if service needs and funds remain after a competitive request for proposals; and

(2) distribute funds that become available and must be awarded during a contract period.[~~; and~~]

[~~(3) consider funding for unsolicited applications.~~]

[~~(b) Funds available for one-time procurements and funds available for recurring services are competed separately under the quarterly funding process.~~]

(b) [~~(c)~~] Available funds are regionally or subregionally allocated according to the statewide funding methodology[~~formula, unless exempted through executive order~~].

(c) [~~(d)~~] The commission identifies the goals and services[~~/products~~] to be purchased based on its service procurement plan and results of the previous Request for Proposals (RFP), as applicable.

(d) [~~(e)~~] Selection criteria are designed to select applications that provide the best overall value to the state.

(1) Criteria for selection include program quality, cost, and other factors relevant for determining best value.

[~~(2) A minimum score is established for quarterly funding. The minimum score may be less than the score established for a competitive RFP if the commission has the resources necessary to provide appropriate technical assistance.~~]

(2) [~~(3)~~] Selection criteria [~~for quarterly funds~~] are approved by the commission's executive director.

(e) [~~(f)~~] Notice [~~Once per quarter, if funds are available, notice~~]of available funds for alternative competition is published [~~in the *Texas Register* and~~]on the commission's website and the state's electronic business daily. The notice includes:

(1) the services to be purchased;

(2) the geographic area to be served;

(3) funding availability[~~limitations~~];

(4) method(s) [~~method~~]of payment;

(5) contract period;

(6) any limitations on eligibility to submit an application;

(7) [~~(6)~~] requirements and deadline for submitting an application; and

(8) [~~(7)~~] the location and availability of the solicitation document[~~procedure the commission will use to award the contract~~].

[~~(g) The commission accepts applications on an ongoing basis, and may also consider previously submitted proposals. Applications eliminated during prior competition may be revised and resubmitted for quarterly funding.~~]

[(h) During the quarterly process, the commission will not consider applications received more than six months before the quarterly application due date unless the applicant has submitted a letter requesting consideration of a prior application during that six-month period.]

[(i) All applications are subject to the same requirements and deadlines.]

[(1) To be considered for funding, an applicant must meet the application criteria listed in §143.15 of this title (relating to Application Criteria).]

[(2) Applicants who are not already funded by the commission must submit additional documentation regarding the organization's legal and financial status.]

[(3) If required, applicants shall comply with the Texas Review and Comment System (TRACS).]

[(j) Each application is evaluated in relation to the services to be purchased and the selection criteria. Commission staff evaluate and score proposals that were not scored during the competitive RFP. RAC members may also serve as reviewers outside their own regions.]

[(k) An internal selection panel applies the selection criteria to determine which applications will be funded. The panel also recommends the level of funding for each applicant and establishes conditions and technical assistance requirements, as applicable. Technical assistance is mandatory for any application with a score less than the minimum score established for a competitive RFP.]

[(l) The panel's recommendations are reviewed by the commission's executive management team and approved by the executive director.]

[(m) Quarterly funding will not be available for services that will be included in a competitive RFP beginning six months prior to the scheduled RFP. Under extenuating circumstances, however, the commission's executive director may waive this provision.]

§143.22. Other[Noncompetitive] Funding Processes.

(a) The commission may solicit a proposal from only one source if it is not feasible to use competitive procedures or state law does not require competition.

(b) One of the following must apply:

(1) A competitive process failed to elicit acceptable bids.

(2) The agency awarding or appropriating the funds to the commission either authorized the noncompetitive negotiation or approved the entity to receive funds.

(3) Because of an emergency, it is necessary to proceed without formal advertising to avoid delay.

(4) The material or service to be purchased is available from only one source.

(5) State law does not require competition.

(c) If the available funds exceed $25,000, a notice that services will be purchased is published on the commission's website and on the state' electronic business daily.[The commission follows the procedures below:]

[(1) A notice that funds are available for the service is published on the commission's website, on the state's electronic business daily, and in the *Texas Register* at least 21 days before a contract is signed.]

[(2) The commission conducts a cost analysis or budget review which includes verification of the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit (if applicable and authorized).]

[(3) The commission evaluates the organization and the proposed program in relation to federal and state requirements and criteria set by the agency.]

[(4) If applicable, the commission obtains consent from federal funding sources as required by Office of Management and Budget (OMB) Circular A-102.]

[(5) Applicable state regulations, such as the Historically Underutilized Business (HUB) Program, will also be followed.]

(d) After a noncompetitive award is made, the commission reserves the right to use a competitive process in subsequent years.

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

Filed with the Office of the Secretary of State, on October 18, 2000.

TRD-200007365
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 349-6668

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40 TAC §§143.16, 143.18, 143.23 - 143.25

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

The Texas Commission on Alcohol and Drug Abuse proposes the repeal of §§143.16, 143.18, 143.23, 143.24, and 143.25 concerning Funding. The repeal is proposed because the requirements contained in these sections have been incorporated into other sections or eliminated because they contain unnecessary procedural details.

These sections contain the peer review process and procedures for the cancellation or suspension of solicitation, emergency purchase, noncompetitive renewal, and developmental funding.

Jay Kimbrough, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of the proposed repeals.

Mr. Kimbrough has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be the elimination of redundant rules. There will be no effect on small businesses. There is no anticipated economic cost to current providers.

Comments on the proposal may be submitted to Tamara Allen, Rules Coordinator, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

The repeal is proposed under the Texas Health and Safety Code, §461.012(a)(15) which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering the funding of any commission programs.

The code affected by the proposed repeals is the Texas Health and Safety Code, Chapter 461.

§143.16. Peer Review.

§143.18. Cancellation or Suspension of Solicitations.

§143.23. Emergency Purchase.

§143.24. Noncompetitive Renewal.

§143.25. Developmental Funding.

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

Filed with the Office of the Secretary of State, on October 18, 2000.

TRD-200007366
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 349-6668

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CHAPTER 146. INTERAGENCY AGREEMENTS

40 TAC §146.21

The Texas Commission on Alcohol and Drug Abuse proposes a new §146.21 concerning Criteria to Measure the Effectiveness of Prevention Programs. This section contains the criteria the Texas Commission on Alcohol and Drug Abuse, Texas Juvenile Probation Commission, Texas Youth Commission and Texas Department of Protective and Regulatory Services shall use to measure the effectiveness of prevention programs as required by the 76th Legislature, Acts 1999, Chapter 1051, Sections 1 to 3. Each agency shall also require prevention programs to submit an annual report describing the program's effectiveness in meeting the criteria. The criteria include targeting problems that are specific to a given community or school, providing social services to children who have a family member with a drug addiction, using strategies that are appropriate for children of different ages, and providing continuity in services and intervention strategies for all grade levels.

Jay Kimbrough, Executive Director, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing the rules.

Mr. Kimbrough has also determined that for each year of the first five years the rules are in effect the anticipated public benefit will be an improvement in the quality of prevention services provided to Texas children and their families. There will be no effect on small businesses. Any increased economic costs for current providers resulting from increased service coordination activities should be offset by cost savings due to the elimination of duplicative services.

Comments on the proposal may be submitted to Tamara Allen, Rules Coordinator, Texas Commission on Alcohol and Drug Abuse, P.O. Box 80529, Austin, Texas 78708-0529. Comments must be received no later than 30 days from the date the proposal is published in the *Texas Register*.

This new section is proposed under the Texas Health and Safety Code, §461.012(a)(15) which authorizes the Texas Commission on Alcohol and Drug Abuse to adopt rules governing the functions of the commission, including rules that prescribe the policies and procedures followed by the commission in administering any commission programs.

The code affected by the proposed rule is the Texas Health and Safety Code, Chapter 461.

§146.21. Criteria Established to Measure the Effectiveness of Prevention Programs.

(a) Texas Commission on Alcohol and Drug Abuse, Texas Juvenile Probation Commission, Texas Youth Commission and Texas Department of Protective and Regulatory Services have agreed on the following criteria as measures of a prevention program's effectiveness. According to the 76th Legislature, Acts 1999, Chapter 1051, Section 2, all funded prevention programs shall:

(1) Target problems that are specific to a given community or school.

(A) The provider shall determine what population(s) the program is designed to serve: universal, selective or indicated.

(i) Universal programs reach the general population (such as all students in a school).

(ii) Selective programs target a subset of the general population which is at high risk for substance abuse (such as children of drug users).

(iii) Indicated programs are designed for those who may already be experimenting with drugs or who exhibit other problem-related behaviors.

(B) The program shall identify and describe the primary and secondary target populations including specific information about:

(i) age, gender, and ethnicity;

(ii) risk and protective factors;

(iii) patterns of substance use;

(iv) social and cultural characteristics;

(v) knowledge, beliefs, values, and attitudes; and,

(vi) needs.

(C) The program shall identify long-range goals which:

(i) address identified risks, needs and/or problems of the primary and secondary target populations;

(ii) are designed to enhance protective factors;

(iii) clearly describe behavioral and/or societal changes to be achieved; and

(iv) are realistic in relation to available resources.

(D) The program shall establish objectives for each contract period that are linked to the goals. Objectives must be realistic, outcome oriented, measurable and time-specific.

(2) Provide social services to children who have a family member with a drug addiction.

(A) The program shall identify needs that cannot be met by the program and help the participant access appropriate support systems and community resources. The program shall maintain a current list of referral resources, including other services provided by the organization.

(B) The program shall provide information, referrals and follow-up for participant and/or family needs that cannot be met by the program.

(3) Use strategies that are appropriate for children of different ages. The program design, content, communications and materials shall:

(A) be available in the primary language of the target population;

(B) be appropriate to the literacy level, gender, race, ethnicity, sexual orientation, age and developmental level of the target population; and

(C) recognize the cultural identification (context) of the family unit.

(4) Provide continuity in services and intervention strategies for all grade levels as stipulated in any contracts the program enters into with the agencies in this interagency agreement.

(A) The program shall be designed to build on and support related prevention and intervention efforts in the community. The program shall secure and maintain the support of key decision makers and leaders and shall establish formal linkages and coordinate with other community resources.

(B) Each program that provides activities within this strategy shall work with other service providers, organizations, individuals and families to promote substance abuse services and improve the community's ability to prevent substance abuse and related problems.

(C) The program must use existing community services and resources effectively to enhance the prevention program.

(D) The program must establish formal linkages with other service providers to build a continuum of substance abuse services in the community. The program shall document active participation in collaborations to support community resource development.

(E) The program shall provide information, referrals and follow-up for participant and/or family needs that cannot be met by the program.

(b) In addition, according to the 76th Legislature, Acts 1999, Chapter 1051, Section 3, each agency shall require the program to submit an annual report that describes the program's effectiveness in meeting established criteria.

(1) The program shall perform self-evaluation to verify, document and quantify program activities and effectiveness.

(2) The program shall submit a written evaluation report using the format specified by the funding agency. The provider must submit the report at the end of each contract period, no later than September 30, unless otherwise stipulated in the contract.

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

Filed with the Office of the Secretary of State, on October 18, 2000.

TRD-200007364
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 349-6668

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PART 6. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

CHAPTER 182. SPECIALIZED TELECOMMUNICATIONS ASSISTANCE PROGRAM
SUBCHAPTER B. PROGRAM ELIGIBILITY

40 TAC §182.23

The Texas Commission for the Deaf and Hard of Hearing proposes amendment to §182.23. The amendment is proposed to reduce the length of time a voucher is valid.

David W. Myers, Executive Director, has determined that for each year of the first five years the amendment to this section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Myers has also determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of this amendment will be a shorter wait period in receiving a duplicate voucher if the voucher is lost or destroyed. There will be no effect on small businesses. There is no anticipated economic hardship to persons required to comply with the amendment as proposed.

Comments on this proposed amendment may be submitted to Margaret Susman, Texas Commission for the Deaf and Hard of Hearing, P.O. Box 12904, Austin, Texas 78711-2904.

The amendment is proposed under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

§182.23. Vouchers.

(a) Eligible applicants will be issued an individually numbered voucher with a specified dollar value to be used towards the purchase of the specialized telecommunications device or service listed on the voucher.

(b) Vouchers are non-transferrable and have no cash value.

(c) Vouchers will expire three[~~six~~] months after date of issuance.

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

Filed with the Office of the Secretary of State, on October 19, 2000.

TRD-200007388
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Earliest possible date of adoption: December 3, 2000
For further information, please call: (512) 407-3250

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER H. INVESTMENTS

7 TAC §91.802

The Credit Union Department has withdrawn from consideration a proposed amendment to §91.802, which appeared in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3890).

Filed with the Office of the Secretary of State on October 23, 2000.

TRD-200007433
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: October 23, 2000
For further information, please call: (512) 837-9236

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7 TAC §91.803

The Credit Union Department has withdrawn from consideration a proposed amendment to §91.803, which appeared in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3892).

Filed with the Office of the Secretary of State on October 23, 2000.

TRD-200007438
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: October 23, 2000
For further information, please call: (512) 837-9236

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7 TAC §91.808

The Credit Union Department has withdrawn from consideration a proposed amendment to §91.808, which appeared in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3895).

Filed with the Office of the Secretary of State on October 23, 2000.

TRD-200007440
Harold E. Feeney
Commissioner
Credit Union Department
Effective date: October 23, 2000
For further information, please call: (512) 837-9236

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TITLE 22. EXAMINING BOARDS

PART 4. TEXAS COSMETOLOGY COMMISSION

CHAPTER 89. GENERAL RULES AND REGULATIONS

22 TAC §89.37

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section, submitted by the Texas Cosmetology Commission has been automatically withdrawn. The new section as proposed appeared in the April 21, 2000, issue of the *Texas Register* (25 TexReg 3357).

Filed with the Office of the Secretary of State on October 23, 2000.

TRD-200007452

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 20. EDWARDS AQUIFER AUTHORITY

CHAPTER 707. PROCEDURE BEFORE THE AUTHORITY

SUBCHAPTER C. MEETINGS OF THE BOARD

31 TAC §707.204

The Edwards Aquifer Authority has withdrawn from consideration for permanent adoption new §707.204, concerning Continuance

of Matter Set for a Meeting, which appeared in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7515).

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007346
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Effective date: October 18, 2000
For further information, please call: (210) 222-2204

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CHAPTER 711. GROUNDWATER WITHDRAWAL PERMITS

SUBCHAPTER G. GROUNDWATER AVAILABLE FOR PERMITTING; PROPORTIONAL ADJUSTMENT; EQUAL PERCENTAGE REDUCTION

31 TAC §711.178

The Edwards Aquifer Authority has withdrawn from consideration for permanent adoption new §711.178, concerning Groundwater Withdrawal Schedules, which appeared in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7593).

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007360
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Effective date: October 18, 2000
For further information, please call: (210) 222-2204

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT COMMISSIONER

SUBCHAPTER A. REGULATED LOAN LICENSES

DIVISION 1. GENERAL PROVISIONS

7 TAC §1.4, §1.11

The Finance Commission of Texas (the commission) adopts the repeal of §1.4 and §1.11. This repeal is necessary because the sections that are proposed for repeal relate to prohibitions on authorized lenders under authority of Chapter 3, Texas Civil Statutes, Article 5069-3.01 *et seq.*, which was repealed by the 75th Legislature. This repeal is adopted without changes to the proposal as published in the September 1, 2000, issue of the *Texas Register* (25 TexReg 8542).

The agency received no comments on the proposal.

These rules have also been reviewed as part of a rule review required under House Bill 1, Article IX, Section 167, 75th Legislature. Moreover, they are being replaced by new rules for Texas Finance Code, Chapter 342. The new rules are being published for comment in the *Texas Register*.

The repeal is adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 20, 2000.

TRD-200007408

Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Effective date: November 9, 2000
Proposal publication date: September 1, 2000
For further information, please call: (512) 936-7640

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DIVISION 2. APPLICATION FOR LICENSE AND TRANSFER OF LICENSE

7 TAC §1.41

The Finance Commission of Texas (the commission) adopts the repeal of §1.41. This repeal is necessary because the sections that are proposed for repeal relate to prohibitions on authorized lenders under authority of Chapter 3, Texas Civil Statutes, Article 5069-3.01 *et seq.*, which was repealed by the 75th Legislature. This repeal is adopted without changes to the proposal as published in the September 1, 2000, issue of the *Texas Register* (25 TexReg 8542).

The agency received no comments on the proposal.

These rules have also been reviewed as part of a rule review required under House Bill 1, Article IX, Section 167, 75th Legislature. Moreover, they are being replaced by new rules for Texas Finance Code, Chapter 342. The new rules are being published for comment in the *Texas Register*.

The repeal is adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

The statutory provisions (as currently in effect) affected Chapter 342, Texas Finance Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 20, 2000.

TRD-200007409

Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Effective date: November 9, 2000
Proposal publication date: September 1, 2000
For further information, please call: (512) 936-7640

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SUBCHAPTER K. PROHIBITIONS ON AUTHORIZED LENDERS

7 TAC §1.852, §1.854

The Finance Commission of Texas (the commission) adopts new §1.852 and §1.854 concerning prohibitions on authorized lenders. The rules are adopted without changes to the proposal as published in the September 1, 2000, issue of the *Texas Register* (25 TexReg 8543).

The agency received no comments on the proposal.

Section 1.852 requires a licensee to consider the borrower's financial ability to repay a loan when structuring the terms of a loan. This rule is designed to prohibit a lender from overburdening a consumer's debt load beyond that consumer's capacity to repay.

Section 1.854 prohibits the use of preapproved offers of credit unless the offer is unconditional. This is a new provision and will serve to reduce confusion of consumers who receive offers of credit that purport to be "approved," but upon further review, in fact, have conditional features. The rule further provides that offers of credit may not be conditioned upon the purchase of goods and services unless that practice has been specifically authorized in statute. This rule is further designed to protect consumers from usury violations.

The Subchapter K rules are also necessary due to the repeal of the former Article 5069, Chapters 3, 4, and 5 and the adoption of Texas Finance Code, Chapter 342, *et seq.* Generally, these rules prescribe procedures that are well established and have been and are commonly used throughout the regulated industry. These rules should serve, however, to clarify the procedures.

The new rules are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 authorizes the Finance Commission to adopt rules for the enforcement of the consumer loan chapter.

These rules affect Chapter 342 of the Texas Finance Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 20, 2000.

TRD-200007410
Leslie L. Pettijohn
Commissioner
Finance Commission of Texas
Effective date: November 9, 2000
Proposal publication date: September 1, 2000
For further information, please call: (512) 936-7640

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TITLE 10. COMMUNITY DEVELOPMENT

PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

CHAPTER 182. SMALL BUSINESS ASSISTANCE

SUBCHAPTER A. BUSINESS PERMIT OFFICE

10 TAC §§182.1 - 182.4

The Texas Department of Economic Development (department) adopts the repeal of 10 Texas Administrative Code, Chapter 182. Small Business Assistance, Subchapter A. Business Permit Office, in its entirety. The Subchapter concerns the procedure by which the department assists applicants with obtaining permits and/or license application forms and related information required to be completed in order to obtain a particular state issued license or permit. The repeal is necessary to accurately reflect current law and to allow the adoption of new rules. The repeal is adopted as published in the August 25, 2000, issue of the *Texas Register* (25 TexReg 8117). No comments were received regarding the proposed repeal.

The repeal is adopted pursuant to Government Code, §481.0044(a), which directs the Governing Board of the department to adopt rules for administration of department programs, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

Texas Government Code, Chapter 481, is affected by this proposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 16, 2000.

TRD-200007278
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Effective date: November 5, 2000
Proposal publication date: August 25, 2000
For further information, please call: (512) 936-0177

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CHAPTER 182. BUSINESS ASSISTANCE

SUBCHAPTER A. OFFICE OF PERMIT ASSISTANCE

10 TAC §§182.1 - 182.4

The Texas Department of Economic Development (department) adopts new Chapter 182. Business Assistance Subchapter A. Office of Permit Assistance, §§182.1 - 182.4. Chapter 182 Subchapter A concerns the procedure by which the department allows applicants to obtain permit and/or license application forms and related information required to be completed in order to obtain a particular state issued license or permit. The new rules

are being adopted without changes to the proposed text that was published in the August 25, 2000, issue of the *Texas Register* (25 TexReg 8117). No comments were received concerning the proposed new §§182.1 - 182.4

The new rules are adopted pursuant to Government Code, §481.0044(a), which directs the Governing Board of the department to adopt rules for administration of department programs, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 23, 2000.

TRD-200007446
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Effective date: November 12, 2000
Proposal publication date: August 25, 2000
For further information, please call: (512) 936-0177

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.43

The Public Utility Commission of Texas (commission) adopts new §25.43, relating to Provider of Last Resort (POLR) with changes to the proposed text as published in the July 14, 2000 *Texas Register* (25 TexReg 6638). The rule is necessary to implement the Public Utility Regulatory Act (PURA) §39.106 and to establish the requirements and procedures for applying to serve as POLR and the terms and conditions of POLR service. Under the POLR rule, the commission will designate, no later than June 1, 2001, one or more retail electric providers (REPs) to serve as POLRs in each Texas transmission and distribution utility (TDU) service area that is open to competition. The POLR must offer a standard retail service package at a fixed, non-discountable rate, to any customer requesting it. The rule also requires the POLR to ensure no interruption of service if a REP fails to provide service to a customer. This new section was adopted under Project Number 21408.

A public hearing on the proposed section was held at commission offices on August 18, 2000 at 9:30 a.m. Representatives from Shell Energy Service (Shell), Consumers Union (CU), Green Mountain Energy Company (Green Mountain), Enron Corporation (Enron), Texas Electric Cooperatives, Inc. (TEC), Texas-New Mexico Power Company (TNMP), Entergy Gulf States, Inc. (EGSI), Office of Public Utility Counsel (OPC), Texas Industrial Energy Consumers (TIEC), Electric Reliability Council of Texas Independent System Operator (ERCOT-ISO), TXU Electric Company (TXU), Southwestern Public Service Company (SPS), El Paso Electric (EPE), Reliant Energy (Reliant), Baker Botts, Central and South West Corporation (CSW), New Braunfels Utilities (New Braunfels), and Clark, Thomas and Winters attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received initial comments on the proposed new section from National Energy Marketers Association (NEM), OPC, State of Texas Office of Attorney General of Texas, Consumer Protection Division, Public Agency Representation Section (State of Texas), TEC, Shell, Nucor Steel, TNMP, Steering Committee of the Cities Served by TXU (Cities of TXU), Pedernales Electric Cooperative, Inc (Pedernales), TIEC, Enron, the Cities of Garland and Denton, American Electric Power Energy Services (AEP) SPS, TXU, EGSI, Reliant, and City of Austin, doing business as Austin Energy (COA), and received joint comments of CU, Texas Legal Services Center, Texas Ratepayers' Organization to Save Energy (Consumer Commenters), and of GreenMountain.com, NewEnergy Texas, L.L.C., and Utility.com (Independent Marketers). The commission received reply comments from TXU, Cities of TXU, TIEC, EGSI, Consumer Commenters, AEP, OPC, and Reliant and joint comments of Green Mountain Energy Company and NewEnergy Texas, L.L.C. (Independent Marketers).

Comments on specific questions in the preamble of the proposed rule.

In the preamble, the commission requested that interested parties address nine issues related to the implementation and final development of the proposed rule. The parties' responses to the issues are summarized below.

Issue Number 1

In the event that a customer who is not eligible for the Price To Beat (PTB) fails to make arrangements to be served by a REP, should service to this customer be provided by the affiliated REP or by the POLR?

AEP, EGSI, Reliant, SPS, TNMP, TXU, Shell, TIEC, and State of Texas took the position that a customer who is not eligible for the PTB and who fails to make arrangements to be served by a REP should be provided service by the affiliated REP. To support their position, these respondents looked to PURA §39.102(b) which states, "The affiliated retail electric provider of the electric utility serving a retail customer on December 31, 2001, may continue to serve that customer until the customer chooses service from a different retail electric provider, an electric cooperative offering customer choice, or a municipally owned utility (MOU) offering customer choice." These respondents reasoned that PURA §39.102(b) is clear evidence that the Legislature intended for the affiliated REP to continue to serve non-PTB customers who fail to make arrangements for service after December 31, 2001. AEP pointed out that this "right to continue service" is not conditioned upon the customer being a PTB customer.

Reliant and SPS asserted that there is no indication in PURA that the Legislature intended for non-PTB customers who fail to make arrangements for service to default to POLR service on January 1, 2002. EGSI, Reliant, TXU, and TIEC pointed out that PURA identifies the only two situations in which the POLR is supposed to serve a customer: (1) PURA §39.106(c) states that the POLR

shall provide a standard retail service package to any requesting customer; and (2) PURA §39.106(g) requires the POLR to offer a standard retail service package to customers whose REP fails to serve them. The non-PTB customer who fails to arrange for service is not covered by either one of these provisions, and was therefore not intended to receive POLR service.

Additionally, Reliant noted that PURA §39.101(b)(2), which states that a customer is entitled to assume that the customer's chosen REP will not be changed without the customer's informed consent, also weighs against designating the POLR as the "default provider" for non- PTB customers who fail to make arrangements for service. TIEC contended that a customer who "chooses not to choose" is more likely to prefer continuation of existing service than to be switched to POLR service.

Enron took the position that PURA does not require non-PTB customers, who do not choose a REP, to be served by the affiliated REP. Enron added that sending these customers to the POLR is a better policy than leaving them with the affiliated REP. Enron asserted that PURA §39.102(b) states that the affiliated REP "*may* continue to serve" and permits the affiliated REP to continue to serve a customer until the customer chooses a different REP, but does not mandate that the affiliated REP serve these customers. Enron argued that if the intent was to set the affiliated REP up as the default provider for non-PTB customers who do not choose a REP, that intent would have been made clear somewhere in PURA. In reply comments, AEP noted that under Enron's interpretation of PURA §39.102(b), instead of meaning "has the right to," the word "may" would mean "does not have the absolute right to." AEP reasoned that if Enron's interpretation were the proper interpretation, the Legislature could just as easily have replaced "may" with "may not" in §39.102(b), and that if "may" or "may not" can equally convey the intended meaning, the provision is deprived of legal significance. AEP also noted that numerous provisions of PURA say "the commission may," and the regulatory scheme of PURA would therefore be substantially changed if the phrase were now interpreted to mean the commission "does not have the absolute right to."

Enron also pointed to PURA §39.106(b), which gives the commission the authority to set the customer classes for POLR service, and reasoned that this section gives the commission the authority to determine that POLR service for non-PTB customer load should encompass non- PTB customers who have not chosen a REP by the first day of retail competition. Enron commented that sending these customers to the POLR is better policy than sending them to the affiliated REP, because POLR service is commission-approved, whereas the affiliated REP's price, terms and conditions of service are uncertain. Enron was concerned that the affiliated REP would unilaterally set the price, terms and conditions of service for non-PTB default customers, and that this default service would act as a *de facto* cap on what non-affiliated REPs can charge these customers. Enron noted that setting the POLR up as the default provider for non-PTB customers who do not choose a REP might result in lower POLR prices, because the POLR service would encompass a larger group with price certainty. Another of Enron's major concerns with allowing non-PTB customers to default to the affiliated REP is the market power that such a systematic transfer would give the affiliated REP. Enron explained that the affiliated REP would be handed a group of customers and would not have to spend money to market its services to those customers. Enron argued that this would enable the affiliated REP to provide service at a lower price than other REPs that will have to incur costs for marketing and customer sign-up and set-up. Enron concluded that the commission must determine that non-PTB customers who do not choose a REP default to the POLR.

Although Independent Marketers did not take a position as to whether the affiliated REP or the POLR should serve a non-PTB customer who fails to make arrangements for service, Independent Marketers did advocate for adequate disclosure to such a customer the rate the customer will pay on January 1, 2002. The Independent Marketers stated that such disclosure should take place no later than November 1, 2001. AEP agreed with Independent Marketers that non-PTB customers should be provided with timely and adequate information that gives them the opportunity to select a new REP when competition commences.

The commission finds that the affiliated REP must be the default service provider for non- PTB customers who fail to make arrangements to be served by a REP. The commission believes that PURA §§39.102(b), 39.106(c), and 39.106(g), read together, evidence the Legislature's intent that all customers who do not choose a supplier would be served by the affiliated REP. Furthermore, because PURA §39.102(b) does not distinguish between PTB and non-PTB customers, it would be inconsistent to conclude on the one hand that PTB customers who do not choose a REP default to the affiliated REP, but on the other hand that non-PTB customers who do not choose a REP default to the POLR. The commission therefore disagrees with Enron and declines to adopt its suggestion that non-PTB customers who fail to make arrangements to be served by a REP default to the POLR.

While the commission has noted the Independent Marketers' concern regarding disclosure of the affiliated REP's rate for non-PTB customers as of January 1, 2002, the commission finds that §25.43 is not the appropriate forum in which to address this concern. Disclosure of terms of service is being addressed in §25.474 of this title (relating to the Selection or Change of Electric Service Provider) that has been proposed in Project Number 22255 (*Rulemaking Proceeding for Customer Protection Rules for Electric Restructuring Implementing Senate Bill 7 and Senate Bill 86*). Therefore, comments concerning this issue should be filed in Project Number 22255.

Issue Number 2

Should the POLR be allowed to require that a default customer take service for a minimum term as a condition of continued service? If so, should the POLR be allowed to disconnect the default customer who refuses to agree to a minimum term?

The proposed rule prescribes that requesting POLR customers commit to a six-month minimum term and that default POLR customers do not have to commit to any minimum term. Many utility affiliated respondents favored a one-year minimum term requirement after a shopping period of two billing cycles for all customers. These respondents stated that, if the POLR rate resulted in a significant under-recovery of the cost of providing service, the provider would be harmed if customers were allowed to stay on the service at will, or move on and off POLR service when it is advantageous for them to do so. TXU, SPS, AEP, EGS and TNMP recommended that default customers be permitted a shopping period of two billing cycles (TXU specifies one full billing cycle) at the approved POLR rate before being required to take service for a 12-month minimum term. SPS proposed to require the customer to stay for a term of 12 months or until the POLR term expires, while AEP recommended that a POLR should be permitted to continue serving the customer until the contract expires, regardless of when its term as POLR expires.

AEP suggested the minimum term of one-year start from the initial transfer to POLR service. TIEC agreed with a shopping period, and along with AEP, proposed that after the shopping period, if the customer remains with the POLR, the customer's status should change to that of a requesting customer. TIEC suggested that POLRs could be entitled to require such requesting customers to agree to a minimum term of no more than six months as a condition of continued service. EGSI stated that, if the fixed pricing mechanism results in a variable rate (that is to say, a rate with a variable energy component indexed to the market price), the minimum term of service may not be required. Reliant commented that REPs should be allowed to submit price and minimum terms in their bids, including minimum terms for default customers. Therefore, one REP may submit a relatively lower price bid with a longer term than another REP that submits a bid with no minimum term. The commission may then choose between prices and minimum terms in selecting a REP to provide POLR service.

Consumer Commenters, Cities of TXU, OPC and Independent Marketers supported the proposed rule as published, which prohibits the POLR from requiring a minimum term of service for default customers. OPC also opposed a minimum term for requesting customers. These respondents argued that a minimum term requirement is anticompetitive, impedes the development of a competitive market, and interferes with the customer's statutory right of choice and ability to exercise that choice by selecting a new REP. Independent Marketers and Shell also argued that if a minimum term were allowed, other REPs would be automatically prevented from marketing to default customers. NEM commented that POLR service design and pricing should encourage minimum stays, not mandate minimum terms. NEM stated that there should never be an incentive for any class of customers to use the POLR service option as a long-term standard service option. State of Texas commented that the customer should be allowed the opportunity to make arrangements for a new REP as soon as possible without being subjected to a contract for a term with the POLR.

Regarding the second part of the question, SPS, Enron, State of Texas and Consumer Commenters did not believe that the POLR should be allowed to disconnect the default customer who refuses to agree to a minimum term. TNMP suggested that the POLR charge market prices from the time the customer started to receive POLR service to the time a minimum term begins, so as to eliminate the scenario in which the POLR disconnects a customer who refuses to agree to a minimum term. Enron stated that a shopping period before the customer is required to commit to a minimum term would be a mild alternative. Reliant suggested that the issue of disconnection should be addressed in the customer protection rulemaking.

In reply comments, Independent Marketers opposed the affiliated REPs' proposal to offer term based service, arguing that the purpose of the POLR is to provide transitional service for those customers whose REP fails to serve them. Independent Marketers further stated that the term-based service is a competitive offering and is antithetical to POLR service. Independent Marketers opposed even a six-month term, arguing that the rate would be different for customers taking service from January through June and those taking service from April through September, and would no longer meet the definition of fixed, non-discountable rate. Referring to the second part of the question, Independent Marketers argued that PURA §39.106 requires the POLR to offer a standard service package to all customers requesting it or in the event a REP fails to serve a customer. Independent Marketers further commented that it would be a violation of PURA to condition service on acceptance of a minimum term.

The commission recognizes that if all POLR customers are allowed to enter and exit POLR service without limitations, POLR loads may be difficult to plan for and expensive to serve. However, the commission agrees with State of Texas that bidders competing to serve as POLR will have the opportunity to build the cost of the business risk inherent to the nature of the loads in their bids. The commission agrees with NEM that POLR service should be designed to encourage minimum stays, and that requiring a minimum term would negate that principle. The commission notes that this question addresses term service for default customers, rather than all customers, and observes that the purpose of the POLR is to be a safety net for customers whose REP defaults. A safety net is transitional by nature. The commission believes that placing minimum term requirements on the safety net would not be logical. The commission also agrees that locking customers in one-year contracts may inhibit the development of a competitive market, and it would not be appropriate to lock a default customer into a long term contract that would not allow the customer to exercise the right to choose, even if a shopping period of two billing cycles were allowed. The commission notes that two billing cycles may not be sufficient for customers who have been abandoned by their provider of choice in May or June to find a competitive supplier willing to serve them by the middle of the Summer peaking season.

Referring to the second part of the question, the commission agrees with the position of SPS, Enron, State of Texas, Independent Marketers and Consumer Commenters that the POLR should not be allowed to disconnect the default customer who refuses to agree to a minimum term. The commission agrees with Independent Marketers that allowing the POLR to condition service to default customers on acceptance of a minimum term would be contrary to PURA §39.106(g) requiring the POLR to offer a standard service package to any or all customers that a retail electric provider fails to serve. Additionally, the commission determines that AEP's proposal to automatically change the default customer status to requesting customer status after two billing cycles would not be appropriate because it would amount to submitting default customers to a threat of disconnection if they did not commit to a term. In addition, switching a customer to requesting status without the customer's consent as proposed by AEP could be construed as a form of slamming. The commission notes that a fixed pricing mechanism that would result in a variable rate could not be an alternative to a minimum term to prevent gaming as proposed by EGSI and other respondents since PURA §39.106(b) specifically requires a fixed rate. For these reasons, the commission maintains the proposed rule's prohibition of a minimum term for default customers. The commission also determines that the default customers will not become requesting customers unless they voluntarily request a change in status.

Issue Number 3

Should customers who request POLR service be offered the option to either take service at the POLR hedged rate and sign a contract for a term, or take service at a market- indexed rate? Under the first alternative, how long should the minimum term of service be? In answering this question, please refer to the Pennsylvania Public Utility Commission Tentative Order

(adopted June 2, 2000) and Final Order (adopted June 22, 2000) in Docket Number M- 00960890F0017.

TXU noted that the Pennsylvania Commission's Tentative and Final Orders address the "gaming" problem that arises when the POLR price is lower than the market price. TXU commented that in that situation customers have switched back and forth between a competitive REP and a capped POLR rate to take advantage of lower rates when market prices were high during the peak period. TXU commented that the proposed draft rule will tend to allow similar gaming. TXU contended that allowing for a minimum term that includes a shopping period would assist the market while allowing customers the freedom to exercise choice. TXU proposed an additional option that would allow the POLR to bid a market-based indexed price for large, non-residential customers. SPS stated that POLR customers should be offered a hedged rate and sign a contract for a one-year term. Reliant commented that the issue of gaming would be addressed if REPs bidding to provide POLR service were allowed to specify the terms and conditions of POLR service in their bids. TNMP and AEP proposed that the POLR should have the option of either offering a hedged rate for a minimum term of one year or an unhedged, market-indexed rate. AEP proposed to limit the unhedged rate option to a shopping period of two billing cycles. According to AEP, this relatively short shopping period would provide some protection from attempts at gaming, and should encourage customers to participate in the competitive market and secure a new contract. EGSI also supported a 60-day shopping window at the higher of market rates or the POLR rate for POLR customers similar to the one adopted by the Pennsylvania Public Utility Commission in Docket Number M-00960890F0017. EGSI supported a market-indexed rate, stating that the closer to competitive market rate the POLR price is, the less the need for strong anti-gaming rules.

Consumer Commenters and OPC noted that the Pennsylvania order refers only to commercial and industrial customers who are jumping back and forth from the POLR rate. Cities of TXU recognized that there has been a significant increase in the number of industrial and commercial customers opting for rate-capped default service during peak times in states with a competitive retail market. Cities of TXU agreed that either market-indexed rates or minimum contract terms would be appropriate for these larger, more sophisticated customers, but would be inappropriate for residential customers. However, Consumer Commenters noted that a market- indexed rate is a variable rate and is illegal because it is inconsistent with the PURA §39.106(b) fixed rate requirement. Consumer Commenters argued that, unlike a large commercial or industrial customer, the residential customer does not have the means to watch the price index in the wholesale market on a daily basis. According to Consumer Commenters, over a two-week shopping period, this customer could receive a huge electric bill, based on the indexed rate paid to the POLR.

OPC noted that in other states, the problem suffered by residential customers regarding the POLR has been very different. According to OPC, in those states, REPs or their equivalent have been dropping residential customers when power prices have become too high, thereby forcing residential customers onto the POLR. OPC contended that having a hedged rate with a term contract or a market-indexed rate for the POLR will not cure this problem. Cities of TXU recommended that, unless and until the commission determines a prevalence of residential customers using the POLR service for financial advantage during high-cost months, any term or market-indexed price requirements in the rule should apply only to industrial and commercial customers. State of Texas was opposed to offering any customers a choice between a market- indexed price and a term contract for POLR service, adding that the risk of market fluctuations should be built into the POLR's bid for the fixed rate. Enron stated that the customer may not be given the two options of hedged rate with term contract and market-indexed rates since PURA §39.106(b) requires a single rate. Enron and TIEC contended that the arbitrage concern expressed in the Pennsylvania order is addressed since the proposed rule allows a seasonally differentiated price, and thus does not offer any gaming opportunity. TIEC commented that the imposition of a 12-month minimum term would be unreasonably burdensome to customers and would have a stifling effect on the competitive market. TIEC commented that a six-month term is the longest minimum service term that POLRs should be allowed to impose. NEM, Shell, and Independent Marketers pointed out that if gaming is possible, then POLR services are priced incorrectly and minimum terms are not the right fix. These parties noted that the problem that the Pennsylvania PUC Order addresses stems from POLR rates that are capped through regulation and do not reflect the market. For these respondents, the key element of a POLR rule is correct POLR pricing that is not capped by regulation and reflects market prices plus a risk premium. Independent Marketers and Shell would support a market-indexed POLR rate as the most efficient, market-based method for eliminating any potential gaming. Independent Marketers and Shell, like State of Texas, opposed offering customers a choice between a market based pricing option and a hedged rate with minimum term. Independent Marketers and Shell believe that it is essential that the rule restrict the POLR to one rate for each class of customers to differentiate POLR service from competitive services, so as not to inhibit retail competition.

In reply comments Independent Marketers agreed with State of Texas that the risk of market fluctuations should be built into the POLR's bid for the fixed rate. Independent Marketers suggested that, once this risk is built into the bid, the gaming problem is solved, and the bidder should strive to reflect in the rate the risk that a customer can leave POLR service at any time. If a bidder does not correctly assess this risk, they added, then under-recovery is the penalty.

In reply comments, EGSI and AEP disagreed with Consumer Commenters and OPC that anti-gaming provisions should only concern the large non-residential customer class. EGSI stated that changes in switching rules pertaining to residential customers in Pennsylvania are being adopted for Philadelphia Electric Company, (PECO) and Pennsylvania Power and Light, (PP&L) and requested by Duquesne Light Company. Consumer Commenters stated that in Massachusetts, a recent order put residential POLR customers on a fixed rate, six-month contract term, with the option of paying market-indexed rates as an alternative. Consumer Commenters, however, pointed out that the rate of residential customers switching to competitors in Massachusetts is hovering around zero, and that the order on POLR service would do little to motivate customers to take a risk in the retail market.

EGSI and AEP disagreed with the distinction made by OPC between customers gaming the system by switching from a REP to the POLR and REPs abandoning their customers and dropping them on the POLR. EGSI and AEP contended that the adverse effects in the competitive market place and on the POLR are the same whether customers or REPs engage in price motivated

gaming. If the commission does not approve anti-gaming protections for all customers, EGSI and AEP contended, it may jeopardize the ability to attract bidders for POLR service, or bidders will submit higher bids to compensate for the risks associated with gaming. AEP added that without a minimum term, a rate with a constant energy component, even allowing for seasonal differentials, cannot be expected to limit gaming by customers since the rates must be bid two years in advance. To prevent gaming, EGSI, AEP and TXU proposed to allow the POLR to either require a minimum term or charge a market-indexed rate to customers in all classes.

Reliant expressed a different view and contended that pricing flexibility such as the use of seasonal prices, which the proposed rule allows, will encourage bidders because they will be able to match their pricing more closely to the risks inherent with POLR service. Reliant contended that if the commission allows peak and off-peak pricing, then minimum terms may, indeed, be unnecessary. Consumer Commenters disagreed with EGSI, AEP and TXU, saying that residential consumers who are "dumped" on the POLR should not be punished. Consumer Commenters expressed disappointment in that, while during the legislative debate on restructuring consumers were promised lower prices for electricity and choice, most REPs are now proposing to force customers into long term contracts with penalties for early termination.

Reliant proposed that if the bid process fails and the commission appoints an affiliated REP to provide POLR service in its affiliated TDU area at the PTB, that is when POLR customers should be required to commit to a one-year minimum term. To alleviate concerns about minimum terms that prevent customers from participating in the market expressed by Independent Marketers, other competitive REPs, and consumer representatives, Reliant suggested that the customer be allowed to pay a penalty or exit fee to "buy out" of the minimum term. However, Reliant stated this provision would only be necessitated if the commission were to appoint an affiliated REP as POLR in its affiliated TDU area to offer POLR service at the PTB. Consumer Commenters disagreed, saying that any anti-gaming measures adopted in this rule should not apply to PTB customers, who were explicitly promised that Senate Bill 7, 76th Legislative Session (SB 7) would do no harm to their electric bills. Consumer Commenters proposed that the solution is for the POLR and the default provider for customers who do not choose, to be the same company for the early years of competition. Consumer Commenters suggested that under this scenario the affiliated REP would be the POLR for the PTB customers, serving at the PTB. Because the affiliated REP must offer the PTB for five years, Consumer Commenters contended, it has to plan to serve unanticipated customers returning to PTB anyway and there would be minimal additional negative financial impact on the affiliated REP's ability to plan for these customers. In support of affiliated REPs providing POLR service at the PTB, Cities of TXU and OPC took the position that an affiliated REP enjoys an enviable and lucrative position as the default provider for its affiliated TDU customers until the customers affirmatively elect to receive service from another REP, therefore, it is reasonable that the commission may require a greater degree of responsibility from the affiliated REP.

In its reply comments, TXU agreed with Independent Marketers and Shell in support of a market-indexed rate as the best tool to prevent customer gaming. OPC, however, disagreed, arguing that such a rate will not provide the safety net intended by PURA, and that, if the result of a REP defaulting is to leave customers with very high bills, customer support for electric deregulation is likely to vanish. Independent Marketers in reply comments agreed with State of Texas that there is not a need for a market-indexed rate since bidders have ample opportunity to reflect risk in their bid price.

The commission agrees with TXU that a "gaming" problem is likely to arise when the POLR charges a capped rate that is lower than the market price. The problem has occurred in several states where, as in Pennsylvania, default service is capped below market level through regulation. The commission notes that, where the POLR rate is not capped and is allowed to vary with market price fluctuations, other problems have emerged. In Rhode Island, many large commercial and industrial customers switched from their utility to a competitive supplier when the market opened, but were unable to find a REP to serve them when wholesale prices skyrocketed in the 2000 peaking season and were forced to take POLR service at market-indexed rates. These rates have resulted in very high energy costs that affected the economic viability of their businesses. The commission is concerned that, if business and industrial customers are forced to curtail or shut down their operations and lay off workers because of high wholesale energy costs passed on to them, the POLR no longer functions as a safety net. In Rhode Island, the experience has served to warn customers about the dangers of leaving their traditional supplier and discourage participation in the market.

The high prices experienced in many states in the 2000 peaking season appear to be the result of dysfunctional markets. The commission agrees with OPC that dysfunctional markets cannot be cured by any POLR design. The commission agrees with NEM and Independent Marketers that the key element of a POLR rule is correct POLR pricing. To avoid gaming, the POLR price must not be capped below the market price. The proposed rule prescribes that the POLR offer service at a hedged rate. As stated by State of Texas, bidders will reflect the risk of expected market fluctuations as well as other risks inherent to POLR service in their bids. As noted by TIEC and Enron, the proposed rule allows the POLR to charge seasonally differentiated rates. The commission agrees with Enron, TIEC, and Reliant in reply comments that a seasonally differentiated rate will help bidders more closely match their bids to the risks inherent to POLR service. Under the proposed rule, the POLR price can be designed to be no lower than the market price in all seasons, which is the intended outcome.

The commission agrees with Consumer Commenters that allowing the POLR to charge a market-indexed rate may discourage customers from leaving their traditional suppliers and inhibit the development of a competitive market. Customers must have the certainty of a reasonable fall back option - a safety net in the real sense of the term - or they will not play the market game. In addition, the commission agrees with Consumer Commenters that PURA §39.106(b) requires a fixed rate and, as EGSI correctly stated, a fixed price mechanism that includes a market-indexed energy component results in a variable rate. The commission therefore concludes that market-indexed POLR rates are not allowable under the statute.

The commission determines that requiring a minimum term would be too burdensome for customers and would inhibit competition. The commission notes, however, that if the POLR offers a level or average payment plan, a minimum term is necessary for averaging payments under the plan. The rule is modified to remove the six-month minimum term requirement

imposed on requesting customers, but to allow a six-month minimum term requirement for customers who elect to receive service under a level or average payment plan.

The commission agrees with State of Texas, Enron, Shell and Independent Marketers that the POLR should not offer more than one rate option to each class of customers, and that a POLR service that would offer more than one rate option would become a competitive service offering. The commission also agrees with Enron that the statute limits POLR offering to one standard retail service package at a fixed, non-discountable rate. The commission finds that both the fixed rate requirement and the statutory requirement of one service package would be violated if the POLR could offer customers the choice of a hedged rate under a term contract or an unhedged rate, as proposed by TNMP, AEP and TIEC.

Issue Number 4

Should an affiliated REP be precluded from being designated to serve as POLR in its affiliated TDU area unless no other REP applies or is qualified to serve as POLR in that area?

OPC, Consumer Commenters, Shell, Cities of TXU, and Independent Marketers contended that the bids submitted by affiliated REPs in their affiliated TDU territory should not deviate from the PTB, and that if no other REP submits a lower bid, the affiliated REP should win. Consumer Commenters noted that while it may be generally worthwhile to nurture competition by favoring nonaffiliated REPs, maintaining a consumer "safety net" at the lowest cost was equally important. TIEC pointed out that the PTB is not a factor for large non-residential users. TIEC contended that precluding affiliated REPs from bidding on POLR services for large non- residential customers would hamper competition among POLR bidders, resulting in artificially and unnecessarily high POLR rates for non-PTB customers.

The State of Texas favored preclusion, arguing that since all non-choosing customers will initially be switched to the affiliated REP, the affiliated REP will have an initial competitive advantage, and the right to provide POLR service should go to another REP, if one is willing and available. Reliant predicted that, if the commission has the ability to designate the affiliate REP to provide POLR service at the PTB, other REPs will be discouraged from bidding. Reliant argued that if an affiliated REP providing POLR service is locked into the PTB, the affiliated REP should not only be excluded from bidding, but should also be excused from being the designated POLR if the bidding process were to fail. TXU objected to designating an affiliated REP as the POLR in default of any other acceptable bids. TXU proposed that the service should be re-bid with modifications, and if the bidding process does not result in an award, any certified REP should be eligible for designation as the POLR provider. AEP, TNMP and SPS favored allowing affiliated REPs to bid on POLR service without limiting them to the PTB. EGSI also argued for pricing flexibility for the affiliated REP designated as POLR. In reply comments, AEP concurred with Reliant that if affiliated REPs were locked into the PTB, they should be excluded from bidding but also be excused from being the designated POLR if the solicitation process fails.

In reply comments, Cities of TXU rejected TXU's and other affiliated REPs' proposal that affiliated REPs be exempted from being designated as POLR, arguing that an affiliated REP enjoys an enviable and lucrative position as the default provider for its affiliated TDU customers until the customers affirmatively elect to receive service from other REPs, and that if the legislature intended to obviate any responsibility of the affiliated REP with regard to POLR service, it would have placed limitations upon the commission's control to establish the POLR bidding process and ultimately select a POLR provider. Consumer Commenters agreed that an affiliated REP is limited by PURA to the PTB even if serving as POLR, but rejected arguments by affiliated REPs that the additional risk of serving POLR customers justified more pricing flexibility for those REPs. Consumer Commenters suggested that one option would be to designate the affiliated REP as the POLR during the transitional period, because the affiliated REP already has to plan for unanticipated customers coming in and out of PTB service for the first five years of competition.

The commission agrees with State of Texas, OPC, Consumer Commenters, Shell, Cities of TXU, and Independent Marketers that PURA §39.202 (relating to the PTB) contains no exception for an affiliated REP acting as a POLR. However, the commission is concerned that, in the event the affiliated REP is required to provide service at the PTB, customers who do not pay their bill to the affiliated REP, could then access PTB service as POLR customers and get exactly the same benefits from the same REP. The commission is also concerned that an affiliated REP required to provide POLR service at the PTB may not be able to recover its cost of service. Finally, the commission agrees with Reliant and AEP that designating an affiliated REP to provide POLR service at the PTB might deter other REPs from bidding. The commission agrees with Reliant that the best solution is to preclude affiliated REPs from bidding to serve as POLR for residential and small commercial customers in their affiliate TDU territory for the five years the PTB is in effect in the territory, and determines that an affiliated REP will not be appointed as POLR in its affiliated TDU territory unless no other REP submits a bid or unless no bidders qualify to serve as POLR. Additionally, the commission determines that it must retain the flexibility to consider other options for appointing POLRs if the bid process fails when good cause exists. The commission modifies the rule accordingly.

Even though the commission agrees with State of Texas that competition is best fostered by completely excluding the affiliated REP from bidding in its own area, the commission accepts TIEC's proposal that the affiliated REPs be allowed to bid to serve large non-residential customers not covered by the PTB in their affiliate's territory so as to ensure more bids in the competition to provide POLR service to these customers. The commission modifies the rule to reflect this change. The commission agrees with Consumer Commenters that maintaining a safety net at a low cost is important. The commission believes that its decision to preclude affiliated REPs from bidding to provide POLR service to residential and small commercial customers in their affiliates' territory during the time when the PTB is in effect does not jeopardize the safety net for residential and small commercial customers because these customers have the protection of the PTB during those years. This outcome should satisfy affiliated REPs and TIEC's concerns because the affiliated REPs would still be able to bid to serve non-PTB customers at a market-based price.

The commission finds merit in Reliant and AEP's argument that the affiliated REP who is precluded from bidding to serve residential and small non-residential customers in its affiliate's territory should also be excused from being appointed as POLR for these customers in that territory if the bidding process fails, but the commission reserves the right to appoint the affiliated REP in cases when such appointment is a necessity to preserve the

public interest. The commission declines to adopt TXU's suggestion that, if the solicitation fails, POLR service should be automatically re-bid with modifications. The commission determines that bidders will not provide their best offer at the first round of bidding if they know that they have a second chance at the second round. The issue of re-bidding is further discussed under subsection (i) relating to the selection of the POLR.

Issue Number 5

Please comment on an "insurance" proposal made by EGSI at the June 8, 2000 workshop. Should this proposal be adopted as an alternative to the selection process and POLR pricing method currently included in the draft rule? If so, is it desirable to add a surcharge to transmission and distribution rates as the premium for this insurance, recognizing that it would reduce the headroom for competitive REPs? Does the commission have the authority to impose an additional surcharge on customers to fund such a program?

EGSI stated that a non-fault "insurance" system is an economically efficient method of allowing the POLR to recover the fixed costs associated with reserving the capacity needed for POLR customers. The fixed fee charged to all customers of the electric utility would be equitable, EGSI said, because all customers on the system would benefit from the no-fault insurance system since all customers in a designated POLR area have the right as determined by the commission to receive POLR service. EGSI contended that PURA provides the commission with authority to adopt its proposal, quoting PURA §11.002(a), which states that the purpose of the system of public utility regulation in Texas is to establish a comprehensive and adequate regulatory system to assure rates, operations, and services that are just and reasonable to consumers and utilities. EGSI contended that it would be unreasonably discriminatory to require POLR customers to bear the costs of this service but not require a contribution from non-POLR customers since non-POLR customers benefit from the availability of POLR service. Thus, according to EGSI, a commission rule requiring TDUs to collect a fee to defray POLR costs from all customers is a use of authority implied by PURA §39.106(b).

TNMP was not opposed to the EGSI proposal if a minimum term agreement is not adopted as part of the rule. SPS recognized that there are certain statutory and regulatory limitations that could inhibit the implementation of EGSI's proposal. TXU, AEP, State of Texas, Cities of TXU, and Consumer Commenters questioned whether the commission has the authority under SB 7 to implement EGSI's proposed surcharge. Cities of TXU, Reliant, OPC, State of Texas, and Independent Marketers expressed concern that the addition of another surcharge would adversely affect the headroom for competitive REPs. Independent Marketers and Shell opposed the proposal because it is not a market-based solution to the provision of POLR service. Enron noted that the proposal is so different from the model on which the proposed rule is based that any attempt to develop this alternative at this time would be a lengthy process and would result in two markedly different approaches. OPC contended that the proposal conflicts with PURA §39.106, which prescribes how the POLR is to be financed. According to OPC, PURA §39.106(b) requires that the standard retail service package be offered at a rate approved by the commission, and there is no reference in PURA Chapter 39 to a non-bypassable surcharge for the POLR. Reliant suggested that it is preferable to maintain the cost causation link rather than spread the cost over all customers, as the EGSI proposal would do. Reliant suggested that, as the market matures, the commission may want to revisit the idea in restructuring future POLR requirements.

TIEC opposed the plan, stating that the 911 principle of a fee spread out over all customers does not work in the POLR context when applied to non-residential electricity customers, because the number of non-residential customers in any given service area is almost certain to be much smaller than the number of residential customers, and when the cost of service is spread over a smaller number of customers, the cost to each customer is proportionately higher.

The commission agrees with Enron that the EGSI proposal is very different from the proposed rule and would require much time and effort to fine-tune and finalize. In addition, the commission agrees with the majority of the respondents who question whether there is sufficient basis in SB 7 and in other provisions of PURA to support the creation of a surcharge that would spread the cost of the POLR to all customers. The commission also agrees with the majority of respondents who expressed concern about the effect of an additional non-bypassable surcharge on the headroom. The commission therefore determines that the EGSI proposal should not be adopted at this time.

Issue Number 6

Should the provisions in subsection (g), separation of service, be relaxed to allow the POLR to engage in some limited marketing of its parent REP services? If so, what marketing activities would be allowed?

Consumer Commenters, State of Texas, OPC, Cities of TXU, TIEC, Shell, Enron and Independent Marketers commented that the provisions in subsection (g) should not be relaxed. TIEC stated that the POLR is a quasi-regulated entity; therefore, requiring full separation of the POLR from the parent REP in the marketing context would be consistent with the Code of Conduct's separation requirement. State of Texas and OPC commented that allowing a POLR to market the services of its parent REP would work against normal forces of competition and give the parent REP a competitive advantage in subscribing new customers by funneling POLR customers to the parent REP company. OPC and Independent Marketers preferred a strengthening of the requirements in subsection (g). Independent Marketers suggested that the POLR hire separate employees specifically dedicated to POLR customer service and enrollment. Enron noted that this issue may be of less concern over time and that, as other REPs establish market share, they would not oppose reviewing this restriction at a later time. Consumer Commenters stated that the role of the POLR is to provide a safety net for consumers, and not to provide a competitive advantage to a REP. Consumer Commenters noted that if the commission relaxes subsection (g), then the commission should require the POLR to reflect the value of joint marketing by a reduction in the POLR rate.

TXU, SPS, TNMP, AEP, EGSI, and Reliant commented that the separation of service provision in the proposed rule should be relaxed. TXU and Reliant commented that a modification of the proposed rule would provide an incentive for REPs to bid to serve as the POLR. Reliant and AEP stated that REPs looking to POLR service as a market entry strategy would likely adjust bids accordingly in an effort to win the bid. TNMP, Reliant, EGSI, and AEP stated that relaxing the rule would avoid customer confusion and irritation. These respondents stated that if a customer initiated a call to the POLR to make an inquiry about the services offered by the POLR's parent REP, a customer representative

should have the flexibility of explaining these services instead of being required to give the customer a different phone number to call for the information.

TXU, Reliant, SPS, and EGSI contended that subsection (g) should allow a POLR employee to offer to transfer the customer to the parent REP for the convenience of the customer in the case of a customer-initiated inquiry. AEP and EGSI noted that the POLR must still satisfy the rule requirements of providing the list of certified REPs in the area to the customer and should not proactively propose to connect the customer to the REP.

In reply comments, Cities of TXU supported Consumer Commenters' suggestion that the commission should require a lower POLR rate if it relaxes subsection (g) to allow joint marketing, while TXU and EGSI opposed it. TXU and EGSI noted that if such marketing does provide value, that value would be reflected in a lower bid price for POLR service. TXU urged the commission to use a marketplace model to develop POLR service, not a model based on regulated prices and price determinations. EGSI stated that the proposal is inconsistent with a bidding arrangement and should be rejected.

In reply comments, Consumer Commenters rejected all suggestions premised on using POLR to enhance the ability of new companies to enter the retail market. OPC replied that any value brought to the POLR's affiliate is at the cost of an optimally functioning market because the POLR's affiliate REP gains a competitive advantage.

Cities of TXU replied that the commission should not relax subsection (g) because doing so would open the door to anti-competitive practices like slamming. Cities of TXU noted that it would be difficult to monitor whether information about the services of the parent REP was distributed because of a customer-initiated inquiry or due to aggressive marketing of the services of the parent REP. Cities of TXU stated that the POLR was created as a safe haven for customers seeking plain, no-frills service and presumably customers of the POLR will be aware of their ability to choose a competitive REP and do not need to be targeted for more marketing from the POLR provider. If the commission finds it appropriate to relax the separation of service standards, Cities of TXU recommended that the rule incorporate provisions of the anti-slamming rules applicable to the telecommunications industry, such as third-party verification.

The commission finds that SB 7 separated POLR service from other types of REP service and imposed stricter requirements on the POLR. The commission finds it inappropriate for the POLR to market the services of its parent REP, as this would weaken the separation and distinctions of POLR service established by SB 7. The commission agrees with State of Texas and OPC that allowing the POLR to market the services of its parent REP would give the parent REP too much of a competitive advantage. The commission agrees with Cities of TXU that the POLR should not be allowed more flexibility when a customer initiates a request for information about the parent REP because it would be difficult to monitor whether customers are transferred to the parent REP of a POLR at the customer's unsolicited request or due to aggressive marketing. The commission avoids the necessity for the monitoring of such activities by leaving subsections (g)(1) through (g)(3) unchanged.

Issue Number 7

Should the list of POLR customers be available to all REPs certified to serve electric customers in a designated POLR area for marketing purposes?

Consumer Commenters, TXU, AEP, and SPS commented that the list of POLR customers should not be available for marketing purposes to any third party entity. Consumer Commenters, TXU, and SPS stated that the POLR must protect the privacy of customer information. TXU noted that such disclosure without customer consent would violate the Legislature's determination that customer name and usage history are trade secret information not subject to Open Records disclosure. SPS commented that if the POLR is required to provide a list of its customers to all REPs, this would allow the REPs in that area to "cherry pick" customers from that list, which would be less of an incentive for a REP to bid to be the POLR. Consumer Commenters stated that no REP, including the REP affiliated with the POLR, should have access to this list. Consumer Commenters added that the public purpose of the POLR is to serve the interests of consumers, not the REP community and the public purpose should not be undermined by attempts to "jumpstart" the competitive market by providing free marketing lists to REPs. AEP stated that the requirement in the proposed rule to provide a commission- approved list of certified REPs to the non-requesting customers should be sufficient. AEP added that a list of requesting customers taking POLR service should not be required either.

OPC, TNMP, Reliant, and Cities of TXU commented that this issue would be addressed in the customer protection rulemaking. OPC added that the POLR rule should be consistent with the customer protection rules regarding this issue.

Shell, Enron, Independent Marketers, and State of Texas commented that the list of POLR customers should be available to all REPs for marketing purposes. Shell stated that, it is essential for all certified REPs to have the information needed to market their services. Independent Marketers stated that the availability of the list would ensure that customers on higher priced POLR service will have increased access to REPs offering lower priced service. EGSI and TIEC had no objection to making such a list available to all REPS within the service territory for marketing purposes, but TIEC added the condition that only a *list* of customers be made available, and not any other information about specific customers.

TNMP, Consumer Commenters, Cities of TXU, Enron and EGSI stated that if POLR customers consent to placement on a marketing list, all REPs certified to serve in the area should have equal access to the list. Enron and EGSI added that customers should be able to opt to be excluded from the list.

EGSI commented that the registration agent or the commission should maintain the POLR customer list. EGSI noted that requiring the POLR to maintain the POLR customer list would add a needless layer of administrative complexity and associated costs on the POLR and ultimately POLR customers because the POLR will need to develop procedures to ensure that the customer list does not include the names of customers wishing to be excluded from such a list. EGSI commented that the registration agent or the commission would be in the best position to ensure that customers wishing to be excluded from customer lists for marketing purposes are in fact excluded. As an alternative to providing a customer list, EGSI suggested providing customers with the most recently approved, commission-maintained list of certified REPs eligible to serve in a designated POLR area.

The commission agrees that the POLR must protect the privacy of customer information. The issue of privacy of information is being addressed in the customer protection rules currently being developed. To maintain consistency with those rules regarding the release of customer information to competitive REPs, the

commission authorizes the registration agent of the Independent Organization to provide a periodically updated mass customer list of customers served by the POLR to REPs and aggregators, providing that the list contains only customer information as permitted by the commission's customer protection rules. The commission amends subsection (g)(4) to clarify that a list of POLR customers may be made available by the registration agent to REPs or aggregators, and to specify that the POLR's customers' list may be used by the POLR's affiliated REP for marketing purposes only if it is also available to other REPs.

Issue Number 8

PURA §41.053(c) states that an electric cooperative shall designate itself or another entity as the POLR for retail customers in its service area. Can an electric cooperative delegate that authority to the commission and request that the commission designate the POLR for its service area at the time when the commission is engaged in designating a POLR for a contiguous or surrounding TDU service area? If so, under what conditions?

TEC argued that PURA §41.053, along with the list of exclusive and broad jurisdictional powers in PURA §41.005, gives an electric cooperative's board of directors the power to designate the commission to act on the board's behalf in designating a POLR within the electric cooperative's certificated service area. TEC also stated that enlarging the service area for a POLR and the number of customers in the service area by including an electric cooperative's service area in the POLR's service area should enhance economies of scale and help to lower prices to retail customers served by the POLR.

TEC suggested several conditions that might be imposed on an electric cooperative delegating its authority to the commission. TEC suggested that it would be reasonable for the commission to require that the electric cooperative delegate its authority to establish the procedures and criteria to be used in the selection process along with its POLR designation authority. TEC suggested that an additional condition that might be imposed by the commission is a requirement that the delegation of authority be for a minimum period corresponding to the minimum period for which POLR service will be bid. Finally, TEC suggested that a new subsection (m) be added to the rule allowing an electric cooperative that has adopted customer choice to delegate its authority to select a POLR under PURA §41.053(c) to the commission in the certificated service area of the electric cooperative. TEC further suggested that under its proposed new subsection (m), the commission would accept such delegation of authority under the following conditions: (1) the board of directors provides the commission with a copy of a board resolution authorizing such delegation of authority; (2) the delegation of authority is made at least 30 days prior to the time the commission issues a request for proposals to establish a POLR for a contiguous or surrounding TDU service area; (3) the delegation of authority is for a minimum period corresponding to the period for which the solicitation will be made; and (4) the delegation of authority also provides the commission with the authority to select the criteria and procedures to be used in selecting the POLR within the electric cooperative's certificated service area.

SPS and TNMP took the position that an electric cooperative should be able to delegate its authority to the commission. TXU contended that an electric cooperative's ability to delegate its authority to the commission is unclear, but stated that if such authority is determined to exist, the commission should condition its acceptance of the designation upon the electric cooperative's agreement to adopt all commission rules regarding POLR service, including both the process for making a POLR award, as well as the procedures regarding provision of POLR service. Reliant did not take a position on an electric cooperative's ability to delegate its authority to the commission, but noted that an affiliated REP should not be required to provide POLR service at the PTB in an electric cooperative's service area. Enron did not oppose giving an electric cooperative the option to delegate its authority to the commission.

OPC concluded that PURA does not give an electric cooperative the authority to require or compel an entity to serve in the electric cooperative's certificated service area. This conclusion is premised on the language of PURA §41.053(c) which states, "On its initiation of customer choice, an electric cooperative shall designate itself or another entity as the provider of last resort for retail customers within the electric cooperative's certificated service area and shall fulfill the role of default provider of last resort in the event no other entity is available to act in that capacity." OPC interpreted this provision to mean that if no entity agrees or volunteers to serve as POLR in an electric cooperative's service area, the electric cooperative is obligated to serve as the default POLR. In other words, according to OPC an electric cooperative cannot designate as POLR an entity that is not willing to serve as POLR. Furthermore, OPC stated an electric cooperative cannot delegate to the commission authority that it does not have. OPC noted that the comments submitted by other parties do not address this issue of whether an electric cooperative has authority to require an entity to serve as the POLR in the electric cooperative's certificated service area. OPC concluded that the commission has no express or implied authority of its own under PURA Chapter 41 to designate a POLR in an electric cooperative's service area.

OPC also commented on TEC's suggestion that a new subsection (m) be added to the proposed rule to address a REP's delegation of authority to the commission to designate a POLR under PURA §41.053(c). OPC did not support TEC's subsection (m) principally because it would be applicable in situations where no REP or other entity volunteers to serve as POLR in the certificated area of the electric cooperative and thus, is contrary to PURA §41.053(c). Moreover, OPC questioned whether such a provision is needed or appropriate in the commission's rules, arguing that if REPs or other eligible entities volunteer to serve as the POLR in the certificated service area of the electric cooperative, the electric cooperative may designate the POLR, in accordance with PURA §41.053(c). OPC concluded that if no entity volunteers to serve as the POLR, the electric cooperative is specifically obligated by PURA §41.053(c) to serve as the default POLR.

The commission concludes that the broad authority given to an electric cooperative in PURA Chapter 41 includes the power to delegate to the commission the electric cooperative's authority to designate the POLR for its service area and to establish the procedures and criteria for designating a POLR. If the commission chose to accept the delegated authority, the commission's delegated authority would in all respects resemble the electric cooperative's original authority, and therefore, because an electric cooperative cannot compel an unwilling entity to serve as POLR, the commission likewise could not do so on the electric cooperative's behalf.

The commission adopts new subsection (m) regarding an electric cooperative's delegation of authority to the commission. The language of this new subsection satisfies the concerns of both

TEC and OPC. As TEC advocates, subsection (m) recognizes an electric cooperative's ability to delegate its authority to the commission. At the same time, subsection (m) does not exceed the limits of an electric cooperative's authority. A bidder that submits a POLR bid for a service area that includes an electric cooperative's certificated service area would clearly do so voluntarily. Therefore, the selection of a POLR for an electric cooperative's certificated service area through a competitive bidding process would not exceed an electric cooperative's authority. Furthermore, if the competitive bidding process that includes the electric cooperative's certificated service area fails, the commission's delegated authority is extinguished, and such authority reverts to the electric cooperative. In other words, if the voluntary competitive bidding process fails, then authority to designate an entity as a POLR reverts back to the electric cooperative, and unless the electric cooperative finds an entity that is willing to serve as POLR, the electric cooperative must serve as the default POLR for its own certificated service area. Furthermore, the commission finds that adopting subsection (m) is in the public interest because including an electric cooperative's service area in the POLR's service area should enhance economies of scale and help to lower prices to retail customers served by the POLR. New subsection (m) also gives the commission the discretion to accept or reject an electric cooperative's delegation of authority. This is necessary in order for the commission to be able to efficiently manage and allocate its resources.

Issue Number 9

If the competitive selection process for the POLR fails, should the commission retain the flexibility to appoint a POLR to serve in a service area for more than one year? If so, how should that be reflected in the rule?

The respondents in general broadened the issue to include whether the POLR term should be limited to one year for every POLR, whether appointed or awarded. The Independent Marketers, TXU, TNMP, Reliant, and Shell supported a yearly bidding process to reduce the price risk and costs associated with having to hedge wholesale electricity prices over a two-year period. TXU suggested that in order to encourage a more robust, competitive market, the commission should limit a POLR service appointment to a single one-year term and require bids every time a new POLR is needed. Shell and the Independent Marketers pointed out that a yearly competitive selection process would help ensure that prices for POLR service more accurately reflect the market price of electricity. Reliant, in its reply comments, stated that until the market matures and REPs have more experience with POLR service, the commission should only require bids for one-year terms.

AEP, EGSI, SPS, and State of Texas were generally not in favor of allowing the commission the flexibility to appoint a REP to serve as a POLR for more than one term if it is unwilling to serve another term. TXU, State of Texas, AEP, TIEC and EGSI suggested that each eligible REP should be required to serve as POLR in an area before an unwilling REP could be appointed to serve another term. AEP added that requiring an unwilling REP to serve a second POLR term would be unreasonable and punitive, and would appear to impose an inappropriate level of market interference and create an unreasonable business risk for the REP. TXU and EGSI suggested that if the bidding process fails once, the commission should request another round of bids, adjusting bid parameters if necessary. EGSI added that the commission should only extend the appointment beyond one year if it finds that such an extension is in the public interest. TIEC expressed a similar view, stating that the commission should retain the authority to re-appoint, but re-appointment should be truly a last resort, to be used only if the bid selection process has failed for two consecutive years and no other qualified REP becomes available during that time.

Consumer Commentors, Cities of TXU, and OPC generally favored the commission retaining the flexibility to appoint a REP two consecutive terms. OPC stated that the commission must maintain as much flexibility as possible in appointing a POLR. Such a policy would allow the commission to avoid bidding for a POLR annually when it is already known that there will be no acceptable bidders. Consumer Commenters favored amending subsection (i)(3)(A) to give the commission the flexibility to appoint a POLR for a term of more than one year.

Cities of TXU noted that nothing in the statute prohibits the commission from designating a POLR in the event the competitive selection process fails and added that PURA §39.106 provides wide discretion to the commission regarding the designation of the POLR. In fact, Cities of TXU argued that §39.106(e) leaves both the selection process and the schedule for re-designation of the POLR completely within the determination of the commission. Cities of TXU commented that it is essential that the commission preserve its flexibility in the selection process to address issues that may arise. Cities of TXU and Enron both supported the current language in the rule regarding this issue. Extending beyond the issue of the POLR term of service, Reliant suggested that at the end of the POLR term, current POLR customers should not be rolled-over to the new POLR. Rather, the new POLR should serve only new POLR customers.

The commission agrees with Independent Marketers, TXU, TNMP, Reliant, and Shell that a yearly bidding process would reduce the price risk to the POLR and its cost of having to hedge wholesale electricity prices over a two-year period. The commission therefore amends the rule to indicate that it will accept one-year and two-year bids from interested bidders. The commission would prefer a two-year term but reserves the right to select one-year term proposals if the price of two-year term proposals is too high and will indicate as much in the Request For Proposal. The commission generally agrees with the comments of SPS, State of Texas, AEP, TIEC, and EGSI that if the bidding process fails, the appointed POLR will serve for a one-year term and the area will be re-bid prior to the end of the one-year term. If the bidding process fails again, the commission will make every effort to consider all qualified REPs capable of serving as POLR in a given area before appointing an unwilling REP to a second term. If the commission finds that it in the public interest for a REP to serve an additional term after all available options have been considered, it retains the flexibility to appoint a REP for an additional term. The commission disagrees with TXU and EGSI that if the solicitation fails, the commission should automatically request a second round of bids. The commission prefers to retain this as an option rather than an obligation. The commission is concerned that if bidders know that if they don't get it right the first time they get another chance, they will not provide their best bid the first time around.

The commission disagrees with Reliant that customers should be retained by the exiting POLR's parent REP when a POLR's term of service comes to an end. The commission determines that if POLR responsibilities are being transferred to another REP, the customers should be transferred as well, as they are

customers of POLR service, not customers of the POLR's parent REP. Subsection (i)(7) has been added to reflect this determination.

Specific Sections of the Rule

Subsection (a) - Purpose

Pursuant to its general argument that POLR service to large non-residential customers be more flexible for the provider, TXU suggested making an explicit distinction between large non- residential customers and all other types of customers in subsection (a)(1). TXU suggested inserting the phrase "residential and small non-residential customer" into the current wording of subsection (a)(1), and inserting a new subsection covering large non-residential customers whose POLR package would be "at either a hedged or unhedged rate or any combination thereof as determined by selection of the respective bid." In reply comments, TIEC responded that a POLR should not be allowed to offer unhedged POLR pricing as a substitute for a hedged rate. TIEC stated that an unhedged rate was an acceptable option to large non-residential customers as long as a hedged rate was also available.

Consistent with its findings pursuant to Issue Number 3 and to subsection (f) of this rule, the commission declines to make the changes recommended by TXU and TIEC.

AEP objected to the wording of subsection (a)(2) stating that all customers will be assured continuity of service if a REP terminates service. AEP wanted the rule to clarify that continuity of service should not be assured for those customers who have been properly disconnected under the commission's rules.

The commission notes that while a REP has the right to terminate service, it may not have the right to disconnect except for reasons of imminent hazard. This question is addressed in Subchapter R of this title (Relating to Customer Protection Rules for Retail Electric Service). To ensure consistency with the Customer Protection Rules, subsection (a)(2) is amended to ensure that all customers will be assured continuity of service if a REP terminates service for reasons other than those specified in the commission rules relating to disconnection of service.

Subsection (b) - Application

COA, Cities of Garland and Denton, and Pedernales all objected to the provision in subsection (b) that MOUs and electric cooperatives must opt into competition and "meet the requirements for REP certification in Texas" as a condition for being designated to serve as POLR outside their service area. COA wants MOUs to be eligible to serve as POLR outside their service areas if they opt into competition, with no further requirement. The Cities of Garland and Denton and Pedernales stated that the requirement that a MOU or an electric cooperative meet REP certification requirements to be a POLR in its service area is placing an impermissible condition on an MOU or electric cooperative. TEC contended that subsection (b) was inconsistent with other sections of the proposed rule as well as with PURA. TEC noted that under PURA the commission is to designate a REP to serve as a POLR, and that as defined under law, an electric cooperative cannot be a REP even though it may provide similar functions. TEC said PURA does permit an electric cooperative to be a POLR, however, and argued that the proposed rule is not designed to address the situations where an electric cooperative or MOU is exercising its authority to designate a POLR within its service area. TEC suggested adding to subsection (b) language to specify that the rule does not apply to the situation where an electric cooperative or a MOU exercises its right to designate a POLR within that electric cooperative's or MOU's certificated service area, but that the rule is applicable when an electric cooperative delegates its authority to the commission in accordance with new subsection (m) to select a POLR within the electric cooperative's service area.

In reply comments, OPC stated that TEC's proposed change to subsection (b) and addition of subsection (m) was contrary to PURA §41.053(c), and questioned whether the revision was needed or appropriate in the commission's rules.

The commission agrees with TEC that the proposed rule does not address the situation where a MOU or an electric cooperative is exercising its authority to designate a POLR within its service area and concludes that the proposed rule is therefore not inconsistent with PURA §40.053(c). The commission agrees with TEC that an electric cooperative or a MOU cannot be a REP under PURA §31.002(17) and PURA §11.003(14), and therefore is not eligible to be designated by the commission to be a REP outside its service area, even if it meets the requirements for REP certification in Texas. Consequently, to maintain consistency with PURA the commission deletes the second sentence in §25.43(b). The commission accepts TEC's proposed addition specifying that the rule does not apply to the situation where an electric cooperative or a MOU exercises its right to designate a POLR within that electric cooperative's or MOU's certified service area as a useful clarification. The commission addresses TEC's proposed addition of a subsection (m) to govern an electric cooperative's delegation of authority to the commission under preamble Issue Number 8 and in new subsection (m) of this section.

Subsection (c) - Definitions

TXU proposed to add a new definition, "awarded," to indicate a REP selected by the commission to serve as POLR through the competitive bidding process. TXU stated that the word "designated" as used in the proposed rule is confusing because it refers to either a REP selected as POLR through the solicitation process, or a REP appointed by the commission in cases when the solicitation fails to provide a winning bidder. TXU proposed to reserve the term "designated" for a POLR appointed by the commission if the solicitation fails to produce a qualified winning bidder, and proposed to use the word "selected" to include both a "designated" and an "awarded" POLR.

The commission agrees with TXU that the use of the word "designated" in the proposed rule can be confusing. However, the commission notes that the word "designated" as used in this section is consistent with the use of this word in PURA §39.106, where "designated" refers to the commission's selection of a POLR either through a solicitation of bids, or through other procedures and criteria. To relieve the ambiguity and at the same time maintain consistency with PURA, the commission adopts the word "designated" to refer to a POLR who is either appointed by the commission or selected through a solicitation of bids. The word "appointed" is adopted and its definition added to subsection (c) to refer to a REP required to serve as POLR by the commission in the absence of a qualified winner of the solicitation. The word "awarded" is retained as proposed by TXU and added to subsection (c) to refer to a REP selected by the commission to serve as POLR through the competitive bidding process.

Basic firm service

EGSI proposed to modify the definition of basic firm service to indicate in the first sentence that basic service defines service not

subject to interruption "for reasons of economics and/or price." EGSI also added an exception in the second sentence to indicate that basic service excludes competitive options "except as otherwise provided in this section."

The commission agrees to add "for economic reasons" after the word "interruption" for clarification purposes, noting that adding "and/or price" would be redundant. The commission declines to include the exception language proposed by EGSI, noting that §25.43 does not provide any such exception.

Default customer

EGSI, AEP, and TNMP proposed to refer to such a customer as "non-requesting customer". TNMP explained that the term "default" is used in other states implementing restructuring in reference to their POLR equivalent, and that leaving the term "default" in this rule could create confusion. In addition, EGSI proposed language changes in the definition that would limit the default customer to "a customer whose REP fails to perform" rather than "a customer no longer served by the customer's selected REP." AEP proposed to replace the phrase "because the customer is no longer served by the customer's selected REP" with the phrase "because the customer's selected REP is unable to provide service." In addition, AEP proposed to add language to this subsection to indicate that a customer will automatically lose its status as a non- requesting customer on the day following the second scheduled meter reading following the initiation of service, and that customers for whom service has been terminated pursuant to applicable commission rules, or whose contracts for electric service have expired according to their terms and who have not chosen service from the same or another REP, are not non- requesting customers.

TXU proposed a language change to define the default customer as a customer who is no longer served by the customer's selected REP, including a customer who is unable to obtain electric service from a REP.

The commission acknowledges that, as EGSI, AEP, and TNMP have stated, other states use words like "default customer" somewhat differently. However, the commission notes that there are variations in the way each state that has developed competitive market rules associates certain concepts with a number of key words, including the words "default customer" and "provider of last resort." In addition, the commission notes that these definitions keep changing in other states as they revise their rules and create new ones. The commission believes that the word "default customer" is appropriately applied in this rule. It is the purpose of the definition section to specify what is meant by each term in the context of the rule.

The commission declines to adopt EGSI's proposed change because it is less inclusive than the proposed definition. A REP may fail to provide service for reasons other than a "failure to perform." The commission also declines to adopt a similarly limiting change proposed by AEP because a REP may fail to provide service for reasons other than "inability" to provide service. In both cases, the proposed language changes would have the effect of narrowing the availability of POLR default service in ways that would no longer capture the intent of PURA §39.106(g). The commission declines to adopt the following additional changes proposed by AEP because they are not consistent with the overall approach in the rule:

1. The commission declines to adopt the concept of a default customer losing default customer status after two billing cycles for reasons explained under Issue Number 2.

2. The commission concludes that a customer who has been terminated by its REP for whatever reason is entitled to POLR service, consistent with PURA §39.101(a) and PURA §39.106(g).

3. The commission finds that a customer whose contract has been terminated and who has not chosen service from the same or another REP is also entitled to POLR service as a default customer so as to maintain continuity of service, consistent with PURA §39.101(a).

The commission finds that the rewording proposed by TXU does not maintain the concept of a customer automatically assigned to POLR service when no longer served by its chosen REP, which is important to maintain because it conveys the POLR's mission to ensure continuity of service.

The commission accepts TXU's proposal to add language in the definition of "default customer" to include a customer who is unable to obtain electric service from a REP because it properly includes a category of customers who are entitled to POLR default service.

Designated POLR

TXU proposed to add a definition for the "designated POLR."

The commission adopts a definition for "designated POLR" to refer to a POLR who is either appointed by the commission or selected through a solicitation of bids for reasons explained at the beginning of the discussion of subsection (c).

Fixed rate

EGSI proposed to amend the definition of fixed rate such that the fixed rate "would be established by the commission." EGSI also proposed to alter the "fixed rate" definition as "a rate that may be established by use of a fixed pricing mechanism." TXU proposed to define a fixed rate as "a hedged or unhedged rate." TXU also suggested that the fixed rate be allowed to change according to the pricing structure as submitted during the bid process.

Consumer Commenters stated that a fixed rate cannot have a variable component, and therefore cannot be an unhedged or market-indexed rate.

The commission does not intend to "establish" the POLR rate, as suggested by the proposed EGSI language. PURA §39.106 charges the commission with "approving" the POLR rate, not establishing it. It is the purpose of the rule to obtain a POLR rate that is market-based by requesting bids from interested REPs who will take into account market conditions and risks when establishing their bid price. If the solicitation process fails to result in the selection of a qualified POLR, the rule provides that the commission will appoint a REP to serve as POLR and negotiate the POLR rate with the appointed REP. Even then, it is not the intention of the commission to establish the POLR rate but to negotiate a rate that both parties agree reflects market conditions and risks. The commission therefore declines to adopt EGSI's proposed language change. EGSI also proposed to add that the fixed rate may be established by use of a fixed pricing mechanism. The commission declines to make this change to avoid any ambiguity since a fixed price mechanism can result in either a fixed or a variable rate. EGSI's proposal to eliminate the statement that the POLR rate may be structured so as to reflect a seasonal component is not adopted. To maintain consistency with a change proposed by Enron under Issue Number 3 and adopted by the commission, the rule requires that the POLR rate be structured so as to reflect a seasonal differential, so as to reduce the risk that the POLR rate would fall under the market rate

during the peak season. The commission therefore retains the original concept and modifies the language to indicate in a more general manner that a fixed rate may be structured so as to include a seasonal differential.

The commission declines to define a fixed rate as "a hedged or unhedged rate", as proposed by TXU. The rule as adopted by the commission requires that the POLR offer only one rate for each customer class and that it should be a hedged rate, therefore the commission does not see the need for adding that the fixed rate can be an unhedged rate in the definition. TXU's proposed change also suggests that the fixed rate might change according to the pricing structure submitted by the bidder, so that the pricing structure would be fixed, if not the rate. The commission sees a difference between a fixed rate, and a "constant rate with a fixed pricing structure". TXU's proposal would satisfy the definition of a "constant rate with a fixed pricing structure", but not necessarily that of a fixed rate. The commission finds that this change would open the door to allowing any rate to be defined as a fixed rate, which is contrary to the legislative requirement of a fixed rate.

Hedged rate

EGSI proposed to change the term "hedged rate" to "constant rate." EGSI suggested that, a constant rate would be defined as a fixed pricing mechanism that results in a rate that contains no market-indexed energy component. EGSI proposed to remove the part of the definition that specifies that when the rate is hedged, it is the POLR's responsibility to mitigate the risk of price fluctuations. In addition, EGSI proposed to add language to indicate that the hedged rate or constant rate may be structured so as to reflect a seasonal differential, and may change due to non-bypassable charges.

AEP proposed to change the term "hedged rate" to "constant energy rate," with no conceptual change to the definition.

The commission determines that the term "hedged" applied to electric rates conveys a concept of risk mitigation that the term "constant" does not convey, and that it is important to maintain this distinction in the rule. The commission determines that EGSI's suggestions for the definition of constant (hedged) rate does not improve on nor add clarity to the definition and therefore it declines to adopt this change. The commission does not agree to strike the portion of the definition that clarifies the purpose of a hedged rate, as it is the purpose of the rule to clearly indicate that, by charging a hedged rate, the POLR will have the responsibility of mitigating the risk of market price fluctuations. The commission declines to adopt the reference to a seasonally differentiated rate proposed by EGSI, since the definition of "fixed rate" in the proposed rule already reflects that a fixed rate, for the purpose of this rulemaking, may include a seasonal differential. The commission recognizes the need for a reference to changes due to non- bypassable charges but determines that the treatment of such changes are better addressed in the definition of a fixed rate. The commission modifies the definition of "fixed rate" accordingly.

Non-discountable rate

EGSI proposed to add language to the definition of non-discountable rate to allow for exceptions that might be provided for in the commission's rules.

The commission agrees with EGSI that there is at least one exception that must be accounted for in the definition of non-discountable rate. The commission notes that PURA §39.106(b) mandates that the POLR charge a non-discountable rate. However, PURA §39.903 provides that certain income-eligible customers will receive a rate discount funded by the System Benefit Fund. Therefore, the commission adopts EGSI's suggestion to modify the definition of "non- discountable rate" so as to maintain consistency with the provisions of PURA §39.903 and with the commission's rules relating to the System Benefit Fund.

Requesting customer

EGSI proposed to specify that a requesting customer is one who "voluntarily" selects the POLR.

The commission accepts the proposed change as a needed clarification because it confirms the commission's previous determination that a customer cannot be switched from default status to requesting status without the customer's consent.

Residential Customer

EGSI proposed to add a definition for residential customer that includes single family residences and individual apartments. The proposed definition excludes common facilities at apartment and other multi-dwelling complexes.

The commission agrees that a definition of residential customer needs to be added and should exclude residents of multi-family facilities that are master-metered or that are considered commercial facilities. The commission modifies the proposed definition to ensure that it includes all customers taking service at their place of residence provided it is not a master- metered multi-family facility or a facility metered as a commercial facility.

Unhedged rate

EGSI proposed to change the term "unhedged rate" to "variable rate". EGSI suggested the definition for "variable rate" to be "a fixed pricing mechanism that results in a rate that contains a market-indexed energy component and may vary from time-to-time to reflect energy price fluctuations and changes to the non-bypassable charges."

TXU proposed to define "unhedged rate" as "a *fixed* rate that contains a market- indexed component." AEP proposed to replace the term "unhedged rate" with "market-indexed rate", without changes to the definition. Independent Marketers proposed to delete the definition of unhedged rate as unnecessary because the statute only allows one rate, a hedged rate. Consumer Commenters pointed out that unhedged rates have a variable component and therefore are in conflict with the statutory requirement of a fixed rate.

The commission agrees with EGSI that any pricing mechanism that is indexed to the market will result in a variable rate, and not a fixed rate as suggested by TXU. The commission adopts EGSI's definition of a variable rate as a rate that results from a pricing mechanism that includes a market-indexed component and may vary from time to time to reflect market price fluctuations. This definition will help clear the confusion generated around the interpretation of the term "fixed rate". The commission determines that there is not a need for a definition of "unhedged rate" since the term "hedged rate" is sufficiently defined and the term "unhedged rate" does not appear in the rule. In conclusion, the commission adopts Independent Marketers' suggestion to delete the definition of unhedged rate and adds a definition for "variable rate" as suggested by EGSI.

Subsection (d) - POLR service

Nucor Steel asked the commission to reconsider its April 12, 2000 decision that disallowed non-firm POLR service. Nucor Steel stated a concern that the proposed rule unfairly and unlawfully deprives non-firm customers of the POLR service that they are entitled to by statute. Nucor Steel commented that POLR service must be provided to all customers who request it, and that no customers or customer classes may be excluded. Nucor Steel stated that the failure to offer non-firm POLR service violates the specific mandates of Texas law and unreasonably discriminates against non-firm customers and the non-firm customer classes. According to Nucor Steel, customer classes cannot be combined, eliminated or altered in such a way that if a REP fails to serve a customer, the customer will be forced to take a radically different and unreasonable service. Nucor Steel added that, since firm and non-firm services are radically different in character, by requiring non-firm customers to take firm POLR service (or to have no POLR service at all), the proposed rule effectively denies non-firm customers and customer classes their right to POLR service. In reply comments, Independent Marketers, Cities of TXU, and EGSI stated that the commission has already made its decision on that issue. The Cities of TXU stressed that parties should be entitled to rely upon the commission's policy decisions without having to continuously re-urge their positions. EGSI offered three essential reasons why the POLR should not be required to offer interruptible service. First, a requirement to provide interruptible POLR service is contrary to the intent of PURA §39.106 that POLR service provides a safety net for competitive markets. Secondly, EGSI stated, there are practical operational and economic reasons why interruptible POLR service should not be provided such as the need for determining criteria for interruption, and economic impacts on firm POLR customers. Finally, EGSI suggested that a requirement to provide non-firm POLR service would cause needless complexity in the bid process.

The commission has previously determined that the POLR will not provide interruptible service. PURA §39.106(b) gives the commission the task of designating the classes of customer to whom POLR service applies. For the purposes of this rulemaking, the commission determines the classes of customers to be residential, small non-residential and large non- residential. Each of these classes is entitled to POLR service and the service will be provided at a firm rate approved by the commission. Non-firm customers may be served by the POLR in one of the three designated classes and will receive firm service and a firm-service rate when they are served by the POLR. Non-firm service is a competitive generation service that is inconsistent with the concept of the POLR as a provider of basic service. The commission declines to adopt Nucor Steel's proposed change to the rule.

TXU and Reliant suggested adding subsection (d)(4) to indicate that POLR providers may, as authorized, or shall, as required, provide billing and collection service for REPs as authorized or required elsewhere in this chapter of the rules or by order of the commission. Reliant stated that the Rulemaking to Establish the Terms and Conditions of Transmission and Distribution Utilities and the securitization financing orders contain provisions under which a POLR may be required to provide billing and collection services for a REP in default. Reliant recommended that if a POLR will indeed be required to provide billing and collection services for a REP in default, then the POLR rule must clearly define and describe such a service, and must provide compensation to the POLR for such service.

The commission agrees that this issue should be addressed in the rule but finds TXU's proposed language for this section vague. The commission adopts more specific language to specify that the POLR shall, as required by and in accordance with §25.108, provide billing and collection service for REPs who have defaulted on payments to the servicer of transition bonds or transmission and distribution utilities.

TXU suggested language be added to subsection (d) to state that a REP may serve any or all of the three customer classes. EGSI suggested changes to subsection (d)(2)(B) to specify that the POLR may be selected to provide service for any requesting customer or any non-requesting customer. EGSI requested a language change in subsection (d)(2) to make specific note that the POLR must follow the customer protection rules.

The commission agrees with TXU that a REP may serve any or all three customer classes, and makes the proposed change. The commission does not find it necessary to make the changes EGSI suggested regarding requesting and non-requesting customers. The commission notes that subsection (d)(2)(A) and (B) sufficiently address requesting customers and default customers. The commission agrees that the POLR must follow the customer protection rules set forth for the POLR, but sees no need to reiterate that here.

The Independent Marketers suggested new introductory wording in subsection (d)(3) to specify that the POLR shall offer a single basic, standard retail service package. The Independent Marketers also proposed to add a new subsection (d)(4) to emphasize that the POLR shall offer only one standard package that is limited to basic firm service.

The commission agrees with Independent Marketers and adopts their proposed language to subsection (d)(3). The commission finds the proposed new subsection (d)(4) redundant and declines to adopt it.

Subsection (e) - Standard of Service

AEP proposed to add specific language to subsection (e)(2) to allow the POLR to require that requesting customers meet minimum credit standards and be subject to disconnection.

The commission finds that these standards are properly addressed in the Customer Protection rule and declines to make this change.

AEP proposed to change subsection (e)(2)(C) to replace "unhedged price" with "market- indexed energy rate". Green Mountain and Shell proposed to eliminate this subsection as unnecessary.

The commission agrees with Green Mountain and Shell and eliminates subsection (e)(2)(C) since it has determined that the POLR can only offer one rate per class of customers and is required to offer a hedged rate.

TXU proposed to add a new subsection (e)(2)(F) to specify that a POLR wishing to require a 12-month term of service pursuant to proposed subsections (e)(2)(D) and (E) shall provide in its bid the rate for the 12-month term.

In light of its discussion under Issue Number 3, the commission determines that subsection (e)(2)(F) is not needed.

TXU proposed to change subsection (e)(3) to indicate that the commission may not designate the affiliated REP to serve as POLR in its affiliated TDU unless no other REP is certificated to serve that area. Reliant, AEP, and Shell expressed a concern

that if the affiliated REP can be designated in its affiliated TDU service area to provide POLR service at the PTB, it will deter other REPs from competing for POLR service in the area.

The commission disagrees with the change proposed by TXU because it is too restrictive and limits the commission's flexibility, which may result in inefficient outcomes. In response to Reliant, AEP, and Shell, the commission notes that the provision of subsection (e)(3) limiting instances when the commission can designate the affiliated REP as the POLR in its TDU service territory sufficiently mitigates the concern that the PTB will deter other REPs from competing for POLR service. To improve the organization of the rule, the commission moves subsection (e)(3) to subsection (i) which addresses the selection of the POLR.

Subsection (f) - POLR rate

In subsection (f)(1), TXU proposed that, in the event that the competitive selection process fails, the rate should be established through negotiations between the commission and *any* designated REP, as opposed to *the* designated REP. TXU, SPS, TNMP, EGSI and AEP proposed to eliminate the provision that, if a REP is designated to be the POLR in its affiliated TDU service territory, the rate shall be set at the PTB for residential and small commercial customers prior to January 1, 2005 or until the affiliated REP loses 40% of the customers in each customer group. These parties contended that the PTB would not allow the POLR to recover its cost of doing business. Consumer Commenters disagreed and stated that PURA §39.202 is clear in limiting the ability of an affiliated REP to charging anything but the PTB. In reply comments, OPC, Cities of TXU, and Independent Marketers agreed with Consumer Commenters.

In response to TXU, the commission determines that the rate negotiations should be between the commission and each of the appointed REPs, and modifies the rule accordingly. The commission agrees with Consumer Commenters and others and reaffirms that the affiliated REP's obligation to charge only the PTB in its affiliated TDU service territory until January 1, 2005 or until the affiliated REP loses 40% of the customers in each customer group is a statutory requirement and declines to accept the change proposed by TXU, SPS, TNMP, EGSI, and AEP.

TIEC proposed to change subsection (f)(2)(A) to allow more than one rate to be offered to each class of customers. Independent Marketers proposed to keep the provision allowing only one rate to be offered to each customer class, but to eliminate subsection (f)(2)(B) and to make it possible for the POLR to bid an unhedged rate for any class of customers. TXU proposed to keep the provision allowing one rate to be offered to each customer class, but would reserve subsection (f)(2)(B) allowing the POLR to bid a hedged rate for the residential and small non- residential customers, and add a new subsection (f)(2)(C) to allow the POLR to bid either a hedged rate or an unhedged rate for the large non-residential class. TIEC proposed a new subsection (f)(2)(C) in which an unhedged rate would be offered to customers of the large non- residential class provided a hedged rate is also available, adding the provision that large non- residential customers should be allowed to switch from the unhedged rate to the hedged rate or to other REP service at any time after commencing service on the unhedged rate. AEP wanted the POLR to be allowed to offer small non-residential and large non-residential customers a choice between a fixed rate containing a constant energy rate or a fixed rate containing a market-indexed energy rate. Enron noted that there is no language in the rule (outside the definition of "fixed rate" in subsection (c)) to reflect that the POLR is permitted to offer seasonally differentiated rates, which was agreed to by all workshop participants, and proposed to add language to subsection (f)(2)(B) to require such differentiated rates. In reply comments, Reliant stated that a seasonally differentiated rate would provide sufficient pricing flexibility so that a minimum term would not be necessary. OPC proposed to change the wording of subsection (f)(2) from "Fixed non-discountable rate. The POLR:" to, "As part of a fixed non-discountable rate, the POLR:" Consumer Commenters agreed with OPC in reply comments. In reply comments, EGSI opposed TIEC's proposed new subsection (f)(2)(C) arguing that the cost of hedging the customer's ability to lower the price by switching from the unhedged rate to the hedged rate or to other REP service at any time after commencing service on the unhedged rate would have to be reflected in the POLR bid, resulting in higher POLR bids, and added that the rule should permit the POLR price to reflect as nearly as practicable market-based rates, without an option to switch to lower the POLR price.

The commission reaffirms its April 12, 2000 Open Meeting decision that the POLR should only bid one rate for each class of customers in order to be consistent with PURA §39.106(b), which requires that one standard service package be offered per class of customers. The commission further determines that the POLR rate should be a hedged rate as stated in the proposed rule for reasons explained in the discussion under Issue Number 3. The commission agrees with Reliant and accepts Enron's proposal to add language to subsection (f)(2)(B) requiring the POLR to offer a rate that will be seasonally differentiated. The commission declines to make OPC's proposed wording change as it does not add clarity to nor improve the wording of the rule. The commission reorganizes the presentation of subsection (f)(2) to reflect these decisions in a concise manner.

Nucor Steel provided comments to request that the commission reconsider its April 12, 2000 Open Meeting decision not to require POLR services to mirror services historically offered by incumbent utilities, including offering non-firm interruptible service. Nucor Steel stated that non-firm customers are to be differentiated from the large non-residential customer class and have their own customer classes. In reply comments, TXU disagreed with Nucor Steel that non- firm service is a "standard retail service package" and stated that the standard retail service package pursuant to §39.106(b) of PURA is firm service. EGSI and OPC also opposed Nucor's position.

The commission continues to believe that the purpose of the POLR is to offer a basic service package that does not include options offered in the competitive market. Therefore the commission agrees with TXU, EGSI, and OPC and reaffirms its April 12, 2000 Open Meeting decision rejecting Nucor Steel's proposal to include non-firm services and other historical services in the POLR standard service package.

Subsection (g) - Separation of service

EGSI proposed to add language to the introductory paragraph in subsection (g) to allow for exceptions to the requirement of that subsection as provided elsewhere in the rule. EGSI also proposed to modify the language of the introductory paragraph in subsection (g) to specify that "the POLR shall maintain separate accounts for its competitive REP business and its POLR function," instead of being required to "keep its REP business separate from its POLR function".

The commission declines to adopt the exception language suggested by EGSI as not applicable, since the rule does not provide for any such exception. The commission adopts the language

proposed by EGSI to indicate that the POLR and its parent REP shall keep separate accounts in addition to, rather than instead of, the requirement that the POLR keep its REP business separate from its POLR function. The commission finds that this addition clarifies the intent of the rule.

Subsection (h) - Transition from REP to POLR service

EGSI proposed to change subsection (h)(2), which states that the Independent Organization will notify the POLR that a customer is switched to POLR service by adding that this notification will be made in accordance with the operating rules of the Independent Organization. AEP proposed to refer to the "applicable" Independent Organization to reflect that there are different Independent Organizations in Texas, and to refer to PURA §39.151 in subsection (h)(2). AEP also proposed to add that this subsection applies to a customer that has not been disconnected according to the commission's rules.

The commission adopts EGSI's proposal to clarify that the Independent Organization will act in accordance with its operating rule. The commission adopts the word "applicable" before Independent Organization as proposed by AEP. The commission accepts AEP's suggestion to refer to the part in PURA §39.151 that defines an Independent Organization, but declines to add that this subsection applies to a customer that has not been disconnected according to the commission's rules since subsection (a)(2) already provides the necessary information as to customer eligibility.

EGSI stated that subsection (h)(3) of the proposed rule is unnecessary because subsections (h)(4) and (h)(5) govern the financial responsibility of the REP and POLR during the transition. AEP proposed to change subsection (h)(3) to add "to the appropriate parties" after "without giving notice". AEP proposed to specify that, initially, the TDUs and not the POLR will be responsible for meter readings and should prorate consumption. AEP proposed to substitute the word "consumption" for the word "usage" and to indicate that the customer's consumption will be prorated "using the customer's historic data", rather than "based on the customer's historic data." AEP proposed to specify that the consumption would be prorated to establish "the customer's consumption relevant to the REP and POLR providers" rather than to establish "the customer's charges for the relevant portion of the billing cycle."

The commission declines to delete subsection (h)(3) as proposed by EGSI, as this subsection provides some useful information on details of the transition to POLR service necessary to determine how consumption will be measured. The commission declines to adopt the wording "to the appropriate parties" as suggested by AEP since, without specifying who the appropriate parties are, this addition does not clarify or improve the rule. The commission declines to give the TDU the responsibility of pro-rating the customer's consumption and assessing the consumption relevant to both the REP and the POLR as suggested by AEP, since this function is separate from the meter reading function and the TDU's task until January 1, 2004 for non-PTB customers and until September 1, 2005 for PTB customers, is limited to passing on to the POLR and the REP the metering information necessary for their billing activities unless specifically requested to provide billing services by the REP. The commission declines to substitute the word "consumption" for the word "usage" as suggested by AEP since these words are synonymous and the proposed change does not improve the clarity of the text.

EGSI stated that the POLR should not be responsible financially until it has a reasonable period of time to obtain the new customer information, assimilate the information, place the load into its overall scheduling process, and commence scheduling the POLR customer's load. EGSI suggested that subsection (h)(4) impose a requirement that the switch occur as soon as practicable but in no event later than five days after notification of the switch by the registration agent.

The commission finds that the POLR's mission is different from that of a regular REP and therefore has to operate under a set of circumstances that may imply different procedures and different risks of doing business. Therefore the commission declines to change the switching requirements of the proposed rule as suggested by EGSI.

EGSI suggested changing subsection (h)(5) which says that a REP who terminates service to a customer is financially responsible until the REP notifies the Independent Organization and until the switchover to the POLR is complete by specifying that these activities will be in accordance with the rules of the commission and the Independent Organization.

The commission determines that the proposed rule is sufficiently clear on how to carry out these activities and that the language suggested by EGSI is unnecessary.

Subsection (i) - Selection of the POLR.

TXU suggested specifying in the introductory paragraph of subsection (i) that the term for POLR service begins January 1, 2002 in all areas open for competition on that date. In connection with its response to Issue Number 8, TEC suggested changing the introductory paragraph to indicate that the commission shall not designate the POLR in the service areas of a MOU or in the service area of an electric cooperative unless the electric cooperative has delegated its POLR designation authority to the commission in accordance with a new subsection (m)TEC proposes to add to the rule.

The commission adopts TXU's proposed change with a slight modification to indicate that January 1, 2002 is the date the *first* POLR term begins. The commission adopts TEC's suggested revision to the introductory paragraph of subsection (i) because the revision is necessary to harmonize subsection (i) with new subsection (m), which the commission is adopting for the reasons stated in the discussion of TEC's response to Issue Number 8.

EGSI would change subsection (i)(1)(A) to specify that a bid may be submitted to serve the residential, small non-residential, "and"/or large non-residential. EGSI also would add that bids "for more than one class of customers" will be evaluated independently for each class.

The commission declines to accept EGSI's proposed wording modifications to subsection (i)(1)(A) as they neither add clarity to nor improve the proposed rule.

In subsection (i)(2)(B), TXU suggested that the bidding process fails if the bids received are "not within a range," as determined by the commission. AEP was concerned that subsection (i)(2)(B) gives the commission broad discretion to supercede the results of the competitive process, based on its conclusion that terms and conditions are "unreasonable." AEP contended that the most likely point on which the commission would intercede would be price, and offered modifications to subsection (i)(2)(B) to specify that the competitive bidding process fails if the commission does not receive three bids from qualified bidders as opposed to

one bid in the proposed rule, and if the terms and conditions of those bids are unreasonable, as determined by the commission. Additionally, AEP would specify that in making its determination about the reasonableness of the pricing terms, the commission shall consider how those pricing terms compare to the pricing terms for the same class of POLR service in other areas of the state. EGSI was also concerned that the commission's ability to reject bids based on a determination that the bids are "unreasonable" is overly broad. EGSI suggested specifying that the competitive bidding process fails if the terms and conditions of all the bids received do not comply with the request for proposal bidding specifications. EGSI would consider receipt of at least one complying bid from a non-affiliated REP as a reasonable bid.

TXU's suggestion that the phrase "not within a range" be substituted for the term "unreasonable" in subsection (i)(2)(B) is rejected. PURA §39.101(a)(1) charges the commission with the duty of ensuring that retail customer protections are established that entitle customers to reasonably priced electricity. The use of the term "unreasonable" is consistent with PURA §39.101(a)(1), while the substitution of the phrase "not within a range" is not. The commission concludes that the language recommended by AEP concerning three bids is arbitrary and does not necessarily accomplish AEP's stated purpose of attempting to limit the commission's authority to supercede the results of the competitive process. As to AEP's suggestion to assess the reasonableness of pricing terms by comparing them to pricing terms offered by POLRs in other areas of Texas, it would constrain the commission by requiring it to use as yard sticks pricing terms that may be based on a different set of circumstances and different cost structures. AEP's suggestion would be illogical and inconsistent with the commission's duty under PURA §39.101(a)(1). In addition, it would serve to indicate to bidders what range of prices the commission is bound to accept and would result in bids set at the highest price to be found for POLR service in other areas of the state.

In subsection (i)(3), TXU suggested specifying that the commission may only require a certified REP to become the POLR in an area if the re-bidding process fails. EGSI proposed to change subsection (i)(3)(B) to say that the commission will not require an unwilling REP to serve two consecutive terms unless it finds that it is "in the public interest," rather than if it finds that it is "necessary". In connection with its response to Issue Number 9, OPC suggested that subsection (i)(3)(A) be modified to allow the commission the flexibility to appoint a REP to serve as POLR for such period as the commission may reasonably designate, but no less than one year.

The commission declines to adopt TXU's proposal that the commission may require a certified REP to become the POLR in an area only if the re-bidding process fails. PURA §39.106 gives the commission broad authority in deciding the means by which to designate a POLR, and the commission finds that placing such constraint as suggested by TXU is not necessary and may leave the commission unable to select a POLR if, for unforeseen reasons, it becomes necessary to do so. The commission adopts EGSI's suggested revision as it finds that this revision serves to clarify the intended meaning of the proposed rule. The commission agrees with OPC that it must maintain flexibility with respect to its duty to designate a POLR when a competitive bidding process fails. In fact, that flexibility will be most important when the competitive bidding process fails. Therefore, the commission adopts OPC's suggested revision to subsection (i)(3)(A), except that the commission eliminates the minimum requirement of one year for the appointed POLR term since there may be cases when the commission may have to appoint a REP to finish the POLR term of an existing POLR. The revision works in concert with subsection (i)(3)(B) to give the commission the flexibility it needs to ensure that there is continuity in reliable POLR service in any service area. Additionally, to maintain maximum flexibility in its ability to appoint POLRs when the bid process fails, the commission adds language to indicate that it retains the authority to consider other options for appointing POLRs if the bid process fails when good cause exists.

TXU suggested modifying proposed subsection (i)(5) to specify that the commission shall repeat the POLR selection process six months before the POLR's term ends.

The commission finds it prudent to retain the discretion to adjust the time period for repeating the POLR selection process and therefore declines to adopt this recommendation.

Subsection (j) - Termination of POLR status

TXU proposed clarifying language for subsection (j)(1)(C) and (j)(2) that specifically defines "due process" as a notice and a hearing.

The commission finds that in some cases, a hearing may not be necessary and retains the current rule language.

TXU proposed adding a subsection (j)(2)(C) that requires the departing POLR to arrange with the new POLR to have existing customers on POLR service switched according to the customer choice switching protocols established by the Independent Organization and approved by the commission.

The commission finds this language unnecessary since switching can only occur through the Independent Organization.

AEP suggested that subsection (j)(1)(C) is vague and only subsections (j)(1)(A) and (B) are necessary.

The commission determines that subsections (j)(1)(A) and (B) are not exhaustive of the procedures for termination. There was a great deal of compromise in this rulemaking proceeding and adding subsection (j)(1)(C) was part of a compromise reached among the workshop participants. Therefore the commission disagrees with AEP and reserves the right to impose penalties for good cause provided the commission affords the failing POLR due process.

EGSI proposed that language be added to strengthen the process of notification of deficiency to the POLR. EGSI's proposal would require that the commission provide at least 15 days to clear the deficiency.

The POLR rule does not attempt to impose different rules than are already in place for enforcement. Therefore the commission disagrees with EGSI's proposed language change.

Subsection (k) - Procedures and criteria for POLR selection.

TXU suggested indicating in subsection (k)(2) that the threshold criteria apply to all prospective bidders that are not required to be certified REPS.

The commission has determined that only certified REPs are eligible to serve as POLR, except that if a REP has applied for certification and its certification is pending, the REP may submit a bid for providing POLR service. The commission modifies subsection (i) to reflect this clarification. The commission further determines that the threshold criteria listed in the proposed rule apply to all prospective bidders, including certified REPs. The

commission acknowledges that some of the listed threshhold criteria may appear to subject certified REPs to an unnecessary second level of scrutiny but believes that verification of bidders' REP status is justified. Therefore the commission declines to adopt TXU's proposed change.

TXU proposed to adopt a new subsection (k)(2)(E) to indicate that bidders must, in order to qualify, be able to meet the requirements of the commission's rule relating to the terms and conditions of retail distribution service provided by TDUs.

The commission declines to adopt TXU's proposed new subsection (k)(2)(E) as unnecessary. The Terms and Conditions for Retail Distribution Service rule currently being developed will include the necessary requirements for all REPs, including the POLR.

TXU proposed to substitute the term "determining criterion" for "tie-breaking criterion" in subsection (k)(4).

The commission finds that "tie-breaking" and "determining" as they are used in this subsection are nearly synonymous, and therefore finds it unnecessary to make this change.

Subsection (m) - Electric Cooperative delegation of authority to the commission for the designation of a POLR.

A new subsection (m) was proposed by TEC to set forth a procedure by which an electric cooperative could delegate to the commission the selection of a POLR in the cooperative's service area.

Consistent with its determination under Issue Number 8 that electric cooperatives may delegate their authority to the commission for the designation of a POLR in their service territory the commission adopts subsection (m) to describe the conditions under which this delegation of authority may occur.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, §39.106, which requires that the commission designate, no later than June 1, 2001, one or more REPs to serve as POLRs.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.101, 39.106, 39.107, 39.151, 39.903, and 41.053(c).

§25.43. Provider of Last Resort (POLR).

(a) Purpose. The purpose of this section is to ensure that, as mandated by the Public Utility Regulatory Act (PURA) §39.106:

(1) A basic, standard retail service package will be offered by a POLR at a fixed, non- discountable rate to any requesting customer in all Texas transmission and distribution utilities' (TDUs) service areas that are open to competition; and

(2) All customers will be assured continuity of service if a retail electric provider (REP) terminates service in accordance with the termination provisions of the commission's Customer Protection Rules for Retail Electric Service.

(b) Application. This section applies to REPs that may be designated as POLRs in TDU service areas in Texas. This section does not apply when an electric cooperative or a municipally owned utility (MOU) exercises its right to designate a POLR within its certificated service area. However, this section is applicable when an electric cooperative delegates its authority to the commission in accordance with subsection (m) of this section to select a POLR within the electric cooperative's service area.

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

(1) Appointed POLR - A REP required to serve as POLR by the commission in the absence of a qualified winner of the competitive bidding process.

(2) Awarded POLR - A REP selected by the commission to serve as POLR through the competitive bidding process.

(3) Basic firm service - Electric service not subject to interruption for economic reasons and that does not include value added options offered in the competitive market. Basic firm service excludes, among other competitively offered options, emergency or back-up service, and stand-by service.

(4) Default customer - A customer who is automatically assigned to be served by the POLR because the customer is no longer served by the customer's selected REP, including a customer who is unable to obtain electric service from a REP.

(5) Designated POLR - A POLR who is either appointed by the commission or selected through a solicitation of bids.

(6) Fixed rate - A rate that is established when the POLR is designated and does not change over the term of the POLR, except that the POLR rate may reflect changes due to non-bypassable charges. A fixed rate may be structured so as to reflect a seasonal differential.

(7) Hedged rate - A rate that contains no market-indexed energy component. When a hedged rate is offered, it is up to the POLR to mitigate the risk associated with energy price fluctuations.

(8) Large non-residential - A non-residential customer with a peak demand above one megawatt.

(9) Non-discountable rate - A rate that does not allow for any deviation from the price offered to all customers within a class, except as provided by the rate reduction program of the commission's rules relating to the System Benefit Fund.

(10) Provider of last resort (POLR) - A REP certified in Texas that has been designated by the commission to provide a basic, standard retail service package to requesting or default customers.

(11) Requesting customer - A customer who voluntarily selects the POLR to provide electric service.

(12) Residential customer - A customer taking service at the customer's place of residence provided it is not a master-metered, multi-family facility or a facility metered as a commercial facility.

(13) Small non-residential customer - A non-residential customer with a peak demand of one megawatt or below.

(14) Variable rate - A rate that results from a pricing mechanism that contains a market- indexed energy component and that may vary from time-to-time to reflect market energy price fluctuations.

(d) POLR service.

(1) For the purpose of POLR service, there will be three classes of customers: residential, small non-residential, and large non-residential.

(2) The POLR may be designated to serve any or all of the three customer classes in a POLR area. Within the customer class it is designated to serve, the POLR shall provide service to the following customers:

(A) Any customer requesting POLR service; and

(B) Any customer not receiving service from its selected REP for any reason who is automatically assigned to the POLR.

(3) The POLR shall offer a basic, standard retail service package, which will be limited to:

(A) Basic firm service;

(B) Call center facilities for customer inquiries;

(C) Standard retail billing (which may be provided either by the POLR or another entity);

(D) Benefits for low-income customers as provided for under PURA §39.903 relating to the System Benefit Fund; and

(E) Standard metering, consistent with PURA §39.107 (a) and (b) (which may be provided either by the POLR or another entity).

(4) The POLR shall, in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), provide billing and collection duties for REPs who have defaulted on payments to the servicer of transition bonds or transmission and distribution utilities.

(e) Standards of service.

(1) A REP who has been designated by the commission to serve as POLR for a class in a given area shall serve any or all requesting or default customers in that class.

(2) A POLR shall abide by the applicable customer protection rules as provided for under Subchapter R of this chapter (relating to Customer Protection Rules for Retail Electric Service). In addition, the POLR shall be held to the following general standards:

(A) The POLR shall inform any default customer assigned to it that it is now providing service to the customer and disclose all charges the customer will be responsible for;

(B) The POLR shall provide default customers and any customer who inquires about selecting a provider a commission maintained list of certified REPs;

(C) The POLR may not require that a customer sign up for a minimum term as a condition of service. When the POLR offers a level or average payment plan in accordance with the commission's customer protection rules, a residential or small non-residential customer who elects to receive service under such plan may be required to sign up for a minimum term of no more than six months.

(f) POLR rate.

(1) The POLR rate shall be established through the competitive bidding process. In the event that the competitive bidding process fails under circumstances described in subsection (i)(3) of this section, the POLR rate may be established through negotiations between the commission and an appointed REP. If a REP is appointed to become the POLR in its affiliated transmission and distribution utility (TDU) service territory, the rate will be set at the price to beat (PTB) for residential and small non-residential customers prior to January 1, 2005 or until the affiliated REP loses 40% of its customers in each customer group.

(2) Fixed non-discountable rate. The POLR shall offer one fixed rate for each class of customers identified in this section that will meet the following requirements:

(A) the rate shall be non-discountable, except for the rate discount provided for by the rate reduction program of the commission's rules relating to the System Benefit Fund;

(B) the rate shall be a hedged rate; and

(C) the rate shall be seasonally differentiated.

(g) Separation of service. The POLR shall maintain separate accounts for its competitive REP business and its POLR business and keep its REP business separate from its POLR function. In addition, the POLR shall abide by the following provisions:

(1) The POLR and its affiliated REP may share the same facilities, but the POLR shall have a separate phone number.

(2) The POLR and its affiliated REP may share employees.

(3) An employee answering the POLR phone line will read from a script to describe POLR service and will not market the services of the POLR's affiliated REP. If the customer asks about the services of the POLR's affiliated REP's, the employee may only give the caller the REP's telephone number.

(4) The commission may authorize the registration agent of the Independent Organization to provide to REPs and aggregators a periodically updated mass customer list of customers served by the POLR containing information similar to the information that the registration agent is authorized to release under the commission's customer protection rules. The POLR's affiliated REP may not use the POLR's customer list to market its services unless the list is made available to other REPs through the registration agent.

(h) Transition from REP to POLR service.

(1) POLR service for a requesting customer is initiated when the customer makes arrangements for service.

(2) If the applicable Independent Organization, as specified by PURA §39.151, becomes aware that a REP is no longer scheduling for a customer, it will notify the POLR that the customer is switched to POLR service in accordance with the operating rules of the Independent Organization.

(3) If the REP terminates service to a customer whose consumption is determined by monthly meter readings without giving notice, the POLR shall prorate the customer's usage based on the customer's historic data or load profile to establish the customer's charges for the relevant portion of the billing cycle, unless the customer requests and is willing to pay for an out-of-schedule meter read. Nothing in this section precludes a POLR from having an out-of-cycle meter read performed for a new customer on its own initiative provided the POLR does not pass on the cost of the meter read to the customer.

(4) The POLR is responsible for obtaining resources and services needed to serve the customer once it has been notified that it is serving the defaulting REP's customers. The customer is responsible for charges for POLR service at the POLR rate from that time.

(5) If a REP terminates service to a customer, it is financially responsible for the resources and services used to serve the customer until it notifies the Independent Organization of the termination of the service and until the switchover to the POLR is complete.

(6) The POLR is financially responsible for all costs of providing electricity to customers from the time the switchover is complete until such time as the customer leaves POLR service.

(i) Selection of the POLR. The commission shall designate certified REPs, or REPs that have applied for certification and meet REP certification requirements, to serve as POLRs in areas of the State in which customer choice is in effect no later than June 1, 2001, and as required when the term of a POLR ends thereafter, except that the commission shall not designate the POLR in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated its POLR designation authority to the commission in accordance with subsection (m) of this section The first term for POLR service begins January 1, 2002 in all areas open for competition on that date.

(1) The commission will use a competitive bidding process to select the POLR for each customer class in each designated POLR service area.

(A) A bidder may submit a bid to serve the residential, small non-residential or the large non-residential class. A bidder may submit a bid for more than one class. Bids will be evaluated independently for each class.

(B) A REP may not submit a bid to provide POLR service to the residential and small commercial customer classes in its affiliated TDU service territory during the years when the PTB is in effect. A REP may submit a bid to provide POLR service to non-PTB customers in its affiliated TDU territory.

(C) The commission will consider bids for one-year or two-year terms.

(2) The competitive bidding process fails if:

(A) The commission does not receive any bids from qualified bidders for a given customer class in a given area; or

(B) The terms and conditions of the bids received are unreasonable, as determined by the commission.

(3) If, in a customer class or area, the competitive bidding process fails, the commission may investigate why the bidding process was unsuccessful and re-bid the service with modifications, or the commission may appoint any certified REP serving a customer class in an area to become the POLR for that customer class in that area. Additionally, for good cause the commission may use other options for appointing POLRs if the bid process fails. If a REP is appointed to serve as POLR, the following terms and conditions will apply:

(A) The appointed REP will serve as POLR for a one-year term, or for such a period as the commission may reasonably designate.

(B) The commission will not appoint an unwilling REP to serve in an area for two consecutive terms unless it finds that requiring such REP to serve two consecutive terms is in the public interest.

(4) The affiliated REP may not be appointed to serve as POLR in its affiliated TDU area unless no other REP applies to serve that area or the commission rejects all bids for that area.

(5) If the commission determines that the bidding process fails under paragraph (2) of this subsection, the commission will negotiate the POLR price for each customer class with the appointed REP. The commission shall negotiate the rate for each class separately to ensure cross subsidization among classes does not occur.

(6) Before the POLR's term of service comes to an end so as to ensure timely continuation of service the commission shall repeat the initial selection process.

(7) When a POLR's term of service comes to an end, responsibility for the POLR's customers will be transferred to the newly designated POLR.

(j) Termination of POLR status.

(1) The commission may revoke a REP's POLR status:

(A) If the POLR fails to maintain REP certification;

(B) If the POLR fails to provide service in a manner consistent with the commission rule relating to POLR service after it is provided up to 60 calendar days' notice of the deficiency; or

(C) At the commission's discretion for good cause provided the commission affords the failing POLR due process.

(2) A POLR that wishes to terminate its obligations must inform the commission of the actions it is planning to take to ensure a smooth transition.

(A) The departing POLR may, with the approval of the commission, transfer its POLR obligations to a qualified REP willing to assume the departing POLR's terms of service.

(B) The departing POLR shall notify its customers and inform them of the transfer of POLR obligations to a new POLR at least 60 days before the transfer takes place.

(C) If a POLR terminates its obligations without properly informing the commission and the customers and ensuring a smooth transition, the POLR will be subject to the penalties provided for in §25.107(j) of this title (relating to the Certification of Retail Electric Providers (REPs)).

(3) If a POLR defaults or has its status revoked before the end of its term, the commission may appoint any certified REP serving a customer class in an area to become the POLR for that customer class in that area until a new POLR is awarded or appointed to serve at a negotiated rate. The conditions of service under subsections (d)-(g) of this section apply to the interim POLR.

(k) Procedures and criteria for POLR selection.

(1) The general procedure for the request for proposals (RFP) to select the POLRs will be as follows:

(A) The commission staff will develop an RFP for commission approval.

(B) A commission staff evaluation team will evaluate the proposals submitted in response to the RFP.

(C) The evaluation team will forward its recommendation to the commission.

(2) The following threshold criteria will be used to determine whether bidders qualify:

(A) Bidder's competence and qualifications, including prior REP experience. The bidder should demonstrate that it has retail experience and that it has staff with sufficient electric experience.

(B) Quality of the bidder's activity plan, including its demonstrated readiness to provide service at the beginning of the term of POLR service.

(C) Minimum standards for technical and managerial resources consistent with §25.107(g) of this title.

(D) Minimum standards for financial strength consistent with §25.107(f) of this title.

(3) The proposals of qualified bidders will be evaluated on the basis of the proposed rates for each customer class.

(4) If two or more qualified bidders bid equal rates, the commission will enter into price negotiations with each bidder. If the

tie is not resolved through negotiations, contribution to enhancement of market competitiveness will be the tie-breaking criterion.

(l) Service areas. The RFP will describe the service areas. The POLR service area should be no larger than an existing TDU service area, and may be smaller. When a TDU service area is divided into smaller areas, the commission will attempt to divide the service area so that the customer composition of the smaller areas will reflect that of the larger TDU service area.

(m) Electric cooperative delegation of authority. An electric cooperative that has adopted customer choice may propose to delegate to the commission its authority to select a POLR under PURA §41.053(c) in its certificated service area in accordance with this section. The commission will, at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions will apply:

(1) the board of directors will provide the commission with a copy of a board resolution authorizing such delegation of authority;

(2) the delegation of authority will be made at least 30 days prior to the time the commission issues a request for proposals to establish a POLR for a contiguous or surrounding TDU service area;

(3) the delegation of authority will be for a minimum period corresponding to the period for which the solicitation will be made;

(4) the electric cooperative wishing to delegate its authority to designate a POLR will also provide the commission with the authority to select the criteria and procedures to be used in selecting the POLR within the electric cooperative's certificated service area; and

(5) if the competitive bidding process that includes the electric cooperative certificated area fails, the commission's delegated authority is extinguished, and such authority reverts to the electric cooperative.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 20, 2000.

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Rhonda Dempsey
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Public Utility Commission of Texas
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION

SUBCHAPTER AA. EMPLOYEE TRAINING

28 TAC §1.2702

The Commissioner of Insurance adopts amendments to §1.2702 relating to training for employees of the department. The amended section is adopted with minor changes to the proposed text published in the August 25, 2000, issue of the *Texas Register* (25 TexReg 8134).

The amended section is necessary to update Subchapter AA to reflect the department's policies and procedures regarding training offered to department employees. Subchapter AA codifies department policies and procedures regarding employee training. Section 656.048 of the Government Code requires state agencies to adopt rules relating to the eligibility of employees for training and education supported by the agency and the obligations assumed by the employees after receiving the training and education.

The amended section is also necessary to address certain recently enacted statutory provisions regarding employee training. State agencies are required by §21.010 of the Labor Code to provide employees with employment discrimination training. Therefore, the adopted amendments to §1.2702 address training regarding policies prohibiting discrimination, including sexual harassment.

Section 660.147 of the Government Code specifies when a state agency may pay or reimburse a state employee for a travel expense associated with a training seminar conducted by a state agency for its employees. Therefore, the adopted amendments to §1.2702 specify when travel expenses may be incurred by department employees to attend department-sponsored training.

The amendments to §1.2702 also address the payment of instructor fees and clarify the type of information provided to department employees about department-sponsored training. In addition, the amendments to §1.2702 reflect the current agency practice of recording education leave as emergency leave, rather than administrative leave, on an employee's monthly attendance record.

The amendments to §1.2702 address required training on discrimination, including sexual harassment; travel expenses for department-sponsored training; the use of videoconferencing or interactive television for training; and, procedures regarding tuition reimbursement. For clarification purposes, the amended section as proposed was modified by the addition of a caption to §1.2702(b)(5). In addition, the amended section as proposed was modified by correcting capitalization errors in the words "Section" and "Division" in §1.2702(b)(5).

No comments were received regarding the adoption of the amended section.

The amended section is adopted pursuant to Insurance Code §36.001 and the Government Code §656.048. The Insurance Code §36.001 authorizes the commissioner to adopt rules for the conduct and execution of the duties and functions of the department as authorized by statute. The Government Code §656.048 provides for the adoption of rules by state agencies relating to training and education of agency employees.

§1.2702. Employee Training Program.

(a) Components of program. The employee training program for the department consists of agency-sponsored training, seminars and conferences, and tuition reimbursement, as set out and described in subsections (b)-(d) of this section.

(b) Agency-sponsored training. A program of in-house training for agency employees is provided.

(1) Training on Policies Prohibiting Discrimination. All new employees must attend an orientation session within 30 days of their date of hire containing information on the department's policies

and procedures including information on discrimination and sexual harassment. Employees must attend supplemental training on discrimination, including sexual harassment, every two years.

(2) Quarterly Training Calendar and Catalog. A quarterly training calendar lists course offerings. A training catalog contains course descriptions of all available courses. An employee wishing to register for in-house training courses should contact the training liaison for the employee's division. The employee's supervisor must approve all requests for in-house training.

(3) Payment of Course Fees. Some in-house training may require a division to pay for instructor fees and/or course materials, payment of which is coordinated though the Professional Development section of the department's Human Resources Division. If the course offers an optional examination for a fee, the employee taking the course will be responsible for payment of the examination fee. Any employee passing the examination may request reimbursement of the examination fee upon proof of payment of the fee and passing the examination. Some fees may be reimbursed at a percentage of base fee amounts as determined by the commissioner. Approval of payment is contingent upon availability of funds.

(4) Travel Expenses for Department-Sponsored Training. Travel expenses incurred by employees attending department-sponsored training will not be reimbursed unless the commissioner of insurance or his or her designee certifies the following:

(A) The department does not possess interactive television or videoconference facilities at the designated headquarters of the employee attending the seminar;

(B) The department cannot purchase or lease such facilities at a cost less than the total travel costs associated with the seminar; and

(C) The department does not have access to another agency's interactive television or videoconference facilities at the same location.

(5) Professional Development Section Assistance. The Professional Development Section of the department's Human Resources Division will assist the seminar coordinators in determining, on a case-by-case basis, the feasibility of using videoconferencing or interactive television for department-sponsored training. If it is determined that the travel expenses to attend agency sponsored training are justified, the requesting division's associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employees' chain of command will prepare a written request to obtain certification from the commissioner of insurance prior to the training event. Copies of the certification must be submitted to the Professional Development Section of the department's Human Resources Division and to the department's Accounting Division.

(c) Seminars and conferences. The department may also pay for training, seminars or conferences unavailable in-house and related to a current or prospective duty assignment. Requests to attend an external training program, seminar or conference must be approved by the associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command. Training, seminars or conferences which are required to maintain a professional license will be considered a priority in allocating a division's training budget if the professional license is a requirement of the employee's job. Attendance at an approved training program, seminar or conference will be considered part of the employee's normal work duties. An employee will not be required to use accrued leave to attend an approved training program, seminar or conference.

(d) Tuition reimbursement. The department may reimburse full-time regular employees for tuition and required fees or may grant education leave in lieu of tuition reimbursement if the criteria set out in paragraphs (1)-(5) of this subsection are met.

(1) Eligibility. Eligibility requirements for tuition reimbursement must be satisfied as set out in subparagraphs (A)-(I) of this paragraph.

(A) An employee must have completed 12 consecutive months of full-time employment with the department prior to requesting approval to receive tuition reimbursement or education leave. However, if the associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command determines that an employee with less than 12 consecutive months of full-time employment needs a particular course and recommends the employee for eligibility, the 12-month requirement may be waived.

(B) An employee must have achieved an overall performance rating of at least 3.25 on the employee's most recent performance evaluation at the time of the request for approval to receive tuition reimbursement or education leave.

(C) An employee must not have been the subject of formal disciplinary action for at least six months prior to requesting approval to receive tuition reimbursement or education leave. As used in this section, "disciplinary action" includes a formal written reprimand, suspension without pay, or salary reduction for disciplinary reasons.

(D) An employee must meet all admission requirements of the educational institution offering the course for which approval to receive tuition reimbursement or education leave is requested.

(E) The course work must be related to a current or prospective duty assignment within the agency. A prospective duty assignment may include a position within the agency to which the employee aspires. The associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command will determine whether a course relates to a current or prospective duty assignment in the employee's division. The Human Resources Division will work with an employee's division to determine whether a course relates to a current or prospective duty assignment within the agency.

(F) At the time of the request for approval to receive tuition reimbursement or education leave, comparable training must not be scheduled to be offered in-house during the period of time covered by the tuition reimbursement or education leave request.

(G) The employee's participation must not adversely affect workload or performance.

(H) The employee must complete the course within the semester for which tuition reimbursement or education leave was requested.

(I) The employee must receive a passing grade in the course. A passing grade is a grade which will entitle the employee to receive credit for the course from the educational institution offering the course.

(2) Reimbursable costs. Criteria addressing the extent to which cost of tuition may be reimbursed are set out in subparagraphs (A)-(E) of this paragraph.

(A) The maximum amount an employee may be reimbursed for an approved tuition reimbursement request is $250 per

semester, not to exceed $500 per fiscal year. If an employee presents compelling reasons, the maximum amount for tuition reimbursement may be increased to $500 per semester, not to exceed $1,000 per fiscal year. Such increased amounts must be specifically approved by the associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command and by the chief of staff.

(B) Employees may be reimbursed for the cost of tuition and related fees at an educational institution.

(C) Employees will not be reimbursed for any part of tuition covered by scholarships, grants or other awarded funds.

(D) Employees will not be reimbursed for items that are not part of tuition, such as textbooks, workbooks, lab supplies.

(E) Employees will not be reimbursed for auditing a course.

(3) Education leave in lieu of tuition reimbursement. Criteria for taking education leave in lieu of tuition reimbursement are set out in subparagraphs (A)-(F) of this paragraph.

(A) Education leave may be taken only for approved courses which are offered only during work hours.

(B) Before requesting education leave, employees should fully consider and explore education options that would not involve education leave. For example, employees should consider registering for classes scheduled before or after work, or during the lunch hour when courses are available at those times. Employees may also request a flex-time or compressed work week schedule that would allow for class attendance without the use of education leave. Such a work schedule must not disrupt or adversely affect performance by the employee or the employee's division, section, program or activity.

(C) An employee approved for education leave in lieu of tuition reimbursement may be granted up to six hours per week of education leave in lieu of tuition reimbursement.

(D) Education leave may be taken for the sole purpose of attending an approved course during work hours. An employee may not take education leave if the employee does not actually attend the class for which education leave has been approved. Education leave may not be taken during the week of spring break. Education leave may not be taken to study for a course.

(E) Education leave will be treated as emergency leave on the employee's monthly attendance record with a notation that the emergency leave is for the purpose of attending a course approved for education leave.

(F) An employee who has been approved for education leave in lieu of tuition reimbursement will receive, on a provisional basis, the approved amount of education leave. If the employee satisfactorily completes the course, the approved leave will remain designated as education leave. However, if the employee fails to satisfactorily complete the course for which education leave was granted, of if the employee separates from employment with the department before submitting the final grade report for any courses for which education leave was granted, the leave will be changed to annual leave, compensatory time leave or overtime leave, and the employee's leave balances will be adjusted accordingly. If the employee's leave balances are exhausted, the remaining education leave will be changed to leave without pay, and the employee's pay will be adjusted accordingly.

(4) Procedure. Specific procedural steps required to complete the tuition reimbursement process are set out in subparagraphs (A)-(G) of this paragraph.

(A) An employee must receive written approval to receive tuition reimbursement or education leave prior to enrolling in the course or courses for which tuition reimbursement or education leave is requested. Approval of tuition reimbursement or education leave will be granted on a semester-by-semester basis.

(B) Tuition reimbursement or education leave must be approved by the associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command. The Human Resources Division also will review all requests for tuition reimbursement or education leave to ensure compliance with this policy. In addition, education leave must be approved by the chief of staff. The chief of staff has been authorized by the commissioner to determine whether good cause exists to grant education leave in lieu of tuition reimbursement.

(C) To receive reimbursement for tuition, within two weeks after receipt of the final grade in a course for which reimbursement has been approved, the employee must submit a purchase request, a copy of the final grade report, and an itemized tuition receipt to the associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command. The department will not reimburse tuition if an employee separates from employment with the department before submitting the final grade report for any courses for which tuition reimbursement was granted.

(D) If an employee has been approved for education leave, within two weeks after receipt of the final grade in a course for which education leave has been approved, the employee must submit a copy of the final grade report to the associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command.

(E) An employee must immediately notify the associate commissioner--or highest level manager who reports directly to the commissioner, if not an associate commissioner--in the employee's chain of command if the employee ceases to be enrolled in a class for which reimbursement or education leave has been requested.

(F) A manager may require that an employee receiving tuition reimbursement or education leave make regular reports regarding the employee's progress in the course for which reimbursement or leave has been authorized.

(G) Copies of documentation regarding tuition reimbursement and education leave will be forwarded to the Human Resources Division. The Human Resources Division will monitor compliance with and utilization of this policy.

(5) Use of equipment. Employees may not use department equipment, such as computers, calculators, or typewriters to complete course work.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2000.

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Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: November 8, 2000
Proposal publication date: August 25, 2000
For further information, please call: (512) 463-6327

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PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER A. MEDICAL POLICIES

28 TAC §134.2

The Texas Workers' Compensation Commission (the commission) adopts the repeal of §134.2 regarding an insurance carrier's responsibility to submit medical reports as published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 3910).

As required by the Government Code §2001.033(1), the commission's reasoned justification for this repeal of a rule is set out in this order which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the commission disagrees with some of the comments and proposals.

The commission adopts the repeal of §134.2 to eliminate redundancy in the rules. Recently amended §102.9 of this title (relating to Submission of Information Requested by the Commission) makes the current §134.2 unnecessary.

There are no changes in the text of the rule; the rule is deleted in its entirety.

One comment opposing the proposed repeal of §134.2 was received from an individual.

Summary of the comment and commission response is as follows:

Comment: Commenter asked that the commission not repeal §134.2. Specifically, the commenter stated that all insurance carriers must remain accountable for all medical reports and all information requested by the commission and that this rule was necessary to hold insurance carriers accountable should they fail to honor a request by the commission for documentation.

Response: The commission disagrees. Section 102.9 (relating to Submission of Information Requested by the Commission) encompasses the issue raised by the commenter and makes previous §134.2 unnecessary. Under the provisions of §102.9 those subject to the Act are required to provide information requested by the commission.

The repeal is adopted pursuant to the Texas Labor Code §402.061 which requires the commission to adopt rules necessary for the implementation and enforcement of the Texas Workers Compensation Act and Texas Labor Code §402.004, which requires insurance carrier to make available any records or other necessary information. The repeal is adopted pursuant to the Texas Labor Code §402.061 and §402.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 20, 2000.

TRD-200007399
Susan Cory
General Counsel
Texas Workers' Compensation Commission
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Proposal publication date: May 5, 2000
For further information, please call: (512) 804-4287

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER C. PERMITS FOR TRAPPING, TRANSPORTING, AND TRANSPLANTING GAME ANIMALS AND GAME BIRDS

31 TAC §§65.101, 65.103, 65.105, 65.111, 65.115 - 65.117

The Texas Parks and Wildlife Commission adopts amendments to §§65.101, 65.103, 65.105, 65.111, 65.115, and 65.117, and new 65.116, concerning Permits to Trap, Transport, and Transplant Game Animals and Game Birds. Sections 65.101, 65.103, and 65.115 are adopted with changes to the proposed text as published in the July 28, 2000, issue of the *Texas Register* (25 TexReg 7117). Sections 65.105, 65.111, 65.116, and 65.117 are adopted without changes and will not be republished. The change to §65.101, concerning Definitions, adds a definition of 'supervisory permittee' to establish the distinction between persons authorized by the permit to perform activities and the person who supervises the activities. The change to §65.103, concerning Trap, Transport, and Transplant Permit, alters subsection (a) to limit the requirement for a wildlife management plan to the release site only, alters subsection (b) to require applications received between September 1 and November 15 to be approved or denied within 45 days, alters subsection (d) to allow the movement of antlered bucks only between contiguous or nearly contiguous properties under common ownership, and adds new subsection (g) to stipulate that mortalities incurred during a permitted activity remain part of the total number of animals or birds authorized to be trapped and may not be replaced. The change to §65.115, concerning Notification, Recordkeeping, and Reporting Requirements, alters subsection (a) to require notification prior to each instance of an activity governed by the subchapter; alters subsection (b) to replace the term 'game warden' with the phrase 'employee of the department acting within the scope of official duties' and adds new paragraph (7) to conform the requirements of the subsection to changes made to subsection (c); eliminates the requirements of proposed subsections (c)(7) and (d) and replaces them with requirements for a financial disclosure form to be signed by the trap site owner and the release site owner and included with the supervisory permittee's report to the department; and rewords subsection (e) to require permittees to maintain all animals that die in the course of permitted activities in an edible condition until final disposition.

The amendment to §65.101, concerning Definitions, is necessary to assign meanings to words and terms used in the subchapter. The amendment to §65.103, concerning Trap, Transport, and Transplant Permit, is necessary: for the department to acquire biological information needed to assess proposed relocations of game animals and game birds for the purposes of determining whether such proposals are consistent with the department's statutory obligation prevent depletion and waste; to provide a system for orderly and timely disposition of applications; and to prevent practices constituting the sale of protected wildlife. The amendment to §65.115, concerning Notification, Recordkeeping, and Reporting Requirements, is necessary to: provide a mechanism by which the department is able to monitor permitted activities to assess compliance with the law; to establish a documentation regime to assist the department in determining that a permittee's activities are consistent with the terms and conditions of a permit; to provide for financial disclosure in order to prevent the sale of protected wildlife; and to set forth requirements for the disposition of animals and birds that die in the process of permitted activities. New §65.116, concerning Nuisance Squirrels, is necessary to provide a convenient and user-friendly method for the humane trapping and relocation of squirrels that are destructive to property. The amendment to §65.117, concerning Prohibited Acts, is necessary to: make language structurally and grammatically consistent and to provide a convention for identifying vehicles and trailers used to conduct permitted activities.

The amendment to §65.103, concerning Trap, Transport, and Transplant Permit, will function by specifying the content of a stocking plan, establishing a minimum deer-to-acreage-ratio for the purpose of waiving release-site inspections, implementing a time limit for department review of permit applications, and stipulating the conditions under which buck deer must have their antlers removed for transport. The amendment to §65.115, concerning Notification, Recordkeeping, and Reporting Requirements, will function by establishing a timeframe for notification of the department prior to the trapping, transporting or release of deer, implementing a requirement for permittees to maintain a daily log of permitted activities, requiring permittees to disclose the financial particulars of permitted activities, and specifying procedures for the disposition of mortalities. New §65.116, concerning Nuisance Squirrels, will function by relocating the provisions of former §65.103(g) in a new section for clarity's sake. The amendment to §65.117, concerning Prohibited Acts, will function by implementing an identification requirement for trailers and vehicles used to transport.

The department received 16 comments concerning adoption of the proposed rules. Six commenters opposed adoption of the rules by stating that the rules constituted the privatization of wildlife resources. The department disagrees and responds that wildlife resources are the property of the people of the state, which status is fixed by the legislature and not subject to change by the commission. No changes were made as a result of the comments. Two commenters opposed adoption of the rules because they claimed there were no provisions for the humane treatment of animals. The department disagrees with the comments and responds that in addition to the animal cruelty provisions contained in the Penal Code, §65.116 and §65.117 contain explicit language requiring the humane treatment of animals, violation of which is a criminal offense. No changes were made as a result of the comments. Two commenters opposed adoption of the rules by stating that TPW personnel should be the only persons permitted to trap, transport, and release wildlife. The department disagrees with the comments and responds that Parks and Wildlife Code, Chapter 43, Subchapter E specifically prohibits the state from incurring any expense for trapping, transporting, or transplanting game animals or game birds pursuant to a permit issued for that purpose. No changes were made as a result of the comments. One commenter opposed adoption of the rules because of the possibility of wildlife diseases being transmitted from one population to another. The department, while acknowledging the potential for disease transmission, disagrees with the comment and responds that TPW has no scientific evidence to suggest the likelihood that diseases will be spread as a consequence of the rules. No changes were made as a result of the comment. One commenter opposed adoption of the rules and stated that contraception should be used, rather than relocation. The department disagrees with the comment and responds that there is no credible scientific research to suggest that contraception would have any effect on populations of free-ranging deer. No changes were made as a result of the comment. One commenter opposed adoption of the rules and stated that the potential for abuse was too high. The department disagrees and responds that it believes that the oversight and enforcement provisions of the rules are sufficient to detect and prosecute violations. No changes were made as a result of the comment. One commenter opposed the 'minimal impact release' ratio of one deer to 200 acres, preferring instead a 1:100 ratio. The department disagrees with the comment and responds that the 1:200 ratio represents a consensus agreement arrived at by staff and members of the regulated community. No changes were made as a result of the comment. One commenter opposed adoption because rule language did not stipulate that walk-in traps be used to trap squirrels and because there were no provisions to prevent the death of animals during transport. The department disagrees with the commenter and responds that language in §65.116(3) explicitly requires all trapping devices to be designed not to inflict physical injury to trapped squirrels. With respect to animals expiring during transport, the department responds that §65.117 contains explicit language requiring the humane treatment of animals; however, due to the very nature of such activities the possibility of animal fatalities cannot be completely eliminated.

Texas Deer Association and Texas Wildlife Association commented in support of the adoption of the proposed rules.

The sections are adopted under Parks and Wildlife Code, §43.061, which requires the commission to adopt rules for the content of wildlife stocking plans, certification of wildlife trappers, and the trapping, transporting, and transplanting of game animals and game birds under the subchapter, and §43.0611, which requires the commission to adopt rules for fees, applications, and activities, including limitations on the times of the activities, relating to permits for trapping, transporting, or transplanting white-tailed deer

§65.101. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings assigned by Parks and Wildlife Code.

(1) Amendment--A specific alteration or revision of currently permitted activities, the effect of which does not constitute, as determined by the department, a new trapping, transporting and transplanting operation.

(2) Certified Wildlife Trapper--An individual who receives a department-issued permit pursuant to this section.

(3) Natural Habitat--The type of site where a game animal or game bird normally occurs and existing game populations are not dependent on manufactured feed or feeding devices for sustenance.

(4) Nuisance Squirrel--A squirrel that is causing damage to personal property.

(5) Overpopulation--A condition where the habitat is being detrimentally affected by high animal densities, or where such condition is imminent.

(6) Permittee - any person authorized by a permit to perform activities governed by this subchapter.

(7) Release Site--The specific destination of game animals or game birds to be relocated pursuant to a permit issued under this subchapter.

(8) Stocking Policy--The policy governing stocking activities made or authorized by the department as specified in §§52.101-52.105, 52.201, 52.202, 52.301 and 52.401 of this title (relating to Stocking Policy).

(9) Supervisory permittee - A person who supervises the activities of permittees authorized to conduct activities.

(10) Trap Site--The specific source of game animals or game birds to be relocated pursuant to a permit issued under this subchapter.

§65.103. Trap, Transport, and Transplant Permit.

(a) For the purposes of this subchapter, the content of a wildlife stocking plan shall for a release site shall be the same as that required for a wildlife management plan under the provisions of §65.25 of this title (relating to Wildlife Management Plan). No inspection by the department of a release site is required if the release will not exceed a ratio of one white-tailed deer per 200 acres at the release site; however, when the accumulated releases on a tract result in a ratio of one deer to 200 acres, no further releases shall take place unless a site inspection has been performed by the department.

(b) Applications received by the department between September 1 and November 15 in a calendar year shall be approved or denied within 45 days of receipt.

(c) The department may deny a permit application if the department determines that:

(1) the removal of game animals or game birds from the trap site may be detrimental to existing populations or systems;

(2) the removal of game animals or game birds may detrimentally affect the population status on neighboring properties;

(3) the release of game animals or game birds at the release site may be detrimental to existing populations or systems;

(4) the release site is outside of the suitable range of the game animal or game bird;

(5) the applicant has misrepresented information on the application or associated wildlife stocking plan; or

(6) the activity identified in the permit application does not comply with the provisions of the department's stocking policy.

(d) A buck deer transported under the provisions of this subchapter shall have its antlers removed prior to transport, unless:

(1) the transport takes place between February 10 and March 31 of a calendar year; or

(2) the trap site and the release site are owned by the same person. The sites shall be contiguous, but may be separated by a water body or public roadway.

(e) The department may establish trapping periods, based on biological criteria, when the trapping, transporting, and transplanting of game animals and game birds under this section by individuals will be permitted.

(f) The department may, at its discretion, require the applicant to supply additional information concerning the proposed trapping, transporting, and transplanting activity when deemed necessary to carry out the purposes of this subchapter.

(g) Game animals and game birds killed in the process of conducting permitted activities shall count as part of the total number of game animals or game birds authorized by the permit to be trapped.

§65.115. Notification, Recordkeeping, and Reporting Requirements.

(a) No person shall trap, transport, or release a game animal or game bird under a permit authorized by this subchapter unless that person has notified the department not less than 24 hours nor more than 48 hours prior to each instance of trapping, transportation, or release. Notification shall be by fax or telephone contact with the Law Enforcement Communications Center in Austin, and shall consist of:

(1) in the case of trapping or transport, the supervisory permittee's name, permit number, and the date(s) that the trapping or transport will occur; and

(2) in the case of release, the date, time, and specific location of the release.

(b) A supervisory permittee shall maintain, keep current, and furnish upon request by a department employee acting within the scope of official duties a daily log containing:

(1) the number of game animals or game birds trapped;

(2) the sex of game animals or game birds trapped;

(3) the locations where game animals or game birds were trapped and released;

(4) the dates when trapping occurred;

(5) the trapping methods used;

(6) any mortality incurred during the permitted activity and the disposition of carcasses; and

(7) the completed financial disclosure forms required by subsection (d) of this section.

(c) The supervisory permittee shall file a report on a form provided by the department not later than 30 days following the expiration date of the permit. The report shall include, at a minimum:

(1) the number of game animals or game birds trapped;

(2) the sex of game animals or game birds trapped;

(3) the locations where game animals or game birds were trapped and released;

(4) the dates when trapping occurred;

(5) the trapping methods used;

(6) any mortality incurred during the permitted activity and the disposition of carcasses; and

(7) the completed financial disclosure forms required by subsection (d) of this section.

(d) Upon the completion of trapping activities authorized by a permit under this subchapter, the supervisory permittee shall complete and sign a Triple T verification form. The form shall also be signed by the landowner of the trap site (or a full-time employee of the landowner who is authorized to act on the landowner's behalf) prior to the transport of any game animal or game bird. Upon the release of the game animals or game birds, the form shall be signed by landowner of the release site (or a full-time employee of the landowner who is authorized to act on the landowner's behalf). In the instance that a permit authorizes multiple release sites, a separate Triple T Verification form shall be required for each trap site/release site combination. The form shall be supplied by the department to the supervisory permittee and shall be retained as provided by subsection (b) of this section.

(e) All game animals or game birds that die as a result or in the course of activities conducted under a permit issued under authority of this subchapter shall be kept in an edible condition until disposed of by one of the following methods:

(1) documented donation to charitable organizations, public hospitals, orphanages, or indigent persons;

(2) documented transfer or donation to other persons authorized to receive such specimens under a license or permit issued by the department; or

(3) special disposition as prescribed in writing by the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007371
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: November 7, 2000
Proposal publication date: July 28, 2000
For further information, please call: (512) 389-4775

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PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 355. RESEARCH AND PLANNING FUND

SUBCHAPTER B. ECONOMICALLY DISTRESSED AREAS FACILITY ENGINEERING

31 TAC §355.72, §355.77

Texas Water Development Board (board) adopts amendments to 31 TAC §355.72 and new §355.77, Research and Planning Fund, concerning criteria for eligibility of facility planning projects for financial assistance and procurement of facility engineering services for projects funded through the Economically Distressed Areas Program (EDAP). Section 355.72 is adopted without change to the proposed text as published in the September 1, 2000 issue of the Texas Register (25 TexReg 8599) and will not be republished. New §355.77 is adopted with change to correct a typographical error in §355.77(C)(4)(a). The word "a" should be "at" in reference to "at least three persons."

The amendments to §355.72 are adopted in anticipation of a limited amount of funding for facility engineering becoming available as a result of cost savings on some projects, the termination of non-performing contracts, and the lapse of commitments. They are intended to clarify criteria that must be met and documentation which must be submitted before the board may consider an application for financial assistance for facility planning projects under the EDAP. The new §355.77 will provide guidance for applicants procuring facility engineering services for EDAP projects.

In 1999, the legislature added requirements to §15.407 of the Water Code for the board to adopt rules governing the procurement process for facility engineering services and for the executive administrator to review and approve the selection process used by an EDAP applicant to procure such services. The amendments are intended to address problem areas that have been identified in processing applications for EDAP assistance.

The amendments to §355.72 make it clear that certain fiscal information, including recent audits, rates and charges, and capital improvement plans, must be submitted, reviewed and evaluated by staff before the board will consider an application for facility engineering financial assistance under EDAP. The requirement for an executed contract for facility engineering services is reflective of the statutory amendments and recognizes the importance of these services to the quality of facility planning projects. Current rules require that an applicant must hold a Certificate of Convenience and Necessity (CCN) or have an application on file with TNRCC to obtain one for service to the proposed project area. The amendment to §355.72 would require that applicant to obtain any necessary CCN before consideration of an application by the board; however, an alternative is included that would allow the applicant to submit an executed interlocal agreement with the holder of the applicable CCN as evidence of the applicant's authority to provide services to the project area.

New §355.77 is intended to fulfill the legislative directive in SB 1421 for the board to adopt rules concerning the procurement of facility engineering services by recipients of EDAP funding. The new provisions are supplemental to the basic provisions of the Professional Services Procurement Act (Chapter 2254, TEX. GOV. CODE) and make it clear that the service provider must be selected pursuant to written procedures that assure that the selection process is open to all qualified providers and that each step of the selection process is documented. Also provided are basic requirements of: (i) an acceptable statement of qualifications (SOQ); (ii) recommended procedures for solicitation of SOQs, including publication and response schedules and minimum contents of a Request for Qualifications; (iii) criteria for evaluation of SOQs based on factors indicative of qualifications and experience; (iv) procedures for review of SOQs, including suggested makeup of an evaluation committee, a ranking process, and an interview procedure; and (v) contract negotiation process. The suggested procurement guidelines are formulated to ensure that the selection of a provider of facility engineering services has documentation which the Executive Administrator can review to verify that a qualified provider has been selected who can deliver needed engineering services at a reasonable cost within the constraints of the particular project.

The requirement for an applicant to submit an executed contract for facility engineering services that have been procured in compliance with state law and the procedural requirements set out in

the new §355.77 with the application may be of particular significance. This and the other information to be required by the proposed amendment will allow staff to make a preliminary evaluation of the state of the applicant's fiscal affairs and of its potential capacity to manage and complete the proposed project. These amendments may also alleviate the need for conditional commitments, which can tie up funds that may never be accessed because the applicant cannot provide basic information necessary to evaluate an application, such as the recent audits.

No comments were received on the proposed amendments and new section.

The amendments and new section are adopted under the authority of the Texas Water Code, §6.101.

§355.77. Procurement of Facility Planning Services.

(a) Professional engineering services necessary for preparing a facility plan for economically distressed areas shall be procured according to the Texas Government Code, Chapter 2254 (Professional Services Procurement Act), other applicable state and local laws, and the requirements of this section. The objective of this section is to establish basic parameters from which it can be determined that applicants receiving facility planning funds obtain the necessary professional engineering services through a process that is open to all interested qualified providers. Written procedures and documentation are recommended in order to insure receipt of services of qualified professionals at a responsible cost within the reasonable constraints of location and time for performance.

(b) Applicants shall procure the services of a consultant to perform the facility planning services pursuant to written procedures adopted by the applicant. The applicant shall maintain documentation of compliance with each step. The procedures and documentation submitted in the selection of the consultant will generally comply with the following requirements:

(1) contents of an acceptable statement of qualifications (SOQ);

(2) criteria for evaluating SOQs;

(3) solicitation of SOQs;

(4) review of SOQs according to criteria; and

(5) negotiation of a consulting services contract.

(c) The procedures and documentation establishing the applicant's compliance with the procedures shall be reviewed and approved by the executive administrator prior to consideration by the board of an application for financial assistance for such services; provided however, the executive administrator may approve variations from the requirements of this subsection based on a written finding that the applicant has substantially met the objectives of this section. The executive administrator shall review the procedures and documentation to ascertain compliance with these requirements.

(1) The applicant shall establish the contents of the statement of qualifications, or SOQ, for persons seeking to provide the facility planning services which will be reviewed by the applicant. The SOQ shall include at a minimum:

(A) the key personnel (including subconsultants or subcontracted personnel) who will be performing tasks within the scope of services identifying such personnel by name, professional license or registration number, areas of expertise, years of experience in that area, and the elements of the scope of services for which each such personnel will be responsible and describe specific project experience that would demonstrate expertise for that element;

(B) references establishing experience with government projects, facility planning phase engineering, demographic research, and residential surveys identified by specific project identification, location, project reference contact person and telephone number, and dates of engagement and completion of assignment;

(C) insurance coverage held by the respondent relative to the project identifying the carrier by name, address, telephone number, and type and extent of coverage;

(D) a signed and notarized statement that the respondent has no interest in the project that would conflict with the performance of the responsibilities of an engineer; and

(E) a list of any litigation, arbitration, administrative action related to past or current project performance, or the subject of any professional censure or licensure suspension involving any identified key personnel, and if so, a brief description of each and including a brief explanation if the respondent has ever been terminated from an assignment for nonperformance or unsatisfactory work.

(2) Criteria for evaluating the SOQ will include:

(A) educational and experiential background of key consultant personnel who will perform work on the project;

(B) record of success by the consultant and its key personnel, demonstrated by similar work previously performed;

(C) adequacy of staff and equipment to perform the work within the time needed;

(D) demonstrated ability of consultant to work effectively with other parties and public agencies related to the project;

(E) demonstrated continuing interest by the consultant in the success, efficiency, and effective performance of facilities and plans on which the consultant has previously worked;

(F) record of timely completion of previous projects; and

(G) demonstrated capacity to carry out the kind and extent of work required.

(3) The applicant shall insure a sufficient number of qualified respondents by publicizing a request for qualifications, or RFQ, once at least 21 days and once at least seven days before selection of a consultant, in a local newspaper within the geographical area in which the work will be performed and in a newspaper of the nearest major municipality. The RFQ shall contain at a minimum:

(A) a general description of the project planning area and the facility planning services sought specifically including a reference to the work required pursuant to §355.73 of this title;

(B) a statement that documentation of the minimum requirements for consideration which are to be submitted in the SOQ shall be available upon request;

(C) a statement that criteria for evaluating the qualifications is available from the applicant;

(D) a deadline by which respondents must submit SOQs to the requesting applicant; and

(E) the requesting applicant's contact person.

(4) The applicant shall select the most qualified respondent by order of highest qualification based on the published criteria.

(A) Evaluation of the SOQs shall be performed by at least three persons: at least one resident within the applicant's customer base who will be affected by the proposed project, at least one

with a technical expertise in the field for which the services are sought, and at least one from the management of the applicant. Each member of the ranking team will independently rank each SOQ based on the published criteria. The scores assigned to each SOQ will be accumulated to achieve a single ranking for each SOQ.

(B) Based on the rankings, the applicant shall identify the three consultants with the highest rankings, or short list.

(C) Upon completion of ranking and preparation of the short list, if the applicant deems it necessary to interview firms in order to determine the most qualified respondent, the applicant shall issue an invitation to appear for an interview to each respondent on the approved short list.

(D) Upon the issuance of invitations to appear, the applicant shall form an interview panel to interview each respondent on the short list for the purpose of ascertaining qualifications of each interviewee and ultimately selecting the most qualified respondent. At the conclusion of the interviews or upon completion of the short list if interviews are deemed unnecessary by the applicant, the applicant shall identify the most qualified respondent, the second most qualified, and the third most qualified.

(5) In order to complete the procurement process, the applicant shall negotiate the terms of a consulting services contract, including a task budget, with the consultant receiving the highest ranking. The contract shall be acceptable in form and substance to the executive administrator. In the event that the applicant cannot conclude an acceptable contract with the highest ranked consultant, the applicant shall negotiate the terms of a consulting services contract, including a task budget, with the consultant receiving the second highest ranking. In the event that the applicant cannot conclude an acceptable contract with the second highest ranked consultant, the applicant shall negotiate the terms of a consulting services contract, including a task budget, with the consultant receiving the third highest ranking. If the applicant cannot conclude an acceptable contract with the third highest ranked consultant, the applicant shall be required to commence the process over from the start.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board (the board) adopts amendments to 31 TAC §§375.2, 375.15, 375.17, and 375.221 concerning the funding program for the Clean Water State Revolving Fund (CWSRF) without changes to the proposed text as published in the September 1, 2000, issue of the *Texas Register* (25 TexReg 8602) and will not be republished. The amendments are adopted to update the rules, expand the scope of definitions, and clarify administrative procedures.

Section 375.2, relating to Definitions of Terms, is amended to add nonpoint source or estuary management to the types of projects eligible for funding. Previously, the board has focused on those activities that met the Clean Water Act (Act), section 212 definition of "treatment works". The board now intends to broaden that focus to address the funding of all nonpoint source and estuary management activities, as authorized in sections 601, 319 and 320 of the Act. Therefore, the broader meaning of "project" is adopted to include sections 319 and 320 projects, and the broader term "project" is substituted for the term "treatment works" throughout the definition section.

The section is further amended to expand the definition of "building" to include the implementation of a project. The current definition fits the erection, acquisition, alteration, remodeling, improvement or extension of a treatment works facility, but the additional word "implementation" is a better description of activities funded as nonpoint source or estuary management projects. Additionally, the definition of "construction" is adopted for amendment to eliminate the redundant listing of activities already included in the definition of "building". Finally, the definition of "estuary management project" is amended to allow funding of the development of an estuary management plan, as authorized in section 601 of the Act.

Section 375.15, relating to Criteria and Methods for Distribution of Funds, is amended for consistency, to include the two new types of projects (nonpoint source or estuary management) into the eight categories of funding. The section is also amended to extend a commitment deadline in limited circumstances where an applicant has timely submitted an application, as defined in the chapter rules, but additional information is deemed to be necessary for consideration of a proposed project. The change will allow the Executive Administrator to request additional information from an applicant without causing the applicant to lose its place on the funding list.

Section 375.17, relating to Intended Use Plan, is amended to describe acceptable changes that may be made to a project after it has been listed on an adopted Intended Use Plan. These changes include the applicant, itself; the number of participants in a consolidated project; and the solution to an identified water supply problem. The amendments allow the board to focus on providing funding for solutions to the water supply needs of a particular area, rather than focusing on a particular applicant or project.

Section 375.221, relating to Pre-Design Funding Option, is amended to delete the requirement that loans made under this option must be closed within six months of the board commitment. The purpose of the six-month time limitation was to encourage timely closing so as to move the federal dollars into immediate projects. Experience has shown that six months is too short a time and that many of the commitments must return to the board for time extensions. The remainder of the subsections are renumbered accordingly.

There were no comments received on the proposed amendments.

SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §375.2

The amendments are adopted under the authority of the Texas Water Code §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State including specifically the SRF program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Suzanne Schwartz
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Texas Water Development Board
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For further information, please call: (512) 463-7981

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DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §375.15, §375.17

The amendments are adopted under the authority of the Texas Water Code §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State including specifically the SRF program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. PROVISIONS PERTAINING TO USE OF CAPITALIZATION GRANT FUNDS
DIVISION 3. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §375.221

The amendments are adopted under the authority of the Texas Water Code §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State including specifically the SRF program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007324
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: November 7, 2000
Proposal publication date: September 1, 2000
For further information, please call: (512) 463-7981

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PART 20. EDWARDS AQUIFER AUTHORITY

CHAPTER 701. GENERAL PROVISIONS

31 TAC §§701.1, 701.3, 701.5

I. INTRODUCTION.

The Edwards Aquifer Authority ("Authority") adopts new 31 TAC §§701.1, 701.3, and 701.5, consisting of general provisions relating to the Authority's rules, without changes to the proposed text as published in the August 11, 2000 issue of the *Texas Register* (25 TexReg 7493). The sections will not be republished.

These rules have been written to provide general information regarding the purpose and construction of all rules adopted by the Authority, as well as to provide the business office and mailing address of the Authority.

II. SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES; AND CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The Authority is required by the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634) ("Act"), to implement Edwards Aquifer management programs relating to, among other things, fees, exempt wells, interim authorization, permitted wells, permit conditions, groundwater available for permitting, proportional adjustment, equal percentage reduction, abandonment and cancellation of permits, aquifer recharge, storage and recovery, additional groundwater supplies available for permitting, transfers, meters and alternative measuring methods, groundwater trust, water quality, and comprehensive water management plan implementation.

A primary manner in which these various groundwater management programs will be implemented by the Authority will be through the adoption of rules for each program. Rulemaking has become essential for the operation of agencies charged by the legislative branch with programmatic implementation responsibilities. Thus while the Authority's activities are derived from express and implied powers set forth in the Act, the implementation of these powers is accomplished largely through rulemaking. In order to ensure uniform and consistent application of rules adopted by the Authority, it is essential that

basic parameters be established. This is accomplished by the adoption of §§701.1, 701.3, and 701.5.

Section 701.1 states the general purpose of the Authority's rules. This section provides that the purpose of the Authority's rules is to implement the Act and other laws applicable to the Authority and to set forth the administrative procedures to be followed in Authority proceedings.

Section 701.3 relates to the construction of the Authority's rules. This section provides that unless otherwise expressly provided, the past, present, and future tense shall each include the other; the masculine, feminine and neutral gender shall each include the other; and the singular and plural number shall each include the other.

Section 701.5 states the business office and mailing address of the Authority.

III. REGULATORY IMPACT ANALYSIS OF MAJOR ENVIRONMENTAL RULES.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the rules are "major environmental rules" as that term is defined by §2001.0225(g)(3) of the Texas Government Code. The basis for this determination is that the rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The rules set forth general provisions that will apply to all the rules issued by the Authority. They are informational in nature and have been written to provide basic parameters for all the rules of the Authority. The specific intent of these rules is to provide a basic understanding of the purpose and construction of the rules of the Authority. For this reason, the Authority finds that none of the rules are "major environmental rules" and that, therefore, no further analysis is required by §2001.0225 of the Texas Government Code.

IV. TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," ("TPRPRA") requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of these rules. First, the Authority has made a "categorical determination" that rules that provide general information only do not affect private real property. These rules provide general information only. They simply state the purpose of the rules of the Authority, some general rules regarding construction of Authority rules, and provide the business office and mailing address of the Authority. They have no direct affect on private real property and may not result in a taking. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from TPRPRA under §2007.003(b)(4) of the Texas Government Code. See Act §§1.08(a), 1.11(a), 1.11(h); TEXAS GOVERNMENT CODE ANNOTATED, §2001.004(1) (Vernon 2000). It was held, in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375 (Tex. App.--San Antonio 2000, pet. filed), that the Act expressly mandates the adoption of substantive and procedural rules and that such actions are therefore excepted from the TPRPRA. The holding in that case controls here. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the TPRPRA under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the adoption of these rules.

V. SUMMARY OF PUBLIC COMMENTS.

Five public hearings were held on this and other rules proposed by the Authority on: Wednesday, August 9, 2000 at 6:00 p.m. at the Conference Center of the Edwards Aquifer Authority, 1615 N. St. Mary's Street, San Antonio, Texas; Tuesday, August 15, 2000 at 6:00 p.m. at the New Braunfels Civic Center, 380 S. Seguin Avenue, New Braunfels, Texas; August 17, 2000 at 6:00 p.m. at St. Paul's Lutheran Church, 1303 Avenue M, Hondo, Texas; Tuesday, August 22, 2000 at 6:00 p.m. at the Sgt. Willie De Leon Civic Center, 300 E. Main Street in Uvalde, Texas; and Thursday August 24, 2000 at the San Marcos Activities Center, 501 E. Hopkins, San Marcos, Texas. At those hearings, no public comments were received on proposed §§701.1, 701.3, or 701.5. Further, no written comments were submitted to the Authority on proposed §§701.1, 701.3, or 701.5.

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The new sections are adopted pursuant to §§1.08(a), 1.11(a) and (h) of Act; and TEXAS GOVERNMENT CODE, §§2001.004(1) (Vernon 2000) of the Administrative Procedure Act ("APA"). The Authority interprets these sections as requiring the Authority to adopt rules providing a basic understanding of the purpose and construction of all the rules adopted by the Authority, as well as to provide the public with the Authority's business office and mailing address to promote effective communication between the regulated community and the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. The Authority interprets this provision as authorizing the establishment of general provisions applicable to all rules adopted by the Authority.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, including, in particular, administrative procedures to be used before the Board and the Authority. The Authority interprets this section as requiring the adoption of general provisions applicable to all rules adopted by the Authority.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. Pursuant to this section, the Authority is required to comply with the APA in connection with its rulemaking, even though the Authority is not a state agency and would therefore otherwise not generally be subject to APA

requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." The Authority interprets establishing general provisions applicable to all rules adopted by the Authority as falling within this requirement.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007340
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Effective date: November 7, 2000
Proposal publication date: August 11, 2000
For further information, please call: (210) 222-2204

CHAPTER 702. GENERAL DEFINITIONS

31 TAC §702.1

I. INTRODUCTION.

The Edwards Aquifer Authority ("Authority") adopts new 31 TAC, §702.1, relating to definitions generally applicable to the rules of the Authority, with changes to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7495-7500).

The Authority adopts the rule for the purpose of satisfying its statutory obligation to adopt rules necessary to carry out the Authority's power and duties under the Edwards Aquifer Authority Act. See Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act").

II. SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES.

The Authority is required by the Act to implement Edwards Aquifer management programs relating to, among other things, fees, exempt wells, interim authorization, permitted wells, permit conditions, groundwater available for permitting, proportional adjustment, equal percentage reduction, abandonment and cancellation of permits, aquifer recharge, storage and recovery, additional groundwater supplies available for permitting, transfers, meters and alternative measuring methods, groundwater trust, water quality, and comprehensive water management plan implementation. Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer. This duty to adopt rules necessarily includes rules related to the definitions that apply for any of the Authority programs. This duty under §1.11(a) to adopt procedural and substantive rules for its programs is incorporated into the discussion below of each definition.

A primary manner in which these various groundwater management programs will be implemented by the Authority is through the adoption of rules for each program. Rulemaking has become essential for the operation of agencies charged by the legislative branch with programmatic implementation responsibilities. Thus while the Authority's activities are derived from express and implied powers set forth in the Act, the implementation of these powers is accomplished largely through rulemaking.

In addition to the practicality of program implementation through rulemaking, there are legal requirements set forth in the Act that governs the program development of the Authority. These legal requirements are pre-existing legal "facts" that bind the Authority because it is a creature of the Act. In addition, there may be other facts that operate to provide contours as to the development of the general definitions that the Authority may choose to adopt. Both types of facts, legal and otherwise, may exist to provide a factual basis for the rule as adopted. The factual basis for the general definitions in §702.1 and the rational connection between the factual basis for the rule and the rule as adopted is discussed below.

The factual basis for the definitions of aquifer, augmentation, authority, beneficial use, board, commission, conservation, diversion, domestic or livestock use, industrial use, irrigation use, livestock, municipal use, order, person, pollution, recharge, reuse, water supply facility, well, well J-17, well J-27, and withdrawal are grounded in legal facts. All of these terms are already defined in §1.03 or §1.11(f) of the Act. These definitions in this final rule are taken directly from, and conform with these sections of the Act. There is a rational connection between the legal factual basis of the pre-existence of these definitions in §1.03 and §1.11(f) of the Act and the final rule as adopted because the rule merely incorporates the statutory definitions into the regulatory definitions in §702.1.

The factual basis for the definitions of "groundwater" and "underground water" are grounded in legal facts. In §1.03(20), the term "underground water" is assigned the meaning that this term has in §52.001,TEXAS WATER CODE. Since the passage of the Act, chapter 52, TEXAS WATER CODE, has been repealed and recodified as chapter 36, TEXAS WATER CODE. See Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 933, sec. 2, 6, 1995 Texas General Laws 4673. In so doing, the legislature abandoned the use of the term "underground water" in favor of the more modern term "groundwater" found at §36.001(5), TEXAS WATER CODE, and is defined as "water percolating below the surface of the earth." Under §1.08(a) of the Act, chapter 36, TEXAS WATER CODE (which replaced chapter 52) is now applicable to the Authority to the extent that it does not conflict with the Act. The Act provides no other guidance relative to the definition of groundwater or underground water. Accordingly, the Authority can identify no conflict within the Act that would prevent adopting the statutory definition of groundwater found in chapter 36, TEXAS WATER CODE. Thus, in correlating and updating the definition of underground water in the Act, which is cross-referenced to a part of the TEXAS WATER CODE that was subsequently repealed and recodified, a rational connection is established between the legal factual basis and the final rule as adopted.

The factual basis for the definition for "general manager" is that §1.11(d)(5) of the Act provides that the Board may hire an "executive director" to manage the Authority. Groundwater conservation districts normally call their chief executive officer a "general manager." Likewise, the Authority would prefer to call its chief executive officer a general manager. The functions and duties of the general manager would be no different than those envisioned, by the Act, to be performed by the executive director. The actual title that the Authority may adopt for its chief executive officer does not confer particular substantive duties or obligations separate and distinct from any other title that may be adopted. Thus, there is a rational connection between the legal factual basis for the hiring of an executive director in §1.11(d)(5) of the Act and the conventions of groundwater conservation districts and the adoption of a definition for "general manager."

The factual basis for the definition of "Act" is that the Act does not include a section setting out the official name for the Act. The Texas Supreme Court has referred to the Act as the "Edwards Aquifer Act." *See Barshop v. Medina County Under. Wat. Cons. Dist.*, 925 S.W. 2d 618, 623 (Texas 1996); *see also Edwards Aquifer Authority v. Bragg,* 21 S.W. 3d 375, 377 (Texas App. - San Antonio 2000 pet. filed). In the rules of the Authority, and in other documents in which it is appropriate to cite to sections of the Act leading to authority for a proposition, it will be necessary to specifically cite to the Act. In light of the Act's creation of an official name for the Act, it is useful to adopt the short-form definition, namely "Act", to mean the "Edwards Aquifer Authority Act." In so doing, the need to continually refer to a form of the name that is long and cumbersome will be eliminated and clarify that the Edwards Aquifer Act also creates the Edwards Aquifer Authority. This substitution provides a rational connection between the facts and the definition of "Act" because the definition accurately provides a short form for "Edwards Aquifer Authority Act" and the definition specifically references the longer-form of the name of the Act that has been cited by appellate courts in the state, numerous legal pleadings, and other documents citing to the Act.

The factual basis for the definition of "APA" is grounded in legal facts. Section 1.ll(h) of the Act provides that the Authority is, among other things, "subject to . . . the Administrative Procedure and Texas Register Act, (Article 6252-13a, Vernon's Texas Civil Statutes)." This article was generally referred to as "TAPTRA." Since the passage the Act, TAPTRA, has been repealed and recodified as chapter 2001, TEXAS GOVERNMENT CODE . See Act of May 22, 1993, 73rd Legislature, Regular Session, Chapter 268, § 1, 1993 Texas General Laws 583. The official title of chapter 2001 is the "Administrative Procedures Act." TEXAS GOVERNMENT CODE ANNOTATED, §2001.002 (Vernon 2000). The Administrative Procedures Act is uniformly referred to as the "APA." It is not likely that the legislature intended for the Authority to continue to be "subject to" a law that has been repealed. Instead, the more reasonable interpretation is that the Authority is subject to TAPTRA as it may be amended, repealed, or, in this case, recodified. Thus, in correlating and updating the outdated reference to TAPTRA with the APA, in the definitions in §702.1, a rational connection is established between the legal factual basis and the final rule as adopted.

The factual basis for the definitions of "applicant" and "application" are derived initially from the legal facts derived from the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first obtaining a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.15(c) envisions the Authority's issuance of regular, term, and emergency permits for the withdrawal of groundwater from the aquifer. Section 1.16(a) envisions that an existing user may "apply" for an initial regular permit. The permitting process, possibly culminating in the issuance of a permit (or other approval) by an administrative agency, is normally commenced by the filing of an "application." An application essentially requests that the Authority issue a permit authorizing an activity sought to be conducted. The application must demonstrate facts justifying the issuance of the permit. The person or entity filing an application is generally referred to as an "applicant." The term "applicant" appears in §1.16(b) the Act. The term "application" is mentioned in §§1.16(b), 1.17(d)(1), 1.18(b) and 1.29(f) of the Act. The concepts of "applicant" and "application" are often considered part of the terminology used by an agency in its procedural rules related to its permit program. The Act does not provide definitions for the terms "applicant" and "applications." Because these terms are likely to be regularly used by the Authority in referring to its rules, the general facilitation of its procedures, in relation to its permit program, and by the regulated community interacting with the Authority as applicants, as well, the Authority has determined that definitions of these terms is useful. There is a rational connection between this factual basis and the definitions of "applicant" and "application" in §702.1 because these definitions refer to an "applicant" as one who filed an application, and an "application" as the document that is required to be filed with the Authority in order to commence the processes of obtaining a permit or other approval.

The Authority requires physical facilities for the purpose of conducting its activities. Persons or entities interested in the affairs of the Authority will need to know the location of the Authority in order properly transact business with the Authority. Thus, it is necessary for the Authority to identify to the public where the official Authority offices are and, when the Authority refers to "its offices", where it is referring to. The Act does not provide a definition for the term "Authority offices." Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to the Authority's programs, as well as by the regulated community that will interact with the Authority, the Authority has determined that it is useful to define this term. There is a rational connection between this factual basis and the definition of "Authority offices" in §702.1 because this definition cross-references the rule in §701.5 of this title (relating to Business Office and Mailing Address of the Authority) which provides the physical as well as the mailing address of the Authority.

The factual basis for the definitions of "declarant," "declaration of historical use" (or "declaration") is derived initially from the legal facts contained in the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.15(c) envisions that the Authority may issue regular, term and emergency permits for the withdrawal of groundwater from the aquifer. Section 1.16(a) envisions that an existing user may "apply" for an initial regular permit by filing a "declaration of historical use." Under §1.16(a), a declaration is essentially an application for an initial regular permit requesting that the Authority issue an initial regular permit for the withdrawal of groundwater

from the aquifer, and the facts during the historical period justifying the issuance of the permit. A person or entity filing a declaration is generally referred to as a "declarant." The term "declarant" does not appear in the Act. The term "declaration of historical use" (and therefore "declaration") is mentioned in §§1.16(a), (b), (c), (d)(1), §1.17(a)(2), (b), and (d)(2) of the Act. The concepts of "declarants" and "declarations of historical use" (or "declarations") are often considered to be part of the terminology used by water resource management agencies in water rights proceedings similar to a water rights adjudication and in the procedural rules related to such a proceeding. The Act does not provide definitions for the terms "declarant", "declaration of historical use" (or "declaration"). Because these terms are likely regularly used by the Authority in its rules, and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that interacts with the Authority as a declarant(s), the Authority has determined that it is useful to define these terms. There is a rational connection between this factual basis and the definitions of "declarant" and "declaration of historical use" (or "declaration") in §702.1 because these definitions refer to a "declarant" as an existing user who filed a declaration, and a "declaration of historical use" (or "declaration") as the document that is required to be filed with the Authority in order to apply for an initial regular permit under §1.16(a) of the Act.

The factual basis for the definitions of "permit" and "permittee" are derived initially from the legal facts derived from the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.15(c) envisions that the Authority may issue regular, term, and emergency permits for the withdrawal of groundwater from the aquifer. Section 1.16(a) envisions that an existing user may apply for an initial regular permit. The permitting process culminates in the granting (or denial) of an application. If an application is granted, then a "permit" is issued by the appropriate administrative agency. The permit essentially authorizes a regulated activity to proceed pursuant to conditions. The person or entity owning or holding a permit is generally referred to as a "permittee." The term "permittee" does not appear in the Act. The term "permit" is mentioned in §§1.11, 1.14, 1.15, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.22, 1.23, 1.24, 1.26, 1.29, 1.30, 1.32, 1.34, 1.35, 1.36, 1.40, and 1.44. The term "permit" is primarily used in the context of a groundwater water permit, i.e. a permit that authorizes withdrawal of groundwater from the aquifer. The concepts of "permit" and "permittee" are often considered part of the terminology used by water resource management agencies in water rights proceedings, similar to water rights adjudication, and in procedural rules related to such proceedings. The Act does not provide definitions for the terms "permittee" or "permit." Because these terms are likely to be regularly used by the Authority, in its rules and in the general conducting of its procedures as they relate to its permit program, and by the regulated community that interacts with the Authority as a permittee, the Authority has determined that it is useful to define these terms. There is a rational connection between this factual basis and the definitions of "permittee" and "permit" in §702.1 because these definitions refer to a "permittee" as one to whom a permit has been issued, and a "permit" as the document issued by the Authority as a result of the granting of an application.

The factual basis for the definitions of "registrant" and "registration" is derived initially from the legal facts contained in the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority, for exempt wells and interim authorization withdrawals. Section 1.33(b) envisions that the owner of an exempt well will "register" the well with the Authority. A "registration" is essentially an application for the owner of a well to obtain exempt well status. The registration provides the request to the Authority to recognize the well's exempt status, and the facts supporting the recognition. No permit is issued to the owner of an exempt well. A person or entity filing a registration is generally referred to as a "registrant." The term "registrant" does not appear in the Act, The term "registration" appears in §1.29(g) of the Act. Also, the term "register" is mentioned in §1.33(b) of the Act. The concepts of "registrants" and "registrations" are often considered to be part of the terminology used by water resource management agencies in managing exempt wells and in the procedural rules related to such a proceeding. The Act does not provide definitions for the terms "registrant" or "registration." Because these terms are likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as a registrant, the Authority has determined that it is useful to define these terms. There is a rational connection between this factual basis and the definitions of "registrant" and "registration" in §702.1 because these definitions refer to a "registrant" as one who files a registration, and a "registration" as the document required to be filed with the Authority in order to qualify for exempt well status, or other registrations that may be required by other permit program rules of the Authority.

The Authority requires staff to manage its permitting and rulemaking files. Persons or entities interested in the affairs of the Authority will need to know the administrative point of contact for the filing of documents with the Authority in order to properly transact business with the Authority. Thus, it is necessary for the Authority to identify to the public the official to whom documents should be directed and filed relative to pending permitting or rulemaking matters. The Authority would like to designate that point of contact as its "docket clerk." The term "docket clerk" does not appear in the Act. Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures, as they relate to the Authority's permitting and rulemaking, as well as by the regulated community that will interact with the Authority, the Authority has determined that it is useful to define this term. There is a rational connection between this factual basis and the definition of "docket clerk" in §702.1 because this definition identifies that the docket clerk is the person designated by the general manager as such.

The Board of Directors of the Authority and the Authority staff require legal counsel relative to the matters of the Authority. Persons or entities interested in the affairs of the Authority may require identification of the Authority's legal counsel in order to properly transact business with the Authority. Thus, it is necessary for the Authority to identify to the public the legal counsel relative to matters pending before the Authority. The Authority would like to designate the legal counsel to the Board, and the staff, as its "general counsel." The term "general counsel" does not appear in the Act. Because this term is likely to be used, on a regular basis, by the Authority in its rules, the general conducting of its procedures as they relate to the Authority's permitting and rulemaking, and by the regulated community that will interact with the Authority, the Authority has determined that it is useful

to define this term. There is a rational connection between this factual basis and the definition of "general counsel" in §702.1 because this definition identifies the general counsel as the attorney engaged as such by the Board.

The factual basis for the definitions of "judge", "party", "petitioner", "pleadings", "protestant", and "SOAH " are derived initially from the fact that the Authority is "subject to" the APA due to the operation of §1.11(h) of the Act. Section 2001.004(1), TEXAS GOVERNMENT CODE, also provides that the Authority is required to adopt rules of practice stating the nature and requirement of all available formal and informal procedures. This would necessarily include definitions relevant to the rules of practice or procedural rules. The permitting procedures relative to certain permit applications may result in contested case hearings. Contested cases are governed by subchapter C of the APA. Contested case hearings are trial-type proceedings that resemble trials. Judges, parties, petitioners, pleadings, protestants, and SOAH are all persons, documents, or entities that are often part of the terminology used by administrative agencies that have matters before them that may result in a contested case hearing. The Act does not provide definitions for these terms. Because these terms are likely to be regularly used by the Authority in its rules and in the general conducting of its contested case proceedings as they relate to its permit program, as well as by the regulated community that will interact with the Authority as applicants, the Authority has determined that it is useful to define these terms. The term "judge" is derived from §2003.001(1), TEXAS GOVERNMENT CODE. The basis for the definition of "party" is §2001.003(4), TEXAS GOVERNMENT CODE. The basis for the definition of "pleadings" is 31 TAC § 155.5 (6). The basis for the definition of "SOAH" is §2003.001(1), TEXAS GOVERNMENT CODE. The definitions of "petitioners" and "protestants" are based on generally accepted notions and understandings of the terms. There is a rational connection between this factual basis and these definitions in §702.1 because they are derived from and closely track the statutory or regulatory definitions found in other provisions that are similar to and relevant to the conduct of the contested case hearings that may result from the Authority's permit application processing or are derived from generally accepted understandings of the terms.

Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.14(d) of the Act provides the grounds for and the procedure by which the Authority may increase the quantity of groundwater available for permitting and modify the effect of §1.14(b) and (c) of the Act which creates maximum quantities of groundwater that may be permitted for certain periods of time. Among the groundwater strategies available to "raise the cap" is supplemental recharge. Also, §1.11(f) of the Act empowers the Authority to contract with a person who uses water from the aquifer to construct, operate, own, finance, and maintain water supply facilities. That section defines the term "water supply facility" as including, among other things, a recharge project. Section 1.44 of the Act provides the terms and conditions under which a political subdivision of the state may enter into an interlocal contract with the Authority for an aquifer recharge project. Section 1.45 of the Act authorizes the Authority to build or operate recharge dams and provides certain terms and conditions for the operation of such facilities as well as eligible source water for the recharge project. These sections of the Act, among others, create the legal facts that recognize the authority of the Authority over recharge projects associated with the aquifer. Recharge projects have three basic components: (1) recharge; (2) storage; and (3) recovery. Recharge to the aquifer results in increasing the supply of groundwater within the aquifer. The purpose of the recharge is to store the water in the aquifer for a period of time such that the recharged water may be recovered from a point of withdrawal at a later time when needed. In order to recharge to and store water in the aquifer, the Authority would be required to issue a permit for this purpose. The Authority proposes to call this permit an "aquifer recharge and storage permit." In order to withdraw the water that has already been recharged and stored in the aquifer the Authority would be required to issue a permit for this purpose. The Authority proposes to call this permit a "recharge recovery permit." The Act does not provide definitions for these terms. Because these terms are likely to be regularly used by the Authority in its rules and in the general conducting of permit program related to recharge project, as well as by the regulated community that will interact with the Authority as applicants for these projects, the Authority has determined that it is useful to define these terms. There is a rational connection between this factual basis and the definitions of "aquifer recharge and storage permit" and "recharge recovery permit" in §702.1 because these definitions identify the name of the permit that would authorize the recharge of the aquifer, and the withdrawal of the recharged water from the aquifer.

Section 1.16(a) of the Act authorizes only an "existing user" to file declarations of historical use (also known as applications for initial regular permit) for withdrawals of groundwater placed to beneficial use during the historical period (June 1, 1972 through May 31, 1993). In order to qualify as an existing user, the existing user would had to have owned a well from which withdrawals from the aquifer were made and placed to beneficial use during the historical period. See e.g. §§ 1.16(a); and 1.17(a) and (d)(2). This necessarily means that the well owned by the existing user would had to have been installed and made withdrawals no later than May 31, 1993. The Authority proposes to refer to these wells as "existing wells." Section 1.14(e) of the Act also provides for a prohibition on withdrawals of groundwater from the Edwards Aquifer ("Aquifer") from wells drilled after June 1, 1993. The purpose of preventing withdrawals from post-June 1, 1993 wells is to prevent an uncontrolled ever increasing demand on the aquifer at the expense of the historical users of the aquifer. *See Barshop,* 925 S. W. 2d at 632. The Authority proposes to refer to the post-June 1, 1993 wells as "new wells." The term "existing well" then functions in harmony with the term "existing user" that is defined in §1.03(10) of the Act. The term "new well" would function with the term "new user." Existing users are made eligible by the Act to receive an initial regular permit, while new users are not so eligible. Thus, existing wells are eligible for an initial regular permit, while new wells are not. The Act does not provide definitions for "existing well" or "new well." Because the Act creates the concept of "existing user," "historical use," and a date for the establishment of a prohibition against the withdrawal of groundwater from certain wells, it is necessary to give meaning and definition to "existing well" and "new well." These terms are also likely to be regularly used by the Authority in its rules and in the general conducting of its permit program, as well as by the regulated community that will interact with the Authority. There is a rational connection between this factual basis and the definitions of "existing well" and "new well" in §702.1 because the definition of "existing well" is linked to the concept of "existing user" and "historical period" and "new well" is linked to the concept of post-June 1, 1993 wells which are ineligible to receive an initial regular permit.

Section 1.14(f) of the Act authorizes the Authority to allow "uninterruptible" withdrawals from the Aquifer when certain index wells for the "San Antonio pool" and the "Uvalde pool" are at certain levels. Section 1.19(b) of the Act provides for the minimum index well level for the San Antonio Pool below which term permit withdrawals are automatically "interrupted." Section 1.19(c) of the Act provides for the minimum index well level for the Uvalde pool below which term permit withdrawals are automatically "interrupted." The Act does not provide definitions for the terms "San Antonio pool," "Uvalde pool," or "interruptible." Because these terms are likely to be regularly used by the Authority in its rules and in the implementation of the Authority's aquifer management programs, as well as by the regulated community that will interact with the Authority, the Authority has determined that it is useful to define these terms. The Act has identified that the Authority should manage the aquifer on a two-pool basis for certain purposes (although, the Act does allow for the Authority to create additional pools if warranted. See § 1.14(g)). The Authority interprets the current hydrogeologic data as indicating that within the aquifer, unique hydrological conditions exist in some areas relative to other areas. Examples of these hydrological conditions include varying aquifer transmissivities, storativity, flow paths and water quality conditions. Two areas within the aquifer that may be considered different pools include the "Uvalde pool" and the "San Antonio pool." Hydrographs from monitoring wells in these two areas indicate that aquifer conditions, such as groundwater flow paths and storativity, are such that different pools for these areas exist. Generally, there are not yet enough data points to accurately map the boundary location between the two pools. Moreover, the likelihood that such data will be developed within the time frames required for the Authority to begin implementation of its aquifer management programs, for example, permitting and critical period, as required by the Act, do not permit it to wait for the development of such data. The Authority notes that as the data improves it will be able to refine its definition of these pools accordingly. However, the Authority interprets the current relevant data to suggest that the boundary between the pools is generally near the Uvalde-Medina County line, with the "Uvalde pool" being confined to the part of the aquifer underlying Uvalde County, with the balance of the aquifer underlying the jurisdictional boundaries of the Authority as constituting the "San Antonio pool." As for the term "interruptible", sections 1.14(f) and 1.19 clearly indicate that this term is used to describe the cessation, curtailment, or reduction of a permittee's right to make withdrawals from the aquifer due to aquifer level conditions as measured as certain index wells. There is a rational connection between the factual basis discussed above and the definitions of "Uvalde pool" and "San Antonio pool" in §702.1 because these definitions refer to the "Uvalde pool" as the part of the aquifer under Uvalde County, and the "San Antonio pool" as the portion of the aquifer underlying the Authority's jurisdictional boundaries. There is a rational connection between the factual basis discussed above and the definition of "interruptible" because the definition refers to the conditioning of the right to make withdrawals under a permit based on index well levels.

Section 1.15(a) of the Act provides broad authority to the Authority to manage (1) withdrawals from the Aquifer, and (2) points of withdrawals pursuant to the Act. Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer, or the construction of a well, without first having obtained a permit issued by the Authority. These sections of the Act provide the legal facts that recognize the regulation of certain activity through the issuance of permits that the Authority proposes to call "groundwater withdrawal permits," "well construction permits," and "monitoring well permits." The Act does not provide definitions for these terms. Because these terms are likely to be regularly used by the Authority in its rules and in the general conducting of permit program, as well as by the regulated community that will interact with the Authority as applicants, the Authority has determined that it is useful to define these terms. There is a rational connection between this factual basis and these definitions in §702.1 because these definitions, respectively, provide that "groundwater withdrawal permits" authorize withdrawals of groundwater from the aquifer, "well construction permits" authorize the construction of a well designed for the purpose of making withdrawals from the aquifer, and "monitoring well permits" authorize the measuring of water level or water quality of the aquifer.

The factual basis for the definitions of "initial regular permit" and "historical use" is derived initially from the legal facts contained in the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.15(c) envisions that the Authority may issue, among other things, regular permits for the withdrawal of groundwater from the aquifer. Section 1.16(a) envisions that an existing user may apply for an "initial regular permit" by filing a declaration of historical use. Under §1.16(a), a declaration is essentially an application for an initial regular permit for withdrawals made during the statutorily established historical period. This section provides that the "historical period" is from June 1, 1972 through May 31, 1993. Section 1.16(d) of the Act provides some of the elements that, if proven by convincing evidence, would require the Board to grant an application for an "initial regular permit." Section 1.17(a) of the Act authorizes persons owning wells meeting certain criteria to continue to make withdrawals from the well even though they have yet not been issued an "initial regular permit." These concepts of "initial regular permit" and "historical period" will be part of the terminology used by the Authority in the implementation of its permit program and in the procedural rules associated therewith. The Act does not provide definitions for these terms. Because these terms are likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant, the Authority has determined that it is useful to define these terms. There is a rational connection between this factual basis and the definition of "historical use" because the definition tracks the same dates used in §1.16(a) the Act. There is a rational connection between this factual basis and the definition of "initial regular permit" because the definition refers to this type of permit as a groundwater withdrawal permit authorized pursuant to §1.16 of the Act.

The factual basis for the definition of "additional regular permit" is derived initially from the legal facts contained in the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.15(c) envisions that the Authority may issue, among other things, regular permits for the withdrawal of groundwater from the aquifer. Section 1.18(a) of the Act authorizes the Authority to issue "additional regular permits" if there remains water available for permitting after the

issuance of all initial regular permits. The section also provides that groundwater withdrawals pursuant to "additional regular permits" are subject to maximum permitted groundwater withdrawal amounts set out in sections 1.14(b) and (c) of the Act. Section 1.18(b) of the Act prohibits the Authority from considering or taking action on an application for an "additional regular permit" until the Authority has taken final action on all pending applications for initial regular permits. This concept of an "additional regular permit" will be part of the terminology used by the Authority in the implementation of its permit program and in the procedural rules associated therewith. The Act does not provide a definition for this term. Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant, the Authority has determined that it is useful to define this term. There is a rational connection between this factual basis and the definition of "additional regular permit" because the definition refers to this type of permit as a groundwater withdrawal permit authorized pursuant to §1.18 of the Act.

The factual basis for the definition of "term permit" is derived initially from the legal facts contained in the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.15(c) envisions that the Authority may issue, among other things, term permits for the withdrawal of groundwater from the aquifer. Section 1.19(a) of the Act authorizes the Authority to issue term permits for groundwater withdrawals from the Aquifer for up to 10 years. Section 1.19(b) of the Act provides for the minimum index well level for the San Antonio pool below which term permit withdrawals would be automatically interrupted. Section 1.19(c) of the Act provides for the minimum index well level for the Uvalde pool below which term permit withdrawals would be automatically interrupted. This concept of a "term permit" will be part of the terminology used by the Authority in the implementation of its permit program and in the procedural rules associated therewith. The Act does not provide a definition for this term. Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant, the Authority has determined that it is useful to define this term. There is a rational connection between this factual basis and the definition of "term permit" because the definition refers to this type of permit as a groundwater withdrawal permit authorized pursuant to §1.19 of the Act.

The factual basis for the definition of "emergency permit" is derived initially from the legal facts contained in the Act. Section 1.15(a) authorizes the Authority to "manage all withdrawal points from the aquifer." Section 1.15(b) generally prohibits the withdrawal of groundwater from the aquifer without first having obtained a permit issued by the Authority (subject to exceptions not relevant to this discussion). Section 1.15(c) envisions that the Authority may issue, among other things, emergency permits for the withdrawal of groundwater from the aquifer. Section 1.20(a) of the Act authorizes the Authority to issue emergency permits for groundwater withdrawals from the Aquifer not to exceed 30 days to prevent severe, imminent threats to the public health or safety. This concept of a "emergency permit" will be part of the terminology used by the Authority in the implementation of its permit program and in the procedural rules associated therewith. The Act does not provide a definition for this term. Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant, the Authority has determined that it is useful to define this term. There is a rational connection between this factual basis and the definition of "emergency permit" because the definition refers to this type of permit as a groundwater withdrawal permit authorized pursuant to §1.20 of the Act.

The factual basis for the definition of "aquifer management fee" is derived initially from the legal facts contained in the Act. Section 1.29(b) of the Act directs the Authority to assess an "aquifer management fee" on aquifer use to finance its administrative and programmatic expenses authorized under the Act. Section 1.29(e) of the Act provides that in developing its fees, the Authority may charge different fee rates on a per acre-foot basis for different types of uses as long as they are equitable between types of uses. This section also creates a fee differential between agricultural users and non-agricultural users for "aquifer management fees" whereby the agricultural fee may not exceed 20 percent of the aquifer management fees assessed against non-agricultural users. In addition, this section creates a distinction between agricultural and non-agricultural users when calculating aquifer use under §1.29(b) of the Act by providing that aquifer use for agricultural users is the actual volume of groundwater withdrawn, while for non-agricultural users it is the face value authorized to be withdrawn in an initial regular permit. This concept of an "aquifer management fee" will be part of the terminology used by the Authority in the implementation of its fee program and in the procedural rules associated therewith. The Act does not provide a definition for this term. Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its fee program, as well as by the regulated community that will interact with the Authority, the Authority has determined that it is useful to define this term. There is a rational connection between this factual basis and the definition of "aquifer management fee" because the definition refers to this type of fee as a fee based on aquifer use or taxes in lieu of user fees under certain circumstances as authorized pursuant to §1.29 of the Act.

The factual basis for the definition of "non-exempt well" is derived initially from the legal facts contained in the Act. Section 1.31(a) of the Act provides that owners of "non-exempt wells" are required to install meters on wells, or, if the meter requirement is waived, apply alternative measuring methods to calculate the volume of groundwater withdrawals from the Aquifer. This reference to a "non-exempt well" must necessarily mean that there is something in the Act contemplated to be an "exempt well." In addition, this raises the issue of from what are the wells "exempt." Section 1.33(a) and (c) essentially provides the definition for "exempt well." To qualify for exempt well status a well must (1) produce no more than 25,000 gallons water a day , (2) for domestic or livestock use, (3) not be located within a subdivision requiring platting, and (4) not serve a subdivision requiring platting. Section 1.33(a) provides that the "exemption" extends to the duty to install a meter. Section 1.33(b) of the Act provides that "exempt wells" must be registered with the Authority. Section 1.16(c) of the Act provides that owners of exempt wells are also not required to file declarations of historical use in order to continue to make lawful withdrawals from their exempt wells (i.e. they are exempt from the duty to file a declaration of historical

use). Only wells that file a declaration of historical use are eligible for interim authorization status under §1.17(a)(2) of the Act. A review of §1.31 and §1.33 of the Act lead to the conclusion that the Act contemplates two types of wells within the jurisdiction of the Authority. First, some wells will require a groundwater withdrawal permit (e.g. initial regular permit, additional regular permit, term permit or emergency permit). These wells are referred to in §1.31 as "non-exempt wells." The second type of wells are "exempt wells." Pursuant to sections 1.15(b) and 1.16(c) these wells do not require a permit. The Authority interprets these sections as precluding the issuance of a groundwater withdrawal permit to owners of exempt wells. Instead, §1.33(b) merely requires the owners of exempt wells to register the wells. The Act does not provide for the waiver of exempt well status. These concepts of a "exempt well" and "non-exempt" will be part of the terminology used by the Authority in the implementation of its permit program and in the procedural rules associated therewith. The Act does not provide a definition for these terms. Because these terms are likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority, the Authority has determined that it is useful to define these terms. There is a rational connection between this factual basis and the definition of "exempt well" and "non-exempt well" because the definition of "exempt well" tracks the statutory criteria found in §1.33(a) and (c) of the Act. As for the definition of "non-exempt well" there is a rational connection between this factual basis and this definition because the definition requires that the legal basis for the withdrawals from non-exempt wells be interim authorization status or groundwater withdrawal permit.

The factual basis for the definition of "surface water" is derived initially from the legal facts contained in the Act. Section 1.08(b) of the Act provides that the Authority does not have the authority to regulate "surface water." The Act does not provide a definition for this term. The definition of the term is fundamental to identifying over what water resources the Authority has jurisdiction. Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its permit program, as well as by the regulated community that will interact with the Authority, the Authority has determined that it is useful to define this term. The Authority interprets the jurisdictional limitation in §1.08(b) to apply to surface water over which the prior appropriation doctrine applies and jurisdiction is vested in the Texas Natural Resource Conservation Commission. Surface water is generally considered to be "state water." The definition of "state water" is found in §11.021(a), TEXAS WATER CODE. There is a rational connection between this factual basis and the definition of "surface water" because the definition refers to the definition of state water as identifying the surface water over which the Authority would have no jurisdiction.

III. REGULATORY IMPACT ANALYSIS OF MAJOR ENVIRONMENTAL RULES.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that this proposed rule in not a "major environmental rule" as that term defined by §2001.0225(g)(3) of the Texas Government Code. The basis for this determination is that the proposed rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The proposed rule would set forth general definitions that will apply to all the rules issued by the Authority. These rules have been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout the Authority's other rules. Some of these definitions are identical to the definitions that appear in the Act while other definitions provide useful "short-hand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules. The specific intent of these definitions is thus to allow for a more efficient understanding and operation of other rules of the Authority. For this reason, we find that the proposed rule is not a "major environmental rule" and that, therefore, no further analysis is required by §2001.0225 of the Texas Government Code.

IV. TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," ("TPRPRA") requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the proposal of this rule. First, the Authority's action in adopting this rule is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the TPRPRA under §2007.003(b)(4) of the Texas Government Code. See Act §§ 1.03, 1.08(a), 1.11(a), and 1.11(f); TEXAS WATER CODE ANN. § 36.001(5). It was held, in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375,(Texas App. San Antonio 2000 pet. filed), that the Edwards Aquifer Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted from TPRPRA. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the TPRPRA under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of this rule.

V. SUMMARY OF PUBLIC COMMENTS AND AUTHORITY RESPONSES.

Five public hearings were held on these and other rules proposed by the Authority on: Wednesday, August 9, 2000, at 6:00 p.m. at the Conference Center of the Edwards Aquifer Authority, 1615 N. St. Mary's Street, San Antonio, Texas; Tuesday, August 15, 2000 at 6:00 p.m. at the New Braunfels Civic Center, 380 S. Seguin Avenue, New Braunfels, Texas; August 17, 2000 at 6:00 p.m. at St. Paul's Lutheran Church, 1303 Avenue M, Hondo, Texas; Tuesday, August 22, 2000 at 6:00 p.m. at the Sgt. Willie De Leon Civic Center, 300 E. Main Street in Uvalde, Texas; and Thursday August 24, 2000 at the San Marcos Activities Center, 501 E. Hopkins, San Marcos, Texas. At those hearings, public comments were received on the proposed §702.1. In addition, written comments were received from members of the public regarding §702.1. The public comment period closed on September 11, 2000. Oral and/or written comments were provided by Earl & Brown, P.C. ("Earl & Brown"); Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. on behalf of the Texas Farm Bureau ("TFB"); the Texas Nursery & Landscape Association ("TNLA"); William R. Haney ("Haney"); Color Spot Nurseries ("CSN"); Glenn, JoLynn and David Bragg (the "Braggs"); the Texas Cattle Feeders Association, Inc. ("TCFA"); and Vivian Windrow ("Windrow").

Public Comments No. 1, No. 2, and No. 3:

The TCFA seeks a revision of the definition of "agricultural use" in order to include the watering of livestock within the definition. Similarly, the TNLA and CSN seek a revision of the definition of "agricultural use" in order to include the watering of nursery products by a nursery grower. Section 702.1, however, does not include a definition for "agricultural use." Instead, that term is defined in the Authority's proposed Chapter 709 rules.

Authority's Response:

The Authority believes that the comments of the TCFA, the TNLA, and CSN on this point will be more appropriately addressed when Chapter 709 is adopted by the Authority. For this reason, the Authority disagrees with the comments to the extent they relate to §702.1, and the Authority has declined to modify §702.1 in response to the comments.

Public Comment No. 4:

The TFB's comments correctly point out that while the text of the preamble to the notice of proposed rulemaking for §702.1 (25 Texas Reg. 7495-96) erroneously suggests the Authority is proposing a definition of the "Medina Pool," §702.1 actually includes no such definition.

Authority's Response:

The Authority agrees with the comment. It is unclear whether the TFB would support or oppose the inclusion of such a definition. The Authority has determined not to include a definition of the "Medina Pool" in §702.1. Section 1.14(g) of the Act states: "The authority by rule may define other pools within the aquifer, in accordance with hydrogeologic research, and may establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools." The Authority has decided not to include such a definition at this time. No amendment to §702.1 is necessary in response to this comment.

Public Comment No. 5:

Both Haney and Earl & Brown submitted comments on the definition of "exempt well" found at §702.1(b)(22). As proposed, that definition reads as follows:

Exempt well- A well that produces 25,000 gallons of water a day or less for domestic or livestock use that is not within or serving a subdivision requiring platting.

Haney asks that the definition state:

Exempt well- A well that produces 25,000 gallons of water a day or less for domestic or livestock use, or livestock watering, that is not within and serving a subdivision requiring platting. The withdrawal and beneficial use of less than 1250 gallons of water a day from an otherwise exempt well for purposes other than domestic or livestock use, or livestock watering, does not void a well's exempt status.

Haney reasons that these changes are merited because: (1) an otherwise exempt well owner, under proposed §702.1(b)(22), may inadvertently come to reside in a platted subdivision without incurring a change in water usage; and (2) a "de minimus" exception, defined by Haney to mean 1,250 gallons per day or less, ought to be created for otherwise exempt well owners who wish to pump relatively small amounts of water for non-exempt purposes from their exempt wells.

Authority's Response:

The Authority disagrees with the Haney comments. First, the current definition of "exempt well" as proposed by the Authority closely tracks the criteria found in §1.33 of the Act. Second, the addition of the phrase "or livestock watering" is redundant and unnecessary. Further, §702.1(b)(20)(c) already specifies that "domestic or livestock use" includes the "watering of animals."

Third, §1.33(c) specifically states that a well is not exempt if it is "within or serving a subdivision requiring platting." The Authority believes that changing this phrase to "within and serving a subdivision requiring platting" would be contrary to the Act. Such a change would allow, for example, a domestic or livestock well located outside a subdivision requiring platting to provide service to unlimited connections within the subdivision. The Authority believes that such an arrangement would violate the Act. Further, the Authority has, in its proposed exempt well rules, found at Subchapter C of the Authority's proposed Chapter 711 rules, attempted to address the concern raised by Haney involving a situation in which a well owner resides on land which was unsubdivided during the historical period but which subsequently came to be subdivided in a way that required platting. Amendment of §702.1 is not necessary or warranted on this point.

Finally, the Authority believes the Act mandates that if an exempt well is used for non-exempt purposes then it loses its exempt status and should require a permit. Thus, exempt well owners should not be allowed to pump up to 1,250 gallons per day for non-exempt purposes from their exempt wells. Further, there are practical and logistical impediments to this proposal by Haney. The only way to confirm whether a given exempt well owner were, in fact, pumping no more than 1,250 gallons per day for non-exempt uses would be by installing a meter on the well. However, §1.33 of the Act clearly states that exempt wells are exempt from the metering requirement. The Authority has declined to modify §702.1(b)(22) in response to the Haney comments.

Public Comment No. 6:

Earl & Brown asks that the definition of "exempt well" be revised as follows:

Exempt well- A well that produces 25,000 gallons of water a day or less or which is physically capable of only producing up to a maximum of 25,000 gallons per day average on an annual basis for domestic of livestock use that is not within or serving a subdivision requiring platting, which is exempt from metering requirements.

Authority's Response:

The Authority disagrees with the Earl & Brown comment. First, the current definition of "exempt well" as proposed by the Authority closely tracks the criteria found in §1.33 of the Act. The Earl & Brown comment would add new a criterion outside the scope of §1.33 of the Act. Allowing for the averaging of pumpage throughout the year would clearly allow pumping on any given day to exceed 25,000 gallons. The Authority believes this would contravene the clear language of §1.33 of the Act. Second, the language proposed by Earl & Brown appears to be nonsensical. It is unclear how a well could be "physically capable" of producing more than 25,000 gallons on certain days, but less on other days, so that the average on an annual basis was below 25,000 gallons. Third, the only way to measure average use is with a meter. However, §1.33 of the Act specifies that exempt wells are excluded from the meter requirement. The Authority has declined to modify §702.1(b)(22) in response to the Earl & Brown comments.

Public Comment No. 7:

Haney also submitted comments on the definition of "industrial use" found at §702.1(b)(29). As proposed, that definition reads as follows:

Industrial use- The use of water for, or in connection with, commercial or industrial activities, including manufacturing, bottling; brewing; food processing; scientific research and technology; recycling; production of concrete, asphalt, and cement; commercial uses of water for tourism, entertainment, and hotel or motel lodging; generation of power other than hydroelectric; and other business activities.

Haney suggests the following definition:

Industrial use- The use of water in excess of 1250 gallons per day for, or in connection with, commercial or industrial activities, including manufacturing, bottling; brewing; food processing; scientific research and technology; recycling; production of concrete, asphalt, and cement; commercial uses of water for tourism, entertainment, and hotel or motel lodging; generation of power other that hydroelectric; and other business activities.

As with his proposed change to the definition of "exempt well," Haney proposes this change because he believes a "de minimus" exception, defined by Haney to mean 1,250 gallons per day or less, ought to be created for otherwise exempt well owners who wish to pump relatively small amounts of water for non-exempt purposes from their exempt wells.

Authority's Response:

The Authority disagrees with this comment. First, the Authority's definition of "industrial use" in §702.1(b)(29) identically tracks the definition found in §1.03(11) of the Act. The definition found in the Act does not include any de minimus exclusion. Second, the Authority believes the Act mandates that if an exempt well is used for non-exempt purposes then it loses its exempt status. Thus, exempt well owners should not be allowed to pump up to 1,250 gallons per day for non-exempt purposes, such as industrial purposes, from their exempt wells. Further, there are practical and logistical impediments to this proposal by Haney. The only way to confirm whether a given exempt well owner were, in fact, pumping no more than 1,250 gallons per day for non-exempt uses, such as industrial uses, would be by installing a meter on the well. However, §1.33 of the Act clearly states that exempt wells are exempt from the metering requirement. The Authority has declined to modify §702.1(b)(22) in response to the Haney comment.

Public Comments No. 8 and No. 9:

Both the TNLA and CSN assert that the definition of "irrigation use" is inadequate and circular, thereby leading to confusion and misinterpretation. Neither entity proposes substitute language.

Authority's Response:

The Authority disagrees with this comment. The definition of "irrigation use," found at §702.1(b)(31), is identical to the definition found at §1.03(12) of the Act. Further, the Authority believes that the definition is clear. The Authority has declined to modify §702.1(b)(31) in response to this comment.

Public Comments No. 10 and No.11:

The Braggs and Windrow both commented upon proposed rule § 702.1(32) which states:

(32) Interruptible-When referring to a groundwater withdrawal permit, the conditioning of the right to withdraw groundwater from the aquifer that makes the right subject to complete cessation, temporary curtailment, or reduction of the amount of groundwater that may be withdrawn from the aquifer based upon the measurement of a water level at an index well, or as otherwise determined by the board.

The Braggs and Windrow recommend that the ending phrase, "or as otherwise determined by the board," be deleted. The Braggs assert that this language is too general and will render groundwater management and planning impossible. They also contend that interruptiblility should be keyed solely upon "spring flow protection" or "groundwater and spring flow modeling." Windrow feels that the phrase is too vague and, instead, any criteria for interruption of groundwater withdrawals should be specified.

Authority's Response:

The Authority agrees that the phrase "or as otherwise determined by the board" is somewhat vague and could be made more definite. The intent of this definition is to make withdrawal amounts subject to interruption based upon the measurement of a water level at an index well or upon the criteria set forth in the Authority's comprehensive water management plan implementation rules which, though not yet adopted by the Authority, will, when adopted, be codified at 31 TAC Chapter 715. Accordingly, the Authority has modified §702.1(b)(32) in response to these comments by deleting the phrase "or as otherwise determined by the board" and replacing it with the phrase "or as otherwise required by the comprehensive water management plan implementation rules found at 31 TAC Chapter 715 (relating to Comprehensive Water Management Plan Implementation)."

Public Comment No. 12:

The TFB asserts that the Authority was required by the Texas Private Real Property Rights Preservation Act to prepare a "takings impact assessment" or "TIA" before providing notice of the proposed adoption of rule 702.1.

Authority's Response:

The Authority disagrees. Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act" ("TPRPRA"), requires governmental entities, under certain circumstances, to prepare a TIA in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of this rule. First, the rules themselves impose no burden upon vested private real property. As such, they have no direct affect on vested private real property and may not result in a taking. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(4) of the Texas Government Code. See Act §§1.03, 1.08(a), 1.11(a), (f) and (h); Texas Government Code Annotated, §§ 2001.004(1), 2001.021(b), 2001.026, 2001.029, and 2001.031, and §36.001(5) of the Texas Water Code. It was held, in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375, 379 (Texas App. San Antonio 2000, pet. filed), that the Edwards Aquifer Act expressly mandates the adoption of substantive and procedural rules and that such actions are therefore excepted from the Texas Private Real Property Rights Preservation Act. The holding in that case controls here. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under §2007.003(b)(11)(C) of the Texas Government Code as

actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the adoption of these rules.

VI. CONCISE RESTATEMENT OF PARTICULAR STATUTORY PROVISIONS UNDER WHICH THE RULE IS ADOPTED AND THE AUTHORITY INTERPRETATION OF THE PROVISIONS AS AUTHORIZING OR REQUIRING THE RULE.

Section 1.03 of the Act sets forth definitions of various words and phrases used throughout the Act that the Legislature provided in passing the Act. Many of the definitions in this final rule are taken directly from, and conform with this provision. In addition, §1.14(d) of the Act provides the grounds for and the procedure by which the Authority may increase the quantity of groundwater available for permitting and modify the effect of §1.14(b) and (c) of the Act which creates maximum quantities of groundwater that may be permitted for certain periods of time. Among the groundwater available is conservation, augmentation, and supplemental recharge. Also, §1.11(f) of the Act empowers the Authority to contract with a person who uses water from the aquifer to construct, operate, own, finance, and maintain water supply facilities. That section defines the term "water supply facility" as including "a dam, reservoir, treatment facility, transmission facility, or recharge project." Section 1.44 of the Act provides the terms and conditions under which a political subdivision of the state may enter in to an interlocal contract with the Authority for an aquifer recharge, storage and recovery project. Section 1.45 of the Act authorizes the Authority to build or operate recharge dams and provides certain terms and conditions for the operation of such facilities as well as eligible source water for the recharge project. In conjunction with §1.08(a) and §1.11(a) of the Act discussed below, the Authority interprets these sections as authorizing the adoption of the following general definitions in conformance with the Act: (6) aquifer; (9) augmentation; (10) authority; (12) beneficial use; (13) board; (14) commission; (15) conservation; (18) diversion; (20) domestic or livestock use; (29) industrial use; (31) irrigation use; (34) livestock; (36) municipal use; (39) order; (43) person; (46) pollution; (48) recharge; (52) reuse; (59) water supply facility; (60) well; (62) well J-17; (63) well J-27; and (64) withdrawal. The Authority also interprets these sections, as well as §36.001(5), Texas Water Code, as authorizing the adoption of a definition for (26) groundwater and (58) "underground water." In §1.03(20), the term "underground water" is assigned the meaning that this term has in §52.001, Texas Water Code. Since the passage the Act, chapter 52, Texas Water Code, has been repealed and recodified as chapter 36, Texas Water Code. See Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 933, sec. 2, 6, 1995 Texas General Laws 4673. In so doing, the legislature abandoned the use of the term "underground water" in favor of the more modern term "groundwater" found at §36.001(5), Texas Water Code, and is defined as "water percolating below the surface of the earth." Under §1.08(a) of the Act, chapter 36, Texas Water Code, which replaced chapter 52, is now applicable to the Authority to the extent that it does not conflict with the Act. The Authority can identify no conflict with the Act in adopting the statutory definition of groundwater found in chapter 36, Texas Water Code.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, and the procedural rules associated therewith in the administration of the programs.

Section 1.11(d)(5) of the Act provides that the Board may hire an executive director to manage the Authority. Consistent with groundwater conservation district practices, the preference of the Authority is to refer to its "executive director" as the "general manager." In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (25) general manager.

Section 1.ll(h) of the Act provides that the Authority is, among other things, "subject to the Administrative Procedures Act, TEXAS GOVERNMENT CODE ANN. §§2001.001-2001.902 (Vernon 2000). Because the Authority is "subject to" the APA due to the operation of §1.11(h) of the Act, §2001.004(1), TEXAS GOVERNMENT CODE, provides that the Authority is required to adopt rules of practice stating the nature and requirement of all available formal and informal procedures. This would necessarily include definitions relevant to the rules of practice or procedural rules. In addition, §1.16(a) of the Act provides for existing users to file declarations of historical use (otherwise known as applications for initial regular permits) for withdrawals made during the statutorily established historical period. Section 1.33(b) of the Act provides that exempt wells must be registered with the Authority. In conjunction with §§1.08(a) and 1.11(a) of the Act discussed above, the Authority interprets these sections as authorizing the adoption of the following procedural definitions: (1) Act; (3) APA; (4) applicant; (5) application; (11) Authority offices; (16) declarant; (19) docket clerk; (24) general counsel; (33) judge; (40) party; (41) permit; (42) permittee; (43) petitioner; (45) pleadings; (47) protestant; (50) registrant; (51) registration; and (54) SOAH (State Office of Administrative Hearings).

Section 1.14(d) of the Act provides the grounds for and the procedure by which the Authority may increase the quantity of groundwater available for permitting and modify the effect of §1.14(b) and (c) of the Act which creates maximum quantities of groundwater that may be permitted for certain periods of time. Among the groundwater available is supplemental recharge. Also, §1.11(f) of the Act empowers the Authority to contract with a person who uses water from the aquifer to construct, operate, own, finance, and maintain water supply facilities. That section defines the term "water supply facility" as including, among other things, a recharge project. Section 1.44 of the Act provides the terms and conditions under which a political subdivision of the state may enter in to an interlocal contract with the Authority for an aquifer recharge, storage and recovery project. Section 1.45 of the Act authorizes the Authority to build or operate recharge dams and provides certain terms and conditions for the operation of such facilities as well as eligible source water for the recharge project. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, the Authority interprets

these sections as authorizing the adoption of the following terms related to recharge projects: (8) aquifer recharge and storage permit; and (49) recharge recovery permit.

Section 1.14(e) of the Act provides for a prohibition on withdrawals of groundwater from the Edwards Aquifer (Aquifer) from post-June 1, 1993 new wells, as well as, provisions for interruptible withdrawals from such wells if the amount of groundwater available for permitting is increased pursuant to §1.14(d) of the Act. In addition, §1.03(10) defines the term "existing user." Also, §1.16(a) of the Act authorizes "existing user" to files declarations of historical use (also known as applications for initial regular permit) for withdrawals of groundwater placed to beneficial use during the historical period. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act creates the concept of "existing user," "historical use," and a date for the establishment of a prohibition against the withdrawal of groundwater from certain wells, and it is necessary to give meaning and definition to this concept as created in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (23) existing well; and (37) new well.

Section 1.14(f) of the Act authorizes the Authority to allow uninterruptible withdrawals from the Aquifer when certain index wells for the San Antonio and Uvalde Pools are at certain levels identified in the section. Section 1.19(b) of the Act provides for the minimum index well level for the San Antonio Pool below which term permit withdrawals would be automatically interrupted. Section 1.19(c) of the Act provides for the minimum index well level for the Uvalde Pool below which term permit withdrawals would be automatically interrupted. In conjunction with §§1.08(a) and 1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (32) interruptible; (53) San Antonio pool; and (58) Uvalde pool.

Section 1.15(a) of the Act provides broad authority to the Authority to manage (1) withdrawals from the Aquifer, and (2) points of withdrawals pursuant to the Act. Section 1.15(b) of the Act prohibits withdrawals from the Aquifer except pursuant to a prior issued groundwater withdrawal permit. An exception to this permit requirement is recognized for withdrawals made based on interim authorization status under §1.17 of the Act, and exempt wells under §1.33 of the Act. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act creates the concept of groundwater withdrawals by permit, it is necessary to give meaning and definition to this concept as created in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (27) groundwater withdrawal permit; (35) monitoring well permit; and (61) well construction permit.

Section 1.16(a) of the Act provides for existing users to file declarations of historical use (otherwise known as applications for initial regular permits) for withdrawals made during the statutorily established historical period. Section 1.16(d) of the Act provides some of the elements that, if proven by convincing evidence, would require the Board to grant an application for an initial regular permit. Section 1.15(c) of the Act authorizes the Authority to issue, among other things, regular permits. Section 1.17(a) of the Act authorizing persons owning wells meeting certain criteria to continue to make withdrawals from the well even though they have yet not been issued an initial regular permit. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (17) declaration of historical use (or declaration); (30) initial regular permit; and (28) historical period.

Section 1.18(a) of the Act authorizes the Authority to issue additional regular permits if there remains water available for permitting after the issuance of all initial regular permits. The section also provides that groundwater withdrawals pursuant to additional regular permits are subject to maximum permitted groundwater withdrawal amounts set out in §1.14(b) and (c) of the Act. Section 1.18(b) of the Act prohibits the Authority from considering or taking action on an application for an additional regular permit until the Authority has taken final action on all pending applications for initial regular permits. Section 1.15(c) of the Act authorizes the Authority to issue, among other things, regular permits. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (2) additional regular permit.

Section 1.19(a) of the Act authorizes the Authority to issue term permits for groundwater withdrawals from the Aquifer for up to 10 years. Section 1.19(b) of the Act provides for the minimum index well level for the San Antonio Pool below which term permit withdrawals would be automatically interrupted. Section 1.19(c) of the Act provides for the minimum index well level for the Uvalde Pool below which term permit withdrawals would be automatically interrupted. Section 1.15(c) of the Act authorizes the Authority to issue, among other things, term permits. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (57) term permit.

Section 1.20(a) of the Act authorizes the Authority to issue emergency permits for groundwater withdrawals from the Aquifer not to exceed 30 days to prevent severe, imminent threats to the public health or safety. Section 1.15(c) of the Act authorizes the Authority to issue, among other things, emergency permits. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (21) emergency permit.

Section 1.29(b) of the Act directs the Authority to assess an aquifer management fee on aquifer use to finance its administrative and programmatic expenses authorized under the Act. Section 1.29(e) of the Act provides that in developing its fees, the Authority may charge different fee rates on a per acre-foot basis for different types of uses as long as they are equitable between types of uses. This section also creates a fee differential between agricultural users and non-agricultural users for aquifer management fees whereby the agricultural fee may not exceed 20 percent of the aquifer management fees assessed against non-agricultural users. In addition, this section creates a distinction between agricultural and non-agricultural users when calculating aquifer use under §1.29(b) of the Act by providing that aquifer use for agricultural users is the actual volume of groundwater withdrawn, while for non-agricultural users it is the face value authorized to be withdrawn in an initial regular permit. In conjunction with § 1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the

Authority interprets these sections as authorizing the adoption of a definition for (7) aquifer management fee.

Section 1.31(a) of the Act provides that owners of non-exempt wells are required to install meters on wells, or, if the meter requirement is waived, apply alternative measuring methods to calculate the volume of groundwater withdrawals from the Aquifer. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (38) non-exempt well.

Section 1.33(a) of the Act provides that wells qualifying for exempt status are not required to install a meter on the well. This subsection also provides some of the criteria for a well to quality for exempt well status. Section 1.33(b) of the Act provides that exempt wells must be registered with the Authority. Section 1.33(c) of the Act provides additional criteria for a well to quality for exempt well status. Section 1.16(c) of the Act provides that owners of exempt wells are not required to file declarations of historical use in order to continue to make lawful withdrawals from their exempt wells. In conjunction with §§1.08(a) and 1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (22) exempt well.

Section 1.08(b) of the Act provides that the Authority does not have the authority to regulate surface water. The Authority interprets the jurisdictional limitation in §1.08(b) to apply to surface water over which the prior appropriation doctrine applies and jurisdiction is vested in the Texas Natural Resource Conservation Commission. Surface water is generally considered to be "state water." The definition of state water is found in §11.021(a), Texas Water Code. In conjunction with §1.08(a) and §1.11(a) of the Act discussed above, because the Act employs this term and it is necessary to give meaning and definition to this term as used in the Act, the Authority interprets these sections as authorizing the adoption of a definition for (56) surface water.

The new section is adopted pursuant to §§1.03, 1.08(a), 1.11(a), (d)(5), (f) and (h), 1.14(d)-(f), 1.15(a)-(c), 1.16(a), (c), and (d), 1.17(a), 1.18(a) and (b), 1.19(a)-(c), 1.20(a), 1.29(b) and (e), 1.31(a), 1.33(a)-(c), 1.44, and 1.45 of the Act; §§11.021(a) and 36.001(5), Texas Water Code Annotated; and §2001.004(1), Texas Government Code Annotated.

§702.1. General Definitions.

(a) In its rules, the Authority employs two types of definitions. The first type are general definitions that apply to all rules of the Authority. The second type are specific definitions that apply only to the chapters in this title in which they are located. The specific definitions applying only to terms within a particular chapter are set out in that chapter.

(b) The following words and terms, when used in any rule of the Authority, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Act-The Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2353, as amended.

(2) Additional regular permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, § 1.18(a).

(3) APA-The Administrative Procedures Act, Chapter 2001, Government Code.

(4) Applicant-A person who files an application with the Authority.

(5) Application--A form document required by the Authority to initiate the process of obtaining the issuance of a permit, registration, exemption, license or any other Authority approval. A declaration of historical use is an application for an initial regular permit.

(6) Aquifer-The Edwards Aquifer, which is that portion of an arcuate belt of porous, water-bearing, predominately carbonate rocks known as the Edwards and Associated Limestone in the Balcones Fault Zone extending from west to east to northeast from the hydrologic division near Brackettville in Kinney County that separates underground flow toward the Comal Springs and San Marcos Springs from underground flow to the Rio Grande Basin, through Uvalde, Medina, Atascosa, Bexar, Guadalupe and Comal counties, and in Hays County south of the hydrologic division near Kyle that separates flow toward the San Marcos River from flow to the Colorado River Basin.

(7) Aquifer management fees-The fee authorized to be assessed by the Authority based:

(A) on aquifer use under the Act, § 1.29(b) and (e); or

(B) taxes in lieu of user fees to be paid by groundwater users in a groundwater conservation district governed by Chapter 36, Water Code, pursuant to a contract between the Authority and the water district under the Act, § 1.29(b).

(8) Aquifer recharge and storage permit - A permit issued by the Authority for the recharge of the aquifer.

(9) Augmentation-An act or process to increase the amount of water available for use or springflow.

(10) Authority--The Edwards Aquifer Authority.

(11) Authority offices-The Authority's principal offices identified in § 701.5 of this title (relating to Business Office and Mailing Address of the Authority).

(12) Beneficial use--The use of the amount of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose.

(13) Board-The board of directors of the Authority.

(14) Commission-The Texas Natural Resource Conservation Commission.

(15) Conservation-Any measure that would sustain or enhance water supply.

(16) Declarant-An existing user who files a declaration of historical use.

(17) Declaration of historical use (or declaration)-The form document required by the Authority to be filed pursuant to the Act, § 1.16(a). A declaration is an application for an initial regular permit.

(18) Diversion-The removal of state water from a watercourse or impoundment.

(19) Docket clerk-The docket clerk of the Authority as designated by the general manager.

(20) Domestic or livestock use-Use of water for:

(A) drinking, washing, or culinary purposes;

(B) irrigation of a family garden or orchard the produce of which is for household consumption only, or

(C) watering of animals.

(21) Emergency permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, § 1.20(a).

(22) Exempt well-A well that produces 25,000 gallons of water a day or less for domestic or livestock use that is not within or serving a subdivision requiring platting.

(23) Existing well-A well drilled before June 1, 1993.

(24) General counsel-The general counsel of the authority hired by the board.

(25) General manager-The executive director hired by the board to be the chief administrator of the Authority.

(26) Groundwater-Water percolating below the surface of the earth.

(27) Groundwater withdrawal permit--A permit issued by the authority pursuant to § 1.15(b) of the Act authorizing the withdrawal of groundwater from the aquifer.

(28) Historical period-The period from June 1, 1972, through May 31, 1993, inclusive.

(29) Industrial use-The use of water for, or in connection with, commercial or industrial activities, including manufacturing, bottling; brewing; food processing; scientific research and technology; recycling; production of concrete, asphalt, and cement; commercial uses of water for tourism, entertainment, and hotel or motel lodging; generation of power other than hydroelectric; and other business activities.

(30) Initial regular permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, § 1.16(d).

(31) Irrigation use-The use of water for the irrigation of pastures and commercial crops, including orchards.

(32) Interruptible-When referring to a groundwater withdrawal permit, the conditioning of the right to withdraw groundwater from the aquifer that makes the right subject to complete cessation, temporary curtailment, or reduction of the amount of groundwater that may be withdrawn from the aquifer based upon the measurement of a water level at an index well, or as otherwise required by Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(33) Judge-A SOAH administrative law judge.

(34) Livestock-Animals, beasts or poultry collected or raised for pleasure, recreational use, or commercial use.

(35) Monitoring well permit-A permit issued by the Authority pursuant to § 1.15(b) of the Act for the measuring of the water quality of the aquifer or water level of the aquifer.

(36) Municipal use-The use of water within or outside of a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity, including the use of treated effluent for certain purposes specified as follows. The term includes:

(A) the use of water for domestic use, the watering of lawns and family gardens, fighting fires, sprinkling streets, flushing sewers and drains, water parks and parkways, and recreation, including public and private swimming pools;

(B) the use of water in industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands; and

(C) the application of treated effluent on land under a permit issued under Chapter 26, Water Code, if:

(i) the primary purpose of the application is the treatment or necessary disposal of the effluent;

(ii) the application site is a park, parkway, golf course, or other landscaped area within the authority's boundaries; or

(iii) the effluent applied to the site is generated within an area for which the commission has adopted a rule that prohibits the discharge of the effluent.

(37) New well-A well drilled on or after June 1, 1993.

(38) Non-exempt well-Any well, the groundwater withdrawals from which, are required to be authorized by interim authorization status or a groundwater withdrawal permit.

(39) Order-Any written directive of the board carrying out the powers and duties of the Authority under Article 1 of the Act.

(40) Party-Each person admitted as a party in a contested case hearing.

(41) Permit-The written document issued by the Authority approving an application for a permit.

(42) Permittee-A person to whom the Authority has issued a permit.

(43) Person-An individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association and any other legal entity.

(44) Petitioner--A person who files a petition with the authority.

(45) Pleadings-Any document filed by parties in a contested case hearing.

(46) Pollution-The alteration or contamination of the physical, thermal, chemical, or biological quality of any water in the state, or the contamination of any water in the state, that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, property, or public health, safety, or welfare or that impairs the usefulness of the public enjoyment of the water for any lawful or reasonable purpose.

(47) Protestant-Any person opposing, in whole or in part, an application.

(48) Recharge-Increasing the supply of water to the aquifer by naturally occurring channels or artificial means.

(49) Recharge recovery permit-A permit issued by the Authority pursuant to § 1.15(b) for withdrawal of groundwater stored in the aquifer pursuant to an aquifer recharge and storage permit.

(50) Registrant-A person who files a registration with the Authority.

(51) Registration-The document required to be filed pursuant to the Act, § 1.33(b) or as may otherwise be required by the rules of the Authority.

(52) Reuse-Authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before the water is discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(53) San Antonio Pool-That part of the aquifer underlying the boundaries of the Authority, other than Uvalde County.

(54) SOAH-The State Office of Administrative Hearings.

(55) Surface Water-Has the meaning of "state water" as defined by § 11.021, Water Code.

(56) Term permit-A groundwater withdrawal permit issued by the Authority pursuant to the Act, § 1.19(a).

(57) Underground water-Has the meaning of "groundwater" as defined by § 36.001(5), Water Code, as incorporated in paragraph (26) of this subsection.

(58) Uvalde Pool-That part of the Aquifer underlying the boundaries of the Authority and Uvalde County.

(59) Water supply facility-Any infrastructure designed for the supply of raw or potable water for any beneficial use, including a dam, reservoir, treatment facility, transmission facility, or recharge project.

(60) Well-A bored, drilled, or driven shaft or an artificial opening, in the ground made by digging, jetting, or some other method where the depth of the shaft or opening is greater than its largest surface dimension, but does not include a surface pit, surface excavation, or natural depression.

(61) Well construction permit-A permit issued by the Authority pursuant to § 1.15(b) of the Act for the construction or modification of wells or other works designed for the withdrawal of water from the aquifer.

(62) Well J-17-State well number AY-68-37-203 located in Bexar County.

(63) Well J-27-State well number YP-69-50-302 located in Uvalde County.

(64) Withdrawal-An act or a failure to act that results in taking water from the aquifer by or through man-made facilities, including pumping, withdrawing or diverting groundwater.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

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Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Effective date: November 7, 2000
Proposal publication date: August 11, 2000
For further information, please call: (210) 222-2204

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CHAPTER 705. JURISDICTION OF THE EDWARDS AQUIFER AUTHORITY

31 TAC §705.1, §705.3

I. INTRODUCTION.

The Edwards Aquifer Authority ("Authority") adopts new 31 TAC, §705.1 and §705.3, consisting of rules relating to the jurisdiction of the Authority, without changes to the proposed text as published in the August 11, 2000 issue of the *Texas Register* (25 TexReg 7500-7502). The sections will not be republished.

These rules have been written to clearly define the Authority's jurisdiction.

II. SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES.

The Authority is required by the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act")), to implement Edwards Aquifer management programs relating to, among other things, fees, exempt wells, interim authorization, permitted wells, permit conditions, groundwater available for permitting, proportional adjustment, equal percentage reduction, abandonment and cancellation of permits, aquifer recharge, storage and recovery, additional groundwater supplies available for permitting, transfers, meters and alternative measuring methods, groundwater trust, water quality, and comprehensive water management plan implementation.

The Authority interprets these provisions as requiring the establishment of rules relating to the Authority's jurisdiction. Specifically, § 1.08(b) expressly provides that the jurisdiction of the Authority extends to underground water within or withdrawn from the Aquifer, but not to surface water. Together, these sections clearly demonstrate a rational connection between the factual basis for the rule and the rule as adopted.

III. REGULATORY IMPACT ANALYSIS OF MAJOR ENVIRONMENTAL RULES.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the rules are "major environmental rules" as that term is defined by §2001.0225(g)(3) of the Texas Government Code. The basis for this determination is that the rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The rules merely state the Authority's understanding concerning its jurisdiction. Their specific intent is to state and clarify the extent of the Authority's power. These rules do not contain any environmental or human health standards that impose requirements on the regulated community. For these reasons, we find that none of the rules are "major environmental rules" and that, therefore, no further analysis is required by § 2001.0225 of the Texas Government Code.

IV. TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," ("TPRPRA") requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of these rules. First, the Authority has made a "categorical determination" that rules that provide general information only do not affect private real property. These rules provide general information only; that is, they provide general statements concerning the nature of Authority's jurisdiction. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation

mandated by state law and is thus excluded from TPRPRA under §2007.003(b)(4) of the Texas Government Code. See Act § 1.08(a), 1.08(b), 1.11(a). It was held, in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375 (Texas App. - San Antonio 2000, pet. filed), that the Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted from TPRPRA. Third, it is the position of the Authority that all valid actions of the Authority are excluded from TPRPRA under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the adoption of these rules.

V. SUMMARY OF PUBLIC COMMENTS.

Five public hearings were held on these and other rules proposed by the Authority on: Wednesday, August 9, 2000 at 6:00 p.m. at the Conference Center of the Edwards Aquifer Authority, 1615 N. St. Mary's Street, San Antonio, Texas; Tuesday, August 15, 2000 at 6:00 p.m. at the New Braunfels Civic Center, 380 S. Seguin Avenue, New Braunfels, Texas; August 17, 2000 at 6:00 p.m. at St. Paul's Lutheran Church, 1303 Avenue M, Hondo, Texas; Tuesday, August 22, 2000 at 6:00 p.m. at the Sgt. Willie De Leon Civic Center, 300 E. Main Street in Uvalde, Texas; and Thursday August 24, 2000 at the San Marcos Activities Center, 501 E. Hopkins, San Marcos, Texas. At those hearings, no public comments were received on proposed §705.1 or §705.3. Further, no written comments were submitted to the Authority on proposed §705.1 or §705.3.

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.08(b) of the Act provides that the Authority's "powers regarding underground water apply only to underground water within or withdrawn from the aquifer." The term "aquifer" is defined by § 1.03(1) of the Act as "the Edwards Aquifer, which is that portion of an arcuate belt of porous, water-bearing, predominately carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone extending from west to east to northeast from the hydrologic division near Brackettville in Kinney County that separates underground flow toward the Comal Springs and San Marcos Springs from underground flow to the Rio Grande Basin, through Uvalde, Medina, Atascosa, Bexar, Guadalupe, and Comal counties, and in Hays County south of the hydrologic division near Kyle that separates flow toward the San Marcos River from flow to the Colorado River Basin."

The term "underground water" is located in § 1.03(20) of the Act and is assigned the meaning that this term has in § 52.001, Texas Water Code. Since the passage of the Act, chapter 52, Texas Water Code, has been repealed and recodified as chapter 36, Texas Water Code. See Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 933, sec. 2, 6, 1995 Texas General Laws 4673. In so doing, the legislature abandoned the use of the term "underground water" in favor of the more modern term "groundwater" found at § 36.001(5), Texas Water Code, and is defined as "water percolating below the surface of the earth." Under § 1.08(a) of the Act, chapter 36, Texas Water Code (which replaced chapter 52) is now applicable to the Authority to the extent that it does not conflict with the Act. The Act provides no other guidance relative to the definition of groundwater or underground water. Accordingly, the Authority can identify no conflict within the Act that would prevent adopting the statutory definition of groundwater found in chapter 36, Texas Water Code.

Section 1.08(b) also states that "this subsection is not intended to allow the authority to regulate surface water." The Authority interprets the jurisdictional limitation in § 1.08(b) to apply to surface water over which the prior appropriation doctrine applies and jurisdiction is vested in the Texas Natural Resource Conservation Commission. Surface water is generally considered to be "state water." The definition of "state water" is found in § 11.021(a), Texas Water Code.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act.

The new sections are adopted pursuant to §§1.08(a), 1.08(b) and 1.11(a) of the Act. The Authority interprets these sections as requiring the Authority to adopt rules establishing the jurisdiction of the Authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000

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General Manager
Edwards Aquifer Authority
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CHAPTER 707. PROCEDURE BEFORE THE AUTHORITY

I. INTRODUCTION.

The Edwards Aquifer Authority ("Authority") adopts new 31 TAC, §§707.1, 707.101-707.106, 707.201-707.208, 707.301-707.315, 707.401-707.417, 707.422, 707.424, 707.426, 707.428, 707.501-707.519, 707.601-707.626, consisting of rules governing procedure before the Authority. Sections 707.201, 707.203, 707.303, 707.304, 707.309, 707.311, 707.312, 707.405, 707.411-707.416, 707.428, 707.504, 707.510, 707.515, 707.601, 707.604, and 707.605 are adopted with changes to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7500-7533). Sections 707.1, 707.101, 707.102, 707.103, 707.104, 707.105, 707.106,

707.202, 707.205, 707.206, 707.207, 707.208, 707.301, 707.302, 707.305, 707.306, 707.307, 707.308, 707.310, 707.313, 707.314, 707.315, 707.401, 707.402, 707.403, 707.404, 707.406, 707.407, 707.408, 707.409, 707.410, 707.417, 707.422, 707.424, 707.426, 707.501, 707.502, 707.503, 707.505, 707.506, 707.507, 707.508, 707.509, 707.511, 707.512, 707.513, 707.514, 707.516, 707.517, 707.518, 707.519, 707.602, 707.603, 707.606, 707.607, 707.608, 707.609, 707.610, 707.611, 707.612, 707.613, 707.614, 707.615, 707.616, 707.617, 707.618, 707.619, 707.620, 707.621, 707.622, 707.623, 707.624, 707.625, and 707.626 are adopted without changes to the proposed text and will not be republished. Section 707.204 is being withdrawn from consideration and therefore will not be republished.

These rules have been written to provide the public and Authority staff with procedures necessary for the effective implementation of many of the Authority's substantive programs including permitting, well registration, exempt wells, meters, transfers of groundwater withdrawal rights, agricultural conservation loans, monitoring wells, and cancellation and abandonment of permitted rights. These rules also establish basic requirements governing the filing of documents with the Authority and the service of such documents on other persons, and for the conduct of meetings of the Authority's Board of Directors. Finally, these rules establish procedures governing contested case hearings on certain applications.

II. SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES.

The Authority is required by the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634) ("Act") to implement Edwards Aquifer management programs relating to, among other things, permitting, well registration, exempt wells, meters, transfers of groundwater withdrawal rights, agricultural conservation loans, monitoring wells, and cancellation and abandonment of permitted rights. In order to implement these programs, the Authority must establish rules of procedure that will allow for the fair, consistent, and efficient administration of these and other programs. Moreover, the Authority is required to establish rules governing the filing of documents with the Authority, the service of documents, and the conduct of meetings of the Authority's Board of Directors. Finally, the Authority is required to establish rules governing contested case hearings on certain applications filed with the Authority.

Subchapter A consists solely of §707.1. Section 707.1 provides uniform definitions to be used throughout the rest of Chapter 707. It clarifies the meaning of certain terms used in Chapter 707, provides useful short-hand to reduce the amount of cumbersome regulatory language, and generally allows for a more efficient understanding and operation of the chapter.

Subchapter B consists of six sections (§§707.101-.106) and contains general provisions related to Authority procedures. Section 707.101 states the purpose of Chapter 707, explaining that Chapter 707 provides the procedures to be followed in Authority proceedings. Section 707.102 provides general standards regarding the computation of time when a period of time is prescribed or allowed under the Authority's rules or by applicable statute. This section adds clarity and consistency to Authority practice.

Section 707.103 provides general rules to be followed by persons when filing documents with the Authority. It requires that all such documents be submitted to the docket clerk of the Authority, that any docket or application number appear on the first page, and that such documents be filed by mail or by hand delivery. It also states the circumstances under which documents may be filed by facsimile. It provides that if a person files a document by facsimile, he or she must file an additional copy or copies with the docket clerk by mail or hand delivery within three days. This section also includes a requirement that "the Authority may waive one or more of the requirements of this section or impose additional filing requirements" §707.103(h). The purpose of this provision is to allow the Authority flexibility in the filing of documents. It may be appropriate, in some instances, for the Authority to waive certain requirements. In other instances, it may be appropriate to impose additional filing requirements. Where the Authority imposes additional filing requirements on a class of applicants or registrants, it has every intention of providing sufficient notice to persons who would be required to comply with that additional requirement. The Authority has no intention of imposing additional filing requirements with insufficient notice.

Section 707.104 provides general requirements to be followed by persons when serving documents under Chapter 707. It requires service either in person, by courier, United States mail, or facsimile. Section 707.104 also includes general rules concerning when service by mail and by facsimile is considered complete. It provides that service to a person by facsimile must be followed by service of an extra copy in person, by mail, or carrier-receipted delivery within one day. It also contains a certificate of service requirement and provides an extra three days when a person has a right or is required to do some act within a prescribed period after a document is served on that person by mail or facsimile.

The difference between the number of days following *filing* by facsimile in which a "hard copy" copy must be filed (§707.103(c)) (three) versus the number of days following *service* by facsimile in which a "hard copy" must be served (§707.104(b)) (one) is based on the fact that the rule regarding service of documents contains a "mailbox rule" while the rule regarding the *filing* of documents contain no "mailbox rule." Specifically, §707.104(b) states that "service by mail shall be complete upon deposit of the document, enclosed in a postage-paid properly addressed wrapper, in a post office of official depository under the case and custody of the United States Postal Service." Accordingly, when §707.103(c) requires a party filing by facsimile to file a copy of the document by mail within three days, the docket clerk of the Authority must actually receive the document within three days. On the other hand, since service by mail is complete upon deposit with the U.S. Postal Service, a party serving a document by facsimile may simply deposit a copy of the document in the mail on the day following the day that service by facsimile is made.

Section 707.105 states requirements for applicants, registrants and permittees regarding changes to addresses or telephone numbers. The Authority believes that these requirements are needed for the Authority to adequately maintain information necessary for its various permitting, registration and other programs.

Section 707.106 sets forth general requirements regarding the use of forms provided by the general manager. The Authority

believes that the use of forms created and furnished by the Authority is necessary for the efficient processing of various applications and registrations and for the efficient administration of the Authority's permitting, registration and other programs. The fact that supplements may be attached as needed allows parties to avoid being constrained by space limitations on the forms.

Subchapter C consists of eight sections (§§707.201-.208) and establishes general rules regarding the conduct of meetings of the Board of Directors of the Authority. The Act provides that the Authority is governed by its Board of Directors, Act, §1.09. The purpose of subchapter C is facilitate the efficient conduct of the meetings of that body. It is intended to help create an environment at Board meetings that is conducive to decision-making and to orderly public input. This chapter is also intended to impart predictability and transparency to the decision-making process.

Section 707.201 states requirements regarding the frequency, scheduling, notice and conduct of board meetings. Section 707.202 relates to the conduct and decorum at Board meetings, and provides some general rules regarding the conduct of persons at such meetings. It also pertains to instances in which persons attending Board meetings have special requests. Section 707.203 pertains to deadlines to file comments on matters set for discussion at a Board meeting and it states some general rules regarding such deadlines. Section 707.205 pertains to the signing of orders or resolutions showing actions taken at Board meetings. It specifies that any such orders or resolutions may be signed by the chair or by any Board member if he or she did not vote against the action taken. Section 707.206 relates to audio recording of Board meetings. It specifies that the assistant to the secretary of the Board shall make audio recordings of meetings of the Board that are open to the public under the Texas Open Meetings Act. It also states that audio recordings will be made of closed sessions, except that no recordings will be made of private consultations with an attorney. Section 707.207 concerns minutes taken in meetings of the Board and states some requirements concerning such minutes. Section 707.208 pertains to instances in which an evidentiary hearing is held before the Board. It specifies that in such cases, the procedures of subchapter G of Chapter 707, 31 TAC, shall apply.

Subchapter D consists of fifteen sections (§§707.301-.315) and states requirements to file various applications and registrations in order to conduct certain activities related to the withdrawal of water from the Edwards Aquifer. These sections seek to establish clear requirements regarding which activities require the filing of an application or a registration with the Authority.

Section 707.301 states that subchapter D applies to any application or registration filed with the Authority. Section 707.302 states the basic requirement that any person who wishes to obtain a permit, authorization, or other approval from the Authority must submit a written application to the Authority on a form provided by the general manager. The Authority believes that the use of forms created and furnished by the Authority is necessary for the efficient processing of various applications and registrations and for the efficient administration of the Authority's permitting, registration and other programs.

Section 707.303 relates to who the Authority considers to be the proper applicant, registrant, or declarant in situations where a well has one owner. Many wells in the Edwards Aquifer region are owned by more than one person. This rule clarifies the responsibility of joint well owners and specifies that where a well has more than one owner, the owners shall select one among them to act for and represent the others in the filing the application, registration or declaration.

Section 707.304 states the general rule that any person seeking to withdraw groundwater from the Edwards Aquifer must file an application for a groundwater withdrawal permit. This section essentially reflects a requirement stated in §1.15(b) of the Act. It also makes clear that no such application must be filed if the well is exempt from the permit requirement by §1.16(c) and §1.33 of the Act and §711.20 of the Authority's rules.

Section 707.305 pertains to the requirement to file an application for a well construction permit and provides that a person seeking to perform one of the activities mentioned in §711.12(2)-(5) of the Authority's rules must file such an application. As with §707.304, this section essentially reflects a requirement stated in §1.15(b) of the Act.

Section 707.306 pertains to the requirement to register a well and provides that an owner of an existing well or an exempt well must register the well. It also states that well registrations must be filed no later than 180 days from the effective date of the Chapter 707 rules. It is through this requirement that the Authority can keep track of and manage all points of withdrawal of groundwater from the Edwards Aquifer. Section 1.15(a) of the Act requires the Authority to manage all withdrawal points from the Edwards Aquifer. Moreover, §1.33(b) of the Act requires the registration of all exempt wells. This section helps to implement these statutory requirements.

Section 707.307 concerns the effect of registrations filed before the effective date of the Chapter 707 rules. It provides that owners of wells that were registered with the Authority prior to the effective date of these rules need not file another well registration. This section avoids unnecessary duplication of work on the part of those regulated by the Authority.

Section 707.308 pertains to the requirement to file an application for exempt well status. It states that an owner of an existing or proposed well that the owner believes to be exempt from the requirements to obtain a permit, and who wishes to withdraw groundwater from that well, must file such an application. It also provides that an owner of a permitted well who wishes to convert that well to one with exempt well status must file such an application. This section helps to implement §1.16(c) and §1.33 of the Act which exempt certain well owners from permitting and metering requirements. It is through the requirement stated in this section that the Authority can assess and, where appropriate, validate, a person's claim that a well is exempt from permitting and metering requirements under these sections of the Act.

Section 707.309 pertains to the requirement to file an application for a permit to install or modify a meter. It states that a person seeking to install a new meter or modify an existing meter must file such an application with the Authority. It also provides that a person seeking to employ an alternative measuring method or modify an existing alternative measuring method must file such an application. Section 707.310 pertains to the requirement to register a meter. It states that an owner of an existing well equipped with a meter or alternative measuring method must register the meter or alternative measuring method. It also requires that meter registrations be filed with the Authority no later than 180 days from the effective date of the Chapter 707 rules. The Authority is directed by the Legislature, in §1.11(b) of the Act, to ensure compliance with metering requirements.

Meters are an essential way that the Authority monitors groundwater withdrawals from the Edwards Aquifer. Such information is necessary for the implementation of many of the Authority's statutorily-mandated programs. Information derived from meters is also necessary to determine compliance with limitations on withdrawal, including permitted amounts. Information from meters may also be necessary for the assessment of fees under §1.29 of the Act.

Section 707.311 concerns the requirement to file a declaration of historical use. It states that for each well from which groundwater from the aquifer has been withdrawn and placed to beneficial use during the historical period, a declaration of historical use must have been filed by December 30, 1996. This section helps to implement §1.16 of the Act. The deadline stated in this section is required under §1.16(b) of the Act as modified by the opinion of the Texas Supreme Court in *Barshop v. Medina County Underground Water District,* 925 S.W.2d 618, 628-630 (Tex. 1996). This section also states that an owner of a well that is exempt from the requirement to obtain a groundwater withdrawal permit is not under a requirement to file a declaration of historical use. This provision helps to implement §1.15(b) and §1.33 of the Act.

Section 707.312 pertains to declarations of historical use received before the effective date of Chapter 707 and provides that such declarations need not be resubmitted. This provision avoids unnecessary duplication of work on the part of those seeking initial regular permits from the Authority.

Section 707.313 pertains to the requirement to file an application for a monitoring well permit and provides that a person seeking to perform one of the activities mentioned in §711.12(3) of the Authority's rules must file such an application. Monitoring wells are a potential conduit for contamination of the aquifer. This requirement allows the Authority to regulate and control such devices.

Section 707.314 pertains to the requirement to file an application for an aquifer recharge and storage permit and provides that a person seeking to perform one of the activities mentioned in §711.12(7) of the Authority's rules must file such an application.

Section 707.315 pertains to the requirement to file an application for a recharge recovery permit and provides that any person seeking to perform one of the activities mentioned in §711.12(8) of the Authority's rules must file such an application. Under §1.08 of the Act, the Authority may take actions to increase the recharge of the aquifer. Under §1.11(f) and §1.44, the Authority may enter into contracts with persons and political subdivisions to construct or operate a recharge facility. By this section, the Authority initiates a mechanism to allow it to regulate such activities.

Subchapter E consists of twenty-six sections (§§707.401-.428) and sets forth, with particularity, the required contents of various applications and registrations to be filed with the Authority. These sections will put persons subject to regulation by the Authority on notice as to the Authority's information requirements.

Essentially, the sections in subchapter E list the information that the Authority has determined is necessary for its review and processing of various types of registrations and applications. Section 707.401 lists the contents of and requirements for all applications and registrations. The remaining sections in subchapter E each list the required additional contents for particular types of applications or registrations. In addition to requiring information necessary for the review and processing of applications and registration, some of these requirements are intended to help the Authority to obtain information that the Authority needs in order to effectively manage, conserve and protect the Aquifer and to implement its statutorily-mandated programs.

The sections of subchapter E set forth informational requirements. They do not establish the substantive criteria that will be applied to each type of registration and application. Substantive criteria that apply to each type of permit or registration are to be found elsewhere in the Authority's rules. To a large extent, the required contents reflect the substantive criteria that will be applied to each type of application and registration. However, oftentimes, they are not an exact match. As noted above, some of the information may be necessary, not for the review of that application or registration, but to satisfy other informational needs of the Authority.

Section 707.401 provides general requirements concerning the contents of and requirements for all applications and registrations filed with the Authority. It requires that all applications and registrations be typewritten or printed legibly in ink. It also states that each application and registration shall include: the full name, post office address, and telephone number of applicant or registrant; the signature of the applicant or registrant; and an attestation. The section also states additional requirements pertaining to the name and signature of the applicant or registrant, depending upon the type of entity. This section helps to assure that the Authority will be able to process all applications and registrations and can contact the applicant or registrant. It also helps to establish clarity with regard to the person responsible for each application and registration and the statements contained therein.

Section 707.402 states that applicants and registrants are encouraged to confer with the Authority staff on any questions concerning the preparation of an application or registration. This section makes it clear that the Authority does not believe that applicants and registrants are expected to work in isolation from the Authority. Rather Authority staff is available to persons throughout the application or registration process.

Section 707.403 pertains to application fees to be charged by the Authority and requires that a non-refundable application fee of $25 accompany all applications other than an application for an agricultural conservation loan. The basis for this fee is found in §1.29(f) of the Act and the $25 amount is necessary to offset some of the Authority's administrative costs incurred in the processing of applications. Section 707.403 also requires a non-refundable application fee of $250 to accompany an application for an agricultural conservation loan. The basis for this fee is found in §17.896(c) of the Texas Water Code and Title 31, Texas Administrative Code, §367.44(e). The $250 amount is to cover administration of the conservation loan program and to establish and maintain a default reserve account. The amount was established in a loan agreement between the Authority and the Texas Water Development Board.

Section 707.404 concerns registration fees to be charged by the Authority and requires that a $10 registration fee accompany all registrations filed with the Authority. The basis for this fee is found in §1.29(g) of the Act and the $10 amount is necessary to offset some of the Authority's administrative costs incurred in the processing of registrations.

Section 707.405 list the required contents for applications for initial regular permit (that are in addition to the information specified in §707.401). The Authority is directed by §1.16 of the Act to issue initial regular permits to certain "existing users" of the Edwards Aquifer groundwater. The required contents of such applications are: the name and address of the well owner; the source

of groundwater supply; the rate of withdrawal; the method of withdrawal; and a declaration of historical use. This section also specifies the required contents of a declaration of historical use. The declaration must contain: the total amount of water beneficially used during each calendar year of the historical period; the maximum number of acres irrigated during any one calendar year of the historical period; the purpose for which the groundwater was used during each year of the historical period; the amount of groundwater claimed as the maximum beneficial use during any one calendar year of the historical period; the number and location of each well owned by the applicant for which the applicant claims withdrawals during the historical period; and the place of use of groundwater withdrawn from each well. If the groundwater was withdrawn or used by a contract user or a prior or former existing user, the name, address, and telephone number of each contract user or prior or former existing user must be provided. If the applicant requests equitable adjustment on the grounds that the applicant's use was affected by a requirement of or participation in a federal program, then any fact upon which such a request is made must be stated. If the groundwater is to be sold on a wholesale or bulk basis, the declaration of historical use must also contain a description of how it will be sold, transported or transferred and the name, address, and telephone number of every person to whom it will be delivered, the location to which it will be delivered, and the purpose for which it will be used. This information is necessary to allow the Authority or a party protesting a proposed permit to investigate and verify an applicant's claims regarding the historical use of a contract user, prior user or former existing user.

The list of the required contents of an application for an initial regular permit provided in §707.405 will assist the Authority in obtaining the information necessary for it to assess a claim to an initial regular permit. This provision will also help the Authority to obtain other valuable information needed to manage all points of withdrawal from the Edwards Aquifer and to accomplish its other various duties to manage, conserve, preserve, and protect the Aquifer and to prevent waste or pollution of water in the Edwards Aquifer.

Section 707.406 concerns applications for additional regular permits and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.18 of the Act allows the Authority to issue additional regular permits following the issuance of initial regular permits, to the extent water is available for permitting. The required contents of an application for such a permit are: the name and address of the well owner; the source of groundwater supply; the proposed amount of withdrawal; the proposed purpose of use; the proposed maximum rate of withdrawal; the proposed method of withdrawal; the proposed place of use; a legal description of the location of each well; a map showing the location of each well; a water conservation plan; a water reuse plan; a description of the meter to be used; a list of all other permits applied for or issued by the Authority to the applicant; and any other information as may be required by the general manager. The list of the required contents of an application for an additional regular permit provided in §707.406 will assist the Authority in obtaining the information necessary for it to assess a claim to such a permit.

Section 707.407 concerns applications for term permits and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.19 of the Act allows the Authority to issue interruptible term permits for withdrawal of groundwater. The required contents of applications for such a permit are: the name and address of the well owner; the source of groundwater supply; the proposed amount of withdrawal; the proposed purpose of use; the proposed maximum rate of withdrawal; the proposed method of withdrawal; the proposed place of use; a legal description of the location of each well; a map showing the location of each well; a water conservation plan; a water reuse plan; a description of the meter; a list of all other permits applied for or issued by the Authority to the applicant; and any other information as may be required by the general manager. The list of the required contents of an application for a term permit provided in §707.407 will assist the Authority in obtaining the information necessary for it to assess a claim to such a permit.

Section 707.408 concerns applications for emergency permits and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.20 of the Act allows the Authority to issue emergency permits only to prevent the loss of life or to prevent a severe, imminent threat to public health and safety. The required contents of an application for such a permit are: the name and address of the well owner; the source of groundwater supply; the proposed amount of withdrawal; the proposed purpose of use; the proposed maximum rate of withdrawal; the proposed method of withdrawal; the proposed place of use; a reasonably clear description of the location of each well; a list of all other permits applied for or issued by the Authority to the applicant; the basis for the issuance of an emergency permit; and any other information as may be required by the general manager. The list of the required contents of an application for an emergency permit provided in §707.408 will assist the Authority in obtaining the information necessary for it to assess a claim to such a permit.

Section 707.409 concerns applications to renew emergency permits. Section 1.20(c) of the Act allows the Authority to renew emergency permits when appropriate. Under §707.409, such an application must contain the information specified in §707.408. It also states that such an application must be filed before the existing emergency permit has expired. The list of the required contents of an application to renew an emergency permit provided in §707.409 will assist the Authority in obtaining the information necessary for it to assess a claim to such a permit.

Section 707.410 concerns well registrations and lists the required contents for such registrations (that are in addition to the information specified in §707.401). Section 1.15(a) of the Act requires the Authority to manage all withdrawal points from the Edwards Aquifer. Moreover, §1.33(b) of the Act requires the registration of all exempt wells. Taken together, these provisions allow the Authority to impose a registration requirement on all wells. The required contents of such a registration are: the name and address of the well owner; a legal description of the location of the well; a map showing the location of the well, the three nearest wells within a quarter mile of the well, and any possible sources of contamination; the purpose of use; the amount of withdrawal; the maximum rate of withdrawal; the depth of the well; the size of the pump and pumping method; the date of construction; a list of all other permits applied for or issued by the Authority to the applicant; and any other information as may be required by the general manager.

The Authority has developed the list of items required in a well registration in order to provide the Authority with necessary baseline information. These required contents will allow the Authority to obtain valuable information needed to manage all points of withdrawal from the Edwards Aquifer and to accomplish its other various duties to manage, conserve, preserve, and protect the

Aquifer and to prevent waste or pollution of water in the Edwards Aquifer. For example, the requirement for registrants to include a map showing, among other things, any possible sources of contamination is one of the primary ways in which the Authority is able to gather information on potential sources of contamination of the aquifer. It is through such well registrations that the Authority collects information that is vital to the development and implementation of a variety of its statutorily-mandated programs.

Section 707.411 concerns applications for a well construction permits and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.15(b) of the Act directs the Authority to regulate new well construction through a well construction permit program. The required contents of an application for such a permit are: the name and address of the owner of the proposed well; a legal description of the location of the proposed well; a map showing the location of the proposed well, the three nearest wells within a quarter mile of the proposed well, and any possible sources of contamination within 500 feet of the well; the proposed purpose of use; the amount proposed to be withdrawn; the proposed maximum rate of withdrawal; the proposed depth of the well; the size of the pump and pumping method; the approximate date that construction will begin; the identity of the well drilling contractor; a list of all other permits applied for or issued by the Authority to the applicant; the claimed legal basis under which groundwater will be withdrawn; and any other information as may be required by the general manager. The list of the required contents of an application for a well construction permit provided in §707.411 will assist the Authority in obtaining the information necessary for it to assess a person's right to construct a well. This provision will also help the Authority to obtain other valuable information needed to manage all points of withdrawal from the Edwards Aquifer and to accomplish its other various duties to manage, conserve, preserve, and protect the Aquifer and to prevent waste or pollution of water in the Edwards Aquifer.

Section 707.412 concerns meter registrations and lists the required contents for such registrations (that are in addition to the information specified in §707.401). The Authority is directed by the Legislature, in §1.11(b) of the Act, to ensure compliance with metering requirements. The required contents for meter registrations are: the name and address of the well owner; a legal description of the location of the well on which the meter is located; a map showing the location of the well; whether or not the well is an exempt well or a permitted well; the purpose of use of the water withdrawn from the well; a description of the meter; the date that the meter was installed; and any other information as may be required by the general manager. In addition, the rule lists the specific elements to be included in the description of the meter. It is through the required contents of meter registrations and through meters that the Authority collects information that allows it to monitor the withdrawal of groundwater from the aquifer as well as compliance with substantive meter requirements, withdrawal limitations derived from the Act, the Authority's rules, or stated in a groundwater withdrawal permit, and to assess certain fees based on usage.

Section 707.413 concerns applications for a permit to install or modify a meter and lists the required contents for such applications (that are in addition to the information specified in §707.401). The Authority is directed by the Legislature, in §1.11(b) of the Act, to ensure compliance with metering requirements. The required contents of such applications are: the name and address of the owner of the well on which the meter is proposed to be installed; a legal description of the location of the well; a map showing the location of the well; whether or not the well is an exempt well or a permitted well; the purpose of use of the water withdrawn from the well; a description of the meter; and any other information as may be required by the general manager. In addition, the rule lists the specific elements to be included in the description of the meter. It is through the required contents of this application and the meters themselves that the Authority collects information that allows it to monitor the withdrawal of groundwater from the aquifer as well as compliance with substantive meter requirements, withdrawal limitations derived from the Act, the Authority's rules, or stated in a groundwater withdrawal permit, and to assess certain fees based on usage.

Section 707.414 concerns applications to transfer interim authorization status and to amend an application for an initial regular permit and lists the required contents for such applications (that are in addition to the information specified in §707.401). The required contents of such applications are: the names and addresses of the person who seeks to transfer his or her interim status and of the person to whom that status is proposed to be transferred; legal descriptions of the locations of the two wells; the purpose of use for the well that has current interim authorization status and the proposed purpose of use for the well to which the transfer is proposed; the amount of groundwater proposed to be withdrawn at the well to which the transfer is proposed; the place of use of the water withdrawn from the well under interim status and the proposed place of use for the water withdrawn from the well to which the transfer is proposed; the period of time for which the transfer is proposed; a copy of the transfer agreement; the price per acre-foot or other consideration; and any other information as may be required by the general manager.

Section 707.415 concerns applications to transfer and amend a permit and lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents of such applications are: the names and addresses of the person who seeks to transfer his or her permitted rights and person to whom those rights are proposed to be transferred; legal descriptions of the locations of the two wells; the purpose of use for the currently permitted well and the proposed purpose of use for the well to which the transfer is proposed; the amount of groundwater proposed to be withdrawn at the well to which the transfer is proposed; the place of use of the water withdrawn from the permitted well and the proposed place of use for the water withdrawn from the well to which the transfer is proposed; the period of time for which the transfer is proposed; a copy of the transfer agreement; the price per acre-foot or other consideration; and any other information as may be required by the general manager.

Section 1.34 of the Act governs the ability of permit applicants or permit holders to transfer their rights. However, only certain types of transfers are allowed by §1.34. It is through the required contents of an application to transfer interim authorization status and to amend an application for an initial regular permit (§707.414) or an application to transfer and amend a permit (§707.415) that the Authority can assess whether a particular proposed transfer is allowed and approve or disapprove the proposed transfer. With particular reference to the requirement that such applications include the price per acre-foot for the water right purchased, such information is of great value to the Authority. Specifically, the Authority may be required to pay market prices for the purchase, proportional adjustment, or "buy down"

of water rights. The Authority must have the means to determine the market prices of groundwater withdrawal rights within the Edwards Aquifer region. Requiring the inclusion of prices in applications allows the Authority to develop such information. However, the Authority realizes that some transfers may not involve a true price (e.g., a gift) and will therefore allow an application for a transfer of water rights to indicate other consideration given, in appropriate circumstances.

Section 707.416 concerns applications for exempt well status and lists the required contents for such applications (that are in addition to the information specified in §707.401). Sections 1.16(c) and 1.33 of the Act exempt certain well owners from permitting and metering requirements. The required contents of such applications are: the name and address of the owner of the well (or proposed well); a legal description of the location of the well; a map showing the location of each well; the purpose of use; the maximum amount of withdrawal per day; the maximum rate of withdrawal; the depth of the well; the size of the pump and pumping method; the approximate date of well construction; a list of all other permits applied for or issued by the Authority to the applicant; a statement as to whether the well is within a subdivision requiring platting; a statement as to whether the well serves a subdivision requiring platting; and any other information as may be required by the general manager. The list of the required contents of an application for exempt well status provided in §707.416 will assist the Authority in obtaining the information necessary for it to assess a person's claim of exemption from permitting and metering requirements.

Section 707.417 pertains to applications for well monitoring permits and lists the required contents for such applications (that are in addition to the information specified in §707.401). Those required contents are: the name and address of the well owner; a legal description of the location of the well; a map showing the location of the well; a statement of the purpose of the monitoring well; a description of the method to be used to measure water depth or quality; the amount of water to be withdrawn per annum; the depth of the well; and any other information as may be required by the general manager. This provision will help the Authority regulate and keep track monitoring wells which are potential conduits of contamination of the aquifer and will thus help the Authority to prevent pollution of water in the aquifer.

Section 707.422 pertains to applications for agricultural conservation loans and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.11(d)(1) of the Act empowers the Authority to issue and administer grants, loans, or other financial assistance to water users for water conservation and water reuse. Section 1.24(c) of the Act allows the Authority to issue grants or make loans to finance the purchase or installation of equipment or facilities for water conservation. The required contents of such applications are: the name and address of the well owner; the tax identification or social security number of the applicant; a description of the intended use of the loan proceeds; a description of any item to be purchased; a legal description of the real property to be affected; any Authority permit application number; credit references; any invoice of items to be purchased with loan proceeds; if, for refinancing, a statement of the date that the equipment was purchased; a statement the applicant's consent and compliance meeting certain requirements; certain specified financial records; documents verifying the organization, existence and authority of the applicant; and any other information that may be required by the general manager. The list of the required contents of an application for an agricultural conservation loan provided in §707.422 will assist the Authority in obtaining the information necessary to assess whether a person is eligible for a agricultural conservation loan, whether the Authority can adequately protect its interests if it extends such a loan, and whether to extend such a loan.

Section 707.424 pertains to applications for a declaration of abandonment of a groundwater withdrawal permit and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.16(g) provides that an initial regular permit remains in effect until the permit is abandoned. The required contents of an application for declaration of abandonment of a groundwater withdrawal permit are: the name and address of the well owner; a description of the facts demonstrating non-use; a description of facts showing an intent to abandon; and any other information that may be required by the general manager. The list of the required contents provided in §707.424 will assist the Authority in obtaining the information necessary for it to determine whether a groundwater withdrawal permit should be abandoned.

Section 707.426 pertains to applications to cancel a groundwater withdrawal permit and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.16(g) provides that an initial regular permit remains in effect until the permit is cancelled. The required contents of an application to cancel a groundwater withdrawal permit are: the name and address of the well owner; a description of the facts demonstrating non-use; and any other information that may be required by the general manager. The list of the required contents provided in §707.426 will assist the Authority in obtaining the information necessary for it to determine whether a groundwater withdrawal permit should be cancelled.

Section 707.428 pertains to applications to convert base irrigation groundwater and lists the required contents for such applications (that are in addition to the information specified in §707.401). Section 1.34(c) of the Act places limits on the transfer of a portion of a permit holder's groundwater withdrawal rights where such rights are based on irrigation use. However, under circumstances described in Chapter 711, subchapter L, of the Authority's rules, the Authority has determined that such limitations can be removed through the "conversion of base irrigation groundwater." The required contents of an application to convert base irrigation groundwater are: the name and address of the well owner; and, if the application is based in physical impossibility, a description of all facts demonstrating physical impossibility. If the application is based on conservation, additional contents are required. The list of the required contents provided in §707.428 will assist the Authority in obtaining the information necessary for it to assess whether a permit holder should be allowed to convert base irrigation groundwater and thus remove the limitations on transfer.

Generally speaking, many of the sections listing the required contents of types of applications and registrations include a provision requiring: "any other information that the general manager may require." (See §§707.405(5)(K), 707.406(14), 707.407.15, 707.408(10), 707.410(10), 707.411(13), 707.412(8), 707.413(7), 707.414(9), 707.415(14), 707.416(14), 707.417(8), 707.422(13), 707.424(4), 707.426(3), 707.428(3)(O). The basis for this language lies in the need for flexibility in the review and processing of applications and the registrations by the Authority. The Authority, acting through its general manager, will need to exercise such flexibility. The processing and review of many applications and registrations

will be straight-forward, presenting a generic and well-defined set of issues to be examined. Other applications and registrations, however, will be unique and will present special issues and raise questions that are particular to that application or registration. These provisions, allowing the general manager to require "other information," included in the sections listing the required contents of each type of application and registration, provides the Authority with some flexibility in dealing with unique applications and registrations.

Subchapter F consists of nineteen sections (§§707.501-.519) and sets forth the procedures to be used by the Authority when processing and taking action on various applications and registrations filed with the Authority. The intent of this subchapter is to provide well-defined procedures and time-frames regarding the processing of applications and registrations. Also, many of the provision in subchapter F aim to ensure that permit decisions are reached through an unbiased method, are sound, and well-explained to the public. Some provisions in this subchapter also help to promote administrative efficiency.

Section 707.501 concerns the Authority's initial action on applications and registrations and provides that all applications and registrations shall be stamped or marked "Received" by the docket clerk with the date of receipt clearly indicated. This section establishes consistency in connection with the receipt of applications and registrations by the Authority and ensure that accurate records are kept regarding the date on which an application or registration is received.

Section 707.502 concerns the Authority's initial review of applications and registrations for administrative completeness. It provides that such review shall generally be completed within 45 business days of the receipt of the application or registration and payment of applicable fees. The Authority believes that this time frame provides sufficient time for staff to conduct such a review and ensures that the permit process moves along at a reasonable pace. Further, in connection with applications for emergency permits, the rule provides that such review shall be conducted within ten business days. This shortened time frame reflects the urgent need that a successful applicant for an emergency permit might have. The rule also states the basic criteria that shall be used in conducting such a review and provides that upon completion of this review, the general manager shall notify the applicant and forward the registration or application to the docket clerk with a request that it be filed.

Section 707.503 concerns the general manager's return of applications and registrations that are deemed to be not administratively complete. It provides procedures to be followed by the general manager in such circumstances and provides procedures to be followed to allow an applicant to correct deficiencies. This rule assures that an applicant or registrant will receive appropriate notice where an application or registration is not complete and allows for the efficient correction of deficiencies.

Section 707.504 concerns the technical review of applications by the Authority. It provides procedures to be followed by Authority staff in conducting such review. In particular, it generally directs Authority staff to complete such review within 90 business days of the determination that an application is administratively complete. The Authority believes that this time frame provides sufficient time for staff to conduct such a review and ensures that the permit process moves along at a reasonable pace. It also provides procedural requirements regarding the providing of additional material that may be necessary for technical review. These requirements create a mechanism whereby applications may be efficiently supplemented when appropriate. It also provides that the general manager or his designee may enter public or private property for the purpose of inspecting, investigating or verifying conditions or information submitted in connection with an application or a registration. This provision provides Authority staff with the means necessary to investigate and verify information provided in an application.

Section 707.505 governs changes to applications and registrations. It provides procedures governing when and how non-substantive and substantive changes may be made to applications and registrations. This section allows for appropriate non-substantive changes to efficiently be made to applications. It also provides safeguards to ensure that substantive changes will be made only when directed by the applicant.

Section 707.506 pertains to extensions of time to process applications and provides procedures to be followed where Authority staff determines that technical review of an application cannot be completed within the normal time period. This section provides flexibility to allow Authority staff extra time, where appropriate, to complete their technical review.

Section 707.507 applies to all applications for groundwater withdrawal permits and provides procedures regarding the proposed permit and technical summary to be prepared by the general manager, including the providing of notice to the applicant. This section also directs the general manager to prepare a proposed permit. It thus assures that the applicant is notified of the terms of the permit proposed by the general manager and the basis for those terms. This section also provides procedures regarding the filing of a proposed permit with the docket clerk and its presentation to the Board and provides procedures applicable where the general manager recommends to deny an application. It also provides procedures regarding the technical summary and lists the appropriate contents of the technical summary. If the application is for an initial regular permit, the proposed rule specifies that the general manager shall issue the proposed permit or denial and technical summary within 90 days of the effective date of these rules. The Authority believes that this time frame provides sufficient time for the general manager to propose actions on permit applications and ensures that the permit process moves along at a reasonable pace.

Section 707.508 applies to all applications other than applications for groundwater withdrawal permits and provides procedures regarding the proposed approval and technical summary to be prepared by the general manager, including the providing of notice to the applicant. It directs the general manager to prepare a proposed permit unless the general manager recommends to deny the application. It provides procedures regarding the filing of a proposed approval with the docket clerk and its presentation to the Board. This section also provides procedures applicable where the general manager recommends to deny an approval. It also provides procedures regarding the technical summary and lists the contents of the technical summary.

Section 707.509 concerns the referral to docket clerk of a proposed permit, approval, authorization or denial, and technical summary. It provides that when administrative and technical review is complete, the completed appropriate documents shall be forwarded to the docket clerk for presentation to the Authority for action and publication, if appropriate. This section assures that actions on permits and other approvals are all channeled through a central office - that of the docket clerk - so that they can be presented to the board for final action in a organized and methodical manner.

Section 707.510 concerns the publication of a notice of the proposed permit and technical summary in the *Texas Register* and in local newspapers. It applies only to only to those types of applications that the Authority has determined are subject to contested case hearings. Those types are: (1) applications for initial regular permits; (2) applications for additional regular permits; (3) applications for term permits; (4) applications for aquifer recharge and storage permits; (5) applications for recharge recovery permits; (6) applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal is transferred from west of Cibolo Creek to east of Cibolo Creek; and (7) applications to transfer and amend permit where the location of the point of withdrawal is transferred from west of Cibolo Creek to east of Cibolo Creek. This section provides procedures for the publication of a proposed permit, approval, authorization or denial, and technical summary in the *Texas Register* and in local newspapers. It requires that such notice be published no later than 30 days following the referral of the proposed permit, approval, authorization or denial to the docket clerk. It also states the required contents of such notice. This section assures that interested parties are provided with sufficient notice of the terms of a proposed permit or denial and the general manager's basis for his proposed action on applications for which a contested case hearing may be requested within a reasonable time. This section also requires that the notice include information regarding the opportunity to file a request for a contest case hearing.

Section 707.511 concerns the supplementation of an application required by a change in any of the Authority's rules. It provides that if any pending application is affected by a change in rules before final action on the application is taken, the applicant shall have a right to submit information as necessary to comply with such change. This section assures that applicants are not prejudiced by any change in Authority rules regarding the contents or requirements of an application or the criteria for the granting of a permit.

Section 707.512 governs the withdrawal of an application by an applicant and provides procedures pertaining to the withdrawal of an application both with and without prejudice. This section provides definite procedures regarding the withdrawal of applications. The purpose of this rule is to allow an applicant to efficiently withdraw and application "with prejudice" while discouraging applicants from consecutively filing and withdrawing applications "without prejudice" thus increasing administrative burdens on the agency. It should be noted that because applications for initial regular permits must have all been on file by December 30, 1996, an application for initial regular permit cannot be effectively withdrawn "without prejudice."

Section 707.513 governs action by the Board on applications where there the Authority has determined there is no right to a contested case hearing. The Board takes final action on the following applications where there is no right to a contested case hearing: (1) an application for an agricultural conservation loan; (2) an application for a variance from the comprehensive management plan; (3) a decision of the Board regarding loss of exempt well status; (4) the denial of an applications for a well construction permit; (5) the denial of an application for exempt well status; (6) the denial of any application to install or modify meter or alternative measuring method; (7) the denial of an application to transfer interim authorization status and amend application for initial regular permit except where the location of the point of withdrawal is to be transferred from west of Cibolo Creek to east of Cibolo Creek; (8) the denial of any application to transfer and amend permit except where the location of the point of withdrawal is to be transferred from west of Cibolo Creek to east of Cibolo Creek. The section provides procedures for: the scheduling of a Board meeting following technical review and the referral of the proposed permit, approval, authorization or denial to the docket clerk; notice of such a Board meeting; the consolidation or severance of matters by the Board; oral presentations before the Board; public comment; and Board action. This section provides relatively streamlined procedures for decisions which, although they are important, do not have the potential to affect all users of the aquifer.

Section 707.514 governs action by the Board on applications where there is a right to a contested case hearing but none were requested or requests were withdrawn. It applies to actions for which a contested case hearing may be requested but, where, after the time for the filing of a hearing request has passed, no timely hearing request has been received, all timely hearing requests have been withdrawn, or the judge has remanded the application because of settlement. It provides procedures for: the scheduling of a Board meeting following technical review and the referral of the proposed permit, approval, authorization or denial to the docket clerk; notice of such a Board meeting; the consolidation or severance of matters by the Board; oral presentations before the Board; public comment; and Board action. This section provides relatively streamlined procedures for decisions which although they could have been the subject of a contested case hearings, they are not opposed.

Section 707.515 concerns actions on applications by the general manager. Its purpose is to delegate authority to the general manager to take action on behalf of the Board to for certain listed actions. Under this section, the general manager may, under certain circumstances, grant: (1) applications for well construction permits; (2) applications for exempt well status; (3) applications for permit to install or modify meter or alternative measuring method; (4) applications to transfer interim authorization status and amend application for initial regular permit in all instances except when the location of the point of withdrawal is to be transferred from west of Cibolo Creek to east of Cibolo Creek; (5) applications to transfer and amend permit in all instances except when the location of the point of withdrawal is to be transferred from west of Cibolo Creek to east of Cibolo Creek; (6) applications for conservation plan approval; and (7) applications for reuse plan approval. It also provides procedures applicable in such instances. Through this section, the Authority has delegated to the general manager the authority to "handle administratively" the granting of these types of applications. This rule is meant to provide for the streamlined and efficient processing of applications that are not likely to be controversial or affect other users. By contrast, the Authority is not willing to delegate authority to the general manager to deny any of these types of permits or to act on any initial, term, recharge and emergency permits, and other permits which may affect the withdrawal rights of all other users.

Section 707.516 concerns corrections to permits by the general manager. It provides procedures regarding when and how the general manager may make non-substantive corrections to permits. This section allows for appropriate non-substantive changes to efficiently be made to permits. It also provides safeguards to ensure that only appropriate corrections are made.

Section 707.517 provides special procedures regarding the loss of exempt well status. It covers situations were the Authority receives information from a person other than the well owner indicating that the well no longer qualifies as an exempt well. It provides for notice and an opportunity for the well owner to provide information indicating to the general manager why exempt well status should not be cancelled. The purpose of §707.517 is to provide the general manager with a administrative fact-finding device. The general manager has no authority to withdraw exempt well status, only to place such a recommendation before the Board.

Section 707.518 provides special procedures regarding applications for emergency permits. It provides that where the general manager finds that the issuance of an emergency permit is warranted, the general manager shall issue that permit for a term not exceeding 30 days. This section provides for notice to the applicant and public comment and directs the general manager to submit the permit to the Board following public comment for ratification, recission, granting, renewal or modification. These expedited procedures are designed to ensure that emergency permits, when necessary, are granted as quickly as possible.

Section 707.519 establishes a moratorium on the processing of applications for additional regular permits until a final determination has been made on all applications for initial regular permits. This section recognizes the fact that cumulative maximum historical use during any one calendar year during the historical period for all applicants exceeds the amount that is legally available for permitting and, therefore, there will not be additional groundwater legally available for permitting in the near future.

Subchapter G consists of twenty-six sections (§§707.601-.626) and establishes procedures to be used by the Authority in connection with contested case hearings. These rules are meant to establish an efficient mechanism by which certain persons may challenge the claims to permitted withdrawal rights of other persons and for those rights to be determined in a quasi-judicial proceeding.

Section 707.601 defines the applicability of subchapter G, which concerns contested case hearings on Authority applications. Under this section, contested case hearings may be requested and granted in connection with applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits. Contested case hearings may also be requested and granted in connection with applications to transfer groundwater withdrawal rights where the transfer of the point of withdrawal is from west to east of Cibolo Creek.

The Authority has decided to allow the opportunity for contested case hearings in the situations noted above for the following reasons. All of these situations involve either: (1) a request by a well owner to be allocated a portion of the finite total amount of water that the Legislature has declared is available for permitting; (2) a request for a type of permit that could, when cumulated with other permits of that type, result in the over-appropriation of groundwater in the Edwards Aquifer; or (3) a request by a well owner, that could, when accumulated with other requests of that type, result in the concentration of permitted withdrawals in areas near Comal and San Marcos springs. Decisions in these situations have the potential to affect all other applicants or permittees. All other applicants may be affected by decisions in category (1) because to the extent that historical use is attributed to any given applicant, the cumulative amount of maximum historical use during any one calendar year for all applicants will be higher, resulting in an increased need to adjust all applicants' maximum historical use (or statutory minimums) downward in order to meet the Legislature's limit on the total amount of permitted withdrawals.

Applicants and permittees may be affected by category (2) because over-appropriation of groundwater may result in the triggering of aquifer management programs which include interruptions in withdrawal rights or other required reductions in withdrawals. Certain transfers of water rights - where the point of withdrawal is proposed to be transferred from west to east of Cibolo Creek - fall under category (3). Such transfers, accumulated over time, have the potential to result in the concentration of withdrawals near San Marcos and Comal Spring. Such concentration will likely result in decreased springflows triggering aquifer management measures that have the potential to negatively affect permitted withdrawal rights and cause required reductions in withdrawals throughout the region thus affecting all applicants and permittees.

The Authority has therefore determined that decisions implicating such considerations should be subjected to the opportunity for a contested case proceedings. Accordingly, for such decisions, applicants may be required to prove their entitlement to the permit or transfer at issue in a quasi-judicial proceeding. Those potentially affected parties (defined in §707.602) will have the right to request such a proceeding and, if that request is granted, will have the right to present evidence which would tend to refute or defeat the applicant's claim to the permit or transfer at issue. This system will assure greater accuracy in the Authority's issuance of important permits and permitted withdrawal amounts and a more fair apportionment of permitted rights.

This rule is also consistent with the recently proposed substantive rules (Chapter 711, Subchapter L) governing transfers of groundwater rights. Specifically, §711.352 imposes stringent criteria for the approval of transfers where the point of withdrawal of a right to withdraw groundwater is transferred from west to east of Cibolo Creek.

Section 707.602 states the classes of persons that are entitled to request a contested case hearing. The persons who are entitled to request a contested case hearing are: the applicant for that permit or approval; an applicant for another groundwater withdrawal permit issued by the Authority; and any permittee holding a groundwater withdrawal permit issued by the Authority.

The purpose of the Authority's procedures with respect to initial regular permits is to determine who has statutory-based rights to withdraw a portion of the 450,000 acre-feet of Edwards Aquifer groundwater initially available for permitting. Accordingly, the process of issuing initial regular permits is a process by which a finite amount of water (as determined by the Legislature) is allocated to various persons possessing statutory rights to some of that water. The Authority has determined that the individual decisions that make up this process should be subject to the possibility of a quasi-judicial proceeding which is in the nature of water rights adjudication. Persons who have an interest in that proceeding are the applicant for a particular permit at issue; any other applicant seeking an allocation of the finite amount and any permittee already provided with an allocation. By the nature of the proceeding, these are the only parties that could possibly have an interest in the proceeding. Anyone else is simply a bystander, with no real interest, because no part of the allocation of the total finite amount could conceivably go to that person. Thus, the Authority has determined that citizens, business entities, and groups that are not applicants or permittees do not have standing to request a contested case hearing.

Moreover, such proceedings involving applications for initial regular permits may have only incidental effects on downstream users, springflows, habitat and endangered species. The Authority has other programs which are primarily designed to advance these goals. Accordingly, the Authority is justified in determining that contested case hearings on initial regular permits and in other matters should not be a forum for persons and groups who are not applicants to argue their individual interest or their version of the public interest.

Section 707.603 concerns the required form and contents of a request for a contested case hearing. It provides that a request for a contested case hearing must be in writing and be filed by United States mail, facsimile, or hand-delivery with the docket clerk within the time specified in §707.604 of these rules. This rule helps to ensure that requests for contested case hearings submitted to the Authority are submitted in a regularized format that will allow the Authority to efficiently assess and act on such requests.

Section 707.604 concerns the time for the filing of a request for a contested case hearing. It provides that, unless a different time limit is specified in the notice of the proposed permit and technical summary, a hearing request must be filed with the docket clerk within 30 days of the date of publication of that notice in the *Texas Register*. The Authority believes that 30 days is sufficient time for a person to assess whether they wish to file a request for a contested case hearing, collect any information necessary to support their request, and complete and submit their request. The Authority also believes that this time frame helps move the permitting process along quickly.

Section 707.605 provides procedures applicable to the processing of a request for a contested case hearing by the Authority. It states that hearing requests not filed within the time period specified in §707.604 shall not be processed and shall be returned by the docket clerk to the person filing the request. This section also directs the docket clerk to provide notice to the applicant, general manager and any persons making a timely hearing request at least 30 days prior to the first meeting at which the Board considers the request. It also provides that persons may submit written responses to the hearing request no later than 20 days before a Board meeting at which the board will evaluate the hearing request. It also provides for the opportunity to file replies to those responses. The Authority must move the permitting process along and promote certainty in its decision-making process. Objective criteria and firm deadlines regarding when an eligible person must file a request for a contested case hearing and pleadings serve these goals. Moreover, the time frames regarding notice of the Board meeting in which a request will be considered allows parties sufficient time to prepare for such a meeting.

Section 707.606 governs action by the Board on a request for a contested case hearing. It specifies that the determination of whether a hearing request should be granted is not, in itself, a contested case subject to the APA. It provides procedures applicable to the Board's consideration of the hearing request and states that the Board may: (1) determine that the hearing request does not meet the requirements of this subchapter and deny the hearing request; (2) determine that the hearing request does not meet the requirements of this subchapter, deny the hearing request, and refer the application to a public meeting to develop public comment before acting on the application; or (3) determine that a hearing request meets the requirements of this subchapter and direct the docket clerk to refer the application to SOAH for a contested case hearing. It also provides that a request for a contested case hearing shall be granted if the request: (A) is supported by competent evidence; (B) is submitted by a person entitled to request under §707.602 of these rules; (C) complies with the requirements set forth in §707.603 of these rules; and (D) is timely filed with the docket clerk. This section sets forth the possible actions that the Board may take in response to a request for a contested case hearing. This section also provides procedural standards that the Board is to apply to requests for contested case hearings.

Section 707.607 concerns the service of documents filed in a contested case. It specifies that a person filing the document must serve a copy on all parties to the contested case including the general manager at or before the time that the request is filed. It also requires the inclusion of a certificate of service. This rule helps to assure that parties to a contested case receive copies of all relevant documents filed with the Authority by any other party to the contested case.

Section 707.608 delegates the authority to conduct contested case hearings to SOAH. It also specifies that as supplemented by subchapter G of Chapter 707, the applicable rules of practice and procedure of SOAH govern any contested case hearing of the Authority conducted by SOAH. SOAH is uniquely qualified in terms of experience and manpower to conduct contested case hearings on behalf of the Authority. Moreover, SOAH has developed an extensive set of procedural rules governing SOAH proceedings. The Authority expects that SOAH will conduct such hearings in a much more efficient and expeditious manner than if the Authority had decided to attempt to conduct such proceedings on its own.

Section 707.609 provides procedures to be followed when the Board refers a contested case to SOAH. It specifies that the Authority shall provide to the judge a list of issues to be addressed. It also states the Board may identify additional issues to be addressed, or may limit issues or areas to be addressed, at any time. This rule promotes the efficient use of SOAH's resources by helping to focus the SOAH judge on issues that are important in any given proceeding.

Section 707.610 concerns the designation of parties at contested case hearings. It confers party status on: (1) the general manager; (2) the applicant; (3) the person who requested the contested case hearing that was granted; and (4) an applicant for an initial regular permit who files a notice of party status under §707.626. The general manager, being the person who has proposed a particular decision on a permit application is necessarily party to a contested case proceeding regarding that proposal. Likewise, the applicant is a necessary party. In cases where the person requesting a contested case hearing on an application is not the applicant associated with that application, naturally, the person requesting the contested case should participate in the hearing that he or she initiated.

Subsection (d) of §707.610 provides that "an applicant for an initial regular permit who files a notice of party status pertaining to §707.626 . . . is a party in all contested case hearings for which notice has been given." The purpose of this provision, in conjunction with §707.626, is to reduce administrative burdens of he Authority and on applicants who would like to obtain party status in several contested case hearings.

Persons entitled to make use of this rule are must also be qualified to request a contested case hearing. Under §707.602, the categories of such persons are: the applicant for that permit or

approval; an applicant for another groundwater withdrawal permit issued by the Authority; and any permittee holding a groundwater withdrawal permit issued by the Authority. As discussed in more detail with respect to §707.602, the Authority has determined that these categories of persons, by nature of their status, have an interest in all applications sufficient to justify party status in a contested case hearing. As a result of §707.602, any applicant for an initial regular permit has the right to request a contested case hearing on every application for an initial regular permit and may gain party status in every resulting contested case hearing.

Rather than require such a person to file a request for a contested case hearing with respect to every application in which that person is interested, thus incurring for himself and imposing upon the Authority potentially significant costs and administrative burdens, this mechanism allows a person with standing to participate as a party in several contested case hearings where that hearing had been requested by another person and granted by the Authority. Thus, this provision, in conjunction with proposed §707.626, reduces administrative burdens on both applicants and the Authority by allowing an applicant, through one filing, to request party status in several or all contested case hearings. Moreover, this provision will likely result in a decreased total number of requests for contested case filed with the Authority.

Section 707.611 concerns the burden of proof at contested case hearings and provides that the burden of proof is on the applicant to establish by convincing evidence that he is entitled to an application for a groundwater withdrawal permit. The basis for this rule is that the applicant is in the best position to possess or have available evidence to prove the elements necessary to allow him to receive a groundwater withdrawal permit. The absence of such a rule would likely lead to a multitude of unsubstantiated, unsupportable, and fraudulent claims to groundwater withdrawal permits.

Section 707.612 concerns subpoenas at contested case hearings. It provides procedures concerning such subpoenas and specifies that requests for such subpoenas shall be in writing and directed to the Authority. This rule comports with a SOAH procedural rule (see Title 1, Texas Administrative Code, §155.43(e)), that states that requests for subpoenas shall be directed to the referring agency

Section 707.613 concerns the remand of contested case hearings to the Board. It provides that at the request of the applicant, a SOAH judge may remand an application to the Board if all timely hearing requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted. It also states procedures regarding such a remand. This rule allows for the efficient removal of matters from SOAH and their return to the Board of Directors in cases in which there is no fact-finding or other useful role for SOAH to play.

Section 707.614 concerns certified questions in contested case hearings. It provides that a SOAH judge may certify a question to the Authority at any time during a contested case hearing. It lists types of issues that are appropriate for certification. It also provides procedures to be followed where a question is certified. This rule allows for legal or policy questions that arise during a contested case hearing, which are appropriately addressed by the Board, to be referred by SOAH back to the Board.

Section 707.615 concerns proposals for decision in contested case hearings. It specifies that a proposal for decision submitted to the Authority by a SOAH judge shall, where appropriate, include any recommended changes to the permit originally proposed by the general manager. This rule promotes the efficient communication of the results of the SOAH judge's recommendation to the Board.

Section 707.616 allows a party to waive the right to review and comment upon the SOAH judge's proposal for decision. It requires such waiver to be either in writing or stated on the record at the hearing. This rule allows the process by which a SOAH recommendation is acted on by the Board to be expedited in appropriate situations.

Section 707.617 concerns pleadings following the submittal of a proposal for decision. It provides that exceptions or briefs may be filed within 20 days after the date of the judge's submittal of the proposal for decision. It also specifies that replies to such exceptions or briefs, if any, must be filed within 30 days after the date of the judge's submittal of the proposal for decision. These time frames are designed to allow parties to sufficient time to prepare and file briefs in connection with a proposal for decision while moving the permitting process along at a fairly quick pace.

Section 707.618 governs the scheduling of a meeting of the Board in connection with a proposal for decision. It provides procedures applicable to such scheduling, including notice to parties of the date of the meeting and deadlines for the filings of exceptions and replies. It allows the Board to consolidate related matters or sever issues in a proceeding under certain circumstances. This rule allows for the efficient and regular scheduling of proposals for decision for consideration by the Board.

Section 707.619 concerns oral presentations to the Board regarding contested cases. It provides that any party to the contested case hearing may make an oral presentation at the Board meeting in which the proposal for decision in that case is presented to the Board. It limits such presentations to 15 minutes each, excluding time for answering questions, unless the chair or the general counsel establishes other limitations. This rule establishes general requirements concerning oral presentations to the Board on contested case hearings designed to move the process along quickly. Presumably, parties would have had more time to present their views to the SOAH judge. Exceptions to these requirements can be made where appropriate.

Section 707.620 concerns the reopening of the record in connection with a contested case hearing. It states that the Board may order the judge to reopen the record for further proceedings on specific issues and provides procedure applicable to such an order. This rule provides needed flexibility to allow parties to present additional evidence in appropriate situations.

Section 707.621 concerns the decision rendered by the Board in connection with a contested case hearing. It specifies that the Board shall render its decision upon the expiration of 30 days or later following service of the judge's proposal for decision, unless the parties have waived review. This section also specifies the Board's decision will be rendered no more than 90 days after the date the proposal for decision is presented to the Board, unless the Board determines that there is good cause for continuing the proceeding. It also provides that the decision, if adverse to any party, shall include findings of fact and conclusions of law separately stated. These time frames will allow parties sufficient time

to present additional argument to the Board and are intended to ensure that decisions will be made on a fairly expeditious basis.

Section 707.622 concerns motion for rehearing on decisions in contested case hearings. It provides that only a party to the contested case may file a motion for rehearing. It also specifies that a motion for rehearing is a prerequisite to appeal. The rule also provides procedures applicable to the filing of, response to, and the ruling on such a motion for rehearing. A motion for rehearing is due within 20 days after the date the party seeking to file the motion or his attorney is notified of the decision or order. The reply to that motion for rehearing is due 30 days after the date a party or his attorney is notified of the decision or order. The Authority believes that this rule provides sufficient time for the reply while moving the permitting process along at a fairly quick pace. These procedures allow parties undertake an effort to convince the Authority to change its decision and provides the Authority with an opportunity to correct any errors.

Section 707.623 declares that in the absence of a timely motion for rehearing, a decision or order of the board is final on the expiration of the period for filing a motion for rehearing. It also provides that if a party files a motion for rehearing, a decision or order of the board is final and appealable on the date of the order overruling the motion for rehearing or on the date the motion is overruled by operation of law. This rule helps to define when an order of the Authority on a permit following a contested case hearing become "final" or "final and appealable."

Section 707.624 concerns the right to appeal a final decision in a decision in a contested case hearing. It provides that a person who was a party to a contested case before the Authority and is affected by a final decision or order of the Authority in that case may file a petition for judicial review within 30 days after the decision or order is final and appealable. It provides that procedures for appealing an order of the Board in contested cases are governed by provisions of the APA governing judicial review of contested case decisions. For the purposes of such an appeal, this section also defines the items to be included in the record in a contested case.

Section 707.625 concerns the payment of costs for preparing the record on appeal. It provides that a party who appeals a final decision in a contested case shall pay all costs of preparation of the record and that such a charge is considered to be a court cost and may be assessed by the court in accordance with the Texas Rules of Civil Procedure. This rule will allow the Authority to offset some of the costs involved in preparing a record in contested case proceedings that are subjected to judicial review.

Section 707.626 relates to notice of party status. This section states that any applicant for an initial regular permit may obtain party status in any or all contested cases by filing the requisite notice. The section provides that the notice must be in writing and filed with the docket clerk within the time provided by §707.604. In addition, the section lists the information that must be contained in the notice.

As noted above, §707.626 acts in conjunction with subsection (d) of §707.610. The purpose of these provisions, as described in more detail above, is to reduce administrative burdens of he Authority and on applicants who would like to obtain party status in several contested case hearings.

III. REGULATORY IMPACT ANALYSIS OF MAJOR ENVIRONMENTAL RULES.

Section 2001.0225 of the APA requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the Chapter 707 rules, as adopted, are "major environmental rules" as that term defined by §2001.0225(g)(3) of the APA. The basis for this determination is that the rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The rules establish procedures to be followed in Authority proceedings. Specifically, these set forth procedures: (1) regarding the computation of time and the filing of documents; (2) governing meetings before the Board; (3) pertaining to the filing of applications and registrations with the Authority; (4) to be followed by the Authority with respect to the processing and review of such applications and registrations; and (5) regarding contested case hearings on applications. The specific intent of these procedural rules is to allow the Authority to efficiently implement its powers and duties. For this reason, we find that these rules do not have a specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." Accordingly, we find that none of the rules are "major environmental rules" and that, therefore, no further analysis is required by §2001.0225 of the APA.

IV. SUMMARY OF PUBLIC COMMENTS.

Five public hearings were held on proposed chapter 707 and other rules proposed by the Authority on: Wednesday, August 9, 2000 at 6:00 p.m. at the Conference Center of the Edwards Aquifer Authority, 1615 N. St. Mary's Street, San Antonio, Texas; Tuesday, August 15, 2000 at 6:00 p.m. at the New Braunfels Civic Center, 380 S. Seguin Avenue, New Braunfels, Texas; August 17, 2000 at 6:00 p.m. at St. Paul's Lutheran Church, 1303 Avenue M, Hondo, Texas; Tuesday, August 22, 2000 at 6:00 p.m. at the Sgt. Willie De Leon Civic Center, 300 E. Main Street in Uvalde, Texas; and Thursday August 24, 2000 at the San Marcos Activities Center, 501 E. Hopkins, San Marcos, Texas. Oral comments on these rules were provided by John Brigman; Louis Obdyke; Tom Wassenich; and Dianne Wassenich. Written comments on these rules were provided by San Antonio Water System ("SAWS"); Vinson & Elkins ("V&E"); Roger & Marvin Verstuyft Farms ("Verstuyft Farms"); Earl & Brown ("Earl & Brown"); Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. on behalf of the Texas Farm Board ("TFB"); Inland Ocean, Inc. ("Inland"); Fulbright & Jaworski on behalf of Vulcan Materials Company ("Vulcan"); the City Public Service Board of San Antonio ("CPS"); and the Texas Department of Agriculture ("TDA").

Comments regarding Chapter 707 generally

TFB asserts that the Authority was required by the Texas Private Real Property Rights Preservation Act to prepare a "takings impact assessment" or "TIA" before providing notice of the proposed adoption of the Chapter 707 rules.

The Authority disagrees with the commenter. Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," ("TPRPRA") requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of these rules. First, the Authority has made a "categorical determination" that rules of practice and procedure do not affect private real property. These proposed rules establish and describe the procedures to be followed in Authority proceedings and before the Board of Directors of the Authority. More specifically, these

provisions would set forth procedures: (1) regarding the computation of time and the filing of documents; (2) governing meetings before the board; (3) pertaining to the filing of applications and registrations with the Authority; (4) to be followed by the Authority in connection with the processing and review of such applications and registrations; and (5) regarding contested case hearings on applications. As such, they have no direct affect on private real property and may not result in a taking. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from TPRPRA under §2007.003(b)(4) of the Texas Government Code. See Act §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b), 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), and 1.34; Texas Government Code Annotated, §2001.004(1) (Vernon 2000). It was held, in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375 (Tex. App. - San Antonio 2000, pet. filed), that the Act expressly mandates the adoption of substantive and procedural rules and that such actions are therefore excepted from the TPRPRA. The holding in that case controls here. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the TPRPRA under §2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the adoption of these rules.

TDA comments generally that the Authority should have prepared a "small business effects statement" prior to proposing the adoption of the Chapter 707 rules, pursuant to §2006.002(d) of the Texas Government Code.

The Authority disagrees with the commenter for the following reason. Chapter 2006 of the Texas Government Code, subchapter A, requires state agencies to prepare a small business effects statement (SBES) prior to proposing a rule that would have an adverse economic effect on small businesses. By the statute's express terms, this requirement applies only to a "state agency." The term "state agency" is defined, for the purposes of Chapter 2006, subchapter A, as "a department, board, bureau, commission, division, office, council or other agency of the state." Texas Government Code Annotated, §2006.001(3).

Section 2006.002 does not apply to the Authority because the Authority does not meet the definition of the term "state agency" as set out forth in Chapter 2006. Section 1.02(a) of the Act creates the Authority as a "conservation and reclamation district" under Article XVI, §59 of the Texas Constitution. Conservation and reclamation districts created under this authority have long been considered to be "political subdivisions" of the State of Texas. See, e.g., *Guaranty Petroleum*, 609 S.W.2d at 530. In *Guaranty Petroleum*, the Texas Supreme Court explained the difference between political subdivisions and state agencies as follows:

A political subdivision differs from a department, board or agency of the State. *A political subdivision has jurisdiction over a portion of the State; a department, board or agency of the State exercises its jurisdiction throughout the State.* Members of the governing body of a political subdivision are elected in local elections or are appointed by locally elected officials; those who govern departments, boards or agencies of the State are elected in *statewide* elections or are appointed by State officials.

Guaranty Petroleum, 609 S.W.2d at 531 (emphasis added).

Guaranty Petroleum makes clear that state agencies are characterized by having *statewide* jurisdiction and are governed by persons who are elected in *statewide* elections or are appointed by state officials. Political subdivisions like the Authority, on the other hand, have jurisdiction over only a portion of the state and are governed by persons who are elected in local elections or are appointed by locally elected officials. These principles have been reiterated by the Texas Supreme Court in *Lohec v. Galveston County Commissioners Court,* 841 S.W.2d 361, 364 (Tex. 1992) (noting that "statewide jurisdiction" is "a trait required of entities recognized as department, boards, or agencies of the state") and *Monsanto Company v. Cornerstones Municipal Utility District,* 865 S.W.2d 937, 939-40 (Tex. 1993).

Because the Authority has jurisdiction over only a portion of the State and because the members of its governing body are elected in local elections or are appointed by locally elected officials, the Authority is a political subdivision and not a state agency, and is not subject to the SBES requirement found in Chapter 2006 of the Government Code.

Section 707.103(h)

Section 707.103 sets forth general procedures applicable to the filing of documents with the Authority. Subsection (h) states that "the Authority may waive one or more of the requirements of this section or impose additional filing requirements."

SAWS proposes changing §707.103(h) so that it reads:

(h) The Authority may waive one or more of the requirements of this section or impose additional filing requirements *after notification of affected applicants or other interested parties.*

The Authority disagrees with the commenter. The purpose of §707.103(h) is to allow the Authority some flexibility in the filing of documents. For example, subsection (d) of §707.103 requires that an original and one copy of all documents shall be filed. It may be appropriate, in some cases to waive this requirement without prior notification to "affected applicants or other interested parties." Likewise, for some particular types of filings, it may be appropriate to impose additional filing requirements. In such a case, the Authority has every intention of providing sufficient notice to persons who would be required to comply with that additional requirement. The Authority has no intention of imposing additional filing requirements with insufficient notice. In light of the above discussion, the Authority has not modified §707.103(h).

Section 707.103(c) and §707.104(b)

Section 707.103(b) concerns the *filing* of documents with the Authority. It provides that "if a person files a document by facsimile, he or she must file with the docket clerk the appropriate number of copies by mail or hand delivery within *three days.*" (Emphasis added.) Section 707.104(b) concerns the *service* of documents required to be filed under the Authority's rules. It provides that "service by facsimile must be followed by serving an extra copy in person, by mail or by carrier-receipted delivery within *one day.*" (Emphasis added.) SAWS suggests that for the sake of consistency, the time in which service by facsimile must be followed by serving an extra copy in person, by mail or by carrier receipted delivery be changed from one to three days.

The Authority disagrees with the commenter. This difference noted by SAWS finds its basis in the fact that the Authority's rule regarding the service of documents contains a "mailbox rule" (see §707.104(b) (stating that service by mail shall be complete

upon deposit of the document, enclosed in a postage-paid properly addressed wrapper, in a post office of official depository under the case and custody of the United States Postal Service")) while the Authority's rule regarding the filing of documents contain no "mailbox rule." Accordingly, when §707.103(c) requires a party filing by facsimile to file a copy of the document by mail within three days, the docket clerk of the Authority must actually receive the document within three days. On the other hand, since service by mail is complete upon deposit with the U.S. Postal service, a party serving a document by facsimile may simply deposit a copy of the document already served by facsimile in the mail on the day following the day that service by facsimile is made. In light of the above discussion, the Authority has not modified §707.103(c) and §707.104(d).

Section 707.201(f)

Section 707.201 provides general information and procedures concerning meetings of the Board of Directors of the Authority. Subsection (f) of that section, as proposed, states as follows:

The Parliamentarian shall decide issues of parliamentary procedure, but may be overruled by majority vote of the board. The Parliamentarian is appointed to that position by the chair pursuant to the Bylaws of the Authority.

Inland comments that where the Parliamentarian is a director, such director should not vote in a matter where an issue regarding parliamentary procedure is at hand.

The Authority agrees, in part, and disagrees, in part, with the commenter. Under §707.201(f), as proposed, the Parliamentarian is always a director. The Authority disagrees with the commenter in that the Authority declines to relieve a voting director of his or her right to vote on any matter before the Authority. However, to avoid any conflict with Robert's Rules of Order in these rules, the Authority has modified §707.201(f) to allow for the appointment of a Parliamentarian who is not a director, as follows:

The Parliamentarian shall decide issues of parliamentary procedure, but may be overruled by majority vote of the board. The Parliamentarian is appointed to that position by the chair pursuant to the Bylaws of the Authority.

Section 707.203

Section 707.203 concerns the deadline for the filing of comments on matters set for a meeting of the Board. This section, as proposed, provides as follows:

The board or the general counsel may set deadlines for the public to file written comments on matters set for a meeting of the board. The general counsel, whether by agreement of the interest persons and any judge assigned to the matter, or the general counsel's own motion, may extend a filing deadline.

SAWS expresses concern over the general counsel alone making a determination as to such deadlines. SAWS maintains that in certain parts of the rules, the Board clearly delegates activities to the General Manager, but no such delegation to general counsel has been recognized. SAWS recommends changing §707.203 to provide only that the Board my extend deadlines for the public to file written comments on matters set for a meeting of the Board.

The Authority agrees, in part, and disagrees, in part, with the commenter. The Authority agrees that the authority to extend the deadline to file written comments on matters set for a meeting of the Board should not be delegated to the general counsel. However, the Authority believes that it is appropriate to delegate such authority to the general manager. The Authority has therefore modified §707.203 as set forth below.

The board or the general *manager* may set deadlines for the public to file written comments on matters set for a meeting of the board. The general *manager*, whether by agreement of the interest persons and any judge assigned to the matter, or the general *manager's* own motion, may extend a filing deadline.

Section 707.204(b)

Section 707.204 concerns the continuance of a matter set for a board meeting. Subsection (b) of that section, as proposed, allows the general counsel, either by agreement of the parties and any judge assigned to the matter, or by the general counsel's own motion, to reschedule the presentation of a matter at a board meeting.

SAWS expresses concern over the general counsel alone making a determination as to such continuances. SAWS maintains that in certain parts of the rules, the Board clearly delegates activities to the General Manager, but no such delegation to general counsel has been recognized. SAWS proposes eliminating the general counsel's authority to reschedule the presentation of a matter at a board meeting and modifying the rule so that only the board could reschedule the presentation of a matter at a board meeting.

In response to the public comments, the Authority has elected not to adopt §707.204 at this time and hereby withdraws the rule from consideration for permanent adoption.

Section 707.303

Section 707.303 attempts to clarify who is the proper applicant, registrant, or declarant for an application, registration or declaration. This rule states, in part, that "if there is more than one owner, a joint application, registration, or declaration shall be filed by those owners." Vulcan suggests a modification to this rule that would clarify that lessees, assignees, and easement holders are not joint owners. Joint ownership, according to Vulcan, only occurs if the interest holder is entitled to divided or undivided shares in the withdrawals from the well at any given time.

The Authority agrees with Vulcan's interpretation that lessees, assignees and easement holders are not joint owners of wells and need not be parties to a joint application. The Authority adds the following language to the end of §707.303 to clarify that lessees, assignees and easement holders need not be parties to a joint application: "For the purposes of this rule, a lessee or assignee of the surface estate, or an easement holder, is not considered an owner of a well."

Section 707.304

Section 707.304, as proposed, states the requirement that "any person seeking to withdraw groundwater from the aquifer, unless exempted from the permit requirement by §1.16(c) and §1.33 of the Act and §711.20 of this title (relating to Groundwater Withdrawal Permits), must file with the Authority an application for a groundwater withdrawal permit. SAWS recommends removing what it contends is an inadequate rule reference to "§711.20 of this title . . ."

The Authority agrees, in part, and disagrees, in part, with the commenter. The rule referenced in §§707.304-711.20 - relates to "Eligibility for Exempt Well Status" (not to "Groundwater Withdrawal Permits"). The Authority has revised §707.304 accordingly.

Section 707.306 and §707.308

Section 707.306 states the requirement that the owner of an existing or exempt well must register the well with the Authority. Section 707.308 states the requirement that an owner of a well that believes the well to be exempt from permitting requirements file an application for exempt well status. TFB questions whether an exempt well owner should be required to register a well and file an application for a exempt well status and pay both fees. TFB asserts that these requirements are redundant and unnecessary. TFB urges that all that is required is well registration.

The Authority disagrees with the commenter. The requirements to register a well and to file an application for exempt well status are completely independent. All existing wells including those requiring a groundwater withdrawal permit and exempt wells must be registered with the Authority. It is only through this requirement that the Authority can keep track of all points of withdrawal of groundwater from the Edwards Aquifer. On the other hand, only those well owners who claim to be exempt from the requirements to obtain a groundwater withdrawal permit are required to file an application for exempt well status. It is through this requirement that a person presents the Authority with information that would allow the Authority to validate the person's claim of exemption. Accordingly, both requirements are necessary. Moreover, because these are separate and independent requirements, separate filing fees are appropriate.

Section 707.308

As noted above, §707.308 states the requirement that an owner of a well who believes the well to be exempt from permitting requirements file an application for exempt well status. Earl & Brown urge the addition of a subsection (c) to §707.308 which would read as follows:

If an owner of an existing or proposed well submits a properly completed application for exempt well status, the Authority must provide the applicant with a written notice of the Authority's decision to approve or disapprove the exempt well status within 30 days from the date the application is received by the Authority. In the event the Authority fails to take such action on an application for exempt well status within 30 days, the application shall be deemed approved as a matter of law.

Earl & Brown assert that this addition is necessary for the purpose of avoiding unnecessary delays in processing applications for exempt well status. In support of this suggested addition, they also argue that it is imperative that applicants have the opportunity to obtain groundwater withdrawal rights before their well construction permits expire.

The Authority disagrees with the commenter. Procedures applicable to actions on applications for exempt well status are provided by §§707.501.-707.509, and 707.515, and 707.516 of these rules. The Authority believes that these procedures are necessary and appropriate for the consideration of applications for exempt well status. It is through these procedures that the Authority can assure the efficacy of the results of its determinations on exempt well status. The Authority notes that it seriously intends to process and act on applications in a timely manner. To shortcut the Authority's procedures by providing that an application will "deemed approved as a matter of law" following the expiration of a specified time would most likely lead in inaccurate results.

Section 707.309

Section 707.309 states the requirement that any person seeking to install a new meter or modify an existing meter file an application for a permit to install or modify a meter. Earl & Brown suggest adding a new provision to §707.309 which would state as follows:

In the event an existing meter is damaged to the extent that it is no longer properly functioning, the requirement to file an application with the Authority for a permit to install a new meter shall be waived provided the well owner can sufficiently demonstrate to the authority that an emergency condition existed in which the existing meter was no longer functioning.

The Authority disagrees with the commenter. If an existing meter is damaged to the extent that it is no longer properly functioning, then, under the Authority's substantive meter rules, subchapter M of Chapter 711, the meter would have to be repaired or replaced. If the meter was to be replaced, the well owner would be required to file an application pursuant to §707.309. If the meter needed repairs such that the repairs would constitute a "modification" for the purposes of §707.309, then the well owner would likewise be required to file an application pursuant to §707.309. The Authority does not understand or foresee what emergency condition might require the waiver of these requirements.

SAWS urges that the term "modify" as used in §707.309 not include standard maintenance. SAWS suggests that the following italicized language be added to the last sentence of §707.309:

For the purpose of this chapter, the term "modify" in connection with a meter means to make any physical change to the meter *other than standard maintenance.*

The Authority agrees with the commenter. The language of §707.309 has been modified as suggested.

Section 707.310

Section 707.310 states the requirement that an owner of an existing well equipped with a meter register the meter with the Authority by filing a meter registration no later than 180 days from the effective date of these rules. SAWS urges the addition language that would provide that meters registered with the Authority prior to the effective date of these rules through the filing of forms previously prescribed by the Authority need not be registered again.

The Authority agrees with the commenter. The Authority has added the following language to the end of §707.309.

Meters registered with the Authority prior to the effective date of these rules through the filing of forms previously prescribed by the Authority need not file another meter registration.

Section 707.311

Section 707.311 concerns the requirement to file a Declaration of Historical Use. It provides, in part, that "a declaration of historical use (application for an initial regular permit) must have been filed with the Authority pursuant to § 1.16(a) of the Act by December 30, 1996 . . . ." SAWS recommends removing what it contends is an inadequate rule reference to "§711.20 of this title . . ."

The Authority agrees, in part, and disagrees, in part, with the commenter. The rule referenced in §§707.311-711.20 - relates to "Eligibility for Exempt Well Status" (not to "Groundwater Withdrawal Permits"). The Authority has revised §707.311 accordingly.

Earl & Brown maintains that §707.311 should state that the time to file a declaration of historical use should be stated as "on or before March 1, 1994" in accordance with the language of §1.16(a) of the Act. Earl & Brown agrees that the deadline was changed to December 30, 1996, but contends that the change was not made pursuant to the Act.

The Authority agrees, in part, and disagrees, in part, with the commenter. Although the Act, on its face, does not establish December 30, 1996, as the deadline for filing declarations of historical use, but instead mentions March 1, 1994, that deadline was changed to December 30, 1996, by decision of the Supreme Court of Texas in *Barshop v. Medina County Underground Water District,* 925 S.W.2d 618, 628-630 (Tex. 1996). In order to clarify the legal basis for the December 30, 1996 deadline, the Authority has added the indicated language to §707.311

A declaration of historical use (application for an initial regular permit) must have been filed with the Authority pursuant to §1.16(a) of the Act and the decision of the Texas Supreme Court in *Barshop v. Medina County Underground Water District,* 925 S.W.2d 618, 628-630 (Tex. 1996) by December 30, 1996 . . . .

Section 707.312

Section 707.312, as proposed, provides that "declarations of historical use received by the Authority before the effective date of this subchapter need not be resubmitted." CPS notes that the terms "declaration of historical use" and "application for an initial regular permit" are used sometimes used interchangeably, as in §707.311. CPS also notes that the text of §707.405 makes it appear that a declaration of historical use is just one part of an application for an initial regular permit. CPS requests clarification as to whether §707.312 applies to an application for an initial regular permit or whether the Authority will require re-submission of the initial permit application after the effective date of the rules.

The Authority agrees that §707.312 should be clarified. Accordingly, the Authority has modified §707.312 to clarify that applications for an initial regular permit received by the Authority before the effective date of this subchapter need not be resubmitted.

Section 707.403

Section 707.403 provides, in part, as follows:

For all applications other than for an agricultural conservation loan, a non-refundable application fee of $25 must accompany that application in order for it to be considered by the Authority.

TFB asserts that §709.11, as proposed, contradicts §707.403. Section 709.11 states, in part, as follows:

The general manager shall impose a $25 fee to file with the Authority an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit, and recharge recovery permit.

The Authority agrees with the commenter that §709.11, as proposed, seems to contradict §707.403. To address this apparent contradiction, and as additionally noted in the Final Order Adopting Rule for its Chapter 709 rules, the Authority has modified §709.11 as set forth below:

The general manager shall impose a $25 fee to file with the Authority *any application, including but not limited to,* an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit, and recharge recovery permit.

Section 707.405 generally

Section 707.405 lists the contents of an application for an initial regular permit/declaration of historical use. V&E submitted comments to §707.405 generally, contending that the rule retroactively creates requirements for permit applications that were required to be filed by December 30, 1996, and that these new requirements were not reflected in the Authority's prior rule. Furthermore, V&E asserts that even seemingly innocuous problems with this rule are made significant given §711.98(j) which states as follows:

Subject to the duty of the board to determine the amount groundwater that may be withdrawn under an initial regular permit, the board shall grant an application for an initial regular permit if the following elements are established . . . (14) the application is in compliance with the rules of the Authority.

V&E believes these rules could cause an application to fail due to the retroactive application of these rules and recommends that the rules allow the applicant some time to supplement an application in order to meet the new requirements.

The Authority disagrees with the commenter. The rules Authority's rules allow an applicant to supplement an application in order to meet any new requirements. Specifically, §707.511 (relating to Supplementation of Application Required by Change in Rules) states that "if any pending application is affected by a change in these rules before final action on the application is taken by the Authority, the applicant shall have a right to submit information as necessary to comply with such change."

Section 707.405(3)

Paragraph (3) of §707.405, as proposed, requires that applications for an initial regular permit contain the amount of groundwater proposed to be withdrawn - stated in acre-feet per year - by the well that is the subject of the application. SAWS urges that an application for an initial regular permit should indicate historic use, not future or intended use. Accordingly, SAWS suggests the deletion of Paragraph (3) from §707.405. V&E also points to Paragraph (3) as irrelevant for the purposes of establishing historical use on which initial permits are based.

The Authority agrees with the commenters that an application for initial regular permit should focus on historic as opposed to intended or future uses. Moreover, most of the subjects in paragraph (3) of §707.405, as they relate to historical use, are covered in paragraph (6)(A) and (6)(C) of §707.405. Accordingly, the Authority has modified §707.405 by deleting paragraph (3) and renumbering the remaining paragraphs in the section.

Section 707.405(4)

Paragraph (4) of §707.405, as proposed, requires that applications for an initial regular permit contain the proposed maximum rate of withdrawal in gallons per minute or cubic feet per second.

SAWS contends because applications for initial permits are for existing, not proposed, wells and that paragraph (4) should be amended to read as follows:

Rate of Withdrawal. The maximum rate of withdrawal in gallons per minute or cubic feet per second each well is capable of producing shall be stated.

As noted above, the Authority agrees with the commenter that an application for initial regular permit should focus on historic as opposed to intended or future uses. Accordingly, the Authority has modified paragraph (4) of §707.405, as suggested, to make it clear that the application for initial regular permit requests historical information. In addition, the Authority has made a similar change to paragraph (5) of §707.405.

Section 707.405(6)(A)

Paragraph (6) of §705.405, as proposed (now paragraph (5)), requires that applications for an initial regular permit include a declaration of historical use. Subparagraph (A) of that paragraph requires the declaration to state "the total amount of water from the aquifer that the applicant or his contract user, prior user or former existing user withdrew and beneficially used without waste during each calender year of the historical period."

Earl & Brown urges that an applicant should be required to submit the total amount of water withdrawn from the Aquifer by a "prior user or former existing user" only if the applicant is able to obtain such information using reasonable efforts. Furthermore, Earl & Brown assert that such information should be verifiable and reliable or supported by affidavit.

The Authority disagrees with the commenter. It is the Authority's position that all applicants must document the beneficial use of underground water from the aquifer during the historical period, including use made by prior users. For any year in which an applicant fails to document or otherwise submit evidence of the amount of such prior use, the Authority will assume that usage for that year was zero.

Section 707.405(6)(E)

Subparagraph (E) of paragraph (6) (now paragraph (5)), of §707.405, as proposed, requires the declaration of historical use to state "the number and location of each well owned by the applicant and for which the applicant claims groundwater from the aquifer was withdrawn and placed to beneficial use during the historic period and the amount of water withdrawn from each well during each year of the historical period."

SAWS asserts that reporting production by individual wells is too cumbersome for an integrated pumping system. SAWS suggests amending this provision so that it reads as follows:

(E) the number and location of each well owned by the applicant and for which the applicant claims groundwater from the aquifer was withdrawn and placed to beneficial use during the historic period;

The Authority agrees with the commenter. This provision, as proposed, imposes a burdensome requirement. The Authority agrees that the burden of collecting and submitting the information at issue is not outweighed by the Authority's need for that information. The Authority has therefore modified this provision as suggested by the commenter.

Section 707.405(6)(G)

Subparagraph (G) of paragraph (6) (now paragraph (5)) of §707.405 requires the declaration of historical use to state (if the groundwater was withdrawn from the well or placed to a beneficial use by a contract user, prior user or former existing user), "the name, address and telephone number of each contract user, prior user or former existing user, the year of withdrawals, purpose of use, place of use and amount of withdrawals, including copies of the legal documents establishing the legal right of the contract user to withdraw and/or place groundwater from the aquifer to beneficial use."

Earl & Brown urge that this section should be changed to require such information only when the applicant is able to obtain it with "reasonable effort" and the information obtained is accurate and reliable. Additionally, Earl & Brown urge that if the applicant cannot obtain the information, a notation should be added to the application and no penalty should be suffered by the applicant.

The Authority disagrees with the commenter. It is the Authority's position that all applicants must document the beneficial use of underground water from the aquifer during the historical period, including use made by contract users, prior users, or former existing users. The information required in this subparagraph is necessary in order for the Authority or a party protesting a proposed permit to investigate and verify an applicant's claims of historical use of a contract user, prior user or former existing user. For any year in which an applicant fails to document or otherwise submit evidence of the amount of such prior use and the identity of such contracts user, prior user or former existing user, the Authority will assume that usage for that year was zero. However, the Authority has modified this provision to add the missing comma.

Section 707.405(6)(I)

Subparagraph (I) of paragraph (6) (now paragraph (5)) of §707.405 requires a declaration of historical use to provide - in instances where the groundwater is to be sold on a wholesale or bulk basis - "a description of how the groundwater will be sold, transported or transferred, the name address, and telephone number of every person to whom water will be delivered, the location to which the groundwater will be delivered, and the purpose for which the groundwater will be used . . . ."

SAWS comments that to require the identification of other than contracting parties is not only cumbersome, but ridiculous. SAWS suggests that §707.405(6)(I) read as follows:

. . . a description of how the groundwater will be sold, transported or transferred, the location . . . .

The Authority disagrees with the commenter. The requirement in subparagraph I to list "the name, address and telephone number of every person to whom water will be delivered" applies on its face to only where "the groundwater is to be sold on a wholesale or bulk basis." There is no requirement for an applicant (including SAWS) to list all the name, address and telephone of all retail water customers.

Section 707.405(6)(K)

Subparagraph (K) of paragraph (6) (now paragraph (5)) of §707.405 requires a declaration of historical use to contain "any other information that the general manager may require." Earl & Brown urge the deletion of this provision asserting that it may allow the General Manager to unfairly require supplemental information from one applicant when other applicants may not be called on to submit the same information. Earl & Brown contend that any information required in the declaration of historical use should be clearly delineated in the rules and required of all applicants.

The Authority disagrees with the commenter. The Authority, acting through its general manager, will need to exercise flexibility in its processing and review of applications for initial regular permits. The processing and review of many applications will be

straight-forward, presenting a generic and well-defined set of issues to be examined. Other applications, however, are unique and will present special issues and will raise questions that are particular to that application. This rule, as written, provides the Authority with some flexibility in dealing with unique applications.

Section 707.410 generally

Section 707.410 concerns the contents of a well registration. SAWS asserts generally that the well registration requirements are too burdensome. The Authority disagrees with the commenter. The Authority has developed the list of items required in a well registration in order to provide the Authority with necessary baseline information. It is through such well registrations that the Authority collects information that is vital to the development and implementation of a variety of its statutorily-mandated programs.

Section 707.410(3)(B) and (C)

Subparagraphs (3)(B) and (3)(C) of §707.410 require well registrations to contain a map showing, respectively, the location of "the three nearest wells within a quarter of a mile of the well and the names and addresses of the owners of the nearby wells" and "any possible sources of contamination such as existing and proposed livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks."

SAWS contends the Authority is in a position to maintain records of other wells and be knowledgeable of pollution sources. Therefore, SAWS contends that paragraphs (3)(B) and 3(C) of §707.410 should be eliminated as they are not appropriate for well registration.

The Authority agrees, in part, and disagrees, in part, with the commenter. While the Authority agrees that it should maintain records of wells and be knowledgeable of pollution sources, it needs to be able to collect information regarding those subjects. The well registration requirement is one of the primary ways in which the Authority is able to gather such information. Accordingly, the Authority declines to modify §707.410(3)(B) and (C).

Section 707.411

Section 707.411 concerns the contents of applications for well construction permits. Earl & Brown propose that a new paragraph - paragraph (14) - be added to §707.411 that would read as follows:

In the event the Authority approves an application for a well construction permit, the permit shall be valid for a period of 180 days from the time the Authority approves said permit. General Manager shall reserve the right to authorize an extension of the 180 day period provided that the applicant for a well construction permit submits a written request for an extension prior to the termination of the 180 day period. In the event the General Manager authorizes such extension, the extended time shall in no event exceed 60 days from the date the original 180 day period would have terminated.

The Authority agrees in part, and disagrees, in part, with the commenter. Earl & Brown's proposed addition to §707.411 refers to a requirement, found in §711.108(a) of the Authority's rules which was proposed concurrently with Chapter 707. That requirement states as follows:

A well constructed pursuant to a well construction permit must be completed within 180 days of issuance of the permit. Upon expiration of the term, the permit is automatically expires and is canceled.

The Authority realizes that due to the potential unavailability of water well drillers, sometimes the 180 day period in which to construct a well is not sufficient. In response to Earl & Brown's comment, and in response to other comments received in response to §711.108, as proposed, the Authority will modify §711.108(c) so that it reads as follows:

(c) A well constructed pursuant to a well construction permit must be completed within 180 days of the issuance of the permit. The permit term may be extended by one additional 180-day extension period by the general manager. In order to obtain such an extension, the holder of a well construction permit must submit a written request to the general manager explaining the need for the extension. If the holder of the well construction permit demonstrates a need for an extension and demonstrates that the permit holder's failure to complete the well within the original 180-day term is not due to the permit holder's own lack of diligence, then the general manager may authorize the extension. Upon expiration of the term, including any extension granted, the permit automatically expires and is canceled.

Section 707.411(3)(C)

Subparagraph (3)(C) of §707.411, as proposed, requires that applications for a well construction permit include a map showing the location of "any possible sources of contamination such as existing and proposed livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks."

SAWS expresses concern over the difficulty of complying with identification of potential sources of well contamination. SAWS recommends that a specific radius of concern for the identification of potential sources of well contamination be established and proposes that §707.411(3)(C) read as follows:

any possible sources of contamination within a quarter of a mile of the proposed location, such as . . . .

The Authority agrees, in part, and disagrees, in part, with the commenter. Although the Authority needs to be able to collect information regarding possible sources of contamination to Edwards Aquifer groundwater (e.g., livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks), it is the Authority's intent to assure that its application requirements are reasonable. The Authority has therefore agreed to modify §707.411(3)(C) as follows.

(C) any possible sources of contamination *within 500 feet of the well*...

Earl & Brown urge that the word "known" be inserted into subparagraph (C) of §707.411(3) so that it requires the submittal of a map showing the location of:

. . . (C) any possible sources of *known* contamination such as existing and proposed livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks;

The Authority agrees, in part, and disagrees, in part, with the commenter. While the Authority agrees with the commenter that there should be some limit on an applicant's duty to investigate the existence and location of sources of possible contamination, the commenter's suggested revision to this rule does not provide a clear standard. In an effort to provide a more workable standard, the Authority has modified this provision to require the submittal of a map showing the location of:

. . . (C) any possible sources of contamination *that are known or should be known to the applicant* such as existing and proposed livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks;

Section 707.412(6)(N)

Section 707.412 concerns the contents of meter registrations. Subparagraph (6)(N) of that section, as proposed, requires the description of the meter contained in the registration to include "the maximum period of time and maximum amount that the totalizer may record the cumulative amount of groundwater withdrawn from the aquifer."

SAWS urges that the above language be amended because a meter totalizer records the cumulative amount pumped, not the time. SAWS suggests that the section should be amended so that it reads as follows:

the maximum amount that the totalizer may record of groundwater withdrawn from the aquifer.

The Authority agrees, in part, and disagrees, in part, with the commenter. The Authority agrees that regarding the capacity of the totalizer, the rule should require only the maximum cumulative amount of groundwater withdrawn from the aquifer that the meter is capable of measuring. However, the Authority disagrees that the commenters suggested revisions are the best way to achieve this goal. Accordingly, the Authority will amend the rule to read as follows:

the maximum cumulative amount of groundwater withdrawn from the aquifer that the totalizer is capable of measuring.

Section 707.413

Section 707.413 concerns the required contents for an application for a permit to install or modify a meter. Earl & Brown proposes the addition of the italicized language to §707.413:

Subject to those limitations set forth in §707.310, in addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Application and Registrations), an application for a permit to install or modify meter shall contain the following . . . .

The Authority disagrees with the commenter. Section 707.413 concerns the required contents of an application for a permit to install or modify a meter. Under §707.309, only persons seeking to install a new meter or modify an existing meter must file an application for a permit to install or modify a meter. Section 707.310 states the requirement that owners of existing wells equipped with meter register the meter with the Authority. Section 707.310 also clarifies that the requirement to register a meter does not apply to any meter owned by the Authority. The requirement to file a meter registration and the requirement to file an application to install or modify a meter are separate and independent from each other. Accordingly, it would make no sense to make the terms of the rule listing the required contents of an application for a permit to install or modify a meter subject to any of the limitations set forth in the rule that requires certain well owners to register a meter.

Section 707.414

Section 707.414 concerns the contents of an application to transfer interim authorization status and amend application for initial regular permit.

SAWS suggests an amendment to the title and text of §707.414 to clarify that a transfer of groundwater withdrawal rights under interim authorization does not modify or amend an application for an initial regular permit to read as follows:

Applications to Transfer Interim Authorization Status

In addition . . . , an application to transfer interim authorization status shall contain . . . .

The Authority disagrees with the commenter. Anytime a groundwater withdrawal right under interim authorization is transferred, this transfer results in a change to the application for initial regular permit that serves as the basis for the interim authorization right transferred. The application should therefore be amended in conjunction with the transfer.

Earl & Brown propose the addition of new paragraph (10) at the end of §707.414 which would require the following item to be included in an application to transfer interim authorization status and amend application for initial regular permit :

The meter reading taken in the last day of the month that immediately proceeds the month in which the application to transfer interim authorization status and amend application for initial regular permit is being submitted to the Authority.

The Authority agrees, in part, and disagrees, in part, with the commenter. The Authority agrees that a provision similar to the one that Earl & Brown suggest will be useful in minimizing and allowing the resolution of conflicts regarding the amount of aquifer management fees that are to be assessed against the transferee versus the transferor. The Authority has modified §707.414 by adding paragraph (9) as set forth below, and has renumbered the remaining subsections accordingly.

(9) A meter reading taken on the last day of the month immediately preceding the month in which the application to transfer interim authorization status and amend application for initial regular permit is submitted to the Authority.

The Authority has added the same requirement to §707.415.

Section 707.414(8) and §707.415(8)

Paragraphs (8) of §707.414 and §707.415 require that applications to transfer interim authorization status and amend application for initial regular permit and applications to transfer and amend permit contain the price per acre-foot paid for the water right transferred.

Earl & Brown contend that these provisions should be deleted because the price per acre foot paid for the transfer of a groundwater withdrawal right is privileged and confidential. Further, Earl & Brown assert that the Authority has no statutory authority to require such information and the price per acre foot is irrelevant to the legal merits of a proposed transfer of groundwater withdrawal rights. Finally, Earl & Brown state such disclosure is not required by §1.34 of the Act or any other provision of the Act.

SAWS expresses concern that the Authority can only demand disclosure of transaction prices from public entities. SAWS predicts that many prices will be listed as "$10 and other consideration." To reflect what SAWS believes the Authority can require, SAWS suggests that the italicized language be added to §707.414(8) and

707.415(8):

(8) The price per acre-foot *for transactions involving a public entity.*

The Authority disagrees with the commenters. While §1.34 of the Act governs the ability of permit applicants or permit holders to

transfer their rights, only certain types of transfers are allowed by that section. Accordingly, the Authority may require persons who seek to transfer water rights to file an application with the Authority so that the Authority can approve or disapprove the proposed transfer. Such an approval or disapproval is not a legally binding determination regarding the ownership of property equivalent to a judicial decision declaring the respective rights to property. Rather, it is an administrative function that the Authority must perform in order to effectively manage its permit program and keep track of permitted groundwater withdrawal rights.

The Authority is not aware of any law that makes the price paid for Edwards Aquifer groundwater rights privileged and confidential. Moreover, in requiring such an application, the Authority may require persons to submit information that would enable and assist the Authority in performing its statutorily-mandated duties. In fulfilling some of those duties, the Authority may be required to pay market prices for the purchase, proportional adjustment, or "buy down" of water rights. To do so, the Authority must have the means to determine the market prices of groundwater withdrawal rights within the Edwards Aquifer region. Requiring the inclusion of prices in such applications allows the Authority to develop such information.

However, comments on §707.414(8) and §707.415(8) have caused the Authority to re-examine these provisions. Specifically, the Authority now realizes that some transfers of water rights may not involve a price (e.g., a gift). To allow for such situations, the Authority has modified §707.414(8) and §707.415(8) to read as follows:

(8) The price per acre-foot or other consideration.

These changes are not meant to relieve persons filing an application to transfer from the requirement to disclose a price where a price was actually paid.

Section 707.416(6)

Section 707.416 concerns the contents of an application for exempt well status. Paragraph (6) of §707.416, as proposed, requires such an application to contain "the maximum rate of withdrawal of groundwater that the well (or proposed well) is (or will be) is capable of in gallons per minute or cubic feet per second."

SAWS suggests a clarification of "rate of withdrawal" through the addition to Paragraph (6) of the italicized language indicated below:

Rate of Withdrawal. The maximum rate of withdrawal of groundwater that the well (or proposed well) is (or will be) ...is capable of *producing* in gallons per minute . . . .

Although SAWS references Paragraph (5) of §707.416, an examination of the substance of the comment itself indicates that SAWS probably meant to comment on Paragraph (6).

The Authority agrees with the commenter. The omission of the word "producing" was inadvertent. The Authority has modified §707.416(6) accordingly.

Section 707.416(11)

Paragraph (11) of §707.416 requires an application for exempt well status to contain "a statement as to whether the well (or proposed well) is within a subdivision requiring platting pursuant to Chapter 711, subchapter C, of this title."

SAWS suggests that the Authority eliminate paragraph (11) because it considers it to be a duplicate entry in the list of items in an application for exempt well status.

The Authority disagrees with the commenter. The Authority suspects that SAWS believed that paragraphs (11) and (12) of §707.416 to be duplicates. While they are similar, they are not duplicates. Paragraph (11) requires an application for exempt well status to contain "a statement as to whether the well (or proposed well) is *within* a subdivision requiring platting pursuant to Chapter 711, subchapter C, of this title." (Emphasis added.) Paragraph (12), on the other hand, requires such an application to contain "a statement as to whether the well (or proposed well) *serves* (or *will serve*) a subdivision requiring platting pursuant to Chapter 711, subchapter C, of this title." (Emphasis added.)

Section 707.416(14)

Paragraph (14) of §707.416 requires an application for exempt well status to contain "any other information as may be required by the general manager." Earl & Brown urge the deletion of paragraph (14) because of their concern that it allows the General Manager discretion in requiring certain information from some applicants but not others. All required information, Earl & Brown argue, should be specified in the rules and required of all applicants.

The Authority disagrees with the commenter. The Authority, acting through its general manager, will need to exercise flexibility in its processing and review of applications for exempt well status. The processing and review of many applications will be straight-forward, presenting a generic and well-defined set of issues to be examined. Other applications, however, will be unique and will present special issues and will raise question that are particular to that application. This rule, as written, provides the Authority with some flexibility in dealing with unique applications.

Section 707.422(10)(E)

Section 707.422 concerns the contents of an application for an agricultural conservation loan. Subparagraph (E) of paragraph (10) of §707.422, as proposed, requires that the applicant to agree that the "that the applicant is current on all Edwards Aquifer aquifer management fees payable to the Authority and has a property installed and functioning meter on any Edwards Aquifer well related to the equipment to be financed."

SAWS points out a typographical error in this subparagraph. The rule, according to SAWS, should require the applicant to agree "that the applicant is current on all Edwards Aquifer aquifer management fees payable to the Authority and has a *properly* installed and functioning meter on any Edwards Aquifer well related to the equipment to be financed."

The Authority agrees with the commenter. The Authority has modified §707.422(10)(E) as set forth above to correct this error.

Section 707.424

Section 707.424 concerns the contents of an application for declaration of abandonment of a groundwater withdrawal permit. Earl & Brown contend that §707.424 should include a brief description explaining what constitutes abandonment of a groundwater withdrawal permit. At a minimum, Earl & Brown suggest the rules should delineate the amount of time that must elapse before a well may be deemed abandoned.

The Authority disagrees with the commenter. The Authority recently proposed Subchapter H of Chapter 711 of the Authority's rules. Subchapter H expressly governs the abandonment and cancellation of Edwards Aquifer permitting groundwater withdrawal rights. Proposed §711.196 of subchapter H clarifies what constitutes abandonment of a groundwater withdrawal

permit. These concerns are thus addressed elsewhere in the Authority's rules.

Section 707.424(4)

Paragraph (4) of §707.424 requires an application for declaration of abandonment of a groundwater withdrawal permit to contain "any other information as may be required by the general manager."

Earl & Brown assert that this paragraph gives the general manager too much discretion, allowing the general manager to require information from some applicants but not others, and therefore should be deleted. Earl & Brown assert that the Authority should require uniform information of all applicants and should clearly state what information is required in the rules.

The Authority disagrees with the commenter. The Authority, acting through its general manager, will need to exercise flexibility in its processing and review of applications for declaration of abandonment of a groundwater withdrawal permit. The processing and review of many applications will be straight-forward, presenting a generic and well-defined set of issues to be examined. Other applications, however, will be unique and will present special issues and will raise questions that are particular to that application. This rule provides the Authority with some necessary flexibility in dealing with unique applications.

Section 707.426

Section 707.426 concerns the contents of an application to cancel a groundwater withdrawal permit.

In connection with §707.425, SAWS states that it believes it is unnecessary for the Authority to try to give meaning to every action in §1.16(g) of the Act. SAWS does not want to see unused permitted rights canceled by the Authority because SAWS contends these unused rights serve a conservation purpose and should not be canceled. Accordingly, SAWS recommends deleting §707.426 in its entirety.

The Authority disagrees with the commenter. Section 707.426 only lists the contents required for the an application to cancel a groundwater withdrawal permit. The substantive rules that deal with cancellation are found in the Chapter 711, Subchapter H, rules, recently proposed by the Authority. Comments as to the meaning assigned by the Authority to the term "cancelled" as used in §1.16(a) of the Act are more properly directed at the Subchapter H rules. Moreover, contrary to SAWS' suggestion, the cancellation of permitted rights does not does not defeat the Authority's conservation purpose. The cancellation of a permitted right does not mean that the right will necessarily be reallocated.

Inland asserts that non-use is an insufficient reason for the cancellation of a permit. Inland contends that this provision promotes waste of a natural resource and believes that it will be found unconstitutional. Inland recommends deleting this section in its entirety.

The Authority disagrees with the commenter. First, it is unclear what criteria in addition to non-use Inland is suggesting should be considered necessary to justify the cancellation of a permitted right. Second, the Authority does not understand how a rule stating the required contents of an application to cancel a groundwater withdrawal permit promotes waste. In any event, as stated above, substantive comments regarding the meaning of "cancelled" as used in the §1.16(g) Act are more properly directed at the Subchapter H rules. Third, and as noted above, the cancellation of permitted rights does not does not defeat the Authority's conservation purpose. Finally, although the Authority does not believe its substantive rules regarding cancellation of permitted rights are unconstitutional, if and when they are held unconstitutional, those rules will be voided and repealed.

Section 707.426(2)

Paragraph (2) of §707.426 requires that an application to cancel a groundwater withdrawal permit contain "a detailed description of all facts demonstrating that all or part of the groundwater authorized to be withdrawn pursuant to a groundwater withdrawal permit issued by the authority has not been put to beneficial use at any time during the 10-year period immediately preceding the filing of an application to cancel a groundwater withdrawal permit."

Verstuyft Farms explains that weather conditions may cause an irrigator to use more water one year and less the next. Verstuyft maintains that irrigators should not be penalized for not using all permitted water within a 10 year period. Rather, Verstyuft recommends that the unused portion of the permitted water should either be considered conservation of a natural resource or the permit holder should be allowed to lease that unused amount.

The Authority disagrees with the commenter. Section 707.426 only lists the contents required for the an application to cancel a groundwater withdrawal permit. The substantive rules that deal with cancellation are found in the Chapter 711, Subchapter H, rules, recently proposed by the Authority. Specifically, proposed §711.202 provides substantive standards regarding the cancellation of groundwater withdrawal permits. Comments regarding whether and under what conditions a permitted right should be cancelled are properly directed toward the Subchapter H rules.

Section 707.426(3)

Paragraph (3) of §707.426 requires that an application to cancel a groundwater withdrawal permit contain "any other information as may be required by the general manager." Earl & Brown assert that this paragraph gives the general manager too much discretion, allowing the general manager to require information from some applicants but not others and therefore should be deleted. Earl & Brown assert that the Authority should require uniform information of all applicants and should clearly state what information is required in the rules.

The Authority disagrees with the commenter. The Authority, acting through its general manager, will need to exercise flexibility in its processing and review of applications to cancel a groundwater withdrawal permit. The processing and review of many applications will be straight-forward, presenting a generic and well-defined set of issues to be examined. Other applications, however, will be unique and will present special issues and will raise question that are particular to that application. This rule provides the Authority with some necessary flexibility in dealing with unique applications.

Section 707.428

Section 707.428 concerns the contents of applications to convert base irrigation groundwater. SAWS asserts that the term "base irrigation" should be deleted in favor of more generic language based on the possibility that the restriction on transfer of "base irrigation" groundwater is challenged or overturned. SAWS recommends that §707.428 be amended to read as follows:

Application to Transfer Irrigation Groundwater.

In addition . . . an application to transfer irrigation shall contain...

(2) . . . to place irrigation groundwater to beneficial use at...

The Authority disagrees with the commenter. The Authority declines to assume that its rules or its interpretation of the Act will be challenged and overturned. If and when the Authority's interpretations concerning the transferability of groundwater under §1.34 of the Act are successfully challenged, the Authority will, at that time, revise its rules as necessary.

Section 707.428(3)(F)

Paragraph (3) of §707.428 requires the inclusion of certain items in an application to convert base irrigation groundwater if the proposed conversion is based on conservation (as opposed to physical impossibility). Subparagraph (F) of paragraph (3), as proposed, requires an application to include "a statement describing the accuracy of the water conservation equipment."

SAWS recommends that the language in subparagraph (F) be modified so that it reads as follows:

(F) Efficiency. A statement describing the efficiency of the water conservation equipment and supporting documentation from a recognized source.

The Authority agrees, in part, and disagrees, in part with the commenter. First, the Authority agrees that the term "efficiency" more appropriately describes the information sought by the Authority. Accordingly, the Authority has modified §707.428(3)(F) as shown below:

(F) Efficiency. A statement describing the efficiency of the water conservation equipment.

Second, the Authority disagrees that it is appropriate to add an express requirement for supporting documentation from a recognized source in this subparagraph. There are many instances in these rules where items required to be included in an application may need to be supported by various types of documentation. The rules do not specify what types of documentation are appropriate in each instance. Section 707.302 of these rules requires that "any person who wishes to obtain a permit, authorization, or other approval from the Authority shall submit a written application to the Authority on a form provided by the general manager." The Authority expects that the form provided by the general manager, and its associated instructions, will provide information on the appropriate supporting documentation for each type of application.

Earl & Brown request that a brief explanation be added to §707.428 describing the conditions or circumstances under which an applicant may submit an application to convert base irrigation groundwater (i.e., physical impossibility and/or conservation).

The Authority disagrees with the commenter. Substantive rules dealing with the transfer of permitted rights and the conversion of base irrigation groundwater (Chapter 711, subchapter L) have recently been proposed. Specifically, §711.342 describes the conditions or circumstances under which the Authority will allow the conversion of base irrigation groundwater. The substance of these rules may satisfy the concern expressed by the commenter.

Earl & Brown propose adding a subsection to §707.428 that would be titled Economic and Practicability and would read:

If the application is based on Economic and Practicability, a detailed description of all facts demonstrating that it is no longer economically and practicable the owner of a regular permit, or an applicant for a regular permit for a well qualifying for interim authorization status, to place base irrigation groundwater to beneficial use at the place of use identified in the regular permit for the application for an initial regular permit.

The Authority disagrees with the commenter. The Authority has determined in its proposed substantive rules governing transfers of groundwater withdrawal rights (Chapter 711, Subchapter L) that the only grounds for conversion of base irrigation groundwater are physical impossibility and conservation. This determination is set forth in proposed §711.342 which is the substantive rule governing conversion of base irrigation groundwater. Therefore, comments urging an additional ground for the conversion or base irrigation groundwater are properly directed toward that substantive rule.

Section 707.502(b)(1)

Section 707.502 provides procedures relating to the general manager's review of applications and registrations for administrative completeness. Paragraph (b)(1) of §707.502 provides that "in reviewing an application or registration for administrative completeness, the general manager shall assess whether the application or registration contains the necessary information in legible form which will allow . . . the general manager to forward the application or registration to the docket clerk to be filed and maintained in the permanent records of the Authority."

Earl & Brown assert that this statement is grammatically incorrect and should possibly read:

"The General Manager is to forward the Application of Registration to the Docket Clerk to be filed and maintained in the permanent records of the Authority."

The Authority disagrees with the commenter. The Authority believes that §707.502(b)(1), as written, is grammatically correct.

Section 707.504

Section 707.504 provides procedures related to the technical review, by Authority staff, of applications. Earl & Brown propose to add a new subsection to §707.504 - subsection (d) - to read as follows:

In the event the Authority staff fails to complete its technical review of an application within 90 business days of the determination, by the General Manager, of the applications administrative completeness, applications shall be administratively deemed approved as a matter of law.

The Authority disagrees with the commenter. First, the result of the staff's completion of the technical review is not an "approval" of an application as the above language suggests. Rather, the result of completing the technical review is that the general manager can then prepare a proposed permit and technical summary based on that technical review. See §707.507. Second, the technical review process cannot be side-stepped by operation of law. Without completion of the technical review, there can be no basis for the issuance of a proposed permit or proposed denial.

Section 707.504(b)

Subsection (b) of §707.504, as proposed, states, in part, that "the applicant shall be promptly notified of any additional material necessary for a complete technical review."

Earl & Brown suggest that the first sentence of §707.504(b), should be clarified so that it specifies that "the applicant shall be promptly notified *in writing* of any additional material necessary

for a complete technical review." The Authority agrees with the commenter. Accordingly, the Authority has modified §707.504(b) as indicated by the above underscored language.

Sections 707.507, .508, .509, .510 and .515

Sections 707.507, .508, .509, .510, and .515, provide procedures pertaining to the proposed permit and technical summary, referral to docket clerk, publication of notice of proposed permit and technical summary in the *Texas Register* and local newspapers, and actions by the general manager, respectively.

Regarding these sections generally, Inland states that while it is appropriate for the Board to vote on all initial regular permit applications, any future withdrawal permit applications, including term, recharge and emergency permits, should be handled administratively. Inland urges that the rules should be changed to provide "consistency and certainty and to have all applications handled administratively."

The Board disagrees with the commenter. The Authority is willing to delegate to the general manager the authority to "handle administratively" only the granting of those applications listed in §707.515(b). The Authority is not willing to delegate authority to the general manger to act or term, recharge and emergency permits, and other permits which may affect the withdrawal rights of all other users.

Section 707.507(b)

Section 707.507 provides procedures regarding the preparation of a proposed permit and technical summary by the general manager. Subsection (b) of §707.507 provides various details regarding what the general manager is to do with the proposed permit and technical summary or proposed denial.

Earl & Brown assert that subsection (b) of §707.507 should contain a statement explaining that after the completion of a technical review, the general manager shall provide the applicant with a copy of the proposed permit. Earl & Brown urge that the sentence in §707.507(b) which reads, in part: "the proposed permit shall be filed with the Docket Clerk . . ." should read "the proposed permit shall be *mailed to the applicant and* filed with the docket clerk."

The Authority disagrees with the commenter. Such a modification to subsection (b) is not necessary in light of the fact that subsection (d) of §707.507 states that "the general manager will notify the applicant by mail that technical review of the application is complete and provide the applicant with a copy of the proposed permit (or denial) and the technical summary."

Earl & Brown urge that the word "detailed" be added to the last sentence of §707.507(b) so as to specify that if the general manager recommends to deny an application, "the general manager shall prepare a proposed denial stating the *detailed* reasons for that recommendation."

The Authority disagrees with the commenter. The Authority believes that it is sufficient to require the general manager to state the "reasons" for the denial.

Section 707.515(b)(4)(A)

Section 707.515 delegates authority to the general manager to take action on behalf of the Board of Directors of the Authority for certain actions and provides procedures regarding such actions. Subsection (b) of §707.515 lists the types of permits that the general manager may grant. Among those types, subparagraph (4)(A) of subsection (b) states that the general manager may grant "applications to . . . transfer interim authorization status and amend application for initial regular permit" in certain circumstances.

SAWS contends that a transfer of water rights under interim authorization does not modify or amend an application for an initial regular permit. Accordingly, SAWS suggests deleting the language "and amend application for initial regular permit" from § 707.515(4)(A):

application to: (A) transfer interim authorization status and. . . .

The Authority disagrees with the commenter. Anytime a groundwater withdrawal right under interim authorization is transferred, this transfer results in a change to the application for initial regular permit that serves as the basis for the interim authorization right transferred. The application should therefore be amended in conjunction with the transfer.

Section 707.517

Section 707.517 provides "special procedures regarding loss of exempt well status." TFB contends that the procedure set forth in this section by which the Authority may cancel exempt well status, after the Authority has received notice that the well no longer qualifies as exempt, inappropriately places the burden on the well owner to demonstrate that the well should not lose exempt status. TFB asserts that there seems to be no requirement calling for the Authority to confirm information it receives despite the possibility that the information could be false or maliciously submitted. Additionally, according to TFB, if the well owner fails to submit information showing that he is entitled to exempt status, the general manager is required to submit a proposed denial of that status to the Board. TFB suggests removing the section or refining it so as not to place the regulatory burden on the exempt well owner without further Authority verification of the received information.

The Authority disagrees with the commenter. First, it should be noted that the general manager has no power to cancel or revoke exempt well status. The general manager is only entitled to submit a proposal for presentation to the Board of Directors that exempt well status be withdrawn. With regard to the consideration of such a matter by the Board, there is no suggestion that the well owner has the burden to show that exempt well status should not be revoked. Rather, the general manager would have the burden of showing that a revocation of exempt well status is appropriate. The overall purpose of §707.517 is to provide the general manager with a administrative fact-finding device. The failure of well owner to submit information in response to an inquiry by the general manager does not result in a final decision revoking exempt well status, but only in a referral of the matter to the Board of Directors.

John Brigman stated that §707.517 should be written better to require the Authority to have proof that a well no longer qualifies as an exempt well. The Authority disagrees with the commenter. As explained above, the general manager has no power to cancel or revoke exempt well status but may only submit a proposal for presentation to the Board of Directors that exempt well status be withdrawn. If and when such a matter comes before the Board, the general manager would have to demonstrate to the Board that revocation of exempt well status is appropriate.

Section 707.601

Section 707.601 sets forth the types of applications on which contested case hearings may be requested and granted. Earl & Brown propose deleting the portions of this section that allow the

right to request a contested case hearing on a transfer of groundwater withdrawal rights (either interim authorization or permitted rights) where the location of the point of withdrawal to which the transfer is proposed is east of Cibolo Creek. Earl & Brown contend that the Act does not provide the Authority the power to treat the transfer of rights to points east of Cibolo Creek, in a way that is different and inconsistent from other transfers.

The Authority disagrees with the commenter. This procedural rule is consistent with the recently proposed substantive rules (Chapter 711, Subchapter L) governing transfers of groundwater rights. Specifically, §711.352 imposes stringent criteria for the approval of transfers where the point of withdrawal of a right to withdraw groundwater is transferred from west to east of Cibolo Creek. To the extent that the Authority treats transfers that propose to move water rights from west to east of Cibolo Creek differently from other transfers, it would be appropriate to comment on the substantive rule that imposes the more stringent criteria on such transfers (as opposed to the procedural rule). Moreover, the Authority has the discretion to treat transfers of water rights from west to east of Cibolo Creek differently in order to fulfill its duty to protect springflows at San Marcos and Comal Springs as well as habitat and endangered and threatened species in those areas.

However, Earl & Brown's comment on §707.601 has led the Authority to discover some inconsistencies between its procedural and substantive rules. To achieve greater consistency with §711.352, the Authority has modified §§707.510, 707.515, and 707.601 so that they read as follows:

Section 707.510. Publication of Notice of Proposed Permit and Technical Summary in the *Texas Register* and in Local Newspapers.

(a) Applicability. . . . This section also applies to:

(1) applications to transfer interim authorization status and amend application for initial regular permit where the right to withdraw groundwater is to be transferred from west of Cibolo Creek to east of Cibolo Creek; and

(2) applications to transfer and amend permit where the right to withdraw groundwater is to be transferred from west of Cibolo Creek to east of Cibolo Creek.

Section 707.515. Actions on Applications by the General Manager. . . .

(b) The general manager may grant the following: . . .

(4) applications to:

(A) transfer interim authorization status and amend application for initial regular permit; or

(B) transfer and amend permit in all instances other than where the right to withdraw groundwater is to be transferred from west of Cibolo Creek to east of Cibolo Creek;

Section 707.601. Applicability

. . . Contested case hearings may also be requested and granted in connection with:

(1) applications to transfer interim authorization status and amend application for initial regular permit where the right to withdraw groundwater is to be transferred from west of Cibolo Creek to east of Cibolo Creek; and

(2) applications to transfer and amend permit, where the right to withdraw groundwater is to be transferred from west of Cibolo Creek to east of Cibolo Creek.

Section 707.602

Section 707.602 lists those persons who are entitled to request a contested case hearing. They are: the applicant for that permit or approval; an applicant for another groundwater withdrawal permit issued by the Authority; and any permittee holding a groundwater withdrawal permit issued by the Authority. Tom Wassenich states that he is concerned that a citizen or citizens group cannot request a contested case hearing unless they have a permit. He objects to this and believes there are many interested parties with good intentions who should be able to contest an application.

The Authority disagrees with the commenter. The Authority has determined that citizens and groups that are not applicants or permittees do not have standing to request a contested case hearing. The purpose of the Authority's procedures regarding initial regular permits is to determine who has statutory-based rights to withdraw groundwater from the Edwards Aquifer. These procedures have only incidental protective effects on downstream users, springflows, habitat and endangered species. The Authority has other programs which are primarily designed to advance these goals.

The process of issuing initial regular permits is a process by which a finite amount of water (as determined by the Legislature) is allocated to various persons possessing statutory rights to some of that water. If a person is not an applicant for an initial regular permit, that person has no interest in the determination of the amount of water that may be allocated to a particular applicant. Accordingly, the Authority is justified in determining that contested case hearings on applications for initial regular permits should not be a forum for persons and groups who are not applicants to argue their individual interest or their version of the public interest.

Louis Obdyke states that he would like the right to comment on permits and applications without being required to be an applicant or permittee. To the extent that Mr. Obdyke means that he would like to be a party to contested case hearings, the Authority disagrees with the commenter. As noted above, the Authority has determined that non-applicants and non-permittees do not have such standing. However, to the extent that Mr. Obdyke means that he would like to offer public comment on any permit or application being considered by the Authority at a meeting of the Board of Directors of the Authority, Mr. Obdyke may, consistent with Subchapter C, Chapter 707 of the Authority's rules, do so.

Section 707.604

Section 707.604, as proposed, states that "unless a different time limit is specified in the notice of the proposed permit and technical summary, a hearing request must be filed with the docket clerk on or before the 30th day following the date of publication of that notice in the *Texas Register*."

SAWS expresses concern about a possible arbitrary decrease in the time allowed to request a contest case hearing. SAWS believes a period shorter than 30 days should not be considered and recommends that the rule be amended so that it reads as follows:

Unless a longer time limit is specified in the notice of proposed permit and technical summary . . . .

The Authority agrees with the commenter that a period shorter than 30 days should not be considered. Accordingly, the Authority has modified §707.604 as indicated above.

With respect to §707.604, Dianne Wassenich states that ordinary citizens do not read the *Texas Register* and that it makes more sense to publish the proposed permit and technical summary in the town in which the permit is being applied for. The Authority disagrees with the commenter. Section 707.510(b) of the Authority's rules already requires the Authority to publish a notice of a proposed permit and technical summary in a newspaper of general circulation throughout the Authority's jurisdiction and at least five other newspapers within the jurisdiction of the Authority, in addition to the *Texas Register*. The reference to publication in the *Texas Register* in §707.604 concerns only the date on which the period to file a hearing request begins.

Section 707.605

Section 707.605 provides the procedures applicable to the processing of a request for a contested case hearing by the Authority. As proposed, this section directs the docket clerk to provide notice to the applicant, general manager and any persons making a timely hearing request at least 20 days prior to the first meeting at which the Board considers the request. Although the Authority did not receive comments on this rule, the Authority has noticed a typographical error in the rule as proposed. The Authority meant to propose that the docket clerk provide notice of hearing request at least 30 days prior to the first meeting at which the board considers the request. Thirty days notice provides a person with an opportunity to submit a written response pursuant to §707.605(d). The Authority has modified §707.605 accordingly.

Section 707.606(c)(1)

Section 707.606 provides procedures regarding action by the Board of Directors of the Authority on a request for a contested case hearing. Subsection (c) states criteria which, if met, shall result in the granting of a request for a contested case hearing. Paragraph (1) of subsection (c) requires that a request for a contested case hearing be "supported by competent evidence."

TFB asserts that before September 1, 1999, §5.115(a) of the Texas Water Code articulated a similar standard but that in 1999, the Legislature deleted the "competent evidence" requirement from §5.115. TFB asserts that this phrase was hard to define and the TNRCC encountered difficulty in its implementation. TFB urges the Authority to define "competent evidence" in a way that provides flexibility and curtails confusion.

The Authority disagrees with the commenter. The Authority does not believe there is a need to provide a rule defining the term "competent evidence." Numerous other statutes governing administrative agency proceedings employ this term. See, e.g., Texas Natural Resources Code, Annotated, §51.189(c) (Vernon Supp. 2000). If a problem predicted by TFB is indeed encountered, the Authority may reconsider this decision.

Section 707.610(d)

Section 707.610 provides procedures regarding the designation of parties in contested case hearings. Subsection (d) of §707.610 provides that "an applicant for an initial regular permit who files a notice of party status pertaining to §707.626 (relating to Designation of Party Status) is a party in all contested case hearings for which notice has been given."

Earl & Brown argue that this section should be deleted because it may violate other statutes and, seemingly, only serves the San Antonio Water System ("SAWS"). According to Earl & Brown, as a pre-requisite to obtaining party status, a person must demonstrate an interest in the application being heard. Earl & Brown therefore urge that all parties, including SAWS, must provide convincing evidence showing a vested interest in each and every application they wish to protest. Earl & Brown objects to blanket protests which would allow parties to obtain party status in all pending groundwater applications.

The Authority disagrees with the commenter. First, although SAWS advocated the inclusion of this provision, there is no reason why other parties could not take advantage of it. Second, the Authority is not aware of any statute that this rule would violate. Third, contrary to Earl & Brown's assertions there is no requirement that a party "demonstrate an interest in the application being heard" - in order to obtain party status. Rather, party status is conferred on: (1) the general manager; (2) the applicant; (3) the person who requested the contested case hearing that was granted; and (4) an applicant for an initial regular permit who files a notice of party status under §707.626. Under §707.602, the categories of persons who may request a contested case hearing are: the applicant for that permit or approval; an applicant for another groundwater withdrawal permit issued by the Authority; and any permittee holding a groundwater withdrawal permit issued by the Authority. The Authority has determined that those categories of persons, by nature of their status, have an interest in all applications sufficient to justify party status in a contested case hearing. As a result of §707.602, any applicant for an initial regular permit has the right to request a contested case hearing on every application for an initial regular permit and may gain party status in every resulting contested case hearing. Subsection (d) of §707.610, in conjunction with §707.626, reduces administrative burdens on both applicants and the Authority by allowing an applicant, through one filing, to request party status in several or all contested case hearings.

Section 707.611

Section 707.611 states that in a contested case hearing, "the burden of proof is on the applicant to establish by convincing evidence that he is entitled to have an application for a groundwater withdrawal permit granted." Earl & Brown propose that the following sentence be added to the end of §707.611:

However, once an applicant has presented convincing evidence that they are entitled to have an application for groundwater withdrawal permit granted, the burden of proof shall then shift to the protestant to establish convincing evidence that the applicant is not entitled to a groundwater withdrawal permit either in the amount originally applied for or as a complete denial of a permit

The Authority disagrees with the commenter. If and when an applicant shows by convincing evidence that they are entitled to a groundwater withdrawal permit, the contested case is over. It makes no sense for the burden to then shift to the protestant to prove otherwise.

Section 707.614(b)(1)

Section 707.614 provides procedures related to a State Office of Administrative Hearings (SOAH) judge certifying a question to the Authority. Subsection (b) of §707.614 enumerates the type of issues or questions that appropriate for certification. Under paragraph (1) of subsection (b), policy questions that are appropriate for certification include "the Authority's interpretation of its rules and applicable statutes."

Earl & Brown assert that if this rule is adopted by the Authority, motions should be filed with the Authority requesting that a court certify a question to the Authority asking the Authority to interpret Article I, §1.34 Item C, of the Act.

The Authority disagrees with the commenter. Earl & Brown seem to misunderstand the subject and purpose of §707.614. This section does not enable or encourage the Authority to request that a court certify a question to the Authority. Rather, this rule is meant to provide guidance to a SOAH Administrative Law Judge who has been assigned to hear a contested case referred to SOAH by the Authority pursuant to §§707.606, 707.608, and 707.609, as to when it is proper to certify a question to the Authority. In such a case, the decision to certify the question lies with the SOAH judge, although a motion to certify may be filed by the general manager.

Section 707.621(b)

Section 707.621 provides procedures relating to decisions by the Board of Directors of the Authority in a contested case hearing following the filing of a proposal for decision (PFD) by a SOAH judge. Subsection (b) of §707.621 provides that "the board's decision will be rendered no more than 90 days after the date of that the proposal for decision is presented to the board, unless the board determines that there is good cause for continuing the proceeding."

Earl & Brown assert that a grammatical error exists in §707.621(b) and suggest the sentence was meant to read as follows: "The Board's decision will be rendered no more than ninety (90) days after the date that the proposal for decision is presented to the Board . . . ."

The Authority disagrees with the commenter. The Authority does not believe that §707.621(b) contains a grammatical error. The Authority does not consider using a numeral instead of spelling a number and including the numeral in parentheses to be a grammatical error.

Earl & Brown recommend adding the following sentence to the end of §707.621(b):

In the absence of a showing of good cause, if the Board fails to render a decision 90 days after the date that the proposal for decision is presented to the Board, the proposal for decision shall be deemed administratively approved as a matter of law.

The Authority disagrees with the commenter. To allow a permit to be granted as a matter of law through the expiration of a 90-day deadline would delegate too much authority to the SOAH Administrative Law Judge presiding at the contested case hearing. It is the Authority's responsibility to issue and deny permits and to act on applications, not SOAH's. While the Authority is serious about reviewing and acting on all proposals for decisions in a timely manner, circumstances may arise that would necessitate a delay in the Board's schedule.

Section 707.622(b)

Section 707.622 provides procedures related to motions for rehearing in matters which have been referred to a contested case hearing. Subsection (b) of that section provides, in part, that "a reply to a motion for rehearing must be filed with the docket clerk within 30 days after the date a party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the date that the decision or order is mailed by first-class mail."

Earl & Brown recommend that the 30 day time line should not activate until a party or his attorney of record is notified "of the motion for rehearing," rather than from the date of the decision or order.

The Authority disagrees with the commenter. Under §707.622, a motion for rehearing is due within 20 days after the date the party seeking to file the motion or his attorney is notified of the decision or order. The reply to that motion for rehearing is due 30 days after the date a party or his attorney is notified of the decision or order. This time line provides the party seeking to respond to a motion for rehearing with approximately 10 days to prepare and file a reply. The Authority believes that this rule provides sufficient time for the reply. The party filing the reply will have been a party to and would have participated in the contested case. Thus, that party will most likely be very familiar with the issues raised in the contested case and in the motion for rehearing. As a precedent, the Authority also notes that the Texas Natural Resource Conservation Commission utilizes the same time line for motions for rehearing and replies in 30 TAC, §80.272.

Section 707.626

Section 707.626 allows any applicant for an initial regular permit to obtain party status in any or all contested cases by filing a notice thereof. It also provides procedures applicable to such a notice and the required contents of such a notice. Earl & Brown propose the omission of this entire section based on reasons stated in their comments to §707.610(d).

The Authority disagrees with the commenter. The Authority declines to delete this rule for the reasons stated in its response to Earl & Brown's comments to §707.610(d).

V. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rules governing procedures of the board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, including, in particular, administrative procedures to be used before the Board and the Authority.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and shall regulate permits." This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to establish procedures related to the filing and processing of various applications and registrations with and by the Authority.

Section 1.11(d)(1) of the Act empowers the Authority to issue and administer grants, loans, or other financial assistance to water users for water conservation and water reuse. Section 1.24(c) of the Act allows the Authority to issue grants or make loans to

finance the purchase or installation of equipment or facilities for water conservation. These sections, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, empower the Authority to establish procedures related to the filing and processing of applications for agricultural conservation loans with and by the Authority.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. Pursuant to this section, the Authority is required to comply with the APA in connection with its rulemaking, even though the Authority is not a state agency and would therefore otherwise not generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.15(a) of the Act directs the Authority to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by this Act. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that would allow the Authority to fulfill these mandates.

Section 1.15(b) of the Act states that "except as provided by §1.17 and §1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will implement this limitation.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, empowers the Authority to establish procedures related to the filing and processing of applications for initial and additional regular permits, term permits and emergency permits.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules governing the filing and processing of such applications or declarations.

Section 1.16(b) of the Act sets forth certain requirements concerning an existing user's declaration of historical use and an applicant's payment of application fees required by the Board. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will implement these requirements.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under §1.33 of the Act is not required to file a declaration of historical use. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will implement this exemption.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This section, in conjunction with §1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to fulfill this mandate.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: (1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the Authority. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to determine who may continue to withdraw water under such authority.

Section 1.17(b) of the Act specifies that use under "interim authorization" may not exceed on an annual basis the historical, maximum, beneficial use of water without waste during any one calendar year as evidenced by the person's declaration of historical use, unless otherwise determined by the Authority. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement this condition.

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, empowers the Authority to establish procedures related to the filing and processing of applications for such permits.

Section 1.19(a) of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to issue term permits and to implement the limitations and conditions stated in §1.19.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to issue emergency permits when appropriate and to implement the conditions stated in §1.20.

Section 1.29(f) of the Act requires the Authority to impose a permit application fee of not more than $25. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to fulfill this mandate.

Section 1.29(g) of the Act empowers the Authority to impose a registration application fee of not more than $10. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, allows the Authority to adopt procedural rules that will allow the Authority to collect such a fee.

Section 1.33(a) of the Act provides that a well that produces 25,000 gallons of water a day or less for domestic or livestock use is exempt from metering requirements. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to determine who may qualify for such an exemption.

Section 1.33(b) of the Act requires that exempt wells be registered with the Authority or with an underground water conservation district in which the well is located. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement this requirement.

Section 1.34(a) of the Act provides that a place of use for Edwards Aquifer groundwater may not be outside the boundaries of the Authority. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement these requirements.

Section 1.34(c) of the Act provides that a holder of a permit for irrigation use may not lease more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. This section, in conjunction with §1.11(a) and (h) of the Act, and §2001.004(1) of the APA, requires the Authority to adopt procedural rules that will allow the Authority to implement these requirements.

SUBCHAPTER A. DEFINITIONS

31 TAC §707.1

The new sections are adopted pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act and §2001.004(1) of the Texas Administrative Procedure Act (Texas Government CODE Annotated, §§2001.001-.902 (Vernon 2000)) ("APA").

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007343
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Effective date: November 7, 2000
Proposal publication date: August 11, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER B. GENERAL PROVISIONS

31 TAC §§707.101-707.106

The new sections are adopted pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act and §2001.004(1) of the Texas Administrative Procedure Act (Texas Government CODE Annotated, §§2001.001-.902 (Vernon 2000)) ("APA").

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SUBCHAPTER C. MEETINGS OF THE BOARD

31 TAC §§707.201, 707.203, 707.205-707.208

The new sections are adopted pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act and §2001.004(1) of the Texas Administrative Procedure Act (Texas Government CODE Annotated, §§2001.001-.902 (Vernon 2000)) ("APA").

§707.201. Meetings.

(a) The board shall meet as necessary for the conduct of business at times and places necessary for the performance of the Authority's duties. Meetings shall be scheduled in accordance with the Bylaws of the Authority. The Authority is subject to the Open Meetings Act, including any existing or future exceptions that may be provided by law.

(b) Meetings of the board shall be presided over by the chair, or in the chair's absence, the vice chair, or in the absence of both the chair and the vice chair, the secretary, or in the absence of all three, the treasurer. In the absence of all four such officers, the voting directors present shall elect a temporary chair for that meeting.

(c) Business may be considered in accordance with Robert's Rules of Order or other standard rules of procedure as may be adopted by the directors from time to time. Directors may also, to the extent permitted by applicable laws, suspend by a majority vote any such rules.

(d) Non-voting directors may participate in and comment on any matter before the board in the same manner as a voting director. A non-voting director may not vote on any matter before the board.

(e) Members of the South Central Texas Water Advisory Committee (SCTWAC) may participate in board meetings to represent downstream water supply concerns and assist in solutions to those concerns. SCTWAC members may request the chair to permit them to address the board on such matters. SCTWAC members may not vote on matters before the board.

(f) The Parliamentarian shall decide issues of parliamentary procedure, but may be overruled by majority vote of the board. The Parliamentarian is appointed to that position by the chair pursuant to the Bylaws of the Authority.

§707.203. Deadline to File Comments on Matter Set for a Meeting.

The board or the general manager may set deadlines for the public to file written comments on matters set for a meeting of the board. The general manager, either by agreement of the interested persons and any judge assigned to the matter, or on the general manager's own motion, may extend a filing deadline.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gregory M. Ellis
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SUBCHAPTER D. REQUIREMENTS TO FILE APPLICATIONS AND REGISTRATIONS

31 TAC §§707.301-707.315

The new sections are adopted pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act and §2001.004(1) of the Texas Administrative Procedure Act (Texas Government CODE Annotated, §§2001.001-.902 (Vernon 2000)) ("APA").

§707.303. Proper Applicant, Registrant, or Declarant.
If a well or a proposed well has one owner, that owner shall file the application, registration or declaration. If there is more than one owner, a joint application, registration, or declaration shall be filed by those owners. In such an instance, the owners shall select one among them to act for and represent the others in the filing the application, registration or declaration. Written documentation of such a selection satisfactory to the Authority shall be filed with the application, registration or declaration. For the purposes of this section, a lessee or assignee of the surface estate, or an easement holder, is not considered an owner of a well.

§707.304. Requirement to File an Application for a Groundwater Withdrawal Permit.
Any person seeking to withdraw groundwater from the aquifer, unless exempted from the permit requirement by §1.16(c) and §1.33 of the Act and §711.20 of this title (relating to Eligibility for Exempt Well Status), must file with the Authority an application for a groundwater withdrawal permit.

§707.309. Requirement to File Application for Permit to Install or Modify Meter.
Any person seeking to install a new meter or modify an existing meter must file with the Authority an application for a permit to install or modify a meter. Any person seeking to employ an alternative measuring method or modify an existing alternative measuring method must file with the Authority an application for a permit to install or moAdify a meter as well. For the purpose of this chapter, the term "modify" in connection with a meter means to make any physical change to the meter other than standard maintenance. Meters registered with the Authority prior to the effective date of these rules through the filing of forms previously prescribed by the Authority need not file another meter registration.

§707.311. Requirement to File Declaration of Historical Use.
A declaration of historical use (application for an initial regular permit) must have been filed with the Authority pursuant to §1.16(a) of the Act and the decision of the Texas Supreme Court in *Barshop v. Medina County Underground Water District,* 925 S.W.2d 618, 628-630 (Tex. 1996) by December 30, 1996, for each well from which groundwater from the aquifer has been withdrawn and placed to beneficial use during the historical period. An owner of an well exempt from the requirement to obtain a groundwater withdrawal permit under §1.16(c) and §1.33 of the Act and §711.20 of this title (relating to Eligibility for Exempt Well Status) is not under a requirement to file a declaration of historical use.

§707.312. Declarations Received Before Effective Date of These Rules.

Applications for initial regular permits/declarations of historical use received by the Authority before the effective date of this subchapter need not be resubmitted.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

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Gregory M. Ellis
General Manager
Edwards Aquifer Authority
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For further information, please call: (210) 222-2204

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SUBCHAPTER E. REQUIREMENTS FOR APPLICATIONS AND REGISTRATIONS

31 TAC §§707.401-707.417, 707.422, 707.424, 707.426, 707.428

The new sections are adopted pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act and §2001.004(1) of the Texas Administrative Procedure Act (Texas Government CODE Annotated, §§2001.001-.902 (Vernon 2000)) ("APA").

§707.405. Applications for Initial Regular Permits/Declarations of Historical Use.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for an initial regular permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address and telephone number of the well owner, if different from that of the applicant.

(2) Source of Supply. The applicant shall clearly state whether the Edwards Aquifer is the source of groundwater from the well.

(3) Rate of Withdrawal. The proposed maximum rate of withdrawal in gallons per minute or cubic feet per second each well is capable of producing shall be stated.

(4) Method of Withdrawal. The method to be used to withdraw groundwater shall be described.

(5) Declaration of Historical Use. A declaration of historical use containing:

(A) the total amount of water from the aquifer that the applicant or his contract user, prior user or former existing user withdrew and beneficially used without waste during each calendar year of the historical period;

(B) the maximum number of acres irrigated during any one calendar year of the historical period;

(C) the purpose(s) for which the groundwater was used during each year of the historical period;

(D) the amount of groundwater the applicant claims as the maximum beneficial use of water without waste during any one calendar year of the historical period;

(E) the number and location of each well owned by the applicant and for which the applicant claims groundwater from the aquifer was withdrawn and placed to beneficial use during the historical period;

(F) the place of use of groundwater withdrawn from each well;

(G) if the groundwater was withdrawn from the well or placed to a beneficial use by a contract user, prior user or former existing user, then the name, address and telephone number of each contract user, prior user or former existing user, the year of withdrawals, purpose of use, place of use and amount of withdrawals, including copies of the legal documents establishing the legal right of the contract user to withdraw and/or place groundwater from the aquifer to beneficial use;

(H) any facts upon which the applicant requests equitable adjustment on the grounds that the applicant's historic use was affected by a requirement of or participation in a federal program;

(I) if the groundwater is to be sold on a wholesale or bulk basis, whether metered or un-metered, transported or transferred, a description of how the groundwater will be sold, transported or transferred, the name, address and telephone number of every person to whom the water will be delivered, the location to which the groundwater will be delivered, and the purpose for which the groundwater will be used, including copies of the legal documents establishing the right for the groundwater to be sold, transported or transferred;

(J) a separate Well Information Sheet prescribed by the general manager or a registration form from a groundwater district or other entity with the same data as the Well Information Sheet for each well accompanied by a photograph of the well taken approximately 100 feet from the well head; and

(K) any other information that the general manager may require.

§707.411. Applications for Well Construction Permits.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for a well construction permit shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the proposed well, if different from the applicant.

(2) Location. A legal description of the location of the proposed well, including: the county; section, block and survey; labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of:

(A) the proposed well;

(B) the three nearest wells within a quarter of a mile of the proposed location, and the names and addresses of the owners of the nearby wells; and

(C) any possible sources of contamination within 500 feet of the well that are known or should be known to the applicant such as existing and proposed livestock or poultry yards, septic system absorption fields, underground or above ground petroleum storage tanks.

(4) Purpose of Use. The proposed purpose of use stated in definite terms. If the groundwater is to be used for more than one purpose, the approximate amount to be used for each purpose shall be stated.

(5) Amount of Withdrawal. The total amount of groundwater proposed to be withdrawn from the aquifer and beneficially used on an annual and monthly basis, stated in number of acre-feet.

(6) Rate of Withdrawal. The maximum rate of withdrawal that the proposed well would be capable of, in gallons per minute or cubic feet per second, shall be stated.

(7) Depth. The proposed depth of the well and proposed depth of cement casing.

(8) Pump. The size of the proposed pump and pumping method.

(9) Proposed Construction Date. The approximate date that well construction operations are proposed to begin.

(10) Identity of Well Drilling Contractor. The name, address, telephone number and license number of the well drilling contractor.

(11) Other Permits. A list of all other permits applied for or issued by the Authority to the applicant.

(12) Legal Basis of Right to Withdraw Groundwater. The applicant shall identify the claimed legal basis under which groundwater will be withdrawn from the aquifer.

(13) Any other information as may be required by the general manager.

§707.412. Meter Registrations.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), a meter registration shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the well on which the meter is installed, if different from that of the registrant.

(2) Location. A legal description of the location of the well on which the meter is installed including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority;

(3) Map. A map showing the location of the well on which the meter is installed;

(4) Status of Well. Whether the well on which the meter is installed is an exempt well or a permitted well.

(5) Purpose of Use. The purpose of use of groundwater withdrawn from the well on which the meter is installed stated in definite terms. If the groundwater is used for more than one purpose, the approximate amount to be used for each purpose shall be stated.

(6) Description of the Meter. A description of the meter or alternative measuring method including:

(A) a description of the method used to measure the flow rate;

(B) a description of the method used to measure the cumulative amount of groundwater withdrawn from the aquifer;

(C) its size;

(D) the units in which the measurements will be recorded;

(E) a statement describing its accuracy;

(F) a description of the manufacturer's quality control and assurance program;

(G) its normal operating range;

(H) its pressure rating;

(I) a description of its construction materials;

(J) a description of its design;

(K) a description of its mechanical operation;

(L) a statement of whether the totalizer is resettable;

(M) the date that the meter was last calibrated and who calibrated it;

(N) the maximum cumulative amount of groundwater withdrawn from the aquifer that the totalizer is capable of measuring;

(O) a description of its instantaneous readout capabilities for flow rate and total quantity measured; and

(P) a statement that the meter was installed according to the manufacturer's specifications.

(7) Date Installed. The date or approximate date that the meter was installed or the alternative measuring method was first implemented.

(8) Any other information as may be required by the general manager.

§707.413. Applications for Permits to Install or Modify Meter.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for a permit to install or modify meter shall contain the following:

(1) Name and Address of Owner. The full name, post office address, and telephone number of the owner of the well on which the meter is proposed to be installed if different from the applicant.

(2) Location. A legal description of the location of the well on which the meter is to be installed including: the county; section, block and survey; labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of the well on which the meter is to be installed.

(4) Status of Well. Whether the well on which the meter is to be installed is an exempt well or a permitted well.

(5) Purpose of Use. The purpose of use of groundwater withdrawn from the well on which the meter is to be installed stated in definite terms. If the groundwater is used for more than one purpose, the approximate amount to be used for each purpose shall be clearly stated.

(6) Description of the Meter. A description of the meter or alternative measuring method including:

(A) a description of the method used to measure the flow rate;

(B) a description of the method used to measure the cumulative amount of groundwater withdrawn from the aquifer;

(C) its size;

(D) the units in which the measurements will be recorded;

(E) a statement describing its accuracy;

(F) a description of the manufacturer's quality control and assurance program;

(G) its normal operating range;

(H) its pressure rating;

(I) a description of its construction materials;

(J) a description of its design;

(K) a description of its mechanical operation;

(L) a statement of whether the totalizer is resettable;

(M) the maximum cumulative amount of groundwater withdrawn from the aquifer that the totalizer is capable of measuring; and

(N) a description of its instantaneous readout capabilities for flow rate and total quantity measured.

(7) any other information as may be required by the general manager.

§707.414. Applications to Transfer Interim Authorization Status and Amend Application for Initial Regular Permit.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application to transfer interim authorization status and amend application for initial regular permit shall contain the following with respect to both the well which currently has interim authorization status and the well (or proposed well) to which the transfer is proposed:

(1) Names and Addresses of Owners. The full name, post office address and telephone number of the person who seeks to transfer his or her interim authorization status and the name and address of the person to whom that status is proposed to be transferred as well as the name, address, and telephone numbers of any contact persons, if different from the transferor or transferee.

(2) Locations. A legal description of two locations of the two wells including: the county; section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Purposes of Use. The purpose of use for the well which has current interim authorization status and the proposed purpose of use for the well to which the transfer is proposed stated in definite terms. If the groundwater is used (or is proposed to be used) for more than

one purpose, the approximate amount used for each purpose shall be clearly stated.

(4) Withdrawal amounts. The amount of groundwater which is proposed to be withdrawn at the well to which the transfer is proposed.

(5) Place of Use. The place of use of groundwater withdrawn from the well under interim authorization status and the place of use of groundwater withdrawn from the well to which the transfer is proposed.

(6) Term of Transfer. The period of time for which the transfer is proposed;

(7) A copy of the transfer agreement and any supporting documents.

(8) The price per acre-foot or other consideration.

(9) A meter reading taken on the last day of the month immediately preceding the month in which the application to transfer interim authorization status and amend application for initial regular permit is submitted to the Authority.

(10) Any other information as may be required by the general manager.

§707.415. Applications to Transfer and Amend Permit.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application to transfer and amend a permit shall contain the following with respect to both the currently permitted well and the well (or proposed well) to which the transfer is proposed:

(1) Names and Addresses of Owners. The full name, post office address and telephone numbers of the person who seeks to transfer his or her permitted right and the name and address of the person to whom those rights are proposed to be transferred as well as the name, address, and telephone numbers of any contact persons, if different from the transferor or transferee.

(2) Locations. A legal description of the locations of the two wells including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Purpose of Use. The purpose of use for the currently permitted well and the proposed purpose of use for the well to which the transfer is proposed stated in definite terms. If the groundwater is used (or is proposed to be used) for more than one purpose, the approximate amount used for each purpose shall be clearly stated.

(4) Withdrawal amounts. The amount of groundwater proposed to be withdrawn at the well to which the transfer is proposed.

(5) Places of use. The place of use of groundwater withdrawn from the permitted well and the place of use of groundwater withdrawn from the well to which the transfer is proposed.

(6) Term of Transfer. The period of time for which the transfer is proposed.

(7) A copy of transfer agreement and any supporting documents.

(8) The price per acre-foot or other consideration.

(9) A meter reading taken on the last day of the month immediately preceding the month in which the application to transfer permit is submitted to the Authority.

(10) Any other information as may be required by the general manager.

§707.416. Applications for Exempt Well Status.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application for exempt well status shall contain the following:

(1) Name and Address of Owner. The full name, post office address and telephone number of the owner of the well (or proposed well) if different from that of the applicant.

(2) Location. A legal description of the location of the well (or proposed well), including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority.

(3) Map. A map showing the location of the well (or proposed well).

(4) Purpose of Use. The purpose (or proposed purpose) of use stated in definite terms. If the groundwater is used (or is proposed to be used) for more than one purpose, the approximate amount used (or proposed to be used) for each purpose shall be clearly stated.

(5) Maximum Amount of Withdrawal Per Day. The maximum amount of groundwater that the well (or proposed well) is (or will be) capable of withdrawing per day stated in gallons.

(6) Rate of Withdrawal. The maximum rate of withdrawal of groundwater that the well (or proposed well) is (or will be) is capable of producing in gallons per minute or cubic feet per second.

(7) Depth. The depth or proposed depth of the well, the depth of the cement casing, and other well specifications.

(8) Pump. The size of the pump and pumping method.

(9) Date of Construction. The approximate date that the well was constructed (or will be constructed).

(10) Other Permits. A list of all other permits applied for or issued by the Authority to the applicant.

(11) A statement as to whether the well (or proposed well) is within a subdivision requiring platting pursuant to Chapter 711, Subchapter C, of this title (relating to Groundwater Withdrawal Permits).

(12) A statement as to whether the well (or proposed well) serves (or will serve) a subdivision requiring platting pursuant to Chapter 711, Subchapter C, of this title.

(13) Plat. If the well (or proposed well) is within or serves a subdivision requiring platting pursuant to Chapter 711, Subchapter C, of this title, the applicant shall include a copy of any plat prepared for that subdivision.

(14) Any other information as may be required by the general manager.

§707.428. Applications to Convert Base Irrigation Groundwater.

In addition to the information specified in §707.401 of this title (relating to Contents of and Requirements for All Applications and Registrations), an application to convert base irrigation groundwater shall contain the following:

(1) Names and Addresses of Owners. The full name, post office address and telephone numbers of the person who owns a regular permit.

(2) Physical Impossibility. If the application is based on physical impossibility, a detailed description of all facts demonstrating

that it is physically impossible for the owner of a regular permit, or an applicant for a regular permit for a well qualifying for interim authorization status, to place base irrigation groundwater to beneficial use at the place of use identified in the regular permit or the application for an initial regular permit.

(3) Conservation. If the application is based on conservation:

(A) A statement that groundwater from the aquifer has been conserved after the installation of water conservation equipment;

(B) Location. A legal description of the location of the water conservation equipment including: the county, section, block and survey, labor and league; the number of feet to the two nearest non-parallel property lines (legal survey lines); or other adequate legal description approved by the Authority;

(C) Map. A map showing the location of the water conservation equipment;

(D) Description of the Water Conservation Equipment. A description of the water conservation equipment:

(E) Measurement Method. A description of the method used to measure the amount of groundwater from the aquifer cumulatively conserved on an annual basis;

(F) Efficiency. A statement describing the efficiency of the water conservation equipment;

(G) Quality Control. A description of the manufacturer's quality control and assurance program;

(H) Operating Range. A description of the water conservation equipment's normal operating range;

(I) Materials. A description of the water conservation equipment's construction materials;

(J) Design. A description of the equipment's design;

(K) Mechanical Operation. A description of the equipment's mechanical operation;

(L) Operational Life. An estimate of the maximum period of time that the equipment will be reasonably functional in conserving groundwater from the aquifer;

(M) Factory Specifications. A statement that the equipment was installed according to the manufacturer's specifications.

(N) Date Installed. The date that the equipment was installed.

(O) Any other information as may be required by the general manager.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gregory M. Ellis
General Manager
Edwards Aquifer Authority
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For further information, please call: (210) 222-2204

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SUBCHAPTER F. ACTIONS ON APPLICATIONS AND REGISTRATIONS BY THE AUTHORITY

31 TAC §§707.501-707.519

The new sections are adopted pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act and §2001.004(1) of the Texas Administrative Procedure Act (Texas Government CODE Annotated, §§2001.001-.902 (Vernon 2000)) ("APA").

§707.504. Technical Review.

(a) After an application is determined by the general manager to be administratively complete, Authority staff shall commence a technical review of the application as necessary and appropriate. Authority staff shall complete the technical review of an application within 90 business days of the determination, by the general manager, of the application's administrative completeness. For applications for emergency permits, such review shall be conducted within 20 business days.

(b) The applicant shall be promptly notified in writing of any additional material necessary for a complete technical review. If the applicant provides the information within the period of time noted in subsection (a) of this section, Authority staff will complete the technical review of the application within the original technical review period extended by the number of days from the request to the submittal of the additional information. If the necessary additional information is not received by the general manager before expiration of the technical review period and the information is considered essential by the general manager, the general manager may return the application to the applicant. In no event, however, will the applicant have fewer than 30 days to provide the technical data before an application is returned. Decisions to return an application to the applicant during the technical review will be made on a case-by-case basis.

(c) The general manager or his designee is entitled to enter public or private property at any reasonable time and upon reasonable notice for the purpose of inspecting, investigating or verifying conditions or information submitted in connection with an application or a registration.

§707.510. Publication of Notice of Proposed Permit and Technical Summary in the Texas Register and in Local Newspapers.

(a) Applicability. This section applies to applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits. This section also applies to:

(1) applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal is proposed to be transferred from west of Cibolo Creek to east of Cibolo Creek; and

(2) applications to transfer and amend permit where the location of the point of withdrawal is proposed to be transferred from west of Cibolo Creek to east of Cibolo Creek; and

(b) Upon receipt of the proposed permit, approval, authorization or denial, and the technical summary from the general manager, the docket clerk shall arrange for publication of a notice of the proposed permit, approval, authorization or denial, and technical summary in:

(1) the *Texas Register*;

(2) a newspaper of general circulation throughout the Authority's jurisdiction; and

(3) at least five other newspapers within the jurisdiction of the Authority.

(c) Time of Publication. The notice referred to in subsection (b) of this section shall be published no later than 30 days following the referral of the proposed permit, approval, authorization or denial to the docket clerk.

(d) Such notice shall contain:

(1) a description of the proposed permit, authorization or approval including any conditions;

(2) a brief description of the technical summary; and

(3) a statement that a copy of the proposed permit or approval, technical summary, and application are available for inspection by the public at the offices of the Authority;

(4) if the proposal is that the application be denied, a summary of the reasons for denial;

(5) a statement that the proposed permit, approval, authorization or denial will be presented to the Board for action within 60 days unless a request for hearing is submitted within 30 days pursuant to §§707.601-707.604 of this title (relating to Procedures for Contested Case Hearings on Applications); and

(6) a statement that the applicant, another applicant for a groundwater withdrawal permit, or a permittee holding a groundwater withdrawal permit may request a hearing on this application by filing with the docket clerk, on or before the 30th day after the publication of the notice of the proposed permit, authorization, approval or denial, and technical summary, in the *Texas Register*, in accordance with §§707.601-707.604 of this title.

§707.515. Actions on Applications by the General Manager.

(a) The purpose of this section is to delegate authority to the general manager to take action on behalf of the board for the actions listed in subsection (b) of this section.

(b) The general manager may grant the following:

(1) applications for new well construction permits;

(2) applications for exempt well status

(3) applications for permit to install or modify meter or alternative measuring method installation;

(4) applications to:

(A) transfer interim authorization status and amend application for initial regular permit; or

(B) transfer and amend permit in all instances other than when the location of the point of withdrawal is proposed to be transferred from west of Cibolo Creek to east of Cibolo Creek;

(5) applications for operation of monitoring well;

(6) applications for conservation plan approval; and

(7) applications for reuse plan approval.

(c) Following technical review, the general manager may grant a permit, authorization or approval under this section if:

(1) the application meets all relevant statutory and administrative criteria; and

(2) the application does not raise new issues that require the interpretation of Authority policy.

(d) The general manager shall inform the applicant of his or her decision, where appropriate, by sending a copy of such permit, authorization or approval along with the technical summary to the applicant by certified mail/return-receipt requested.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Gregory M. Ellis
General Manager
Edwards Aquifer Authority
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SUBCHAPTER G. PROCEDURES FOR CONTESTED CASE HEARINGS ON APPLICATIONS

31 TAC §§707.601-707.626

The new sections are adopted pursuant to §§1.08(a), 1.11(a), 1.11(b), 1.11(d)(1), 1.11(h), 1.15(a), 1.15(b), 1.15(c), 1.16(a), 1.16(b). 1.16(c), 1.16(d), 1.17(a), 1.17(b), 1.18, 1.19(a), 1.20, 1.24(c), 1.29(f), 1.29(g), 1.33(a), 1.33(b), 1.34(a), and 1.34(c) of the Act and §2001.004(1) of the Texas Administrative Procedure Act (Texas Government CODE Annotated, §§2001.001-.902 (Vernon 2000)) ("APA").

§707.601. Applicability.

The provisions of this subchapter apply to contested case hearings on applications before the board. Contested case hearings may be requested and granted in connection with applications for initial regular permits, additional regular permits, term permits, aquifer recharge and storage permits, and recharge recovery permits. Contested case hearings may also be requested and granted in connection with:

(1) applications to transfer interim authorization status and amend application for initial regular permit where the location of the point of withdrawal is proposed to be transferred from west of Cibolo Creek to east of Cibolo Creek; and

(2) applications to transfer and amend permit, where the location of the point of withdrawal is proposed to be transferred from west of Cibolo Creek to east of Cibolo Creek.

§707.604. Time for Filing of Request for Contested Case Hearing.

Unless a longer time limit is specified in the notice of the proposed permit and technical summary, a hearing request must be filed with the docket clerk on or before the 30th day following the date of publication of that notice in the *Texas Register*.

§707.605. Processing of Hearing Request.

(a) Applicability. The requirements in this section apply only to hearing requests that are filed within the time period specified in §707.604 of this title (relating to Time for Filing of Request for Contested Case Hearing). Hearing requests not filed within the time period specified in §707.604 of this title shall not be processed and shall be returned by the docket clerk to the person filing the request.

(b) After a hearing request is filed, the docket clerk shall schedule the hearing request for a board meeting.

(c) The docket clerk shall provide notice to the applicant, general manager and any persons making a timely hearing request at least 30 20 days prior to the first meeting at which the board considers the request. The docket clerk shall explain how the person may submit public comment, explain that the board may hold a public meeting, and explain the requirements of this subchapter.

(d) Persons may submit written responses to the hearing request no later than 20 days before a board meeting at which the board will evaluate the hearing request. Responses shall be filed with the docket clerk and served on the same day to the general manager, the applicant and any persons filing hearing requests.

(e) The person who filed the hearing request may submit a written reply to a response no later than six days before the scheduled board meeting at which the board will evaluate the hearing request. A reply may also contain additional information responding to the notice by the docket clerk required by subsection (d) of this section. A reply shall be filed with the docket clerk and served on the same day to the general manager, the applicant, and any person filing hearing requests.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 709. FEES

I. INTRODUCTION.

The Edwards Aquifer Authority ("Authority") adopts new 31 TAC, §§ 709.1, 709.3, 709.5, 709.7, 709.9, 709.11, 709.13, 709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, and 709.35, consisting of rules relating to the fee structure of the Authority. Sections 709.11, 709.19, and 709.21 are adopted with changes to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7533-7548). Sections 709.1, 709.3, 709.5, 709.7, 709.9, 709.13, 709.15, 709.17, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, and 709.35 are adopted without changes to the proposed text and will not be republished.

These rules have been written to establish the Authority's procedures for implementing and collecting fees.

II. SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES; AND CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The Authority is required by the Edwards Aquifer Authority Act (Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 Texas General Laws 2350, 2358-59, as amended by Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 261, 1995 Texas General Laws 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 524, 1995 Texas General Laws 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 Texas General Laws 634 ("Act")), to implement Edwards Aquifer management programs relating to, among other things, fees, exempt wells, interim authorization, permitted wells, permit conditions, groundwater available for permitting, proportional adjustment, equal percentage reduction, abandonment and cancellation of permits, aquifer recharge, storage and recovery, additional groundwater supplies available for permitting, transfers, meters and alternative measuring methods, groundwater trust, water quality, and comprehensive water management plan implementation. In order to generate revenue to fund the implementation of these programs and to regulate the use of the aquifer, the Authority must establish a uniform fee system. In these rules, the Authority is establishing rules setting forth the various types of fees imposed by the Authority and providing procedures for the adoption and assessment, as well as the billing and collection, of those fees.

The new sections are adopted pursuant to §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act; § 2001.004(1) of the Texas Administrative Procedure Act (Texas Government Code Annotated, §§ 2001.001-.902 (Vernon 2000)) ("APA"); and § 36.205 of the Texas Water Code (Texas Water Code Annotated, § 36.205 (Vernon 2000)). The Authority interprets these sections as authorizing the Authority to adopt rules establishing a fee structure for the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rules governing procedures of the Board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, which includes application, registration, aquifer management, and regular permit special retirement fees, and in particular, administrative procedures to be used before the Board and the Authority.

Section 1.11(b) of the Act requires the Authority "ensure compliance with permitting, metering, and reporting requirements and shall regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, empowers the Authority to establish procedures related to the filing and processing of various applications and registrations with and by the Authority.

Section 1.11(d)(2) of the Act provides, among other things, that the Authority may enter into contracts.

Section 1.11(f) of the Act provides the Authority may contract with a person who uses water from the aquifer for the Authority or that person to construct, operate, own, finance, and maintain water supply facilities which include a dam, reservoir, treatment facility, transmission facility, or recharge project. This section

further provides management fees or special fees may not be used for purchasing or operating these facilities.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. Pursuant to this section, the Authority is required to comply with the APA in connection with its rulemaking, even though the Authority is not a state agency and would therefore otherwise not generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.15(a) of the Act directs the Authority to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by this Act.

Section 1.16(b) of the Act sets forth certain requirements concerning an existing user's declaration of historical use and an applicant's payment of application fees required by the Board.

Section 1.16(d)(1) of the Act requires the Board to grant an initial regular permit to an existing user who, among other things, files a declaration and pays fees as required by this section.

Section 1.29(a) of the Act relates to fees. This section provides that the allocation of the cost of reducing withdrawals or permit retirements must be borne: solely by users of the aquifer for reducing withdrawals from the level on the effective date of this article to 450,000 acre-feet a year, or the adjusted amount determined under § 1.14(b) for the period ending December 31, 2007; and equally by downstream water rights holders for permit retirements from 450,000 acre-feet a year, or the adjusted amount determined under § 1.14(d) for the period ending December 31, 2007, to 400,000 acre-feet a year, or the adjusted amount determined under §1.14(d) for the period beginning January 1, 2008.

Section 1.29(b) of the Act provides for the assessment of aquifer management fees based on aquifer use under the water management plan to finance the Authority's authorized administrative expenses and programs. This section also allows water districts governed by Chapter 52 of the Texas Water Code and within the Authority's boundaries, to contract with the Authority to pay the Authority's expenses through taxes in lieu of user fees, to be paid by water users in the district. This section provides the Authority with the power to assess fees in order to generate revenue to finance the operation of the Authority in its regulation of the aquifer, however, the Authority may not collect a total amount of fees and taxes that is more than is reasonably necessary for the administration of the Authority.

Section 1.29(c) of the Act provides that the Authority shall assess an equitable special fee based on permitted aquifer water rights to be used only to finance the retirement of rights necessary to meet the goals of the Authority for reducing the maximum annual volume of water withdrawals from the aquifer. The section further provides the Authority shall set the fees on permitted aquifer users at a level sufficient to match the funds raised from the assessment of equitable special fees on downstream water rights holders.

Section 1.29(d) of the Act provides for the assessment of equitable special fees by the Commission on all downstream water rights holders in the Guadalupe River Basin to be used to finance the retirement of aquifer rights necessary to meet the goals of the Authority for reducing the maximum annual volume of water withdrawals from the aquifer. This section further provides that downstream water rights holders shall pay the assessed fees to the Authority. This section prohibits the assessment of fees by the Commission on contractual deliveries of water stored in Canyon Lake that may be diverted downstream of the San Marcos Springs or Canyon Dam.

Section 1.29(e) of the Act provides for the development of an equitable fee structure under § 1.29 and authorizes the Authority to establish different fee rates on a per acre-foot basis for different types of use. The fees must be equitable between types of uses and shall be assessed on the amount of water a permit holder is authorized to withdraw under the permit. Aquifer management fee rates for agricultural use shall be based on the volume of water withdrawn and may not be more than 20 percent of the fee rate for municipal use. Aquifer management fees rates for non-agricultural users are to be based on the face value of a permittee's initial regular permit or the amount authorized to be withdrawn under interim authorization status.

Section 1.29(f) of the Act requires the Authority to impose a permit application fee of not more than $25.

Section 1.29(g) of the Act empowers the Authority to impose a registration application fee of not more than $10.

Section 1.29(h) of the Act states that special fees collected under subsection (c) or (d) of §1.29 may not be used to finance a surface water supply reservoir project.

Section 1.36(b) of the Act provides the Authority with enforcement power and states that Authority shall provide for the suspension of a permit of any class for failure to pay a required fee or for a violation of a permit condition, order of the Authority, or rule adopted by the Authority.

Section 1.44(c)(2) of the Act relates to cooperative contracts for artificial recharge and states the political subdivision causing artificial recharge of the aquifer is entitled to withdraw during any 12-month period the measured amount of water actually injected or artificially recharged during the preceding 12-month period, as demonstrated and established by expert testimony, less an amount determined by the Authority to account for that part of the artificially recharged water discharged through springs, and to compensate the Authority in lieu of users' fees.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This proposed rulemaking is in furtherance of this legislative mandate. These proposed rules are rules of practice that state the procedures applicable to the fee setting process of the Authority.

Section 36.205 of the Texas Water Code authorizes groundwater conservation districts to set fees for administrative acts of the districts. Such fees may not unreasonably exceed the cost to the district of performing the administrative function for which the fee is charged.

Subchapter A

Subchapter A consists solely of § 709.1 which contains the definitions of eleven terms that are central to the establishment and management of a uniformly understandable multi-tiered fee system. These terms are used in substantive sections here and throughout other chapters in this rulemaking. The definitions are necessary to provide a factually accurate short-form elaboration of elements (terms) that are necessary for the rational implementation of a fee system that is consistent with the intent of the Act.

Although the term "agricultural use" is used in § 1.29(e) of the Act, it is not defined in the Act. The Authority has defined "agricultural use" in § 709.1(1) as the "the use of water for irrigation use." Irrigation use is defined in § 1.03(12) of the Act as "the use of water for the irrigation of pastures and commercial crops, including orchards." There are numerous facts that support the Authority's definition of "agricultural use." A review of the legislative history of the Act reveals there is no reference by the Legislature to a specific definition of agricultural use, even though such definitions exist in other Texas statutes. The Authority interprets this lack of reference as some evidence that the Legislature did not intend to bind the Authority to an existing definition; rather it intended a definition be created by the Authority consistent with the Act.

Additional facts supporting the definition of agricultural use are derived from § 1.29(e) of the Act and § 709.19 in Chapter 709 which provide that agricultural users pay aquifer management fees at an amount no more than 20 percent of the fee for non-agricultural users (the "20 percent rule"). It is the Authority's position that the 20 percent rule is designed for those water users who cannot pass on the added cost of aquifer management fees to consumers, such as irrigators. There are many users who may qualify as an agricultural user under other law, yet may be able to pass on the additional overhead due to the assessment of an aquifer management fee because they control their pricing structure. These users are not intended to have the benefit of the 20 percent rule and are therefore not included in the definition.

Additional support for the definition of agricultural use is found in the categories of beneficial use specifically identified in the Act. Under the Act, there are three types of beneficial use subject to permitting rules: municipal use, industrial use and irrigation use. Of these three types of use, only irrigation use is reasonably close in nature to agricultural use. As such, defining agricultural use to be the use of water for irrigation use is logical and supported by the Act.

Section 709.1(2) defines "annual operating revenue requirement" as the total revenues reflected in an annual budget adopted by the board that are reasonably required to adequately meet all the projected costs of aquifer management by the Authority. Section 1.29(b) of the Act authorizes aquifer management fees to finance the Authority's administrative expenses and programs. The section further provides that the Authority may not collect an amount of fees that is more than is reasonably necessary for its administration. In order to establish rules implementing an aquifer management fee program within the boundaries authorized by the Act, certain definitions had to be written. The definition of "annual operating revenue requirement" is the benchmark used for the aquifer management fee program. This definition establishes the figure that will be reflected in the Authority's annual budget that will serve as the basis for the calculation and assessment of aquifer management fees.

"Aquifer use" is defined in § 709.1(3) as the withdrawal of groundwater from the aquifer under interim authorization status or under a permit issued by the board. The definition is necessary because "aquifer use" would generally be considered to be the "end use" of the groundwater for its ultimate beneficial use. On the other hand, it could mean the volume of withdrawals of groundwater from the aquifer. There is a difference between the amount of "withdrawals" and the amount of "beneficial use." For purposes of aquifer management fees, the Authority's point of compliance is at the meter on the wellhead, not at the ultimate place of use. The volume of groundwater that is withdrawn is what the aquifer management fee should be assessed against, not the amount that is applied at the place of use for beneficial use. A definition of "aquifer use" is required to clarify that the aquifer management fee is assessed against the volume of groundwater withdrawn rather than the volume that may be applied to beneficial use.

"Cash needs approach" is defined in § 709.1(4) of Chapter 709 and provides the basis for how the annual operating revenue requirement (§709.1(2)) of the Authority is determined. The definition is required to more clearly define what costs and cash needs are considered by the Authority when determining the annual operating revenue requirement.

The definition of "costs of aquifer management" in § 709.1(5) is required because that term is used in the definition of annual operating revenue requirement in § 709.1(2) above. It is necessary to clarify what costs are contemplated by the Authority when determining the annual operating revenue requirement.

The definition of "downstream water right holder" in § 709.1(6) is based on § 1.29(d) of the Act which states that equitable special fees shall be assessed on "all downstream water rights holders in the Guadalupe River Basin." This term is not defined by the Act, however, it is necessary to include this definition so the water right holders included in the category and subject to permit retirement special fees, are clearly defined. The orifices of the springs are the point of reference for determining which water users are "downstream" for purposes of assessment of the permit retirement special fees.

The definition of "fiscal year" in § 709.1(7) is necessary to clearly define the period of time that is the basis of the Authority's fee programs and budgetary and administrative process.

"Non-agricultural use" is defined in § 709.1(8). This definition is necessary to define the beneficial use that is not considered "agricultural use" and, therefore, not entitled to the 20 percent rule under § 709.19. In addition, this definition is necessary to determine how the Authority will calculate and assess the aquifer management fee. Section 1.29(e) of the Act authorizes the Authority to establish different fee rates for different types of use. In order to implement this provision in the rules, it is necessary to define "non-agricultural use."

Section 709.1(10) contains the definition of "permit retirement special fee" which is based on § 1.29(c) of the Act. This provision in the Act allows the Authority to assess an equitable special fee based on permitted aquifer water rights to be used to finance the retirement of rights. In order to implement § 1.29(c) of the Act, a definition was necessary to clearly establish what the fee contemplated in that provision would be called and how it would be defined. This eliminates confusion with other fees authorized by the Act and makes clear the statutory basis for the fee.

Section 709.1(11) defines a "unit cost basis" as "the amount of a fee expressed in dollars per acre-foot per annum." Because the Act and the rules refer to water in increments of "acre-feet" such a definition is required in order to apply a fee amount to each increment on an annual basis.

Finally, all the definitions contained in § 709.1 provide the basis for a common regulatory language which enables regulated persons and entities and the general public to communicate effectively with the Authority.

Subchapter B

Subchapter B consists of three sections (§§ 709.3 -709.7) that address the establishment of a $10.00 fee for registration applications. Establishment of the registration fee is consistent with § 1.29(g) of the Act which states that the "Authority may impose a registration application fee not to exceed $10." Although the Act does not require a registration fee, the Authority has determined that it is fiscally reasonable and prudent to assess the fee for filing any registration application. While the registration process is relatively simple, it nonetheless, has an administrative cost and has a cumulative impact on the Authority's budget. The registration fee helps offset that cost.

Section 709.7 dealing with Enforcement for Nonpayment, states that the general manager may refuse to accept for filing, or otherwise process, a registration application if the fee is not paid. Other actions authorized by law also may be used to enforce the fee requirement in this subchapter. This section is consistent with § 1.36 of the Act relating to Enforcement which states the Authority "may enter orders to enforce the terms and conditions of permits, orders, or rules issued or adopted under this article." Collection of these fees is central to the ability of the Authority to finance its operations pursuant to the requirements of the Act. As such, a uniform system of enforcement is necessary to ensure collection of the fees.

Subchapter C

Subchapter C consists of three sections (§§ 709.9 - 709.13) that address the establishment of a $25 fee for filing with the Authority any application, including but not limited to, an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit and recharge recovery permits. Establishment of the permit application fee is in compliance with § 1.29 (f) of the Act which states the Authority "shall impose a permit application fee not to exceed $25."

Although the Act states the fee shall not exceed $25, the Authority has determined that it is fiscally reasonable and prudent to assess the full amount allowed by the Act for filing any permit. The permit application process has an administrative cost and has a cumulative impact on the Authority's budget. The permit application fee helps offset the cost.

Section 709.13 dealing with Enforcement for Nonpayment, states that the general manager may refuse to accept for filing, or otherwise process, a permit application if the fee is not paid. This section is consistent with § 1.36 of the Act relating to Enforcement which states the Authority "may enter orders to enforce the terms and conditions of permits, orders, or rules issued or adopted under this article." Collection of these fees is central to the ability of the Authority to finance its operations pursuant to the requirements of the Act. As such, a uniform system of enforcement is necessary to ensure collection of the fees.

Subchapter D

Subchapter D consists of eleven sections (§§ 709.15 -709.35) relating to aquifer management fees. Section 709.15 sets forth the purpose of rules in this subchapter which is to establish the basis for calculation, assessment, billing and collection of aquifer management fees in a manner that is consistent with §§ 1.11 (f) and 1.29 (b) and (e) of the Act. Section 1.29(b) of the Act states that the "Authority shall assess equitable aquifer management fees based on aquifer use under the water management plan to finance its administrative expenses and programs . . .."

Section 709.17 is a direct reflection of the fact that the Authority has determined that a fair, balanced and fiscally responsible fee system should be applicable to all aquifer use except for withdrawals of groundwater from wells which are exempt under §§ 1.16 (c) and 1.33 of the Act. Section 1.16(c) of the Act states that the "owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of this article is not required to file a declaration of historical use." Section 1.33 of the Act provides that a "well that produces 25,000 gallons of water a day or less for domestic or livestock use is exempt from metering requirements." These provisions in the Act have been properly incorporated into the Authority's rules regarding aquifer management fees.

Section 1.29 of the Act requires that the Authority develop, assess, bill, and collect an aquifer management fee. However, the Act does not set out the procedures for these various processes. A typical approach in the development of a regulatory fee such as the aquifer management fee, would be for the agency to develop and adopt a budget in order to identify their revenue requirements for the appropriate fiscal year. Generally, once a budget is developed, the fee may be determined by dividing into the budget the number of acre-feet that are anticipated to be withdrawn or authorized to be withdrawn, as appropriate, in a fiscal year. Section 709.19 describes step-by-step procedures for the adoption and assessment of an aquifer management fee for the succeeding year. The fee is based on aquifer use consistent with § 1.29 (e) of the Act which authorizes the Authority to establish different fee rates on a per acre-foot basis for different types of use. In order to implement the intent of the Act, the Authority has established two user blocks:

Block 1: non-agricultural users; and

Block 2: agricultural users.

In order to establish an equitable fee structure under § 1.29(e) of the Act, the Authority developed a framework based on its annual operating revenue requirements, the total volume of annual aquifer use for Block 1 users, carryover funding from the previous fiscal year, calculated revenue from Block 2 users and other sources of potential revenue. After the net annual operating revenue requirement is determined, it is divided by the total authorized or contracted aquifer use for Block 1 (non-agricultural) users. Subsequently, under §709.19(d) as modified, the Authority calculates the aquifer management fee for Block 2 (agricultural) users at $3.00 per acre-foot for base irrigation groundwater and at an amount not more than 20 percent of the Block 1 unit cost per year for unrestricted irrigation groundwater. The unit cost is expressed in dollars per acre-foot per year. The intended effect of this approach is to provide for an equitable fee structure by establishing a uniform average unit cost of groundwater by type of use, regardless of quantity withdrawn, and bifurcating the aquifer management fee for agricultural use between base and unrestricted irrigation groundwater as discussed above.

Section 1.29 of the Act requires that the Authority develop, assess, bill, and collect an aquifer management fee. However, the Act does not set out the procedures for these various processes. Section 709.21 provides procedures for billing and collection of aquifer management fees for all persons authorized for aquifer use under interim authorization status pursuant to § 1.17 of the Act and rules of the Authority, or under a final groundwater withdrawal permit issued by the Board. The rule implements the requirements of § 1.29 (e) by establishing a billing system that charges agricultural users for the actual volume of groundwater withdrawn from the aquifer in a calendar year. Non-agricultural

user fees are assessed on either the historical maximum beneficial use (for interim status under § 1.17 of the Act) or total groundwater authorized to be withdrawn in a final permit issued by the Board, irrespective of whether groundwater was withdrawn in either case.

The balance of the discussion in § 709.21 describes invoicing, payment schedules, collection mechanisms, late fees and other details essential to developing and maintaining an orderly and predictable system for collecting aquifer management fees from the two Blocks of users, unless subject to a user contract under § 709.25 of the rules. The basis for the rule is the establishment of an understandable and reasonable framework for billing and effectively collecting aquifer management fees.

Section 709.23 states that the Authority may not collect a total amount of aquifer management fees that is more than reasonably necessary for the annual operating revenue requirements for the administration of the Authority as reflected in its adopted annual fiscal year budget. The basis for this rule is the limitation on fees and taxes found in § 1.29 (b) of the Act which states that the amount collected may not be "more than is reasonably necessary for the administration of the Authority."

Section 709.25 encourages water conservation by allowing the general manager to contract with any non-agricultural user for the user to commit to aquifer use that is less than the amount to which the user would otherwise be authorized. The incentive for non-agricultural users to contract for a lower volume of groundwater withdrawal from the aquifer is the assessment by the Authority of a proportionately lower aquifer management fee. In order to retain long-term flexibility for water planning by the Authority, the rule provides a maximum term of one year for user contracts. The basis for the rule, conservation incentives for Block 1 users, is consistent with planned reductions in withdrawals from the aquifer consistent with the Act.

Section 709.27 establishes an effective period of one calendar year for aquifer management fees calculated and assessed by the general manager. The annual basis of the aquifer management fee is tied to the Authority's need to meet its annual operating revenue requirements. The use of a calendar year for the calculation and assessment of the aquifer management fee allows the Authority to manage the aquifer management fee system in conjunction with its annual budgetary process.

Section 709.29 prohibits the Authority from expending aquifer management fee revenues for the purchase or operation of water supply facilities. The aquifer management fee system is specifically linked to the Authority's need to meet its annual operating revenue requirements. Expenditures based on aquifer management fee revenues for other purposes are not contemplated by the rule. This rule will ensure that aquifer management fee revenues collected by the Authority are used as intended by the Act.

Section 709.31 allows the Authority, under conditions spelled out in the rule, to waive fees in the form of an offset if an aquifer user is required to pay aquifer management fees to the Authority and the Authority owes money to the user. The basis of the waiver is an attempt to simplify, by contract, the transfer of money between the Authority and regulated users.

Section 709.33, Enforcement for Nonpayment, states that the general manager may suspend the processing of any application if there is a determination that the applicant is delinquent on payment of an aquifer management fee. In addition, the general manager may take other actions authorized by law to enforce the fee requirement in this subchapter. This section is consistent with § 1.36 of the Act relating to Enforcement which states the Authority "may enter orders to enforce the terms and conditions of permits, orders, or rules issued or adopted under this article." Uniform enforcement of the collection of aquifer management fees is central to the ability of the Authority to finance its operations pursuant to the requirements of the Act.

Section 709.35 prohibits withdrawal of groundwater from the aquifer by any person if the person, or his predecessor in interest, is delinquent in the payment of an aquifer management fee that is due and payable to the Authority. Uniform enforcement of this prohibition works in concert with § 709.33, Enforcement for Nonpayment, to protect the aquifer from unauthorized withdrawals and assure collection of aquifer management fees. Collection of these fees is central to the ability of the Authority to finance its operations pursuant to the requirements of the Act.

III. REGULATORY IMPACT ANALYSIS OF MAJOR ENVIRONMENTAL RULES.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of "major environmental rules." The Authority has determined that none of the rules are "major environmental rules" as that term is defined by §2001.0225(g)(3) of the Texas Government Code. The basis for this determination is that the rules do not have the specific intent to "protect the environment" or "reduce risks to human health from environmental exposure." The specific intent of these rules is to provide an outline of procedures for implementing and collecting fees by the Authority, resulting in the development of a uniform fee system that generates revenue for the Authority. This revenue is used by the Authority to regulate the use of the aquifer. For this reason, the Authority finds that none of the rules are "major environmental rules" and that, therefore, no further analysis is required by § 2001.0225 of the Texas Government Code.

IV. TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act," requires governmental entities, under certain circumstances, to prepare a takings impact assessment ("TIA") in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of these rules. First, the Authority has made a "categorical determination" that rules establishing procedures for implementing and collecting fees do not affect private real property. These rules set forth the various types of fees imposed by the Authority and provide procedures for the adoption and assessment, as well as the billing and collection, of those fees. They have no direct affect on private real property and may not result in a taking. Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(4) of the Texas Government Code. See Act §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act; § 2001.004(1) of the APA; and § 36.205 of the Texas Water Code . It was held in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375 (Tex. App. -- San Antonio 2000, pet. filed), that the Edwards Aquifer Act expressly mandates the adoption of substantive and procedural permitting rules and that such actions are therefore excepted

from the Texas Private Real Property Rights Preservation Act. The holding in that case controls here. Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the adoption of these rules.

V. SUMMARY OF PUBLIC COMMENTS.

Five public hearings were held on these and other rules proposed by the Authority on: Wednesday, August 9, 2000 at 6:00 p.m. at the Conference Center of the Edwards Aquifer Authority, 1615 N. St. Mary's Street, San Antonio, Texas; Tuesday, August 15, 2000 at 6:00 p.m. at the New Braunfels Civic Center, 380 S. Seguin Avenue, New Braunfels, Texas; Thursday, August 17, 2000 at 6:00 p.m. at St. Paul's Lutheran Church, 1303 Avenue M, Hondo, Texas; Tuesday, August 22, 2000 at 6:00 p.m. at the Sgt. Willie De Leon Civic Center, 300 E. Main Street in Uvalde, Texas; and Thursday August 24, 2000 at the San Marcos Activities Center, 501 E. Hopkins, San Marcos, Texas. Oral and/or written comments on these rules were provided by Paul Aelvoet; Harold Weiblen; Thomas C. Trautner for Aldridge Nursery, Inc.; Herb Faseler; Richard Frenzel for the Bexar County Water Control and Improvement District #10 in Windcrest; Rafael Pineda; Susan Combs for the Texas Department of Agriculture; Eddy D. Edmondson for the Texas Nursery & Landscape Association; Vinson & Elkins L.L.P.; P J Ellison Kalil for Ellison's Greenhouses, Inc.; Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. for the Texas Farm Bureau; David Sabalka for Color Spot Nurseries; Scott Peck, AIFD TME; Judy Rutledge for Allied Florists of Houston; Fohn Farm Inc., Joe M. Fohn, for Bobby Fohn and David Fohn; Ralph and Allen Gilliam, Gilliam Ranch; Gregory and Cora Rothe; John Persyn; Mark Lamon for the Medina County Farm Bureau; Glenn Bragg, JoLynn Bragg, and David Bragg for Bragg Pecan Farms, Inc.; Curtis Boehme, Nelson Boehme and Dorothy Boehme for S.J. Boehme & Sons Inc.; Earl & Brown; San Antonio Water System; Ken Horton for the Texas Pork Producers Association, Inc.; Ross Wilson for the Texas Cattle Feeders Association, Inc.; Jeane M. Funkhouser for Eden Etc. Florists; Jim and Ellen Ellison for Ellison's Greenhouses, Inc.; Jimmy Klepac for Klepac Greenhouses, Inc.; Gayle Johnson for the Texas State Florists' Association; M.M. McWilliam; Frank Mechler, Jr.; Glen Kriewald; Ernie Schreiner; Rudy Botello; Jerry (surname illegible); Carroll T. Keller; Edgar H. Alzlnot, Jr.; G.J. Boehme; William R. Fewell; Ralph Kohlleppel, Jr.; R.Q. Stinson; Lynn F. Boehme; Ralph Kohlleppel; Chris Schuele; David B. Carter; Gail F. Boehme; Harry Lee Keller; Tim Schott; Morris Salazar; Kye Mash; Wm. Terry (surname illegible); Marshall Persyn; (first name illegible) Haby; Raymond T.(surname illegible); Jeff Tickner; George (surname illegible); Ted Kohlleppel; David Kohlleppel; David M. (surname illegible); James G. Wernette; Gilbert Eryeso; Alvin Santlelonso; Tylar J. (surname illegible); Aubrey Freeman; David Villarreal; Pamela Gardner; Mark Mendosa; Jacinto Sala; Alex Nieto; John Mueller; Edward Moore; (first name illegible) Villarreal; (first name illegible) Vogt; Jay Rogers; J. Lyon Argell; D.A. Villarreal; John Persyn; Melvin M. Zinsmeyer; Roger T. Graff; Deborah Cox; Karen Bain; Thomas Chautner; P. Gregory; Wm. Bain; Keith Taylor; (first name illegible) A. Neumann; Robert Neumann; Glenn Weiblen; Maurice DeCork, Jr.; (first name illegible) Boehme; Harold J. Bemos; (first name illegible) Besh; Stanley Riker; William H. Reus; Austin A. Clary; Fred Schueling, Jr.; Joe M. Fohn for Fohn Farm; Donald Bush for Hidden Valley; Ronnie Muennik; Tom Verstuyft; Richard S. Sterling; Calvin Bendell; Edwin L. Yanta; Chuck (surname illegible); Deon E. Stewart; Scott Noell; (first name illegible) Wurzbach; Charles L. Noonan, Jr.; Sarah L. Tracy; Rebecca D. Faseler; Roy Reyes; Ricky Robles; Melissa Ackermann; Derek Boehme; Julie Boehme; Niesso Boehme; Pat Wylach; Kathleen D. Carskaddin; Thomas Boehme; Authur Weiblen; Corinne Davenport; Harvey Boehme; Darlene Boehme; Jeanette Boehme; (first name illegible) Keller; Cindy Hawkins; C. Ray Hawkins; Elva Hawkins; Arthur G. Isle "Tootie"; Dale K. Saatek, Jr.; Robert DeLeo, Jr.; (first name illegible) W. Banner; Mark Vish; Staci S. Boehme; Vicki Boehme; Allison Boehme; George James; Russell Meyer; Clarence Mumme; Annette Billings; Wade Swanson; Geneviere Aelvoet; Amy Soltos; (first name illegible) Linderman; Rick Aelvoet; Robert Fohn; David Fohn; Jared Boehme; Fred Weiblen; Adele Boehme; Derek M. (surname illegible); Melissa Boehme; Leah Boehme; Morris Faseler; Cordell Bohlen; Jay E. Muennik; Franklin Muennik; Malvern Jesk; Jimmy Stewart; Thomas H. Carskadden; Rebecca C. Janysek; Roy Lee Bippert; Eloise Bippert; Shawn Noonan; Lucille Bippert; Leonard Bippert; Michele D. Bippert; Troy Bippert; Kris Noonan; Wm Reichert; Bernard Echtle; Margaret M. Echtle; Michael E. Echtle; Ashley Echtle; George M. Echtle; Alfred Keller, Jr.; Agnes E. Echtle; Marcella Keller; William Echtle; Michael Weiblen; Kathy Eaton; Joy M. Persyn; Brad Haby; Rebecca J. Haby; Gary Grantham; Marsha Lanham; Jeffrey Lanham; Gladys Gembler for the Bexar County Farm Bureau; and other individuals whose first and last names were illegible on the written comments. (The Authority has made every effort to interpret the names contained in this list as accurately as possible based on the oral and written comments received).

Section 709.1(1)

Proposed § 709.1(1) sets forth the definition for "agriculture use" as "the use of water for irrigation use."

Public Comment No. 1:

Eddy D. Edmondson, Texas Nursery and Landscape Association ("TNLA"), Jeane M. Funkhouser, Eden Etc. Florists, PJ Ellison Kalil, Ellison's Greenhouses, Inc. (T.S.F.A. Grower Director), Scott Peck, AIFD TME, Judy Rutledge, TMF, Allied Florists of Houston, Jim and Ellen Ellison, Ellison's Greenhouse, Jimmy Klepac, Klepac Greenhouses Incorporated, Gayle Johnson, AAF TMF, Texas State Florists' Association, and David Sabalka, Color Spot Nurseries

propose that the definition of "agriculture use" be expanded to include nursery products so that those in the nursery business are treated as agricultural users and not industrial users under the rules. The proposed change to § 709.1(1) reads as follows:

Agricultural use- The use of water for irrigation use, "or for watering nursery products by a nursery grower as those terms are identified in the Texas Agricultural Code, Subtitle B, Chapter 71, Subchapter A, § 71.041."

Authority's Response:

The Authority staff received the above-referenced comments, and disagrees with the comments. The basis for this determination is that according to the Edwards Aquifer Authority Act (the "Act"), aquifer management fees for agricultural use are to be no more than 20% of the rate charged to municipal and industrial users. The purpose of this break in the fee structure is to protect industries having an inelastic demand for their products.

There is no evidence the Act intended nurseries be included in that category. In light of the above discussion, the Authority has not modified §709.1(1) accordingly.

Public Comment No. 2:

John Riley with Vinson & Elkins, L.L.P., commented that the definition of "agricultural use" is too narrow and contrary to the intent of the Act. He maintains that restricting the definition of "agricultural use" to that of "irrigation use" makes agricultural activities more expensive. Riley believes the Legislature intended the reduced agricultural fee to be applied more broadly that just in regards to the water that is used for irrigation. Accordingly, Riley requests a clarification or change in the rule to reflect this.

Authority's Response:

The Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that according to the Act, aquifer management fees for agricultural use are to be no more than 20% of the rate charged to municipal and industrial users. The purpose of this break in the fee structure is to protect industries having an inelastic demand for their products. There is no evidence the Act intended a broader definition of "agricultural use" be used. In light of the above discussion, the Authority has not modified §709.1(1) accordingly.

Public Comment No. 3:

Douglas Caroom with Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P., for the Texas Farm Bureau ("TFB."), asserts that the definition omits nurseries, aquaculture, feedlot operations, and other agricultural-type operations that may use Aquifer water, denying these types of agricultural operations the benefit of the 20% fee limitation imposed by the Act. The TFB recommends that the Authority use the definition of "Agriculture" as provided in § 2.001 of the Texas Agriculture Code.

Authority's Response:

The Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that according to the Act, aquifer management fees for agricultural use are to be no more than 20% of the rate charged to municipal and industrial users. The purpose of this break in the fee structure is to protect industries having an inelastic demand for their products. There is no evidence the Act intended the operations listed by the TFB be included in that category. In light of the above discussion, the Authority has not modified §709.1(1) accordingly.

Public Comment No. 4:

Susan Combs, Commissioner of the Texas Department of Agriculture ("TDA"), asserts the Texas Legislature did not intend for the definitions "irrigation use" and "agricultural use" to have identical definitions. TDA proposes that "agricultural use" include nurseries and feedlot operations.

Authority's Response:

The Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that according to the Act, aquifer management fees for agricultural use are to be no more than 20% of the rate charged to municipal and industrial users. The purpose of this break in the fee structure is to protect industries having an inelastic demand for their products. There is no evidence the Act intended nurseries or feedlot operations be included in that category. In light of the above discussion, the Authority has not modified §709.1(1) accordingly.

Public Comment No. 5:

Ross Wilson, Vice President of the Texas Cattle Feeders Association and Ken Horton, Executive Vice President of the Texas Pork Producers Association, Inc., proposed that livestock production and the consumption of water by livestock be included in the definition of "agricultural use" and thereby entitled to the "agricultural user" fee.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that according to the Act, aquifer management fees for agricultural use are to be no more than 20% of the rate charged to municipal and industrial users. The purpose of this break in the fee structure is to protect industries having an inelastic demand for their products. There is no evidence the Act intended livestock production be included in that category. Moreover, most groundwater for raising livestock in the region is used by wells that are exempt from the Authority's permit requirement and therefore is not subject to any aquifer management fee. In light of the above discussion, Authority staff has not modified §709.1(1) accordingly.

Public Comment No. 6:

Earl & Brown proposes changing § 709.1(1) so that it reads: "the use of groundwater for irrigation use and/or for agricultural industrial use." Earl & Brown also proposes the addition of a definition for "agricultural industrial use" which reads: "beneficial use of groundwater for the production of food or fiber or for any other use that may be deemed agricultural as that term is commonly defined."

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that the recommended definitions are too broad. There is no evidence the Act intended the definition of agricultural use be defined as proposed. In light of the above discussion, Authority staff has not modified §709.1(1) accordingly.

Section 709.1(4)

Proposed § 709.1(4) sets forth the definition for "cash needs approach" and states in part:

the method of determining annual operating revenue requirement of the Authority based on, and sufficient to cover, all cash needs for administrative and program expenses, including but not limited to . . ..

Public Comment No. 7:

Earl & Brown proposed changing § 709.1(4) so that it reads:

the method of determining the annual operating revenue requirements of the Authority based on, and sufficient to cover, all "reasonable and necessary" cash needs for administrative and program expenses . . ..

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that the board of directors adopts an annual budget it believes to be appropriate for the Authority's administrative and programmatic

needs. Therefore, implicit in this "cash needs approach" is the assumption that the Authority's expenses are reasonable and necessary. In light of the above discussion, Authority staff has not modified §709.1(4) accordingly.

Section 709.1(8)

Proposed § 709.1(8) sets forth the definition for "non-agricultural use" as "the beneficial use of groundwater withdrawn from the aquifer for any use other than irrigation use."

Public Comment No. 8:

Susan Combs, Commissioner of the TDA, proposes the word "irrigation" be changed to "agriculture" so that the definition reads: "the beneficial use of groundwater withdrawn from the aquifer for any use other than agriculture use."

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is the proposed definition is too broad and would have to be defined. The purpose of the Act's break in the fee structure between irrigation and municipal use is to protect industries having an inelastic demand for their products. There is no evidence that any other sector of the agricultural industry is subject to this price inelasticity. In light of the above discussion, Authority staff has not modified §709.1(8) accordingly.

Public Comment No 9:

Earl & Brown proposes changing § 709.1(8) to read as follows:

Beneficial use of groundwater withdrawal from the aquifer for any use other than irrigation or agricultural industrial use.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is the proposed definition is too broad and would have to be defined. The purpose of the Act's break in the fee structure between irrigation and municipal use is to protect industries having an inelastic demand for their products. There is no evidence that any other sector of the agricultural industry is subject to this price inelasticity. In light of the above discussion, Authority staff has not modified §709.1(8) accordingly.

Section 709.11

Proposed § 709.11 establishes the permit application fees and states:

The general manager shall impose a $25 fee to file with the Authority an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit, and recharge recovery permits. The fee must be paid at the time the application is filed.

Public Comment No. 10:

Earl & Brown recommends adding the following sentence to the end of § 709.11:

Permit application fee shall be waived by the Authority on all applications submitted prior to the adoption of these rules.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that the permit application fee is specifically authorized by the Act. Moreover, the majority of permit application fees were received in 1996. In light of the above discussion, Authority staff has not modified §709.11 accordingly.

Public Comment No. 11:

TFB states that proposed § 709.11 contradicts § 707.403. Section 707.403 states, in part, as follows:

For all applications other than for an agricultural conservation loan, a non-refundable application fee of $25 must accompany that application in order for it to be considered by the Authority.

Authority's Response:

Authority staff received the above-referenced comment, and agrees with the comment. To address this apparent contradiction, the Authority staff has modified §709.11 as set forth below:

The general manager shall impose a $25 fee to file with the Authority any application, including but not limited to, an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit, and recharge recovery permits. The fee must be paid at the time the application is filed.

Section 709.13

Proposed § 709.13 deals with Enforcement for Nonpayment and states:

If the applicant has failed to pay the permit application fee or is delinquent to the Authority with respect to any other fee that is due and owing from the applicant to the Authority, the general manager may refuse to accept for filing, or otherwise process, a permit application.

Public Comment No. 12:

SAWS states that it doubts the Authority has the ability to stall processing of any application that is not in arrears or found to be in violation of EAA rules.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that Article 1, § 1.36 of the Act, expressly provides that the Authority "may enter orders to enforce the terms and conditions of permits, orders, or rules issued or adopted under this article." Further, the Authority by rule "shall provide for the suspension of a permit of any class for a failure to pay a required fee or a violation of a permit condition or order of the authority or a rule adopted by the authority." In light of the above discussion, Authority staff has not modified §709.13.

Section 709.19(d)(3)

Proposed § 709.19(d)(3) provides as follows:

By December 20th, the general manager shall calculate the aquifer management fee that may be assessed against Block 1 non-agricultural use on a unit cost basis by dividing the net annual operating revenue requirements by the total authorized aquifer use of Block 1 non-agricultural users.

Public Comment No. 13:

SAWS proposes amending the rule to recognize the contracted permit amount as follows:

By December 20th, the general manager shall calculate the aquifer management fee that may be assessed against Block 1 non-agricultural use on a unit cost basis by dividing the net

annual operating revenue requirements by the total authorized "or contracted" aquifer use of Block 1 non-agricultural users.

Authority's Response:

Authority staff received the above-referenced comment, and agrees with the comment. The basis for this determination is that the calculation of annual aquifer management fees is derived after staff determines the total authorized annual aquifer use for non-agricultural users. The Authority should use the total authorized and contracted aquifer use as described in §709.25 to calculate the aquifer management fee for Block 1 non-agricultural users. In light of the above discussion, Authority staff has modified §709.19(d)(3) accordingly.

Sections 709.19(a), 709.19(d)(2), 709.19(d)(3), 709.19(d)(4), 709.21(c)

Proposed § 709.19(a) states that:

Not later than December 31st of each year, the general manager shall, pursuant to this subchapter, calculate and assess an aquifer management fee for the succeeding year.

Proposed § 709.19(d)(2) provides that:

Not later than November 30th, the general manager shall determine the total volume of aquifer use as reported in the groundwater users reports for the prior year by Block 1 non-agricultural users.

Proposed §§ 709.19(d)(3) and 709.19(d)(4) provide that the deadline by which the general manager shall calculate the aquifer management fee to be assessed against non-agricultural users and agricultural users, is December 20th.

Public Comment No. 14:

SAWS proposes changing § 709.19(a) to read: "no later than December 20th of each year . . .." SAWS also requests the elimination of § 709.19(d)(2) stating it is an unnecessary step in fee assessment, and that there be consistency among the dates used in this section.

Authority's Response:

Authority staff received the above-referenced comments, and disagrees in part with the comments. The basis for this determination in regard to §709.19(a) is that the proposed change would limit the Authority's flexibility to assess aquifer management fees for the succeeding year. However, to achieve consistency, Authority staff recommends changing the dates in §709.19(d)(3) and §709.19(d)(4) from December 20th to December 31st. In light of the above discussion, Authority staff has modified §709.19(d)(3) and §709.19(d)(4) as set forth below:

(d)(3) By December 31st . . ..

(d)(4) By December 31st . . ..

The Authority staff agrees in part with the comments. The basis for this determination in regard to §709.19(d)(2) is that although this section details an important step in the process of calculating aquifer management fees, including a specific reference to a date is not necessary. In light of the above discussion, Authority staff has modified §709.19(d)(2) as set forth below:

(d)(2) The general manager shall determine the total volume of aquifer use as reported in the groundwater users reports for the prior year by Block 1 non-agricultural users.

In light of these modifications by the Authority, § 709.21(c) has also been amended to maintain consistency between the dates used in § 709.19 and § 709.21 as follows:

§ 709.21(c) Not later than December 31st, the general manager shall mail an aquifer management fee invoice to all non-agricultural users. Not later than December 31st, the general manager shall mail a groundwater use report form to all agricultural users . . ..

Section 709.19(d)(4)

Proposed § 709.19(d)(4) states, in part, that "the general manager shall calculate the aquifer management fee for Block 2 agricultural users at an amount equal to 20 percent of the aquifer management fee for Block 1 non-agricultural users."

Public Comment No. 15:

Susan Combs, Commissioner of the TDA, asserts that § 709.19(d)(4) requires the Authority's general manager to determine the aquifer management fees for agricultural users at an amount that "may not be more than 20 percent of the fee rate for municipal use", pursuant to § 1.29(e) of the Act. TDA further asserts that the Authority is repressing irrigated agriculture by increasing water rates and charging the maximum rate allowed by law. Accordingly, TDA requests that the Authority consider the financial position of farmers and ranchers before charging these rates.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 16:

Fohn Farm Inc./Fohn Bros. Farms, through Joe M. Fohn commenting for Bobby Fohn and David Fohn, commented on the cost of aquifer management fees stating it reported a monetary per acre loss on its crops and asked the Authority to consider the current depressed state of agricultural prices, asserting that such status makes higher management fees unaffordable.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 17:

The following persons and associations commented on § 709.19(d)(4) and urge the Authority to adopt a maximum cap of $3.00 per acre foot regarding water management fees:

M.M. McWilliam; Frank Mechler, Jr.; Glen Kriewald; Ernie Schreiner; Glenn Bragg; Rudy Botello; Jerry (surname illegible); Carroll T. Keller; Edgar H. Alzlnot, Jr.; G.J. Boehme; William R. Fewell; Ralph Kohlleppel, Jr.; R.Q. Stinson; Lynn F. Boehme; Ralph Kohlleppel; Chris Schuele; David B. Carter; Gail F. Boehme; Harry Lee Keller; Tim Schott; Morris Salazar; Kye Mash; Wm. Terry (surname illegible); Marshall Persyn; (first name illegible) Haby; Raymond T.(surname illegible); Jeff Tickner; George (surname illegible); Ted Kohlleppel; David Kohlleppel; David M. (surname illegible); James G. Wernette; Gilbert Eryeso; Alvin Santlelonso; Tylar J. (surname illegible); Aubrey Freeman; David Villarreal; Pamela Gardner; Mark Mendosa; Jacinto Sala; Alex Nieto; John Mueller; Edward Moore; (first name illegible) Villarreal; (first name illegible) Vogt; Jay Rogers; J. Lyon Argell; D.A. Villarreal; John Persyn; Melvin M. Zinsmeyer; Roger T. Graff; Deborah Cox; Karen Bain; Thomas Chautner; P. Gregory; Wm. Bain; Keith Taylor; (first name illegible) A. Neumann; Robert Neumann; Glenn Weiblen; Maurice DeCork, Jr.; (first name illegible) Boehme; Harold J. Bemos; (first name illegible) Besh; Stanley Riker; William H. Reus; Austin A. Clary; Fred Schueling, Jr.; Joe M. Fohn (Fohn Farm); Donald Bush (Hidden Valley); Ronnie Muennik; Tom Verstuyft; Richard S. Sterling; Calvin Bendell; Edwin L. Yanta; Chuck (surname illegible); Deon E. Stewart; Scott Noell; (first name illegible) Wurzbach; Charles L. Noonan, Jr.; Sarah L. Tracy; Rebecca D. Faseler; Roy Reyes; Ricky Robles; Melissa Ackermann; Derek Boehme; Julie Boehme; Niesso Boehme; Pat Wylach; Kathleen D. Carskaddin; Thomas Boehme; Arthur Weiblen; Corinne Davenport; Harvey Boehme; Darlene Boehme; Jeanette Boehme; (first name illegible) Keller; Cindy Hawkins; C. Ray Hawkins; Elva Hawkins; Arthur G. Isle "Tootie"; Dale K. Saatek, Jr.; Robert DeLeo, Jr.; (first name illegible) W. Banner; Mark Vish; Dorothy M. Boehme; Staci S. Boehme; Vicki Boehme; Curtis Boehme; Allison Boehme; Paul Aelvoet; George James; Russell Meyer; Clarence Mumme; Annette Billings; Wade Swanson; Geneviere Aelvoet; Amy Soltos; (first name illegible) Linderman; Rick Aelvoet; Robert Fohn; David Fohn; Harold Weiblen; Jared Boehme; Fred Weiblen; Adele Boehme; Nelson Boehme; Derek M. (surname illegible); Melissa Boehme; Leah Boehme; Morris Faseler; Cordell Bohlen; Jay E. Muennik; Franklin Muennik; Malvern Jesk; Jimmy Stewart; Thomas H. Carskadden; Rebecca C. Janysek; Roy Lee Bippert; Eloise Bippert; Shawn Noonan; Lucille Bippert; Leonard Bippert; Michele D. Bippert; Troy Bippert; Kris Noonan; Wm Reichert; Bernard Echtle; Margaret M. Echtle; Michael E. Echtle; Ashley Echtle; George M. Echtle; Alfred Keller, Jr.; Agnes E. Echtle; Marcella Keller; William Echtle; Michael Weiblen; Kathy Eaton; Joy M. Persyn; Brad Haby; Rebecca J. Haby; Gary Grantham; Marsha Lanham; Thomas C. Trautner; Jeffrey Lanham; Mark Lamon for the Medina County Farm Bureau; Gladys Gembler for the Bexar County Farm Bureau, and other individuals whose first and last names were illegible on the written comments.

Authority Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 18:

In assessing the aquifer management fee under § 709.19(d)(4), Clarence Mumme requests that the Authority consider: 1) the Agricultural Industry's inability to pass the increased cost of water to their produce buyers, 2) the possibility that the unlimited or increasing charge for water use would become an unaffordable cost of business for farmers, 3) the possibility of soon incurring a $30.00 per acre user fee that would equal the cost of leasing irrigated land, 4) the contention that land owners pay a higher price for irrigated land, 5) the expense and risk of drilling a well, plus the expenditures made in purchasing, operating, and maintaining irrigation equipment, 6) the economic impact of farming in the seven county area, 7) annual changes in rainfall coupled with the assertion that irrigation water is used only when there is an insufficient amount of rain, and 8) the lower expense related to rain water as opposed to pumped water. Finally, Mr. Mumme proposes capping charges for farmers' water usage at $3.50 per acre-foot per year or, in the alternative, pay land owners $250 per acre foot per year for non-usage of his/her allocated two acre feet.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination in regard to limiting the amount of the annual aquifer management fee for agricultural users is that the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Authority staff received the above-referenced comment, and disagrees in part with the comment. The basis for this determination in regard to paying land owners for non-usage of his/her allocated two acre-feet per acre, is that the Authority may consider payment for non-use of a well owner's allocated groundwater in a separate program. In light of the above discussion, Authority staff has not modified §709.19(d)(4) accordingly.

Public Comment No. 19:

Ralph and Allen Gilliam of Gilliam Ranch, and Gregory and Cora Rothe, propose the elimination of § 709.19(d)(4) so the Board may retain the discretion to set agricultural user fees annually, as a part of the budget process. The Board's retention of this discretion may aid in avoiding high fees which could make farming economically prohibitive. Alternatively, if the rule is not abolished, the commenters assert that a modification is necessary to allow the general manager to annually recommend a proper percentage relationship between agricultural and non-agricultural users.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees in part with the comment. The basis for this determination is that aquifer management fees are mandated by the Act and

must be available as a regulatory tool. In light of the above discussion, Authority staff has not modified §709.19(d)(4) accordingly.

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 20:

S. J. Boehme and Sons, Inc. (through Curtis, Nelson, and Dorothy Boehme), recommends changing the wording of § 709.19(d)(4) to read:

(d)The aquifer management fee shall be calculated and addressed as follows:

(4) By December 20th, except as provided in § 711.420(3) of this title (relating to Enforcement) the general manager shall calculate the aquifer management fee for Block 2 agricultural users at $3.00 per acre foot for the first acre foot of initial regular permit - the amount above an acre foot be charged no more than 20 percent of the aquifer management fee for Block 1 non-agricultural users.

Boehme and Sons assert these changes will:

(1) promote water conservation for agricultural use;

(2) encourage the sale or lease of water to Block 1 non-agricultural users resulting in an increase in management fees return per acre foot;

(3) aide tenants and renters in remaining in agriculture thereby allowing landowners to continue leasing their land; and

(4) result in a smaller increase of management fees for non-agricultural users.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 21:

Glenn Bragg, JoLynn Bragg, and David Bragg of Pecan Farms, Inc. ("Bragg"), contend that the language of this section mandates that agricultural fees be set at 20% of industrial/municipal use, thereby eliminating the Authority's ability to adjust agricultural fees below the 20% mark. Bragg contends the Act (§ 1.29(e)) demonstrates that the 20% rate was intended to be a maximum fee which allows the Authority to set rates below that maximum. Furthermore, Bragg comments that agricultural user fees will increase over time and users will likely receive buy-down fee assessments for both the 450,000 and 400,000 acre-feet (FY 2008) caps. Consequently, the fees and the increasing budgets will rapidly become insupportable for agriculture if the Authority immediately begins charging at the 20% maximum rate. Bragg emphasizes that agricultural users cannot pass the cost of increasing fees off to the consumer and recommends that agricultural water fees be fixed at the current rate of $3.70 per acre-foot unless or until agricultural prices can support an increase.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 22:

Paul Aelvoet commented on 709.19(d)(4) and states Senate Bill 1477 requires the agricultural fee be no more than 20% of the non-agricultural fee. He states "an amount equal to 20%" is an illegal changing of the law.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 23:

Harold Weiblen commented on §709.19(d)(4) and states the language in the proposed rule should track the Act.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination is that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Public Comment No. 24:

Thomas C. Trautner with Aldridge Nursery, Inc. states that the proposed fees will be about $7.00 an acre foot and may rise over the next few years, due mostly to the Authority's litigation expenses. He contends increasing fees to pay for litigation is

against the law and unreasonable under § 1.29(b) of the Edwards Aquifer Authority Act. Mr. Trautner also contends the $7.00 fee per acre foot could go as high as $20.00 for irrigation use. For most farmers that rarely net more than $100,000 annually, this $14,000 fee during a drought would taken 14% of that income. He feels $7.00 is an unreasonable amount to pay for your own water and asserts that farmers will eventually become unable to operate if these higher management prices continue to rise.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees in part with the comment. The basis for this determination in regard to the statement that increasing fees to pay for litigation is illegal and unreasonable, is that § 1.29 of the Act expressly provides that the Authority shall assess aquifer management fees "to finance its administrative expenses and programs" thereby allowing the Authority to take into account litigation expenses when determining fees. In light of the above discussion, Authority staff has not modified §709.19(d)(4) accordingly.

Authority staff received the above-referenced comment, and disagrees in part with the comment. The basis for this determination in regard to the statement that increasing fees to $7.00 and above will result in farmers being unable to operate, is that the Authority cannot make such a determination based on the variables involved. Crop production costs are based on the type of crop grown and profit margins vary according to the type of crop grown. The Authority has determined, however, that to better reflect the requirements and the intent of the Act, the board may determine annually by resolution the aquifer management fee rate for agricultural users. This rate will be $3.00 per acre-foot for base irrigation groundwater and not more than 20% of the fee rate for municipal use for unrestricted irrigation groundwater. The board may consider limiting aquifer management fees for agricultural users in this annual resolution. In light of the above discussion, Authority staff has modified §709.19(d)(1) and (4) accordingly.

Section 709.21

Proposed § 709.21 deals with Billing and Collection of aquifer management fees.

Public Comment No. 25:

Richard Frenzel, General Manager of the Bexar County Water Control and Improvement District #10 in Windcrest objects to agricultural users being guaranteed two-acre feet of water per year. He also disagrees with agricultural users paying "after the fact" for whatever they use, while municipal/industrial users have to pay in advance for whatever they are going to be allocated.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that this requirement is described in the Act. Moreover, user contracts described in §709.25 provide an opportunity for municipal and industrial well owners to pay only for the groundwater projected to be used in a given year. In light of the above discussion, Authority staff has not modified §709.21 accordingly.

Section 709.21(b)(2)(B)

Proposed § 709.21(b)(2)(B) states, in part, as follows:

(2) If the aquifer use is non-agricultural, then the fee shall be assessed on:

(B) for a permittee, the total volume of groundwater authorized to be withdrawn in a final permit issued by the board, irrespective of whether the groundwater was actually withdrawn.

Public Comment No. 26:

Earl & Brown proposes an addition to § 709.21(b)(2)(B). As amended, it would read:

(B) for a permittee, the total volume of groundwater authorized to be withdrawn in a final permit issued by the board, irrespective of whether the groundwater was actually withdrawn. However, in order to promote conservation and avoid unnecessary waste under a "take or pay" scheme, the Authority shall refund to the payor Aquifer Management Fees in an amount equal to that portion unpumped permit which was not withdrawn during the calender year.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination in regard to the "take or pay" issue is that user contracts described in §709.25 are intended to promote conservation by allowing non-agricultural users to voluntarily limit the amount of groundwater they will use in a calendar year. In light of the above discussion, Authority staff has not modified §709.21(b)(2)(B) accordingly.

Section 709.21(c) and (e)

Proposed § 709.21(c) states, in part, that "the general manager shall mail a groundwater use report form to all agricultural users to report aquifer use for the preceding calendar year."

Proposed § 709.21(e) states, in part, "for agricultural users, the groundwater use report shall constitute an aquifer management fee invoice . . . This invoice for agricultural use becomes due and payable immediately upon mailing of the groundwater use report by the general manager."

Public Comment No. 27:

SAWS recommends the following changes to the above-mentioned sections:

(c)...to report aquifer use for "current" calender year.

(e) This invoice for agricultural use becomes due and payable immediately upon mailing of the groundwater use report by the "agricultural user."

Authority's Response:

Authority staff received the above-referenced comment, and agrees with the comment. The basis for this determination is the proposed revisions will better describe the process for distributing annual groundwater use report forms and for collecting aquifer management fees. In light of the above discussion, Authority staff has modified §709.21(c) and §709.21(e) accordingly. (Note: Although SAWS' comment refers to §709.21(b), Authority staff has concluded the comment was intended to address §709.21(c)).

Section 709.21(d)

Proposed § 709.21(d) provides for the payment of the aquifer management fee by non-agricultural users and provides that:

An aquifer management fee invoice for a non-agricultural user becomes due and payable immediately upon mailing. If the total annual aquifer management fee invoice for the user is less than $600, the user shall pay the fee on a lump sum basis. Such an

invoice becomes delinquent if payment in full is not received by the Authority on or before March 1st of the year for which the aquifer management fee is in effect. If the total annual aquifer management fee invoice for a non-agricultural user is equal to or greater than $600, then the user may elect to pay the fee on a lump sum or in equal monthly payments. Such an invoice becomes delinquent if payment in full for a lump sum payment is not received in full by March 1st of the year for which the aquifer management fee is in effect. If the non-agricultural user elects to pay on a monthly payment schedule, then the pro rata portion of the invoice becomes due monthly on the last working day of each month. Each monthly payment of an invoice becomes delinquent if payment in full is not received by the Authority on or before the last working day of each month for which the monthly payment becomes due and payable.

Public Comment No. 28:

Richard Frenzel, General Manager of the Bexar County Water Control and Improvement District #10 in Windcrest, proposes changing § 709.21(d) to read as follows:

An aquifer management fee invoice for a non-agricultural user becomes due and payable immediately upon mailing. If the total annual aquifer management fee invoice for the user is less than $600, the user shall pay the fee on a lump sum basis. Such an invoice becomes delinquent if payment in full is not received by the Authority on or before March 1st of the year for which the aquifer management fee is in effect. If the total annual aquifer management fee invoice for a non-agricultural user is equal to or greater than $600, then the user may elect to pay the fee "in" a lump sum or in equal monthly payments. Such an invoice becomes delinquent if payment in full for a lump sum payment is not received in full by March 1st of the year for which the aquifer management fee is in effect. If the non-agricultural user elects to pay on a monthly payment schedule, then the pro rata portion of the invoice becomes due monthly on the last working day of each month. Each monthly payment of an invoice becomes delinquent if payment in full is not received by the Authority on or before the last working day of each month for which the monthly payment becomes due and payable.

Authority's Response:

Authority staff received the above-referenced comment, and agrees with the comment. The basis for this determination is this was a typographical error. In light of the above discussion, Authority staff has modified §709.21(d) accordingly.

Public Comment No. 29:

Herb Faseler commented that § 709.21(d) is discriminatory because an aquifer management fee for a non-agricultural user is delinquent if not paid by March 1 of the year for which the fee is in effect, while an invoice for agricultural users is delinquent if not received by January 31 of each year. He states January is a difficult month because farmers and ranchers must pay taxes in January and that a payment plan should be an option for agricultural users.

Authority's Response:

Authority staff received the above-referenced comment, disagrees with the comment. The basis for this determination is that as agricultural users, farmers pay aquifer management fees for groundwater used in the production of a crop during the preceding year. Municipal and industrial users are paying for the current year's groundwater use by March 1, whereas farmers are paying after the fact based on actual water use. Therefore, the proposed rule is not discriminatory. In light of the above discussion, Authority staff has not modified §709.21(d) accordingly.

Section 709.21(f)

Proposed § 709.21(f) states:

For any aquifer management fee that is delinquent, if payment in full is not received on or before 10 days after the date the amount became delinquent, then the General Manger shall assess, for every month thereafter that the invoice remains delinquent, a penalty of 5 percent of the then delinquent amount.

Public Comment No. 30:

Thomas C. Trautner asserts that the five percent penalty is usurious, especially when additional pumping cannot occur until late fees and penalties are paid.

Authority's Response:

Authority staff received the above-referenced comment, and agrees in part with the comment. The basis for this determination in regard to the penalty for late payments is that in an effort to maintain consistency with other legal constraints, the section should be amended to allow the Authority to assess a penalty for late payments in an amount equivalent to the maximum amount allowed by law. In light of the above discussion, Authority staff has modified §709.21(f) accordingly.

Section 709.21(g)

Public Comment No. 31:

Earl & Brown proposes adding § 709.21 (g), which reads:

If the total amount of Aquifer Management Fees for Block-1 Non-Agricultural User Exceeds a total of $1,000 annually, the payor shall have the option of paying the Authority a one time $10 Administration Fee and then be allowed to pay the total fees in 12 equal monthly installments to the Authority.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination in regard to monthly payments of Block 1 non-agricultural aquifer management fees is that the proposal to add §709.21(g) is repetitive of §709.21(d) detailing options for monthly payment of aquifer management fees for non-agricultural users. In light of the above discussion, Authority staff has not added §709.21(g) accordingly.

Chapter 709 - General

In response to the Authority's request to the Texas Workforce Commission ("TWC") to prepare a Local Employment Impact Statement pursuant to § 2001.022 of the Texas Government Code, the TWC responded in a letter to the Authority regarding Chapter 709 stating:

After reviewing the information provided to our Department, there is no apparent basis to refute the proposed employment impacts outlined in the (information submitted on behalf of the Authority). Our data will not confirm nor deny the potential lost jobs nor the newly created jobs based upon the impact of these proposed rules.

The Authority determined the letter did not constitute a Local Employment Impact Statement because it did not meet the criteria

identified in § 2001.022(a) of the Texas Government Code. Because the Commission did not prepare and deliver to the Authority a Local Employment Impact Statement within 25 days after the date on which the Commission received the proposed rules, the proposed rules are presumed not to affect local employment pursuant to § 2001.022(e) of the Texas Government Code and no Local Employment Impact Statement is required to be included in the Notice of Proposed Rule.

Public Comment No. 32:

Thomas C. Trautner with Aldridge Nursery states the Authority is not excused from examining the impact of Chapter 709 on employment because the TWC did not make any findings regarding the issue.

Authority Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The Authority has complied with all the requirements of the Texas Government Code and has applied the legal presumption set out in § 2001.022(e). Based on the letter provided by the TWC, no Local Employment Impact Statement is required to be included in the Notice of Proposed Rule. There is no additional requirement that the Authority conduct an impact analysis independent of the TWC.

Public Comment No. 33:

Rafael Pineda states the Texas Legislature was not authorized to exercise total domain over water. "This water is private water, and it should stay private water." He also feels a great deal of water can be conserved with various sprinkler systems.

Authority's Response:

Authority staff received the above-referenced comment, and disagrees with the comment. The basis for this determination is that the aquifer is a natural resource of Texas. The Legislature, through § 1.08 of the Act, has stated that the Authority has "all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in the aquifer." In light of the above discussion, Authority staff has not modified any rules contained in Chapter 709.

Public Comment No. 34:

The TFB asserts that the Authority was required by the Texas Private Real Property Rights Preservation Act to prepare a "takings impact assessment" or "TIA" before providing notice of the proposed adoption of the Chapter 709 rules.

Authority's Response:

The Authority staff received the above-referenced comment and disagrees with the comment. Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act" ("TPRPRA"), requires governmental entities, under certain circumstances, to prepare a TIA in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of these rules.

First, the Authority has made a "categorical determination" that these proposed Chapter 709 rules do not affect vested property rights and, as such, adoption of these rules is not an action that "may result in a taking." The rules at issue here establish procedures for implementing and collecting fees. The rules set forth the various types of fees imposed by the Authority and provide procedures for the adoption and assessment, as well as the billing and collection, of those fees. They have no direct affect on private real property and may not result in a taking.

Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(4) of the Texas Government Code. See §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act; § 2001.004(1) of the APA; and § 36.205 of the Texas Water Code .

This conclusion is directly supported and controlled by the decision in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375, (Tex. App. - San Antonio 2000, pet. filed) (*"EAA v. Bragg"*). In that case, the Plaintiffs sued to invalidate a set of rules adopted by the Authority (the "prior permitting rules") which were substantially similar to these proposed rules and which were designed, like these rules, to implement the Authority's programs. The Fourth Court of Appeals held that the Authority's adoption of its prior permitting rules was expressly mandated by the Act and was therefore excepted from the operation of TPRPRA. The holding in that case controls here.

Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Accordingly, for the reasons stated above, a TIA need not be performed in connection with the proposal of these rules.

Public Comment No. 35:

The TDA commented generally that the Authority should have prepared a "small business effects statement" prior to proposing the adoption of the Chapter 709 rules, pursuant to § 2006.002(d) of the Texas Government Code.

Authority Response:

The Authority staff received the above-referenced comment and disagrees for the following reasons. Chapter 2006 of the Texas Government Code, subchapter A, requires state agencies to prepare a small business effects statement (SBES) prior to proposing, for adoption, a rule that would have an adverse economic effect on small businesses. By the statute's express terms, this requirement applies only to a "state agency." The term "state agency" is defined, for the purposes of Chapter 2006, subchapter A, as "a department, board, bureau, commission, division, office, council or other agency of the state." *Id.* § 2006.001(3).

Section 2006.002 does not apply to the Authority because the Authority does not meet the definition of the term "state agency" as set out forth in Chapter 2006. Section 1.02(a) of the Act creates the Authority as a "conservation and reclamation district" under Article XVI, § 59 of the Texas Constitution. Conservation and reclamation districts created under this authority have long been considered to be "political subdivisions" of the State of Texas. *See, e.g., Guaranty Petroleum,* 609 S.W.2d 529, 530 (Tex. 1980). In *Guaranty Petroleum,* the Texas Supreme Court explained the difference between political subdivisions and state agencies as follows:

A political subdivision differs from a department, board or agency of the State. *A political subdivision has jurisdiction over a portion of the State; a department, board or agency of the State exercises its jurisdiction throughout the State.* Members of the governing body of a political subdivision are elected in local elections or are appointed by locally elected officials; those who govern departments, boards or agencies of the State are elected in statewide elections or are appointed by State officials.

Guaranty Petroleum, 609 S.W.2d at 531 (emphasis added).

This opinion makes clear that state agencies are characterized by having statewide jurisdiction and are governed by persons who are elected in statewide elections or are appointed by state officials. Political subdivisions like the Authority, on the other hand, have jurisdiction over only a portion of the state and are governed by persons who are elected in local elections or are appointed by locally elected officials. These principles have been reiterated by the Texas Supreme Court in *Lohec v. Galveston County Commissioners Court,* 841 S.W.2d 361, 364 (Tex. 1992) (noting that "statewide jurisdiction" is "a trait required of entities recognized as department, boards, or agencies of the state") and *Monsanto Company v. Cornerstones Municipal Utility District,* 865 S.W.2d 937, 939-40 (Tex. 1993).

Because the Authority has jurisdiction over only a portion of the State and because the members of its governing body are elected in local elections or are appointed by locally elected officials, the Authority is a political subdivision and not a state agency, and is not subject to the SBES requirement found in Chapter 2006 of the Government Code.

No revisions to the Chapter 709 are required in response to this comment.

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rules governing procedures of the Board and the authority." This section directs the Board to adopt rules as necessary to implement the various substantive programs set forth in the Act related to the Edwards Aquifer, which includes application, registration, aquifer management, and regular permit special retirement fees, and in particular, administrative procedures to be used before the Board and the Authority.

Section 1.11(b) of the Act requires the Authority "ensure compliance with permitting, metering, and reporting requirements and shall regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, empowers the Authority to establish procedures related to the filing and processing of various applications and registrations with and by the Authority.

Section 1.11(d)(2) of the Act provides, among other things, that the Authority may enter into contracts.

Section 1.11(f) of the Act provides the Authority may contract with a person who uses water from the aquifer for the Authority or that person to construct, operate, own, finance, and maintain water supply facilities which include a dam, reservoir, treatment facility, transmission facility, or recharge project. This section further provides management fees or special fees may not be used for purchasing or operating these facilities.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. Pursuant to this section, the Authority is required to comply with the APA in connection with its rulemaking, even though the Authority is not a state agency and would therefore otherwise not generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.15(a) of the Act directs the Authority to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by this Act.

Section 1.16(b) of the Act sets forth certain requirements concerning an existing user's declaration of historical use and an applicant's payment of application fees required by the Board.

Section 1.16(d)(1) of the Act requires the Board to grant an initial regular permit to an existing user who, among other things, files a declaration and pays fees as required by this section.

Section 1.29(a) of the Act relates to fees. This section provides that the allocation of the cost of reducing withdrawals or permit retirements must be borne: solely by users of the aquifer for reducing withdrawals from the level on the effective date of this article to 450,000 acre-feet a year, or the adjusted amount determined under § 1.14(b) for the period ending December 31, 2007; and equally by downstream water rights holders for permit retirements from 450,000 acre-feet a year, or the adjusted amount determined under § 1.14(d) for the period ending December 31, 2007, to 400,000 acre-feet a year, or the adjusted amount determined under §1.14(d) for the period beginning January 1, 2008.

Section 1.29(b) of the Act provides for the assessment of aquifer management fees based on aquifer use under the water management plan to finance the Authority's authorized administrative expenses and programs. This section also allows water districts governed by Chapter 52 of the Texas Water Code and within the Authority's boundaries, to contract with the Authority to pay the Authority's expenses through taxes in lieu of user fees, to be paid by water users in the district. This section provides the Authority with the power to assess fees in order to generate revenue to finance the operation of the Authority in its regulation of the aquifer, however, the Authority may not collect a total amount of fees and taxes that is more than is reasonably necessary for the administration of the Authority.

Section 1.29(c) of the Act provides that the Authority shall assess an equitable special fee based on permitted aquifer water rights to be used only to finance the retirement of rights necessary to meet the goals of the Authority for reducing the maximum annual volume of water withdrawals from the aquifer. The section further provides the Authority shall set the fees on permitted aquifer users at a level sufficient to match the funds raised from the assessment of equitable special fees on downstream water rights holders.

Section 1.29(d) of the Act provides for the assessment of equitable special fees by the Commission on all downstream water

rights holders in the Guadalupe River Basin to be used to finance the retirement of aquifer rights necessary to meet the goals of the Authority for reducing the maximum annual volume of water withdrawals from the aquifer. This section further provides that downstream water rights holders shall pay the assessed fees to the Authority. This section prohibits the assessment of fees by the Commission on contractual deliveries of water stored in Canyon Lake that may be diverted downstream of the San Marcos Springs or Canyon Dam.

Section 1.29(e) of the Act provides for the development of an equitable fee structure under § 1.29 and authorizes the Authority to establish different fee rates on a per acre-foot basis for different types of use. The fees must be equitable between types of uses and shall be assessed on the amount of water a permit holder is authorized to withdraw under the permit. Aquifer management fee rates for agricultural use shall be based on the volume of water withdrawn and may not be more than 20 percent of the fee rate for municipal use. Aquifer management fees rates for non-agricultural users are to be based on the face value of a permittee's initial regular permit or the amount authorized to be withdrawn under interim authorization status.

Section 1.29(f) of the Act requires the Authority to impose a permit application fee of not more than $25.

Section 1.29(g) of the Act empowers the Authority to impose a registration application fee of not more than $10.

Section 1.29(h) of the Act states that special fees collected under subsection (c) or (d) of §1.29 may not be used to finance a surface water supply reservoir project.

Section 1.36(b) of the Act provides the Authority with enforcement power and states that Authority shall provide for the suspension of a permit of any class for failure to pay a required fee or for a violation of a permit condition, order of the Authority, or rule adopted by the Authority.

Section 1.44(c)(2) of the Act relates to cooperative contracts for artificial recharge and states the political subdivision causing artificial recharge of the aquifer is entitled to withdraw during any 12-month period the measured amount of water actually injected or artificially recharged during the preceding 12-month period, as demonstrated and established by expert testimony, less an amount determined by the Authority to account for that part of the artificially recharged water discharged through springs, and to compensate the Authority in lieu of users' fees.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This proposed rulemaking is in furtherance of this legislative mandate. These proposed rules are rules of practice that state the procedures applicable to the fee setting process of the Authority.

Section 36.205 of the Texas Water Code authorizes groundwater conservation districts to set fees for administrative acts of the districts. Such fees may not unreasonably exceed the cost to the district of performing the administrative function for which the fee is charged.

SUBCHAPTER A. DEFINITIONS

31 TAC §709.1

The new section is adopted pursuant to §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act; § 2001.004(1) of the Texas Administrative Procedure Act (Texas Government Code Annotated, §§ 2001.001-.902 (Vernon 2000)) ("APA"); and § 36.205 of the Texas Water Code (Texas Water Code Annotated, § 36.205 (Vernon 2000)). The Authority interprets these sections as authorizing the Authority to adopt rules establishing a fee structure for the Authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007351
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Effective date: November 7, 2000
Proposal publication date: August 11, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER B. REGISTRATION FEES

31 TAC §§709.3, 709.5, 709.7

The new sections are adopted pursuant to §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act; § 2001.004(1) of the Texas Administrative Procedure Act (Texas Government Code Annotated, §§ 2001.001-.902 (Vernon 2000)) ("APA"); and § 36.205 of the Texas Water Code (Texas Water Code Annotated, § 36.205 (Vernon 2000)). The Authority interprets these sections as authorizing the Authority to adopt rules establishing a fee structure for the Authority.

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SUBCHAPTER C. PERMIT APPLICATION FEES

31 TAC §§709.9, 709.11, 709.13

The new sections are adopted pursuant to §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act; § 2001.004(1) of the Texas Administrative Procedure Act (Texas Government Code Annotated, §§ 2001.001-.902 (Vernon 2000)) ("APA"); and § 36.205 of the Texas Water Code (Texas Water

Code Annotated, § 36.205 (Vernon 2000)). The Authority interprets these sections as authorizing the Authority to adopt rules establishing a fee structure for the Authority.

§709.11. Permit Application Fees; Applicability.

The general manager shall impose a $25 fee to file with the Authority any application, including but not limited to, an application for a regular, term, or an emergency groundwater withdrawal permit, a well construction permit, monitoring well permit, aquifer recharge and storage permit, and recharge recovery permits. The fee must be paid at the time the application is filed.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. AQUIFER MANAGEMENT FEES

31 TAC §§709.15, 709.17, 709.19, 709.21, 709.23, 709.25, 709.27, 709.29, 709.31, 709.33, 709.35

The new sections are adopted pursuant to §§ 1.08(a), 1.11(a), (b), (d)(2), (f), and (h), 1.15(a), 1.16(b) and (d)(1), 1.29(a), (b), (c), (d), (e), (f), (g), and (h), 1.36(b), 1.44(c)(2) of the Act; § 2001.004(1) of the Texas Administrative Procedure Act (Texas Government Code Annotated, §§ 2001.001-.902 (Vernon 2000)) ("APA"); and § 36.205 of the Texas Water Code (Texas Water Code Annotated, § 36.205 (Vernon 2000)). The Authority interprets these sections as authorizing the Authority to adopt rules establishing a fee structure for the Authority.

§709.19. Adoption and Assessment.

(a) Not later than December 31st of each year, the general manager shall, pursuant to this subchapter, calculate and assess an aquifer management fee for the succeeding year.

(b) The aquifer management fee shall be based on aquifer use.

(c) The aquifer management fee shall be based on two user blocks, and be uniform such that the average unit cost of groundwater, regardless of quantity withdrawn, remains constant and is applicable to all the aquifer users within the same user block. The Blocks shall be as follows:

(1) Block 1: non-agricultural users; and

(2) Block 2: agricultural users.

(d) The aquifer management fee shall be calculated and assessed as follows:

(1) By resolution and order, the board shall adopt a Block 1 and an agricultural users aquifer management fee rate and budget reflecting its annual operating revenue requirement for the succeeding fiscal year based on a cash-needs approach. The budget shall determine the net annual operating revenue requirement by subtracting from the annual operating revenue requirement any carryover funding from the current fiscal year in addition to funding from other sources expected to be available for expenditure during the fiscal year, including but not limited to, aquifer management fees for agriculture use for preceding calendar years.

(2) The general manager shall determine the total volume of aquifer use as reported in the groundwater users reports for the prior year by Block 1 non-agricultural users.

(3) By December 31st, the general manager shall calculate the aquifer management fee that may be assessed against Block 1 non-agricultural use on a unit cost basis by dividing the net annual operating revenue requirements by the total authorized or contracted aquifer use of Block 1 non-agricultural users.

(4) By December 31st, except as provided in §711.420(3) of this title (relating to Enforcement), the general manager shall calculate the aquifer management fee for Block 2 agricultural users as follows:

(A) For base irrigation groundwater: $3.00 per acre-foot; or

(B) For unrestricted irrigation groundwater: Not more than 20 percent of the aquifer management fee for Block 1 non-agricultural users.

(e) The unit cost for the aquifer management fees shall be expressed in dollars per acre-foot per annum.

§709.21. Billing and Collection.

(a) All persons authorized for aquifer use under interim authorization status pursuant to §1.17 of the Act and the rules of the Authority, or under a final groundwater withdrawal permit issued by the board, are required to pay to the Authority an aquifer management fee as assessed pursuant to this subchapter.

(b) The general manager shall bill to and collect from all aquifer users an aquifer management fee for the fiscal year as calculated and assessed by the general manager pursuant to this subchapter, unless subject to a user contract under §709.25 of this title (relating to User Contracts),

(1) If the aquifer use is agricultural, the aquifer management fee shall be assessed on the total volume of groundwater withdrawn in a calendar year from the aquifer by an aquifer user.

(2) If the aquifer use is non-agricultural, then the fee shall be assessed on:

(A) for an applicant qualifying for interim authorization status under §1.17 of the Act, the historical, maximum beneficial use set forth in §4B of the application for initial regular permit, irrespective of whether the groundwater was actually withdrawn; or

(B) for a permittee, the total volume of groundwater authorized to be withdrawn in a final permit issued by the board, irrespective of whether the groundwater was actually withdrawn.

(c) Not later than December 31st, the general manager shall mail an aquifer management fee invoice to all non-agricultural users. Not later than December 31st, the general manager shall mail a groundwater use report form to all agricultural users to report aquifer use for the current calendar year.

(d) An aquifer management fee invoice for a non-agricultural user becomes due and payable immediately upon mailing. If the total annual aquifer management fee invoice for the user is less than $600,

the user shall pay the fee on a lump sum basis. Such an invoice becomes delinquent if payment in full is not received by the Authority on or before March 1st of the year for which the aquifer management fee is in effect. If the total annual aquifer management fee invoice for a non-agricultural user is equal to or greater than $600, then the user may elect to pay the fee in a lump sum or in equal monthly payments. Such an invoice becomes delinquent if payment in full for a lump sum payment is not received in full by March 1st of the year for which the aquifer management fee is in effect. If the non-agricultural user elects to pay on a monthly payment schedule, then the pro rata portion of the invoice becomes due monthly on the last working day of each month. Each monthly payment of an invoice becomes delinquent if payment in full is not received by the Authority on or before the last working day of each month for which the monthly payment becomes due and payable.

(e) For agricultural users, the groundwater use report shall constitute an aquifer management fee invoice. An agricultural user shall file a completed groundwater use report form with the Authority no later than January 31st of each year for aquifer use for the preceding calendar year. Payment of the aquifer management fee shall accompany the completed groundwater use report. This invoice for agricultural use becomes due and payable immediately upon mailing of the groundwater use report by the agricultural user. An invoice becomes delinquent if payment in full is not received by the Authority on or before January 31st of each year.

(f) For any aquifer management fee that is delinquent, if payment in full is not received on or before 10 days after the date the amount became delinquent, then the General Manager shall assess, for every month thereafter that the invoice remains delinquent, a penalty equivalent to the maximum amount allowed by law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

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CHAPTER 711. GROUNDWATER WITHDRAWAL PERMITS

I. INTRODUCTION.

The Edwards Aquifer Authority ("Authority") adopts new 31 TAC, §§711.1, 711.10, 711.12, 711.14, 711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118, 711.130, 711.132, 711.134, 711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, 711.234. Sections 711.1, 711.12, 711.94, 711.96, 711.98, 711.100, 711.102, 711.108, 711.112, 711.116, 711.118, 711.130, 711.134, 711.166, 711.168, 711.172, and 711.176 are adopted with changes to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7548 - 7596) and are republished herein. Sections 711.10, 711.14, 711.90, 711.92, 711.104, 711.110, 711.132, 711.160, 711.162, 711.164, 711.170, 711.174, 711.180, 711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, and 711.234 are adopted without changes and will not be republished.

These rules have been written to implement the Authority's groundwater withdrawal permitting program.

In response to the public comments, the Authority has elected not to adopt §711.178 at this time and hereby withdraws the rule from consideration for permanent adoption.

II. SUMMARY OF THE FACTUAL BASES FOR THE ADOPTED RULES; AND CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Legislature, Regular Session, Chapter 626, 1993 TEXAS GENERAL LAWS 2350, as amended by Act of May 28, 1995, 74th Legislature, Regular Session, Chapter 3189, 1995 TEXAS GENERAL LAWS 2505, Act of May 16, 1995, 74th Legislature, Regular Session, Chapter 361, 1995 TEXAS GENERAL LAWS 3280, and Act of May 6, 1999, 76th Legislature, Regular Session, Chapter 163, 1999 TEXAS GENERAL LAWS 634 (the "Act"), requires the Authority to implement a permitting system whereby "existing users" of groundwater from the Edwards Aquifer and other potential users of aquifer water may apply for and receive initial regular permits and other types of permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. Other types of permits are also required by the Act for well construction and related work. Certain other withdrawals are exempted by the Act from permitting requirements. The Act also specifies an "interim authorization" period prior to the issuance by the Authority of final initial regular permits during which certain existing users of the aquifer may continue to make withdrawals. The Act imposes a number of restrictions upon the use of the aquifer during the interim authorization period as well as after permits are issued. It also places limits on the ability to transfer permits or interim authorization status. The rules in this Chapter 711 are intended to effectuate these various components of the Act.

The new sections are adopted pursuant to the following statutory provisions:

Section 1.01 of the Act contains the findings of the Texas Legislature that the Edwards Aquifer is a distinctive natural resource and that a special regional management district (the Authority) is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, existing industries, and the economic development of the state.

Section 1.03(1) defines the "Edwards Aquifer."

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water

from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered wasteful under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. These rules further those objectives.

Section 1.08(b) makes it clear that the Authority's powers apply only to water within or withdrawn from the Edwards Aquifer, and not to surface water.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.13 of the Act requires the Authority to allow credit to be given for certified reuse of aquifer water. The Authority will likely adopt rules implementing this section. This concept is acknowledged in Subchapter F.

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows

are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(g) of the Act allows the Authority to, by rule, define other pools within the aquifer in accordance with hydrogeologic research, and to establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority "to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act." This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(b) of the Act, in conjunction with *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996)(holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996) provides that an existing user's declaration of historical use (permit application) must be file on or before December 30, 1996, and the applicant must timely pay all application fees required by the Authority. It further requires irrigation applicants to submit, as part of their applications, documentation regarding the number of acres irrigated during the historical period.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.16(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: "(1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the authority."

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22 of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. These concepts are implemented in the Chapter 711 rules.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is acknowledged in Subchapter F.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred (alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented, in part, in Chapter 711.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented, in part, in Chapter 711.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This rulemaking is in furtherance of this legislative mandate.

Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711derive in part from this statutory authority and implement this chapter and the supporting rules.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.101(a) empowers the Authority to make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater in order to, among other things, prevent waste and carry out the duties provided elsewhere in Chapter 36. This requirement is implemented, in large part, through Chapter 711.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.115 provides that no person may drill a well, alter the size of a well or well pump, or operate a well without first obtaining a permit from the Authority.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711, primarily in the definition of waste found in § 711.1.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.211(a) endows

districts such as the Authority with the "functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law." This broad delegation of powers is incorporated into the Chapter 711 rules.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.221 empowers representatives of the Authority to enter land and perform tests and other inspections. This authority is incorporated into Chapter 711, primarily in § 711.416.

16 TAC, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TAC, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

Subchapter A

Section 711.1, Subchapter A of the Chapter 711 rules, sets forth the definitions that will apply to all rules issued by the Authority in Chapter 711. These rules have been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout Chapter 711. They are intended to provide useful "short-hand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules, thus allowing for a more efficient understanding and operation of other rules of the Authority.

Contained within § 711.1 are definitions of "existing user" (§711.1(2)), "contract user" (§711.1(1)), and "prior user" (§711.1(4)). In order to obtain an initial regular permit, the applicant must be an "existing user." See Act § 1.16(a).

As defined by § 711.1(2), an "existing user" is "a person, or the successor in interest of such a person, who, on June 1, 1993, owned an existing well from which groundwater from the aquifer had been withdrawn and placed to beneficial use during the historical period." A well owner who transferred his interest in the well during the historical period is referred to by the Authority as a "prior user." A person who did not own an aquifer well, but who withdrew or purchased aquifer water during the historical period pursuant to a contractual or other agreement with the well owner, qualifies as a "contract user." Although "existing user" is defined in the Act, the Authority believes that, based upon the remainder of the text of the Act, the statutory definition of "existing user" requires elaboration by the Authority and the definitions of "contract user" and "prior user" must be added.

The statutory definition states that an existing user need only have beneficially used aquifer water "on or before June 1, 1993," a date which corresponds with the close of the statutory "historical period." See Act § 1.16(a). The Act goes on to provide, however, any application for an "initial regular permit" must be based upon aquifer use during the historical period. See Act § 1.16(a) and (b). Thus, no initial regular permit may be granted to an "existing user" unless his or her use was during the historical period. The Authority's definition makes this clear.

The Authority's definition also clarifies that an "existing user" may be the person who owned the existing well on June 1, 1993 or his "successor in interest." Because, for any particular applicant, the ownership of points of withdrawal and places of use may not have been static since the inception and closure of the statutory historical period, the Authority must account for transfers and the impact of transfers on existing user status.

The Authority's definition also clarifies that an "existing user" must be the owner of the well for which an application is sought. The Authority believes this requirement is implicit in the Act. The sine qua non of an "existing user" is ownership of the point(s) of withdrawal (i.e. well(s)) from which the withdrawals are made during the historical period. For example, § 1.17(a) makes clear that interim authorization status only extends to persons owning non-exempt producing wells. Further, numerous sections of the Act make reference to the owner of a well having certain rights and duties, thereby confirming that proper applicants for initial regular permits must be the well owners. See §§1.03(21)(E) and (F) (relating to the definition of waste); 1.16(b) (evidentiary obligation of owners of irrigation wells); 1.16(c) (owners of exempt wells not required to file declarations of historical use); 1.17(a) (owners of producing wells may continue to withdraw under interim authorization); 1.17(d)(2) (well owners may file declarations of historical use); and 1.31(a) (owners of nonexempt wells).

It is equally necessary to define "contract user" (711.1(1)) and "prior user" (711.1(4)) which create a distinction as to who may apply for a permit. For any individual well, the ownership of points of withdrawal and places of use may not have been static since the inception and closure of the statutory historical period. Thus, without elaboration by the Authority, a reading of the definition of "existing user" in the Act could lead one to the incorrect inference that there may be multiple permit holders deriving their permits from the same point of withdrawal, place of use, and historical use. This could result in absurd outcomes, such as former well owners applying for initial regular permits for wells they no longer own.

Take, for example, a hypothetical well that was owned and used by more than one person before, during and after the historical period. The well was originally owned and used by Mr. U prior to the commencement of the historical period in 1972. It was then sold to Mr. V in 1970. The well was owned and used by Mr. V for the period from 1970 through 1980. It was then sold by Mr. V to Mr. W in 1980. Mr. W used the well himself until 1985. While continuing to own the well, Mr. W then, by contract, leased his land to Mr. X and allowed Mr. X to withdraw water from the well to irrigate the land. Mr. W sold the well to Mr. Y in 1995, after the close of the historical period in 1993. Mr. Y filed a timely permit application with the Authority. Mr. Y then sold his land, well and permit application to Mr. Z in 1998. Unless distinctions are made, via the Authority's rules, between contract users, existing users, and prior users, there would be confusion as to who may apply for and obtain a permit for the historical use of the well in question. The legislature did not intend to allow Messrs. U, V, W, X, Y and Z each to obtain a permit for the same well and historical use. For example, Mr. U cannot be an existing user because he did not have use during the historical period, even though he may have been the original owner. Mr. V, who has not held any interest in the land or the well since 1980, has no right to claim a permit. Similarly, Messrs. W and Y have not held any interest since 1995 and 1998, respectively. Mr. X simply leased from Mr. W the right to withdraw water from the well. He does not have an ownership interest. Under the definitions adopted by the Authority, Mr. U has no status of any kind, Messrs. V and

W would be "prior users", and Messrs. V, W, and Y would be the predecessors in interest to the "existing user," Mr. Z, and Mr. X would be a "contract user." Mr. Y, although a former existing user, would have no status because he acquired and sold his interest after the close of the historical period. Only Mr. Z would be the "existing user" entitled to apply for an initial regular permit. Mr. Z would also be entitled to base his permit application on the pumpage during the historical period of his predecessors in interest, and any prior users and contract users. This is consistent with the Court's reasoning in *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996) wherein the court noted: "Historical use could be established through previous landowners' withdrawals from the well, and permits could be transferred to future owners of the land." It logically follows that an application for an initial regular permit and the right to file the declaration of historical use may also be transferred to future owners of the land. This necessarily means that one's existing user status is transferred with the transfer of the land. Accordingly, by elaborating upon the definition of existing user and adding definitions for contract users and prior users, the possibility of multiple applicants for the same point of withdrawal and place of use is eliminated.

Section 711.1(3) defines "historical use" as "the lawful withdrawing and placing to beneficial use of groundwater from the aquifer during the historical period." The Authority believes this definition is required to add clarity as to the type of historical usage upon which a permit application may be granted. The Authority is charged with the duty to prevent waste of the aquifer. See Act § 1.08. The Act makes it clear that, while an initial regular permit must be based upon historical usage, that historical usage must have lawfully been obtained and put to beneficial use during the historical period. Section 1.16(d) of the Act states that a initial regular permit shall be granted to an applicant who files a declaration, pays his fee, and "establishes by convincing evidence beneficial use of underground water from the aquifer." (Emphasis added.) See also § 1.16(e). The common law relating to groundwater, which was controlling during the historical period, likewise prohibits the waste (i.e., non-beneficial use) of groundwater. Thus, waste constitutes an unlawful use of groundwater which cannot be considered by the Authority when calculating one's eligibility for a permit. The definition clarifies this point.

As amended in response to public comments (discussed more fully below), § 711.1(5) defines "producing well" as "a well from which groundwater from the aquifer is capable of being withdrawn for a beneficial use." This definition is needed to clarify the phrase "producing well" which is found in § 1.17(a) of the Act. Section 1.17 provides certain well owners with the right to continue pumping aquifer water, pursuant to "interim authorization" status, while their permit applications are pending before the Authority. The section states, in part, that "a person who, on the effective date of the Act, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the authority. . . ." Without clarification by the Authority, this section of the Act could be read to mean that, in order to qualify for interim authorization status, a well owner must have actually withdrawn water on the effective date of the Act (June 28, 1996). The Authority does not believe this to be the Legislature's intent. Instead, the Authority believes the intent was to allow anyone who, on the effective date of the Act, owned a well capable of producing, regardless of whether it actually produced on that particular date, to qualify for interim authorization status assuming the other statutory criteria are met. The definition makes this clear.

Section 711.1(6) defines "waste" using 10 different criteria. Six of those criteria are essentially identical to those found in Act's definition of waste found at § 1.03(21) and require no further elaboration. Although "waste" is defined in the Act, the Authority believes that, based upon the remainder of the text of the Act, and other statutory authorities, the statutory definition of "waste" requires elaboration by the Authority. Thus, additional definitional criteria for waste are added, consistent with the Act and other statutes for which the Authority has enforcement responsibility. First, subparagraph (E) of the Act's definition of "waste" is modified by the italicized language:

Willfully or negligently causing, suffering or permitting groundwater from the aquifer to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the well, unless:

(1) such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26, Water Code; *and*

(2) after discharge, the groundwater from the aquifer is beneficially used by the existing user, applicant or permittee making the discharge;

This revision reiterates the requirement found throughout the Act that water from the aquifer be beneficially used and not wasted.

Next, the following subparagraph H is added to the definition of "waste:"

(H) Constructing, installing, drilling, equipping, completing, altering, operating, maintaining, or making withdrawals from a well without a required permit;

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711 primarily through subparagraph (H) of the waste definition in § 711.1.

Next, the following subparagraph (I) is added to the definition of "waste:"

(I) Withdrawal of water that is substantially in excess of the volume or rate reasonably required for a beneficial use;

The addition of subparagraph (I) is consistent with and in harmony with the Legislative objectives of the Act. Subparagraph (I) is designed to further elucidate the meaning of subparagraph (B) of the definition related to beneficial use. It also furthers the objectives of other applicable provisions of the Act. Section 1.03(4) of the Act defines "beneficial use" as "the use of the *amount of water* that is economically necessary *for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose*." (Emphasis added.) This evidences a clear intent on the part of the Legislature that, for any given use, the amount of withdrawn water used may not be unreasonably high when compared to the intended end use. If, for example, an industrial user used twice the amount of water to produce its products than would a competitor who generated the same output, then such excessive usage would be considered non-beneficial and wasteful by the Authority.

Next, the following subparagraph (J) is added to the definition of "waste:"

(J) Irrigation use of groundwater from the aquifer in a volume per irrigated acre that is so insufficient that a crop could not have been reasonably cultivated and produced.

The Act delegates to the Authority broad discretion to limit waste of water, protect the aquifer, and maximize the beneficial use of water from the aquifer. See, e.g., Act §§ 1.08(a) and 1.14(a). Section 1.16(d)(2) dictates that groundwater first be beneficially used before it can qualify for the statutory irrigator minimum in section 1.16(e). The use of a quantity of aquifer water in a volume per acre that is insufficient to reasonably cultivate and produce a crop does not constitute a beneficial use and is, therefore, wasteful. The definition in § 711.1(6)(J) implements this beneficial use requirement.

Subchapter B

The Act requires the Authority to implement a permitting system whereby certain "existing users" of groundwater from the aquifer and other potential users of aquifer water may apply for and receive initial regular permits and/or other types of permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. Other types of permits are also required by the Act for well construction and related work. Sections 711.10 - 711.14, Subchapter B of the Chapter 711 rules, set forth the activities for which a permit from the Authority is required.

Section 711.10 sets out the purposes of the Chapter 711 rules, which relate to managing the aquifer to protect the aquifer, species dependent upon springflows from the aquifer, and the various entities and other interests utilizing the aquifer. These purposes are derived directly from sections 1.01, 1.06(a) and 1.08(a) of the Act, furthering the Legislative objectives behind the creation of the Authority, and require no further elaboration.

Section 711.12 identifies the types of activities for which a permit is generally required from the Authority. This section provides that a permit is generally required before one may construct, alter or operate an aquifer well, including a monitoring well, or a well pump. These provisions derive primarily from § 1.15(b) of the Act. The Authority interprets the requirement in § 1.15(b) of the Act, to obtain a permit before constructing a well, to extend to all types of aquifer wells, including monitoring wells, and to extend to construction activities such as the installation of pumps. This conclusion is buttressed by Chapter 36 of the Texas Water Code, which generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. However, as set forth in rule § 711.12(b), the Authority does not consider the well construction permit requirement to extend to routine operation and maintenance operations for wells after they are constructed.

Section 711.12 further provides that a permit is generally required before one may recharge water into the aquifer, store water in the aquifer, or construct or alter a well designed to withdraw non-Edwards groundwater if the well intersects the Edwards Aquifer. These provisions derive primarily from the Authority's duties to protect the aquifer as mandated in sections 1.08(a), 1.14(a) and 1.15(a) of the Act and § 36.113 of the Texas Water Code. The Authority believes that the construction of wells which intersect the aquifer, or projects designed to enhance recharge into the aquifer or store water in the aquifer all have the potential to negatively impact the quality and/or quantity of water within the aquifer. Accordingly, it is appropriate to regulate such activities through the Authority's permitting process.

Section 711.14 identifies the types of groundwater withdrawals for which a withdrawal permit is not required from the Authority -- withdrawals from wells qualifying for interim authorization status, or from exempt wells. This rule derives directly from and implements sections 1.15(b), 1.17(a) and 1.33 of the Act, which create exemptions from the permit requirement for "exempt wells" and wells qualifying for interim authorization status.

Subchapter E

The Act requires the Authority to implement a permitting system whereby "existing users" of groundwater from the aquifer and other potential users of aquifer water may apply for and receive initial regular permits and/or other types of permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. The Act also requires the Authority to issue permits for the construction of Edwards Aquifer wells. Sections 711.90-711.118, Subchapter E of the Chapter 711 rules, help fulfill these requirements by setting forth the types of permits issued by the Authority, the conditions governing how and when such permits could be issued, the quantity of and conditions under which water could be withdrawn or wells constructed pursuant to such permits, the duration of such permits, the required contents of permit applications, and the rights and limitations associated with being the holder of such permits.

Primarily, the sections in Subchapter E list the information that the Authority has determined is necessary for its consideration and issuance of various types of permits. Most of the sections in Subchapter E each list the attributes of the various kinds of permits issued by the Authority and the criteria by which permit applications will be judged. The rules also identify the elements an applicant is required to prove in order to obtain a permit from the Authority. The requirements in these rules pertain to information that the Authority needs in order to effectively manage, conserve and protect the Aquifer and to implement its statutorily-mandated programs.

Section 711.90 identifies the types of permits which may be issued by the Authority: (1) initial regular permits, as authorized by § 1.16 of the Act; (2) additional regular permits, as authorized by § 1.18 of the Act; (3) term permits, as authorized by § 1.19 of the Act; (4) emergency permits, as authorized by § 1.20 of the Act; (5) and (6) aquifer recharge and storage permits and recharge recovery permits, as authorized by sections 1.08(a) and 1.14(a), 1.15(a) of the Act and § 36.113 of the Texas Water Code; (7) well construction permits, as authorized by § 1.15(b) of the Act; and (8) monitoring wells, as authorized by § 1.15(a) and (b) of the Act. The Authority interprets the requirement in § 1.15(b) of the Act to obtain a permit before constructing a well to extend to all types of aquifer wells, including monitoring wells. The Authority further believes that projects designed to enhance recharge into the aquifer or store water in the aquifer (i.e., aquifer recharge and storage and recharge recovery activities) can potentially negatively impact the quality and/or quantity of water within the aquifer. Accordingly, it is appropriate to regulate such activities through the Authority's permitting process.

Section 711.92 provides that, as designated in a groundwater withdrawal permit, aquifer water may be beneficially used only for irrigation use, municipal use or industrial use. This limitation derives from the Act. The Act clearly requires that water pumped from the aquifer be "beneficially used" and not wasted. See, e.g., Act sections 1.16(d) and (e) (authorizing permits if beneficial use

is established, and calculating permit amounts based upon beneficial use without waste), 1.17 and 1.18. While the Act does not expressly identify the types of use which may be considered "beneficial," the Act does identify and define four specific types of use - domestic or livestock use, industrial use, irrigation use, and municipal use. Domestic or livestock use is expressly made exempt from permitting requirements pursuant to sections 1.15(b) and 1.33 of the Act and such use is not governed by § 711.92. The Authority has concluded that the remaining three types of uses identified in the Act -- industrial, irrigation and municipal -- cover the gambit of known, lawful purposes to which water from the aquifer is being put or is likely to be put and for which a permit would be required.

Section 711.94(a) requires that groundwater withdrawn from the aquifer, whether withdrawn during or after the historical period, must be placed to beneficial use without waste. This limitation derives from the Act. The Act clearly requires that water pumped from the aquifer be "beneficially used" and not wasted. See, e.g., Act sections 1.16(d) and (e) (authorizing permits if beneficial use is established, and calculating permit amounts based upon beneficial use without waste), 1.17 and 1.18. Section 1.35(c) prohibits the waste of water withdrawn from the aquifer. The use of water in a way that is not beneficial is the equivalent of wasting water. Section 1.08(a) of the Act charges the Authority with the duty to prevent the waste of aquifer water.

Section 711.94(b) and (c) provide that the beneficial use of water by a "contract user" (one who withdrew or purchased and put to beneficial use aquifer water during the statutory historical period pursuant to a contract or other legal right from a prior or existing user from an existing well) may only be claimed by the prior or existing user in support of a permit application. As discussed more fully in the discussion for Subchapter A, above, this rule is included to avoid the result whereby more than one person (i.e., the prior user, existing user, and/or contract user) each seeks a permit based upon the same pumpage during the historical period.

Section 711.94(d) states that "irrigation in the volume of two-acre feet per irrigated acre is rebuttably presumed to constitute beneficial use without waste." It is clear that § 1.16(e) the Act calls for a "permit minimum" for certain irrigators equivalent to two-acre feet per acre. Thus, this rule makes it clear that irrigators begin with the presumption in their favor that irrigation in that quantity is not wasteful. The purpose of including the phrase "rebuttably presumed" in this rule is not to affect the process by which irrigators are issued permits or to affect their eligibility for the statutory two acre-feet irrigator minimum. Instead, it is intended to facilitate the Authority's ability and duty to prevent waste by irrigators once permits have been issued. Not all irrigation practices necessitate the use of two acre-feet of water per acre per year, nor are irrigators any more exempt than any other aquifer users from the requirement in § 1.35(c) of the Act that aquifer water be beneficially used and not wasted. It is possible that an irrigator's practices may be wasteful even if his rate of use is below two acre-feet per acre per year. In that event, the Authority needs to retain the right to rebut the presumption that usage of two acre-feet is not wasteful.

Section 711.94(e) provides that irrigation of multiple or successive crops is a beneficial use to the extent it does not constitute waste. This provision is added to make it clear that the planting of multiple crops in any given year is not, in itself, considered by the Authority to be wasteful. Such practices are common within the boundaries of the Authority, and the Authority does not believe it would be reasonable to consider such practices wasteful in the absence of other evidence indicating waste.

Section 711.94(f) provides a mechanism whereby prior or existing users whose historic use has been affected by a requirement of or participation in a federal program shall be given a credit in their permit applications for the amount of water they would have withdrawn and beneficially used were it not for the federal program. This section derives directly from § 1.16(f) of the Act which requires the Authority to adopt a rule implementing a mechanism to equitably treat permit applicants whose use of the aquifer during the historical period was "affected" by a requirement of, or participation, in a "federal program." Through this rule, the Authority attempts to treat such persons equitably by giving them a "beneficial use credit" for the amount which they would have withdrawn, but for participation in the federal program. That credit is based upon the use by other, similarly situated pumpers who were not affected by the federal program.

Section 711.94(g) provides a mechanism whereby beneficial use of aquifer water, during the historical period, at the same place of use by multiple existing users -- each owning different wells -- will be shared on a pro rata basis. The Authority is aware of several permit applications which fit the following general description: Applicant A, who owns well A, files an application based upon A's aquifer pumpage from well A during the historical period which was used to irrigate Blackacre. Applicant B, who owns well B, also files an application based upon B's aquifer pumpage from well B during the historical period which was used to irrigate Blackacre. Blackacre consists of 100 acres. If no provision is made in the Authority's rules governing how the historical irrigation of Blackacre should be handled in the permitting process, the incorrect inference might be made that Applicant A and Applicant B are each entitled to irrigation permits for 200 acre-feet (100 acres times the statutory two acre-feet per acre irrigator minimum). The Authority has concluded that such a result is contrary to the Act and the intent of the Legislature when they passed the Act. Such an outcome would result in four acre-feet per acre worth of permits being issued. With § 711.94(g), Applicant A and Applicant B would each get a permit for 100 acre-feet (100 acres times the statutory two acre-feet per acre irrigator minimum divided by two applicants).

Section 711.96 clarifies that the Authority's permitting program is limited to withdrawals from the Edwards Aquifer. Therefore, the section states that the Authority cannot issue a permit for the withdrawal of water from non-Edwards aquifers. Similarly, the section provides a mechanism whereby applications for wells withdrawing water from multiple aquifers, including the Edwards Aquifer, will be granted by the Authority only for a quantity corresponding to the amount the well withdraws from the Edwards Aquifer. Section 1.08(b) of the Act makes it clear that the Authority's regulatory powers do not extend to aquifers other than the Edwards Aquifer or to surface waters. Thus, the Authority lacks the power to issue a permit for water withdrawn by an applicant during the historical period from an aquifer other than the Edwards. Notwithstanding this rule, permit applicants or permit holders remain free to pump groundwater from aquifers other than the Edwards without any restriction from the Authority.

Section 711.98 identifies who may apply for, and the attributes of, an initial regular permit ("IRP"). This section is intended to locate, in one convenient reference point, the general attributes of IRPs as contemplated and intended by the Act. It is common practice for water resource management agencies to identify the

criteria necessary to implement their permitting programs. The list of the attributes of an IRP, together with the list of criteria which must be proven in order to obtain such a permit, will assist in enabling the Authority to manage all points of withdrawal from the Edwards Aquifer, and to accomplish its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

The attributes of IRPs are discussed below. Where appropriate, the statutory basis for each rule is identified in parentheses. Only existing users may apply for IRPs (Act § 1.16). IRPs are transferrable (Act § 1.34(a)). IRPs have a perpetual term (Act § 1.16(g)). IRPs may be proportionally adjusted in accordance with the Authority's rules in Subchapter G of Chapter 711 (Act § 1.16(e)). IRPs may be retired in accordance with the Authority's springflow maintenance rules, equal percentage reduction rules, and permit retirement rules. (Act sections 1.14(h), 1.16(g), and 1.21). IRPs may be suspended in accordance with the Authority's demand management rules and groundwater trust rules (Act sections 1.14(d) and 1.22). IRPs may be interrupted in accordance with the Authority's drought management rules, critical period management rules, and springflow maintenance rules (Act sections 1.14(d) and (h), and 1.26). IRPs may be abandoned and/or cancelled in accordance with the Authority's abandonment and cancellation rules (Act § 1.16(g)). This rule does not itself set forth the substantive rules relating to proportional adjustment, permit retirement, and so on. Instead, it merely clarifies that IRPs are subject to those rules and provides a reference to those rules.

The section also lists the elements which an initial regular permit applicant must prove in order to be granted such a permit. For example, the application (declaration) must have been filed and application fee paid on or before December 30, 1996 (required by Act § 1.16(b)) and *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996) (holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996). The application must identify an existing well which was owned by the applicant, or the applicant's predecessor in interest, on June 1, 1993, and the well must be located within the Authority's boundaries and must be a point of withdrawal for Edwards aquifer water. (Act sections 1.14(e), 1.03(1), 1.08(b)). The usage upon which the application is based must have been made during the historical period and by the applicant, a prior user who is the applicant's predecessor in interest, or a contract user. This requirement is included in order to clarify that an application must be based upon historical use and an applicant cannot base his application upon historical use by others with whom the applicant lacks any connection to the well in question. The historical withdrawals must have been placed to a beneficial use for irrigation, municipal or industrial use. (See the discussion for § 711.92, above.) The rule provides that in order to obtain an IRP, the well cannot qualify for exempt well status. (See discussion of public comments on this rule, below.) Finally, the application must be in compliance with the Act and the Authority's rules.

Section 711.98(k) explains that IRPs shall be issued in an amount as calculated in §§ 711.176 and/or 711.180 of the Chapter 711 rules. These rules explain how permit amounts are arrived at and are discussed in more detail below.

Section 711.100 identifies who may apply for, and the attributes of, an additional regular permit ("ARP"). This section is intended to locate, in one convenient reference point, the general attributes of ARPs as contemplated and intended by the Act. It is common practice for water resource management agencies to identify the criteria necessary to implement their permitting programs. The list of the attributes of an ARP, together with the list of criteria which must be proven in order to obtain such a permit, will assist in enabling the Authority to manage all points of withdrawal from the Edwards Aquifer, and to accomplish its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

The attributes of ARPs are discussed below. The rule provides that any person owning or proposing to construct a well may apply for an ARP if final determinations have been made by the Authority on all IRP applications and the board has declared it will accept ARP applications. § 1.18 of the Act makes it clear that ARPs are subject to the 450,000 and 400,000 acre-feet "caps," and ARPs may be issued by the Authority only if, after all IRPs are issued, there is still water available under those caps for permitting of ARPs. Thus, the Authority will only begin accepting ARP applications in the unlikely event that the cap hasn't been met after all IRP determinations. The rule provides that any applications submitted prior to that time will be returned to the applicant.

Section 711.100 also provides that ARPs are transferrable (Act § 1.34(a)) and have a perpetual term. The Authority has concluded that the term is perpetual because, once issued, ARPs are functionally no different than IRPs, which have a perpetual term.

The rule provides that ARPs may be retired in accordance with the Authority's springflow maintenance rules, equal percentage reduction rules, and permit retirement rules. (Act sections 1.14(h) and 1.21). ARPs may be suspended in accordance with the Authority's demand management rules and groundwater trust rules (Act sections 1.14(d) and 1.22). ARPs may be interrupted in accordance with the Authority's drought management rules, critical period management rules, and springflow maintenance rules (Act sections 1.14(d) and (h), and 1.26). The Authority has also concluded in this rule that, just as with IRPs, ARPs may be abandoned and/or cancelled in accordance with the Authority's abandonment and cancellation rules. The Authority reached this conclusion because, once issued, ARPs are functionally no different than IRPs, and it would be nonsensical for ARPs to be immune from the abandonment and cancellation rules while IRPs are subject to such rules. This rule does not itself set forth the substantive rules relating to permit retirement, suspension, and so on. Instead, it merely clarifies that ARPs are subject to those rules and provides a reference to those rules.

Section 711.100 also lists the elements which, assuming there is water available for such permits, an additional regular permit applicant must prove in order to be granted such a permit. For example, the applicant must pay a fee; the application must identify an existing or proposed well; the well must be located within the Authority's boundaries and must be a point of withdrawal for Edwards aquifer water; and the water produced must be used within the Authority's boundaries. (Act sections 1.14(e), 1.03(1), 1.08(b), 1.34(a)). The withdrawals must be proposed to be placed to a beneficial use for irrigation, municipal or industrial use. (See the discussion for § 711.92, above.)

Section 711.100 also provides that an ARP application cannot be granted unless there will continue to be sufficient water (i.e., enough water below the cap) to provide for any restorations to IRPs required in the event that either of the withdrawal caps are raised. This provision is included because § 1.16(d) gives

the Authority the ability, under limited circumstances, to raise either of the withdrawal caps. In the event these caps are raised, the Authority will, to the extent possible, restore back to IRPs amounts reduced off of IRP amounts through the "proportional adjustment" or "equal percentage reduction" processes mandated by sections 1.16(e) and 1.21(c) of the Act, respectively. The Act gives a clear preference to IRPs over ARPs and to existing users, generally. Thus, in keeping with that preference, the Authority has determined that no ARPs shall be issued if such issuance will reduce the amount of water available to restore to any IRP.

The rule provides that in order to obtain an ARP, the well cannot qualify for exempt well status. (See discussion of public comments on the rule 711.98, below.) The rule also requires that the proposed withdrawals be consistent with the Authority's comprehensive groundwater management rules. As originally proposed, the rule included a requirement that the applicant demonstrate that he has no other reasonable source of water from a municipal supply. This requirement applies to term and emergency permits, but was inadvertently added to this rule for ARPs, and was not intended to be included among the requirements for an ARP. Accordingly, the Authority has deleted this requirement in the rule as adopted. Finally, the application must be in compliance with the Act and the Authority's rules.

Section 711.102 identifies who may apply for, and the attributes of, a term permit. This section is intended to locate, in one convenient reference point, the general attributes of term permits, as contemplated and intended by the Act. It is common practice for water resource management agencies to identify the criteria necessary to implement their permitting programs. The list of the attributes of a term permit, together with the list of criteria which must be proven in order to obtain such a permit, will assist in enabling the Authority to manage all points of withdrawal from the Edwards Aquifer, and to accomplish its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

The rule provides that any person owning or proposing to construct a well may apply for a term permit. Section 1.19 of the Act vests the Authority with the discretion to issue term permits. Because the Act does not require the Authority to issue term permits, and because it is charged with managing, conserving and protecting the aquifer, the Authority will not issue term permits unless the board has issued an order authorizing the issuance of such permits. The rule provides that the Authority will only begin accepting term permit applications after such an order has been issued. Any applications submitted prior to that time will be returned to the applicant. The board is also to specify, by January 15 of each year, the total quantity of water from each pool which may be withdrawn pursuant to term permits.

Section 711.102 also provides that term permits are only transferrable as to ownership (Act § 1.34(a)). Term permits are designed to be issued for special cases. Their issuance will be based upon highly specific facts as to the need of the applicant and the place and purpose of use. If a party applies for and receives a permit based upon his specific needs, it would defeat the limited purpose of term permits to allow the permit holder to then sell the permit to a third party for totally unrelated uses and places of use.

Section 711.102 provides that term permits may be interrupted if certain index wells drop to certain levels. As proposed, the rule was keyed to three index wells. In response to comments, the Authority has amended the rule so that only two index wells apply. Specifically, two different interruption criteria are specified. First, for a well located in the San Antonio pool, a term permit may be interrupted if the J-17 index well measures at or less than 665 feet above mean sea level (msl). Second, for a well located in the Uvalde pool, a term permit may be interrupted if the J-27 index well measures at or less than 865 feet above msl. These interruption criteria are mentioned in the Act.

Section 711.102 next provides that term permits may also be interrupted in accordance with the Authority's springflow maintenance rules, critical period management rules, and drought management rules. (See Act sections 1.14(d) and (h), and 1.26). This rule does not itself set forth the substantive rules relating to springflow maintenance, critical period and drought management rules. Instead, it merely clarifies that term permits are subject to those rules and provides a reference to those rules.

Section 711.102 next provides that a term permit may be issued for any period of time that the Authority considers feasible, but not to exceed 10 years. This provision derives directly from § 1.19(a) of the Act.

Section 711.102 also lists the elements which, assuming water is available for term permits, a term permit applicant must prove in order to be granted such a permit. For example, the applicant must pay a fee; the application must identify an existing or proposed well; the well must be located within the Authority's boundaries and must be a point of withdrawal for Edwards Aquifer water; and the water produced must be used within the Authority's boundaries. (Act sections 1.14(e), 1.03(1), 1.08(b), 1.34(a)). Further, the well cannot qualify for exempt well status. (See discussion of public comments on the rule 711.98, below.) The rule also requires that the applicant be in compliance with any other groundwater permits held by him or her, proposed withdrawals be consistent with the Authority's comprehensive groundwater management rules, and that the applicant has no other reasonable source of water from a municipal distribution system. Because term permits are more vulnerable to interruption than are initial and additional regular permits, they are not as desirable or dependable for water users' needs, nor are they particularly desirable from the Authority's standpoint. The Authority wishes to discourage the drilling of numerous new wells into the aquifer in order to satisfy the short-term needs of the kind required for a term permit.

Because the Authority is charged with managing withdrawals from the aquifer, § 711.102 requires that the applicant demonstrate that: the withdrawals pursuant to the proposed term permit will not unreasonably negatively affect other permittees and the applicant will take all reasonable measures to conserve water. The proposed use of water pursuant to the permit application must be economically feasible in relation to the proposed length of the permit. The applicant must, where applicable, have an approved on-site sewer system or a permit to construct such a system. Finally, the application must be in compliance with the Act and the Authority's rules.

Section 711.104 identifies who may apply for, and the attributes of, an emergency permit. This section is intended to locate, in one convenient reference point, the general attributes of emergency permits, as contemplated and intended by the Act. It is common practice for water resource management agencies to identify the criteria necessary to implement their permitting programs. The list of the attributes of an emergency permit, together with the list of criteria which must be proven in order to obtain such a permit will assist in enabling the Authority to manage all

points of withdrawal from the Edwards Aquifer, and to accomplish its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

The rule provides that any person owning a well may apply for an emergency permit. Section 711.104 provides that emergency permits are not transferrable. This is because emergency permits are designed to be issued for special cases. Their issuance will be based upon highly specific facts relating to the need of the applicant, and the place and purpose of use. If a party applies for and receives an emergency permit based upon his specific needs, it would defeat the very limited purpose of emergency permits to allow the permit holder to then sell the permit to a third party.

Section 711.104 provides that, unlike other withdrawal permits issued by the Authority, emergency permits are not interruptible and may have a term that does not exceed 30 days. Pursuant to § 1.20 of the Act and § 711.104, emergency permits are intended to be issued only under very limited circumstances. They may be issued only "to prevent the loss of life or to prevent severe, imminent threats to the public health or safety." Given such circumstances, combined with the fact that, pursuant to § 1.20 of the Act, emergency permits are generally only valid for 30 days, the Authority has determined that it would be counterproductive to subject emergency permits to interruption.

Section 711.104 next lists the elements which an applicant must prove in order to be granted an emergency permit. The applicant must pay a fee; the application must identify an existing or proposed well; the well must be located within the Authority's boundaries and must be a point of withdrawal for Edwards Aquifer water; and the water produced must be used within the Authority's boundaries. (Act sections 1.14(e), 1.03(1), 1.08(b), 1.34(a)). Further, the well cannot qualify for exempt well status. (See discussion of public comments on the rule 711.98, below.) The withdrawals pursuant to the proposed permit must be placed to a beneficial use for irrigation, municipal or industrial use. The rule also requires that the applicant be in compliance with any other groundwater permits held by him or her and that the withdrawal amounts authorized in all other groundwater withdrawal permits held by the applicant, if any, have been exhausted. Before an applicant may be issued a permit, he or she must have no other source of water from a municipal distribution system. Because emergency permits are issued for very short terms, they are not a particularly dependable water source, nor are they a long-term solution to an applicant's water needs. Therefore, Authority wishes to discourage the drilling of numerous new wells into the aquifer in order to satisfy the short-term needs of the kind required for an emergency permit. The Authority wishes to encourage the use of alternate water sources, such as a municipal distribution system, in lieu of emergency permits. Section 711.104, as adopted, furthers that objective.

Pursuant to § 1.20 of the Act, § 711.104 requires the applicant demonstrate that he or she will take all reasonable measures to conserve water. Finally, the application must be in compliance with the Act and the Authority's rules.

In keeping with the purpose of an emergency permit, § 711.104 provides that, if an emergency permit is to be issued, the board shall issue a permit which authorizes only the withdrawal of an amount of Edwards Aquifer water which is necessary to prevent the loss of life or to prevent severe, imminent threats to public health or safety as demonstrated in the application.

Section 1.15(a) and (b) of the Act direct the Authority to manage and regulate all withdrawal points from the aquifer and to require a permit for any person seeking to construct a well or other works designed to withdraw aquifer water. Section 1.08(a) of the Act endows the Authority with broad powers to manage, conserve, preserve and protect the aquifer and prevent the waste or pollution of water in the aquifer. Activities related to the construction of wells have the obvious potential to negatively impact the quantity and quality of water within the aquifer. Therefore, the Authority adopts § 711.108 which implements the Authority's well construction permitting program. Section 711.108 identifies who may apply for, and the attributes of, a well construction permit ("WCP"). This section is intended to locate, in one convenient reference point, the general attributes of WCPs as contemplated and intended by the Act. It is common practice for water resource management agencies to identify the criteria necessary to implement their permitting programs. The list of the attributes of a WCP, together with the list of criteria which must be proven in order to obtain such a permit will, assist in enabling the Authority to manage all points of withdrawal from the Edwards Aquifer, and to accomplish its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

The rule provides that one must first apply for and obtain a WCP in order to:

1) construct, install, drill, equip, complete, alter, operate or maintain a well or other works designed for the withdrawal of aquifer water;

2) construct, install, drill, equip, complete, alter, operate or maintain a well or other works designed for the monitoring of the water quality or level of the aquifer;

3) equip, complete, alter, operate or maintain a well pump installed or to be installed on an aquifer well; or

4) construct, install, drill, equip, complete or alter a well or other works designed to withdraw groundwater from an aquifer other than the Edwards Aquifer, but that intersects the Edwards Aquifer.

(For a more thorough discussion of these criteria, see the discussion of § 711.12, above.)

Section 711.108 provides that WCPs are not transferrable. This is because WCPs are intended to be issued to individual applicants who can demonstrate their intention and ability to comply with the rules of the Authority in the construction activity in question. If a party applies for and receives a WCP, the Authority believes it would defeat the very limited purpose of a WCP to allow the permit holder to then sell the permit to a third party.

Section 711.108 provides that WCPs have a term of 180 days within which construction activities must be completed. Upon application to the Authority, the permit term may be extended by one additional 180-day period if the permit holder demonstrates to the Authority that the permit holder's failure to complete the well within the original 180-day term is not due to the permit holder's own lack of diligence. Upon the expiration of the permit term, the permit automatically expires and is cancelled. The Authority believes it would be counterproductive to issue open-ended construction permits without providing any deadline within which to perform the proposed construction activities. The Authority has concluded that construction permits should be issued to allow construction of wells for which there is a real need, not for wells which may be needed at some indefinite point in

the future. Further, issuance of open-ended construction permits (i.e., permits with no construction deadline) would hinder the Authority's ability to monitor permit holders' construction activities for compliance with the Authority's rules. Thus, adding a construction deadline increases the administrative convenience and effectiveness of the Authority.

Section 711.108 next lists the elements which an applicant must prove in order to be granted a WCP. The applicant must pay a fee; the application must identify an existing or proposed well; the well must be located within the Authority's boundaries and must be a point of withdrawal for Edwards Aquifer water; the withdrawals must be proposed to be placed to a beneficial use for domestic or livestock use, irrigation use, municipal use, or industrial use; and the water produced must be used within the Authority's boundaries. (Act sections 1.14(e), 1.03(1), 1.08(b), 1.34(a)).

The rule also requires that the applicant have a legal right to make withdrawals from the well. In other words, the proposed well must either be exempt, or one for which a groundwater withdrawal permit has been obtained. Section 711.108 requires that the applicant be in compliance with any other Authority permits held by him or her and that the quantity of water the well would be capable of producing, if constructed, is consistent with the quantity of water the applicant proposed to produce.

Section 711.108 requires the applicant demonstrate: that the construction and operation of the proposed well would not unreasonably negatively affect the aquifer or other permittees; and that the proposed well will be constructed, operated and maintained consistent with the Authority's own water quality rules and all other applicable local, state and federal laws relating to well construction, operation and maintenance. Section 1.11(d)(10) of the Act empowers the Authority, within its boundaries, to enforce Chapter 32 of the Texas Water Code and any rules adopted thereunder. Chapter 32 relates to issues concerning well construction. Similarly, Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. Section 36.115 prohibits the drilling of a well or alteration of a well pump without a permit. The Chapter 711 rules incorporate these requirements. The Authority believes it is appropriate to require compliance with these "other applicable laws" in § 711.108. Finally, the application must be in compliance with the Act and the Authority's rules.

Section 711.110 identifies who may apply for, and the attributes of, a monitoring well permit ("MWP"). This section is intended to locate, in one convenient reference point, the general attributes of MWPs as contemplated and intended by the Act. It is common practice for water resource management agencies to identify the criteria necessary to implement their permitting programs. The list of the attributes of a MWP, together with the list of criteria which must be proven in order to obtain such a permit will assist in enabling the Authority to manage all points of withdrawal from the Edwards Aquifer, and to accomplish its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

Section 1.15(a) and (b) of the Act directs the Authority to manage and regulate all withdrawal points from the aquifer and to require a permit for any person seeking to construct a well or other works designed to withdraw aquifer water. Section 1.08(a) of the Act endows the Authority with broad powers to manage, conserve, preserve and protect the aquifer and prevent the waste or pollution of water in the aquifer. Activities related to the construction of wells have the obvious potential to negatively impact the quantity and quality of water within the aquifer. Although a monitoring well will typically withdraw much less water than other aquifer wells, the Authority has determined that a permit should be required for such wells. The Authority cannot effectively regulate wells of which it is unaware. Further, just as with any other type of well, monitoring wells are potential conduits of contamination of the aquifer and this rule will help prevent pollution of water in the aquifer.

Section 711.110 provides that any person proposing to construct a monitoring well may apply for a MWP. Section 711.110 provides that MWPs are transferrable, non-interruptible, and perpetual in term. The Authority does not believe that the quantity of water withdrawn by monitoring wells is sufficient to warrant interruption during times of drought, etc. Further, a key function of monitoring wells is to monitor water quality and quantity in the aquifer. This function is critically important during times of drought and other circumstances during which other types of permits may be interrupted. Thus, monitoring well withdrawals are arguably more valuable and necessary during times when other permit withdrawals are subject to interruption.

Section 711.110 next lists the elements which a MWP applicant must prove in order to be granted such a permit. The applicant must pay a fee; the application must identify an existing or proposed well; the well must be located within the Authority's boundaries and must be a point of withdrawal for Edwards Aquifer water; and the well must be used for monitoring purposes. The rule also requires that the applicant demonstrate that he or she will take all reasonable measures to conserve water. Finally, the application must be in compliance with the Act and the Authority's rules.

Section 711.112 identifies the many provisions that shall be included, and the issues that are to be addressed, in any groundwater withdrawal permit issued by the Authority. It is common practice for water resource management agencies to identify and specify the contents of their permits. This list of the required contents of a groundwater withdrawal permit will assist the Authority in managing all points of withdrawal from the Edwards Aquifer, and accomplishing its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

Pursuant to section 711.112, the permit shall identify: the name, address and phone number of the permit owner and any authorized representative of the owner; the type of permit; the permit term; the purpose of use for the permit; and the maximum authorized rate of withdrawal in gallons per minute, together with the maximum total annual volume of withdrawal by purpose of use. The Authority is required, pursuant to § 1.15(d) of the Act, to specify a maximum rate and total volume of withdrawal for each groundwater withdrawal permit issued by it. Where applicable, the permit shall identify the applicant's "maximum historical use," "historical average minimum" or "irrigator minimum," "phase-1 proportionally adjusted amount," "step-up amount," "phase-2 proportionally adjusted amount," and "equal percentage reduction amount." These terms are relevant to the method by which initial regular permit amounts are calculated and reduced in order to achieve the 450,000 and 400,000 acre-feet "caps" mandated by the Act. They may also bear upon any "restoration" of permit amounts in the event that the Authority raises either of the withdrawal caps. These terms

are defined and applied in sections 711.172 and 711.174 of these rules. Readers are encouraged to refer to the discussion of those sections, below, for a more complete explanation of those terms and their purposes.

Section 711.112 also requires that the permit identify the location of the well(s) for which the permit is issued; the place of use of the water withdrawn; the source of the groundwater (which must be the Edwards Aquifer); the type of meter or alternative measuring method employed on the well(s); the conditions for the retirement, suspension, or interruption of withdrawals or, where applicable, the conditions for renewal of the permit; any reporting requirements imposed upon the permit holder; a notice that the permit is subject to the limitations provided in the Act and the Authority's rules; a listing of the standard groundwater withdrawal conditions set forth in the Subchapter F rules (discussed in more detail below); and any other appropriate conditions on the withdrawal of water from the aquifer.

Section 711.116 identifies the many provisions that shall be included, and issues that are to be addressed, in any well construction permit ("WCP") issued by the Authority. It is common practice for water resource management agencies to identify and specify the contents of their permits. This list of the required contents of a WCP will assist the Authority in managing all points of withdrawal from the Edwards Aquifer, and accomplishing its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

Pursuant to § 711.116, the permit shall identify: the name, address and phone number of the permit owner and any authorized representative of the owner; the type of permit; the permit term; and the purpose of use for the permit. The Authority is required, pursuant to § 1.15(d) of the Act, to specify a maximum rate and total volume of withdrawal for each groundwater withdrawal permit issued by it. Thus, § 711.116 requires the permit to specify the maximum authorized rate of withdrawal in gallons per minute, together with the maximum annual volume of withdrawal by purpose of use for the proposed well.

As originally proposed, the rule also required the permit to specify the maximum monthly rate of withdrawals in acre-feet. This requirement has been deleted to conform more closely with the two rate and volume criteria which are specified in § 1.15(d) of the Act.

Section 711.116 also requires that the permit provide a detailed legal description of the well location and identify: the applicant's specific legal authority to make withdrawals if the well is constructed; the source of the groundwater (which must be the Edwards Aquifer); the pump size, pumping rate, pumping method and other specifications for metering the well; the internal diameter, well depth and other construction specifications for the well; and any reporting requirements imposed upon the permit holder. The permit must also include a notice that the permit is subject to the limitations provided in the Act and the Authority's rules and any other appropriate conditions on the withdrawal of water from the aquifer.

Section 711.118 identifies the many provisions that shall be included, and the issues that are to be addressed, in any monitoring well permit ("MWP") issued by the Authority. It is common practice for water resource management agencies to identify and specify the contents of their permits. This list of the required contents of a MWP will assist the Authority in managing all points of withdrawal from the Edwards Aquifer, and accomplishing its other various duties to manage, conserve, preserve, and protect the Edwards Aquifer and to prevent waste or pollution of the aquifer.

Pursuant to § 711.118, the permit shall identify: the name, address and phone number of the permit owner and any authorized representative of the owner; the type of permit; the permit term; and the purpose of use for the well authorized by the permit. The Authority is required, pursuant to § 1.15(d) of the Act, to specify a maximum rate and total volume of withdrawal for each groundwater withdrawal permit issued by it. Thus, § 711.118 requires the permit to specify the maximum authorized rate of withdrawal in gallons per minute, together with the maximum annual volume of withdrawal by purpose of use for the proposed well.

As originally proposed, the rule also required the permit to specify the maximum monthly rate of withdrawals in acre-feet. This requirement has been deleted to conform more closely with the two rate and volume criteria which are specified in § 1.15(d) of the Act.

Section 711.118 also requires that the permit provide a detailed legal description of the well location and identify: the purpose of the monitoring activity; the source of the groundwater (which must be the Edwards Aquifer); the pump size, pumping rate, pumping method and other specifications for metering the well; the internal diameter, well depth and other construction specifications for the well; the construction specifications for any additional monitoring equipment to be installed or associated with the well; and any reporting requirements imposed upon the permit holder. The permit must also include a notice that the permit is subject to the limitations provided in the Act and the Authority's rules and any other appropriate conditions on the withdrawal of water from the aquifer.

Many of the sections listing the required contents of Authority permits include provisions requiring: "any other appropriate conditions . . . as determined by the Authority" or "any other information required by the board to implement the Act or the Authority's rules." (See §§ 711.112(26) and (27), 711.116(16) and (17), and 711.118(17) and (18).) The basis for these provisions lies in the need for flexibility in the processing and issuance of applications by the Authority. The Authority will need to exercise such flexibility. The processing and issuance of many applications will be straight-forward, presenting a generic and well-defined set of issues to be examined. Other applications, however, will be unique and will present special issues and raise questions that are specific to that application. The provisions allowing the Authority to require "other information" provides the Authority with some flexibility in dealing with unique situations.

Subchapter F

While the Act requires the Authority to implement a permitting system, it also imposes a number of restrictions, limitations and other requirements upon the withdrawal of water from the Edwards Aquifer. Sections 711.130-711.134, Subchapter F of the Chapter 711 rules, harmonize these provisions of the Act by notifying holders of groundwater withdrawal permits that they must comply with a number of conditions, including: avoiding actions that adversely affect water quality or threatened or endangered aquifer-dependent species; complying with other Authority rules, including rules designed to protect water quality, conserving water, maximizing beneficial use of water, protecting aquatic and wildlife habitat and threatened or endangered species, and protecting instream uses, bays and estuaries; and complying with the Act. These conditions will be incorporated into the terms of

the permits when they are issued. These conditions implement requirements from the Act and are necessary for the Authority to effectively regulate its permits in order to manage, conserve, preserve, and protect the aquifer and to prevent the waste or pollution of water in the aquifer. The Subchapter F rules do not themselves set forth the substantive conditions which apply to permits issued by the Authority. Instead, they merely clarify that the permits are subject to those conditions and provide a reference to the rules implementing those conditions.

Section 711.130 states that the purpose of Subchapter F is to establish the standard conditions required to be contained in a groundwater withdrawal permit. Those conditions are designed, among other things, to: 1) protect the quality of water in the aquifer; 2) protect the water quality of the surface streams to which the aquifer provides springflow; 3) achieve water conservation and the maximization of groundwater available for withdrawal from the aquifer; 4) protect aquatic and wildlife habitat and listed threatened or endangered species; and 5) provide for instream uses, bays and estuaries. These objectives derive directly from § 1.14(a) of the Act, and the Authority is given, by that section of the Act, a clear mandate to limit "authorizations to withdraw water from the aquifer" (i.e. permits) in order to achieve those objectives. Because the objectives listed in § 711.130 derive directly from § 1.14(a) of the Act, no further elaboration is required.

In response to public comments, and as discussed more fully in the public comments discussion, the Authority has revised and reorganized §711.130 and §711.134. These revisions are primarily non-substantive and are intended to make the rule more easily understood.

Section 711.132 simply clarifies that Subchapter F applies to all groundwater withdrawal permits issued by the Authority.

Section 711.134 is included in the Chapter 711 rules in order to comply with the statutory mandate contained within § 1.16(h) of the Act. Section 1.16(h) requires the Authority to provide notice to each permit holder that his or her permit "is subject to limitations" provided in the Act. These limitations are referred to by the Authority as "conditions" upon the permits issued by the Authority. Thus, 711.134 lists each of the conditions (or limitations) which the Act empowers or requires the Authority to impose upon groundwater withdrawal permits. The section does not itself set forth the substance of the conditions which apply to permits issued by the Authority. Instead, it merely clarifies that the permits are subject to those conditions and provides a reference to the rules or other applicable laws which actually implement those conditions. The section also specifies that the permit holder is required to comply with the listed conditions. This section is intended to locate, in one convenient reference point, the standard conditions to which all groundwater withdrawal permits are subject and with which all permit holders must comply.

The conditions listed in § 711.134, and the statutory bases therefor, are as follows:

1) Permittees must comply with the Authority's rules relating to the construction, operation, and maintenance of wells. Sections 1.08(a), 1.11(a), (b), (d)(10) and (11), (h), 1.14(a)(1) and (2), 1.15(a) and (b), 1.35(d) of the Act and Chapters 32, 36 and 49 of the Texas Water Code empower and require the Authority to regulate the construction, operation and maintenance of Edwards Aquifer wells within its boundaries.

2) Permittees must comply with the Authority's rules relating to the abandonment and closure of wells. Sections 1.08(a), 1.11(a),(b), (d)(8),(10), and (11), (h), 1.14(a), 1.15(a), and 1.16(g), 1.35(d) of the Act and Chapters 32, 36 and 49 of the Texas Water Code empower and require the Authority to implement and enforce rules regarding the abandonment and closure of wells.

3) Permittees must comply with the Authority's rules relating to the spacing of wells. Sections 1.08(a), 1.11(a), (b), and (h), 1.14(a), 1.15(a), and 1.35(d) of the Act and Chapters 36 and 49 of the Texas Water Code empower and require the Authority to regulate the spacing of Edwards Aquifer wells within its boundaries.

4) Permittees must comply with the Authority's rules relating to the installation, operation and maintenance or well fields. Sections 1.08(a), 1.11(a), (b) and (h), 1.14(a), 1.15(a), 1.35(d) of the Act and Chapters 36 and 49 of the Texas Water Code empower and require the Authority to regulate wells fields of Edwards Aquifer wells within its boundaries.

5) Permittees must comply with the Authority's rules relating to the recharge of the aquifer. Sections 1.08(a), 1.11(a), (b), (d), (f) and (h), 1.14(d), 1.15(a), 1.27(b), 1.44, 1.45 of the Act empower and require the Authority to regulate artificial recharge activities related to the Aquifer.

6) Permittees must take no action that pollutes or contributes to the pollution of the aquifer. Sections 1.08(a), 1.14(a), 1.15, and 1.35(d) of the Act empower and require the Authority to regulate and prevent pollution of the Aquifer.

7) Permittees must comply with the Authority's aquifer water reuse rules. Sections 1.03(19), 1.08(a), 1.11(a), (b), (d), and (h), 1.13, 1.14(d), 1.15(a), 1.21(b), 1.23, 1.24(c), and 1.27(b)(3) of the Act empower and require the Authority to regulate and require the beneficial use and utilization of groundwater withdrawn from the aquifer that is reused.

8) Permittees are prohibited from wasting aquifer water. Sections 1.08(a), 1.11(a), (b), (f), and (h), 1.14(e), (f), 1.15(a), (b), (c) and (d), 1.16(c), (d), (g) and (h), 1.18, 1.19, 1.20, 1.33, 1.35, and 1.44(a) of the Act and Chapter 36 of the Texas Water Code empower and require the Authority to regulate and prevent the waste of water from the Aquifer.

9) Permittees must comply with the Authority's groundwater conservation rules. Sections 1.01, 1.08(a), (b), 1.11(a), (b), (d), 1.14(a), 1.15(a), 1.17(c), 1.21(b), 1.23(a), (b) and (c), 1.24, 1.25(a), 1.27(b), and 1.34(b) of the Act empower and require the Authority to adopt rules designed to conserve groundwater.

10) Permittees must comply with the Authority's demand management rules. Sections 1.08(a), 1.10(i), 1.11(a), (b), (d) and (h), 1.14(h), 1.15(a), 1.17(c), 1.22(a) and (b), 1.25(a), and 1.29(a) of the Act empower and require the Authority to adopt rules designed to manage the demand for aquifer water.

11) Permittees must comply with the Authority's drought management rules. Sections 1.08(a), 1.11(a), (b), and (h), 1.14(d) and (f), 1.15(a), 1.17(c) of the Act empower and require the Authority to adopt rules designed to manage the aquifer during times of drought.

12) Permittees must comply with the Authority's critical period management rules. Sections 1.08(a), 1.11(a), (b) and (h), 1.14(d) and (f), 1.15(a), 1.17(c) and 1.26 of the Act empower and require the Authority to adopt rules designed to manage the aquifer what the Act describes as "critical periods."

13) and 14) Permittees must comply with the Authority's rules relating to the installation, operation and maintenance of meters or alternative measuring methods, including any record keeping and reporting requirements contained therein. Sections 1.08(a), 1.11(a), (b),(d) and (h), 1.15(a), 1.31, 1.32 and 1.33(a) of the Act and Chapters 36 and 49 of the Texas Water Code empower and require the Authority to adopt rules regulating meters or alternative measuring devices and their installation on aquifer wells.

15) Permittees must comply with the Authority's rules requiring the beneficial use of aquifer water and prohibiting waste. Sections 1.08(a), 1.11(a), (b), (f) and (h), 1.14(e) and (f), 1.15(a), (b), (c) and (d), 1.16(c), (d), (g) and (h), 1.18, 1.19, 1.20, 1.33(a), 1.35and 1.44(a) of the Act and Chapter 36 of the Texas Water Code empower and require the Authority to adopt rules requiring beneficial use and prohibiting waste.

16) Permittees must comply with the Authority's rules relating to the interruption or retirement of withdrawal rights. Sections 1.08(a), 1.11(a), (b), (d) and (h), 1.14(a), (d), (f) and (h), 1.15(a), 1.17(c) and 1.27(a) and (b) of the Act empower and require the Authority to adopt rules providing mechanisms whereby permitted withdrawal rights may be interrupted and/or retired.

17) and 18) Permittees must comply with the Authority's rules relating to the method by which permits are "proportionally adjusted" or reduced by "equal percentage reduction" in order to achieve the withdrawal caps. Sections 1.08(a), 1.11(a), (b) and (h), 1.14(b) and (c), 1.15(a) and (b), 1.16, 1.18(a), (b) and (c), 1.20(d), 1.21(a) and (c), 1.44(d) of the Act empower and require the Authority to implement such reduction strategies.

19) Permittees must comply with the Authority's rules relating to the retirement of withdrawal rights. Sections 1.08(a), 1.11(a), (b) and (h), 1.14(h), 1.15(a), 1.16(g), 1.21, 1.22(a), 1.24(c), 1.29(a), (c) and (d) of the Act empower and require the Authority to adopt rules providing mechanisms whereby permitted withdrawal rights may be interrupted.

20) Permittees must comply with the Authority's rules relating to the acquisition of additional water supplies. Sections 1.08(a), 1.11(a), (b), and (h), 1.15(a), 1.25(a) and (b), and 1.27(b) of the Act empower and require the Authority to adopt such rules.

21) Permittees must comply with the Authority's rules requiring the providing of notice in the event of a change in name or mailing address.

22) Permittees must pay all applicable Authority fees. Such fees are authorized by § 1.29 of the Act.

23) Permittees must comply with the Authority's rules relating to the interim authorization period. Sections 1.08(a), 1.11(a), (b) and (h), 1.15(a) and (b), 1.16(c), 1.17 and 1.33(a) of the Act empower and require the Authority to adopt rules governing the interim authorization period.

24) and 25) Permittees must comply with the Authority's rules relating to the abandonment and cancellation of wells or permits. Sections 1.08(a), 1.11(a), (b), (d)(8) and (h), 1.14(b) and (c), 1.15(a) and 1.16(g) of the Act empower and require the Authority to adopt rules governing abandoned or cancelled wells or permits.

26) Permittees must comply with the Authority's rules relating to the method by which permits amounts may be are "restored" in the event the withdrawal caps are raised. Sections 1.08(a), 1.11(a), (b) and (h), 1.14(d) and 1.15(a) of the Act empower the Authority to adopt such rules.

27) Permittees must comply with the Authority's rules regulating the transfer of permit rights. Sections 1.08(a), 1.11(a), (b) and (h), 1.15(a), 1.22(a), 1.24(c), 1.28(b), 1.30, and 1.34 of the Act and Chapter 36 of the Texas Water Code empower the Authority to adopt such rules.

28) Permittees must comply with the Authority's prohibitions against transferring water outside the boundaries of the Authority. Section 1.34(a) of the Act empower the Authority to prohibit such transfers.

29) - 32) Finally, permittees must comply with the terms of their permits, the Act, the Authority's rules, and any other condition which may, in the board's discretion, be reasonable and appropriate. The basis for these provisions lies in the need for flexibility in the issuance and regulation of permits by the Authority. The Authority will need to exercise such flexibility. Many permits will be straight-forward, presenting a generic and well-defined set of issues to be examined. Other permits, however, will be unique and will present special issues and raise questions that are specific to that permit. The provisions allowing the Authority to require compliance with "other reasonable conditions" provides the Authority with some flexibility in dealing with unique situations.

Subchapter G

The Act requires the Authority to implement a permitting system. The Act also imposes two "caps" which limit the aggregate amount of certain permitted withdrawals which may be issued by the Authority. Specifically, the Act mandates that, initially, total permitted withdrawals for initial and additional regular permits may not exceed 450,000 acre-feet per year and, after January 1, 2008, total permitted withdrawals may not exceed 400,000 acre-feet per year. In the absence of these "caps," total permitted withdrawals might exceed the cap amounts. Therefore, the Act requires the Authority to "proportionally adjust" initial regular permit amounts to reach the 450,000 acre-feet cap, and implement "equal percentage reductions" in order to reach the 400,000 acre-feet cap. The Act also imposes several permit "minimums" applicable to certain initial regular permit holders. Sections 711.160-711.182, Subchapter G of the proposed Chapter 711 rules, implement these provisions of the Act by establishing the amount of groundwater available for permitting, explaining which types of permits are subject to the caps, implementing a method of calculating the permit minimums, and setting out the procedures for carrying out "proportional adjustment" and "equal percentage reductions."

Section 711.160 explains that the purpose of the subchapter is to establish the amount of groundwater available for permitting, and to set forth the procedures to be used to proportionally adjust permit amounts and implement equal percentage reductions to permit amounts. The factual basis for § 711.160 is grounded in legal facts found in the Act. A review of the Act demonstrates that the Authority's permit program needs to establish the amount of groundwater available for permitting for each category of groundwater withdrawal permits; and establish procedures for implementing "proportional adjustments" and "equal percentage reductions" of initial regular permits under certain circumstances. For initial and additional regular permits, sections 1.14 (b) and (c) of the Act impose two permitted withdrawal parameters or "caps," subject to certain limitations. The first cap (1.14 (b)) sets a maximum of 450,000 acre-feet of permitted withdrawals per year until December 31, 2007. The second cap (1.14 (c)) sets a maximum of 400,000 acre-feet per year of permitted withdrawals beginning January 1, 2008. Section 1.16 (e) of the Act requires that initial regular permits be proportionally adjusted in

the event that the aggregate maximum historical use of groundwater from the aquifer exceeds 450,000 acre-feet per annum. Section 1.21(c) requires equal percentage reductions of initial regular permits and additional regular permits (if any) in order to meet the 400,000 acre-feet per annum "cap." These legislative facts form the basis of and set parameters for the purpose of Subchapter G as stated in this section. The rules set forth in this subchapter implement these requirements of the Act. In that §711.160 identifies these purposes to be advanced by subchapter G, a rational connection is established between the legislative factual basis in the Act and the final rule as adopted.

Section 711.162 provides that Subchapter G only applies to certain categories of groundwater withdrawal permits. The factual basis for § 711.162 is grounded in legal facts found in the Act. The Authority may issue other types of permits, such as well construction permits. However, the Authority interprets the "caps" in sections 1.14(b) and (c) as being applicable only to initial and additional regular permits. Similarly, it interprets the "equal percentage reduction" provisions of § 1.21(c) to apply to initial and additional regular permits. A review of § 1.16(e) of the Act shows that it may only apply to initial regular permits. Initial and additional regular permits are both groundwater withdrawal permits. There are other types of groundwater withdrawal permits recognized in the Act which require consideration of the amount of groundwater available for permitting (term permits and emergency permits). Monitoring well permits, while not mentioned in the Act, also exist within the Authority boundaries and require treatment in this subchapter. These facts form the basis for § 711.162. In that § 711.162 limits the scope of subchapter G to groundwater withdrawal permits, there is a rational connection between the factual basis and the final rule as adopted.

Section 711.164 provides that the aggregate withdrawal "caps" - 450,000 acre-feet from the effective date of these rules through December 31, 2007 and 400,000 acre-feet thereafter - apply to initial regular permits and additional regular permit unless either of the caps is increased by the Authority pursuant to § 1.14(d) of the Act. The factual basis for § 711.164 is grounded in legislative facts found in the Act. Sections 1.14(b) and (c) of the Act, respectively, provide that the amounts of groundwater available for permitting are 450,000 acre-feet per year through December 31, 2007, and 400,000 acre-fee per year thereafter, unless either of the caps is increased by the Authority pursuant to § 1.14 (d). Sections 1.14(b) and (c) do not specifically identify the groundwater withdrawal permits to which the "caps" apply. Those sections do not state that the caps apply to all permits. However, a review of the Act as a whole shows that these caps can logically only apply to initial and additional regular permits. In this analysis, it is important to also consider the import of §§ 1.16(e), 1.18(a), 1.19, 1.20, and 1.21(a) of the Act. The "cap" is made applicable to initial regular permits by § 1.16(e) where it provides that, "to the extent water is available for permitting," certain permit amounts should be recognized and certain proportional adjustment procedures may need to be invoked. Section 1.16 addresses exclusively the issuance of initial regular permits. Section 1.18(a) also provides that "to the extent water is available for permitting after the issuance of permits to existing users" (i.e. initial regular permits), then the Authority may issue additional regular permits. Neither § 1.19 nor 1.20, relating to term and emergency permits, respectively, contain langauge such as "to the extent water is available for permitting" which would suggest an intent to subject those types of permits to the caps. Further, term and emergency permits are subjected to their own, independent limiting factors. Section 1.19 of the Act provides for interruption of withdrawals under term permits based on the triggering of certain index well water levels. Because of this interruptibility feature of term permits at higher aquifer levels (than initial and additional regular permits might otherwise be subject to) it is unnecessary to apply the caps in sections 1.14(b) and (c) to term permits. Section 1.20(d) specifically provides that withdrawals under emergency permits may be made "without regard to its effect on other permit holders." The Authority interprets this provision to mean that the issuance of emergency permits does not affect the permit allocation process under §1.14(b) and (c), the proportional adjustment process under § 1.16(e), or the equal percentage reduction process under § 1.12(c). Section 1.21(a) and (c) also reinforce the conclusion that the "caps" do not apply to term or emergency permits. Under subsection (a), the Authority is to prepare a plan to reduce withdrawals "under regular permits" to meet the cap. Similarly, subsection (c) establishes the process to reduce withdrawals "under regular permits" to reduce "each regular permit" to meet the cap. These legislative facts in the form of sections of the Act form the factual basis for § 711.164. This rules implements these requirements of the Act. In that § 711.164 identifies the amount of groundwater available for permitting for initial and additional regular permits, a rational connection is established between the legislative factual basis in the Act and the final rule as adopted.

Section 711.166 states that the amount of groundwater which may be withdrawn pursuant to term permits is not subject to the withdrawal caps. Instead, the aggregate amount of term permits which can be issued by the Board will be governed by the amount specified in the Board's annual order authorizing the issuance of term permits. Further, term permit withdrawals will only be authorized when the key index well levels are greater than as specified as follows: 1) for wells within the San Antonio pool, when well J-17 is greater than 665 feet above mean sea level; and 2) for wells within the Uvalde pool, when well J-27 is greater than 865 feet above mean sea level.

The Act does not establish a "cap" on the amount of groundwater available for permitting for term permits. However, under § 1.15(a) of the Act, the Authority is authorized to manage all points of withdrawals from the aquifer. Additionally, § 1.08(a) confers on the Authority all of the powers, rights, and privileges necessary to manage, conserve, preserve and protect the aquifer. Withdrawals under term permits early or late in a year when the aquifer is above certain higher index well readings (i.e. when the aquifer is "full") may affect the water supply that will be available to the holders of initial regular permits during periods of low rainfall and high rates of withdrawals. Term permit withdrawals may also affect the performance of the Authority's other aquifer management programs. The amount of groundwater that is in the aquifer at the beginning of a year varies based on the prior year's rainfall and amount of withdrawals. Accordingly, the act of establishing, by order of the Board, on an annual basis the amount of groundwater that may be permitted under term permits will assist the Authority in managing the overall water supply that is available from the aquifer. Section 711.166 also provides the conditions set forth in the Act that term permit withdrawals will only be authorized when key index well levels are greater than as specified as follows: for wells within the San Antonio pool, when well J-17 is greater than 665 feet above mean sea level; and for wells within the Uvalde pool, when well J-27 is greater than 865 feet above mean sea level. There is a rational connection between this factual basis for § 711.166 and the

rule as adopted because it provides rational limits on term permit withdrawals, which are not subject to the "cap" as discussed above for § 711.164, by specifying aggregate permissible term permit withdrawals in the Board's annual order, and by conditioning term permit withdrawals on index well readings.

Section 711.168 provides that the amount of groundwater which may be withdrawn pursuant to emergency permits is not subject to the withdrawal caps. Instead, the amount of emergency permits the board may issue shall not exceed the amount necessary to prevent the loss of life or to prevent severe, imminent threats to public health or safety. The criteria for eligibility for an emergency permit derive from §1.20 of the Act. The Act does not establish a "cap" on the amount of groundwater available for permitting for emergency permits. However, under § 1.15(a) of the Act, the Authority is authorized to manage all points of withdrawals from the aquifer. Additionally, § 1.08(a) confers on the Authority all of the powers, rights, and privileges necessary to manage, conserve, preserve and protect the aquifer . Because of the nature and duration of withdrawals under emergency permits (i.e. relatively low withdrawal amounts in rare circumstances for relatively short 30-day time periods), there is little likelihood that these withdrawals will materially affect the water supply that will available to the holders of regular permits. Moreover, emergency permit withdrawals are not likely to affect the performance of the Authority's other aquifer management programs. This section ensures that groundwater withdrawals necessary to meet emergency conditions, as described in this section, are available only in quantities of groundwater determined by the Authority to be necessary. The Act and the rules defer judgment to the Authority with regard to making a determination on whether conditions meet the criteria listed in this section and, therefore, justify an emergency permit. The maintenance of public health and safety is established in this section as a requirement that takes precedence over all other allocation requirements and parameters on groundwater withdrawn from the aquifer. Accordingly, there is a rational connection between this factual basis for § 711.168 and the rule as adopted because it provides that emergency permit withdrawals are not subject to the "cap" as discussed above for § 711.164, and that amount of withdrawals under emergency should be limited to that amount required to address the emergency.

Section 711.170 provides that the amount of groundwater which may be withdrawn pursuant to monitoring well permits is not subject to the withdrawal caps. Instead, the amount of monitoring well permits may not exceed the amount reasonably necessary to properly collect water quality samples from the aquifer. The Act does not establish a "cap" on the amount of groundwater available for permitting for monitoring well permits. However, under § 1.15(a) of the Act, the Authority is authorized to manage all points of withdrawal from the aquifer. Additionally, § 1.08(a) confers on the Authority all of the powers, rights, and privileges necessary to manage, conserve, preserve and protect the aquifer. Because of the nature and duration of withdrawals under monitoring well permits (i.e. generally low withdrawal amounts on an intermittent basis), there is little likelihood that these withdrawals will materially affect the water supply that will available to the holders of regular permits. Moreover, monitoring well permit withdrawals are not likely to affect the performance of the Authority's other aquifer management programs. This section ensures that groundwater withdrawals necessary to perform monitoring well functions are available in quantities of groundwater determined by the Authority to be necessary for this purpose. Subsection 711.170 (b) states that irrespective of the groundwater levels of index wells J-17, TD 69-47-306, or J-27, the amount of groundwater from the aquifer that the Board may permit to be withdrawn pursuant to monitoring well permits shall not exceed the amount necessary to properly collect water quality samples from the aquifer for each calendar year. This section gives proper recognition to the significance of groundwater quality monitoring to the long-term maintenance of the viability of the aquifer. Monitoring activities will not be constrained or made more difficult by groundwater policy established by the Authority to allocate withdrawals for persons with other types of permits. Accordingly, there is a rational connection between this factual basis for § 711.170 and the rule as adopted because it provides that monitoring well permit withdrawals are not subject to the "cap" as discussed above for § 711.164, and that amount of withdrawals under monitoring well permits emergency should be limited to that amount required for this purpose.

Section 711.172 sets forth the mechanism by which initial regular permits will be proportionately adjusted, if necessary, in order to reach the 450,000 acre-feet withdrawal cap or other applicable cap. The factual basis for § 711.172 is grounded in the legislative facts found in § 1.16(e) of the Act. Section 1.16(e) provides for proportional adjustment under certain circumstances. Section 1.16 is limited to initial regular permits. Accordingly, the proportional adjustment process only applies to initial regular permits. Subsection (a) of § 711.172 provides that this section only applies to initial regular permits.

Section 1.16(e) provides for, among other things, the recognition of groundwater withdrawal amounts in an initial regular permit equal to "the average amount of water withdrawn annually during the historical period." Only existing users who have "operated a well for three or more years during the historical period" qualify for this treatment. The Authority refers to this concept as the "historical average minimum." The Act provides no guidance in its text as to (1) what "operate a well" means; (2) how the "three or more years" is calculated for purpose of qualifying for the historical average minimum; and (3) how the historical average minimum is calculated for purposes of determining the average annual beneficial use during the historical period.

"Operate a well" can essentially be interpreted to mean one of at least two concepts: (1) the well is being supplied with energy, the pump is engaged, and groundwater is emanating and being discharged from the well head; or (2) the well is fully functionally and is capable of making withdrawals, but is not in fact making withdrawals or is only intermittently making withdrawals (these wells are sometimes referred to as well "capable of operation"). The "operate a well" criteria has the purpose of determining eligibility for the "historical average minimum" based on three or more years of operation. Because § 1.16 of the Act, among others, requires actual beneficial use of groundwater from the aquifer during the historical period in order to be eligible to receive an initial regular permit, the Authority interprets the phrase "operate a well" as requiring a physical discharge of groundwater from the well as constituting the operation of a well for purposes of the threshold determination of eligibility of an existing user for the "historical average minimum."

As for the "three or more years" criteria, a year could mean either that a well was operated for a full three or more years (i.e., 1095 or more continuous or intermittent days) or that the operation of the well occurred at any time in a year, albeit for a period of time less than a full year. Generally, water users do not keep their water accounting records on a daily basis. Most water use reporting is on an annual basis. Additionally, most water wells

do not operate on a continuous basis. There may be days when withdrawals from a well are not required to be made. Accordingly, the Authority interprets "three or more years" to mean that an applicant is required to have withdrawn groundwater from a well and placed the water to a beneficial use in three or more years during the historical period (even if it was for no more than one day within a year).

As for the calculation of "average amount of water withdrawn annually during the historical period," the Authority refers to standard definitions of an "average" as constituting a single value that summarizes or represents the general significance of a set of unequal values and being the quotient obtained by dividing the sum total of a set of figures by the number of figures. See WEBSTER'S COLLEGIATE DICTIONARY 80 (10th ed. 1997). The "number of figures" for purposes of § 1.16(e) would be the total number of years during the historical period inclusive of an after the date of initial installation of the well, irrespective of whether withdrawals may have been made in any year. The "sum total of a set of figures" would be the total aggregate withdrawals during the historical period.

As for calculating the "historical average" as discussed above, the purpose of § 1.16(e) in allowing for a "historical average minimum" is to recognize as a minimum initial regular permit groundwater withdrawal amount the arithmetic mean (as discussed above) of the aggregate water that is required on an annual basis for the beneficial use requirements of an existing user. The actual beneficial use requirement of an existing user would necessarily include both low and high water use years. Moreover, the high years may be very high (as long as the use was not wasteful), and the low years may be very low, even including years in which there was no water use. However, these high and low years would nonetheless be accurate representations of the actual beneficial use requirements for an existing user in that particular year. Therefore, for purposes of calculation of a "historical average," a year in which a well that was capable of operation but did not in fact operate should be included for purposes of calculating the average historical beneficial use.

The Act does not provide definitions for "operate a well" or "historical average minimum." Because these terms are likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant or permittee, the Authority has determined that it is useful to define these terms. Section 711.172(b)(1) and (4) incorporates the concepts discussed upon in the factual basis discussed above providing a rational connection between the factual basis and the final rule as adopted.

The factual basis for the definition of "irrigator minimum" is derived from the legislative facts contained in the Act. Section 1.16(e) provides that existing irrigator users receive an initial regular permit for not less than 2.0 acre-feet per acre for each acre actually irrigated in any one calendar year during the historical period. During the historical period an irrigator may have placed water to beneficial use for irrigation during the historical period in four typical ways. First, the irrigator may have withdrawn groundwater from a well owned by the irrigator and irrigated a place of use owned by the irrigator. Second, the irrigator may have withdrawn groundwater from a well owned by the irrigator and irrigated a place of use owned by a third party. Third, the irrigator may have leased or assigned to a third-party the right to withdraw groundwater from a well owned by the irrigator and the third-party irrigated a place of use owned by the irrigator. Fourth, the irrigator may have leased or assigned to a third-party the right to withdraw groundwater from a well owned by the irrigator and the third-party irrigated a place of use owned by the third-party. Additionally, a transferee of an application for an initial regular permit may have relied on the placing to beneficial use for irrigation purpose that may have been done by a contract user, prior existing user or former existing user. The withdrawal of groundwater from a well, or the irrigation of a place of use may have occurred lawfully with the permission of the owner of the place of use, or unlawfully without such permission. The Authority does not interpret the Act as requiring it to issue an initial regular permit to a person who had no legal right to access either the well or the place of use for irrigation purposes. As is discussed in the definition of "existing user" in § 711.1(2), an existing user who may be eligible for an "irrigator minimum" must also be the owner of the well from which the place of use was irrigated. The Act does not provide a definition for "irrigator minimum." Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant or permittee, the Authority has determined that it is useful to define this term. Section 711.172(b)(2) incorporates the concepts discussed upon in the factual basis discussed above providing a rational connection between the factual basis and the final rule as adopted.

The factual basis for the definition of "maximum historical use" is derived from the legislative facts contained in the Act. Section 1.16(e) provides that "to the extent water is available for permitting, the board shall issue the existing user a permit for withdrawal of an amount of water equal to the user's maximum beneficial use of water without waste during any one calendar year of the historical period." The Authority refers to this concept as "maximum historical use." Section 1.16(e) also provides for the upward extrapolation of an existing user's maximum historical use" if a water user does not have historical use for a full year." Because irrigators are to receive an initial regular permit in the amount of their "irrigator minimum" as discussed above, irrigators generally do not claim "maximum historical use" other than the 2.0 acre-feet per year constituting the "irrigator minimum." The Act does not provide a definition for "maximum historical use." Because this term is likely to be regularly used by the Authority in its rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant or permittee, the Authority has determined that it is useful to define this term. Section 711.172(b)(2) incorporates the concepts discussed upon in the factual basis discussed above thereby providing a rational connection between the factual basis and the final rule as adopted.

The factual basis for the definition of "step-up amount" is derived from the legislative facts contained in the Act. Section 1.16(e) provides for the proportional adjustment of initial regular permits in the event that the aggregate maximum historical uses exceeds the amount of groundwater available for permitting (i.e. 450,000 acre-feet per annum). This section also provides for the minimum initial regular permit amounts as discussed above: the irrigator minimum and the historical average minimum. If the proportional adjustment process results in adjusting an initial regular permit below the required minimum, then the groundwater withdrawal amount in the permit must be adjusted back upwards to the applicable minimum. The definition accounts for situations in which an irrigator applicant qualifies for both the irrigator and historical average minimums, by calculating the step-up amount

as the difference between the higher of the two minimums and the applicant's phase 1 proportionally adjusted amount. The Authority refers to this upward adjustment as a "step-up amount." The Act does not provide a definition for "step-up amount." Because this term is likely to be regularly used by the Authority in it rules and in the general conducting of its procedures as they relate to its permit program, as well as by the regulated community that will interact with the Authority as an applicant or permittee, the Authority has determined that it is useful to define this term. Section 711.172(b)(2) incorporates these concepts in the factual basis discussed above.

Section 1.16 (e) of the Act requires that initial regular permits be proportionally adjusted in the event that the aggregate of all maximum historical uses of groundwater from the aquifer exceeds 450,000 acre-feet per annum. The purpose of this section is to provide a procedural mechanism to achieve the 450,000 acre-foot "cap." Subsection (c) of § 711.172 reflects this purpose.

Section 1.16(e) does not define the term "proportional." The Authority refers to standard definitions of "proportional" as "having the same or a constant ratio." See WEBSTER'S COLLEGIATE DICTIONARY 936 (10th ed. 1997). Subsection (d) of 711.172 incorporates this definitional concept.

Section 1.16(e) of the Act requires that initial regular permits be proportionally adjusted in the event that the aggregate maximum historical use of groundwater from the aquifer exceeds 450,000 acre-feet per annum. The Authority has no discretion in this regard. Section 1.16(e) mandates that the proportional adjustment process be applied if the criteria in that section are satisfied. Subsection (e) of § 711.172 incorporates this duty to proportionally adjust.

Section 1.16(e), while requiring proportional adjustment under certain circumstances, does not state what procedural device should be used by the Authority to make the adjustment. Section 1.11(c) of the Act authorizes the board to issues orders to enforce the Act and its rules. The board will issue an order when it grants an application for an initial regular permit. Thus, it is appropriate also to issue an order to accomplish a proportional adjustment. The use of orders by governing bodies such as the board of directors of the Authority is a common procedural tool to effectuate a regulatory action. Therefore, subsection (f) of § 711.172 incorporates the concept of a proportional adjustment order.

Section 1.16(e), while requiring proportional adjustment under certain circumstances and giving some guidance, does not state in a detailed manner how the Authority is to calculate the adjustment. A review of § 1.16(e) reveals that several concepts and steps need to be set out in the calculation. Under § 1.16(e) it will be necessary for the Authority to determine each applicant's maximum historical use (MHU) during the historical period. The board must also determine if an applicant qualifies for an "irrigator minimum" or a "historical average minimum." Then, a proportional adjustment factor (referred to by the Authority as a "phase-1 proportional adjustment factor" or "PA-1 factor") will be calculated by subtracting 450,000 from the total of all maximum historical uses (MHUs) and dividing the result by the total of all MHUs. A "phase-1 proportionally adjusted amount" ("PA-1 Amount") will then need to be calculated for each applicant by multiplying the applicant's MHU times the PA-1 Factor and subtracting the product from the applicant's MHU. In order to implement the duty to issue initial regular permits at an irrigator minimum or an historical average minimum to an applicant who so qualifies, the Authority will then need to compare the PA-1 Amount to the minimum. If the PA-1 amount is less than the minimum, the Authority will then determine a "step-up amount" (SUA) which will be equal to the difference between the minimum and the PA-1 Amount. If, after the SUAs are made, the 450,000 "cap" will be exceeded (which the Authority estimates is likely), then the Authority will need to pursue a "withdrawal reduction" program. Section 711.180, discussed more fully below, discusses this program and will allow the Authority to further reduce withdrawals by entering into agreed orders whereby initial regular permit applicants may waive (possibly by selling to the Authority) all or part of their applications for initial regular permits. If the "withdrawal reduction" program is successful, then the 450,000 "cap" will have been met and there will be no need to do a second proportional adjustment. If, despite these waivers, the total of all PA-1 Amounts plus all SUAs still exceeds the 450,000 acre-feet cap, then a second proportional adjustment will need to implemented by calculating a "Phase-2 proportional adjustment factor" (referred to by the Authority as a "PA-2 Factor") by adding the totals of all remaining PA-1 amounts and SUAs, subtracting 450,000 from the sum, and then dividing the result by the totals of all remaining PA-1 amounts and SUAs. The second proportionately adjusted amount (PA-2 Amount) will then be calculated for each applicant as follows: for applicants eligible for an SUA, their PA-2 amount will be calculated by multiplying the PA-2 factor by their PA-1 and SUA, and subtracting the result from the total of their PA-1 amount and SUA; for those ineligible for an SUA, their PA-2 amount will be calculated by multiplying the PA-2 factor by their PA-1 amount and subtracting the result from their PA-1 amount. At this point, if not sooner, the 450,000 acre-foot cap will have been met. Subsection (g) of § 711.172 incorporates these concepts for the calculation of proportional adjustments under § 1.16(e) of the Act. The approach meets the requirements of § 1.16 of the Act and provides an integrated procedure that distributes the reduction of withdrawals among the existing initial regular permits.

Section 1.14(d) of the Act provides that the "caps" may be raised under certain circumstances. Section 1.21(c) of the Act allows for the "restoration" of reduced amounts under certain circumstances. If the "cap" is raised it will be necessary to identify how the additional groundwater available for permitting will be allocated. Subsection (h) of 711.172 provides that if the "cap" is raised, then the proportionately adjusted amounts will be restored through the inverse application of this section.

Pursuant to § 1.21 (c) of the Act, §711.174 establishes the "equal percentage reduction" process for the retirement of initial regular permits. The equal percentage reduction requirement of the Act is triggered after January 1, 2008 if the overall volume of groundwater authorized to be withdrawn from the aquifer under regular permits is greater than 400,000 acre-feet per year. Under this requirement, the maximum authorized withdrawal of each regular permit will be reduced by an equal percentage as necessary to reduce overall maximum demand to 400,000 acre-feet per year or to an adjusted amount determined under subsection (d) of § 1.14 of the Act. The equal percentage reduction process only applies to initial regular permits. (This procedure also theoretically applies to additional regular permits. However, because the Authority estimates the aggregate of the irrigator and historical average minimums will exceed the 450,000 "cap" there will likely be no water left that is available for permitting of additional regular permits after all initial regular permits have been issued.) The equal percentage reduction rules will be a subchapter of the comprehensive water management plan implementation rules in chapter 715 of this title. These rules have not yet

been proposed. Section 711.174 is a cross-reference in chapter 711 to those rules in chapter 715 as an aid to those who may have an interest in that subject matter.

Section 1.16(e) provides for the various scenarios governing the groundwater withdrawal amount to be issued in an initial regular permit. There are two basic scenarios as follows: (1) the aggregate maximum historical use of all applications for initial regular permits does not exceed the 450,000 acre-foot "cap;" or (2) the aggregate maximum historical use does exceed the 450,000 acre-foot "cap." In the event of the first scenario, an applicant must receive an initial regular permit in the amount of his "maximum historical use." In the second scenario, which appears much more likely, proportional adjustment under § 1.16(e) of the Act is triggered. Under this circumstance there are six possible outcomes: (1) if an applicant does not qualify for an irrigator or historical average minimum, and no phase-2 proportional adjustment is performed, then the initial regular permit is issued in the phase-1 proportionally adjusted amount; (2) if an applicant does not qualify for an irrigator or historical average minimum, and a phase-2 proportional adjustment is performed, then the initial regular permit is issued in the phase-2 proportionally adjusted amount; (3) if an applicant does qualify for an irrigator or historical average minimum, and no phase-2 proportional adjustment is performed, and the phase-1 proportionally adjusted amount is greater than the irrigator or historical average minimum, as appropriate, then the initial regular permit is issued in the phase-1 proportionally adjusted amount; (4) if an applicant does qualify for an irrigator or historical average minimum, and no phase-2 proportional adjustment is performed, and the phase-1 proportionally adjusted amount is less than the irrigator or historical average minimum, as appropriate, then the initial regular permit is issued, after step-up, in the amount of the irrigator or historical average minimum; (5) if an applicant does qualify for an irrigator or historical average minimum, a phase-2 proportional adjustment is performed, and the phase-2 proportionally adjusted amount is greater than the irrigator or historical average minimum, as appropriate, then the initial regular permit is issued in the phase-2 proportionally adjusted amount; and (6) if an applicant does qualify for an irrigator or historical average minimum, a phase-2 proportional adjustment is performed, and the phase-2 proportionally adjusted amount is less than the irrigator or historical average minimum, as appropriate, then the initial regular permit is issued in the phase-2 proportionally adjusted amount and the applicant is compensated by the Authority for the fair market value of the difference between the applicant's PA-2 amount and minimum. Section 711.176 sets forth these methods by which initial regular permit amounts will be determined. In cases such as category (6), above, compensation will be provided at the fair market value as defined in § 11.0275 of the Texas Water Code. Section 711.176 is intended to normalize allocations when the 450,000 acre-feet cap is not exceeded and in several contingency options that derive from circumstances in which the aggregate cap is exceeded. The section is needed because, based upon the Authority's extensive review of the initial regular permit applications on file, it appears entirely possible that the aggregate of the maximum historical uses will exceed the cap and it even appears likely that the aggregate of all minimums will exceed the cap. In order to meet its statutory duty to achieve the cap, the Authority must implement measures to adjust permit amounts. In the event that withdrawals derived under Phase-2 calculations cannot be authorized, compensation is provided for.

Section 1.14(b) of the Act prohibits the Authority from issuing initial regular permits in an aggregate amount that exceeds 450,000 acre-feet per annum. The basic procedure provided by the Act to ensure that the aggregate total does not exceed the "cap" is the proportional adjustment process contained in § 1.16(e) of the Act. The Authority currently estimates that after "stepping-up" the proportionally adjusted permits to their appropriate minimums, the aggregate of the irrigator and historical average minimums will exceed the "cap." Accordingly, the Authority will be required to "reduce withdrawals" and, under § 129(a)(1) of the Act, those withdrawal reduction costs are to be borne by existing users. One manner in which the Authority may "reduce withdrawals" to the 450,000 acre-foot "cap" is to enter into agreements with applicants that they may abandon or waive all or part of their application for an agreed to compensation. By entering into such agreements at the application phase (pre-permit issuance) rather than waiting until initial regular permits have been issued (which the Authority cannot do if the "cap" is going to be exceeded) the Authority will be able to affect the final aggregate groundwater withdrawal amount in the initial regular permits. Section 711.180 provides the procedural mechanism for this "withdrawal reduction" by the application waiver approach to be realized.

Subchapter I

The Act requires the Authority to impose and enforce a number of restrictions, limitations and other requirements upon the use of water from the aquifer. Sections 711.220-711.234, Subchapter I of the Chapter 711 rules, impose a number of prohibitions on aquifer use, including: requiring water withdrawn from the aquifer to be used within the Authority's boundaries; limiting withdrawals from new wells; requiring permits for most withdrawals and well construction; requiring registration of exempt wells; requiring compliance with the Act, the Authority's rules and the terms of Authority permits; and prohibiting waste or pollution of the aquifer.

Section 711.220(a) generally requires that groundwater withdrawn from the aquifer be used within the Authority's boundaries. This rule implements § 1.34(a) of the Act which states that aquifer water "must be used within the boundaries of the Authority." Section 711.220(b) states that, for water processed into or used to produce a commodity, the place of use is the plant site where the commodity is produced. This portion of the rule is not found in the Act, however, its creation is a necessary extension of subsection (a). Realizing aquifer water will, at times, be used in the production of commodities, the Authority has established a uniform rule that designates the site of production as the place where aquifer water is used. It would not be practical to use the destination point of commodities as the place of use; such a concept would make it impossible for producers to market their products beyond the Authority's boundaries.

Section 711.222 prohibits aquifer withdrawals from new wells unless the withdrawals are from an exempt well, a permitted well, or a well identified as a point of withdrawal in a transfer approved by the Authority. This rule is based on § 1.15 of the Act which gives the Authority the power to manage withdrawals from the aquifer and all withdrawal points from the aquifer. Section 1.15 of the Act further states that unless exemptions apply, a person "may not withdraw water from the aquifer . . . without obtaining a permit from the Authority." The water management programs implemented by the Authority in furtherance of the Act are based, in part, on the Authority's ability to issue permits to control and manage aquifer withdrawals. Without this ability, the Authority

would not be able to carry out the statutory mandates set out in the Act, such as the maximum permitted withdrawal levels. Section 711.222 will ensure that new well withdrawals are in compliance with the limitations imposed by the Act.

Section 711.224(a) generally prohibits groundwater withdrawals without a permit issued by the Authority unless otherwise excepted. This rule is derived directly from § 1.35(a) of the Act which states that a person "may not withdraw water from the aquifer except as authorized by a permit issued by the Authority or by this article." While § 1.35(a) of the Act indicates water may be withdrawn from the aquifer without a permit if authorized by other provisions in the article, the Authority has included specific references in § 711.224(a) to those provisions of the Act providing exceptions to the permitting requirements. Therefore, the Authority has included in § 711.224(a) the exceptions from the permitting requirement provided in §§ 1.15(b), 1.16(c), 1.17(a) and 1.33(a) and (c) of the Act and § 711.14 of this title (relating to Withdrawals Not Requiring a Groundwater Withdrawal Permit).

Section 711.224(b) prohibits new well construction unless authorized pursuant to a well construction permit. This provision is based on § 1.15(a) and (b) of the Act which authorizes the Authority to manage all withdrawals from the aquifer and states that a person may not "begin construction of a well . . . for withdrawal of water from the aquifer without obtaining a permit from the Authority." This section is further based on §36.119(a) of the Texas Water Code which decrees that drilling a well without a required permit is illegal. Under § 1.08(a) of the Act, chapter 52 of the Texas Water Code is applicable to the Authority to the extent that it does not conflict with the Act. Chapter 52 has since been repealed and recodified as chapter 36, Texas Water Code, which is now applicable to the Authority. See Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 933, sec. 2, 6, 1995 Texas General Laws 4673. Section 711.224(c) prohibits the operation of a well at a higher rate of production than authorized in a withdrawal permit. The foundation for this requirement is also located in § 36.119(a) of the Texas Water Code which decrees that operating a well at a higher rate of production than the rate approved for the well is illegal. Additional grounds for § 711.224(c) are found in § 1.15(d) of the Act which requires each permit "specify the maximum rate and total volume of water" that may be withdrawn. Implementing the concepts of § 36.119(a) of the Water Code and § 1.15 of the Act into § 711.224 will prevent unauthorized withdrawals or levels of withdrawals from permitted wells as well as the construction of unauthorized wells.

Section 711.226 prohibits operation of an exempt well unless the well has been registered with the Authority. This rule implements § 1.33(b) of the Act which states that exempt wells must register with the Authority. By conditioning operation of an exempt well on the filing of the statutorily mandated registration, the rule will ensure compliance with the Act.

Section 711.228 prohibits violations of the Act, the Authority's rules, or the terms or conditions of a permit. This rule is derived from § 1.35(b) of the Act which states that a person "may not violate the terms or conditions of the permit." It is also derived from § 1.35(e) of the Act which states that a person "may not violate this article or a rule of the Authority adopted under this article." The adoption of this rule will enable the Authority to use the enforcement powers authorized by § 1.36 of the Act which states the Authority "may enter orders to enforce the terms and conditions of permits, orders, or rules issued or adopted under this article." The purpose of § 711.228 is to deter violations. However, in the event a provision of the Act, a rule adopted by the Authority, or the terms and conditions or a permit, are violated, the Authority will have the ability to take enforcement action.

Section 711.230 prohibits the waste of groundwater within or withdrawn from the aquifer. This rule is derived from § 1.35(c) of the Act which expressly prohibits the waste of aquifer water. The establishment of a rule prohibiting waste is further supported by § 1.08(a) of the Act which states that the Authority "has all of the powers, rights, and privileges necessary . . . to prevent the waste or pollution of water in the aquifer." The adoption of this rule will enable the Authority to use the enforcement powers authorized by § 1.36 of the Act which states the Authority "may enter orders to enforce the terms and conditions of permits, orders, or rules issued or adopted under this article." The purpose of § 711.230 is to deter violations. However, in the event aquifer water is wasted in violation of this rule, the Authority will have the ability to take enforcement action to stop the waste.

Section 711.232 prohibits the pollution of the aquifer. This provision is based directly on § 1.35(d) of the Act which states that a "person may not pollute or contribute to the pollution of the aquifer." The establishment of a rule prohibiting pollution is further supported by § 1.08(a) of the Act which states that the Authority "has all of the powers, right, and privileges necessary . . . to prevent the waste or pollution of water in the aquifer." The adoption of this rule will enable the Authority to use the enforcement powers authorized by § 1.36 of the Act which states the Authority "may enter orders to enforce the terms and conditions of permits, orders, or rules issued or adopted under this article." The purpose of § 711.232 is to deter pollution of the aquifer. However, in the event the aquifer is polluted in violation of this rule, the Authority will have the ability to take enforcement action to stop such action.

Section 711.234 identifies various practices declared to be nuisances. These practices are: 1) wasting of aquifer water; 2) operation of a well at a higher rate of production than the rate approved for the well; and 3) pollution of the aquifer. This section is based, in part, on § 36.119(a) of the Texas Water Code. Under § 1.08(a) of the Act, chapter 52 of the Texas Water Code is applicable to the Authority to the extent that it does not conflict with the Act. Chapter 52 has since been repealed and recodified as chapter 36, Texas Water Code, which is now applicable to the Authority. See Act of May 29, 1995, 74th Legislature, Regular Session, Chapter 933, sec. 2, 6, 1995 Texas General Laws 4673. Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that operating a well at a higher rate of production than the rate approved for the well is declared to be a nuisance. This concept is incorporated into § 711.234(2). Section 711.234(1) is based on § 11.092, Texas Water Code, which states the wasteful use of water is a public nuisance. While this particular rule applies to surface water, the Authority has determined it should be applied to aquifer groundwater in an effort to protect those who use the water. Finally, the Authority includes pollution or the contribution to the pollution of the aquifer as a nuisance in § 711.234(3). This classification is supported by Texas common law which defines a public nuisance as a condition that amounts to an unreasonable interference with a right common to the general public. *Jamail v. Stoneledge Condo. Owners Ass'n,* 970 S.W.2d 673 (Tex. App. - Austin 1998, no writ). Pollution of the aquifer water would interfere with the rights of other aquifer users to enjoy clean, unadulterated water.

By declaring waste, excessive production, and pollution of aquifer water as nuisances, § 711.234 is intended to prevent the

occurrence of these practices which could endanger or cause harm to lawful users of the aquifer.

III. REGULATORY IMPACT ANALYSIS OF MAJOR ENVIRONMENTAL RULES.

Section 2001.0225 of the Texas Government Code requires an agency to perform, under certain circumstances, a regulatory analysis of major environmental rules ("RIAMER"). There are two primary components that must be met before a RIAMER is required. First, no RIAMER need be prepared if the rules in question are not "major environmental rules" or "MERs." Second, even if the rules are MERs, no RIAMER need be prepared if adoption of the MERs would not result in any one of the following criteria listed in § 2001.0225(a)(1)-(4):

1. the MER would "exceed" a standard set by federal law, unless the MER is specifically required by state law;

2. the MER would "exceed" an express requirement of state law, unless the MER is specifically required by federal law;

3. the MER would "exceed" a requirement of a delegation agreement or contract between the state and an agency or representative of the federal governmental to implement a state and federal program; or

4. the MER is adopted solely under the "general powers" of the agency instead of under a specific state law.

The following analysis examines whether a RIAMER is required for any of the rules on a subchapter by subchapter basis.

Analysis of Subchapter A

The Authority has determined that none of the rules in Subchapter A of 31 TAC - § 711.1 (the "Subchapter A Rules") are "major environmental rules" as that term is defined by §2001.0225(g)(3) of the Texas Government Code. The Subchapter A rules set forth the definitions that will apply to all rules issued by the Authority in Chapter 711. These rules have been written to provide uniform definitions for words and phrases that are expected to be used consistently throughout Chapter 711. They are intended to provide useful "short-hand" to reduce the amount of cumbersome regulatory language necessary in other Authority rules, thus allowing for a more efficient understanding and operation of other rules of the Authority. The definitions have no regulatory import outside of their incorporation in substantive rules that may be found elsewhere in Chapter 711. Because they do not have the specific intent to protect the environment or reduce risks to human health from environmental exposure, they are not MERs.

Further, even if any of the Subchapter A rules were MERs, no RIAMER need be prepared for those rules because none of the rules in Subchapter A meet any of the criteria listed in APA § 2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. Under that program, no federal financial assistance may be made to projects that the EPA determines may contaminate the Edwards Aquifer so as to create a significant hazard to public health. There is no federal law that specifically requires definitions such as those contained in the Subchapter A rules. Therefore, the Subchapter A rules do not exceed a standard set by federal law.

Second, the Subchapter A rules do not exceed an express requirement of state law. Instead, the rules are designed to carry out the Authority's statutory responsibility to: manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals, allow for interim authorization withdrawals prior to permit issuance, impose various conditions and restrictions on aquifer use, require that aquifer use be limited to beneficial uses, prohibit waste of aquifer water, and regulate transfers of aquifer rights (pursuant to, *inter alia,* §§ 1.03(4), (10) and (21), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.17 and 1.34 of the Act). The rules are designed to comply with these express requirements of state law and not exceed them. There are no other applicable "express requirements of state law" which are exceeded by these rules.

Third, the Subchapter A rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the Subchapter A rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these rules are adopted in part under the Authority's general powers, they are also adopted under the Act. In particular, the rules are adopted pursuant to, *inter alia,* §§ 1.03(4), (10) and (21), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.17 and 1.34 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; allow for interim authorization withdrawals prior to permit issuance; impose various conditions and restrictions on aquifer use; require that aquifer use be limited to beneficial uses; prohibit waste of aquifer water; and regulate transfers of aquifer rights. For these reasons, it is not necessary to perform a RIAMER on the Subchapter A rules.

Analysis of Subchapter B Rules

With respect to Subchapter B of 31 TAC, §§ 711.10 - 711.14 (the "Subchapter B Rules"), the Authority has determined that only § 711.12 is a "major environmental rule" as that term is defined by §1.0225(g)(3) of the Texas Government Code because it has the specific intent to protect the environment. The Subchapter B rules generally set forth the activities for which a permit from the Authority is required. The other Subchapter B rules do not have the specific intent to protect the environment or reduce risks to human health from environmental exposure and are, therefore, not MERs.

Further, no RIAMER need be prepared for any of the Subchapter B rules because none of the rules in Subchapter B meet any of the criteria listed in APA § 2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. Under that program, no federal financial assistance may be made to projects that the EPA determines may contaminate the Edwards Aquifer so as to create a significant hazard to public health. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater, or for well construction or related work. Therefore, the Subchapter B rules do not exceed a standard set by federal law. Moreover, even if

the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; and protect the quality of the water within the aquifer (pursuant to, *inter alia,*§§ 1.08(a), 1.11(a), (b) and (d), 1.14 and 1.15 of the Act).

Second, the Subchapter B rules do not exceed an express requirement of state law. Instead, the rules are designed to carry out the Authority's statutory responsibility to: manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals and well construction, and protect the quality of the water within the aquifer (pursuant to, *inter alia* §§ 1.08(a), 1.11(a), (b) and (d), 1.14 and 1.15 of the Act). The rules are designed to comply with these express requirements of state law and not exceed them. Other than the Act, there are no other "express requirements of state law" which could be exceeded by these rules.

Third, the Subchapter B rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the Subchapter B rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia,* §§ 1.08(a), 1.11(a), (b) and (d), 1.14 and 1.15 of the Act, which require the Authority to, among others: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; and protect the quality of the water within the aquifer. For these reasons, it is not necessary to perform a RIAMER on the Subchapter B rules.

Analysis of Subchapter E

The Subchapter E rules of 31 TAC, §§ 711.90-711.118 (the "Subchapter E Rules") would implement the Authority's permitting program by essentially setting forth: the categories of permits issued by the Authority, the conditions governing how and when such permits could be issued, the quantity of and conditions under which water could be withdrawn or wells constructed pursuant to such permits, the duration of such permits, the required contents of permit applications, and the rights and limitations associated with being the holder of such permits. Because these rules impose limits on the legal authority to withdraw groundwater which did not exist under the common law, they would tend to have an environmental protection aspect. Therefore, Subchapter E rules are probably MERs because they have the specific intent to "protect the environment."

However, no RIAMER need be prepared for any of the Subchapter E rules because none of them meet any of the criteria listed in APA § 2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater or for construction of Edwards Aquifer wells. Therefore, the Subchapter E rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by state law which requires the Authority to manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals and well construction, and specify withdrawal amounts pursuant to those permits (pursuant to, *inter alia,* §§ 1.03(9), (11), (12), (13) and (14), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20 and 1.33(a), (b) and (c) of the Act).

Second, the Subchapter E rules do not exceed an express requirement of state law. Instead, the rules are designed to carry out the Authority's statutory responsibility to manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals and well construction, and specify withdrawal amounts pursuant to those permits (pursuant to, *inter alia,* §§ 1.03(9), (11), (12), (13) and (14), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20 and 1.33(a), (b) and (c) of the Act). The rules are designed to comply with these express requirements of state law and not exceed them. Other than the Act, there are no other "express requirements of state law" which are applicable to these rules or which could be exceeded by these rules.

Third, the Subchapter E rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the Subchapter E rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia* §§ 1.03(9), (11), (12), (13) and (14), 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20 and 1.33(a), (b) and (c) of the Act, which require the Authority to manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, to regulate permits, manage withdrawals and points of withdrawals from the aquifer, require various types of permits for certain withdrawals and well construction, and specify withdrawal amounts pursuant to those permits. For these reasons, it is not necessary to perform a RIAMER on the Subchapter E rules.

Analysis of Subchapter F

The Act requires the Authority to implement a permitting system. At the same time, the Act imposes a number of restrictions, limitations and other requirements upon the withdrawal of water from the Edwards Aquifer. The Subchapter F rules of 31 TAC, §§ 711.130-711.134 (the "Subchapter F Rules") would harmonize

these provisions of the Act by clarifying that holders of groundwater withdrawal permits must comply with a number of conditions, including: avoiding actions that adversely affect water quality, or threatened or endangered aquifer-dependent species; complying with other Authority rules, including rules designed to protect water quality, conserve water, maximize beneficial use of water, protect aquatic and wildlife habitat and threatened or endangered species, and protect instream uses, bays and estuaries; and complying with the Act. Because these rules impose limits on the legal authority to withdraw groundwater which did not exist under the common law, they would tend to have an environmental protection aspect. Therefore, the Subchapter F rules are probably MERs because they have the specific intent to "protect the environment."

However, no RIAMER need be prepared for any of the Subchapter F rules because none of them meet any of the criteria listed in APA § 2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater or for construction of Edwards Aquifer wells, or which imposes conditions upon such permits akin to those found in the Subchapter F rules. Therefore, the Subchapter F rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; develop and implement a demand management plan; close abandoned, wasteful or dangerous wells; regulate well construction, operation, maintenance and closure; ensure adequate springflows; protect threatened and endangered species; provide notice to permit holders of the limitations provided by the Act; retire permits to reduce withdrawals; implement water conservation and reuse measures; acquire permitted rights for aquifer management purposes; require water conservation and reuse plans; implement a conservation management plan, a demand management plan, and a critical period management plan; limit transport of water out of Uvalde and Medina Counties; impose fees; regulate withdrawals of water from the Guadalupe River in lieu of aquifer withdrawals; require meters on aquifer wells; require water use reports; and regulate transfers of aquifer rights (pursuant to, *inter alia,* §§ 1.07, 1.08(a), 1.10(i)(1) and (2), 1.11(a), (b), (d)(8), (d)(10) and (d) (11), 1.14, 1.15, 1.16, 1.17, 1.21, 1.22, 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.30, 1.31, 1.32, 1.34, 1.35, and 1.36 of the Act).

Second, the Subchapter F rules do not exceed an express requirement of state law. Instead, the rules are designed to carry out the Authority's statutory responsibility to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; develop and implement a demand management plan; close abandoned, wasteful or dangerous wells; regulate well construction, operation, maintenance and closure; ensure adequate springflows; protect threatened and endangered species; provide notice to permit holders of the limitations provided by the Act; retire permits to reduce withdrawals; implement water conservation and reuse measures; acquire permitted rights for aquifer management purposes; require water conservation and reuse plans; implement a conservation management plan; a demand management plan, and a critical period management plan; limit transport of water out of Uvalde and Medina Counties; impose fees; regulate withdrawals of water from the Guadalupe River in lieu of aquifer withdrawals; require meters on aquifer wells; require water use reports; and regulate transfers of aquifer rights (pursuant to, *inter alia,* §§ 1.07, 1.08(a), 1.10(i)(1) and (2), 1.11(a), (b), (d)(8), (d)(10), and (d)(11), 1.14, 1.15, 1.16, 1.17, 1.21, 1.22, 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.30, 1.31, 1.32, 1.34, 1.35, and 1.36 of the Act). The rules are designed to comply with these express requirements of state law and not exceed them. There are no other "express requirements of state law" which are applicable to these rules or which could be exceeded by these rules.

Third, the Subchapter F rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the Subchapter F rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia,* §§ 1.07, 1.08(a), 1.10(i)(1) and (2), 1.11(a), (b), (d)(8), (d)(10) and (d)(11), 1.14, 1.15, 1.16, 1.17, 1.21, 1.22, 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.30, 1.31, 1.32, 1.34, 1.35, and 1.36 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals and well construction; develop and implement a demand management plan; close abandoned, wasteful or dangerous wells; regulate well construction, operation, maintenance and closure; ensure adequate springflows; protect threatened and endangered species; provide notice to permit holders of the limitations provided by the Act; retire permits to reduce withdrawals; implement water conservation and reuse measures; acquire permitted rights for aquifer management purposes; require water conservation and reuse plans; implement a conservation management plan, a demand management plan, and a critical period management plan; limit transport of water out of Uvalde and Medina Counties; impose fees; regulate withdrawals of water from the Guadalupe River in lieu of aquifer withdrawals; require meters on aquifer wells; require water use reports; and regulate transfers of aquifer rights. For these reasons, it is not necessary to perform a RIAMER on the Subchapter F rules.

Analysis of Subchapter G

The Act requires the Authority to implement a permitting system. The Act also imposes two "caps" which limit the aggregate amount of certain permitted withdrawals which may be issued by the Authority. Specifically, the Act mandates that, initially, total permitted withdrawals may not exceed 450,000 acre-feet per year and, after January 1, 2008, total permitted withdrawals may not exceed 400,000 acre-feet per year. In the absence of

these "caps," total permitted withdrawals might exceed the cap amounts. Therefore, the Act requires the Authority to "proportionally adjust" permit amounts to reach the 450,000 acre-feet cap, and implement "equal percentage reductions" in order to reach the 400,000 acre-feet cap. The Act also imposes several permit "minimums" applicable to certain initial regular permit holders. The Subchapter G rules of 31 TAC, §§ 711.160-711.180 (the "Subchapter G Rules") would implement these provisions of the Act by establishing the amount of groundwater available for permitting, explaining which types of permits are subject to the caps, implementing a method of calculating the permit minimums, and setting out the procedures for carrying out "proportional adjustment" and "equal percentage reductions."

Because the Subchapter G rules implement caps on the aggregate amounts of groundwater withdrawal permits, and provide for proportional adjustment, and equal percentage reductions of permits, this subchapter would tend to have an environmental protection aspect. Therefore, the Subchapter G rules are probably MERs because they have the specific intent to "protect the environment."

However, no RIAMER need be prepared for any of the Subchapter G rules because none of them meet any of the criteria listed in APA § 2001.0225(a)(1)-(4). First, the rules do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA for portions of the Edwards Aquifer, which applies only to federally-funded projects conducted on the aquifer. There is no federal law that specifically requires permitting for withdrawals of Edwards Aquifer groundwater or limits the maximum amount which can be withdrawn pursuant to those permits. Therefore, the Subchapter G rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; limit permitted withdrawals to achieve the caps and protect the aquifer; proportionately adjust, if necessary, to meet the 450,000 acre-feet cap; implement the permit minimums; and conduct equal percentage reduction, if necessary, to meet the 400,000 acre-feet cap (pursuant to, *inter alia,* §§ 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20, 1.21, and 1.44 of the Act).

Second, the Subchapter G rules do not exceed an express requirement of state law. Instead, the rules are designed to carry out the Authority's statutory responsibility to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; limit permitted withdrawals to achieve the caps and protect the aquifer; proportionately adjust, if necessary, to meet the 450,000 acre-feet cap; implement the permit minimums; and conduct equal percentage reduction, if necessary, to meet the 400,000 acre-feet cap (pursuant to, *inter alia,* §§ 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20, 1.21, and 1.44 of the Act). The rules are designed to comply with these express requirements of state law and not exceed them. There are no other "express requirements of state law" which could be exceeded by these rules.

Third, the Subchapter G rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the Subchapter G rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia,* §§ 1.08(a), 1.11(a) and (b), 1.14, 1.15, 1.16, 1.18, 1.19, 1.20, 1.21, and 1.44 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; require various types of permits for certain withdrawals; limit permitted withdrawals to achieve the caps and protect the aquifer; proportionately adjust, if necessary, to meet the 450,000 acre-feet cap; implement the permit minimums; and conduct equal percentage reduction, if necessary, to meet the 400,000 acre-feet cap. For these reasons, it is not necessary to perform a RIAMER on the Subchapter G rules.

Analysis of Subchapter I

The Act requires the Authority to impose and enforce a number of restrictions, limitations and other requirements upon the use of water from the aquifer. The Subchapter I rules of 31 TAC,- §§ 711.220-711.234 (the "Subchapter I Rules") impose a number of prohibitions on aquifer use, including: requiring water withdrawn from the aquifer to be used within the Authority's boundaries; limiting withdrawals from new wells; requiring permits for most withdrawals and well construction; requiring registration of exempt wells; requiring compliance with the Act, the Authority's rules and the terms of Authority permits; and prohibiting waste or pollution of the aquifer.

The Authority has determined that §§711.222, 711.224, 711.230, and 711.232 have the specific intent to protect the environment and are, therefore, probably MERs. The other Subchapter I rules do not have the specific intent to protect the environment or reduce risks to human health from environmental exposure and are, therefore, not MERs.

However, no RIAMER need be prepared for any of the Subchapter I rules because none of them meet any of the criteria listed in APA § 2001.0225(a)(1)-(4). First, the rules in Subchapter I do not exceed a standard set by federal law. The only reasonably related federal law establishes the Sole Source Aquifer Program implemented by the EPA. There is no federal law that specifically imposes restrictions akin to those in the Subchapter I rules. Therefore, the Subchapter I rules do not exceed a standard set by federal law. Moreover, even if the rules did exceed a standard set by federal law, the rules are specifically required by the Act, a state law which requires the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits, manage withdrawals and points of withdrawals from the aquifer; limit withdrawals from new wells; prohibit transfers of water outside the Authority's boundaries; require compliance with permits, the Act, and Authority rules; and prohibit waste and pollution of the aquifer (pursuant to, *inter alia* 1.08(a), 1.11(a) and (b), 1.14(e), 1.15(a), 1.34(a), and 1.35 of the Act).

Second, the Subchapter I rules do not exceed an express requirement of state law. Instead, the rules are designed to carry out the Authority's statutory responsibility to: manage, conserve, preserve and protect the aquifer, adopt rules to carry out its powers and duties under the Act, regulate permits; manage withdrawals and points of withdrawals from the aquifer, limit withdrawals from new wells, prohibit transfers of water outside the Authority's boundaries, require compliance with permits, the Act, and Authority rules, and prohibit waste and pollution of the aquifer (pursuant to, *inter alia* §§ 1.08(a), 1.11(a) and (b), 1.14(e), 1.15(a), 1.34(a), and 1.35 of the Act). The rules are designed to comply with these express requirements of state law and not exceed them. Other than the Act, there are no other "express requirements of state law" which could be exceeded by these rules.

Third, the Subchapter I rules do not exceed a requirement of a delegation agreement or contract between the State of Texas and an agency or representative of the federal government to implement a state and federal program. The subject matter of the rules is not covered by any delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program.

Fourth, the Subchapter I rules would not be adopted solely under the general powers of the Authority instead of under a specific state law. While these rules are adopted in part under the Authority's general powers, they are also adopted under the Act, a specific state law regarding the Edwards Aquifer. In particular, the rules are adopted pursuant to, *inter alia,* §§ 1.08(a), 1.11(a) and (b), 1.14(e), 1.15(a), 1.34(a), and 1.35 of the Act, which require the Authority to, among other things: manage, conserve, preserve and protect the aquifer; adopt rules to carry out its powers and duties under the Act; regulate permits; manage withdrawals and points of withdrawals from the aquifer; limit withdrawals from new wells; prohibit transfers of water outside the Authority's boundaries; require compliance with permits, the Act, and Authority rules; and prohibit waste and pollution of the aquifer. For these reasons, it is not necessary to perform a RIAMER on the Subchapter I rules.

IV. TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT.

Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act" ("TPRPRA"), requires governmental entities, under certain circumstances, to prepare a TIA in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of these rules.

First, the Authority has made a "categorical determination" that these Chapter 711 rules do not affect vested property rights and, as such, adoption of these rules is not an action that "may result in a taking." The rules at issue here implement a permitting program for the withdrawal of water from the Edwards Aquifer. The Act requires the Authority to implement a permitting system whereby existing users and other potential users of aquifer water may apply for and receive permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. Other types of permits are also required by the Act for well construction and related work. Certain other withdrawals are exempted by the Act from permitting requirements. The Act also specifies an interim authorization period prior to the issuance by the Authority of final permits during which certain existing users of the aquifer may continue to make withdrawals. The Act imposes a number of restrictions upon the use of the aquifer during the interim authorization period as well as after permits are issued. It also places limits on the ability to transfer permitted or interim authorization rights. These rules are intended to effectuate these various components of the Act.

TPRPRPA makes it clear that a TIA need only be performed when the proposed governmental action is one that "may result in a taking." See id., §§ 2007.043(a), 2007.041(a), 2007.042(a). If an action is one that has no potential to result in a taking, then no TIA need be performed. Adoption of the rules at issue here is not an action that "may result in a taking" for two reasons. The rules cannot result in the taking of a vested private real property right. Traditional takings doctrine dictates that, in order to constitute a compensable taking, the property right alleged to have been "taken" must rise to the level of a vested right. Prior to the adoption of the Act, a landowner's right to pump groundwater underlying his or her property derived from the common law English Rule, also known as the "Rule of Capture." The rules implement a permitting structure which is admittedly at odds with the Rule of Capture. However, a landowner's common law Rule of Capture right does not rise to the level of a vested property right. Under the common law, water underlying a landowner's property may be reduced to possession by the pumping of another. In other words, a landowner has no right to exclude others from the water underlying his land. As such, the landowner's expectancy of water does not rise to the level of a vested property right which could be "taken" by the passage of these rules and passage of these rules is not an action that may result in a taking.

Additionally, with respect to Edwards Aquifer water, any common law rights a landowner may have had in the past have been effectively abolished by the Legislature within the boundaries of the EAA by the passage of the Act. Under the old common law, a landowner was essentially free to drill a well and pump as much water as he pleased for whatever use and location of use he pleased. Passage of the Act changed the rules within the boundaries of the EAA. The basis for the right to withdraw groundwater under the Act changed from being an incident of the ownership of land to one based on use during the statutorily-defined "historical period." See Act § 1.16. Excluding "exempt" wells, a landowner must now obtain a permit prior to drilling a well and making withdrawals, and this permit may be issued only if there is "water available for permitting" or if certain aquifer conditions are met. Id. §§ 1.14, 1.15, 1.16, 1.18 and 1.19. The rate and total quantity of withdrawals are subject to limitation. Id. § 1.15(d). Regulation under the Act leaves no room for the common law to operate within the boundaries of the EAA with respect to Edwards Aquifer groundwater. As a result, there are no vested property rights which could be taken by the passage of these rules and no TIA need be prepared.

Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(4) of the Texas Government Code. See §§ 1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act, §§ 36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code, and § 2001.004(1) of the APA.

This conclusion is directly supported and controlled by the decision in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d. 375, (Tex. App. San Antonio 2000, pet. filed) (*"EAA v. Bragg"*). In that case, the Plaintiffs sued to invalidate a set of rules adopted by the Authority (the "prior permitting rules") which were substantially similar to these rules and which were designed, like these rules, to implement the Authority's permitting program. The Fourth Court of Appeals held that the Authority's adoption of its prior permitting rules was expressly mandated by the Act and was therefore excepted from the operation of TPRPRPA. The holding in that case controls here.

Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Fourth, it is the position of the Authority that the adoption of these rules constitutes an action taken by a governmental entity to "to prohibit or restrict a condition or use of private real private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state." Texas Government Code Annotated, § 2007.003(b)(6).

Fifth, it is the position of the Authority that the adoption of these rules constitutes an action which: "(A) is taken in response to a real and substantial threat to public health and safety; (B) is designed to significantly advance the health and safety purpose; and (C) does not impose a greater burden than is necessary to achieve the health and safety purpose." Texas Government Code Annotated, § 2007.003(b)(13). Accordingly, for the reasons stated above, a TIA need not be performed in connection with the proposal of these rules.

V. SUMMARY OF PUBLIC COMMENTS.

Five public hearings were held on the Chapter 711 rules and other rules proposed by the Authority on: Wednesday, August 9, 2000, at 6:00 p.m. at the Conference Center of the Edwards Aquifer Authority, 1615 N. St. Mary's Street, San Antonio, Texas; Tuesday, August 15, 2000 at 6:00 p.m. at the New Braunfels Civic Center, 380 S. Seguin Avenue, New Braunfels, Texas; August 17, 2000 at 6:00 p.m. at St. Paul's Lutheran Church, 1303 Avenue M, Hondo, Texas; Tuesday, August 22, 2000 at 6:00 p.m. at the Sgt. Willie De Leon Civic Center, 300 E. Main Street in Uvalde, Texas; and Thursday August 24, 2000 at the San Marcos Activities Center, 501 E. Hopkins, San Marcos, Texas.

At those hearings, public comments were received on the proposed Chapter 711 rules. In addition, written comments were received from members of the public regarding Chapter 711. The public comment period closed on September 11, 2000. Oral and/or written comments were provided by Inland Ocean, Inc. ("Inland"); Fulbright & Jaworski, L.L.P. on behalf of Vulcan Materials Co. ("Vulcan"); San Antonio Water System ("SAWS"); Earl & Brown ("Earl & Brown"); Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P. on behalf of the Texas Farm Bureau ("TFB"); Vinson & Elkins, L.L.P. ("V&E"); Edward G. Vaughan ("Vaughan"); Howard M. Schirmer ("Schirmer"); Bexar County Water Control and Improvement District No. 10 ("BCWCID"); W. M. Menard, Sr. ("Menard"); Howard B. Shadrock ("Shadrock"); Robert Grossenbacher ("Grossenbacher"); Verstraeten Bros. Farms, Inc. ("VBI"); Denis Zinsmeyer ("Zinsmeyer"); Cemex USA Construction, Inc. ("Cemex"); Steve Kosub ("Kosub"); Kirk Patterson ("Patterson"); City Public Service of San Antonio, Texas ("CPS"); Bexar County Farm Bureau ("BCFB"); Medina County Farm Bureau ("MCFB"); Gilliam Ranch and Gregory and Cora Rothe ("Gilliam and Rothe"); Bragg Pecan Farms, Inc. ("Bragg"); Dietrich J. Gembler III ("Gembler"); Tracy King ("King"); JoLynn Bragg ("Ms. Bragg"); Maurice Rimkus ("Rimkus"); Lawrence Friesenhahn ("Friesenhahn"); Rodney Reagan ("Reagan"); Richard Frenzel ("Frenzel"); Thomas Taggert on behalf of the City of San Marcos ("Taggert"); Russell Johnson, on behalf of SAWS ("Johnson"); Herb Faseler ("Faseler"); Suzanne (last name unknown) on behalf of East Medina County Special Utility District ("Suzanne"); Paul Aelvoet ("Aelvoet"); John (last name unknown) ("John"); and the Texas Department of Agriculture ("TDA").

While the commenters generally did not express support or opposition to adoption of the rules as a whole, they did, as discussed more fully below, suggest changes to and/or opposition to certain portions of the rules.

Section 711.1(2)

Vulcan commented upon § 711.1(2), which, as proposed, states:

(2) Existing user-A person or the successor in interest of a such person, who, on June 1, 1993, owned an existing well from which groundwater from the aquifer had been withdrawn and placed to beneficial use during the historical period.

Vulcan maintains that one need not be the well owner in order to be an "existing user," and that lessees, assigns, and easement holders should be considered "existing users" thereby entitled to ownership of initial regular permits. Vulcan further contends that ownership interests of lessees, easement holders, and other assignees may be limited in time, place of use, or purpose. Accordingly, while Vulcan does not seek any amendment to the definition of "existing user" in § 711.1(2), it seeks to add a definition in § 711.1 which would define "owned an existing well" to include those who are lessees, assignees, easement holders or others with a legal right to withdraw water from an aquifer well.

Authority staff received the above-referenced comment and disagrees with it. The basis for this determination is as follows. The *sine qua non* of an "existing user" is ownership of the point(s) of withdrawal (i.e. well(s)) from which the withdrawals are made during the historical period. It is correct that the Court in *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 n.3 (Tex. 1996) stated as follows:

This holding does not necessarily limit the definition of 'user' to individuals owning land. Under some circumstances, an entity that does not own the land or the well may be considered a "user" if the entity had some right to withdraw water.

The Authority does not necessarily disagree with this *dicta* of the Court. However, this discussion is not applicable to the definition of "existing user." There is a distinction between an "existing user" and a mere "user" of the aquifer. First, the Court noted that the term "user" was not defined by the Act. The term "existing user" is defined by the Act. See § 1.03(10). Second, the Court was careful to preserve this distinction in the above-cited footnote. Third, the discussion of "user" in footnote 3 was in relation to the nature of the "use" of groundwater from the aquifer and whether the "use" runs with the landowner personally, or with the land, and did not concern the issue of whether a mere "user" who owned no well could qualify as an "existing user." The Court stated as follows:

The Act does not define 'user' and does not specify whether the use of water runs with the land. It is therefore unclear whether a 'user' includes prior and future owners of the land, or whether a 'user' is only the landowner in possession of the land at the time a permit is requested (i.e. when the declaration of historical use is on file on or before December 30, 1996).

A review of the Act also shows that an "existing user" must own the well upon which the declaration for historical use is based. For example, § 1.17(a) makes clear that interim authorization status only extends to persons owning non-exempt producing wells. Further, in numerous sections the Act makes reference to the owner of a well having certain rights and duties, thereby confirming that proper applicants for initial regular permits must be the well owners. See §§1.03(21)(E) and (F) (relating to the definition of waste); 1.16(b) (evidentiary obligation of owners of irrigation wells); 1.16(c) (owners of exempt wells not required to file declarations of historical use); 1.17(a) (owners of producing wells may continue to withdraw under interim authorization); and 1.31(a) (owners of nonexempt wells).

In light of the above discussion, Authority staff has not modified § 711.1(2) and has not added a new definition of "owned an existing well" in §711.1 as suggested by Vulcan.

Section 711.1(5)

SAWS submitted comments regarding § 711.1(5) of the proposed rules. SAWS requests a clarification of the definition of "producing well." SAWS recommends § 711.1(5) read :

(5) Producing well- A well from which groundwater from the aquifer is capable of being withdrawn for a beneficial use.

SAWS does not explain the basis for this suggested change.

Authority staff received the above-referenced comment and agrees with it. The basis for this determination is that if a well is incapable of withdrawing water for beneficial use it is most likely an abandoned well. The Authority believes it is reasonable to treat all non-abandoned wells which are capable of withdrawing aquifer water as "producing wells." In light of the above discussion, Authority staff has modified §711.1(5) as suggested by SAWS.

Section 711.1(6)(E)

Earl & Brown submitted an unintelligible comment on a portion of the proposed definition of "waste" in § 711.1(6)(E).

Because the comment is unintelligible, no response is required by the Authority.

An unidentified speaker commented on § 711.1(6)(E) which defines, in part, "waste." The commentator stated that while the Authority holds agricultural producers accountable for waste, the rules only contain one minor rule regarding the waste that results from altered springflow. He feels the proposed rules are too focused on agriculture.

The Authority disagrees with this comment. The basis for this determination is as follows. The definition found in §711.1(6)(E) closely tracks the statutory definition found in § 1.03(21) of the Act. Further, the language of the definition is not in any way limited to agriculture, but applies to any practice that may result in waste. In light of the above discussion, the Authority has declined to revise § 711.1(6)(E).

Section 711.1(6)(J)

Bragg and Ms. Bragg commented on the definition of waste contained in §711.1(6)(J). They appear to support the definition agreeing that water use in an amount that is insufficient for crop production constitutes waste. Instead of recommending revisions to § 711.1(6)(J), they appear to recommend that each existing irrigation user be guaranteed a minimum of 2 acre-feet of water for seasonal crop irrigation or, for permanent crops such as pecans which allegedly have greater water requirements, that each existing irrigation user be guaranteed a minimum equal to whatever amount is necessary to complete a crop cycle. In order to make this feasible, Bragg suggests the Authority raise the 450,000 acre-feet withdrawal "cap" by 0.3% to account for all pecan farmers.

Authority staff received the above-referenced comments and agrees that water use which is insufficient for crop production constitutes waste. The Authority disagrees with the remainder of the comments. The Act is prescriptive regarding the calculation of maximum historical use, average historical use, and two acre-feet per irrigated acre in any one year during the historical period from 1972 to 1993. Irrigators of commercial pecan orchards, while entitled to at least a two acre-feet minimum, can receive a permit for more than two acre-feet if evidence of groundwater withdrawal from the aquifer, during the historical period, demonstrates that their historical average minimum exceeds two acre-feet per acre per year. The Authority, however, does not believe it has the statutory authority to increase the statutory irrigator minimum to an amount in excess of two acre feet per year. Further, the Authority does not believe that, at this time, it would be justified in raising the 450,000 acre-feet withdrawal "cap." Section 1.14(b) of the Act mandates that, until December 31, 2007, permitted withdrawals may not exceed 450,000 acre-feet of water per year. The chapter 711 rules are written to implement this 450,000 acre-feet cap. It is true that § 1.14(d) of the Act allows the Authority to, under limited circumstances, raise this cap. This can be done, however, only under very limited circumstances. Before determining that the cap may be raised, the Authority must first, through studies and implementation of various water management strategies, determine that additional supplies are available from the aquifer. The Authority must also undertake consultations with appropriate state and federal agencies in order to raise the cap. At this time, the Authority does not believe it has adequate data nor does it believe that sufficient water management strategies have been implemented or adequate consultations have taken place in order to justify raising the cap. While the Authority may, at some future date, attempt to raise the cap, it declines to do so at this time. In light of the above discussion, Authority staff has declined to modify § 711.1(6)(J).

Earl & Brown, on behalf of their clients, commented upon proposed rule § 711.1(6)(J), which defines "waste", in part, as:

Irrigation use of groundwater from the aquifer in a volume per irrigated acre that is so insufficient that a crop could not have been reasonably cultivated and produced.

Earl & Brown seeks the deletion of this item, arguing that there is no basis for it in the Act, and that the language is confusing and ambiguous.

The Authority disagrees with this comment. The basis for this determination is as follows. The Act delegates to the Authority broad discretion to limit waste of water, protect the aquifer, and maximize the beneficial use of water from the aquifer. See, e.g., Act §§ 1.08(a) and 1.14(a). It is true that § 1.16(e) of the Act provides that existing irrigation users may receive a permit for

not less than two acre-feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period. However, § 1.16(d)(2) dictates that groundwater first be beneficially used before it can qualify for the statutory irrigator minimum in § 1.16(e). The use of a quantity of aquifer water in a volume per acre that is insufficient to reasonably cultivate and produce a crop does not constitute a beneficial use and is, therefore, wasteful. The definition in § 711.1(6)(J) implements this beneficial use requirement. In light of the above discussion, the Authority has declined to revise § 711.1(6)(J).

Section 711.12(a)(4)

As proposed, rule § 711.12(a)(4) states that any person wishing to "install, equip, complete, alter, operate, or maintain a well pump installed or to be installed on a well designed for the withdrawal of groundwater from the aquifer" must first obtain a permit from the Authority. SAWS commented that the first word of this section, "install," is confusing and redundant of the later phrase "installed or to be installed" and suggests that it be deleted.

Authority staff agrees with the comment. The basis for this determination is that the word "install" is arguably synonymous with equip and is confusing because it is redundant in light of the phrase "installed or to be installed." In light of the above discussion, Authority staff has modified § 711.12(a)(4).

Sections 711.20 and 711.32

V&E commented upon proposed rules §§ 711.20 and 711.32 which are not a part of these proposed rules and which, therefore, require no response by the Authority.

Section 711.94(c)

SAWS commented upon proposed § 711.94(c). SAWS seeks clarification that a contract user only has a right to receive a permit if specifically granted by contract. SAWS proposes that the section read:

(c) Unless otherwise provided by contract, the beneficial use of groundwater by a contract user may only be claimed by a prior user or existing user in support of a declaration.

The Authority supports this suggested revision and will revise the rule. The revision clarifies the intent of the rule, which is to identify the appropriate users who may claim beneficial use by contract users. It also makes clear the Authority's conclusion that contract users may not themselves claim historical use and obtain an initial regular permit.

Section 711.94(d)

Both Earl & Brown and Faseler commented upon proposed §711.94(d), which states:

Irrigation use of groundwater from the aquifer in the volume of two acre-feet per irrigated acre is rebuttably presumed to constitute beneficial use without waste.

Earl & Brown proposes changing the word "rebuttably" to "irrebuttably." Faseler, on the other hand, believes the percolation rate should be used to determine how water is to be applied, not as a regulation.

The Authority disagrees with these comments. The purpose of including the phrase "rebuttably presumed" in the rule is not to affect the process by which irrigators are issued permits or to affect the eligibility of an irrigator for the statutory two acre-feet irrigator minimum. Instead, it is intended to facilitate the Authority's ability to prevent waste by irrigators once permits have been issued. Not all irrigation practices necessitate the use of two acre-feet of water per acre per year, nor are irrigators any more exempt than any other aquifer users from the requirement that aquifer water be beneficially used and not wasted. It is possible that an irrigator's practices may be wasteful even if his rate of use is below two acre-feet per acre per year. In that event, the Authority believes it needs to retain the right to rebut the presumption that usage of two acre-feet is not wasteful.

Section 711.96(b)(1)

Vaughan commented on proposed rule § 711.96(b)(1), which states:

(b) An Application for a groundwater withdrawal permit for a well that withdraws groundwater from multiple aquifers, including the Edwards Aquifer, may be granted by the board in an amount that does not exceed:

(1) for irrigation use, the pro rata share of the number of acres beneficially irrigated with the volume of aquifer water withdrawn from the well based on the percentage of aquifer water produced from the well, multiplied by two acre-feet; or. . .

Vaughan claims the Act provides existing irrigation users/ applicants "shall receive a permit for not less than two acre feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period." Vaughan relays the calculation for historical users which he states gives such users a permit for "at least the average amount of water withdrawn annually during the historical period." Vaughan argues the legislative intent mandated irrigation permits of two acre feet per year based only upon the number of irrigated acres during the historical period.

The Authority disagrees with this comment. Based upon § 1.16(d)(2) of the Act, there is a statutory requirement that irrigation water must be beneficially used and not wasted. This necessarily means that the volume of groundwater applied to the land for irrigation purposes must be in sufficient minimum quantities to reasonably cultivate and produce a crop and thereby constitute beneficial use.

Pursuant to § 1.08(b) of the Act, the Authority has jurisdiction only over "groundwater within or withdrawn from the Edwards Aquifer." Thus, the Authority has no statutory authority to issue an initial regular permit for the irrigation of land by non-Edwards Aquifer water. Notwithstanding the rule, permit applicants or permit holders remain free to pump groundwater from aquifers other than the Edwards without any restrictions from the Authority.

Sections 711.172 - 711.176

Edward G. Vaughan generally protests proposed rules §§ 711.172 through 711.176 to the extent that they endeavor to limit the permit amount to below the supposed statutory minimum of two feet per acre. Vaughan cites § 1.16 of the Act and legislative intent as mandating that irrigators shall not receive a permit for less than two acre feet for each acre of land actually irrigated in any one calendar year during the historical period.

Authority staff received the above-referenced comment, and disagrees with it. The reasons for this disagreement are found in response to other comments to §711.172 and §711.176 below.

Section 711.96(b)(1)

Earl & Brown commented on proposed rule §711.96(b)(1). While the comment is difficult to interpret, Earl & Brown appears to be concerned that the wording of this provision improperly results in

a double reduction of the permit amount. Earl & Brown suggests that the permit amount should be calculated by multiplying the total acreage irrigated times the percentage of Edwards Aquifer water produced times two acre-feet per acre.

The Authority agrees with the method of calculation suggested by Earl & Brown and states that it is consistent with the intent of the rule as originally proposed. In light of the comments, the Authority staff has modified §711.96 (b)(1) to clarify the wording of the method by which the permit amount for multiple aquifer wells is calculated to be consistent with this intent.

Section 711.96(b)(1) and (b)(2)

SAWS commented on proposed rule § 711.96(b)(1) and (b)(2), concurrently. SAWS, in order to clarify that only production of Edwards groundwater is at issue in the case of a commingled well, asks that the sections read:

(b)(1) ...based on the percentage of Edwards Aquifer water produced from the well,... and

(b)(2) ...actual amount of groundwater from the Edwards Aquifer.

Authority staff received the above-referenced comment, and agrees that only production of Edwards groundwater is at issue in the case of a commingled well. However, no amendment to these rules is necessary because "aquifer" is defined in Authority §702.1(b)(6) as "the Edwards Aquifer . . . ". In light of the above discussion, Authority staff has not modified §711.96 (b)(1) and §711.96 (b)(2) .

Section 711.96(b)(2)

Earl & Brown, on behalf of their clients, commented on proposed §711.96 (b)(2), which states:

(b) An application for a groundwater withdrawal permit for a well that withdraws groundwater from multiple aquifers, including the Edwards Aquifer, may be granted by the board in an amount that does not exceed: . . .

(2) for non-irrigation use, the actual amount of groundwater from the aquifer.

Earl & Brown claims the rule needs to be clarified to stipulate that the water withdrawn from the aquifer must be beneficially used.

Authority staff received the above-referenced comment, and agrees with it. The Authority notes that all withdrawals of groundwater from the aquifer are subject to the continuing duty to be placed to beneficial use. However, the Authority agrees that it is useful to reemphasize that principle in this rule. In light of the above discussion, Authority staff has modified §711.96 (b)(2).

Proposed Counterpart to § 711.96 for Edwards Water Commingled with Surface Water

SAWS proposes adding a new section similar to §711.96 which would address the situation of Edwards Aquifer water commingled with surface water before being put to a beneficial use.

Authority staff received the above-referenced comment, and agrees that such a rule may be worth considering. Under the procedural requirements of the APA, however, the Authority is limited in its ability to adopt new rules without first providing notice and an opportunity for the public to comment upon those rules. Therefore, the Authority declines to create such a rule at this time, but may consider such an option in future rulemaking efforts.

Further, Authority staff disagrees the change is entirely necessary because this fact situation is already covered by other rules. For example, in Section 711.1(6)(J) the definition of "waste" includes that if the well is too small to irrigate the claimed acreage with sufficient enough water to successfully raise a crop, then use of that water is per se waste. In evaluating the applications the staff will reduce the acreage for which an initial regular permit is issued to the amount that can reasonably be supported by the well.

Section 711.98(e), (f), and (g), §711.100

Section 711.98(e) states that initial regular permits may be retired in accordance with the following rules of the Authority: (1) the Springflow Maintenance Rules of Subchapter G of Chapter 715; (2) the equal percentage reduction rules of Subchapter G of Chapter 711; or (3) the regular permit retirement rules of Subchapter H of Chapter 715. Subchapters G and H of Chapter 715 have yet to be adopted by the Authority. SAWS objects to specifically identifying these Subchapters in favor of a more generic approach stating that permit may be retired in accordance with "future rules adopted by the Authority."

SAWS makes similar suggestions for §711.98(f) and (g), which identify rules by which initial regular permits may be suspended or interrupted, respectively. SAWS also suggests similar changes in § 711.100.

The Authority disagrees with these comments. The level of detail in the rules as proposed is greater than that suggested by SAWS. The Authority believes it is preferable to identify, as much as possible, the circumstances by which permits may be retired, suspended or interrupted and the location of the applicable rules. The fact that these rules will be developed at a future date does not diminish the need to provide the public with notice of the proposed location of the relevant rules.

Section 711.98(g)(3)

As proposed, § 711.98(g)(3) provides as follows:

(g) If in effect, initial regular permits may be interrupted in accordance with the following rules: ...

(3) the springflow maintenance rules pursuant to Subchapter G (relating to Springflow Maintenance Rules) of Chapter 715 (relating to Comprehensive Water Management Plan Implementation).

Bragg's comments express opposition not at this particular rule, but at the substance of any future springflow maintenance rules which might be adopted by the Authority. Bragg recommends that the Authority evaluate further the effect of groundwater use restrictions and their effect on springflows, with particular attention to: 1) quantifying the effects of water use restrictions imposed long distances from the springs on actual springflows; and 2) assessing springflow augmentation to protect endangered species dependent upon springflows.

The Authority declines to delete or revise § 711.98(g)(3) in response to this comment. All initial regular permits will likely be subject to at least some degree of spring flow maintenance rules pursuant to Chapter 715, Subchapter G of this title (relating to Springflow Maintenance Rules; Comprehensive Water Management Plan Implementation). The Authority believes it is appropriate to give the regulated community advance notice of that fact via § 711.98(g)(3). § 711.98(g)(3) does not itself set forth the substantive springflow maintenance rules. Instead, it merely provides a reference to those rules. The Authority acknowledges,

however, that the issues raised by Bragg, regarding the substance of what the springflow maintenance rules should require, are relevant for consideration at the time those rules are drafted and considered for adoption. In light of the above discussion, Authority staff has not modified § 711.98(g)(3).

Section 711.98(i)

As proposed, § 711.98(i) states: "Initial regular permits may be canceled pursuant to Subchapter H of this Chapter (relating to Abandonment and Cancellation)." While SAWS appears, in the abstract, to acknowledge the need to cancel certain permits through the abandonment and cancellation process, SAWS also states that it needs to obtain pumping rights to be held in reserve for future use. Because SAWS is concerned about having such unused rights canceled by the Authority, it proposes deletion of § 711.98(i). SAWS also comments that unused rights serve a conservation purpose.

The Authority declines to delete § 711.98(i) in response to this comment. Section 1.16(g) of the Act provides that, once issued, initial regular permits remain in effect "until the permit is abandoned, cancelled, or retired." The Authority believes it is appropriate to give the regulated community advance notice of the limitations of initial regular permits and the circumstances under which such permits may be canceled. Further, § 711.98(i) does not set forth the substantive rules regarding when cancellation may take place. Instead, it merely provides a reference to those rules.

Section 711.98(j)(1)

Schirmer commented on rule § 711.98 (j)(1), which states, in part:

(j) . . . The board shall grant an application for an initial regular permit if the following elements are established by convincing evidence: . . .

(1) the applicant filed a declaration on or before December 30, 1996;. . .

Schirmer claims that, roughly 100 years ago, the owner of Comal Springs manually enhanced the flow of the springs. He claims that the current owner of Comal Springs was required to file a declaration on or before December 30, 1996 in order maintain this allegedly enhanced springflow. Having failed to do so, Schirmer apparently contends that flow at Comal Springs should be restricted by the Authority.

The Authority disagrees with the comment. Without even addressing the factual allegations raised by Schirmer, the Authority does not believe that a permit is required for springflows at Comal Springs. A primary objective of the Act is to preserve and protect springflows and the species which depend upon those springflows. This objective would be undermined by ordering the restriction of such springflows. Finally, the entire permitting structure, embodied in the Act, applies to withdrawals from the aquifer made by wells, not to natural springs. In light of the above discussion, Authority staff has not modified § 711.98 (j)(1).

Section 711.98(j)(12)

As proposed, § 711.98(j)(12) reads, in part:

. . . The board shall grant an application for an initial regular permit if the following elements are established by convincing evidence: . . .

(12) the well(s) does not qualify for exempt well status; . . .

Earl & Brown proposes that paragraph (12) should revised to read: "the well is not registered as an exempt well." Earl & Brown reasons that an owner of an exempt well may choose to apply for and receive a permit based upon his historical pumpage even though he could have otherwise foregone the permit process and simply operated his well as an exempt well.

The Authority disagrees. The Act makes it clear that wells which qualify as exempt are therefore exempt from the permitting requirement and the 450,000 and 400,000 acre-feet withdrawal caps. See §§ 1.14(b) and (c), 1.15(b), 1.16(c), and 1.33. In other words, no permit may be issued for such wells. A well that qualifies for exempt well status, and is therefore required to register as an exempt well, cannot simultaneously or alternatively be a permitted well. Exempt status derives from the purpose of use, location of the point of withdrawal, and well production capacity. Exempt well rights are not transferrable because they derive from the land where the well is located and the purpose of use. Issuance of a permit for an exempt well, as desired by Earl & Brown, would lead to results which are administratively absurd and were not intended by the Legislature. For example, the owner of an exempt well who chose to obtain a permit for that well ("Mr. X") could arguably transfer (sell) the permit to another landowner ("Mr. Y"). Mr. Y could then make withdrawals based upon the transferred permit apparently without regard to whether his use qualifies as exempt. However, even though he no longer owns a permit, Mr. X could continue to make exempt withdrawals from his well, assuming he met the criteria in § 1.33 of the Act. The result would be a doubling of the rights to withdraw aquifer water based upon the same historical use -- a result which could not have been intended by the Legislature when it passed the Act. In light of the above discussion, Authority staff has not modified §711.98(j)(12).

Section 711.98(k)

SAWS asked that § 711.98(k) be modified to read:

The board shall issue withdrawal amounts to an applicant for an initial regular permit pursuant to § 711.176 (relating to Groundwater Withdrawal Amount for Initial Regular Permits: Compensation for Step-Up Amounts) or as modified by 711.180 of this title (relating to Voluntary Waiver of Applications for Initial Regular Permits) of this chapter.

The Authority agrees with this comment and revises the rule accordingly. Section 711.180 authorizes the Authority to enter into agreed orders waiving all or a portion an applicant's claimed maximum historical use, PA amount, step up amount, base irrigation groundwater or unrestricted irrigation groundwater claimed in or proposed in a permit application. Thus, an applicant's ultimate permit amount may be affected by such an agreed order, and it is appropriate to acknowledge the effect § 711.180 can have upon the board's permit calculations.

Sections 711.98 - 711.110

TFB submitted comments generally regarding §§ 711.98 - 711.110 of the proposed rules. TFB notes that all of these sections, as proposed, require that the Board grant an application for a permit if certain elements are established by "convincing evidence." TFB asserts that although the Board, via the Act, is required to grant an initial regular permit only after the applicant establishes by "convincing evidence beneficial use of underground water from the aquifer," the Act does not require that all elements be proven by convincing evidence. Additionally, TFB contends this standard is required only for initial regular permits and is inappropriate for other permits,

such as emergency or well-monitoring permits. Therefore, TFB suggests the "convincing evidence" burden of proof should only apply to proving beneficial use of groundwater for initial regular permits.

Authority staff received the above-referenced comment, and disagrees with it. The basis for this determination is that administrative efficiency and consistency is fostered by the uniform use of terminology applicable to the permitting process. In light of the above discussion, Authority staff has not modified §§ 711.98-711.110 .

Section 711.102(d)

Section 711.102(d) provides the circumstances under which withdrawals pursuant to term permits may be interrupted. BCWCID identified a typographical error and commented that §711.102(d)(2) should be revised to read:

If in effect, term permits shall be interrupted in accordance with the following rules: . . .

(2) for wells completed in the San Antonio pool and within Atascosa and Medina counties, well TD 69-47-306 is equal to or less than 685 feet above mean sea level:

This comment has been rendered moot by nature of the fact that the Authority has elected to delete §711.102(d)(2) as proposed.

Section 711.102(g)

Earl & Brown identified a typographical error in § 711.102(g), which, as proposed, read:

The board shall issue a groundwater withdrawal amount to an applicant for an term permit in the amount that is consistent with Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

Earl & Brown notes that the word "an" should be changed to "a."

The Authority staff agrees and has modified § 711.102(g).

Section 711.102(c)

Section 711.102(c) of the proposed rules states that term permits "are transferrable pursuant to Subchapter L (relating to Transfers) of this chapter." Subchapter L, which is in the process of being published as proposed rules, states that term permits are not transferrable except as to ownership. A mere transfer of ownership cannot alter the purpose of use, point of withdrawal, place of use or other permit characteristics. SAWS states that term permits should not be transferable and § 711.102(c) should make this fact clear. SAWS requests more clarity which would prevent a reader from having to reference another portion of the rules.

Authority staff received the above-referenced comment and agrees with it in part. The basis for this determination is that ownership is the only anticipated aspect of a term permit which may be transferred pursuant to Subchapter L (relating to Transfers) of this chapter. A mere transfer of ownership would not affect the term permit's purpose of use, point of withdrawal or place of use. In light of the above discussion, Authority staff has modified § 711.102(c) to read:

(c) Term permits are transferable only as to ownership, pursuant to Subchapter L (relating to Transfers) of this chapter.

Section 711.102(d)

As originally proposed, §711.102(d) identified the scenarios under which withdrawals pursuant to term permits may be interrupted. It identifies various index well levels as well as various rules which are not yet adopted by the Authority. SAWS objects to specifically referencing rules which are not yet adopted and instead favors a more generic approach of stating that term permits may be retired in accordance with "rules adopted by the Authority as allowed by § 1.14(f) and other sections of the Act." SAWS further objects to the use of index well TD 69-47-306 until "supporting hydrogeologic research under § 1.14(g) of the Act has been conducted."

The Authority disagrees with these comments. The level of detail in the rules as proposed is greater than that suggested by SAWS. The Authority believes it is preferable to identify, as much as possible, the circumstances by which term permits may be interrupted and the location of the applicable rules. The fact that these rules will be developed at a future date does not diminish the need to provide the public with notice of the proposed location of the relevant rules.

Similarly the Authority disagrees that additional hydrogeologic research is required before establishing additional index wells for any aquifer pool. Section 1.14(g) of the Act provides that additional index wells may be established for a pool (in this case, the San Antonio pool), if such additional index wells "aid the regulation of withdrawals from the pool." Nevertheless, the Authority has deleted §711.102(d)(2) as it was originally proposed and term permits will now only be interrupted based on index wells J-17 and J-27.

Section 711.102(f)(12), (g), and (h)

Section 711.102 deals with term permits and references and, in part, Chapter 715. SAWS objects to the references to Chapter 715 because those rules have not yet been adopted. SAWS proposes that § 711.102 be changed to read:

(f) The board shall grant an application for a term permit if the following elements are established by convincing evidence: . . .

(12) the proposed withdrawal of groundwater is consistent with the water available for permitting. . . .

(g) The board shall issue a groundwater withdrawal amount to an applicant for a term permit in the amount that is consistent with the water available for permitting.

(h) By January 15 of each year, the board by order shall determine the total quantity of groundwater that may be withdrawn from each pool of the aquifer for that calendar year pursuant to term permits. At any time by order of the Board this determination may be revised as appropriate based upon actual aquifer conditions.

Authority staff received the above-referenced comment and disagrees with it. The level of detail in the rule as proposed is greater than that suggested by SAWS. The Authority believes it is preferable to identify, as much as possible, the circumstances by which term permits shall be governed and the location of the applicable rules. The fact that these rules will be developed at a future date does not diminish the need to provide the public with notice of the proposed location of the relevant rules. In light of the above discussion, Authority staff has not modified §711.102(f)(12), (g) or (h).

Section 711.108(a)

Earl & Brown identified a typographical error in §711.108(a) which requires the addition of the word "the" as italicized below:

Any person proposing to perform any of *the* activities set forth in § 711.12(a)(2)-(5) of this title (relating to Activities Requiring a Permit) shall apply for a well construction permit.

The Authority staff agrees and has modified § 711.108(a) .

Section 711.108(c)

Earl & Brown and SAWS both commented upon rule §711.108(c) which states:

A well constructed pursuant to a well construction permit must be completed within 180 days of the issuance of the permit. The permit expires if the well has not been constructed within 180 days of the permit issuance. Upon expiration of the term, the permit automatically expires and is canceled.

Earl & Brown first asserts that confusion arises from the fact that the first sentence indicates the well must be "completed" within 180 days while the second sentence states the well must have been "constructed" within the 180 day period. Second, Earl & Brown proposes that the last sentence of § 711.108(c) be changed to read:

"Upon expiration of the term, in the event the permittee has not constructed/completed a groundwater withdrawal well within the term period, the permit then automatically expires and is canceled."

Due to the size and complexity of the large wells drilled by it, SAWS believes the 180-day period to construct a well should be lengthened to one year, with a mechanism in place to request extensions.

The Authority disagrees with the second comment from Earl & Brown. Upon the expiration of the term, and barring any extensions of the term by the Authority, a construction permit expires and is canceled regardless of whether the well has been completed or not.

The Authority agrees with the first comment from Earl & Brown. The Authority believes that the wording of the rule could be clarified by using the term "completed" consistently throughout.

The Authority also agrees with SAWS that there should be a mechanism for lengthening the 180-day term in response to special circumstances. Other commenters on the Chapter 707 rules, which were proposed concurrently with Chapter 711, have also pointed out that 180 days may, at times, be inadequate when there is a shortage or unavailability of water well drillers to construct a well. Accordingly, the Authority has revised § 711.108(c) to read:

A well constructed pursuant to a well construction permit must be completed within 180 days of the issuance of the permit. The permit term may be extended by one additional 180-day extension period by the general manager. In order to obtain such an extension, the holder of a well construction permit must submit a written request to the general manager explaining the need for the extension. If the holder of the well construction permit demonstrates a need for an extension and demonstrates that the permit holder's failure to complete the well within the original 180-day term is not due to the permit holder's own lack of diligence, then the general manager may authorize the extension. Upon expiration of the term, including any extension granted, the permit automatically expires and is canceled.

Section 711.108(d)(7)

SAWS and Earl & Brown identified a typographical error in §711.108(d)(7) which requires the revision of the word "beneficial" to "beneficially."

The Authority staff agrees and has modified § 711.108(d)(7) .

Section 711.108(d)(3)

Earl & Brown commented upon proposed rule §711.108(d)(3), which states:

"(3) the well head is or will be physically located within the boundaries of the authority;"

Earl & Brown suggests "authority" be changed to "Authority." The Authority agrees and will make the change .

Section 711.108(d)(5)

Earl & Brown commented upon proposed rule §711.108(d)(5). Earl & Brown suggests the word "aquifer," the last word in §711.108(d)(5), be capitalized to read "Aquifer."

The Authority disagrees and feels it is appropriate to refer to the aquifer in lower case.

Section 711.108(d)(6)

Earl & Brown commented upon proposed rule §711.108(d)(6), which provides that applications for well construction permits shall be granted if a number of conditions are established, including that "(6) the withdrawals are proposed to be placed to a beneficial use for domestic, livestock, irrigation, municipal, or industrial use; . . .".

Earl & Brown asserts this section would allow a well to qualify as an exempt well so long as the water is beneficially used for "domestic, livestock, irrigation, and municipal or industrial use," thereby expanding the definition of an exempt well, in conflict with the Act.

Authority staff received the above-referenced comment and disagrees with it. The basis for this determination is that §711.108(d)(6) has nothing to do with qualifying for exempt well status. Instead, it sets the criteria for granting a well construction permit. It does not expand the criteria for exempt wells. However, in order to provide additional clarity on this issue, the Authority has amended this section in order to more closely track the statutory definition for domestic or livestock use and to make other editorial changes. Accordingly, the section now reads:

(6) the withdrawals are proposed to be placed to a beneficial use for domestic or livestock use, irrigation use, municipal use, or industrial use;

Section 711.108(d)(9)

Earl & Brown commented upon proposed rule §711.108(d)(9) which identifies one of the required elements of a well construction application. The rules states:

(9) The quantity of groundwater the well would be capable of producing, if constructed, is consistent with the quantity of groundwater the applicant proposes to produce pursuant to exempt well status or pursuant to a groundwater withdrawal permit.

Earl & Brown comments that the provision should be clarified to mirror the language in the Act relating to exempt wells, found at § 1.33, which provides that a well producing 25,000 gallons of water a day or less for domestic or livestock use is exempt from metering requirements.

Authority staff received the above-referenced comment and disagrees with it. The basis for this determination is that a well with sufficient capacity to produce more than 25,000 gallons of water a day would require a meter to ensure it did not produce more than 25,000 gallons of water per day. By requiring that the well be constructed so that it is capable of only producing the quantity of groundwater the applicant proposes to produce for exempt status, the Authority ensures that the well does not exceed exempt well status and does not need a meter. In light of the above discussion, Authority staff has not modified §711.108 (d)(9).

Section 711.108(d)(11)

Earl & Brown commented upon proposed rule §711.108 (d)(11), which provides that applications for well construction permits shall be granted if a number of conditions are established, including that "(11) the proposed well construction and operation would not unreasonably negatively affect the aquifer or other permittees." Earl & Brown suggests that this provision be omitted because the term "unreasonably negatively affect the aquifer or other permittees" is vague, ambiguous, and inconsistent with the proposed rules. Earl & Brown argues that "unreasonably negatively" should not be used solely as a benchmark for exempt wells.

Authority staff received the above-referenced comment and disagrees with it. The basis for this determination is that §711.108(d)(11) provides a benchmark not only for exempt wells, but for the construction of any wells. It also provides protection for current aquifer users. The rule is consistent with the Authority's statutory duty to manage, conserve, preserve and protect the aquifer and its users. In light of the above discussion, the Authority has not modified §711.108(d)(11).

Section 711.108(d)(14)

Earl & Brown commented upon proposed rule §711.108(d)(14), which provides that applications for well construction permits shall be granted if a number of conditions are established, including that "(14) the application is in compliance with the Act;"

Earl & Brown suggests that, rather than making a general statement that "the application is in compliance with the Act," this provision should continue by listing what must be included in order for an applicant to be in compliance with the Act or, alternatively, incorporate requirements set forth in the Act.

The Authority disagrees. The requirements of the Act are set out in the text of the Act and are further developed in the text of the Authority's rules. To reincorporate these requirements into the confines of a single rule would result in needless duplication and confusion. Accordingly, the Authority declines to modify § 711.108(d)(14).

Section 711.108(d)(15)

Earl & Brown commented upon proposed rule §711.108(d)(15), which provides that applications for well construction permits shall be granted if a number of conditions are established, including that "(15) the application is in compliance with the rules of the Authority."

Earl & Brown suggests that, rather than making a general statement that "the application is in compliance with the rules of the Authority," this provision should continue by listing what must be included in order for an applicant to be in compliance with the rules.

The Authority disagrees. The requirements of the rules are set forth in the text of the Authority's rules. To reincorporate these requirements into the confines of a single rule would result in needless duplication and confusion. Accordingly, the Authority declines to modify § 711.108(d)(15).

Comment on Exempt Wells

Earl & Brown includes a "general comment" concerning whether and when, pursuant to § 1.33(c) of the Act, a well within or serving a subdivision requiring platting qualifies as exempt. This comment is not responsive to any of the Chapter 711 rules within this Final Order Adopting Rules. The Authority is in the process of publishing notice of its proposed exempt well rules. Earl & Brown is encouraged to comment on those rules at the appropriate time.

Section 711.112

Section 711.112 states that groundwater permits issued by the Authority "shall include" various components, including: "(13) The equal percentage reduction amount as calculated pursuant to §711.174 of this title . . . and subchapter H . . . of Chapter 715 of this title . . .; the amount that may be subject to restoration pursuant to § 711.172(h) of this chapter . . . and § 711.304 of the chapter . . . ." (Emphasis added.) SAWS recommends changing § 711.112 (13)to read:

(13) the amount that may be subject to restoration.

SAWS believes this change would add clarity to initial regular permits by identifying the permit amount that may be subject to restoration in the event that additional groundwater supplies become available for permitting.

Authority staff received the above-referenced comment and disagrees with it. The Authority believes that the rule already makes it clear that the "equal percentage reduction amount" is an "amount that may be subject to restoration" in the event that additional groundwater supplies become available for permitting, such as if the Authority raises the 450,000 or 400,000 acre-feet withdrawals caps. The Authority has declined to revise § 711.112 in response to this comment.

Section 711.112(17)

Section 711.112 states that groundwater permits issued by the Authority "shall include" various components, including: "(17) metering or alternative measuring method." SAWS asserts that permits will need to be reissued should a change in meters occur. This, according to SAWS, would be unnecessarily burdensome. SAWS suggests that the permit only have the "duty to meter" as a requirement and that meter registration be handled outside the permit process. SAWS requests that § 711.112(17) read:

(17) requirement to register meters or alternative metering method;

Authority staff received the above-referenced comment and disagrees. The basis for this determination is that the listing, required in § 711.112, merely identifies the issues that are to be addressed in all groundwater withdrawal permits issued by the Authority. The substantive issues raised in the rules do not direct the Authority on how to address the issues in a permit, but simply that the issues must be addressed. The Authority retains considerable flexibility in the permit drafting process regarding how to most effectively address each issue, required by this rule, to be a part of the permit. The Authority will draft its permits in such a way that permits need not necessarily be reissued upon meter changeouts. In light of the above discussion, Authority staff has not modified § 711.112(17).

Section 711.112(19)

Section 711.112 states that groundwater permits issued by the Authority "shall include" various components, including: "(19) conditions for suspension of withdrawals." SAWS believes permits should not able to be suspended, but rather limited, by future unwritten Authority rules. SAWS asserts that § 1.16(h) of the Act clearly recognizes permit limitations and only requires the Authority to notify permit holders "that the permit is subject to limitations." SAWS would have the rule read:

(19) conditions for limitation of withdrawals;

Authority staff received the above-referenced comment and disagrees with it. The basis for this determination is that the term "limitation" as used in § 1.16(h) of the Act is a generic term which encompasses several kinds of reduction strategies on a permittee's right to withdraw groundwater. These reduction strategies will be more fully developed in Chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation) and will include permit retirements, suspensions and interruptions. In light of the above discussion, Authority staff has not modified § 711.112(19) .

Section 711.112(21)

Section 711.112 states that groundwater permits issued by the Authority "shall include" various components, including: "(21) conditions for renewal." SAWS suggests that the rule read:

(21) conditions for renewal, if any;

The Authority received the above-referenced comment and agrees with it in concept. The basis for this determination is that not all groundwater withdrawal permits are renewable. Therefore, the Authority has modified § 711.112(21) as follows:

(21) conditions for renewal, if applicable;

Section 711.116

SAWS submitted comments regarding § 711.116 of the proposed rules which relates to the contents of well construction permits. SAWS states that before completion of a well, the withdrawal rate may not be known, but only estimated. Therefore, any limitations as to withdrawals are only appropriate for construction of exempt wells. SAWS maintains that all other wells would require transfer of permitted water rights before use. SAWS suggested that § 711.116 read:

(6) maximum estimated rate of withdrawal in gallons per minute;

(7) if an exempt well, restriction of production to 25,000 gallons of water a day or less for domestic or livestock use;

(8) ELIMINATE (8)

(16) any other appropriate conditions on the well construction as...

The Authority received the above-referenced comments and disagrees with them. The basis for this determination is that for enforcement purposes, the Authority is required to established clear and identifiable maximum or minimum parameters that must be met by permittees in order to be in compliance with a permit. The creation of compliance parameters based on estimated amounts would not provide the Authority with enforceable permit criteria. However, the Authority does recognize that the wording in §711.116(16) contains a typographical error which has been corrected.

Sections 711.130 and 711.134

TFB submitted comments regarding § 711.134, relating to Standard Conditions, of the proposed rules. Generally, TFB contends this section proposes standard permit conditions which the Authority intends to incorporate into every groundwater withdrawal permit. The section, according to TFB, is written in an awkward manner. TFB suggests the Authority re-write the section in an active voice as follows:

The Authority shall incorporate the following conditions into groundwater withdrawal permits: (1) The permittee shall comply with the requirements of Subchapter G of Chapter 713 of this title, relating to the construction operation, and maintenance of wells.

TFB maintains that, as presently written, the section is unclear as to who is to comply with the standard conditions. TFB has assumed that the permittee is to comply with the conditions and that the Authority will incorporate provisions similar to these in each permit. Additionally, TFB suggests the removal of the explanatory phrases in § 711.134(1), (2), (3), and (4) and replacing them in § 711.130. TFB believes these phrases in § 711.134 make the section cumbersome.

The Authority received the above-referenced comment and agrees with it. The basis for this determination is that the section would be more clearly understood by permittees. In light of the above discussion, Authority staff has modified § 711.130 and §711.134 to read:

Section 711.130 Purpose

The purpose of this subchapter is to establish the standard conditions required to be contained in a groundwater withdrawal permit issued by the authority for, among other things:

(1) the protection of the water quality of the groundwater of the aquifer;

(2) the protection of the water quality of the surface streams to which the aquifer provides springflow;

(3) the achievement of water conservation, and the maximization of the beneficial use of groundwater available for withdrawal from the aquifer;

(4) the protection of aquatic and wildlife habitat, and the protection of species that have been listed as threatened or endangered under applicable federal or state law; and

(5) the providing for instream uses, bays, and estuaries.

Section 711.134 Standard Conditions

Any groundwater withdrawal permit issued by the authority is subject to and the permittee shall comply with the following conditions:

(1) the construction, operation and maintenance of wells pursuant to subchapter C (relating to Well Construction, Operation and Maintenance) of chapter 713 of this title (relating to Water Quality);

(2) the abandonment and closure of wells pursuant to subchapter D (relating to Abandoned Wells; Well Closures) of chapter 713 of this title (relating to Water Quality);

(3) the spacing of wells pursuant to subchapter E (relating to Well Spacing) of chapter 713 of this title (relating to Water Quality);

(4) the installation, operation and maintenance of well fields pursuant to subchapter F (relating to Well Head Protection) of chapter 713 of this title (relating to Water Quality);

(5) the recharge of the aquifer pursuant to subchapter J of this chapter (relating to Aquifer Recharge, Storage and Recovery Project);

(6) taking no action that pollutes or contributes to the pollution of the aquifer;

(7) the beneficial use and utilization of groundwater withdrawn from the aquifer that is reused pursuant to subchapter I (relating to Reuse Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(8) not wasting groundwater within or withdrawn from the aquifer pursuant to subchapters E (relating to Permitted Wells) and I of this chapter (relating to Prohibitions);

(9) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to subchapter C (relating to Groundwater Conservation Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(10) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to subchapter D (relating to Demand Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(11) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to subchapter E (relating to Drought Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation) ;

(12) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to subchapter F (relating to Critical Period Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(13) the installation, operation and maintenance of meters and alternative measuring methods pursuant to subchapter M of this chapter (relating to Meters; Alternative Measuring Methods; and Reporting);

(14) the keeping and filing of reports pursuant to subchapter M of this chapter (relating to Meters; Alternative Measuring Methods; and Reporting), and any other applicable law or rule;

(15) the use of groundwater withdrawn from the aquifer only for an authorized beneficial use and without waste pursuant to subchapter E of this chapter (relating to Permitted Wells) and I (relating to Prohibitions);

(16) the retirement or interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to subchapter G (relating to Springflow Maintenance Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(17) proportional adjustment pursuant to subchapter G (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(18) retirement by equal percentage reductions pursuant to subchapter G (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(19) retirement pursuant to subchapter H (relating to Withdrawal Reductions and Regular Permit Retirement Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(20) the acquisition of additional water supplies pursuant to subchapter J (relating to Alternative Water Supply Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(21) the provision of notice of changes in name and mailing address of the permitting pursuant to §707.105 of chapter 707 of this title (relating to Change of Name, Address or Telephone Number);

(22) the payment of all registration, application, aquifer management, and retirement fees pursuant to chapter 709 of this title (relating to Fees);

(23) the cessation of withdrawals under interim authorization status pursuant to subchapter D (relating to Interim Authorization) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(24) abandonment pursuant to subchapter H (relating to Abandonment and Cancellation) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(25) cancellation pursuant to subchapter H (relating to Abandonment and Cancellation) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(26) the restoration of equally proportionally reduced amounts pursuant to subchapter K (relating to Additional Groundwater Supplies) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(27) the transfer of the permit pursuant to subchapter L (relating to Transfers) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(28) the prohibition on the use of groundwater withdrawn from the aquifer at a place of use outside of the boundaries of the authority pursuant to § 711.220 of this chapter (relating to Place of Use Outside of Authority Boundaries);

(29) compliance with the terms and conditions of the permit;

(30) compliance with the act;

(31) compliance with the rules of the authority; and

(32) any other condition as may, in the discretion of the board be reasonable and appropriate.

Section 711.134

Menard comments on § 711.134 of the proposed rules as this section, among other things, relates to groundwater withdrawal permit conditions based on interruption. Menard objects to § 711.134 which, among other things, may result in the interruption of his permit rights to withdraw groundwater from the aquifer, allegedly thereby depriving him, without compensation, of the ability to beneficially use or lease groundwater.

The Authority received the above-referenced comment and disagrees with it. The basis for this determination is that interruptions of withdrawals under a statutory-based permitting system are temporary and triggered by aquifer or springflow conditions. Thus, interruptions are based upon the lack of available water. The Authority is not aware of any legal duty to compensate the owners of groundwater withdrawal permits for interruptions based on these conditions. Accordingly, the Authority has not modified § 711.134 based on this comment.

Howard B. Shadrock also commented upon § 711.134 of the proposed rules. Shadrock describes irrigation as drought "insurance" and expresses concern over losing that insurance and his inability to cover his costs. Shadrock basically complains that his right to irrigation can be interrupted and not provide him with the water he may need to irrigate during drought conditions.

The Authority received the above-referenced comment and is unable to formulate a response. The nature of the comment is such that it does not make a recommendation concerning a proposed rule, but rather makes observations as to an alleged affect of aquifer regulation during drought conditions. The Authority notes that § 711.134 merely catalogues all of the other sections or other subchapters of the Authority's rules that may impose permit conditions. This section does not itself state the substance of the conditions. The substantive section will be in the other sections or subsections and the Authority encourages commenters to provide comments on the substance of those rules at the appropriate time.

Earl & Brown commented upon proposed rule §711.134(1), which, as proposed, provided:

Any groundwater withdrawal permit issued by the authority is subject to the following conditions:

(1) the protection of the water quality of the native groundwater of the aquifer by: . . .

Earl & Brown suggests the term "native groundwater" should be clearly defined either in this provision or in the General Definition section of these proposed rules.

As shown above, this subsection has been deleted from § 711.134.

Grossenbacher commented on proposed rule § 711.134(4)(D) regarding "Standard Conditions"' and which reads as follows:

(4) the protection of aquatic and wildlife habitat, and the protection of species that have been listed as threatened or endangered under applicable federal or state law by:

(D) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to Chapter 715, Subchapter F of this title (relating to Critical Period Management Rules; Comprehensive Water Management Plan Implementation);

Grossenbacher believes that this section creates a "use it or lose it" rule which is counterproductive and a confiscation of his water rights. Secondly, Grossenbacher comments on the transfer by sale or lease of water rights and the critical period management program of the Authority and its impact on transfers.

The Authority received the above-referenced comment and disagrees with it. Section 711.134(4)(D) is merely a reference to the subchapter that will contain the critical period management rules, and groundwater withdrawal permits will be subject to being conditioned based on those rules. Section 711.134(4)(D) does not itself contain the substance of those rules. Rather, it provides a handy cross-reference to the permittee of where the substance of those rules may be found. The Authority notes, however, that the critical period management plan is not conceived to contain a 10 year "use it or lose it" provision. Rather, this issue is addressed in the abandonment and cancellation rules which are pending proposal by the Authority. We encourage commenters to comment on the "use it or lose it" provisions that may be contained in those rules in proposed subchapter H of chapter 711 of this title.

As for Grossenbacher's comments on transfers, the Authority notes that the transfer rules are also not part of these proposed rules and any comments directed thereto are more appropriately made when the transfer rules are proposed in subchapter L of Chapter 711 of this title.

Schirmer and VBI also commented on proposed rule § 711.134(4)(D). They ask that it be deleted. Schirmer and VBI are Bexar County irrigation farmers and assert that Bexar County farmers are more adversely affected by the Authority's rules than farmers in Medina and Uvalde Counties. Schirmer encourages the Authority to develop an irrigation suspension program for Bexar County farmers.

The Authority received the above-referenced comments and disagrees with the request to delete § 711.134(4)(D). Section 711.134 merely catalogues all of the other sections or other subchapters of the Authority's rules that may impose permit conditions. This section does not itself state the substance of the conditions. The substantive section will be in the other sections or subsections and the Authority encourages comments to provide comments on the substance of those rules at the appropriate time.

SAWS also commented on section of § 711.134. SAWS concurs that withdrawals are limited as per § 1.14 of the Act, but objects to referencing as of yet unwritten rules in § 711.134. SAWS finds it unnecessary for the Authority to try to give meaning to every action in § 1.16(g) of the Act. SAWS comments that it would "hate to see" unused required rights canceled by the Authority because, according to SAWS, unused rights serve a conservation purpose and should not be canceled. SAWS seeks the following revisions:

(1) the protection of the water quality of the native groundwater of the aquifer by taking no action that pollutes or contributes to the pollution of the aquifer; and

ELIMINATE: (1)(A), (1)(B), (1)(C), (1)(D), (1)(E), and (1)(F);

(2)(A), (2)(B), (2)(C), (2)(D), (2)(E), and (2)(F);

(3)(B), (3)(C), (3)(D), (3)(E), (3)(F), (3)(G), and (3)(H);

(4)(A), (4)(B), (4)(C), (4)(D), (4)(E), (4)(H), and (4)(I);

(5)(A),(5)(B), (5)(C), (5)(D), (5)(E), and (5)(H); and (10).

Authority staff received the above-referenced comments and disagrees with them. The basis for this determination is that § 711.134 provides specific conditions of the permit and notice to the applicant that the permit is subject to additional rules that are consistent with the Act stated therein. Section 711.134 merely catalogues all of the other sections or other subchapters of the Authority's rules that may impose permit conditions. This section does not itself state the substance of the conditions. The substantive section will be in the other sections or subsections and the Authority encourages commenters to provide comments on the substance of those rules at the appropriate time. The Authority believes it is appropriate and helpful for the regulated public to be given notice of the relevant rules which may affect their permits.

TFB submitted comments relating to § 711.134(4)(J) of the proposed rules, which states:

Any groundwater withdrawal permit...is subject to the following conditions... . . .

(4) the protection of aquatic and wildlife habitat, and the protection of species that have been listed as threatened or endangered under applicable federal or state law by: . . .

(J) engaging in no conduct that violates the Endangered Species Act, 16 U.S.C. § § 1531-1544 (1998), or applicable state law, relative to listed threatened or endangered species; . . .

TFB seeks the deletion of this provision. TFB presumes that, as a condition of the permit, the provision would require the permittee to comply with the Endangered Species Act ("ESA"). TFB believes the provision is an indefinite requirement and questions what standards the Authority would apply in proving compliance. TFB also points out that the prohibitions of the ESA apply to all applicants whether it is stated in the Authority's rules or not.

The Authority agrees that the regulated community is required by federal law to comply with the ESA regardless of whether that fact is stated as a permit condition by the Authority. Therefore, the Authority has deleted § 711.134(4)(J).

Sections 711.164(b) and 711.170

Zinsmeyer's comments purport to relate to proposed §711.164(b) and §711.170. However, his comments do not appear to be directed at those rules. Section 711.164(b) identifies the 400,000 acre-feet "cap" which becomes effective beginning January 1, 2008. Section 711.170 identifies the amount of groundwater available for permitting for monitoring well permits. Zinsmeyer asserts that every irrigator is entitled to a permit for two acre-feet per acre. He also states that the "use it or lose it" proposal is contradictory in that a well owner will not conserve water if he loses his right to the amount he actually saved.

These comments seem to be directed towards rules which are not a part of this rulemaking package, but which the Authority is in the process of proposing for possible adoption at a later date and which will be located at Chapter 711, Subchapter H of this title (relating to Abandonment and Cancellation; Groundwater Withdrawal Permits). In light of the above discussion, Authority staff has not modified §§ 711.164(b) or 711.170.

Sections 711.166 and 711.168

Taggert commented on §§711.166 and 711.168 which relate to groundwater available for permitting for term and emergency permits. He states as follows:

These rules propose to exclude term and emergency permits from the statutory cap on annual withdrawals. Because of the potential impact of this element to the proposed rules on springflows, the City of San Marcos recommends that the EAA Board and Staff carefully analyze the quantity available for term permitting, and closely scrutinize the circumstances giving rise to emergency permits.

Authority staff received the above-referenced comment and agrees: 1) that term and emergency permits do not apply towards the caps; and 2) that the Authority should carefully analyze the quantity of water available for term and emergency permits. The rules, as written, are designed to foster this inquiry. No modification of §§711.166 and 711.168 is requested or warranted in response to this comment.

Section 711.166(b)(2)

SAWS commented upon proposed rule § 711.166(b)(2), which states that term permit applications are allowed for wells within the San Antonio pool and within Atascosa or Medina counties when well TD 69-47-306 is greater than 685 feet above mean sea level. SAWS maintains that reference to any index well, beyond those mentioned in the Act, should be avoided unless the supporting hydrogeologic research under § 1.14(g) has been conducted. SAWS seeks the deletion of § 711.166(b)(2).

The Authority disagrees that additional hydrogeologic research is required before establishing additional index wells for any aquifer pool. Section 1.14(g) of the Act provides that additional index wells may be established for a pool (in this case, the San Antonio pool), if such additional index wells "aid the regulation of withdrawals from the pool." Nevertheless, the Authority has deleted §711.166(b)(2) as it was originally proposed and term permits will now only be interrupted based on index wells J-17and J-27.

Section 711.168(b)

SAWS commented on § 711.168 (b) of the proposed rules which references index well TD 69-47-306 when discussing the availability of water for emergency permits. SAWS asserts that reference to any index wells, other than those mentioned in the Act, should be avoided unless the supporting hydrogeologic research under § 1.14(g) has been conducted. SAWS suggests amending § 711.168(b) by deleting the reference to well TD 69-47-306.

This comment has been rendered moot by nature of the fact that the Authority has deleted references to well TD 69-47-306 in this section.

Section 711.170(b)

SAWS comments on § 711.170 (b) of the proposed rules which references index well TD 69-47-306 when discussing the availability of water for monitoring well permits. SAWS asserts that reference to any index wells, other then those mentioned in the Act, should be avoided unless the supporting hydrogeologic research under § 1.14(g) has been conducted. SAWS suggests changing § 711.170(b) by deleting the reference to well TD 69-47-306.

The Authority received the above-referenced comment and disagrees that additional hydrogeologic research is required before establishing additional index wells for any aquifer pool. Section 1.14(g) of the Act provides that additional index wells may be established for a pool (in this case, the San Antonio pool), if such additional index wells "aid the regulation of withdrawals from the pool." In light of the above discussion, Authority staff has not modified § 711.170(b).

Section 711.172

Suzanne (last name unknown), with the East Medina County Special Utility District, commented on § 711.172, the proportional reduction rule. She states the decreases in water permits will not allow for the growth rates in Medina County. While she supports farmers getting two acre-feet, she is concerned that Medina County does not have funds like SAWS to transfer water from Canyon Lake or down from the coast.

The Authority received the above-referenced comment and agrees that the proportional adjustment process, which is mandated by the Act, will require some entities to obtain supplemental water supplies. The Authority believes this to be an unavoidable outcome mandated by the Act. The reductions required by the Act and implemented in § 711.172 will require many aquifer users to raise funds to secure other aquifer permits or alternative water sources. The Authority declines to modify § 711.172 in response to this comment.

Section 711.172(b)(1)

Several individuals and entities submitted comments regarding the definition of "historical average minimum" found at § 711.172(b)(1). That definition, as proposed, read as follows:

Historical average minimum-the minimum amount of groundwater from the aquifer, as determined by the authority, that an applicant, who operated a well in three or more years during the historical period, shall be authorized to withdraw in an initial regular permit equal to the average amount of groundwater withdrawn annually during the historical period calculated as follows:

Figure: 31 TAC Chapter 711 Preamble-1

Frenzal, of Bexar County Water and Control Improvement District #10, complains that the definition is hard to follow and needs reworking.

Cemex claims the definition of "historical average minimum" is flawed and should include a mechanism by which longer-term existing users (having operated a well for more than 10 years in the historical period) could eliminate up to five consecutive years of use from the calculation of their historical average. Cemex alleges that a straightforward average calculation prejudices longer-term existing users, as opposed to shorter-term existing users, because longer-term users would be unable to omit earlier years of lesser usage from the period used to calculate their historical average. Cemex points to a prior version of the Authority's rules which contained a mechanism like the one now sought by Cemex. Cemex alleges that the fact that the Authority previously considered such a mechanism to be a viable option, coupled with what Cemex believes to be the Texas Legislature's supposed acquiescence and affirmance of the Authority rule containing that mechanism, divests the Authority of the power to substitute a different rule at this time. Cemex also asserts that policy considerations support the use of a mechanism by which longer-term existing users could eliminate up to five consecutive years of use from the calculation of their historical average instead of a straightforward average calculation.

Making the same arguments as Cemex, Vulcan argues in favor of a mechanism allowing long-term existing users to elect to omit a period of time from the calculation used to arrive at their historical average. Vulcan also contends that the Authority's calculation method will use the "historical average minimum" as the "starting point" from which permits will be adjusted downward.

TFB contends that the calculation of the historical average minimum provided in this section skews the average downward for each well that has operated for three or more years during the historical period. TFB asserts the calculation includes years during the historical period when no water was withdrawn by the well under consideration and also includes the year of the well's installation in the calculation. This approach is inappropriate, according to TFB, because the above-mentioned years should not be added in the calculation in light of the fact that § 1.16(e) of the Act refers to the historical average minimum as the average of the amount of water actually withdrawn annually during the historical period. TFB suggests two alternative methods. Under the first method, TFB would: (1) exclude the year of well installation, any years in which no pumping occurred, and all years for which annual pumping fell outside three standard deviations of the statistical root mean square value; and (2) then calculate the average for the remaining years. A second method, which is the one apparently preferred by TFB, would be to establish a threshold amount of withdrawal for which years having a lesser withdrawal volume would not be included in the calculation of the average.

Johnson commented that the end result of the rule is that long-term users who are required to use an average over a long period of time are treated less fairly than short-time users. However, he stated that given the difficult compromise that had to be achieved to address allocation of historical use consistent with statutory guidelines, the rules as drafted and published are as close to the middle ground as can be accomplished.

Using arguments similar to those made by the TFB, Earl & Brown asserts that the minimum should not be calculated by including years during the historical period when no water was withdrawn by the well owner under consideration.

Kosub commented that the definition should be revised to make it clear that the concept of waste is incorporated and considered when an applicant's historical average minimum is calculated. Pursuant to the definition, as proposed, the minimum is based, in part, upon the "total aggregate withdrawals from the well (in AF/annum) during the historical period." Kosub wishes to see the definition revised to make it clear that withdrawals during the historical period which were wasted and not put to a beneficial use are not included in the calculation of the historical average minimum.

With respect to the comment from Frenzel, the Authority acknowledges that the definition is somewhat lengthy and hard to follow. The Authority believes, however, that this is, to some degree, an unavoidable consequence of the highly technical and complex subject matter. As explained more fully below, however, the Authority has slightly revised the definition in § 711.172(b)(1) in response to another comment and in order to clarify it.

The Authority disagrees with the comments submitted by Cemex and Vulcan. The Authority does not believe it is bound, as a matter of law or policy, to re-adopt its prior rule which included a mechanism by which longer-term existing users (having operated a well for more than 10 years in the historical period) could eliminate up to five consecutive years of use from the calculation of their historical average. The Authority declines to include such a mechanism in § 711.172(b)(1) or in the Chapter 711 rules generally because the Authority now believes that such a mechanism lacks a solid statutory basis. This change in position is based, in part, upon the Authority's two-and-a-half years of additional experience in working with the Act since the original rule, now sought by Cemex and Vulcan, was adopted. Section 1.16(e) of the Act states, in part, that an existing user "who operated a well for three or more years during the historical period shall receive a permit *for at least the average amount of water withdrawn annually during the historical period*." (Emphasis added.) The Authority believes this wording sets out a straightforward averaging process, and does not allow for the exclusion of certain amounts of "water withdrawn annually during the historical period." For the same reasons, the Authority declines to adopt the TFB's and Earl & Brown's suggestions that certain years of low or no pumpage during the historical period be excluded from the calculation of the historical average minimum. The Authority agrees with the comments by Johnson.

It is true that the Authority has, in the past, taken the position now advocated by Cemex and Vulcan. However, the Authority, just like any administrative agency, must have the right and power to repeal, amend or revise its own rules. Administrative agencies may, when reconsidering the relevant facts, alter past interpretations or overturn past administrative rulings and practices.

American Trucking Assns., Inc. v. Atchison, T. & S. F. R. Co., 387 U.S. 397, 416 (1967). "Agencies need sufficient latitude to adjust their rules to reflect actual experience and may even reverse their thinking if necessary." *U.S. v. An Article of Drug Neo-Terramycin,* 540 F.Supp. 363, 373 (N.D. Texas 1982)(citations omitted), aff'd 725 F.2d 986 (5th Cir. 1984).

The Authority does not agree with the assertion that the Texas Legislature has acquiesced or affirmed the Authority's prior rule on this point and that the Authority is therefore legally prohibited from abandoning its old rule or reinterpreting the Act. The old rule cited by Cemex and Vulcan, 31 TAC,§ 703.1, was adopted by the Authority effective March 1, 1998. The rule was invalidated by a Final Judgment issued by the Honorable Judge Joseph H. Hart on December 17, 1998 in a lawsuit styled *Living Springs Artesian Springs, Ltd. v. Edwards Aquifer Authority,* Cause No. 98-02644, in the District Court of Travis County, Texas, 353rd Judicial District. Thus, when the Texas Legislature convened the following month, in January 1999, there was no such rule in effect that the Legislature could, as Cemex and Vulcan contend, "endorse." As a result, there is no basis to contend that the Legislature "agreed," "acquiesced," or "affirmed" the Authority's prior rule.

The Authority also disagrees with Vulcan's assertion that the method used by the Authority to calculate permit amounts will use the "historical average minimum" as the "starting point" from which permits will then be adjusted downward. Section 711.172(g) describes the proportional adjustment process and uses, as the starting point from which permits are proportionately adjusted downward, each applicant's maximum historical use.

The Authority notes that the comment from Kosub is well taken. The intent of the Authority has always been that water withdrawn during the historical period, but which was not put to a beneficial use (i.e., was wasted), cannot be included in an applicant's "total aggregate withdrawals during the historical period" for purposes of calculating the applicant's historical average minimum. The Authority believes that the wording of § 711.172(b)(1) should be revised to make this intent clearer and that the definition could otherwise be clarified. Accordingly, the Authority has revised the rule to read as follows:

Historical average minimum- an amount, as determined by the authority, for an applicant who operated a well in three or more years during the historical period, equal to the average amount of groundwater withdrawn annually during the historical period and put to beneficial use, calculated as follows:

Figure: 31 TAC Chapter 711 Preamble-2

Section 711.172

Patterson asserts that proportional adjustment, without a "buy-down" of permits to reach the 450,000 acre-feet cap, can be accomplished by amending § 711.172 so as to issue an interruptible permit to each applicant for the difference between the applicant's "minimum" permit (either the "historical average minimum" or the "irrigator minimum") and the applicant's permit calculated after the "first proportional reduction" to 450,000 af/y. Patterson suggests this approach because: (1) "buy-downs" are cost prohibitive; (2) the interruptible rights that would be issued to municipal, industrial, and agricultural permit applicants would become very valuable; and (3) the Authority has better uses to which the "buydown" funds could be put.

Authority staff received the above-referenced comment and disagrees with it. The Authority has concluded that an interruptible initial regular permit for the "step-up" amount may have the potential to negatively affect the Authority's other aquifer management programs that are designed to maintain aquifer and springflow levels. Additionally, the interruptibility criteria may well render this part of the initial regular permit unsuitable for the purposes of use for many permittees because the water would not be legally available for withdrawal after the aquifer dropped below certain index well levels earlier in the year and would likely remain unavailable for the remainder of the year. Finally, Authority assessment of this approach indicates that the overall economic effect on the region is less if a "step-up amount" withdrawal reduction program is adopted instead of the issuance of interruptible permits for the "step-up amount." In light of the above discussion, the Authority has not modified § 711.172.

Section 711.172(b)(2)

TFB submitted comments regarding proposed rule § 711.172(b)(2), which defines the "irrigator minimum" as follows:

(2) Irrigator minimum-the minimum amount of groundwater from the aquifer, as determined by the authority, that an applicant for irrigation use shall be authorized to withdraw in an initial regular permit equal to two acre-feet times each acre of land the applicant, or his contract user, prior user, or former existing user actually irrigated in any one calendar year during the historical period if the applicant, or his contract user, prior user, or former existing user:

(A) owned, leased, or otherwise had a legal right to irrigate the land during the historical period; and

(B) owned the well from which the land was irrigated.

TFB alleges that the rule is not clear and seeks clarification as to whether the applicant may have owned the well during the historical period, but leased the irrigated property and the use of the well to a prior user, contract user or former existing user.

The Authority agrees with the comment, in part. The applicant must be an existing user. See § 711.98(a); Act § 1.16(a). However, because the ownership of points of withdrawal and places of use has not been static since the inception and closure of the historical period, the Authority must account for transfers and the impact of transfers on existing user status. There are several types of possible "existing users." First, the classical existing user would be a person who on June 1, 1993, owned an existing aquifer well with historical usage and filed a declaration. This type of existing user would have been the sole owner of the well during the historical period and would not yet have transferred his interest in the well at the time the Authority issues the final initial regular permit. A second type of existing user would be a transferee of the first category of existing user where the transferee acquired his interest in the well during the historical period and has not yet transferred his interest in the well. A third type of existing user is one who acquired his interest in the well after the close of the historical period. A well owner who transferred his interest in the well during the historical period is referred to by the Authority as a "prior user." See § 711.1(4). An existing user who transferred his interest in the well after the close of the historical period is referred to by the Authority as a "former existing user." As defined by § 711.1(2), an existing user is a person, or the successor in interest of such a person, who, on June 1, 1993, owned an existing aquifer well with historical usage. The existing user is free to have owned the well during the historical

period, but leased the irrigated property and the use of the well to a contract user, prior user, or former existing user. (If such a lease was made to a prior user or former existing user, then the prior user or former existing user would also be considered a contract user.) A contract user is defined in § 711.1(1) as a person who, during the historical period, withdrew and placed to beneficial use aquifer water pursuant to a contract or other legal right obtained from a prior user or existing user who owned the existing well. Thus, a contract user cannot have been the owner of the well and § 711.172(b)(2) is misleading to the extent it suggests the contract user must have owned the well. In light of the TFB comment and in order to make the definition more easily understandable, the Authority has modified § 711.172(b)(2) to read:

(2) Irrigator minimum- an amount, as determined by the authority, for an applicant for irrigation use, equal to two acre-feet times each acre of land the applicant, or his contract user, prior user, or former existing user actually irrigated in any one calendar year during the historical period if:

(A) the applicant, or his contract user, prior user, or former existing user owned, leased, or otherwise had a legal right to irrigate the land during the historical period; and

(B) the applicant, or his prior user or former existing user owned the well from which the land was irrigated.

Section 711.172(b)(3)(C)

Frenzel and SAWS commented on § 711.172(b)(3)(C), which states:

(3) Maximum historical use (MHU)-the amount of groundwater from the aquifer as determined by the authority that, unless proportionally adjusted, an applicant for an initial regular permit is authorized to withdraw equal to the greater of the following, as may be applicable: . . .

(C) for an applicant who has beneficial use without waste during the historical period, but, due to the applicant's activities not having been commenced and in operation for a full calendar year, the applicant does not have beneficial use for a full calendar year, the applicant's extrapolated maximum beneficial use calculated as follows: the amount of groundwater that would normally have been placed to beneficial use without waste by the applicant for a full calendar year during the historical period for the applied for purpose had the applicant's activities been commenced and in operation for a full calendar year during the historical period.

Frenzel expresses concern that the "extrapolation" allowed by this rule unfairly treats existing users with less than one year's full use during the historical period more favorably than long-term existing users.

SAWS urges "stricter adherence" to § 1.16(e) of the Act for less than one-year users and suggests that the rule read:

(b)(3)(C) for an applicant who has beneficial use without waste during the historical period for less than a full year, the amount of water that would normally be beneficially used without waste for the intended purpose for a calendar year.

The Authority disagrees with the Frenzel comment. The basis for this determination is that the Authority believes the extrapolation called for in the rule is directly mandated by § 1.16(e) of the Act, which states: "If a water user does not have historical use for a full year, then the authority shall issue a permit for withdrawal based on an amount of water that would normally be beneficially used without waste for the intended purpose for a calendar year."

The Authority also disagrees with the SAWS comment. Rather than merely parroting what § 1.16(e) of the Act says, the Authority believes that it is helpful and appropriate to "flesh out" in more detail the process by which the "extrapolation" for a full year's use will take place. In light of the above discussion, Authority staff has not modified §711.172(b)(3)(C).

Section 711.172(b)(4)

SAWS commented upon § 711.172(b)(4) of the proposed rules, which defines "operate a well" as "the withdrawal of groundwater from a well for a beneficial use." SAWS requests clarification regarding the commencement of a well's operation. SAWS suggests the well's operation begins after it is completed, regardless of withdrawals. Accordingly, SAWS proposes that § 711.172(b)(4) read:

(b)(4) Operate a well- the capability to withdraw groundwater from a well for a beneficial use.

Authority staff received the above-referenced comment and disagrees with it. Section 1.16(e) of the Act provides that, in order to be eligible for the historical average minimum, an applicant must have "operated a well for three or more years during the historical period." The Authority interprets this provision to mean that the applicant must have actually withdrawn water from a well in at least three years. The Authority disagrees with SAWS' suggestion that the phrase "operate a well" should include years in which a well was capable of being operated, but was not actually used to withdraw water. In light of the above discussion, the Authority has not modified § 711.172(b)(4).

Section 711.172

SAWS comments on § 711.172 in general. SAWS requests clarification of the calculations found within § 711.172 and asserts the rules should incorporate hypothetical examples. SAWS suggests grouping the terms "PA-1 amount +" and "SUAs" together, appropriately, in Figure 31 TAC §711.172(g)(8)(A).

The Authority received the above-referenced comment and disagrees with it. The basis for this determination is the commenter did not specify how the calculations found within § 711.172 could be clarified. Given the complexity of the subject matter, the Authority acknowledges that these rules are unavoidably difficult. It is not clear, however, that adding hypothetical examples would add to the clarity to the rules. In light of the above discussion, Authority staff has not modified § 711.172 in response to this comment.

Section 711.172(b)(5)

Earl & Brown commented upon proposed rule §711.172(b)(5), which, as proposed, provided:

(5) Step-up amount (SUA)-the amount of groundwater from the aquifer as determined by the authority that an applicant for an initial regular permit is authorized to withdraw equal to the difference between an applicant's irrigator or historical average minimum, if any, and the applicant's PA-1 amount as determined in subsection(g)(5) of this section.

Earl & Brown comments that the provision should clarify whether the step-up amount is to be "stepped up" with firm or uninterruptible rights or otherwise.

Authority staff received the above-referenced comment and believes the commenter misapprehends the nature of the definition. The definition of the step-up amount (SUA) in §711.172(b)(5) is

but one part of the method used to calculate initial regular permit amounts. The definition does not specify whether SUAs are interruptible, nor should it. Instead, all groundwater withdrawal amounts authorized in initial regular permits may be subject to interruption, as is made clear in § 711.98(g). The Authority concedes, however, that the definition of SUA could be made clearer. Further, the Authority believes a provision must be made to account for irrigators who qualify for both of the minimums in order to ensure that such irrigators get the benefit of whichever minimum is larger. Accordingly, the Authority has modified § 711.172(b)(5) to read:

(5) Step-up amount (SUA)- the difference between an applicant's irrigator or historical average minimum, if any, and the applicant's PA-1 amount as determined in subsection(g)(5) of this section. Where an irrigator applicant qualifies for both an irrigator minimum and an historical average minimum, the SUA shall be equal to the difference between whichever of the applicant's minimums is greater and the applicant's PA-1 amount.

Sections 711.172 - 711.176

The TFB submitted comments generally regarding §§ 711.172-711.176 of the proposed rules. TFB maintains that these rules, operating together, do not guarantee the withdrawal minimums the Act expressly provides in § 1.16(e) which states:

An existing irrigation user shall receive a permit for not less that two acre-feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period. An existing user who has operated a well for three or more years during the historical period shall receive a permit for at least the average amount of water withdrawn annually during the historical period. (Emphasis added by TFB).

TFB contends this is non-negotiable language which the Authority cannot ignore. However, according to TFB, proposed rules §§ 711.172-711.176 allow an applicant to receive an initial regular permit authorizing withdrawal of groundwater, from the aquifer, in an amount below that which the Act guarantees.

The Authority received the above-referenced comment, and disagrees with it. The Act does not guarantee that the initial regular permit minimums would always be able to be withdrawn in any particular year. In fact, sections of the Act, such as § 1.26 relating to critical period management, may specifically result in the inability to withdraw, in a year, the full groundwater amount allowed in an initial regular permit due to aquifer or springflow conditions.

Further, there is only one scenario under which certain applicants may not receive permits entitling them to withdraw the full minimum amount-if an applicant qualifies for a minimum, a PA-2 amount is calculated, and the applicant's minimum is greater than his PA-2 amount, then that applicant will receive a permit allowing him to withdraw only his PA-2 amount. It should be noted that the Authority believes there is a reasonable chance that this scenario will never occur because the Authority's withdrawal reduction (buy-down) program will be effective in achieving the cap. It should be further noted that even if this scenario does occur the applicant will be compensated by the Authority for the fair market value of the difference between the applicant's minimum and PA-2 amount.

Finally, the Authority needs the ability to implement this scenario, if necessary, based upon the realities of the permit program. Based upon its extensive review of the initial regular permit applications on file, it appears entirely likely that the aggregate of all permit minimums will exceed the 450,000 acre-foot cap, yet section 1.14(b) of the Act mandates that permitted withdrawals may not exceed the 450,000 cap. Thus, the Authority must have a mechanism in place in order to achieve the cap. Given that compensation is provided for the amount below the minimum which the applicant may not withdraw, the Authority believes the approach taken by it in § 711.176 is a reasonable way to achieve the cap. In light of the above discussion, the Authority has not modified §§711.172 through 711.176 in response to this comment.

Section 711.172(b)(1)

CPS made comments relating to § 711.172(b)(1)of the proposed rules. CPS suggests the Authority make clear what partial years are to be considered when determining the historical average minimum under this section.

The Authority received the above-referenced comment and disagrees with it. The basis for this determination is that § 711.172(b)(1) provides that any operation, by withdrawal of groundwater, of a well in a year counts as a year for purposes of determining eligibility for the historical average minimum. Therefore, there is no need to identify or provide for special calculation provisions for partial years. Accordingly, the Authority has not modified §711.172(b)(1) in response to this comment.

Section 711.172(b)(3)

CPS commented upon proposed rule § 711.172(b)(3). CPS contends the Authority should clarify how partial years will be treated when determining permitted amounts, particularly for maximum historic use amounts under this section.

Authority staff received the above-referenced comment and disagrees with it. The basis for this determination is that § 711.172(b)(3) provides that for purposes of determining maximum historical use, full calendar years are to be used. If a year is a partial year, the maximum historical use, as with any other full calendar year, is the maximum aggregate withdrawal for that full or partial year. The rule does not allow for the interpolation of the maximum historical use for a partial year except for the special statutorily-derived (1.16(e)) single partial year rule in § 711.172(b)(3)(C). Therefore, there is no need to identify or provide for special calculation provisions for partial years. Accordingly, the Authority has not modified § 711.172(b)(3).

Section 711.172(b)(5)

TFB submitted comments regarding proposed rule § 711.172(b)(5). TFB asserts the definition of "step-up amount" is ambiguous. As a result, TFB suggests defining the numerical amount as a mathematical equation.

The Authority received the above-referenced comment and agrees in part with it. The basis for this determination is the description for "step-up amount" found in § 711.172(g)(6) is derived from a mathematical equation. The Phase-1 proportionally adjusted amount is described in § 711.172(g)(5). However, as noted above, the Authority staff has modified § 711.172(b)(5) to clarify it.

Section 711.172(e)

Bragg submitted comments relating to proposed rule § 711.172(e), which states:

(e) Duty to Proportionally Adjust. If the total aggregate maximum historical use of all initial regular permits exceeds the amount of groundwater available for permitting in § 711.164(a) of this title

(relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), the board shall, pursuant to this section, proportionally adjust the maximum historical use of each permit.

Bragg contends proportional adjustment for agriculture is detrimental and possibly fatal to the industry primarily because an amount less than 2 acre-feet is: 1) not enough to raise annual crops; and 2) will destroy investments and equipment, land purchases, and make improvement impossible. Bragg contends that § 1.14(d) of the Act gives the Authority the power to raise the amount of groundwater available for permitting.

Authority staff received the above-referenced comment and is unable to formulate a clear "agree or disagree" response. The commenter notes several detrimental effects that may be caused to the agricultural economy due to the operation of the rule. However, the commenter does not recommend that the rule be changed. Instead, Bragg recommends that the Authority invoke some other power, with which it has been endowed, to increase the groundwater available for permitting pursuant to § 1.14(d) of the Act. The Authority notes that § 1.16(e) of the Act requires that, if necessary, it perform a proportional adjustment process on all applicants for an initial regular permit. The legislature has not, however, authorized the Authority to consider economic impacts in the proportional adjustment process. Yet (as explained above) the Authority is required to conduct a proportional adjustment process if necessary under § 1.16(e) of the Act. The Authority agrees that § 1.14(d) creates a process whereby the groundwater available for permitting may be increased. However, the Authority may invoke this procedure only after a certain technical basis is determined to exist and after certain consultation procedures have been complied with. The decision to invoke § 1.l4(d) will be available in the event the technical data base is found to exist and the procedural steps occur. The Authority notes that it has proposed other rules to implement § 1.14(d) in subchapter K of this title. The Authority encourages the commenter to comment on those rules at the appropriate time. Accordingly, the Authority has not modified proposed § 711.172(e).

Section 711.172(g)(7) and (g)(8)

TFB submitted comments regarding proposed rule § 711.172(g)(7) and § 711.172(g)(8), which states:

(7) Phase 2-Proportional Adjustment Factor. If the total of all PA-1 amounts plus all step-up amounts remaining after the Board has issued agreed order pursuant to § 711.180 of this title (relating to Voluntary Waiver of Applications for Initial Regular Permits) exceeds 450,000 acre feet per annum, then the board shall calculate a Phase-2 proportional adjustment factor ("PA-2 Factor") as follows:

(8) Phase 2-Proportionally Adjusted Amount. The board shall then calculate a Phase-2 proportionally adjusted amount ("PA-2 amount") for each applicant issued an initial regular permit as follows:

(A) For all applicants eligible to receive a step-up amount:

(B) For all applicants not eligible to receive a step-up amount:

TFB suggests the formula given in § 711.172(g)(8)(A) may be incorrectly written. As written, TFB asserts that the formula applies the PA-2 factor only to the PA-1 amounts, not to SUAs. The formula is presently written as follows:

PA-2 amount = (PA-1 amounts + SUAs) - (PA-2 Factor * PA-1 amounts + SUAs).

TFB contends that the present formula reduces algebraically in the following manner:

PA-2 amount = (PA-1 amounts + SUAs) - (PA-2 Factor * PA-1 amounts + SUAs) which = (PA-1 amounts + SUAs) - (PA-2 Factor * PA-1 amounts) - SUAs

= PA-1 amounts - (PA-2 Factor * PA-1 amounts)

= PA-1 amounts * (1- PA-2 Factor)

TFB states that the reduction occurs because the PA-2 Factor does not operate on the SUAs term as written. The SUAs terms cancel each other. Therefore, the equation reduces down to that equation given in § 711.176(g)(8)(B). TFB maintains that if this is the intended equation for § 711.176(g)(8)(A), then the equations in § § 711.176(g)(8)(A) and 711.176(g)(8)(B) are identical eradicating the need for separate statements in (8)(A) and (B).

On the other hand, if the intent was to reduce the total quantity "(PA-1 amounts + SUAs)" proportionally to the multiplier "PA-2 Factor," the formula should be written as:

PA-2 amount = (PA-1 amounts + SUAs)

which = (PA-1 amounts + SUAs)

= PA-1 amounts * (1- PA-2 Factor) + SUAs * (1- PA-2 Factor)

= (PA-1 amounts + SUAs) * (1 - PA-2 Factor).

TFB asserts these two mathematical approaches give different results. The latter equation would produce a proportional reduction of the total quantity (PA-1 amount + SUA's) rather than only PA-1 amounts.

Grammatically, TFB contends that referring to "PA-1 amounts" and "SUAs" as plural was likely unintended because the formula appears to apply to an individual permit amount-a single quantity.

The Authority received the above-referenced comments and agrees with them. The determination is based on the intention that the formula be written as follows: PA-2 amount = (PA-1 amount + SUA) - (PA-2 Factor x (PA-1 amount + SUA)). In light of the above discussion, Authority staff has modified § 711.172(g)(8)(A).

Section 711.172(g)(9)

TFB submitted comments regarding proposed § 711.172(g)(9), which states:

the board shall issue a final initial regular permit to each eligible applicant...as provided in § 711.176(c)..."

TFB asks whether § 711.176(c) is the correct cross-reference. According to TFB, § 711.176(c) only applies to the issuance of permits where the irrigator or historical average minimum is greater than the PA-1 amount. TFB indicated that it is assuming that permits will be issued to applicants that do not have an irrigator minimum or a historical average minimum.

The Authority received the above-referenced comment and agrees with it. The basis for this determination is that § 711.176 should be amended to include a provision disposing of applications for those who do not qualify for a step-up amount or whose irrigator or historical average minimum is less than their PA-1 or PA-2 amount. By including these provisions, the Authority has reorganized §711.176 and §711.172(g)(9) to read:

§ 711.172(g)(9):

the board shall issue an initial regular permit to each eligible applicant...as provided in § 711.176(b) and (c). . ."

Section 711.176(b):

(b) If the aggregate maximum historical use of all applicants to be issued initial regular permits exceeds the amount of groundwater available for permitting in §711.164(a) of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), then an applicant shall receive an initial regular permit authorizing the withdrawal of groundwater from the aquifer in the following amount:

(1) if the applicant does not qualify for an irrigator or historical average minimum, and no PA-2 amount is calculated pursuant to § 711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), then in an amount equal to the applicant's PA-1 amount as calculated in §711.172(g)(4) and(5);

(2) if the applicant does not qualify for an irrigator or historical average minimum, and a PA-2 amount is calculated pursuant to § 711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), then in an amount equal to the applicant's PA-2 amount;

(3) if the applicant qualifies for an irrigator or historical average minimum, no PA-2 amount is calculated pursuant to § 711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is less than the applicant's PA-1 amount as calculated in §711.172(g)(4) and (5), then in an amount equal to the applicant's PA-1 amount;

(4) if the applicant qualifies for an irrigator or historical average minimum, no PA-2 amount is calculated pursuant to § 711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is greater than the applicant's PA-1 amount as calculated in §711.172(g)(4) and (5), then in an amount equal to the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two);

(5) if the applicant qualifies for an irrigator or historical average minimum, a PA-2 amount is calculated pursuant to § 711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is less than the applicant's PA-2 amount, then in an amount equal to the applicant's PA-2 amount; or

(6) if the applicant qualifies for an irrigator or historical average minimum, a PA-2 amount is calculated pursuant to § 711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is greater than the applicant's PA-2 amount, then in an amount equal to the applicant's PA-2 amount. In such a case, the difference between the applicant's PA-2 amount and the applicable minimum may not be withdrawn by the applicant, but instead, the authority shall provide to the applicant compensation for this amount at the fair market value as that term is defined in §11.0275, Texas Water Code (relating to Fair Market Value).

(c) Initial regular permits issued by the board pursuant to this section may be issued with a provisional groundwater withdrawal amount until the total amount of groundwater permitted for withdrawal in initial regular permits is finally determined following an opportunity for contested case hearings on all initial regular permit applications, as provided in § 711.172(f) of this chapter (relating to Proportional Adjustment of Initial Regular Permits). The authority may periodically issue Proportional Adjustment Orders in order to assure that the amount of groundwater permitted for withdrawal in initial regular permits does not exceed the amount available for permitted withdrawals under section 711.164 of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

Section 711.174(b)

SAWS commented upon § 711.174(b) of the proposed rules. SAWS suggests that the proposed rule should reference only the Act or defined rule. SAWS proposes changing § 711.174 to read:

(b)...retirement of initial regular permits

The Authority received the above-referenced comment and disagrees with it. The basis for this determination is that the reference to proposed subchapter H of chapter 715 will provide a useful cross-reference to the relevant rules that will apply the equal percentage reduction process. By giving interested persons notice of the future location of these rules, such persons will be able to monitor developments in this regard and better understand the organization of the Authority's permit program rules. In light of the above discussion, Authority staff has not modified §711.174.

Section 711.176(b)

TFB commented on proposed rule § 711.176(b), which, as proposed, read:

(b) If the aggregate maximum historical use of all applicants for initial regular permits does not exceed the amount of groundwater available for permitting in § 711.164(a) of this title (relating to groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), than an applicant shall receive an initial regular permit authorizing the withdraw of groundwater from the aquifer in the following amounts: . . .

TFB acknowledges § 711.176(b) provides that an the applicant will receive an initial regular permit authorizing an amount not less than the irrigator minimum, or the historical average minimum, if the aggregate maximum historical use of all applicants for initial regular permits exceeds 450,000 acre-feet each calendar year. However, the section does not expressly mention what amounts applicants with no irrigator or historical average minimum will be permitted to withdraw. TFB assumed applicants not qualifying for irrigation or historical average minimums will be issued an initial regular permit for their Phase 2 Proportionally Adjusted Amount. TFB also asserts that this section does not clearly define what amount an irrigator will be authorized to withdraw if his PA-2 amount exceeds his irrigation minimum. Therefore, TFB suggests the user should receive a permit for his PA-2 amount.

Additionally, TFB maintains that § 711.176(b) does not ensure that those minimums TFB considers to be guaranteed by the Act can actually be withdrawn. TFB argues that § 711.176(c) will,

in fact, drop an irrigation user below his two-acre feet per acre irrigated.

As noted above, the Authority has modified §§ 711.172 and 711.176 in response to this and other comments.

Section 711.176(c)(1)

TFB submitted commented regarding proposed rule § 711.176(c)(1), which, as proposed, read:

(c) If the irrigator or historical average minimum is greater than the PA-1 amount as calculated in § 711.172(g)(5) of this title (relating to Proportional Adjustment of Initial Regular Permits), the groundwater withdrawal amount in a final initial regular permit shall be issued by the board at the irrigator or historical average minimum as follows:

First, TFB asserts that the threshold in the initial paragraph (provided above) is ambiguous. The paragraph seems to require that either the irrigator minimum or the historical average minimum exceed the PA-1 amount because it is triggered if a permit holder's (here an Initial Regular Permit) "irrigator or historical average minimum" is greater than a PA-1 amount. TFB contends it is uncertain whether this is the meaning that is intended since the same phraseology, "irrigator minimum" and "historical average minimum," is used elsewhere (TFB cites § § 711.172(b)(5), 711.172(g)(6)) in a vague manner and not capable of precise application numerically. Therefore, according to TFB, it is unclear whether the use of the wording in this section is intentionally or merely repetitive. Second, TFB maintains the section's requirement that the board issue "a final initial regular permit at the irrigator or historical average minimum" is unclear as well. TFB specifically poses the question of whether the section is meant to read "at the irrigator or historical average minimum, respectively" in reference to previous references to various different quantities. TFB is assuming an applicant may be able to receive assignment of both values.

As noted above, the Authority has modified §711.176 (c).

Section 711.176(c)

TFB submitted comments in reference to § 711.176(c)(1), which states:

(c) If the irrigator or historical average minimum is greater that the PA-1 amount as calculated in § 711.172(g)(5) of this title (relating to Proportional Adjustment of Initial Regular Permits), then the groundwater withdrawal amount in a final initial permit shall be issued by the board at the irrigator or historical average minimum as follows:

(1) the PA-1 amount shall be authorized to be withdrawn as a permitted withdrawal pursuant to the groundwater withdrawal schedule required by § 711.178 of this title (relating to Groundwater Withdrawal Schedules); and. . .

TFB comments that this section purports to allow a permit holder to withdraw the full PA-1 amount although it may be assumed, in some instances, the PA-1 amount will be greater than the PA-2 amount. TFB argues that this seems contradictory and ambiguous especially in light of what §§ 711.176(c)(2) and 711.176(c)(3) require.

The Authority has received the above-referenced comment, and agrees in part with it. As noted above, the Authority has modified § 711.176 in order to, among other things, specify when permit holders will be authorized to withdraw their PA-1 amount and when they will be authorized to withdraw their PA-2 amount.

Section 711.176(c)

TFB commented upon § 711.176(c)(2) of the proposed rules which states:

(c) If the irrigator or historical average minimum is greater that the PA-1 amount as calculated in § 711.172(g)(5) of this title (relating to Proportional Adjustment of Initial Regular Permits), then the groundwater withdrawal amount in a final initial permit shall be issued by the board at the irrigator or historical average minimum as follows:

(2) to the extent necessary, in order to satisfy groundwater available for permitted withdrawals under § 711.164(a) of this title (relating to Groundwater Available for Groundwater for Initial and Regular Permits), the step-up amount as calculated in § 711.172 (b)(5) and (g)(6) of this title (relating to Proportional Adjustment of Initial Regular Permits) may not be withdrawn; and . . .

TFB contends this section precludes withdrawal of step-up amounts as necessary to satisfy the 450,000 acre-foot limit of § 711.164(a), yet does not indicate a quantitative definition of the manner in which the Authority intends to implement the phrase "to the extent necessary."

SAWS also commented upon proposed rules § 711.176(c)(1), (c)(2), and (c)(3), concurrently. SAWS asserts concern that the step up amount is held hostage and unusable. Therefore, SAWS suggests that, if compensation is paid under a PA-2 adjustment, all water for which compensation is not received is available for pumping. SAWS proposes the following changes to § 711.176:

ELIMINATE (c)(1) and (c)(2)

and (c)(3) renumbered (c)(1) to read: less the amount that is proportionally adjusted pursuant to ...(relating to Fair Market Value).

The Authority has received the above-referenced comments, and agrees in part and disagrees in part. The section as written is intended to allow PA-1 water and step-up water to be withdrawn by a permittee as long as and until the aggregate amount of groundwater available for permitting (i.e. the 1.14(b) "cap") is exceeded by the issuance of initial regular permits. Because § 1.14(b) of the Act prevents the Authority from issuing initial regular permits in an amount that exceeds the cap, PA-1 and step-up water will not necessarily always be available to be withdrawn. If the Authority is required to engage in a phase-2 proportional adjustment, the amount of PA-1 water and step-up water (as may be applicable depending on if an applicant qualifies for a minimum or not) that is phase-2 proportionally adjusted will no longer be able to be withdrawn. However, the Authority agrees that the section could be more clearly stated. In light of the above discussion, Authority staff has modified § 711.176 as noted above.

Section 711.176(c)(2) and (3)

The BC Farm Bureau submitted comments regarding § 711.176(c)(2) and (3). The BC Farm Bureau maintains the two-acre foot irrigator minimum should not be subject to a proportional adjustment. According to the BC Farm Bureau, the Act does not provide compensation in lieu of statutory minimums, but it does provide certain guarantees for historical users, which should extend to agricultural users.

Frenzel also inquired into whether the irrigator minimum was subject to proportional adjustment.

The MC Farm Bureau submitted comments regarding proposed rules § 711.176 (c) (2) and (c)(3), concurrently. MC Farm Bureau

contends the Legislature recognized the importance of the two acre foot minimum for agriculture and that minimum should not be subject to a proportional adjustment. MC Farm Bureau claims that while the Act does provide historical users some specified "guarantees," it does not make provisions for compensation in lieu of statutory minimums.

The Authority has received the above-referenced comments and disagrees with them. The basis for this determination is that by virtue of § 1.14(b) of the Act, the Authority may not issue initial regular permits in an amount that exceeds the caps established in those sections. At the same time, by virtue of § 1.16(e) of the Act, the Authority is required to issue certain initial regular permits with either an irrigator minimum or historical average minimum, if applicable. In the event the aggregate of the minimums exceeds the cap, the Authority must have a procedure to adjust the permits to equal the cap. The legislature in § 1.16(e) of the Act provided a procedure known as "proportional adjustment" to accomplish this objective. In addition, as for the payment of proportionally adjusted water below a recognized minimum in order to meet the § 1.14(b) cap, the legislature (in § 1.29(a)(1) of the Act) authorized an allocation procedure for the costs of this withdrawal reduction process. Accordingly, the Authority has not modified § 711.176 in response to these comments.

Section 711.176(c)(3)

TFB commented upon § 711.176(c)(3) of the proposed rules, which states:

(c) If the irrigator or historical average minimum is greater than the PA-1 amount as calculated in § 711.172(g)(5) of this title (relating to Proportional Adjustment of Initial Regular Permits), then the groundwater withdrawal amount in a final initial permit shall be issued by the board at the irrigator or historical average minimum as follows:

(3) the amount that is proportionally adjusted pursuant to § 711.172(g)(7) and (8) of this title (relating to Proportional Adjustment of Initial Regular Permits) may not be withdrawn, but instead the authority shall provide compensation for this amount at the fair market value as that term is defined in § 11.0275, Texas Water Code, (relating to Fair Market Value).

TFB claims the section is ambiguous and/or mathematically imprecise. Specifically, TFB argues there is not clear identification as to what numerical quantity is intended by the phrase "the amount that is proportionally adjusted pursuant to § 711.172(g)(7) and (8)." If applied literally, TFB contends this wording identifies the quantity "(PA-1 amounts + SUAs)" in Section 711.176(g)(8)(A), and "(PA-1)" in § 711.172(g)(8)(B) because those are the quantities "proportionally adjusted" by a proportional reduction. Alternatively, TFB asserts the reference perhaps should be to the quantitative amount of the proportional reduction-the decrement of the reduction.

Furthermore, TFB explains that questions regarding whether or not § 711.172(g)(8)(A) is correctly written/worded, extends to § 711.176(c)(3). TFB contends that if the right hand side of the equation in § 711.172(g)(8)(A) is written as

(PA-1 amounts + SUAs) - (PA-2 Factor * PA-1 amounts + SUAs)

then the quantity acted on by proportional reduction is only the quantity "PA-1 amounts," it being the only quantity multiplied by "PA-2 Factor." On the other hand, if the right hand side should have been written as

(PA-1 amounts + SUAs) - PA-2 Factor * (PA-1 amounts + SUAs),

then the quantity" (PA-1 amounts + SUAs)" is the quantity proportionally reduced.

As stated above, TFB claims this ambiguity extends to § 711.176(c)(3). Specifically, it extends to the part of the subsection which states that the quantity that is "proportionally adjusted" may not be withdrawn, and to that portion which states that permit holders will be compensated for this quantity.

The Authority received the above-referenced comment and agrees with it in part, and disagrees in part. The basis for this determination is that the comments really relate to §711.172(g)(7) and (8) which, as noted above, have been revised. In light of the above discussion, Authority staff, as discussed above for § 711.172(g)(7) and § 711.172(g)(8), has modified § 711.172(g)(8)(A), but not § 711.176 in response to this comment.

Section 711.176(c)(3)

John (last name unknown) commented on the use of the term "fair market value" in § 711.176(c)(3) in relation to the amount the Authority is required to compensate the landowner when the Authority is required to take away from the two acre feet minimum. He believes the rules should state how that amount is determined and how it is defined.

The Authority received the above-referenced comment, and disagrees with it. The basis for this determination is that the term "fair market value" is defined in § 11.0275, Texas Water Code, to mean as follows:

Whenever the law requires the payment of fair market value for a water right, fair market value shall be determined by the amount of money that a willing buyer would pay a willing seller, neither of which is under any compulsion to buy or sell, for the water in an arm-length transaction and shall not be limited to the amount of money that the owner of the water right has paid or is paying for the water.

The Authority believes that this statutory definition is adequate for purposes of § 711.176. The Authority has not modified § 711.176 in response to this comment.

Section 711.176(c)(3)

Inland, submitted comments relating to proposed rule § 711.176(c)(3). Inland asserts that the Authority's "buy-down" to the 450,000 ac. ft. level is premature and would be extremely costly and detrimental to municipalities. According to Inland, under-allocated municipal interests will transfer money to the irrigators and the over-allocated irrigators will transfer withdrawal permits to the municipalities. Therefore, Inland contends that the Authority has interjected itself into the buy-down so that the base rights that are not being used and cannot otherwise be transferred are legitimately bought and retired.

Authority staff received the above-referenced comment, and disagrees with it. The basis for this determination is that no withdrawal reductions (referred to by the commenter as a "buy-down") to the §1.14(b) cap will occur unless it is required due to the aggregate of the minimums exceeding the §1.14(b) cap. If this occurs, the implementation of the program would not be premature, but instead would occur at the appropriate time as required by the Act. Whether the withdrawal reduction program is "costly and detrimental to municipalities" because they are "under-allocated" and irrigators are "over-allocated" is largely a function of the irrigator and historical average minimums as established by the legislature in § 1.16(e) of

the Act. The Authority is unable to affect the initial regular permit "allocation" process by altering the statutorily established minimums in the face of convincing evidence presented by an applicant for an initial regular permit, whether the applicant is an irrigator, municipal or industrial applicant. As for the Authority's "interjection" into the withdrawal reduction process, this is the role that the Authority has been assigned by the legislature through the Act. Finally, for purposes of achieving the §1.14(b) cap, there is no practical difference between the Authority accomplishing the withdrawal reduction by acquiring the waiver by an applicant of its step-up water, base irrigation groundwater, or other categories of water as long as the waiver results in the §1.14(b) cap being achieved. Moreover, after the Authority has issued initial regular permits, the retirement of permitted rights (whether (1) base irrigation groundwater, (2) unrestricted irrigation groundwater of irrigators, or (3) other municipal or industrial rights) may also be implemented to lessen the need for withdrawal reductions to meet the §1.14(b) cap. Accordingly, the Authority has not modified § 711.176 in response to this comment.

Section 711.178

The MC Farm Bureau comments on proposed rule §711.178. The MC Farm Bureau asserts a requirement for withdrawal schedules for irrigators does not serve a useful purpose and would result in unpredictable and unreliable estimates related to water resource management planning. In this regard, it comments that the annual water use report should be sufficient information for the Authority. The MC Farm Bureau is also concerned about the impact of § 711.178(e) on the 2.0 acre-foot per acre per year irrigator minimum and the 110% monthly withdrawal limitation. The MC Farm Bureau suggests either the deletion of §711.178 or the exemption of irrigators from the requirement to submit withdrawal schedules.

Bragg has a similar comment to § 711.178. Bragg comments that agricultural irrigation is based on initial soil moisture (rainfall), evaporation, and specific plant use requirements. Due to the fact rainfall cannot be predicted, either in the short or long term, farmers are unable to predict their irrigation needs. Therefore, Bragg recommends that this paragraph be deleted.

BC Farm Bureau also commented upon proposed rule § 711.178. The BC Farm Bureau contends § 711.178 should be entirely deleted or exempt agricultural users from submitting withdrawal schedules. The BC Bureau maintains requiring the submission of these schedules serves no real purpose and would result in inaccurate estimates and unreliable planning. Further, it argues that the Authority already requires an annual report of groundwater pumping.

Rimkus commented on § 711.178(b), stating the requirement to file, by November 1 of the year after a permit is issued, the amount of water he plans to withdraw each month, is unreasonable. He suggests requiring the following information: 1) what are an irrigator's planting intentions for next year? (acres and crops), and 2) is pre-irrigation planned? Mr. Rimkus states an agriculture expert can take this information and prepare a forecast of the amount of water needed.

Friesenhahn also commented on § 711.178, stating he cannot predict water needs for the following year.

Reagan commented on § 711.178 and believes that it does not follow the legislature's intent. Reagan states there was never any intent to require anyone to meet any schedule for using water. Reagan believes that unless the Authority gets better at predicting the weather, farmers cannot be expected to forecast water usage.

Gilliam Ranch and Gregory and Cora Rothe also commented § 711.178 (e) and (f). Gilliam Ranch and the Rothes maintain that the Act does not give the EAA specific regulatory authority over pumping on a monthly basis. Gilliam and the Rothes are concerned that § 711.178(e) could effectively limit pumping to less than the two acre feet per acre provided by the Act if an irrigator decides to accelerate pumping for the purposes of crop rotation or compensating for dry weather. Gilliam and the Rothes believe predicting water levels is not a reasonable justification for this rule and recommend that § 711.178 (e) and (f) be removed.

TFB also submitted comments relating to § 711.178(e) of the proposed rules. TFB expressed concern over the possibility that this section will undermine the irrigator minimum established in § 1.16(e) of the Act. TFB asserts that a permittee, in any given year, may not actually be able to use his allotted two-acre feet per acre irrigated because in some months, when water is actually needed, the irrigator's use is limited by the schedule that results from pure guesswork. Other months, the irrigators may not need the water due to sufficient rainfall. TFB argues that this limitation is not authorized by the Act and also claims that the Authority did not provide an explanation about how the value of 110% was determined as the appropriate amount.

Gembler also commented on § 711.178 by saying that this rule will not work because irrigators do not know how much it will rain.

Vaughan also comments on § 711.178. Vaughan states that § 711.178 is unworkable from an irrigator's standpoint. First, Vaughan claims the proposed rule requires farmers to guess or speculate what crops will be located in a particular location before such estimations are actually feasible. Specifically, Vaughan addresses § 711.178 (e), which states: "No permittee may withdraw groundwater from the aquifer during any month in excess of 110% of the scheduled monthly amount." Such a provision will adversely affect farming by causing farmers to guess both: (1) the amount of rainfall that will occur and (2) how much water they will require, months in advance. Vaughan argues that the cost of taking time to produce and review paperwork will outweigh the benefits of receiving information that he contends is conjecture at best. As a result, Vaughan predicts that farmers will overestimate their usage early in the year and the carry forward the unused portions of water for the rest of the year.

Grossenbacher also commented on § 711.178 of the proposed rules. He states the rule, in general, is hard to understand. Specifically, under § 711.178, he contends it is nearly impossible for irrigation farmers to provide monthly projections, a year in advance, regarding the amount of water they intend to use as outlined in the proposed rule. SAWS also commented upon proposed rule § 711.178(e) and (f). Specifically, SAWS expresses concern over monthly pumping limits imposed by these subsections. SAWS asserts there is no grant of authority in the Authority's enabling act that allows for withdrawal limits at times other than may be imposed pursuant to a critical period program. It recommends that subsections (e) and (f) be deleted.

CPS also commented upon proposed rule § 711.178(e). CPS objects to the requirement that a permittee may not withdraw groundwater from the aquifer during any month in excess of 110% of this planned monthly amount. CPS asserts this cap is too restrictive because it is not possible to accurately plan water usage a year in advance. CPS suggests one of the

following alternatives be considered in lieu of § 711.178(e): (1) the deletion of § 711.178(e); (2) the amendment of § 711.178(e) to allow withdrawal of 125% of the planned monthly amount; or (3) a new § 711.178(g) allowing for a permittee to adjust the monthly schedule on a quarterly or semi-annual basis.

SAWS commented upon proposed rule § 711.178(b). Specifically, SAWS suggests that § 711.178(b) read:

No later than December 20th of the first year after a groundwater withdrawal permit has been issued to a permittee and continuing each year thereafter, a permittee shall file with the Authority an anticipated groundwater withdrawal schedule on a form approved by the Authority containing the following information: . . .

Friesenhahn commented on § 711.178(b)(3) which requires a permittee to provide "any other information as determined by the board or the general manager." He feels this type of general language is unacceptable.

In response to these public comments, the Authority has elected not to adopt § 711.178 at this time and hereby withdraws the rule.

Section 711.180

SAWS submitted comments regarding proposed rule § 711.180. SAWS asserts that the Authority should use only the most generic terms in describing what an applicant may voluntarily waive. According to SAWS, the Authority's current statement, as to restriction in transfer of irrigation rights, will be challenged and does not follow state law regarding disposal of property rights. SAWS suggests amending § 711.180 to read:

...waiver of all or part of an applicant's maximum historical use, PA amount, or step-up amount.

The Authority received the above-referenced comment and disagrees with it. The references to base irrigation and unrestricted irrigation groundwater is necessary to properly delineate the full range of application features that may be waived and to make this section conform to the substantive content of the transfer rules to be found in subchapter L of this chapter that have recently been proposed. Also, inclusion of these types of groundwater, in the application waiver rules, will assist the Authority in its withdrawal reduction and retirement programs. Accordingly, the Authority has not modified § 711.180.

Section 711.220

Menard's remarks involve the cancellation of groundwater withdrawal permits under § 711.220.

The Authority has received the above-referenced comment and is unable to respond to it at this time. The basis for this determination is that this section is not a proposed section under this Final Order Adopting Rules. Section 711.220 is in the process of being proposed in subchapter H of this chapter in another Notice of Proposed Rule of the Authority. The Authority encourages Mr. Menard to comment on § 711.220 at that time.

Section 711.230

SAWS commented upon proposed rule § 711.230. SAWS maintains that water may be stored within the Edwards Aquifer through an "Aquifer Recharge and Storage Permit" for recovery at a later date. According to SAWS such storage should not be misconstrued as wasteful or subject to a waste determination. SAWS proposes that § 711.230 read:

A person may not waste groundwater withdrawn from the aquifer.

The Authority received the above-referenced comment and disagrees with it. The basis for this determination is that if the Authority issues aquifer recharge and storage permits, under other permitting rules of the Authority, it will necessarily have found that the activity will not constitute the waste of groundwater within the aquifer. However, waste can occur due to the injection of water into the Aquifer and the facts, at some time, may show effects on water quality or that the aquifer has no storage capacity in the area injected. The Authority will need to be able to take appropriate enforcement action in such cases. Accordingly, the Authority has not modified § 711.230.

Section 711.232

Schirmer commented upon proposed rule § 711.232 relating to pollution of the aquifer. Schirmer asserts users over the recharge zone to the north of Bexar County continue to engage in new development and meter installation which, he contends, contributes to the pollution of the Aquifer. Schirmer recommends the Authority enforce § 711.232 to limit further pollution.

Menard also commented upon proposed rule § 711.232. Menard believes pollution and building over the recharge zone of the aquifer is a further restriction on his property right and lowers its value. Menard suggests stricter planning, guidance, and enforcement of the section.

Verstraeten also made comments regarding § 711.232. Verstraeten stated his concern regarding municipal water systems' leasing and purchase of pumping rights in Uvalde and Medina Counties pumping out in Bexar County which he believes prematurely lowers Bexar County water levels. Verstraeten requests that any municipal water system that supplies water over the recharge zone should be responsible for any pollution of the aquifer that occurs as a result. Verstraeten suggests enforcement of § 711.232 by the Authority.

Authority staff received the above-referenced comments and agrees with them. The basis for this determination is that the commenters request that the Authority enforce this rule as written. Accordingly, the Authority has not modified § 711.232.

Section 711.234

SAWS made comments regarding proposed rule § 711.234. SAWS is concerned that the Authority makes a distinction that nuisances exist for exempt wells while the same occurrences are permit violations for permitted wells. SAWS suggests the first sentence of § 711.234 be changed to read:

For exempt wells, the following are declared nuisances:

Furthermore, SAWS maintains that water is capable of being stored in the Aquifer, through an "Aquifer Recharge and Storage Permit," for later recovery. SAWS argues that such storage should not be misconstrued as wasteful or subject to a waste determination. Accordingly, SAWS requests that § 711.234 (1) read:

(1) the wasting of groundwater withdrawn from the aquifer;

The Authority received the above-referenced comment and disagrees with it. The basis for this determination is that this section makes no distinction between exempt and non-exempt wells. The owner of any well that withdraws groundwater at a rate in excess of the permitted amounts will be deemed to be a nuisance. As to the comment concerning waste and aquifer recharge and storage permits, the Authority refers the commenter to its response to § 711.230. Accordingly, the Authority has not modified § 711.234.

Section 711.328

Vulcan made comments to proposed § 711.328 relating to transfer of ownership. Section 711.328 is not a proposed rule that is the subject of this Final Order Adopting Rules. Vulcan's comments focus on certain legal arguments related to the nature of an "existing user." Vulcan also suggests clarification of this section and certain amendments.

The Authority has received the above-referenced comment and is unable to respond to the comment at this time. The basis for this determination is that this section is not a proposed section under this Final Order Adopting Rules. Section 711.328 is in the process of being proposed in subchapter L of this chapter in another Notice of Proposed Rule of the Authority. The Authority encourages Vulcan to comment on § 711.328 at that time.

Comments on the Chapter 711 rules generally

Representative Tracy King

Tracy King, State Representative for the 43rd District which includes Medina and Uvalde Counties and four other counties, gave a general comment not directed to any specific rule. He does not favor this legislation and does not like being forced to regulate groundwater. Rep. King wants the Authority to remember two guarantees in the statute: 1) two-acre feet minimum, and 2) the historical minimum guarantees. Rep. King advises the Authority to avoid court challenges by keeping in mind the intent of the legislature.

The Authority received the above-referenced comment and agrees with it. The basis for this determination is that the legislature created two statutory permit minimums in § 1.16(e) of the Act, an irrigator minimum and a historical average minimum. The Authority has accounted for these minimums in §711.172(b)(1) and (2), 711.172(g)(6), and §711.176(b)(1) and (2). No specific action is requested to be taken relative to any particular section of the proposed rules. In light of this, the Authority has not modified any of the proposed rules.

Inland

Inland generally commented on the Chapter 711 rules without reference to any specific rule. Inland asserts the municipalities in the region are being asked to shoulder an inequitable burden because they have not been granted their maximum historical beneficial use while other historical users, who have no current needs, have been given their maximum historical use. Therefore, Inland contends that the Authority is dividing the region through unfair and inequitable treatment of municipal interests and not utilizing legislatively provided mechanisms (§ 1.14(d)) which could ensure fairness.

The Authority received the above-referenced comment and disagrees with it. The basis for this determination is that no existing user of groundwater from the aquifer that will be granted an initial regular permit will likely receive a permit for their maximum historical use. All such permits will likely be issued after a time where the maximum historical use will have been proportionally adjusted. To the extent that the proportional adjustment process may result in an "equitable" or "inequitable" allocation of the water resources from the aquifer is a decision that has already been made by the Texas Legislature by the passage of Edwards Aquifer Authority Act. The Authority, through its rulemaking process, is generally unable to make reallocations of groundwater from the aquifer in a way that is contrary to the intent of the legislature as expressed in the Act. The Authority agrees that § 1.14(d) creates a process whereby the groundwater available for permitting may be increased. However, the Authority may invoke this procedure only after a certain technical basis is determined to exist and after certain consultation procedures have been complied with. The decision to invoke § 1.l4(d) will be available in the event the technical data base is found to exist and the procedural steps occur. Accordingly, the Authority has not modified and proposed sections in chapter 711.

TFB

TFB asserts that the Authority was required by the Texas Private Real Property Rights Preservation Act to prepare a "takings impact assessment" or "TIA" before providing notice of the proposed adoption of the Chapter 711 rules.

The Authority disagrees. Chapter 2007 of the Texas Government Code, also known as the "Texas Private Real Property Rights Preservation Act" ("TPRPRA"), requires governmental entities, under certain circumstances, to prepare a TIA in connection with certain covered categories of proposed governmental actions. Based on the following reasons, the Authority has determined that it need not prepare a TIA in connection with the adoption of these rules.

First, the Authority has made a "categorical determination" that these Chapter 711 rules do not affect vested property rights and, as such, adoption of these rules is not an action that "may result in a taking." The rules at issue here implement a permitting program for the withdrawal of water from the Edwards Aquifer. The Act requires the Authority to implement a permitting system whereby existing users and other potential users of aquifer water may apply for and receive permits issued by the Authority allowing for the withdrawal of groundwater from the aquifer. Other types of permits are also required by the Act for well construction and related work. Certain other withdrawals are exempted by the Act from permitting requirements. The Act also specifies an interim authorization period prior to the issuance by the Authority of final permits during which certain existing users of the aquifer may continue to make withdrawals. The Act imposes a number of restrictions upon the use of the aquifer during the interim authorization period as well as after permits are issued. It also places limits on the ability to transfer permitted or interim authorization rights. These rules are intended to effectuate these various components of the Act.

TPRPRPA makes it clear that a TIA need only be performed when the proposed governmental action is one that "may result in a taking." See id., §§ 2007.043(a), 2007.041(a), 2007.042(a). If an action is one that has no potential to result in a taking, then no TIA need be performed. Adoption of the rules at issue here is not an action that "may result in a taking" for two reasons.

The rules cannot result in the taking of a vested private real property right. Traditional takings doctrine dictates that, in order to constitute a compensable taking, the property right alleged to have been "taken" must rise to the level of a vested right. Prior to the adoption of the Act, a landowner's right to pump groundwater underlying his or her property derived from the common law English Rule, also known as the "Rule of Capture." The rules implement a permitting structure which is admittedly at odds with the Rule of Capture. However, a landowner's common law Rule of Capture right does not rise to the level of a vested property right. Under the common law, water underlying a landowner's property may be reduced to possession by the pumping of another. In other words, a landowner has no right to exclude others from the water underlying his land. As such, the landowner's expectancy of water does not rise to the level of a vested property

right which could be "taken" by the passage of these rules and passage of these rules is not an action that may result in a taking.

Additionally, with respect to Edwards Aquifer water, any common law rights a landowner may have had in the past have been effectively abolished by the Legislature within the boundaries of the EAA by the passage of the Act. Under the old common law, a landowner was essentially free to drill a well and pump as much water as he pleased for whatever use and location of use he pleased. Passage of the Act changed the rules within the boundaries of the EAA. The basis for the right to withdraw groundwater under the Act changed from being an incident of the ownership of land to one based on use during the statutorily-defined "historical period." See Act § 1.16. Excluding "exempt" wells, a landowner must now obtain a permit prior to drilling a well and making withdrawals, and this permit may be issued only if there is "water available for permitting" or if certain aquifer conditions are met. Id. §§ 1.14, 1.15, 1.16, 1.18 and 1.19. The rate and total quantity of withdrawals are subject to limitation. Id. § 1.15(d). Regulation under the Act leaves no room for the common law to operate within the boundaries of the EAA with respect to Edwards Aquifer groundwater. As a result, there are no vested property rights which could be taken by the passage of these rules and no TIA need be prepared.

Second, the Authority's action in adopting these rules is an action that is reasonably taken to fulfill an obligation mandated by state law and is thus excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(4) of the Texas Government Code. See §§ 1.03(4), (9) - (14), (21), 1.07, 1.08(a), 1.10(i)(1), (2), 1.11(a), (b), (d)(2), (8), (10), (11), (h), 1.14(a) - (f), (h), 1.15(a) - (d), 1.16(a), (c) - (h), 1.17(a) - (d), 1.18, 1.19, 1.20, 1.21, 1.22(a)(1)-(4), 1.23(a), 1.25, 1.26, 1.28(b), 1.29, 1.31, 1.32, 1.33, 1.34, 1.35, 1.36 of the Act, §§ 36.101(a), 36.111, 36.113, 36.1131, 36.119(a), 49.211(a), and 49.221 of the Texas Water Code, and § 2001.004(1) of the APA.

This conclusion is directly supported and controlled by the decision in *Edwards Aquifer Authority v. Bragg,* 21 S.W.3d 375 (Tex. App. San Antonio 2000, pet. filed) (*"EAA v. Bragg"*). In that case, the Plaintiffs sued to invalidate a set of rules adopted by the Authority (the "prior permitting rules") which were substantially similar to these rules and which were designed, like these rules, to implement the Authority's permitting program. The Fourth Court of Appeals held that the Authority's adoption of its prior permitting rules was expressly mandated by the Act and was therefore excepted from the operation of TPRPRPA. The holding in that case controls here.

Third, it is the position of the Authority that all valid actions of the Authority are excluded from the Texas Private Real Property Rights Preservation Act under § 2007.003(b)(11)(C) of the Texas Government Code as actions of a political subdivision taken under its statutory authority to prevent waste or protect the rights of owners of interest in groundwater. Accordingly, a TIA need not be prepared in connection with the proposal of these rules.

Fourth, it is the position of the Authority that the adoption of these rules constitutes an action taken by a governmental entity to "to prohibit or restrict a condition or use of private real private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state." Texas Government Code Annotated, § 2007.003(b)(6).

Fifth, it is the position of the Authority that the adoption of these rules constitutes an action which: "(A) is taken in response to a real and substantial threat to public health and safety; (B) is designed to significantly advance the health and safety purpose; and (C) does not impose a greater burden than is necessary to achieve the health and safety purpose." Texas Government Code Annotated, § 2007.003(b)(13). Accordingly, for the reasons stated above, a TIA need not be performed in connection with the proposal of these rules.

TDA

The TDA commented generally that the Authority should have prepared a "small business effects statement" prior to proposing the adoption of the Chapter 711 rules, pursuant to § 2006.002(d) of the Texas Government Code.

The Authority disagrees for the following reasons. Chapter 2006 of the Texas Government Code, subchapter A, requires state agencies to prepare a small business effects statement (SBES) prior to proposing, for adoption, a rule that would have an adverse economic effect on small businesses. By the statute's express terms, this requirement applies only to a "state agency." The term "state agency" is defined, for the purposes of Chapter 2006, subchapter A, as "a department, board, bureau, commission, division, office, council or other agency of the state." Id. § 2006.001(3).

Section 2006.002 does not apply to the Authority because the Authority does not meet the definition of the term "state agency" as set out forth in Chapter 2006. Section 1.02(a) of the Act creates the Authority as a "conservation and reclamation district" under Article XVI, § 59 of the Texas Constitution. Conservation and reclamation districts created under this authority have long been considered to be "political subdivisions" of the State of Texas. *See, e.g., Guaranty Petroleum Corp. v. Armstrong,* 609 S.W.2d 529, 530 (Tex. 1980). In *Guaranty Petroleum,* the Texas Supreme Court explained the difference between political subdivisions and state agencies as follows:

A political subdivision differs from a department, board or agency of the State. A political subdivision has jurisdiction over a portion of the State; a department, board or agency of the State exercises its jurisdiction throughout the State. Members of the governing body of a political subdivision are elected in local elections or are appointed by locally elected officials; those who govern departments, boards or agencies of the State are elected in statewide elections or are appointed by State officials.

Guaranty Petroleum, 609 S.W.2d at 531 (emphasis added).

This opinion makes clear that state agencies are characterized by having statewide jurisdiction and are governed by persons who are elected in statewide elections or are appointed by state officials. Political subdivisions like the Authority, on the other hand, have jurisdiction over only a portion of the state and are governed by persons who are elected in local elections or are appointed by locally elected officials. These principles have been reiterated by the Texas Supreme Court in *Lohec v. Galveston County Commissioners Court,* 841 S.W.2d 361, 364 (Tex. 1992) (noting that "statewide jurisdiction" is "a trait required of entities recognized as department, boards, or agencies of the state") and *Monsanto Company v. Cornerstones Municipal Utility District,* 865 S.W.2d 937, 939-40 (Tex. 1993).

Because the Authority has jurisdiction over only a portion of the State and because the members of its governing body are elected in local elections or are appointed by locally elected

officials, the Authority is a political subdivision and not a state agency, and is not subject to the SBES requirement found in Chapter 2006 of the Government Code.

No revisions to the Chapter 711 are required in response to this comment.

SUBCHAPTER A. DEFINITIONS

31 TAC §711.1

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The new sections are adopted pursuant to the following statutory provisions:

Section 1.01 of the Act contains the findings of the Texas Legislature that the Edwards Aquifer is a distinctive natural resource and that a special regional management district (the Authority) is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, existing industries, and the economic development of the state.

Section 1.03(1) defines the "Edwards Aquifer."

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered wasteful under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. These rules further those objectives.

Section 1.08(b) makes it clear that the Authority's powers apply only to water within or withdrawn from the Edwards Aquifer, and not to surface water.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.13 of the Act requires the Authority to allow credit to be given for certified reuse of aquifer water. The Authority will likely adopt rules implementing this section. This concept is acknowledged in Subchapter F.

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(g) of the Act allows the Authority to, by rule, define other pools within the aquifer in accordance with hydrogeologic research, and to establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority "to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act." This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(b) of the Act, in conjunction with *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996)(holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996) provides that an existing user's declaration of historical use (permit application) must be file on or before December 30, 1996, and the applicant must timely pay all application fees required by the Authority. It further requires irrigation applicants to submit, as part of their applications, documentation regarding the number of acres irrigated during the historical period.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.16(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: "(1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the authority."

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22 of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. These concepts are implemented in the Chapter 711 rules.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is acknowledged in Subchapter F.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred (alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented, in part, in Chapter 711.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented, in part, in Chapter 711.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This rulemaking is in furtherance of this legislative mandate.

Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711derive in part from this statutory authority and implement this chapter and the supporting rules.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.101(a) empowers the Authority to make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater in order to, among other things, prevent waste and carry out the duties provided elsewhere in Chapter 36. This requirement is implemented, in large part, through Chapter 711.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.115 provides that no person may drill a well, alter the size of a well or well pump, or operate a well without first obtaining a permit from the Authority.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711, primarily in the definition of waste found in § 711.1.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.211(a) endows districts such as the Authority with the "functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law." This broad delegation of powers is incorporated into the Chapter 711 rules.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.221 empowers representatives of the Authority to enter land and perform tests and other inspections. This authority is incorporated into Chapter 711, primarily in § 711.416.

16 TAC, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TAC, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

§711.1. Definitions.

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

(1) Contract user--A person who:

(A) withdrew or purchased groundwater from the aquifer during the historical period pursuant to a contract or other legal right obtained from a prior user or an existing user, from an existing well owned by the prior user or an existing user; and

(B) placed the groundwater to beneficial use.

(2) Existing user--A person or the successor in interest of a such a person, who, on June 1, 1993, owned an existing well from which groundwater from the aquifer had been withdrawn and placed to beneficial use during the historical period,

(3) Historical use--The lawful withdrawing and placing to beneficial use of groundwater from the aquifer during the historical period.

(4) Prior user--A person who owned an existing well during the historical period and withdrew groundwater from the aquifer from the well and placed it to beneficial use during the historical period, and during the historical period conveyed the ownership interest in the well to another person.

(5) Producing well--A well from which groundwater from the aquifer is capable of being withdrawn for a beneficial use.

(6) Waste --

(A) Withdrawal of groundwater from the aquifer at a rate and amount that causes or threatens to cause intrusion into the reservoir of water unsuitable for agricultural, gardening, domestic or stock-raising purposes;

(B) The flowing or producing of wells from the aquifer if the water produced is not used for a beneficial purpose;

(C) Escape of groundwater from the aquifer to any other reservoir that does not contain groundwater;

(D) Pollution or harmful alteration of groundwater in the aquifer by salt water or other deleterious matter admitted from another stratum or from the surface of the ground;

(E) Willfully or negligently causing, suffering or permitting groundwater from the aquifer to escape into any river, creek, natural watercourse, depression, lake, reservoir, drain, sewer, street, highway, road, or road ditch, or onto any land other than that of the owner of the well, unless:

(i) such discharge is authorized by permit, rule, or order issued by the commission under Chapter 26, Water Code; and

(ii) after discharge, the groundwater from the aquifer is beneficially used by the existing user, applicant or permittee making the discharge;

(F) Groundwater pumped from the aquifer for irrigation that escapes as irrigation tailwater onto land, other than that of the well owner, unless permission has been granted by the occupant of the land receiving the discharge;

(G) For water produced from an artesian well, "waste" has the meaning assigned by the Water Code, §11.205;

(H) Constructing, installing, drilling, equipping, completing, altering, operating, maintaining, or making withdrawals from a well without a required permit;

(I) Withdrawal of water that is substantially in excess of the volume or rate reasonably required for a beneficial use; or

(J) Irrigation use of groundwater from the aquifer in a volume per irrigated acre that is so insufficient that a crop could not have been reasonably cultivated and produced.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007355
Gregory M. Ellis
General Manager
Edwards Aquifer Authority
Effective date: November 7, 2000
Proposal publication date: August 11, 2000
For further information, please call: (210) 222-2204

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SUBCHAPTER B. GENERAL PROVISIONS

31 TAC §§711.10, 711.12, 711.14

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The new sections are adopted pursuant to the following statutory provisions:

Section 1.01 of the Act contains the findings of the Texas Legislature that the Edwards Aquifer is a distinctive natural resource and that a special regional management district (the Authority) is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, existing industries, and the economic development of the state.

Section 1.03(1) defines the "Edwards Aquifer."

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered wasteful under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. These rules further those objectives.

Section 1.08(b) makes it clear that the Authority's powers apply only to water within or withdrawn from the Edwards Aquifer, and not to surface water.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.13 of the Act requires the Authority to allow credit to be given for certified reuse of aquifer water. The Authority will likely adopt rules implementing this section. This concept is acknowledged in Subchapter F.

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(g) of the Act allows the Authority to, by rule, define other pools within the aquifer in accordance with hydrogeologic research, and to establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority "to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act." This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(b) of the Act, in conjunction with *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996)(holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996) provides that an existing user's declaration of historical use (permit application) must be file on or before December 30, 1996, and the applicant must timely pay all application fees required by the Authority. It further requires irrigation applicants to submit, as part of their applications, documentation regarding the number of acres irrigated during the historical period.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.16(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years

during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: "(1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the authority."

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22 of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. These concepts are implemented in the Chapter 711 rules.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is acknowledged in Subchapter F.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred (alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented, in part, in Chapter 711.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented, in part, in Chapter 711.

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Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

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16 TAC, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TAC, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

§711.12. Activities Requiring a Permit.

(a) Except as provided in § 711.14 of this title (relating to Withdrawals Not Requiring a Groundwater Withdrawal Permit) and subsection (b) of this section, a person desiring to engage in any of the following activities is required to obtain a permit from the Authority before the commencement of the activity:

(1) withdraw groundwater from the aquifer;

(2) construct, install, drill, equip, complete, alter, operate, or maintain a well, or other works, designed for the withdrawal of groundwater from the aquifer;

(3) construct, install, drill, equip, complete, alter, operate, or maintain a well, or other works, designed for the monitoring of the water quality or level of the aquifer,

(4) equip, complete, alter, operate, or maintain a well pump installed or to be installed on a well designed for the withdrawal of groundwater from the aquifer;

(5) construct, install, drill, equip, complete or alter a well or other works designed to withdraw groundwater from an aquifer other than the Edwards Aquifer, but that intersects the Edwards Aquifer;

(6) recharge water into the aquifer; or

(7) store water within the aquifer.

(b) The requirement to obtain a well construction permit under subsection (a)(2)-(4) of this section does not apply to the performance of routine operation and maintenance after construction and installation of a well if the well is:

(1) an existing non-exempt well that qualifies for interim authorization status under the Act, § 1.17, and subchapter D of this chapter (relating to Interim Authorization);

(2) an existing non-exempt well for which a groundwater withdrawal permit has been issued by the board; or

(3) an existing exempt well.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007356

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Edwards Aquifer Authority
Effective date: November 7, 2000
Proposal publication date: August 11, 2000
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SUBCHAPTER E. PERMITTED WELLS

31 TAC §§711.90, 711.92, 711.94, 711.96, 711.98, 711.100, 711.102, 711.104, 711.108, 711.110, 711.112, 711.116, 711.118

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The new sections are adopted pursuant to the following statutory provisions:

Section 1.01 of the Act contains the findings of the Texas Legislature that the Edwards Aquifer is a distinctive natural resource and that a special regional management district (the Authority) is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, existing industries, and the economic development of the state.

Section 1.03(1) defines the "Edwards Aquifer."

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered wasteful under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. These rules further those objectives.

Section 1.08(b) makes it clear that the Authority's powers apply only to water within or withdrawn from the Edwards Aquifer, and not to surface water.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.13 of the Act requires the Authority to allow credit to be given for certified reuse of aquifer water. The Authority will likely adopt rules implementing this section. This concept is acknowledged in Subchapter F.

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(g) of the Act allows the Authority to, by rule, define other pools within the aquifer in accordance with hydrogeologic research, and to establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority "to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act." This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(b) of the Act, in conjunction with *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996)(holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996) provides that an existing user's declaration of historical use (permit application) must be file on or before December 30, 1996, and the applicant must timely pay all application fees required by the Authority. It further requires irrigation applicants to submit, as part of their applications, documentation regarding the number of acres irrigated during the historical period.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.16(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled

or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: "(1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the authority."

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22 of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. These concepts are implemented in the Chapter 711 rules.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is acknowledged in Subchapter F.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred (alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented, in part, in Chapter 711.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented, in part, in Chapter 711.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This rulemaking is in furtherance of this legislative mandate.

Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711derive in part from this statutory authority and implement this chapter and the supporting rules.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.101(a) empowers the Authority to make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater in order to, among other things, prevent waste and carry out the duties provided elsewhere in Chapter 36. This requirement is implemented, in large part, through Chapter 711.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.115 provides that no person may drill a well, alter the size of a well or well pump, or operate a well without first obtaining a permit from the Authority.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711, primarily in the definition of waste found in § 711.1.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.211(a) endows districts such as the Authority with the "functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law." This broad delegation of powers is incorporated into the Chapter 711 rules.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.221 empowers representatives of the Authority to enter land and perform tests and other inspections. This authority is incorporated into Chapter 711, primarily in § 711.416.

16 TAC, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TAC, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

§711.94. Beneficial Use.

(a) Groundwater withdrawn from the aquifer must:

(1) have been placed to beneficial use without waste during the historical period; or

(2) be placed to beneficial use without waste after the historical period.

(b) Unless otherwise provided by contract, the beneficial use of groundwater by a contract user inures to the benefit of a prior user or an existing user from whose well the contract user made withdrawals.

(c) Unless otherwise provided by contract, the beneficial use of groundwater by a contract user may only be claimed by a prior user or existing user in support of a declaration.

(d) Irrigation use of groundwater from the aquifer in the volume of two acre-feet per irrigated acre is rebuttably presumed to constitute beneficial use without waste.

(e) The irrigation of multiple or successive crops is a beneficial use to the extent it does not constitute waste.

(f) For a prior user or an existing user whose historic use has been affected by a requirement of, or participation in, a federal program, a beneficial use credit shall be given for the amount that would have been withdrawn and beneficially used during the historical period by such prior user or existing user but for the operation of the federal program. If the use was for irrigation purposes, the credit is based on irrigation use on comparable acres on a similarly situated farm that is not in the federal program. If the use was for non-irrigation purposes, the credit is based upon the use of a comparable and similarly situated user whose uses were not affected by participation in a federal program.

(g) Unless otherwise provided by contract, the beneficial use of groundwater during the historical period on the same place of use by multiple existing users each owning different wells is shared pro rata based on the number of existing users who irrigated the place of use during the historical period with the sum total of each existing user's pro rata share not exceeding two acre-feet per irrigated acre.

§711.96. Non-Aquifer Groundwater.

(a) The Authority may not issue to an applicant a groundwater withdrawal permit to withdraw groundwater from an aquifer other than the Edwards Aquifer.

(b) An application for a groundwater withdrawal permit for a well that withdraws groundwater from multiple aquifers, including the Edwards Aquifer, may be granted by the board in an amount that does not exceed:

(1) for irrigation use, the number of acres beneficially irrigated with the water withdrawn from the well multiplied by the percentage of aquifer water produced from the well, multiplied by two acre-feet; or

(2) for non-irrigation use, the actual amount of groundwater withdrawn from the aquifer and placed to beneficial use.

§711.98. Initial Regular Permits.

(a) An existing user may apply for an initial regular permit.

(b) Initial regular permits are transferable pursuant to subchapter L of this chapter (relating to Transfers).

(c) The term of an initial regular permit is perpetual.

(d) If in effect, initial regular permits may be proportionally adjusted in accordance with the proportional adjustment rules pursuant to subchapter G of this chapter (relating to Groundwater Available for Permitting; Proportional Adjustment; and Equal Percentage Reduction).

(e) If in effect, initial regular permits may be retired in accordance with the following rules:

(1) the springflow maintenance rules pursuant to subchapter G (relating to Springflow Maintenance Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(2) the equal percentage reduction rules pursuant to subchapter G of this chapter (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reduction); or

(3) the regular permit retirement rules pursuant to subchapter H (relating to Withdrawal Reductions and Regular Permit Retirement Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(f) If in effect, initial regular permits may be suspended in accordance with the following rules:

(1) the demand management rules pursuant to subchapter D (relating to Demand Management) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation); or

(2) the groundwater trust pursuant to subchapter N of this chapter (relating to Groundwater Trust).

(g) If in effect, initial regular permits may be interrupted in accordance with the following rules:

(1) the drought management rules pursuant to subchapter E (relating to Drought Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(2) the critical period management rules pursuant to subchapter F (relating to Critical Period Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation); or

(3) the springflow maintenance rules pursuant to subchapter G (relating to Springflow Maintenance Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(h) Initial regular permits may be abandoned pursuant to subchapter H of this chapter (relating to Abandonment and Cancellation).

(i) Initial regular permits may be canceled pursuant to subchapter H of this chapter (relating to Abandonment and Cancellation).

(j) Subject to the duty of the board to determine the amount of groundwater that may be withdrawn under an initial regular permit, the board shall grant an application for an initial regular permit if the following elements are established by convincing evidence:

(1) the applicant filed a declaration on or before December 30, 1996;

(2) the applicant paid the application fee on or before December 30, 1996;

(3) the application identifies an existing well(s);

(4) on June 1, 1993, the applicant, or a prior user who is the applicant's predecessor or in interest, owned the well;

(5) the well head is physically located within the boundaries of the authority;

(6) the well is a withdrawal point for groundwater;

(7) the groundwater withdrawn from the well immediately prior to its intake into the well casing was physically located within and discharged directly from the aquifer;

(8) at the time of the withdrawals, the well was operated by:

(A) the applicant;

(B) a prior user who is the applicant's predecessor in interest to the ownership of the well; or

(C) a contract user;

(9) the withdrawals were made during the historical period;

(10) the place of use at which the withdrawals were beneficially used is physically located within the boundaries of the authority;

(11) the withdrawals were placed to a beneficial use for irrigation, municipal, or industrial use;

(12) the well(s) does not qualify for exempt well status;

(13) the application is in compliance with the Act; and

(14) the application is in compliance with the rules of the Authority.

(k) The board shall issue withdrawal amounts to an applicant for an initial regular permit pursuant to §711.176 of this title (relating to Groundwater Withdrawal Amount for Initial Regular Permits; Compensation for Phase-2 Proportional Amounts) or as modified by §711.180 of this title (relating to Voluntary Waiver of Applications for Initial Regular Permits) of this chapter.

§711.100. Additional Regular Permits.

(a) Any person owning a well, or proposing to construct a well, may apply for an additional regular permit if:

(1) final determinations have been made by the board on all applications for initial regular permits filed with the authority on or before December 30, 1996; and

(2) the board has issued an order stating that the authority is accepting for filing applications for additional regular permits.

(b) Unless the board has issued the order authorizing applications for additional regular permits to be filed with the authority, the general manager may not process any application received and must return the application to the applicant along with any application fee submitted. When the general manager is authorized to accept for filing applications for additional regular permits, they shall be processed in the order in which they are received according to the official date and time stamp of the authority on the application.

(c) Additional regular permits are transferable pursuant to subchapter L of this chapter (relating to Transfers).

(d) The term of an additional regular permit is perpetual.

(e) If in effect, additional regular permits may be retired in accordance with the following rules:

(1) the springflow maintenance rules pursuant to subchapter G (relating to Springflow Maintenance Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(2) the equal percentage reduction rules pursuant to subchapter G of this chapter (relating to Groundwater Available for Permitting; Proportional Adjustment; Equal Percentage Reduction); or

(3) the regular permit retirement rules pursuant to subchapter H (relating to Withdrawal Reductions and Regular Permit Retirement Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(f) If in effect, additional regular permits may be suspended in accordance with the following rules:

(1) the demand management rules pursuant to subchapter D (relating to Demand Management) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation); or

(2) the groundwater trust pursuant to subchapter N of this chapter (relating to Groundwater Trust).

(g) If in effect, additional regular permits may be interrupted in accordance with the following rules:

(1) the drought management rules pursuant to subchapter E (relating to Drought Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(2) the critical period management rules pursuant to subchapter F (relating to Critical Period Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation); or

(3) the springflow maintenance rules pursuant to subchapter G (relating to Springflow Maintenance Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(h) Additional regular permits may be abandoned pursuant to subchapter H of this chapter (relating to Abandonment and Cancellation).

(i) Additional regular permits may be canceled pursuant to subchapter H of this chapter (relating to Abandonment and Cancellation).

(j) Subject to the duty of the board to determine the amount of groundwater that may be withdrawn under an additional regular permit, the board shall grant an application for an additional regular permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies an existing or proposed well(s);

(3) the well head is physically located within the boundaries of the authority;

(4) the well is a withdrawal point for groundwater;

(5) the groundwater proposed to be withdrawn from the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the place of use at which the withdrawals are proposed to be beneficially used is physically located within the boundaries of the authority;

(7) the withdrawals are proposed to be placed to a beneficial use for irrigation, municipal, or industrial use;

(8) there remains water available for permitting after the board has made final determinations on:

(A) all applications for initial regular permits;

(B) any restorations of proportional adjustments or equal percentage reductions pursuant to § 711.304 of this title (relating to Allocation of Additional Groundwater Supplies) of this chapter; and

(C) all prior applications for additional regular permits;

(9) the well does not qualify for exempt well status;

(10) the proposed withdrawal of groundwater is consistent with chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(11) the application is in compliance with the Act; and

(12) the application is in compliance with the rules of the Authority.

(k) The board shall issue a groundwater withdrawal amount to an applicant for an additional regular permit in an amount that is consistent with chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

§711.102. Term Permits.

(a) Any person owning a well, or proposing to construct a well, may apply for a term permit.

(b) Unless the board has issued an order authorizing applications for term permits to be filed with the authority, the general manager may not process any application received and must return the application to the applicant along with any application fee submitted. When the general manager is authorized to accept for filing applications for term permits, they shall be processed in the order in which they are received according to the official date and time stamp of the authority on the application.

(c) Term permits are transferable only as to ownership pursuant to subchapter L of this chapter (relating to Transfers).

(d) If in effect, term permits shall be interrupted in accordance with the following rules:

(1) for wells completed in the San Antonio pool, the level of the aquifer for the San Antonio pool is equal to or less than 665 feet above mean sea level as measured at well J-17;

(2) for wells completed in the Uvalde pool, the level of the aquifer for the Uvalde pool is equal to or less than 865 feet above mean sea level as measured at well J-27;

(3) the drought management rules pursuant to subchapter E (relating to Drought Management Rules) of chapter 715 (relating to Comprehensive Water Management Plan Implementation);

(4) the critical period management rules pursuant to subchapter F (relating to Critical Period Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation); or

(5) the springflow maintenance rules pursuant to subchapter G (relating to Springflow Maintenance Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(e) A term permit may be issued for any period the Authority considers feasible not to exceed ten years. Upon expiration of the term, the permit automatically expires and is canceled.

(f) Subject to the duty of the board to determine the amount of groundwater that may be withdrawn under a term permit, the board shall grant an application for a term permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies an existing or proposed well(s);

(3) the well head is physically located within the boundaries of the authority;

(4) the well is a withdrawal point for groundwater;

(5) the groundwater proposed to be withdrawn from the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the withdrawals are proposed to be placed to a beneficial use;

(7) the place of use at which the withdrawals are proposed to be beneficially used is physically located within the boundaries of the authority;

(8) groundwater is available for permitting from the San Antonio or Uvalde pools, as appropriate;

(9) the well does not qualify for exempt well status;

(10) the applicant is in compliance with other groundwater withdrawal permits, if any;

(11) the proposed withdrawal of groundwater under the term permit, if granted, would not unreasonably negatively affect other permittees;

(12) the proposed withdrawal of groundwater is consistent with chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(13) the proposed use of groundwater is economically feasible in relation to the proposed length of the term;

(14) if applicable, the applicant has or will have an approved existing on-site sewer systems, or has been granted an application to construct such a system by the appropriate regulatory agency;

(15) the applicant will take all reasonable measures to ensure conservation of water withdrawn;

(16) the applicant has no other source of water from a municipal distribution system;

(17) the application is in compliance with the Act; and

(18) the application is in compliance with the rules of the Authority.

(g) The board shall issue a groundwater withdrawal amount to an applicant for a term permit in the amount that is consistent with chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

(h) By January 15 of each year, the board by order shall determine the total quantity of groundwater that may be withdrawn from each pool of the aquifer for that calendar year pursuant to term permits. At any time by order of the Board this determination may be revised as appropriate based upon actual aquifer conditions to be consistent with chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation).

§711.108. Well Construction Permits

(a) Any person proposing to perform any of the activities set forth in § 711.12(a)(2)-(5) of this chapter (relating to Activities Requiring a Permit) shall apply for a well construction permit.

(b) Well construction permits are not transferable pursuant to subchapter L of this chapter (relating to Transfers).

(c) A well constructed pursuant to a well construction permit must be completed within 180 days of the issuance of the permit. The permit term may be extended by one additional 180-day extension period by the general manager. In order to obtain such an extension, the holder of a well construction permit must submit a written request to the general manager explaining the need for the extension. If the holder of the well construction permit demonstrates a need for an extension and demonstrates that the permit holder's failure to complete the well within the original 180-day term is not due to the permit holder's own lack of diligence, then the general manager may authorize the extension. Upon expiration of the term, including any extension granted, the permit automatically expires and is canceled.

(d) The general manager shall grant an application for a well construction permit if the following elements are established by convincing evidence:

(1) the applicant paid the application fee;

(2) the application identifies a proposed or an existing well(s);

(3) the well head is or will be physically located within the boundaries of the Authority;

(4) the well is a withdrawal point for groundwater;

(5) the groundwater proposed to be withdrawn from the well immediately prior to its intake into the well casing will be physically located within and discharged directly from the aquifer;

(6) the withdrawals are proposed to be placed to a beneficial use for domestic or livestock use, irrigation use, municipal use, or industrial use;

(7) the place of use at which the withdrawals are proposed to be beneficially used is physically located within the boundaries of the authority;

(8) the applicant has a legal right to make withdrawals from the well;

(9) the quantity of groundwater the well would be capable of producing, if constructed, is consistent with the quantity of groundwater the applicant proposes to produce pursuant to exempt well status or pursuant to a groundwater withdrawal permit;

(10) the applicant is in compliance with other permits the applicant holds from the Authority;

(11) the proposed well construction and operation would not unreasonably negatively affect the aquifer or other permittees;

(12) the well will be constructed, operated and maintained consistent with all applicable local, state, and federal well construction, operation, and maintenance law;

(13) the well will be constructed, operated and maintained consistent with chapter 713 this title (relating to Water Quality);

(14) the application is in compliance with the Act; and

(15) the application is in compliance with the rules of the Authority.

§711.112. Contents of Groundwater Withdrawal Permits.

Groundwater withdrawal permits issued by the Authority shall contain the following:

(1) name, address and telephone number of the owner of the permit;

(2) name, address and telephone number of an authorized representative, if any, of the owner;

(3) permit category;

(4) permit term;

(5) purpose of use;

(6) maximum rate of withdrawal in gallons per minute;

(7) maximum volume of withdrawals by purpose in acre-feet on an annual basis;

(8) if applicable, maximum historical use as defined in § 711.172(B)(3) of this chapter (relating to Proportional Adjustment of Initial Regular Permits);

(9) if applicable, historical average or irrigator minimum as defined in § 711.172(b)(1) and (2), respectively, of this chapter (relating to Proportional Adjustment of Initial Regular Permits);

(10) if applicable, Phase-1 proportionally adjusted amount as calculated pursuant to § 711.172(g)(5) of this chapter (relating to Proportional Adjustment of Initial Regular Permits);

(11) if applicable, Step-up amount as calculated pursuant to § 711.172(g)(6) of this chapter (relating to Proportional Adjustment of Initial Regular Permits);

(12) if applicable, Phase-2 proportionally adjusted amount as calculated pursuant to § 711.172(g)(8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits);

(13) if applicable, the equal percentage reduction amount as calculated pursuant to § 711.174 of this chapter (relating to Equal Percentage Reduction of Initial Regular Permits) and subchapter H (relating to Withdrawal Reductions) and Regular Permit Retirement Rules of chapter 715 (relating to Comprehensive Management Plan Implementation of this title); the amount that may be subject to restoration pursuant to § 711.172(h) of this chapter (relating to Proportional Adjustment of Initial Regular Permits) and § 711.304 of the chapter (relating to Allocation of Additional Groundwater Supplies);

(14) location of the point(s) of withdrawal;

(15) place of use;

(16) source of groundwater;

(17) metering or alternative measuring method;

(18) conditions for retirement of permits;

(19) conditions for suspension of withdrawals;

(20) conditions for interruption of withdrawals;

(21) conditions for renewal, if applicable;

(22) reporting requirements;

(23) notice that the permit is subject to the limitations provided in the Act and these rules;

(24) the standard groundwater withdrawal conditions set forth in subchapter F of this chapter (relating to Standard Groundwater Withdrawal Conditions);

(25) any other appropriate conditions on the withdrawal of groundwater from the aquifer as determined by the Authority; and

(26) any other information required by the board to implement the Act or the Authority's rules.

§711.116. Contents of Well Construction Permits.

Well construction permits issued by the Authority shall contain the following:

(1) name, address and telephone number of the owner of the permit;

(2) name, address and telephone number of an authorized representative, if any, of the owner;

(3) permit category;

(4) permit term;

(5) purpose of use of the well;

(6) maximum rate of withdrawal in gallons per minute;

(7) maximum volume of withdrawals by purpose in acre-feet on an annual basis;

(8) legal description of the location of the well, including:

(A) county;

(B) section, block and survey;

(C) labor and league;

(D) number of feet to the two nearest non-parallel property lines (legal survey lines); and

(E) other adequate legal description, as may be required by the Authority;

(9) identification of the specific legal authority of the applicant to make withdrawals of groundwater from the aquifer from the well;

(10) the source of groundwater;

(11) size of the pump, pumping rate, pumping method, and other construction specifications for metering or alternative measuring method;

(12) internal diameter, total well depth, depth of cement casing, size, and other well construction specifications as appropriate;

(13) reporting requirements;

(14) notice that the permit is subject to the limitations provided in the Act and these rules;

(15) any other appropriate conditions on the well construction as determined by the Authority; and

(16) any other information required by the board to implement the Act or the Authority's rules.

§711.118. Contents of Monitoring Well Permits.

Monitoring well permits issued by the Authority shall contain the following:

(1) name, address and telephone number of the owner of the permit;

(2) name, address and telephone number of an authorized representative, if any, of the owner;

(3) permit category;

(4) permit term;

(5) purpose of use of the well;

(6) maximum rate of withdrawal in gallons per minute;

(7) maximum volume of withdrawals by purpose in acre-feet on an annual basis;

(8) legal description of the location of the well, including:

(A) county;

(B) section, block and survey;

(C) labor and league;

(D) number of feet to the two nearest non-parallel property lines (legal survey lines); and

(E) other adequate legal description, as may be required by the Authority;

(9) purpose of the monitoring activity;

(10) the source of groundwater;

(11) size of the pump, pumping rate, pumping method, and other construction specifications for metering or alternative measuring method;

(12) internal diameter, total well depth, depth of cement casing, size, and other well construction specifications as appropriate;

(13) construction specification for other monitoring equipment to be installed in and associated with the well;

(14) reporting requirements;

(15) notice that the permit is subject to the limitations provided in the Edwards Aquifer Act and these rules;

(16) any other appropriate conditions on the construction well as determined by the Authority; and

(17) any other information required by the board to implement the Act or the Authority's rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. STANDARD GROUNDWATER WITHDRAWAL PERMIT CONDITIONS

31 TAC §§711.130, 711.132, 711.134

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The new sections are adopted pursuant to the following statutory provisions:

Section 1.01 of the Act contains the findings of the Texas Legislature that the Edwards Aquifer is a distinctive natural resource and that a special regional management district (the Authority) is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, existing industries, and the economic development of the state.

Section 1.03(1) defines the "Edwards Aquifer."

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered wasteful under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. These rules further those objectives.

Section 1.08(b) makes it clear that the Authority's powers apply only to water within or withdrawn from the Edwards Aquifer, and not to surface water.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with

§ 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.13 of the Act requires the Authority to allow credit to be given for certified reuse of aquifer water. The Authority will likely adopt rules implementing this section. This concept is acknowledged in Subchapter F.

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(g) of the Act allows the Authority to, by rule, define other pools within the aquifer in accordance with hydrogeologic research, and to establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority "to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act." This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(b) of the Act, in conjunction with *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996)(holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996) provides that an existing user's declaration of historical use (permit application) must be file on or before December 30, 1996, and the applicant must timely pay all application

fees required by the Authority. It further requires irrigation applicants to submit, as part of their applications, documentation regarding the number of acres irrigated during the historical period.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.16(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: "(1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the authority."

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22 of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. These concepts are implemented in the Chapter 711 rules.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is acknowledged in Subchapter F.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred

(alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented, in part, in Chapter 711.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented, in part, in Chapter 711.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This rulemaking is in furtherance of this legislative mandate.

Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711derive in part from this statutory authority and implement this chapter and the supporting rules.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.101(a) empowers the Authority to make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater in order to, among other things, prevent waste and carry out the duties provided elsewhere in Chapter 36. This requirement is implemented, in large part, through Chapter 711.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.115 provides that no person may drill a well, alter the size of a well or well pump, or operate a well without first obtaining a permit from the Authority.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711, primarily in the definition of waste found in § 711.1.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.211(a) endows districts such as the Authority with the "functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law." This broad delegation of powers is incorporated into the Chapter 711 rules.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.221 empowers representatives of the Authority to enter land and perform tests and other inspections. This authority is incorporated into Chapter 711, primarily in § 711.416.

16 TAC, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TAC, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

§711.130. Purpose.

The purpose of this subchapter is to establish the standard conditions required to be contained in a groundwater withdrawal permit issued by the authority for, among other things:

(1) the protection of the water quality of the groundwater of the aquifer;

(2) the protection of the water quality of the surface streams to which the aquifer provides springflow;

(3) the achievement of water conservation, and the maximization of the beneficial use of groundwater available for withdrawal from the aquifer;

(4) the protection of aquatic and wildlife habitat, and the protection of species that have been listed as threatened or endangered under applicable federal or state law; and

(5) the providing for instream uses, bays, and estuaries.

§711.134. Standard Conditions.

Any groundwater withdrawal permit issued by the authority is subject to and the permittee shall comply with the following conditions:

(1) the construction, operation and maintenance of wells pursuant to subchapter C (relating to Well Construction, Operation and Maintenance) of chapter 713 of this title (relating to Water Quality);

(2) the abandonment and closure of wells pursuant to subchapter D (relating to Abandoned Wells; Well Closures) of chapter 713 of this title (relating to Water Quality);

(3) the spacing of wells pursuant to subchapter E (relating to Well Spacing) of chapter 713 of this title (relating to Water Quality);

(4) the installation, operation and maintenance of well fields pursuant to subchapter F (relating to Well Head Protection) of chapter 713 of this title (relating to Water Quality);

(5) the recharge of the aquifer pursuant to subchapter J of this chapter (relating to Aquifer Recharge, Storage and Recovery Project);

(6) taking no action that pollutes or contributes to the pollution of the aquifer;

(7) the beneficial use and utilization of groundwater withdrawn from the aquifer that is reused pursuant to subchapter I (relating to Reuse Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(8) not wasting groundwater within or withdrawn from the aquifer pursuant to subchapters E (relating to Permitted Wells) and I of this chapter (relating to Prohibitions);

(9) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to subchapter C (relating to Groundwater Conservation Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(10) the beneficial use and utilization of groundwater withdrawn from the aquifer pursuant to subchapter D (relating to Demand Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(11) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to subchapter E (relating to Drought Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(12) the interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to subchapter F (relating to Critical Period Management Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(13) the installation, operation and maintenance of meters and alternative measuring methods pursuant to subchapter M of this chapter (relating to Meters; Alternative Measuring Methods; and Reporting);

(14) the keeping and filing of reports pursuant to subchapter M of this chapter (relating to Meters; Alternative Measuring Methods; and Reporting), and any other applicable law or rule; and

(15) the use of groundwater withdrawn from the aquifer only for an authorized beneficial use and without waste pursuant to subchapter E (relating to Permitted Wells) and I of this chapter (relating to Prohibitions);

(16) the retirement or interruption of the right to withdraw and beneficially use groundwater from the aquifer pursuant to subchapter G (relating to Springflow Maintenance Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(17) proportional adjustment pursuant to subchapter G (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(18) retirement by equal percentage reductions pursuant to subchapter G (relating to Groundwater Available for Permitting, Proportional Adjustment, Equal Percentage Reductions) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(19) retirement pursuant to subchapter H (relating to Withdrawal Reductions and Regular Permit Retirement Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(20) the acquisition of additional water supplies pursuant to subchapter J (relating to Alternative Water Supply Rules) of chapter 715 of this title (relating to Comprehensive Water Management Plan Implementation);

(21) the provision of notice of changes in name and mailing address of the permitting pursuant to §707.105 of chapter 707 of this title (relating to Change of Name, Address or Telephone Number);

(22) the payment of all registration, application, aquifer management, and retirement fees pursuant to chapter 709 of this title (relating to Fees);

(23) the cessation of withdrawals under interim authorization status pursuant to subchapter D (relating to Interim Authorization) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(24) abandonment pursuant to subchapter H (relating to Abandonment and Cancellation) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(25) cancellation pursuant to subchapter H (relating to Abandonment and Cancellation) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(26) the restoration of equally proportionally reduced amounts pursuant to subchapter K (relating to Additional Groundwater Supplies) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(27) the transfer of the permit pursuant to subchapter L (relating to Transfers) of chapter 711 of this title (relating to Groundwater Withdrawal Permits);

(28) the prohibition on the use of groundwater withdrawn from the aquifer at a place of use outside of the boundaries of the authority pursuant to § 711.220 of this chapter (relating to Place of Use Outside of Authority Boundaries);

(29) compliance with the terms and conditions of the permit;

(30) compliance with the act;

(31) compliance with the rules of the authority; and

(32) any other condition as may, in the discretion of the board be reasonable and appropriate.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

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SUBCHAPTER G. GROUNDWATER AVAILABLE FOR PERMITTING; PROPORTIONAL ADJUSTMENT; EQUAL PERCENTAGE REDUCTIONS

31 TAC §§711.160, 711.162, 711.164, 711.166, 711.168, 711.170, 711.172, 711.174, 711.176, 711.180

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The new sections are adopted pursuant to the following statutory provisions:

Section 1.01 of the Act contains the findings of the Texas Legislature that the Edwards Aquifer is a distinctive natural resource and that a special regional management district (the Authority) is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, existing industries, and the economic development of the state.

Section 1.03(1) defines the "Edwards Aquifer."

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered wasteful under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. These rules further those objectives.

Section 1.08(b) makes it clear that the Authority's powers apply only to water within or withdrawn from the Edwards Aquifer, and not to surface water.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the

nature and requirements of all available formal and informal procedures."

Section 1.13 of the Act requires the Authority to allow credit to be given for certified reuse of aquifer water. The Authority will likely adopt rules implementing this section. This concept is acknowledged in Subchapter F.

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(g) of the Act allows the Authority to, by rule, define other pools within the aquifer in accordance with hydrogeologic research, and to establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority "to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act." This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(b) of the Act, in conjunction with *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996)(holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996) provides that an existing user's declaration of historical use (permit application) must be file on or before December 30, 1996, and the applicant must timely pay all application fees required by the Authority. It further requires irrigation applicants to submit, as part of their applications, documentation regarding the number of acres irrigated during the historical period.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.16(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: "(1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the authority."

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22 of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. These concepts are implemented in the Chapter 711 rules.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is acknowledged in Subchapter F.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred (alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented, in part, in Chapter 711.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented, in part, in Chapter 711.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This rulemaking is in furtherance of this legislative mandate.

Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) The Authority's rules relating to well construction, well abandonment and cancellation

contained within Chapter 711derive in part from this statutory authority and implement this chapter and the supporting rules.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.101(a) empowers the Authority to make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater in order to, among other things, prevent waste and carry out the duties provided elsewhere in Chapter 36. This requirement is implemented, in large part, through Chapter 711.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.115 provides that no person may drill a well, alter the size of a well or well pump, or operate a well without first obtaining a permit from the Authority.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711, primarily in the definition of waste found in § 711.1.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.211(a) endows districts such as the Authority with the "functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by the constitution, this code, or any other law." This broad delegation of powers is incorporated into the Chapter 711 rules.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.221 empowers representatives of the Authority to enter land and perform tests and other inspections. This authority is incorporated into Chapter 711, primarily in § 711.416.

16 TAC, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TAC, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

§711.166. Groundwater Available for Permitting for Term Permits.

(a) The amount of groundwater authorized to be withdrawn from the aquifer pursuant to term permits is not subject to the maximum total permitted withdrawals provided for in §711.164(a) and (b) of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

(b) The amount of groundwater from the aquifer that the board may permit to be withdrawn pursuant to term permits shall not exceed the number of acre-feet for each calendar year established by the board in its order issued under § 711.102 of this chapter (relating to Term Permits) authorizing the filing of applications for term permits when the following index wells are measuring at the following groundwater levels:

(1) for wells within the San Antonio pool, and well J-17 is greater than 665 feet above mean sea level; or

(2) for wells within the Uvalde pool, well J-27 is greater than 865 feet above mean sea level.

§711.168. Groundwater Available for Permitting for Emergency Permits.

(a) The amount of groundwater authorized to be withdrawn from the aquifer pursuant to emergency permits is not subject to the maximum total permitted withdrawals provided for in §711.164(a) and (b) of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

(b) Irrespective of the groundwater levels of wells J-17 or J-27, the amount of groundwater from the aquifer that the board may permit to be withdrawn pursuant to emergency permits shall not exceed the amount necessary to prevent the loss of life or to prevent severe, imminent threats to the public health or safety for each calendar year.

§711.172. Proportional Adjustment of Initial Regular Permits.

(a) Applicability. This section applies only to initial regular permits.

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

(1) Historical average minimum-an amount, as determined by the authority, for an applicant who operated a well in three or more years during the historical period, equal to the average amount of groundwater withdrawn annually during the historical period and put to beneficial use, calculated as follows:
Figure: 31 TAC §711.172(b)(1)

(2) Irrigator minimum-an amount, as determined by the authority, for an applicant for irrigation use, equal to two acre-feet times each acre of land the applicant, or his contract user, prior user, or former existing user actually irrigated in any one calendar year during the historical period if:

(A) the applicant, or his contract user, prior user or former existing user owned, leased, or otherwise had a legal right to irrigate the land during the historical period; and

(B) the applicant, or his prior user or former existing user owned the well from which the land was irrigated.

(3) Maximum historical use (MHU)-The amount of groundwater from the aquifer as determined by the authority that, unless proportionally adjusted, an applicant for an initial regular permit is authorized to withdraw equal to the greater of the following, as may be applicable:

(A) an applicant's irrigator minimum;

(B) for an applicant who has beneficial use without waste during the historical period for a full calendar year, the applicant's actual maximum beneficial use of groundwater from the aquifer without waste during any one full calendar year of the historical period; or

(C) for an applicant who has beneficial use without waste during the historical period, but, due to the applicant's activities not having been commenced and in operation for a full calendar year, the applicant does not have beneficial use for a full calendar year, the applicant's extrapolated maximum beneficial use calculated as follows: the amount of groundwater that would normally have been placed to beneficial use without waste by the applicant for a full calendar year during the historical period for the applied for purpose had the applicant's activities been commenced and in operation for a full calendar year during the historical period.

(4) Operate a well-The withdrawal of groundwater from a well for a beneficial use.

(5) Step-up amount (SUA) - The difference between an applicant's irrigator or historical average minimum, if any, and the applicant's PA-1 amount as determined in subsection (g)(5) of this section. Where an irrigator applicant qualifies for both an irrigator minimum and an historical average minimum, the SUA shall be equal to the difference between whichever of the applicant's minimums is greater and the applicant's PA-1 amount.

(c) Purpose of Proportional Adjustment. The purpose of proportional adjustment is to adjust the aggregate maximum historical use of all initial regular permits to attain the amount of groundwater available for permitting in § 711.164(a) of this subchapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

(d) Proportionality. An adjustment is proportional when the adjustment of the maximum historical use of an initial regular permit maintains a constant ratio in relation to the adjustment of the maximum historical use of all other permits.

(e) Duty to Proportionally Adjust. If the total aggregate maximum historical use of all initial regular permits exceeds the amount of groundwater available for permitting in § 711.164(a) of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), the board shall, pursuant to this section, proportionally adjust the maximum historical use of each permit.

(f) Proportional Adjustment Orders. The board shall implement and effectuate proportional adjustment by order of the board. Proportional adjustment orders may be provisional for a fixed period of time, or may be final.

(g) Proportional Adjustment Procedure. Proportional adjustment of initial regular permits, if required, shall be performed as follows:

(1) For each applicant who is to be issued an initial regular permit, the board shall determine and assign a maximum historical use.

(2) For each applicant for irrigation use who is to be issued an initial regular permit, the board shall determine and assign an irrigator minimum, if any.

(3) For each applicant who operated a well for three or more years during the historical period and who is to be issued an initial regular permit, the board shall determine and assign a historical average minimum, if any.

(4) Phase-1Proportional Adjustment Factor. If the total of all maximum historical uses of all applicants for initial regular permits to whom the board will issue an initial regular permit exceeds 450,000 acre feet per annum, then the board shall calculate a Phase-1 proportional adjustment factor ("PA-1 Factor") as follows:
Figure: 31 TAC §711.172(g)(4)

(5) Phase-1 Proportionally Adjusted Amount. The board shall then calculate a proportionally adjusted amount ("PA-1 amount") for each applicant to be issued an initial regular permit as follows:
Figure: 31 TAC §711.172(g)(5)

(6) Step-up Amount. For each applicant assigned an historical average or irrigator minimum and whose PA-1 amount is less than the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two), the board shall determine and assign a step-up amount. An applicant whose PA-1 amount is equal to or greater than its irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) shall not receive a step-up amount.

(7) Phase- 2 Proportional Adjustment Factor. If the total of all PA-1 amounts plus all step-up amounts remaining after the Board has issued agreed orders pursuant to § 711.180 of this chapter (relating to Voluntary Waiver of Applications for Initial Regular Permits) exceeds 450,000 acre feet per annum, then the board shall calculate a Phase-2 proportional adjustment factor ("PA- 2 Factor") as follows:
Figure: 31 TAC §711.172(g)(7)

(8) Phase-2 Proportionally Adjusted Amount. The board shall then calculate a Phase-2 proportionally adjusted amount ("PA-2 amount") for each applicant issued an initial regular permit as follows:

(A) For each applicant eligible to receive a step-up amount:
Figure: 31 TAC §711.172(g)(8)(A)

(B) For each applicant not eligible to receive a step-up amount:
Figure: 31 TAC §711.172(g)(8)(B)

(9) The board shall issue an initial regular permit to each eligible applicant establishing a groundwater withdrawal amount authorized to be withdrawn as provided in §711.176(b) and (c) of this chapter (relating to Groundwater Withdrawals Amount for Initial Regular Permits; Compensation for Phase-2 Proportional Amounts).

(h) If the board issues a proportional adjustment order, then the board shall account for all groundwater proportionally adjusted from each initial regular permit. If additional groundwater becomes available for permitting pursuant to § 1.14(d) of the act and subchapter K of this chapter (relating to Additional Groundwater Supplies), then the proportionally adjusted amounts shall be restored through the inverse application of subsection (g) of this section in accordance with § 711.304(3) of this chapter (relating to Allocation of Additional Groundwater Supplies).

§711.176. Groundwater Withdrawal Amounts for Initial Regular Permits; Compensation for Phase-2 Proportional Amounts.

(a) If the aggregate maximum historical use of all applicants to be issued initial regular permits does not exceed the amount of groundwater available for permitting in §711.164(a) of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), then an applicant shall receive an initial regular permit authorizing the withdrawal of groundwater from the aquifer in the amount of the maximum historical use.

(b) If the aggregate maximum historical use of all applicants to be issued initial regular permits exceeds the amount of groundwater available for permitting in §711.164(a) of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits), then an applicant shall receive an initial regular permit authorizing the withdrawal of groundwater from the aquifer in the following amounts:

(1) if the applicant does not qualify for an irrigator or historical average minimum, and no PA-2 amount is calculated pursuant to §711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), then in an amount equal to the applicant's PA-1 amount as calculated in §711.172(g)(4) and(5);

(2) if the applicant does not qualify for an irrigator or historical average minimum, and a PA-2 amount is calculated pursuant to § 711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), then in an amount equal to the applicant's PA-2 amount;

(3) if the applicant qualifies for an irrigator or historical average minimum, no PA-2 amount is calculated pursuant to §711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is less than the applicant's PA-1 amount as calculated in §711.172(g)(4) and (5), then in an amount equal to the applicant's PA-1 amount;

(4) if the applicant qualifies for an irrigator or historical average minimum, no PA-2 amount is calculated pursuant to §711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is greater than the applicant's PA-1 amount as calculated in §711.172(g)(4) and (5), then in an amount equal to the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two);

(5) if the applicant qualifies for an irrigator or historical average minimum, a PA-2 amount is calculated pursuant to §711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is less than the applicant's PA-2 amount, then in an amount equal to the applicant's PA-2 amount; or

(6) if the applicant qualifies for an irrigator or historical average minimum, a PA-2 amount is calculated pursuant to §711.172(g)(7) and (8) of this chapter (relating to Proportional Adjustment of Initial Regular Permits), and the applicant's irrigator or historical average minimum (or where an irrigator applicant qualifies for both minimums, the greater of the two) is greater than the applicant's PA-2 amount, then in an amount equal to the applicant's PA-2 amount. In such a case, the difference between the applicant's PA-2 amount and the applicable minimum may not be withdrawn by the applicant, but instead, the authority shall provide to the applicant compensation for this amount at the fair market value as that term is defined in §11.0275, Texas Water Code (relating to Fair Market Value).

(c) Initial regular permits issued by the board pursuant to this section may be issued with a provisional groundwater withdrawal amount until the total amount of groundwater permitted for withdrawal in initial regular permits is finally determined following an opportunity for contested case hearings on all initial regular permit applications, as provided in §711.172(f) of this chapter (relating to Proportional Adjustment of Initial Regular Permits). The authority may periodically issue Proportional Adjustment Orders in order to assure that the amount of groundwater permitted for withdrawal in initial regular permits does not exceed the amount available for permitted withdrawals under §711.164 of this chapter (relating to Groundwater Available for Permitted Withdrawals for Initial and Additional Regular Permits).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007359
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Effective date: November 7, 2000
Proposal publication date: August 11, 2000
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SUBCHAPTER I. GENERAL PROHIBITIONS

31 TAC §§711.220, 711.222, 711.224, 711.226, 711.228, 711.230, 711.232, 711.234

VI. CONCISE RESTATEMENT OF THE STATUTORY PROVISIONS UNDER WHICH THE RULES ARE ADOPTED.

The new sections are adopted pursuant to the following statutory provisions:

Section 1.01 of the Act contains the findings of the Texas Legislature that the Edwards Aquifer is a distinctive natural resource and that a special regional management district (the Authority) is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, existing industries, and the economic development of the state.

Section 1.03(1) defines the "Edwards Aquifer."

Section 1.03(4) of the Act defines "beneficial use" to mean the use of water that is economically necessary for a purpose authorized by law when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. The concept of beneficial use is incorporated into the permitting rules of Chapter 711.

Section 1.03(9) of the Act defines "domestic or livestock use." This concept is incorporated into the exempt well rules found within Chapter 711.

Section 1.03(10) of the Act defines "existing user" as a person who has withdrawn and beneficially used underground water from the aquifer on or before June 1, 1993. This concept is incorporated into the Chapter 711 rules, while also accounting for

the beneficial use requirement and including the successors in interest of existing users within the definition.

Section 1.03(11) of the Act defines "industrial use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(12) of the Act defines "irrigation use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(13) of the Act defines "livestock." The Chapter 711 rules incorporate this concept when determining whether a well qualifies as "exempt" from permitting requirements.

Section 1.03(14) of the Act defines "municipal use." The Chapter 711 rules incorporate this concept within the types of uses for which aquifer water may be withdrawn.

Section 1.03(21) of the Act defines "waste." This concept is incorporated into the Chapter 711 rules, while also including other practices which are considered wasteful under the Act or under the long-standing water law concept of beneficial use.

Section 1.07 of the Act provides, in part, that the actions taken by the Authority pursuant to the Act may not be construed as depriving or divesting owners of their ownership rights as landowners in underground water, subject to rules adopted by the Authority.

Section 1.08(a) of the Act provides that the Authority "has all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer." This section provides the Authority with broad and general powers to take actions as necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer. These rules further those objectives.

Section 1.08(b) makes it clear that the Authority's powers apply only to water within or withdrawn from the Edwards Aquifer, and not to surface water.

Section 1.11(a) of the Act provides that the Board of Directors ("Board") of the Authority "shall adopt rules necessary to carry out the authority's powers and duties under (Article 1 of the Act), including rule governing procedures of the board and the authority." This section provides broad rulemaking authority to implement the various substantive and procedures programs set forth in the Act related to the Edwards Aquifer, including the permitting program.

Section 1.11(b) of the Act requires the Authority to "ensure compliance with permitting, metering, and reporting requirements and . . . regulate permits." This section, in conjunction with § 1.11(a) and (h) of the Act, and § 2001.004(1) of the APA, requires the Authority to adopt and enforce the Chapter 711 rules.

Section 1.11(d)(2) of the Act empowers the Authority to enter into contracts. Pursuant to this section, the Authority may enter into contracts with well owners concerning meters and reimbursement for same under Subchapter M of the Chapter 711 rules.

Section 1.11(d)(8) of the Act provides that the Authority may close abandoned, wasteful or dangerous wells. The Authority's rules relating to the requirement of beneficial use and the prohibition of waste, as well as the closure of abandoned wells derive in part from this statutory authority.

Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 of the Texas Water Code and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) Chapter 32 imposes certain duties upon drillers of water wells and the owners of those wells. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 derive in part from this statutory authority.

Section 1.11(d)(11) of the Act provides that the Authority may require to be furnished with copies of the water well drillers' logs that are required by Chapter 32 of the Texas Water Code.

Section 1.11(h) of the Act provides, among other things, that the Authority is "subject to" the APA. This section essentially provides that the Authority is required to comply with the APA for its rulemaking, even though the Authority is a political subdivision and not a state agency that would generally be subject to APA requirements. Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures."

Section 1.13 of the Act requires the Authority to allow credit to be given for certified reuse of aquifer water. The Authority will likely adopt rules implementing this section. This concept is acknowledged in Subchapter F.

Section 1.14(a) of the Act provides that authorizations to withdraw aquifer water shall be limited in order to: protect water quality of the aquifer and surface streams to which the aquifer contributes springflow; achieve water conservation; maximize beneficial use of water from the aquifer; protect aquatic and wildlife habitat as well as federally or state-designated threatened or endangered species; and provide for instream uses, bays and estuaries. The Chapter 711 rules are adopted, in large part, pursuant to these statutory mandates.

Section 1.14(b) of the Act imposes, subject to certain limitations, an initial aquifer withdrawal "cap" for permitted withdrawals of 450,000 acre-feet per year, until December 31, 2007. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(c) of the Act imposes, subject to certain limitations, an aquifer withdrawal "cap" for permitted withdrawals of 400,000 acre-feet per year, beginning January 1, 2008. The Chapter 711 rules implement this cap, explain to which permits it applies, how it can be raised, and other procedural details.

Section 1.14(d) of the Act provides that either of the caps listed above may be raised by the Authority if, through studies and implementation of certain strategies, the authority, in consultation with state and federal agencies, determines the caps may be raised.

Section 1.14(e) of the Act requires the Authority to prohibit withdrawals from new wells drilled after the effective date of the Act unless the "caps" are raised and then only on an interruptible basis. The Chapter 711 rules incorporate this prohibition.

Section 1.14(f) of the Act entitles the Authority to allow (or not allow) permitted withdrawals on an uninterruptible basis when certain index wells are at or above the following measurements: for the San Antonio pool, when well J-17 is at or above 650 mean sea level (msl); and for the Uvalde Pool, when well J-27 is at or above 865 msl. The section also imposes the duty on the Authority to limit additional withdrawals to ensure that springflows are not affected during critical drought conditions. The Chapter 711 rules incorporate these concepts by making withdrawals

subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.14(g) of the Act allows the Authority to, by rule, define other pools within the aquifer in accordance with hydrogeologic research, and to establish index wells for any pool to monitor the level of the aquifer to aid the regulation of withdrawals from the pools.

Section 1.14(h) of the Act provides that the Authority generally must ensure, by December 31, 2012, that continuous minimum springflows of Comal and San Marcos Springs are maintained to protect threatened and endangered species to the extent required by federal law. The Chapter 711 rules incorporate this requirement by making withdrawals subject to various conditions keyed on drought conditions and critical period management rules.

Section 1.15(a) of the Act directs the Authority "to manage withdrawals from the aquifer and manage all withdrawal points from the aquifer as provided by the Act." This section is implemented through the Chapter 711 rules.

Section 1.15(b) of the Act states that "except as provided by §§1.17 and 1.33 of this article, a person may not withdraw water from the aquifer or begin construction of a well or other works designed for the withdrawal of water from the aquifer without obtaining a permit from the authority." This section is implemented through the Chapter 711 rules.

Section 1.15(c) of the Act allows the Authority to issue regular permits, term permits, and emergency permits. This section is implemented through the Chapter 711 rules.

Section 1.15(d) of the Act provides that each permit issued by the Authority must specify the maximum rate and total volume of water that the user may withdraw annually. This section is implemented through the Chapter 711 rules.

Section 1.16(a) of the Act allows an existing user to apply for an initial regular permit by filing a declaration of historical use documenting use of aquifer water during the period from June 1, 1972 through May 31, 1993. The initial regular permits issued pursuant to the Chapter 711 rules will be based upon such.

Section 1.16(b) of the Act, in conjunction with *Barshop v. Medina County Underground Water Conservation District,* 925 S.W. 2d 618, 630 (Tex. 1996)(holding that declarations must be filed within six months after the effective date of the Act, i.e., December 30, 1996) provides that an existing user's declaration of historical use (permit application) must be file on or before December 30, 1996, and the applicant must timely pay all application fees required by the Authority. It further requires irrigation applicants to submit, as part of their applications, documentation regarding the number of acres irrigated during the historical period.

Section 1.16(c) of the Act provides that an owner of a well from which the water will be used exclusively for domestic use or watering livestock and that is exempt under § 1.33 of the Act is not required to file a declaration of historical use.

Section 1.16(d) of the Act requires the Board to grant an initial regular permit to an existing user who: (1) files a declaration and pays fees as required by this section; and (2) establishes by convincing evidence beneficial use of underground water from the aquifer. This requirement is incorporated into the Chapter 711 rules.

Section 1.16(e) of the Act explains the quantity of water to be permitted under an initial regular permit. Pursuant to this section, if enough water is available, each existing user shall be permitted for an amount equal to the user's maximum beneficial use during the historical period. If there is not enough water available, then this section requires the Authority to "proportionately adjust" permit amounts downward in order to meet the withdrawals "caps" discussed above. However, this section also creates certain "permit minimums" for existing irrigation users and for those existing users who have operated a well for three or more years during the historical period. This section also requires the Authority to extrapolate water use on an annual basis for those existing users who do not have a full year's use during the historical period. These concepts are incorporated into Chapter 711, primarily in Subchapter G.

Section 1.16(f) requires the Authority to equitably treat persons whose historic use was affected by participation in a federal program, such as agricultural subsidy programs. This concept is incorporated in the Chapter 711 rules.

Section 1.16(g) of the Act provides that initial regular permits do not have a term and remain in effect until abandoned, cancelled or retired. These concepts are incorporated in the Chapter 711 rules.

Section 1.16(h) of the Act requires the Authority to notify each permit holder of the limitations to which the permit is subject. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter F.

Section 1.17(a) of the Act provides that a person who, on the effective date of this article, owns a producing well that withdraws water from the aquifer may continue to withdraw and beneficially use water without waste until final action on permits by the Authority, if: "(1) the well is in compliance with all statutes and rules relating to well construction, approval, location, spacing, and operation; and (2) by March 1, 1994, the person files a declaration of historical use on a form as required by the authority."

Section 1.18 of the Act allows the Authority, in certain circumstances, to issue additional regular permits. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.19 of the Act allows the Authority to issue term permits and places certain limitations and conditions on the right to withdraw water under such a permit. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.20 of the Act allows the Authority to issue emergency permits under certain circumstances and subject to certain conditions. This concept is incorporated into the Chapter 711 rules, primarily in Subchapter E.

Section 1.21 of the Act sets out a process by which the Authority is to implement a plan for reducing the withdrawal "cap" from 450,000 to 400,000 acre-feet per year by January 1, 2008. The plan must be enforceable and include various water conservation, reuse, retirement, and other management measures. If, on or after January 1, 2008, total permitted withdrawals still exceed the 400,000 acre-feet cap, then the Authority must implement "equal percentage reductions" of all permits in order to reach the cap. This concept is implemented in Chapter 711, primarily in Subchapter G.

Section 1.22 of the Act provides that the Authority may acquire permitted aquifer rights to be used for: holding in trust for sale or transfer to other users; holding in trust as a means of managing

aquifer demand; holding for resale or retirement as a means of achieving pumping reductions required by the Act; or retiring the rights. These concepts are implemented in part in Chapter 711.

Section 1.23(a) of the Act provides that the Authority may require certain permittees to submit and implement water conservation plans and water reuse plans. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.25 of the Act requires the Authority to develop and implement a comprehensive water management plan and, in conjunction with the SCTWAC and other water districts, to develop and implement a plan for providing alternative water supplies, with oversight by state agencies and the Edwards Aquifer Legislative Oversight Committee. The alternative supplies plan shall consider alternative technologies, financing issues, costs and benefits, and environmental issues. These concepts are implemented, in part, in Chapter 711, primarily through Subchapter F.

Section 1.26 of the Act requires the Authority to prepare and coordinate implementation of a critical period management plan which meets certain, enumerated criteria. These concepts are implemented in part in Chapter 711, primarily through Subchapter F.

Section 1.29 of the Act authorizes the imposition of various types of fees on various types of permits. The Chapter 711 rules acknowledge this fee provision, primarily in Subchapter E.

Section 1.31 of the Act provides that nonexempt well owners must install and maintain meters or alternative measuring devices to measure the flow rate and cumulative amount of water withdrawn from each well. These concepts are implemented in the Chapter 711 rules.

Section 1.32 of the Act requires permittees to submit annual water use reports to the Authority. This section is acknowledged in Subchapter F.

Section 1.33 of the Act provides the criteria for exempt wells -- i.e., wells that produce no more than 25,000 gallons of water per day for domestic and livestock use and that are not within or serving a subdivision requiring platting. The section explains that such wells are exempt from metering requirements. However, such wells must be registered with the Authority. These concepts are implemented in Chapter 711.

Section 1.34 of the Act imposes certain limitations upon the ways in which aquifer water and/or water rights may be transferred (alienated). First, aquifer water must be used within the Authority's boundaries. Second, the section allows the Authority to establish rules by which a person may install water conservation equipment and sell the water conserved. Third, the section further provides that a holder of a permit for irrigation use may not transfer more than 50 percent of the irrigation rights initially permitted and that the user's remaining irrigation water rights must be used in accordance with the original permit and must pass with transfer of the irrigated land. These concepts are implemented, in part, in Chapter 711.

Section 1.35 of the Act prohibits: withdrawing aquifer water except as authorized by a permit; violating permit terms or conditions; wasting aquifer water; polluting or contributing to the pollution of the aquifer; or violating the Act or an Authority rule. These concepts are implemented in Chapter 711.

Section 1.36 of the Act empowers the Authority to enter orders enforcing the terms and conditions of permits, orders, or rules, and to draft rules suspending permits for failure to pay required fees or violations of permits, orders or rules. These concepts are implemented, in part, in Chapter 711.

Section 2001.004(1) of the APA requires agencies subject to the APA to "adopt rules of practice stating the nature and requirements of all available formal and informal procedures." This rulemaking is in furtherance of this legislative mandate.

Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation.) The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711derive in part from this statutory authority and implement this chapter and the supporting rules.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.101(a) empowers the Authority to make and enforce rules to provide for conserving, preserving, protecting, and recharging of the groundwater in order to, among other things, prevent waste and carry out the duties provided elsewhere in Chapter 36. This requirement is implemented, in large part, through Chapter 711.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.111 requires the Authority to require aquifer users to keep and maintain reports of drilling, equipping, and completing water wells and the production and uses of groundwater. Chapter 711 implements these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.113 empowers districts such as the Authority to require permits for drilling, equipping, or completing wells or for altering the size of wells or well pumps. The section further specifies the permitted format and contents of permit applications, and lays out criteria for the district to consider when ruling on a permit application. The section also provides that permits may be issued subject to the district's rules and other restrictions. The Chapter 711 rules incorporate these requirements.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.1131 specifies what may be included as elements of a permit issued by a district.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.115 provides that no person may drill a well, alter the size of a well or well pump, or operate a well without first obtaining a permit from the Authority.

Chapter 36 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 36.119(a) decrees that drilling a well without a required permit or operating a well at a higher rate of production than the rate approved for the well is declared to be illegal, wasteful per se, and a nuisance. This concept is incorporated into Chapter 711, primarily in the definition of waste found in § 711.1.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.211(a) endows districts such as the Authority with the "functions, powers, authority, rights, and duties that will permit accomplishment of the purposes for which it was created or the purposes authorized by

the constitution, this code, or any other law." This broad delegation of powers is incorporated into the Chapter 711 rules.

Chapter 49 of the Texas Water Code generally applies to groundwater districts such as the Authority. Section 49.221 empowers representatives of the Authority to enter land and perform tests and other inspections. This authority is incorporated into Chapter 711, primarily in § 711.416.

16 TAC, Chapter 76. Section 1.11(d)(10) of the Act provides that the Authority may enforce Chapter 32 and TNRCC rules adopted thereunder. Chapter 32 of the Texas Water Code imposes certain duties upon drillers of water wells and the owners of those wells. (Chapter 32 is now administered not by the TNRCC, but by the Texas Department of Licensing and Regulation (TDLR).) The TDLR's rules implementing Chapter 32 are found at 16 TAC, Chapter 76. These rules impose numerous duties upon well drillers and well owners related to well construction, operation, and plugging. The Authority's rules relating to well construction, well abandonment and cancellation contained within Chapter 711 implement, in part, the rules found in 16 TAC, Chapter 76.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007361
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Effective date: November 7, 2000
Proposal publication date: August 11, 2000
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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 8. PRIVATE SECTOR PRISON INDUSTRIES OVERSIGHT AUTHORITY

CHAPTER 245. GENERAL PROVISIONS

37 TAC §§245.11-245.14, 245.20-245.23, 245.30, 245.40, 245.41, 245.43, 245.45, 245.47

The Private Sector Prison Industries Oversight Authority (the Authority) adopts amendments to 37 TAC §§245.11-245.13, 245.20-245.23, 245.30, 245.40, 245.41, and new §§245.14, 245.43, 245.45, and 245.47 concerning General Provisions, without changes to the proposed text as published in the May 19, 2000, issue of the *Texas Register* (25 TexReg 4499).

The amendments and new sections set the foundation for newly created Authority appointed by the Governor under House Bill 1301. These administrative changes set the standards for operation and the policies and procedures that are to be implemented in order to properly approve, certify, and oversee the operation of private sector prison industries program in the Texas Department of Criminal Justice, the Texas Youth Commission, and county jail correctional facilities, in compliance with the federal Private Sector Prison Industries Enhancement Certification Program.

No comments were received regarding adoption of the amendments and new sections.

The amendments and new sections are adopted under Texas Government Code, §§497.051- 497.062, which provides the Oversight Authority with the authority to promulgate rules; 18 United States Code 1761; 42 United States Code, §§4321-4347; and 40 Code of Federal Regulations Part 1500.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200007430
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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS

The Texas Department of Human Services (DHS) adopts the amendment to §3.704 without changes to the proposed text published in the September 8, 2000 issue of the *Texas Register* (25 TexReg 8833). Section 3.1003 is adopted with changes to the proposed text published in the September 8, 2000 issue of the *Texas Register* (25 TexReg 8834).

The justification for the proposal is to improve client services and reduce administrative cost as a result of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act.

No comments were received regarding the adoption of these amendments.

The department, however, has initiated a minor editorial change to the text of §3.1003 to clarify and improve the accuracy of the section.

SUBCHAPTER G. RESOURCES

40 TAC §3.704

The amendments are adopted under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The amendments implement the Human Resources Code, §§31.001-31.0325.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 23, 2000.

TRD-200007435
Paul Leche
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Effective date: December 1, 2000
Proposal publication date: September 8, 2000
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SUBCHAPTER J. BUDGETING

40 TAC §3.1003

The amendments are adopted under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The amendments implement the Human Resources Code, §§31.001-31.0325.

§3.1003. Deductions.

(a) Temporary Assistance for Needy Families (TANF). DHS allows the following deductions from earned income of each member of the certified group, including members disqualified for noncompliance with a program requirement:

(1) $120 standard work-related expense deduction.

(2) dependent care deduction of actual costs not to exceed:

(A) $200 for each dependent under age two who is receiving TANF, or

(B) $175 for each dependent age two or older who is receiving TANF.

(3) earned income disregard of 90% of the earnings that remain after deducting the standard work-related expense, up to a cap of $1400. This deduction is computed before the dependent care deduction.

(4) eligibility for earned income disregard is allowed under the following conditions:

(A) allowed for the first four months of employment the earnings should be budgeted;

(B) allowed for not more than four months in a 12-month period;

(C) not allowed for one calendar year from the first TANF denial after the maximum disregard has been received; and

(D) not allowed if the client voluntarily quit a job without good cause within the 60 days prior to applying for TANF.

(b) Food stamps. DHS allows deductions from income as stipulated in the Food Stamp Act of 1977 as amended by Title VIII, Section 809 of Public Law 104-193, Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Regarding standard utility deductions, DHS allows either a Standard Utility Allowance (SUA) or a Basic Utility Allowance (BUA) as specified in 7 U.S.C. §2014(7)(C). Households that have out-of-pocket heating and cooling cost qualify for the SUA. Other households can receive the BUA. Regarding a standard shelter deduction for homeless households, DHS allows the standard as computed annually as stipulated in 7 U.S.C. §2014(5).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 47. PRIMARY HOME CARE

The Texas Department of Human Services (DHS) adopts amendments to §47.1901 and §47.4902, and new §47.4903 and §47.4904. The amendment to §47.4902 and new §47.4904 are adopted without changes to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3927). The amendment to §47.1901 and new §47.4903 are adopted with changes to the proposed text. DHS is simultaneously filing related adoptions in chapters 48 and 49 in this issue of the *Texas Register*.

Justification of the amendments and new sections is to revise the rules for home and community support services agencies (HCSSAs) participating in the Primary Home Care program. As part of the department's effort to improve contracting for community care services, DHS held public meetings, convened an ad hoc advisory committee and discussed issues with stakeholder organizations. These rule revisions implement the recommendations that resulted from this process. The goals were to better manage the influx of new or inexperienced contractors; decrease turnover of contractors, thus providing greater stability for clients; and increase DHS resources dedicated to monitoring contracts.

The department received comments regarding adoption of the amendments and new sections from the Texas Association for Home Care. A summary of the comments and the department's responses follow.

Comment: Regarding §47.4903(c) and §48.6028(c), strike "in the DHS region in which the contract application is made." The important thing here is that the licensed agency (HCSSA) has had some experience in providing home care prior to applying for the contract-their experience should not have to be in the region. Region boundaries actually have nothing to do with an agency's service area. With this limitation in the rules, an agency which had been successfully serving several counties, and possibly even a successful contractor in that region, may wish to expand into a county in the contiguous region. They would not be able to do so until they had established non-DHS services in that county for a year. However, an agency contracting for services in the northern part of a large region could later expand to serve the entire region. Also, an agency serving one area with no contracting experience could apply for a contract. The purpose of the prior experience requirement should be to determine that the agency has experience in home care-not to try to control the market place or the number of contracts. If the department wants to cut down on the number of contracts it has to administer

and monitor, it should allow each HCSSA to have one contract regardless of the number of regions in which it operates.

Response: In developing the proposed rules, the agency was aware that some providers may have extensive experience in other regions, but providers on the advisory committee and DHS contract staff indicated that contracted services are significantly impacted by the local administration and staffing. However, in response to comment, DHS will change the proposed language to allow expansion into regions which are contiguous to counties where an agency has the necessary experience. DHS requires separate contracts by region to allow for better contract management. Regional contracts also allow DHS to apply eligibility criteria by region and to evaluate contract performance for an individual contract rather than a single statewide contract.

Comment: Regarding §47.4903(e)(1) and §48.6028(e)(1), it is not clear what a monitoring agreement is. There is nothing written into the licensure rules about monitoring agreements.

Response: The rules being commented on are now §47.4903(f)(1) and §48.6028(f)(1). In response to comment, DHS will define monitoring agreement as "a licensure action, mutually agreed upon by the service provider and DHS, in which the provider agrees to hire a consultant to assist in correcting problems identified in the survey."

Comment: Regarding §47.4903(e)(3) and (h) and §48.6028(e)(3) and (h), amend them to read "has a Level II administrative penalty related to patient health and safety pending with DHS." There are many Level II penalties which have nothing to do with health and safety. Level II penalties do not necessarily indicate there are severe service delivery problems as they may be cited on isolated incidences and do not necessarily reflect a pattern.

Response: The rules being commented on are now §47.4903(f)(3) and (i) and §48.6028(f)(3) and (i). Licensure history is one indicator of an agency's ability to comply with contract requirements. The intent of the proposed rule is to ensure that DHS initiates provisional contracts only with agencies with acceptable licensure histories; therefore, DHS will not issue a provisional contract while Level II administrative penalties are pending. The wording of the rule remains as proposed for §47.4903(e)(3) and §48.6028(e)(3).

For Level II administrative penalties that have been imposed, DHS will develop procedures for reviewing the penalties and determining the appropriateness of proceeding to issue a provisional contract. In response to comment, DHS will not add the suggested language, but will add "DHS may choose not to contract with a HCSSA ..." to §47.4903(i) and §48.6028(i) to indicate that it is DHS's decision whether or not to enter into a contract.

Comment: Regarding §47.4903(j)(2) and §48.6026 (j)(2), the agency should have an opportunity for a second formal review. In other rules currently being promulgated by the department, the intent stated was to do away with the courtesy review and the current sampling methodology; however, the second formal review was to remain. In these rules, we have nothing to set out what a level of compliance is or how it will be determined; there is no courtesy review, and an agency has only one chance to make it. This is unacceptable and will very possibly create more turnover and disruption in the program, although the department's goal stated in the rule preamble is to reduce turnover of contractors and create greater stability for clients.

Response: DHS will not change the rule. These rules do not preclude a second formal review. The other proposed rules (currently being submitted to the *Texas Register* for public comment) remove the requirement of courtesy reviews but maintain the compliance level requirement as specified in 40 TAC §49.25(c). As a result of recommendations from providers and DHS contract staff, DHS is developing pre-contract orientation for HCSSAs to assist them in their decision to contract with DHS and to prepare them for service provision to DHS clients. This, in combination with requiring prior service experience before contracting with DHS, means that HCSSAs receiving a DHS contract should be better prepared to meet the contract requirements.

Comment: Delete §47.4904(c)(1)(B) and §48.6030(c)(1)(B), which states that if a HCSSA has had its contract involuntarily terminated, that HCSSA or anyone with a controlling interest in that HCSSA, may not enter into a new contract with DHS for at least two years. This is much too harsh. Each HCSSA should be judged based upon its own experience. There are many agencies throughout the state under common ownership. It would be very possible for one agency to run into problems at one time or another due to personnel in that agency; however, all of the other agencies would have an excellent record. The HCSSA's with the good records should not be penalized for the one in a totally different area of the state which had a bad experience.

Response: DHS will not change the rule. DHS agrees that the local personnel of HCSSAs can be a key determinant in the quality of services; however, involuntary contract termination is a serious sanction prompted by significant non-compliance with contract requirements. Under the proposed rules, the HCSSA or anyone with a controlling interest may maintain other existing contracts. If there are no additional problems under the existing contracts, the HCSSA or controlling interest party(ies) may apply for a new contract two years after the date of the involuntary termination. DHS has tried to minimize the impact on the HCSSA's other existing contracts or other contracts involving someone with a controlling interest. Instead of taking sanctions statewide, contract management staff in other regions will be alerted to the HCSAA's problems and will monitor the other contracts for compliance.

Comment: Delete §47.4904(d), §48.6030(d) and §48.6108(3). As stated previously, Level II administrative penalties could be for administrative deficiencies that are not related to health and safety and could be for isolated incidents. They do not necessarily reflect a pattern. In fact, the licensing survey process is deficiency based and does not reflect the overall operations of an agency. Contract termination should be for severe problems. The referenced §49.19(b)(3) already has adequate safeguards for termination. In addition §49.18(b)(1) and (2) have provisions for client hold and vendor hold respectively. The department's current rules have plenty of teeth and adequate provisions to discipline contractors or remove them from the program.

Response: DHS will not delete the rules. The rule allows DHS to consider the circumstances of the Level II penalties and evaluate on an individual basis whether to continue to contract with a provider. The wording of the rules indicates that Level II penalties will not automatically result in the termination of a contract.

Comment: Regarding §48.6026(1), replace the proposed language with "have one contract for all counties served." The department continues to complain about the administrative complexity of the community care programs and the number of contractors. One agency serving portions of three contiguous regions must have three separate contracts, file three separate cost reports, have three audits, monitorings, etc. The region where the office is located could have primary responsibility for the contract with the other regions assisting if necessary, e.g., on monitorings in their areas.

Response: DHS will not add the suggested language. The department has divided Texas into regions for administrative purposes; the state is simply too large to be able to manage contracts on a statewide basis. If a HCSSA were to hold only one contract for services throughout the state, any and all sanctions taken by DHS would apply to the statewide contract, although problems resulting in a sanction may have been localized to a specific area/region. This would not be advantageous for the HCSSA nor the clients.

In addition, DHS replaced "AFDC" with "TANF" in the definition of "Medicaid eligible" in §47.1901(16) and updated a citation in §47.1901(19).

SUBCHAPTER A. GENERAL PROVISIONS AND SERVICES

40 TAC §47.1901

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

§47.1901. Definitions.

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

(1) Abuse--Willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or willful deprivation by a caretaker or oneself of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness.

(2) Adult--A person 18 or older, or an emancipated minor.

(3) Aged or elderly person--A person 65 or older.

(4) Assignee--A legal entity that assumes the responsibilities and duties of a current primary home care contract through a legal assignment of contract from another legal entity.

(5) Assignor--A legal entity that assigns its primary home care contract to another legal entity through an assignment of contract.

(6) Attendant--A provider agency employee who provides the authorized tasks to the client.

(7) Client--A person who is determined by the department to be eligible for services.

(8) Controlling interest--An owner who is a sole proprietor, a partner owning 5.0% or more of the partnership, or a corporate stockholder owning 5.0% or more of the outstanding stock of the contracted provider, or a member of the board of directors.

(9) Days--All references to number of days are based on calendar days unless the text clearly states otherwise.

(10) Department--The Texas Department of Human Services.

(11) Emancipated minor--A person under 18 years of age who has the power and capacity of an adult. This includes a minor who has had the disabilities of minority removed by a court of law or a minor who, with or without parental consent, has been married.

(12) Exploitation--The illegal or improper act or process of a caretaker or others using an adult's resources for monetary or personal benefit, profit, or gain.

(13) Family care--A nonskilled, nontechnical in-home attendant service provided to eligible aged and disabled adults who are functionally limited in performing daily activities.

(14) Income eligible--An adult who is neither a Supplemental Security Income (SSI) or Temporary Assistance for Needy Families (TANF) client, but who has income that is equal to or less than the eligibility level established by the department.

(15) Institution--A nursing home, personal care home, intermediate care facility for the mentally retarded (ICF-MR), or state hospital.

(16) Medicaid eligible--An individual who is eligible for Medicaid as an SSI or TANF client, or who is eligible for medical assistance only while living in the community.

(17) Neglect--Failure to provide for oneself the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caretaker to provide these goods or services.

(18) Person with a disability--A person who, because of physical, mental, or developmental impairment, is limited in his capacity to adequately perform one or more essential activities of daily living. Activities of daily living include but are not limited to:

(A) personal and health care;

(B) mobility;

(C) communication; and

(D) money management.

(19) Physician's order--An order for primary home care services that is signed and dated by a medical doctor (MD) or doctor of osteopathy (DO) who is licensed to practice medicine and who does not have a prohibitive ownership or significant financial or contractual relationship (42 Code of Federal Regulations 424.22(d)) with the agency that will deliver primary home care.

(20) Primary home care--In-home, nontechnical, medically related service provided by an attendant to clients whose chronic health problems cause them to be functionally limited in performing activities of daily living.

(21) Prior approval--A decision made by the department regional nurse/caseworker, before services begin and before payment can be made, that the applicant or client meets the department criteria for the requested service.

(22) Provider agency--A home and community support services agency that has a contract with the department to provide primary home care.

(23) Provisional contract--A time-limited contract.

(24) RN supervisor--A nurse who is currently licensed as a registered nurse by the Texas Board of Nurse Examiners and who supervises the primary home care attendants.

(25) Special attendant--A provider agency employee who can substitute for another attendant.

(26) Supervisor--A licensed nurse or individual who meets home and community support services personal assistance services licensing standards. For primary home care services, the supervisor must be a registered nurse. This description applies when the term "supervisor" is used as a stand-alone term. Other types of supervisors are clearly referenced in context.

(27) Unit of service--One hour of authorized service delivered to a prior-approved client.

(28) Waiver 5--Federally approved waiver for individuals who meet income and resources criteria for Medicaid nursing home placement in Texas and who meet functional assessment and medical criteria for primary home care.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2000.

TRD-200007377
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 1, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 438-3108

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SUBCHAPTER D. PROVIDER CONTRACTS

40 TAC §§47.4902 - 47.4904

The amendment and new sections are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment and new sections implement the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

§47.4903. Provisional Contracts.

(a) A provisional contract is limited to one year. The Texas Department of Human Services (DHS) may extend a provisional contract if:

(1) the formal review, including any reexamination, has not been completed prior to the end of the provisional contract period, or

(2) DHS is unable to successfully transfer all clients by the end of the provisional contract period.

(b) Prior to applying for a DHS contract, the home and community support services agency (HCSSA) must:

(1) hold the license used to qualify for the contract for at least one year;

(2) have completed an on-site health survey; and

(3) be eligible for that license to be renewed.

(c) During the 12 months immediately preceding application for a DHS contract, the HCSSA must have provided attendant or home health services:

(1) to at least ten clients, with at least two of these clients having received on-going services during a 60-day block of time; and

(2) for a total of at least 500 hours.

(d) The services in subsection (c) of this section must have been provided in the region in which the contract application is made or in a county contiguous to that region.

(e) DHS will not enter into a provisional contract until the HCSSA has received a pre-contract orientation from DHS.

(f) DHS will not enter into a provisional contract if a HCSSA is:

(1) under a monitoring agreement, defined as a licensure action, mutually agreed upon by the service provider and DHS, in which the provider agrees to hire a consultant to assist in correcting problems identified in the survey;

(2) has a license revocation action pending with DHS; or

(3) has a Level II administrative penalty pending with DHS.

(g) Any contracts entered into after the effective date of this rule will be provisional contracts, including contracts to existing HCSSAs expanding into a new region.

(h) A HCSSA contracting under a new vendor number as a result of a contract assignment will receive a provisional contract, but is exempt from the requirements in subsections (b), (c), and (d) of this section.

(i) DHS may choose not to contract with a HCSSA if, in the preceding 12 months, the HCSSA had any Level II administrative penalties imposed by departmental order.

(j) DHS may not contract with a HCSSA if, in the preceding 24 months, the HCSSA had any community care program contract involuntarily terminated.

(k) Notwithstanding other department rules regarding formal reviews, for provisional contracts, this subsection prevails.

(1) DHS will formally review provisional contracts at least once during the contract's provisional status.

(2) A HCSSA not in compliance with program-specific requirements after the formal review cannot enter into another Primary Home Care (PHC) contract with DHS for at least 24 months from the end date of the provisional contract. Twenty-four months after the end date of the prior provisional contract, the HCSSA may apply for another provisional contract.

(3) A HCSSA choosing to withdraw from the provisional contract cannot enter into another PHC contract with DHS for at least 12 months from the end date of the provisional contract. Twelve months after the end date of the prior provisional contract, the HCSSA may apply for another provisional contract.

(4) If DHS determines that a HCSSA is not in compliance with one or more program-specific requirements, the provider agency may request a reexamination of the determination.

(A) The provider agency must submit the request in writing, and the appropriate DHS staff must receive it within 10 calendar days of the date of the formal review exit conference.

(B) The provider agency's written request must contain a concise statement of the specific actions or determinations it disputes and any supporting documentation the provider agency deems relevant to the dispute.

(C) The lead DHS staff member coordinates a reexamination of the formal review determination with appropriate DHS staff. DHS staff may request additional information from the provider agency.

(D) Within 30 days of the date DHS receives the request for reexamination or of the date DHS receives additional requested information, the lead staff member must send the provider agency DHS's written decision.

(5) If DHS determines that a HCSSA did not meet the requirements in subsection (c) of this section prior to obtaining a DHS contract, the provisional contract will be involuntarily terminated.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2000.

TRD-200007378
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 1, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 438-3108

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CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED

The Texas Department of Human Services (DHS) adopts the repeal of §48.6030, amendments to §48.1201 and §48.6108, and new §48.6026, §48.6028, and §48.6030. The repeal of §48.6030, amendment to §48.6108, and new §48.6026 and §48.6030 are adopted without changes to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3927). The amendment to §48.1201 and new §48.6028 are adopted with changes to the proposed text. DHS is simultaneously filing related adoptions in chapters 47 and 49 in this issue of the *Texas Register*.

Justification for the amendments, repeal, and new sections is to revise the rules for home and community support services agencies (HCSSAs) participating in the Community Based Alternatives program. As part of the department's effort to improve contracting for community care services, DHS held public meetings, convened an ad hoc advisory committee and discussed issues with stakeholder organizations. These rule revisions implement the recommendations that resulted from this process. The goals were to better manage the influx of new or inexperienced contracators; decrease turnover of contractors, thus providing greater stability for clients; and increase DHS resources dedicated to monitoring contracts.

The department received comments regarding adoption of the amendments and new sections from the Texas Association for Home Care. A summary of the comments and the department's responses follow.

Comment: Regarding §47.4903(c) and §48.6028(c), strike "in the DHS region in which the contract application is made." The important thing here is that the licensed agency (HCSSA) has had some experience in providing home care prior to applying for the contract-their experience should not have to be in the region. Region boundaries actually have nothing to do with an agency's service area. With this limitation in the rules, an agency which had been successfully serving several counties, and possibly even a successful contractor in that region, may wish to expand into a county in the contiguous region. They would not be able to do so until they had established non-DHS services in that county for a year. However, an agency contracting for services in the northern part of a large region could later expand to serve the entire region. Also, an agency serving one area with no contracting experience could apply for a contract. The purpose of the prior experience requirement should be to determine that the agency has experience in home care-not to try to control the market place or the number of contracts. If the department wants to cut down on the number of contracts it has to administer and monitor, it should allow each HCSSA to have one contract regardless of the number of regions in which it operates.

Response: In developing the proposed rules, the agency was aware that some providers may have extensive experience in other regions, but providers on the advisory committee and DHS contract staff indicated that contracted services are significantly impacted by the local administration and staffing. However, in response to comment, DHS will change the proposed language to allow expansion into regions which are contiguous to counties where an agency has the necessary experience. DHS requires separate contracts by region to allow for better contract management. Regional contracts also allow DHS to apply eligibility criteria by region and to evaluate contract performance for an individual contract rather than a single statewide contract.

Comment: Regarding §47.4903(e)(1) and §48.6028(e)(1), it is not clear what a monitoring agreement is. There is nothing written into the licensure rules about monitoring agreements.

Response: The rules being commented on are now §47.4903(f)(1) and §48.6028(f)(1). In response to comment, DHS will define monitoring agreement as "a licensure action, mutually agreed upon by the service provider and DHS, in which the provider agrees to hire a consultant to assist in correcting problems identified in the survey."

Comment: Regarding §47.4903(e)(3) and (h) and §48.6028(e)(3) and (h), amend them to read "has a Level II administrative penalty related to patient health and safety pending with DHS." There are many Level II penalties which have nothing to do with health and safety. Level II penalties do not necessarily indicate there are severe service delivery problems as they may be cited on isolated incidences and do not necessarily reflect a pattern.

Response: The rules being commented on are now §47.4903(f)(3) and (i) and §48.6028(f)(3) and (i). Licensure history is one indicator of an agency's ability to comply with contract requirements. The intent of the proposed rule is to ensure that DHS initiates provisional contracts only with agencies with acceptable licensure histories; therefore, DHS will not issue a provisional contract while Level II administrative penalties are pending. The wording of the rule remains as proposed for §47.4903(e)(3) and §48.6028(e)(3).

For Level II administrative penalties that have been imposed, DHS will develop procedures for reviewing the penalties and determining the appropriateness of proceeding to issue a provisional contract. In response to comment, DHS will not add the suggested language, but will add "DHS may choose not to contract with a HCSSA ..." to §47.4903(i) and §48.6028(i) to indicate that it is DHS's decision whether or not to enter into a contract.

Comment: Regarding §47.4903(j)(2) and §48.6026 (j)(2), the agency should have an opportunity for a second formal review. In other rules currently being promulgated by the department, the intent stated was to do away with the courtesy review and the current sampling methodology; however, the second formal review was to remain. In these rules, we have nothing to set out what a level of compliance is or how it will be determined; there is no courtesy review, and an agency has only one chance to make it. This is unacceptable and will very possibly create more turnover and disruption in the program, although the department's goal stated in the rule preamble is to reduce turnover of contractors and create greater stability for clients.

Response: DHS will not change the rule. These rules do not preclude a second formal review. The other proposed rules (currently being submitted to the *Texas Register* for public comment) remove the requirement of courtesy reviews but maintain the compliance level requirement as specified in 40 TAC §49.25(c). As a result of recommendations from providers and DHS contract staff, DHS is developing pre-contract orientation for HCSSAs to assist them in their decision to contract with DHS and to prepare them for service provision to DHS clients. This, in combination with requiring prior service experience before contracting with DHS, means that HCSSAs receiving a DHS contract should be better prepared to meet the contract requirements.

Comment: Delete §47.4904(c)(1)(B) and §48.6030(c)(1)(B), which states that if a HCSSA has had its contract involuntarily terminated, that HCSSA or anyone with a controlling interest in that HCSSA, may not enter into a new contract with DHS for at least two years. This is much too harsh. Each HCSSA should be judged based upon its own experience. There are many agencies throughout the state under common ownership. It would be very possible for one agency to run into problems at one time or another due to personnel in that agency; however, all of the other agencies would have an excellent record. The HCSSA's with the good records should not be penalized for the one in a totally different area of the state which had a bad experience.

Response: DHS will not change the rule. DHS agrees that the local personnel of HCSSAs can be a key determinant in the quality of services; however, involuntary contract termination is a serious sanction prompted by significant non-compliance with contract requirements. Under the proposed rules, the HCSSA or anyone with a controlling interest may maintain other existing contracts. If there are no additional problems under the existing contracts, the HCSSA or controlling interest party(ies) may apply for a new contract two years after the date of the involuntary termination. DHS has tried to minimize the impact on the HCSSA's other existing contracts or other contracts involving someone with a controlling interest. Instead of taking sanctions statewide, contract management staff in other regions will be alerted to the HCSAA's problems and will monitor the other contracts for compliance.

Comment: Delete §47.4904(d), §48.6030(d) and §48.6108(3). As stated previously, Level II administrative penalties could be for administrative deficiencies that are not related to health and safety and could be for isolated incidents. They do not necessarily reflect a pattern. In fact, the licensing survey process is deficiency based and does not reflect the overall operations of an agency. Contract termination should be for severe problems. The referenced §49.19(b)(3) already has adequate safeguards for termination. In addition §49.18(b)(1) and (2) have provisions for client hold and vendor hold respectively. The department's current rules have plenty of teeth and adequate provisions to discipline contractors or remove them from the program.

Response: DHS will not delete the rules. The rule allows DHS to consider the circumstances of the Level II penalties and evaluate on an individual basis whether to continue to contract with a provider. The wording of the rules indicates that Level II penalties will not automatically result in the termination of a contract.

Comment: Regarding §48.6026(1), replace the proposed language with "have one contract for all counties served." The department continues to complain about the administrative complexity of the community care programs and the number of contractors. One agency serving portions of three contiguous regions must have 3 separate contracts, file three separate cost reports, have three audits, monitorings, etc. The region where the office is located could have primary responsibility for the contract with the other regions assisting if necessary, e.g., on monitorings in their areas.

Response: DHS will not add the suggested language. The department has divided Texas into regions for administrative purposes; the state is simply too large to be able to manage contracts on a statewide basis. If a HCSSA were to hold only one contract for services throughout the state, any and all sanctions taken by DHS would apply to the statewide contract, although problems resulting in a sanction may have been localized to a specific area/region. This would not be advantageous for the HCSSA nor the clients.

In addition, DHS replaced "AFDC" with "TANF" in the definition of "Medicaid eligible" in §48.1201(25).

SUBCHAPTER A. DEFINITIONS

40 TAC §48.1201

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001- 22.030 and §§32.001-32.042.

§48.1201. Definitions of Program Terms.

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

(1) Abuse--The willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish; or the willful deprivation by a caretaker or one's self of goods or services which are necessary to avoid physical harm, mental anguish, or mental illness. (Chapter 48, Human Resources Code)

(2) Activities of daily living (ADL)--Activities that are essential to daily self-care; including bathing, dressing, grooming, toileting, housekeeping, shopping, meal preparation, and others.

(3) Adult--A person 18 or older, or an emancipated minor.

(4) Aged or elderly person--A person 65 or older.

(5) Applicant--A person initially requesting services.

(6) Attendant--A person who is employed by a provider agency to give personal care or housekeeping services or both to an eligible family care or primary home care client, according to a service plan.

(7) Caregiver--A relative, guardian, representative payee, or person who has contact with the client that is frequent enough or regularly scheduled enough that a personal relationship exists or the client perceives that person as having a role in helping the client to meet basic needs.

(8) Caregiver support--An interval of rest or relief from caregiving duties given to or arranged for the caregiver of a DHS client.

(9) Client--A person determined eligible for Community Care for the Aged and Disabled (CCAD) services.

(10) Community care--Services provided within the client's own home, neighborhood, or community, as alternatives to institutional care. Community care is sometimes called alternate care.

(11) Controlling interest--An owner who is a sole proprietor, a partner owning 5.0% or more of the partnership, or a corporate stockholder owning 5.0% or more of the outstanding stock of the contracted provider, or a member of the board of directors.

(12) Disabled/incapacitated person--A person who, because of physical, mental, or developmental impairment, is limited temporarily or permanently in his capacity to adequately perform one or more essential activities of daily living, which include, but are not limited to, personal and health care, moving around, communicating, and housekeeping.

(13) Earned income--Cash or liquid resources that a client receives for services he performs as an employee or as a result of self-employment. All other income is unearned income.

(14) Emancipated minor--A person under 18 who has the power and capacity of an adult. This includes a minor who has had the disabilities of minority removed by a court of law or a minor who, with or without parental consent, has been married. Marriage includes common-law marriage.

(15) Emotional or verbal abuse--Any use of verbal communication or other behavior to humiliate, intimidate, vilify, degrade, or threaten with harm.

(16) Expedited response--A face-to-face contact with an applicant by the caseworker within five calendar days of the date of the applicant's request for services.

(17) Exploitation--The illegal or improper act or process of a caregiver or others using an adult's income and resources for monetary or personal benefit, profit, or gain.

(18) Facility--A legal entity that contracts with the department to deliver to clients day services or 24-hour residential services.

(19) Fraud--A deliberate misrepresentation or intentional concealment of information in order to receive or to be reimbursed for the delivery of services to which the individual is not entitled.

(20) Functional need--An individual's requirement for assistance with activities of daily living, caused by a physical or mental limitation or disability.

(21) Immediate response--A face-to-face contact with an applicant by the caseworker within 24 hours of the applicant's request for services.

(22) Income eligible (I.E.)--An adult who, although neither a Medicaid recipient nor a food stamp head of household or spouse, nevertheless has income and resources equal to or less than the eligibility level established by the department.

(23) Institution--A nursing home, an intermediate care facility for the mentally retarded (ICF-MR), a state school, or a state hospital.

(24) Liquid resource--Cash or financial instruments that could be converted to cash within 20 workdays.

(25) Medicaid eligible--An individual eligible for federal medical assistance as an SSI or TANF client, or eligible for medical assistance only (MAO) in a nursing home or while living in the community or through a federally approved waiver.

(26) Medicare eligible--An aged or disabled person who is a recipient of Social Security or railroad retirement benefit payments and meets eligibility criteria to have certain medical expenses paid by the federal Medicare program.

(27) Neglect--The failure to provide for one's self the goods or services which are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caretaker to provide the goods or services. (Chapter 48, Human Resources Code)

(28) Personal leave--Any leave from a residential care facility except for hospitalization or institutionalization. A day of personal leave is any period of 24 consecutive hours.

(29) Prior approval--A regional nurse's authorization that payment may be made to a provider agency, because a client meets the medical criteria for the requested Medicaid service.

(30) Provider agency--An agency that has contracted with DHS to provide the CCAD services that DHS has authorized for eligible clients.

(31) Provisional contract--A time-limited contract.

(32) Resource--Any cash or other liquid assets or any real or personal property owned by an individual and spouse that could be converted to cash to use for support and maintenance.

(33) Responder--A person who responds to an emergency response services (ERS) call activated by a client. Responders may include relatives, neighbors, volunteers, or staff of a sheriff's department, police department, emergency medical service, or fire department.

(34) Sexual abuse--Sexual contact or conduct which is without the voluntary, informed consent of the elderly or disabled adult.

(35) Supplemental security income (SSI)--Monthly payments made by the Social Security Administration (SSA) to an aged or disabled individual who meets the requirements for public aid. SSA determines eligibility for SSI.

(36) Support system--The network of family members, close friends, and neighbors who are usually available and willing to provide regular or occasional assistance to a person.

(37) Unearned income--Income received by a client from sources other than self-employment or employee work activities.

(38) Unmet need--A requirement for assistance with activities of daily living that cannot be met adequately on an ongoing basis by friends, relatives, volunteers, or service agencies other than DHS.

(39) Verbal referral--A referral made by the caseworker to the provider agency in person or by telephone, no later than the first workday after the caseworker's determination that the applicant meets

the criteria for an expedited or immediate response to a request for service, and needs immediate service initiation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on Ocotber 19, 2000.

TRD-200007379
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 1, 2000
Proposal publication date: May 5, 2000
For further information, please call: (512) 438-3108

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SUBCHAPTER J. 1915(c) MEDICAID HOME AND COMMUNITY-BASED WAIVER SERVICES FOR AGED AND DISABLED ADULTS WHO MEET CRITERIA FOR ALTERNATIVES TO NURSING FACILITY CARE

40 TAC §§48.6026, 48.6028, 48.6030, 48.6108

The new sections and amendment are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections and amendment implement the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

§48.6028. Provisional Contracts--Home and Community Support Services Agencies.

(a) A provisional contract is limited to one year. The Texas Department of Human Services (DHS) may extend a provisional contract if:

(1) the formal review, including any reexamination, has not been completed prior to the end of the provisional contract period, or

(2) DHS is unable to successfully transfer all clients by the end of the provisional contract period.

(b) Prior to applying for a DHS contract, the home and community support services agency (HCSSA) must:

(1) hold the license used to qualify for the contract for at least one year;

(2) have completed an on-site health survey; and

(3) be eligible for that license to be renewed.

(c) During the 12 months immediately preceding application for a DHS contract, the HCSSA must have provided attendant or home health services:

(1) to at least ten clients, with at least two of these clients having received on-going services during a 60-day block of time; and

(2) for a total of at least 500 hours;

(d) The services in subsection (c) of this section must have been provided in the region in which the contract application is made or in a county contiguous to that region.

(e) DHS will not enter into a provisional contract until the HCSSA has received a pre-contract orientation from DHS.

(f) DHS will not enter into a provisional contract if a HCSSA is:

(1) under a monitoring agreement, defined as a licensure action, mutually agreed upon by the service provider and DHS, in which the provider agrees to hire a consultant to assist in correcting problems identified in the survey;

(2) has a license revocation action pending with DHS; or

(3) has a Level II administrative penalty pending with DHS.

(g) Any contracts entered into after the effective date of this rule will be provisional contracts, including contracts to existing HCSSAs expanding into a new region.

(h) A HCSSA contracting under a new vendor number as a result of a contract assignment will receive a provisional contract, but is exempt from the requirements in subsections (b), (c), and (d) of this section.

(i) DHS may choose not to contract with a HCSSA if, in the preceding 12 months, the HCSSA had any Level II administrative penalties imposed by departmental order.

(j) DHS may not contract with a HCSSA if, in the preceding 24 months, the HCSSA had any community care program contract involuntarily terminated.

(k) Notwithstanding other department rules regarding formal reviews, for provisional contracts, this subsection prevails.

(1) DHS will formally review provisional contracts at least once during the contract's provisional status.

(2) A HCSSA not in compliance with program-specific requirements after the formal review cannot enter into another Community Based Alternatives (CBA) contract with DHS for at least 24 months from the end date of the provisional contract. Twenty-four months after the end date of the prior provisional contract, the HCSSA may apply for another provisional contract.

(3) A HCSSA choosing to withdraw from the provisional contract cannot enter into another CBA contract with DHS for at least 12 months from the end date of the provisional contract. Twelve months after the end date of the prior provisional contract, the HCSSA may apply for another provisional contract.

(4) If DHS determines that a HCSSA is not in compliance with one or more program-specific requirements, the provider agency may request a re-examination of the determination.

(A) The provider agency must submit the request in writing, and the appropriate DHS staff must receive it within ten calendar days of the date of the formal review exit conference.

(B) The provider agency's written request must contain a concise statement of the specific actions or determinations it disputes and any supporting documentation the provider agency deems relevant to the dispute.

(C) The lead DHS staff member coordinates a re-examination of the formal review determination with appropriate DHS staff. DHS staff may request additional information from the provider agency.

(D) Within 30 days of the date DHS receives the request for re- examination or of the date DHS receives additional requested information, the lead staff member must send the provider agency its written decision.

(5) If DHS determines that a HCSSA did not meet the requirements in subsection (c) of this section prior to obtaining a DHS contract, the provisional contract will be involuntarily terminated.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200007381
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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Proposal publication date: May 5, 2000
For further information, please call: (512) 438-3108

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40 TAC §48.6030

The repeal is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal implements the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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CHAPTER 49. CONTRACTING FOR COMMUNITY CARE SERVICES

40 TAC §49.3, §49.21

The Texas Department of Human Services (DHS) adopts amendments to §49.3 and §49.21 without changes to the proposed text published in the May 5, 2000, issue of the *Texas Register* (25 TexReg 3935). DHS is simultaneously filing related adoptions in chapters 47 and 48 in this issue of the *Texas Register*.

Justification of the amendments is to update the rules and include in the rules the changes in Chapters 47 and 48 that concern recontracting with home and community support services agencies (HCSSAs) participating in the Primary Home Care and Community Based Alternatives programs when contracts are involuntarily terminated. The rules address current contractors whose contracts were involuntarily terminated.

The department received no comments regarding adoption of the amendments.

The amendments are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments implement the Human Resources Code, §§22.001- 22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200007382
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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PART 3. TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

CHAPTER 142. INVESTIGATIONS AND HEARINGS

40 TAC §§142.11, 142.21, 142.22, 142.31, 142.32

The Texas Commission on Alcohol and Drug Abuse adopts the repeal of §§142.11, 142.21, 142.22, 142.31, and 142.32 concerning Investigations and Hearings without changes to the proposed repeal as published in the August 25, 2000, issue of the *Texas Register* (25 TexReg 8362). These sections contain definitions, information on complaints and investigations, information regarding investigations of abuse or neglect of children, the elderly or the disabled, procedures for facility and chemical dependency counselor disciplinary hearings, and administrative penalties. Extensive changes in these rules made it more feasible to repeal the entire chapter and adopt a new one concurrently.

No comments were received regarding the repeal of these sections.

The repeal is adopted under the Texas Health and Safety Code, Chapter 464, which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities and under Texas Occupations Code, Chapter 504, which provides

the commission with the authority to establish procedures for the licensure of chemical dependency counselors.

The codes affected by the proposed repeals are the Texas Health and Safety Code, Chapter 464 and Texas Occupations Code, Chapter 504.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007363
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: December 1, 2000
Proposal publication date: August 25, 2000
For further information, please call: (512) 349-6668

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40 TAC §§142.11, 142.21, 142.31, 142.32

The Texas Commission on Alcohol and Drug Abuse adopts new § §142.11, 142.21, 142.31 and 142.32 concerning Investigations and Hearings. Section 142.11 is adopted without changes. Sections 142.21, 142.31 and 142.32 are adopted with changes to the proposed text as published in the August 25, 2000, issue of the *Texas Register* (25 TexReg 8363). Sections 142.21(g) through (m), 142.31(d) through (g), and 142.31(h) through (o) have been relettered in the correct order. Section 142.32 has been revised to clarify that the commission decides whether a licensee may surrender a license in lieu of paying administrative penalties.

These sections contain definitions and information regarding complaints and investigations, the procedure for contested cases for counselor and facility licenses, and administrative penalties for licensed facilities and counselors.

These new sections are adopted to establish the processes for investigations and hearings for facilities and counselors licensed by the commission. Changes from Chapter 142, which is simultaneously being repealed include: unnecessary definitions are deleted; two sections on different types of investigations have been combined into one; unnecessary provisions about abuse/neglect investigations have been eliminated; the complaint category definitions now include allegations of fraud or misuse of state funds; circumstances under which the commission may require an agency to conduct an internal investigation have been delineated; the rule regarding provider notification has been clarified to defer notification when it might jeopardize investigation of the complaint; provisions for default orders are now included; deadlines are now specified in relation to the effective date of the notice and that is defined as five days after the date of mailing; the system for determining administrative penalties has been restructured so that dollar amounts are attached to violations based on the seriousness of the violation, the number of previous violations, and the person's history of disciplinary action; administrative penalties will no longer be reduced if corrective action is taken and repeat violations will result in substantially higher penalties; there is no longer a provision for waiving administrative penalties; the base amount assessed for a Category B violation has been reduced from $600 to $500; if a person surrenders the license in lieu of paying an administrative penalty relicensure is now prohibited for a two-year period; and, finally, failure to pay an administrative penalty will result in suspension of the license.

No comments were received regarding adoption of the new sections.

These new sections are adopted under the Texas Health and Safety Code, Chapter 464, which provides the Texas Commission on Alcohol and Drug Abuse with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities and under Texas Occupations Code, Chapter 504, which provides the commission with the authority to establish procedures for the licensure of chemical dependency counselors.

The codes affected by the adopted new sections are the Texas Health and Safety Code, Chapter 464 and Texas Occupations Code, Chapter 504.

§142.21. Complaints and Investigations.

(a) A person alleging that a provider or licensee has violated commission statute or rules may file a complaint with the commission. Complaints about licensed counselors must be submitted in writing and under oath.

(b) The commission accepts oral or written reports concerning acts of abuse or neglect of children, the elderly, or the disabled relating to persons funded or licensed by the commission.

(1) When it receives such a report, the commission notifies any other known agencies which license or fund the alleged perpetrator.

(2) When it receives a report of abuse or neglect of a child, the commission also notifies the appropriate state or local law enforcement agency.

(c) The commission may initiate an investigation or disciplinary action against a provider or licensee if it receives information that a violation has or may have occurred.

(d) The commission documents, evaluates, and prioritizes complaints based on the seriousness of the alleged violation and the level of client or participant risk. The commission uses the following categories.

(1) Category I: Alleged violations that pose an immediate threat to the health or safety of individuals receiving prevention, intervention, or treatment services from persons licensed or funded by the commission.

(2) Category II: Alleged violations that pose a potential threat to the health or safety of individuals receiving prevention, intervention, or treatment services from persons licensed or funded by the commission and allegations of fraud or misuse of state funds.

(3) Category III: Alleged violations that do not pose a potential threat to the health or safety of individuals receiving prevention, intervention, or treatment services from persons licensed or funded by the commission.

(4) Category IV: Alleged violations that are not related to commission rules or funding requirements and are not within the jurisdiction of the commission.

(e) The commission will refer complaints outside its jurisdiction to the appropriate agency for action, as appropriate.

(f) The commission will conduct a prompt and thorough investigation of all Category I and Category II complaints, including all allegations of abuse, neglect, and exploitation.

(g) The commission will evaluate Category III complaints. Based on the nature and severity of the alleged incident, the commission will determine whether to investigate the complaint directly or require the provider or facility to conduct an internal investigation and submit its findings to the commission. The results of a provider's internal investigation will be reviewed and may result in additional investigation by commission staff.

(h) The commission shall inform the person in writing of the nature of the complaint unless it would jeopardize the investigation.

(i) The person under investigation shall provide commission staff access to all documents, evidence, and individuals related to the alleged violation, including the results of any internal investigations.

(j) Until the case is resolved, the commission shall send quarterly written status reports to all parties.

(k) The commission shall prepare a complete written report of its investigative findings and conclusions.

(1) The commission shall inform the person under investigation and the complainant of the results of the investigation.

(2) If the commission has found evidence that a child may have been abused or neglected, it shall report the evidence to the appropriate state or local law enforcement agency.

(3) If the investigation reveals that an elderly or disabled person has been abused by another person in a manner that constitutes a criminal offense under any law, including §22.04 Penal Code, the commission shall submit a copy of the investigative report to the appropriate state or local law enforcement agency.

§142.31. Procedure for Contested Cases for Counselor and Facility Licenses.

(a) At any stage of a disciplinary case, the commission and a respondent may resolve the case by entering into an agreed order.

(b) The commission, upon investigation/inspection and development of information indicating that grounds may exist to take disciplinary action, shall issue a notice of intent notifying the respondent of the proposed action.

(1) The notice letter shall be sent via regular first-class and certified mail to the respondent's address of record.

(2) The notice shall specify:

(A) the statutes, rules, or orders allegedly violated;

(B) the factual basis of the alleged violations;

(C) the disciplinary action the commission intends to take; and

(D) notice of an opportunity for a hearing to be held under Subchapter C, Chapter 2001 of the Texas Government Code.

(3) If the commission is seeking an administrative penalty, the letter shall also inform the respondent of the amount of the recommended penalty and of the opportunity for a hearing on the violation, the amount of the penalty, or both.

(4) The letter shall also include the following notices.

(A) If the respondent does not request a hearing on or before the 20th day after notice is effective, the allegations will be deemed true and the commission will issue a default final order implementing the proposed action.

(B) If the respondent requests a hearing but fails to appear at the scheduled hearing, the allegations will be deemed true and the State Office of Administrative Hearings (SOAH) will recommend a default proposal for decision to implement the proposed action.

(C) Notice is effective five days after the date of mailing.

(c) A respondent must submit a timely written request for a hearing to avoid having the allegations in the notice letter deemed true and a default order implementing the proposed action issued by the commission. The request for hearing is timely if filed with the commission or postmarked on or before the 20th day after the notice is effective.

(d) If the respondent fails to request a hearing on or before the 20th day after effective notice, the factual allegations of the notice letter may be deemed true and shall form the basis of a default final order implementing the proposed action.

(e) If the respondent requests a hearing, the commission may offer the respondent an optional informal conference with commission staff prior to the hearing date.

(1) At the informal conference, the respondent will be given an opportunity to show compliance with all requirements of statute, rule, or commission order cited in the notice letter.

(2) After the informal conference, the commission may withdraw or amend charges contained in the notice letter, offer the respondent an opportunity to dispose of the case through an agreed order, or proceed to hearing under SOAH rules.

(f) The commission shall send written notice of the hearing to the respondent's address of record at least ten days before the date of the hearing. The notice shall include:

(1) the date, time, place and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved;

(4) a short, plain statement of the matters asserted; and

(5) a statement that if the respondent does not appear at the hearing, the allegations will be deemed true and the action proposed in the notice of hearing may be granted by default.

(g) If the respondent fails to appear at a scheduled SOAH hearing after being given proper notice of the hearing, SOAH shall issue a proposal for decision recommending the proposed action.

(h) If the case is not resolved through an informal hearing or default decision and goes forward to administrative hearing, the hearing shall be conducted by an administrative law judge employed by the SOAH and shall comply with the requirements of the Texas Government Code, Chapter 2001, Subchapter C and SOAH Rules of Procedure, 1 Texas Administrative Code, Chapter 155.

(1) At the hearing, parties in attendance shall be allowed to present evidence, to examine witnesses, to cross-examine adverse witnesses, to make argument, and to submit legal authority.

(2) After the hearing, the administrative law judge shall issue a proposal for decision containing a statement of the reasons for the proposed decision and of each finding of fact and conclusion of law necessary to the proposed decision.

(3) Exceptions to the proposal for decision, if filed, must be filed with the administrative law judge within 20 days after the date the proposal for decision is mailed. Replies to the exceptions, if any,

must be filed with the administrative law judge within 30 days after the date the proposal for decision is mailed.

(i) The commission's board will consider the proposal for decision in all matters other than an administrative penalty for a chemical dependency counselor at a public meeting and issue an order.

(j) The executive director will consider the proposal for decision regarding an administrative penalty for a chemical dependency counselor.

(k) A motion for rehearing, if filed, must be filed in accordance with the Texas Government Code, Chapter 2001, Subchapter F. When a motion for rehearing is directed at a default final order, the motion must be supported by evidence and address the following factors:

(1) failure to answer or appear at the hearing was due to an accident or mistake and was not intentional or the result of a conscious indifference;

(2) the respondent can present a meritorious defense to the fact findings and legal conclusions in the order; and

(3) granting the rehearing will not work any injury to the commission or its mission.

(l) The respondent appealing a final order shall pay to the commission the cost of preparing the original or a certified copy of the record that is to be transmitted to the reviewing court at rates approved by the General Services Commission.

§142.32. Administrative Penalties For Licensed Facilities and Counselors.

(a) Violations are categorized according to the seriousness of the violation and the actual or potential harm to the health, safety, and welfare of the public. The commission has established specific guidelines for assigning categories. These guidelines show how various offenses are categorized, but do not limit the commission's authority to categorize any particular offense that is not already included in the guidelines or to modify those offenses already categorized. These guidelines are available for review on the commission's website (www.tcada.state.tx.us) and at the commission's administrative offices at 9001 North IH 35, Suite 105, Austin, Texas, 78753.

(b) Administrative penalties are not assessed for the most serious violations, which are assigned to Category A. Instead, the commission will seek to deny, refuse to renew, revoke or suspend the license.

(c) The base administrative penalty for a first time offense is $500 for a Category B violation, $200 for a Category C violation, and $40 dollars for a Category D violation.

(1) The base administrative penalty is doubled for a second-time violation and tripled for a third-time violation. If the same violation is identified four times, the commission may seek to revoke or suspend the license or assess an administrative penalty of four times the base amount.

(2) An additional $250 will be assessed if the person's license has been suspended or revoked during the past five years.

(3) If the total dollar value of administrative penalties assessed during a single inspection or investigation is over $5,000 for a facility or $2,000 for a counselor, the commission may seek to revoke or suspend the license instead of imposing an administrative penalty.

(d) The commission may also charge the licensee for any enforcement costs related to subsequent follow-up compliance visits.

(e) When administrative penalties are recommended, the executive director or designee shall report staff findings and recommendations to the board, including the amount of the recommended penalty.

(f) The executive director shall give written notice to the licensee adversely affected. The notice will be by certified mail. The notice shall include:

(1) a brief summary of the alleged violations;

(2) a statement of the amount of the recommended penalty; and

(3) a notification that the licensee has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(g) A request for hearing must be filed in writing within 20 days of the effective date of notice. Notice is effective five days after mailing.

(h) Section 142.31 of this chapter applies to these proceedings.

(i) Failure to pay an administrative penalty will result in suspension of the license. A licensee who has not paid final administrative penalties is not eligible for licensure renewal.

(j) If approved by the commission, a licensee may surrender the license in lieu of paying administrative penalties. The licensee may reapply for licensure if:

(1) administrative penalties are paid prior to application; and

(2) two years have passed since the date of surrender.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007362
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
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For further information, please call: (512) 349-6668

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PART 6. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING

CHAPTER 181. GENERAL RULES OF PRACTICE AND PROCEDURE

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §181.55

The Texas Commission for the Deaf and Hard of Hearing adopts §181.55 without changes to the text as published in the August 4, 2000, issue of the *Texas Register* (25 TexReg 7344). This rule establishes the task forces of the Commission and their importance to the Commission.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 19, 2000.

TRD-200007389
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
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Proposal publication date: August 4, 2000
For further information, please call: (512) 407-3250

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40 TAC §181.56

The Texas Commission for the Deaf and Hard of Hearing adopts §181.56 without changes to the text as published in the August 4, 2000, issue of the *Texas Register* (25 TexReg 7344). This rule establishes the responsibilities of the task forces of the Commission.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
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For further information, please call: (512) 407-3250

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40 TAC §181.57

The Texas Commission for the Deaf and Hard of Hearing adopts §181.57 without changes to the text as published in the August 4, 2000, issue of the *Texas Register* (25 TexReg 7345). This rule establishes membership requirements and length of term for members of the task forces of the Commission.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
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For further information, please call: (512) 407-3250

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40 TAC §181.58

The Texas Commission for the Deaf and Hard of Hearing adopts §181.58 without changes to the text as published in the August 4, 2000, issue of the *Texas Register* (25 TexReg 7345). This rule establishes qualifications of the members of the task forces of the Commission.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
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Proposal publication date: August 4, 2000
For further information, please call: (512) 407-3250

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SUBCHAPTER F. FEES

40 TAC §181.830

The Texas Commission for the Deaf and Hard of Hearing adopts amendment to §181.830 without changes to the text as published in the August 4, 2000, issue of the *Texas Register* (25 TexReg 7346). This rule modifies how fees for interpreter services are determined in accordance with Texas Administrative Code, § 81.006.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
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Proposal publication date: August 4, 2000
For further information, please call: (512) 407-3250

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CHAPTER 182. SPECIALIZED TELECOMMUNICATIONS ASSISTANCE PROGRAM
SUBCHAPTER B. PROGRAM ELIGIBILITY

40 TAC §182.22

The Texas Commission for the Deaf and Hard of Hearing adopts amendment to §182.22 without changes to the text as published in the April 28, 2000, issue of the *Texas Register* (25 TexReg 3730). This rule will eliminate the returned check fee.

No comments were received.

This rule is adopted under the Human Resources Code, §81.006(b)(3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
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For further information, please call: (512) 407-3250

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 809. CHILD CARE AND DEVELOPMENT
SUBCHAPTER C. REQUIREMENTS TO PROVIDE CHILD CARE

The Texas Workforce Commission (Commission) adopts the repeal of Chapter 809, Subchapter C. Requirements to Provide Child Care, §809.45 and §809.46, new §809.46, and amendments to §809.47, relating to assessing parents' share of cost for child care services without changes to the proposed text as published in the September 8, 2000, issue of the *Texas Register* (25 TexReg 8839). The text will not be republished.

Purpose: The purpose of the new and amended rules is to increase the flexibility of local workforce development boards (Boards) in setting parents' share of cost for child care services and to reinforce parent responsibility. The range of recommended fees will be determined by the Boards taking into account a family's ability to share in the cost of child care, the importance of personal responsibility, and the goal of assisting persons who are working, in training or education with becoming self-sufficient.

Background: To better facilitate self-sufficiency, the Commission asserts that it is important that parents take responsibility for sharing the cost of care for their own children. For that reason, the new and amended rules remove the recommendation of the 9 to 15 percent parents' share of cost range. However, the Commission suggests that Boards set a minimum of nine percent as the parents' share of cost to encourage personal responsibility. By setting policies that incorporate a progressive increase as parents' earnings increase, Boards will help support families and prepare them to pay the full cost of child care as they move toward self-sufficiency. A progressive increase in parents' share of cost will also make limited child care dollars go farther, thus allowing for services to more families who need care.

The new and amended rules no longer contain the provisions relating to the circumstances in which the Agency manages child care service since all 28 Boards are now operational and manage child care services in all workforce areas. For purposes of this preamble, the term "Agency" refers to the daily operations of the Texas Workforce Commission under the direction of the executive director, and the term "Commission" refers to the three-member body of governance composed of Governor-appointed members.

The new §809.46 also no longer contains subsection (f), which required that subsidies used for child care from other funding sources were required to follow the same share of cost policy as that which applied to funds allocated by the Commission for child care services. The new rules allow the Boards to set local parents' share of cost policies relating to funds not allocated by the Commission for child care services such as Welfare-to-Work (WtW) and Workforce Investment Act (WIA) funds. The new and amended rules will enable Boards to set integrated or funding-specific parent share of cost provisions to coordinate parents' share of cost policies in a manner as determined by the Board to best meet the needs of the local residents, and in particular, the needs of persons who are working toward self-sufficiency.

The Commission received comments from two commenters, one from a representative and the other from the North Central Texas Workforce Board. The commenters expressed both support and concerns regarding particular aspects of the rules. A summary of the comments and the responses are set forth as follows.

Comment: One commenter stated that the commenter supports the language changes in the proposed amendments to §809.47 and stated that this change correctly identifies what has been called the "parent's fee" as the parents' share of cost for child care. The commenter also supports the repeal of §809.45

and §809.46 and the issuance of one new rule designated as §809.46 relating to assessing parents' share of cost for child care services.

Response: The Commission strives to streamline the rules of the Agency whenever possible to reflect the goals of the Agency more fully and appreciates the commenter's time in providing comments.

Comment: Regarding §809.46(b), one commenter expressed a concern that a parent's share of cost for child care funded by the Workforce Investment Act (WIA) and/or Welfare-to-Work (WtW) could be considered a charge for participation. The commenter believed that the regulations for both WIA and WtW prohibited such charges. The commenter requested information about whether guidance or clarification had been received from the Department of Labor regarding whether the fees were permissible under WIA and WtW.

Response: The Commission did receive information from the U.S. Department of Labor that the "fee for service" prohibition in WIA and WtW would not prohibit parents sharing in the cost of the child care because the costs are those that would have belonged to the parents. The subsidy for child care is the portion that is provided to the parents to assist with the services that the parents, once becoming self-sufficient, would have the full responsibility of paying. The fee for service prohibition in WIA typically refers to charging participants for accessing the services such as an "application" fee. The Commission asserts that the parents' share of costs is not an access fee, but rather the portion of the shared cost that the parent is responsible for paying.

Comment: Regarding §809.46 generally, one commenter asserted that the issues regarding WIA and WtW parent fees should be addressed in WIA and WtW rules rather than the Child Care rules because the Board's Workforce Center Contractor, and not the Board's Child Care Contractor, is entirely responsible for determining the eligibility and suitability of the child care support service for the WIA and WtW participants.

Response: The Commission believes that the move to working on rules in a more function oriented manner would best suit the rules.

Comment: Regarding §809.46(b), one commenter stated that the addition of §809.46(b) was inappropriate in that it is not required by either State or federal law or regulation and reminded the Commission of its commitment not to impede on local control by imposing additional restrictions.

Response: The Commission intends to illustrate the flexibility for Boards to coordinate and streamline the services for WIA, WtW and Choices with the child care support service. In addition, the Commission is committed to the goals of personal responsibility as outlined in PRWORA. Assisting parents with becoming self-sufficient begins with requiring that families move toward taking a larger degree of personal responsibility as their income increases. The federal regulations at 45 C.F.R. §98.43 also place importance on personal responsibility and the evidence of that personal responsibility in the form of parents sharing the costs of the child care for their children.

Comment: One commenter agreed that the policy regarding the amount applicable for the parents' share of costs should be a local decision and that the Boards are best suited to make that decision. The commenter also expressed that since the rule changes affect child care and have the potential to significantly alter the amount families pay, that the Commission track the impact of the new and amended rules.

Response: The Commission intends that the information on Board policies regarding parent fees be tracked as well as the numbers of persons served in each type of care (Applicant, Choices, Transitional, and At Risk Income Eligible) so that the information can be used to best assist the Boards in managing the funds for eligible families that are working, in training or in education.

40 TAC §809.45, §809.46

The rules are repealed under Texas Labor Code §§301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007331
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: November 7, 2000
Proposal publication date: September 8, 2000
For further information, please call: (512) 463-2573

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40 TAC §809.46, §809.47

The rules are adopted under Texas Labor Code §§301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER K. FUNDS MANAGEMENT

40 TAC §809.221, §809.225

The Texas Workforce Commission (Commission) adopts amendments to §§809.221 and 809.225 relating to General Funds Management and Continuity of Care for child care services and priorities for Choices, Transitional and Texas Workforce Applicant Child Care services, without changes to the proposed rules as published in the September 1, 2000, issue of the *Texas Register*(25 TexReg 8619). The text will not be republished.

Purpose: The purpose of the rule amendments is to reinforce the statutory and regulatory priorities on Child Care services and provide guidance regarding the objectives of affording continuity of care for families receiving Commission-funded child care services.

Generally, the amendments to rules continue to require placing eligible Choices, Transitional or Texas Workforce Applicant's children into child care. However, the rules make it clear that if necessary, due to limitation of funds, a child's care may be discontinued to ensure that the statutory and regulatory priority clients receive child care services. The rule amendments give local flexibility to ensure that funds are used for families that are striving for but have not achieved self-sufficiency and who are required to receive child care services to assist them in becoming self-sufficient.

The rule amendments require Boards to develop policies that reinforce the priorities set forth in the rules that are based on federal and state law. The policies should inform families that are not within the statutory and regulatory categories (Choices, Transitional or Texas Workforce Applicant) that the provision of child care services may be terminated at a specified time, but not less than 15 days, after written notice of the termination of child care services. The notice period must be no less than 15 days as required by §809.72(5), which provides that parents have the right to "(5) written notification by the Board's contractor at least 15 days before the denial, delay, reduction, or termination of child care ...."

For purposes of this preamble, the term "Agency" refers to the daily operations of the Texas Workforce Commission under the direction of the executive director, and the term "Commission" refers to the three-member body of governance composed of Governor-appointed members.

The Commission received one comment from a faith-based provider from the Alamo Workforce Development Area. A summary of the comment and the response is set forth as follows.

Comment: The commenter stated that it appears the purpose of the amendment is to terminate care for all children currently eligible for subsidized child care unless they are in Choices, Transitional or Agency Applicant child care. The commenter asserted that under the proposed amendment, many children currently receiving care will be swept from the rolls and thrown back into the welfare arena. The commenter asked what criteria would be applied to reduce the existing rolls and to determine which children will be removed first. The commenter recommended that the current language in §809.225 be retained, that enrolled children continue to receive care as long as the family remains eligible, and that the rolls be reduced through normal attrition.

Response: The Commission recognizes and appreciates the concern expressed by the commenter and wishes to clarify that the purpose of the proposed amendment is not to reduce the number of Agency-subsidized children in care. Nor is it the Commission's intent to terminate care for currently enrolled children in eligible families. The purpose of the amendment is to reinforce the priority for child care services that Boards are required to afford to recipients of TANF cash assistance who are engaged in employment-related activities, families who are in the process of transitioning off public assistance, and applicants for TANF cash assistance who find employment before they are certified to receive TANF cash benefits. Boards may need the flexibility to remove some children in low-income working families from care in order to serve children in those groups that have the highest priority for services.

Boards will be given the flexibility to set their own criteria for income level eligibility within the limits set within the federal regulations for low-income, working families that will lose Agency-subsidized child care services first, should that become necessary to keep services available to families with the highest priority for child care. The Boards are in the best position to determine the policies that best serve the needs and goals of the workforce areas.

The amended rules are adopted under Texas Labor Code §§301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The rules affect Texas Labor Code, Chapter 302, and Texas Human Resources Code, Chapters 31 and 44.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 18, 2000.

TRD-200007333
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CHAPTER 815. UNEMPLOYMENT INSURANCE

40 TAC §§815.1 - 815.33

The Texas Workforce Commission (Commission) adopts the repeal of §§815.1-815.33, concerning the Unemployment Insurance process without changes as published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6947). The text will not be republished.

The repeal is being adopted in order to clarify and reorganize new rules into subchapters entitled General Provisions; Benefits, Claims and Appeals; and Tax. The repeal allows for the creation of more efficient and well organized new rules that will interpret and administer the provisions of Texas Labor Code, Title 4, Subtitle A, entitled the Texas Unemployment Compensation Act (Act). The new rules are concurrently being adopted in this issue of the *Texas Register*.

No comments were received concerning the proposed repeal.

The repeal is adopted under Texas Labor Code, §§301.061 and 302.062, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Commission services and activities.

The adopted repeal affects Texas Labor Code, Title 4.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 815. UNEMPLOYMENT INSURANCE

The Texas Workforce Commission (Commission) adopts new §§815.1, 815.3, 815.16, 815.17, 815.20, 815.21, 815.32, 815.102, 815.107, 815.113, and 815.128, concerning the Unemployment Insurance process, with changes to the proposed text as published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6947). Sections 815.2, 815.10, 815.15, 815.18, 815.19, 815.22-815.28, 815.101, 815.103-815.106, 815.108, 815.109, 815.111, 815.114, 815.115, 815.129-815.131, and 815.133 are adopted without changes to the proposed text and will not be republished.

The Commission made non-substantive changes to proposed §§815.1, 815.3, 815.16, 815.17, 815.20, 815.21, 815.32, 815.102, 815.107, 815.113, and 815.128, to standardize terminology by adding the phrase "workforce center" as appropriate, and non-substantive grammatical changes to improve readability. The Commission has explained the other changes to the proposed text in its responses to the comments below.

The purpose of the adopted rules is to interpret and administer the provisions of Texas Labor Code, Title 4, Subtitle A, entitled the Texas Unemployment Compensation Act (Act). More specifically, the rules incorporate substantially all of the requirements currently contained in Chapter 815, which is concurrently being repealed and reflects changes to the business practices of the Tax, Benefits, and Appeals functions of the Agency. Some of the changes are non-substantive changes, which include clarifying and reorganizing the rules into subchapters entitled General Provisions; Benefits, Claims and Appeals; and Tax.

In general, the rules are modified:

(1) to more accurately reflect the current business practices of the Agency;

(2) to enhance administrative efficiency and consistency;

(3) to provide more clarity throughout Chapter 815;

(4) to remove gender references; and

(5) to add new provisions to improve the unemployment insurance process for both employers and claimants.

Subchapter A contains §§815.1-815.3 and sets out the general provisions regarding the Unemployment Insurance process. Terms were added to the definition section, including "Agency," "Appeals," "Board," "Commission," and "person." The definition for base period was clarified. The requirements regarding the general determination of mailing dates and the use of forms were clarified. Provisions were amended to conform to legislative changes to the Act.

Subchapter B contains §§815.10-815.32 and sets out the provisions relating to benefits, claims and appeals. Many of the local offices providing unemployment insurance services have closed or have been converted to Local Workforce Development Board service delivery sites. Since these Board locations are part of the Texas Workforce Network as described at Chapter 801, Subchapter B, the adopted rules provide that appeals of determinations and decisions may be filed at these Texas Workforce Centers. The sections pertaining to the Appeal Hearings are modified to reflect the deletion of the words "benefit" and "entitlement;" since the Appeal Hearings procedures are also used for the following:

(1) to appeal determinations and decisions relating to situations where benefits are charged back to the employer's account;

(2) when benefits are cancelled or forfeited; and

(3) to some extent in the Rule 13 Hearings.

Some of the subsections in the rules concerning the Appeal Hearings procedure are rearranged to more accurately reflect the chronology of the process. The procedures regarding continuances and appearances are amended to reflect current practices. Section 815.15 sets out provisions regarding parties with appeals rights. The term "party of interest" is defined. This definition and the use of the term "party of interest" in the rules provide a clear delineation between "party" and "party of interest" as these terms are used in the rules. Section 815.20 sets out provisions regarding claims for benefits and specifies the use of telephonic means for filing claims. The rule also deletes the in-person claim filing for benefits and provides a list of the type of unemployment insurance claimant(s) hereinafter referred to as (claimant(s)) who are exempted from the work registration requirements. The rule also permits employers to file a response to a notice of claim by telephonic means. Section 815.28 is a new rule that clarifies the work search requirements for claimants.

Subchapter C contains §§815.101-815.133 and sets out the provisions relating to tax coverage, contributions or reimbursements, and appeals. The new rules reflect a reorganization of the provisions of Chapter 815 relating to the Tax function. Subchapter C begins with §815.101 so that the number 100 is added to the old rule numbers relating to tax, to simplify the transition into the new subchapter. For example, the rule formerly numbered as §815.6 is now numbered as §815.106. Although the hearing rule for the Tax function is numbered §815.113, the hearing process as provided for in the rule will continue to be known as a Rule 13 hearing. Section 815.102 sets out the requirements regarding the determination of mailing dates and the use of forms for Subchapter C. Section 815.103 sets out a new rule relating to the use of Digital Signatures. Section 815.107 sets out the provisions regarding the required reports and their due dates. The filing requirements of quarterly reports for reimbursing employers and group accounts are clarified and the filing methods are expanded.

The Commission held a public hearing on the proposed rules on August 14, 2000, Room 244 of the Texas Workforce Commission Building at 101 East 15th Street in Austin, Texas. An individual representing the law firm of Jackson Walker and the State Council of the Society of Human Resource Management testified against proposed §815.20(10) because the subsection does not allow employers to file protests by telephone, and §815.28 the work search rule. One individual who testified against these proposed rules for similar reasons represented the Dallas Human Resources Management Association. Representatives of Fort Bend County, Texas Association of Business and Chambers of Commerce, the Texas Society of Human Resource Management, Small Business United of Texas, and the National Federation of Independent Businesses/Texas testified against these two rules again for similar reasons, as well as the proposed party of interest rule §815.15, for being vague. The Commission will incorporate the issues raised in this testimony into the comments and its responses set out below. The designation of commenter will include those individuals who testified at the hearing.

The Agency received comments on the rules from businesses, labor, interested groups and associations. Some commenters supported these rules while others opposed them, and requested clarification on some aspects of the rules. Also during the comment period, some individuals provided written concern about some of the Agency's methods of administration of the unemployment insurance function, but provided no specific comments regarding the Unemployment Insurance Rules.

The names of interested groups and associations providing written comments during the comment period on the rules included the following:

The Texas Association of Business and Chambers of Commerce;

The Unemployment Insurance Division of the Regional Office of the United States Department of Labor;

The Humble Area Chamber of Commerce;

Small Business United of Texas;

The Red Cross;

The law firm of Deats and Levy P.C., on behalf of the AFL-CIO;

Texas Association of School Boards Risk Management Fund Unemployment Compensation program; and

Austin Human Resource Management Association.

Comments: Some commenters disagreed with the party of interest provisions in §815.15 for the following reasons. The commenters stated that the party of interest rule was vague, ambiguous, and/or too complex. Some commenters asserted that the rule was rewritten to remove appeal rights of employers in chargeback situations. Some commenters stated that monetary stake or financial interest was the sole criteria for party of interest status. One commenter suggested that there may be proceedings at which there will be more than one employer with a monetary interest in the proceedings and therefore each employer would be one party of interest. This is the reason that the commenter suggested that the language in §815.15, that allows only one employer to be a party of interest to a proceeding, be deleted. The same commenter also suggested that another "or" be inserted between subparagraphs (c)(4)(A) and (B).

Response: The rule as proposed does not change the current party of interest procedures. Parties who have a financial stake in the claim will be given notice and should timely respond to protect their appeal rights and their financial interest. The provisions of §815.15 do not change the Commission's current policy pertaining to a party of interest. In addition the rule only concerns proceedings in which the claimant and an employer may be a party of interest. The rule does not concern the proceedings referenced in § 815.10 commonly referred to as chargeback proceedings. In these proceedings the claimant is not an interested party because the claimant's benefits are not affected. These proceedings are subject to the provisions of Texas Labor Code, Chapter 204, Subchapter B, V.T.C.A. The party of interest provision and timetable are detailed in §§ 204.021-204.027. Since these provisions provide very specific requirements, there is no need to restate the statutory provisions in a rule.

Section 815.15 embodies the current party of interest procedures when a claimant's benefits are affected. If an employer is named as the last work of a claimant filing an initial claim and if the employer files a timely protest to the notice of claim, regarding that claimant, then that employer is a party of interest in the proceeding pertaining to the issues raised as a result of that initial claim. However, if the employer does not file a timely response, then the employer is not an interested party to the proceeding. This procedure is the same whether the employer is designated as a taxed or reimbursing employer.

When a claimant files an additional or a continuing claim, there are two situations in which an employer designated as a taxed employer may become an interested party. The first is when an employer, who is not a base period employer, is named as the last work by the claimant on the additional or continuing claim and this employer was also named as last work on the initial claim. If this employer filed a timely response to the initial claim, and the employer files a timely response to the notice of claim on the additional or continuing claim, then the employer will be a party of interest in the proceeding pertaining to the issues raised as a result of the additional or continuing claim. The second situation in which an employer designated as a taxed employer, may be a party of interest on an additional or continued claim is when the employer is a base period employer whose account has been ruled subject to chargeback. (This situation would include all base period employers including a base period employer named as the last work on the initial claim.) If this employer files a timely response to the notice of additional or continuing claim, then this employer will be a party of interest in the proceeding pertaining to the issues raised as a result of the additional or continuing claim.

The situation is slightly different when a reimbursing employer is named as the last work on an additional or continuing claim, but there are again two situations when this employer may be a party of interest. The first is when the employer, who is not a base period employer, is named as the last work by the claimant on the additional or continuing claim, and this employer was also named as last work on the initial claim. If this employer filed a timely response to the initial claim and the employer files a timely response to the notice of claim on the additional or continuing claim, then the employer will be a party of interest in the proceeding pertaining to the issues raised as a result of the additional or continuing claim. The second situation in which a reimbursing employer may be a party of interest on an additional or continued claim is when a base period reimbursing employer files a timely response to the notice of claim for an additional or continuing claim. (This situation would include all base period reimbursing employers including a base period reimbursing employer named as the last work on the initial claim.) This employer will be a party

of interest in the proceeding pertaining to the issues raised as a result of the additional or continuing claim.

In addition to the situations described above, the other most common situation in which an employer, whether taxed or reimbursing, can become a party of interest is when that employer provides information that may affect a claimant's entitlement to benefits. If the employer providing the information was a party of interest on the initial claim, or a reimbursing base period employer, or a taxed base period employer whose account is subject to chargeback, then the employer may be a party of interest to the proceeding. For example, the information may raise an issue about a claimant's availability for work or allegations of fraud.

On additional and continuing claims even employers whose financial interest will not be affected by the claim, and under the rule are not considered parties of interest with appeal rights, are given an opportunity and are encouraged to participate in the initial fact finding process of the additional or continuing claim. These employers are also given notice of and allowed to participate in an agency hearing, if the claimant appeals an adverse determination or decision.

For the reasons stated above, the Commission does not support these comments, nor does the Commission support the suggested change to the wording in the rule. The Commission is of the opinion that party of interest is an essential concept that needs to be more clearly articulated in the rules. Accordingly, the Commission is providing a more detailed explanation of the term in the rules. This rule reflects the established guidelines contained in the Commission's *Appeals Manual*, which the Commission continues to apply, and the definition is a well established procedure upon which the public has relied for a number of years.

Comment: One commenter requested that the Commission amend §815.20(7) by inserting the words "and" immediately before the phrase "by participating in re-employment services...."

Response: Since the Act contains a specific citation for participation in re-employment services as a condition for benefits eligibility, the Commission will amend the rule by inserting the language "and if required by §207.021(a)(8)" before the phrase "by participating in re-employment services..."

Comment: One commenter requested the Commission amend §815.20(8)(A) to expressly exclude school employees from the exemption of the work registration requirement. The commenter asserted that since the reasonable assurance does not have a return-to-work date and is not a binding contract of future employment, the teachers who after the summer break, are not hired for a subsequent term would have been subject to the work search requirement.

Response: When the school provision §207.41 of the Act applies and an individual, who files a claim, has only school wages, or other wages that are insufficient, then the claim will be held invalid because of the lack of wage credits due to the suppression of the school wages. However, if the individual refuses to return to school in the fall, then the school wages are unsuppressed and the separation is adjudicated. If the separation qualifies the claimant for benefits, then the work registration and work search requirements apply.

Another situation that the commenter may be referring to is when a claim has sufficient non school wage credits to have a valid claim. The benefits are paid the claimant because the claimant has a nondisqualifying job separation. They have reasonable assurance to return to work for the school. However, if the claimant refuses to return to school in the fall, then school wages are unsuppressed, and the separation is adjudicated. If the separation qualifies the claimant for benefits then the work registration and work search requirements apply. For these reasons the Commission does not support the commenter's suggested amendment to the rules.

Comments: Numerous commenters did not agree with the Commission's rule §815.20(10) as proposed because it does not specifically provide employers the opportunity to respond to notices of claims by telephone. Some commenters stated that they support the employer being able to file responses by telephonic means. Some said that since the claimants are able to file their claims by phone it is only fair that employers be able to file their responses by telephone, as well. Some commenters indicated that the requirement that the employer protest be in writing was costly to small businesses because of their lack of funds and because they are short staffed.

Response: The Commission understands the concerns of the commenters, and agrees that employers should be allowed to file their responses to a notice of claim by telephonic means. The Agency will create procedures and systems that will permit employers to file responses by telephonic means, or other means approved by the Agency in writing. The Agency will create systems to substantiate and verify that the employer filed a timely response.

Comments: Some commenters stated that §815.28, the work search rule, is vague, ambiguous, and unenforceable. A commenter suggested that the rule be repealed so that the Agency can continue its current practices without the rule.

Response: The Commission approved the new section in order to provide additional guidance to the public that utilizes the services of Agency and Agency staff. The Commission currently provides guidance on work search issues in the Appeals, Policy and Precedent Manual and work search requirements will continue to be more specifically defined on a case by case basis by the Commission and published in the *Appeals, Policy and Precedent Manual*. The work search precedent cases are in the section of the manual concerning the requirement that claimants be able and available for full-time employment. Generally, the rules are drafted broadly to provide guidance, and yet provide the Agency the flexibility to administer the unemployment insurance function by being able to accommodate the multitude of varied circumstances encountered through the administration of the unemployment insurance function. The Commission is continuing this practice with the current rules being proposed. The Agency's enforcement of the work search standards requires claimants to make several contacts per week to remain eligible and to maintain records of these contacts. In addition, instructions are given to claimants by Agency staff stressing the necessity of work search and emphasizing that "just one contact" per week is insufficient to maintain eligibility for benefits. For these reasons the Commission does not concur with the commenters' suggestions.

Comments: One commenter indicated that additional work search requirements are needed because local businesses "have difficulty finding qualified employees to support job demands or business expansion."

Response: The Workforce Investment Act (WIA) is designed to make local re-employment programs more responsive to local conditions, thereby addressing these issues. The Commission

supports empowering local Boards since this promotes the tailoring of programs and directing resources to meet local needs of the employers and the local workforce. Ultimately this process will help each area to move unemployed Texans into gainful employment as rapidly as possible.

Comments: Some of the commenters took issue with Texas' rate of exhaustion of benefits and its duration of benefits as compared to New Mexico and other neighboring states, using the statistics to support the proposition that the claimants are not participating in work search activities.

Response: Macroeconomic factors profoundly impact average duration of benefits and exhaustion rate measures, making them very poor performance indicators. Moreover, because Texas' economy differs so dramatically from our neighboring states, both in the size of our insured population and in the diversity of our job market, comparisons of these measures are even less meaningful. In the report entitled *Comparison of State Unemployment Insurance Laws 2000* published by the Department of Labor, table 309 shows that there is a wide range in the duration period among the states allowed under various state laws. In Texas, claimants may receive benefits for as few as 10 weeks or for as long as 26 weeks. New Mexico's duration ranges from 19 to 26 weeks, while Louisiana has for several years had a fixed duration of 26 weeks. Texas has the shortest. Intuitively, a shorter minimum duration will produce higher exhaustion rates, and Texas has one of the shorter minimum durations among the 50 states. In the report entitled *UI Data Summary* for the first quarter of CY 2000, published by the U.S. Department of Labor Office of Workforce Security Division of Fiscal and Actuarial Services, the average duration for Texas claimants is 15.9 weeks. The average duration for New Mexico is 16.3 weeks, which is higher than Texas' rate, while the average duration for Louisiana is 15.8 weeks, which is only one tenth less than Texas' rate. Texas' average duration of 15.9 weeks in 1999 is not inconsistent with rates in other states of similar size and diversity; for example, California (16.4 weeks), New York (17.7 weeks), or Illinois (15.9 weeks). In other instances, states with smaller general populations and a relatively large population of claimants experiencing short-term layoffs tend to have very short duration and exhaustion rates compared to states, like Texas, with an expanding population of claimants formerly employed in professional/technical/managerial professions. Because of the complexity of these variables the Commission does not draw the same conclusions as the commenters.

Comment: A commenter suggested that employees of temporary employment firms should contact the temporary help firm to request a new assignment before filing for unemployment.

Response: The Commission refers the commenter to Texas Labor Code §207.045(h) which provides in part "a temporary employee of a temporary help firm is considered to have left the employee's last work voluntarily without good cause connected with the work if the temporary employee does not contact the temporary help firm for reassignment on completion of an assignment. ..." To the extent that this provision supports the commenter's suggestion, the Commission is in agreement with the commenter.

Comments: Some commenters suggested that the Agency, through the use of existing laws and regulations, give claimants incentives to search and find new jobs as soon as possible. The commenters further suggested that claimants should be required to make multiple contacts per week in order to continue to receive benefits, and that the Agency should strictly enforce sanctions against benefits when claimants do not participate in unemployment profile sessions offered by local Workforce Development Centers.

Response: The Commission agrees with these comments, which is why instructions to claimants stress the importance of work search, and they are told specifically that one contact per week is not sufficient. The Commission enforces the work search regulations by requiring claimants to make several contacts per week in order to maintain eligibility for benefits. In addition, the Agency runs a nightly computerized cross-match to identify claimants who have failed to adhere to profiling participation requirements. Those who do not participate may be held to be ineligible for benefits.

Comments: Some commenters indicated that the Commission should require documented proof that legitimate job contacts have been made each week before continuing unemployment benefits.

Response: The Commission concurs with the commenter's suggestion. Claimants are required to keep documented proof (a weekly written log) of job contacts. The Agency staff verifies work search logs based on a random sampling. Claimants failing to comply may be determined to be ineligible for benefits.

The Commission verifies the work search of the claimants using random sampling. Random sampling is utilized because it has been determined to be statistically valid. In addition, the administrative cost of total verification would be cost prohibitive. The Agency conducted work search verification studies to determine the unit cost to verify one work search contact. In the most recent study conducted by the Benefits Accuracy Measurement Unit (former UI Quality Control Unit), the cost to verify work search contacts is one and one half to two times the savings.

Comments: Some commenters suggested that the Commission require: that claimants accept suitable job offerings that are at least 75% of the former ending wage if they are still unemployed after several weeks of job searching; that all Texas utilize the Agency's job-matching system regardless of their locale--rural or metropolitan; and that the coordination be improved between the Divisions of Unemployment Insurance and Workforce Development at the Texas Workforce Commission.

Response: Federal law defines various aspects of the job suitability concept; however, the Commission through precedent cases requires that claimants, after several weeks of searching, accept jobs that may pay less than their former positions, provided the new job is otherwise suitable and within the prevailing wage. Because the circumstances and local economic conditions vary, the Commission declines to accept this suggested change.

The Workforce Development Division is nearing completion of an updated directory of local Employment Services offices, which will match every zip code in Texas to a specific service point. All claimants, including those who reside in remote areas, will be required to register for work and will be matched against job openings in the Job Service Matching System. These exceptions include those claimants who are active Union members, who are on temporary layoff and have a definite return to work date, and those who are participating in a Work Share program.

When filing a claim for unemployment insurance benefits, each claimant is instructed to register for work at their local workforce center. The claimants are provided the phone number of the

nearest center and are given information about how to register for work search and job matching over the Internet. They are informed that they must get a work registration on file within seven days as part of the eligibility requirements to receive unemployment insurance benefits.

The name, location and phone number of the nearest Workforce Center is also included in the information packet mailed to each claimant immediately after filing. Verification of compliance with work registration is automated between the unemployment insurance process and the Job Service Matching System, and claimants failing to comply may be held ineligible for benefits.

The Agency over the past years has placed a high priority on improving interdivisional coordination by integrating various centralized functions within the Agency with those of the Local Workforce Development Boards. Many coordinated functions have been fully automated (the TWIST system, for example, provides for data sharing and integration). As previously noted, claimants are required to report to local workforce centers and to participate in Workforce services. To this extent the Commission agrees with the commenters' suggestions that coordination is important.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§815.1 - 815.3

The new rules are adopted under Texas Labor Code, §§301.061 and 302.062, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Commission services and activities.

The adopted new rules affect Texas Labor Code, Title 4.

§815.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the statute or context in which the word or phrase is used clearly indicates otherwise.

(1) Act--The Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended.

(2) Additional claim--A notice of new unemployment filed at the beginning of a second or subsequent series of claims within a benefit year or within a period of eligibility when a break of one week or more has occurred in the claim series with intervening employment. The employer named on an additional claim will have 14 days from the date notice of the claim is mailed to reply to the notice. The additional claim reopens a claim series and is not a payable claim since it is not a claim for seven days of compensable unemployment.

(3) Agency-- The unit of state government that is presided over by the Commission and under the direction of the executive director, which operates the integrated workforce development system and administers the unemployment compensation insurance program in this state as established under Texas Labor Code, Chapter 301. It may also be referred to as the Texas Workforce Commission.

(4) Appeal--A submission by a party requesting the Agency or the Commission to review a determination or decision that is adverse to that party. The determination or decision must be appealable and pertain to entitlement to unemployment benefits; chargeback as provided in the Act, Chapter 204; fraud as provided in the Act, Chapter 214; tax coverage or contributions or reimbursements. This definition does not grant rights to a party.

(5) Base period with respect to an individual--The first four consecutive completed calendar quarters within the last five completed calendar quarters immediately preceding the first day of the individual's benefit year, or any other alternate base period as allowed by the Act.

(6) Benefit period--The period of seven consecutive calendar days, ending at midnight on Saturday, with respect to which entitlement to benefits is claimed, measured, computed, or determined.

(7) Board--Local Workforce Development Board created pursuant to Texas Government Code §2308.253 and certified by the Governor pursuant to Texas Government Code §2308.261. This includes a Board when functioning as the Local Workforce Investment Board as described in the Workforce Investment Act §117 (29 U.S.C.A. §2832), including those functions required of a Youth Council, as provided for under the Workforce Investment Act §117(i) (also referred to as an LWDB).

(8) Commission--The three-member body of governance composed of Governor-appointed members in which there is one representative of labor, one representative of employers and one representative of the public as established in Texas Labor Code §301.002, which includes the three member governing body acting under the Act, Chapter 212, Subchapter D, and in Agency hearings involving unemployment insurance issues regarding tax coverage, contributions or reimbursements.

(9) Day--A calendar day.

(10) Landman--An individual who is qualified to do field work in the purchasing of right-of-way and leases of mineral interests, record searches, and related real property title determinations, and who is primarily engaged in performing the field work.

(11) Person--May include a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

(12) Reopened claim--The first claim filed following a break in claim series during a benefit year which was caused by other than intervening employment, i.e., illness, disqualification, unavailability, or failure to report for any reason other than job attachment. The reopened claim reopens a claim series and is not a payable claim since it is not a claim for seven days of compensable unemployment.

(13) Week--A period of seven consecutive calendar days ending at midnight on Saturday.

§815.3. Addresses.

(a) In this chapter, each employing unit which has or had individuals in "employment" so defined in the Act shall notify the Agency of its correct address and of any change in its correct address, and each employing unit shall promptly notify the Agency of any change of address. Each individual who is a claimant for benefits, who is liable to the Agency for an overpayment pursuant to the Act, Chapter 212 or 214, or who is registered for work at an Agency office, or public employment office, including a workforce center, shall promptly notify the Agency of any change of address.

(b) In this chapter, a group account, as referred to in the Act, §205.021, shall be treated as a single employing unit for the purposes of this section and the Agency shall use the address of the group representative as the official address of the group. The group representative shall notify the Agency of the correct address and shall promptly notify the Agency of any change of address.

(c) In all transactions in which notice is required by the Act or this chapter, the Agency shall notify the parties at the last known address as reflected in the Agency records. However, when the Agency mails a notice of an initial claim to the employer, the Agency shall use the address of the employer for whom the claimant last worked,

or if the employer has more than one branch or division at different locations, the location of the branch or division for which the claimant last worked, or a mailing address designated by the employer in the Act, § 208.003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2000.

TRD-200007308
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: November 6, 2000
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SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

40 TAC §§815.10, 815.15 - 815.28, 815.32

The new rules are adopted under Texas Labor Code, §§301.061 and 302.062, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Commission services and activities.

The adopted new rules affect Texas Labor Code, Title 4.

§815.20. Claim for Benefits.

An unemployed individual who has no current benefit year and who wishes to claim benefits shall report to a representative of the Agency in a manner, including telephonic or electronic means, that the Agency may approve, and file a claim for benefits. Before receiving benefits a claimant shall register for work with the public employment office, including workforce centers, serving the individual's area of residence, as provided in paragraphs (3) and (7) of this section, unless exempt from the requirement.

(1) In case of a mass layoff by an employer, if the last employing unit involved makes an appropriate request, the Agency may accept, in lieu of an initial claim from each individual, a list furnished by the last employer of the individuals to be laid off and who wish to file initial claims for benefits. The list shall reflect, with respect to each individual, all information normally required on the initial claim by the Agency, except the reason for separation. If the Agency approves the request, the listing may then be used by the Agency as an initial claim for each individual on the list.

(2) After an individual files a valid initial claim, which establishes the claimant's benefit year, the claimant may, during the benefit year, file subsequent continued claims, weekly or biweekly, by telephonic means, facsimile (fax) transmission, mail, common carrier, or other means as the Agency may approve in writing, but at intervals no less than periods of seven consecutive days. A claimant shall file all claims by telephonic means, in writing or orally, during the hours and days directed by Agency representatives. If at any time during the benefit year, more than 30 days have elapsed since the filing of the claimant's last claim, the claimant shall file an additional or reopened claim for benefits as defined in §815.1 of this chapter (relating to Definitions) and shall comply with all eligibility requirements for the claims. A claimant who exhausts the claimant's regular benefits may file continued claims for extended benefits as referenced in §815.26 of this chapter (relating to Extended Benefit Period Announcement) in the same manner in which the claimant filed claims for regular benefits, but the claimant's claims for extended benefits may be for benefit periods subsequent to the end of the claimant's benefit year.

(3) An individual who files a claim for benefits shall comply with all requirements of the public employment office in which the claimant files an application for work that are necessary to establish a valid registration for work in that public employment office. The claimant shall do the things requested by an Agency representative, whether requested orally or in writing, that are reasonably designed to inform the claimant of the claimant's rights and responsibilities in filing a claim for benefits. The claimant shall also:

(A) provide evidence, when requested to do so, to establish the claimant's correct social security account number;

(B) file all claims in the manner directed by the Agency, whether on Agency-provided forms or by telephonic or other electronic means approved by the Agency for claims purposes;

(C) supply all information within the claimant's knowledge, which is necessary to determine the claimant's rights to benefits under the Act;

(D) sign all provided claims forms personally for the claims that are filed in person or by mail or common carrier; and

(E) submit all claims filed by mail, common carrier, hand delivery or by other means, including telephonic or electronic means, as instructed by the Agency, in accordance with the terms of this section.

(4) An individual may file a claim by mail, common carrier, hand delivery, or by other means as the Agency may approve in writing in any of the following circumstances:

(A) conditions make it impracticable for the Agency representative to take claims by telephonic or other approved means; or

(B) the Agency finds that the claimant has good cause for failing to file a claim by telephonic or other approved means.

(5) If a claimant's answer to a question on a claim filed with the Agency creates uncertainty about the claimant's credibility, or a lack of understanding, or the claimant's record shows that the claimant previously filed a fraudulent claim; then the claimant may be required to file written claims on a Agency approved form in a manner prescribed by the Agency in writing. A claimant required to file a claim under this subsection shall continue to file the claim in the prescribed manner, until the Agency determines that the reason no longer exists, directs otherwise in writing.

(6) The following provisions shall apply to the disqualification provisions of the Act, Chapter 207, Subchapter C, concerning disqualification for benefits.

(A) The term "employment" in the Act, Chapter 207, Subchapter C, shall be interpreted and applied to mean employment as defined in the Act.

(B) The disqualification to be imposed against an individual who has left work to move with a spouse, as provided in the Act, §207.045(c), shall be construed to mean both a benefits (money payments) and a benefit period (time period) disqualification; and a disqualification shall be restricted in its application to apply only to the range from six weeks to 25 weeks.

(C) Agency employees are authorized to administer oaths to claimants in an effort to verify that the re-qualifying requirements of the Act, Chapter 207, Subchapter C, concerning employment or earnings, have been satisfied.

(D) An employer identified as the employer by whom the claimant was employed, for purposes of satisfying the re-qualifying requirements of the Act, Chapter 207, Subchapter C, shall be afforded 14 days within which to respond to notice by the Agency of the filing of an additional claim by the claimant.

(E) In order to satisfy the requirement of the Act, Chapter 207, Subchapter C, concerning returning to employment and working for six weeks, a "work week" shall be defined as a consecutive seven-day period during which the claimant has worked at least 30 hours.

(F) Disqualifying separations, new benefit year, and extended benefit period.

(i) A claimant filing an initial claim, continued claim or additional claim shall be disqualified from receiving benefits if the separation from the claimant's last work is a disqualifying separation as defined in the Act, Chapter 207.

(ii) If a work separation in a previous benefit year is the last separation prior to a claimant's filing an initial claim that creates a new benefit year, then that work separation may result in a disqualification in the new benefit year in accordance with the provisions of the Act, Chapter 207.

(iii) A disqualification resulting from a work separation in a benefit year shall continue during the extended benefit period until:

(I) the extended benefit period is terminated;

(II) the claimant qualifies to file a new initial claim; or

(III) the claimant re-qualifies in accordance with the provisions of the Act, Chapter 207, under which the disqualification was imposed.

(7) A claimant shall be eligible to receive benefits with respect to any week only if the individual demonstrates the availability for work required by the Act, §207.021(a)(4), and if required by §207.021(a)(8), by participating in re-employment services, including, but not limited to, job search assistance services, if the claimant has been determined to be likely to exhaust regular benefits and needs re-employment services pursuant to a profiling system established by the Agency.

(8) The following categories of claimants are exempt from the requirement to register for work:

(A) individuals on temporary layoff with a definite date to return to work;

(B) members in good standing of unions that maintain a hiring hall; and

(C) individuals participating in a Shared Work plan as defined in the Act, Chapter 215.

(9) Withholding From Benefits for Federal Income Tax.

(A) An individual filing a new claim for unemployment compensation shall, at the time of filing the claim, be advised that:

(i) unemployment compensation is subject to federal, state and local income tax;

(ii) requirements exist pertaining to estimated tax payments;

(iii) the individual may elect to have Federal income tax deducted and withheld from the individual's payment of unemployment compensation at the amount specified in the Federal Internal Revenue Code; and

(iv) the individual shall be permitted to change a previously elected withholding status.

(B) Amounts deducted and withheld from unemployment compensation shall remain in the unemployment fund until transferred to the Federal taxing authority as a payment of income tax.

(C) The Agency shall follow all procedures specified by the United States Department of Labor and the Federal Internal Revenue Service pertaining to the deducting and withholding of income tax.

(D) Amounts shall be deducted and withheld under this section only after amounts are deducted and withheld under any other provisions of the Texas Unemployment Compensation Act.

(10) An employer's protest to an initial, additional or continued claim made in accordance with the Act, §208.004, may be delivered by telephonic means which includes a verification procedure approved by the Agency in writing, mail, common carrier, facsimile (fax), or other means approved by the Agency in writing and as prescribed in the Agency's notice of claim form.

§815.21. Interstate Claims.

This section shall govern the Agency in its administrative cooperation with other states adopting a similar rule or regulation for the payment of benefits to interstate claimants, any provision of any other rule to the contrary notwithstanding.

(1) Definitions. As used in this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(A) Agent state--Any state from which or through which an individual files a claim for benefits from another state.

(B) Benefits--The compensation payable to an individual with respect to the individual's unemployment, under the unemployment insurance law of any state.

(C) Interstate benefit payment plan--The plan approved by the Interstate Conference of Employment Security Agencies under which benefits shall be payable to unemployed individuals absent from the state (or states) in which benefit credits have been accumulated.

(D) Interstate claimant--An individual who claims benefits under the unemployment insurance law of one or more liable states through the facilities of an agent state, or directly with the liable state. The term "interstate claimant" shall not include any individual who customarily commutes from a residence in an agent state to work in a liable state unless the Agency finds that this exclusion would create undue hardship on the claimants in specified areas.

(E) Liable state--Any state against which an individual files, through another state, a claim for benefits.

(F) State--Includes the District of Columbia, Puerto Rico, and the Virgin Islands.

(G) Week of unemployment--Includes any week of unemployment as defined in the law of the liable state from which benefits with respect to the week are claimed.

(2) Registration for work.

(A) The agent state shall register for work each claimant who files through the agent state, or upon notification of a claim filed directly with the liable state, as required by the law, regulations, and procedures of the agent state. The registration shall be accepted as meeting the registration requirements of the liable state.

(B) Each agent state shall duly report, to the liable state in question, each interstate claimant who fails to meet the registration/re-employment assistance reporting requirements of the agent state.

(3) Benefit rights of interstate claimants.

(A) If a claimant files a claim against any state, and it is determined by the state that the claimant has available benefit credits in the state, then claims shall be filed only against the state as long as benefit credits are available in that state. Thereafter, the claimant may file claims against any other state in which there are available benefit credits.

(B) For the purposes of this section, benefit credits shall be deemed to be unavailable whenever benefits have been exhausted, terminated, or postponed for an indefinite period or for the entire period in which benefits would otherwise be payable, or whenever benefits are affected by the applications of a seasonal restriction.

(4) Claims for benefits.

(A) Claims for benefits or waiting-period credit filed by an interstate claimant directly with the liable state shall be filed in accordance with the liable state's procedures. Claims shall be filed in accordance with the type of week in use in the agent state. Any adjustments required to fit the type of week used by the liable state shall be made by the liable state on the basis of consecutive claims filed.

(B) Claims shall be filed in accordance with the agent state's regulations for intrastate claims in the local employment offices, affiliated sites, one-stop centers, or at an itinerant service point or by mail, common carrier or by other means, including telephonic or electronic means, as the Agency may approve.

(i) With respect to claims for weeks of unemployment in which an individual was not working for the individual's regular employer, the liable state shall, under circumstances which it considers good cause, accept a continued claim filed up to one week or one reporting period late. If a claimant files more than one reporting period late, an initial interstate claim shall be used to begin a claim series, and no continued claim for a past period shall be accepted.

(ii) With respect to weeks of unemployment during which an individual is attached to the individual's regular employer, the liable state shall accept any claim which is filed within the time limit applicable to the claims under the law of the agent state.

(5) Determination of claims.

(A) The agent state shall, in connection with each claim filed by an interstate claimant, ascertain and report to the liable state in question the facts relating to the claimant's availability for work and eligibility for benefits as are readily determinable in and by the agent state.

(B) The agent state's responsibility and authority in connection with the determination of interstate claims shall be limited to investigation and reporting of relevant facts and the reporting of relevant facts pertaining to each claimant's failure to register for work or report for re-employment assistance as required by the agent state. The agent state shall not refuse to take an interstate claim.

(6) Appellate procedure.

(A) The agent state shall afford all reasonable cooperation in the taking of evidence and the holding of hearings in connection with appealed interstate benefit claims.

(B) With respect to the time limits imposed by the law of a liable state other than Texas, upon the filing of an appeal in connection with a disputed claim, whether or not the appeal is timely shall be determined by the liable state by reference to that state's law, regulations, or policies and practices. In interstate appeals in which Texas is the liable state, whether or not the appeal is timely shall be determined by reference to relevant provisions of the Texas Unemployment Compensation Act and current Agency policies and precedent decisions applicable to intrastate appeals.

(C) The liable state shall conduct hearings in connection with appealed interstate benefit claims. The liable state may contact the agent state for assistance in special circumstances.

(7) Canadian claims. This section shall apply in all its provisions to claims taken in and for Canada.

(8) Notification of interstate claim. The liable state shall notify the agent state of each initial claim, reopened file, claim transferred to interstate status, and each week claim filed from the agent state using uniform procedures and record format pursuant to the Interstate Benefit Payment Plan.

§815.32. Timeliness.

(a) Unless otherwise specified in this chapter, appeals time frames are generally determined within these guidelines:

(1) as established in the Texas Unemployment Compensation Act; and

(2) are extended one working day following a deadline which falls on a weekend, an official state holiday, a state holiday for which minimal staffing is required, or a federal holiday.

(b) Presumption of receipt. A document mailed to a party is presumed to be received if the document was mailed to the complete, correct address of record unless:

(1) there is tangible evidence of nondelivery, such as the document being returned to the Agency by the United States Postal Service; or

(2) credible and persuasive evidence is submitted to the Agency to establish nondelivery, delayed delivery, or misdelivery of the document.

(c) Address for proper mailing.

(1) For a claimant, the proper address is the address given by the claimant to the Agency subject to later changes given by the claimant to the Agency.

(2) For an employer, the proper address is determined under §815.3 of this chapter (relating to Addresses) unless the employer has specifically requested a mailing address change in a protest, appeal, or other correspondence, or at a hearing.

(3) For governmental employers, the group account address shall be used, if applicable.

(4) Mailing of notice to a party representative, whether or not an attorney, is required to bind parties to timeliness rules.

(5) If a party provides the Agency with the party's own incorrect mailing address, an Agency mailing to that address shall be a proper mailing, even if there is proof that the document was never received by the party.

(6) The Agency is not responsible for effectuating an address change when it is listed in correspondence or merely listed by a party on an appeal filed in person, unless the Agency is specifically directed by the party to mail subsequent notices to the address.

(7) If the Agency improperly addresses a document, the time frame for filing an appeal shall begin to run as of the actual date of receipt by the party, even if received by the party within the statutory appeal time frame. However, this subsection does not apply if the party provided an incorrect address under subsection (c)(5) of this section.

(8) Addresses shall be positively verified by hearing officers, who shall also explain to parties the importance of the address being correct and the fact that subsequent appeal deadlines run from the date of mailing, not the date of receipt by the party.

(d) Receipt Date.

(1) Receipt date is date of receipt at the earliest of an Agency, or agent state office, or a workforce center or a Board office.

(2) If an appeal is received at an agent state office or a workforce center or a Board office(s), but the appeal is not dated by the receiving entity, and is forwarded to the appeals (or interstate) processing unit and is dated by that unit, then the appeal date shall be set at three business days earlier than receipt in appeals (or interstate).

(e) Appeal Date.

(1) The appeal date for a document received via United States Postal Service shall be the postmark date or the postal meter date (where there is only one or the other); but where there is both a postmark date and a postal meter date and they conflict, the postmark date controls.

(2) The date a document is delivered to a common carrier (such as Federal Express, Purolator, or other common carrier) controls as the date the appeal is perfected. (Delivery to carrier is equivalent to delivery to United States Postal Service; date of delivery to carrier is equivalent to postmark date.)

(3) An appeal received in an envelope bearing no legible postmark or postal meter date shall be considered to be perfected three business days before receipt by the Agency, or on the date of the document, if the document date is less than three days earlier than date of receipt.

(4) If the mailing envelope is lost after delivery to the Agency, appeal document date shall control. If the document is undated, appeal date shall be three business days before receipt by the Agency, subject to sworn testimony establishing an even earlier date.

(5) If a determination, decision or other written material provides for an appeal by fax, or in an electronic form approved by the Agency in writing, then the appeal date shall be the date and time the appeal is received by the Agency.

(f) Sworn testimony can establish a date for an appeal being perfected, which is earlier than the dates established under subsections (d) and (e) of this section. Only in the face of extremely credible evidence shall a party be allowed to establish an appeal date earlier than a postal meter date, or the date of the document itself. When a party alleges filing an appeal which the Agency has never received, the party must present credible and persuasive testimony of timely filing corroborated by testimony of a disinterested party and/or physical evidence specifically linked to the appeal in question.

(g) Credible and persuasive testimony subject to cross-examination establishing timeliness allows the Agency or the appeal tribunal to rule on the merits.

(h) If a party submits an address change to the Agency during the appeal period (but after the Agency document was mailed to the old address), address change date shall control and shall be considered as the date the appeal was perfected.

(i) Exceptions. The substantive nature of certain cases causes, or creates, exceptions to the general timeliness rules, even where notice is proper or response is clearly late.

(1) Cases fitting into the wage credits/validity of claim category present a one-time exception to the timeliness rules. A late appeal to the appeal tribunal on the issues, if within the same benefit year, shall be deemed timely. However, once a decision has been issued by the appeal tribunal, the appeal time limits in the Act, Chapter 212, shall apply.

(2) In cases dealing with the imposition of fraud and forfeiture provisions of the Act, §214.003, there is a one-time exception at the appeal tribunal stage, if:

(A) the claimant is out of claim status; and

(B) if the claimant has moved.

(3) In cases where there is a continuing ineligibility or condition and there is a late appeal, the appeal tribunal or the Commission can assume jurisdiction 14 days before the late appeal, and rule on the merits if the facts so warrant.

(4) If a chargeback ruling is required, but is omitted, the determination or decision does not become final for the employer; it does become final for the claimant.

(5) In a case where it is ultimately determined that there has been no separation from employment, all rulings are void and all rulings can be set aside at any time.

(6) When there has been a ruling protecting an employer's account on a separation in one benefit year, the employer is not required to timely protest or appeal a ruling on the same separation in a subsequent year.

(7) Timeliness sanctions shall not apply when an Agency representative or a representative of a Board or an agent state representative has given misleading information on appeal rights to a party, if the party:

(A) specifically establishes how the party was misled; or

(B) specifically establishes what the party was told that was misleading and, if possible, by whom the party was misled.

(8) There is no good cause exception to the timeliness rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2000.

TRD-200007309
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: November 6, 2000
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For further information, please call: (512) 463-2573

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SUBCHAPTER C. TAX PROVISIONS

40 TAC §§815.101 - 815.109, 815.111 - 815.115, 815.128 - 815.131, 815.133

The new rules are adopted under Texas Labor Code, §§301.061 and 302.062, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Commission services and activities.

The adopted new rules affect Texas Labor Code, Title 4.

§815.102. Mailing Dates and Use of Forms.

(a) Whenever an individual or an employing unit reports or applies to the Agency in writing upon an Agency form, for purposes of determining the date the writing is submitted, the following dates shall control, in the order listed:

(1) the United States Postal Service postmark date, if legible;

(2) the postal meter date, if legible;

(3) a writing received in an envelope without a legible postmark or postal meter date shall be considered to have been sent three business days before receipt by the Agency, or on the date of the writing, if the date of the writing is less than three days earlier than date of receipt; or

(4) if the mailing envelope is lost after delivery to the Agency, the date on the writing shall control. If the writing is undated, the date the writing was sent shall be three business days before receipt by the Agency, subject to sworn testimony establishing the mailing date.

(b) The date the payment of contributions or reimbursements are received shall be determined in accordance with the provisions of this section.

(c) If the writing was filed in an electronic form approved by the Agency in writing, the date and time stamp the transmission was received by the Agency shall establish the mailing date.

(d) If delivered by a common carrier (i.e., Federal Express, Purolator, or other common carrier) the receipt date shall be the date the writing is delivered to the Common Carrier.

(e) If delivered in person, the date the writing is delivered to the Agency's Central Tax Office in Austin or any Agency Tax Office located throughout the state.

§815.107. Reports Required and Their Due Dates.

(a) Each employing unit shall submit to the Agency a status report in a manner prescribed by the Agency within ten days from the date upon which the employing unit becomes subject to the Act as an employer thereunder, and shall furnish all facts necessary to a determination of the taxable status of the employing unit. Each employing unit shall likewise submit additional status reports at any time upon the request of the Agency and shall, if requested, furnish to the Agency evidence to establish the correctness of information contained in its status reports. Any employing unit which commences or enters into business or which acquires another business or substantially all the assets thereof in the State of Texas shall submit a new status report to the Agency within ten days of the date on which it made the entry or the acquisition.

(b) Each taxed employer shall submit to the Agency, within the month during which contributions for any period become due, and not later than the date on which contributions are required to be paid to the Agency, an employer's quarterly report showing the total amount of remuneration paid during the preceding calendar quarter for employment (or showing that no remuneration was paid during the quarter), showing the total amount of wages (as defined in the Act, §§201.081 and 201.082) paid during the quarter for employment, and showing the amount of wages for benefit wage credits (as defined in the Act, §207.004) paid to each individual during the quarter for employment and the social security account number and name of each individual to whom the wages were paid, and showing other information called for on the employer's quarterly report. The employer's quarterly report shall be made on Agency forms printed by the Agency, or by magnetic or electronic media using a format prescribed by this Agency, or in any other manner approved and prescribed by the Agency in writing, and shall contain all facts and information necessary to a determination of the amount of contributions due. The filing of the report on magnetic or electronic media, or in any other manner approved and prescribed by the Agency in writing, shall be required to the extent provided below.

(c) Each reimbursing employer and the group representative of a group account shall submit an employer's quarterly report during the month following each calendar quarter and shall furnish information that is applicable to the reimbursing employer or the group account, showing the total amount of remuneration paid during the preceding calendar quarter for employment (or showing that no remuneration was paid during the quarter), the name, social security and account number and total amount of wages paid to each individual, and other information that is applicable to the reimbursing employer or group accounts. The employer's quarterly report shall be made on Agency forms printed by the Agency, or by magnetic or electronic media using a format prescribed by this Agency, or in any other manner approved and prescribed by the Agency in writing, and shall contain all facts and information necessary to make a determination of the amount of reimbursements due. The filing of the report on magnetic or electronic media, or in any other manner approved and prescribed by the Agency in writing, shall be required to the extent provided in subsections (d)-(h) of this section.

(d) Each employer which has employees whose benefits are to be financed by the federal government shall submit a separate quarterly report furnishing the names of the employees, their social security numbers, and the wages paid to each. The report shall be submitted the month following each calendar quarter.

(e) All forms and magnetic or electronic media formats for the filing of reports provided for in this section shall be furnished by the Agency to each employing unit, upon application being made, and all reports shall be filed upon the forms or by magnetic or electronic media formats furnished by the Agency. Failure to receive notice regarding the reports shall not; however, relieve the employing unit of the responsibility of filing the reports upon the date the reports are due. Employers who have to report 250 or more employees in any calendar quarter, as defined in the Act, §207.004, shall file their quarterly wages on magnetic or electronic media using a format prescribed by the Agency. A magnetic or electronic media wage report may contain information from more than one employer. Employers with less than 250 employees may elect to use magnetic or electronic media reporting.

(f) The Agency may require the furnishing of additional information as it deems necessary to the proper administration of the Act.

(g) Unless otherwise provided in this subchapter, any report or form shall be completed and filed with the Agency within ten days after the requested report or form is mailed to the individual or employing unit at the address on record with the Agency, or within ten days after the requested forms or reports are personally delivered to the individual or employing unit by the Agency.

(h) When good cause is shown, the Agency may extend the due date for filing of a report required under this section; however, the extension shall only be effective if authorized in writing by the Agency.

§815.113. Commission Hearings Involving Coverage and Contributions or Reimbursements.

(a) In all situations not specifically provided for in the Act or in the rules of the Agency, a hearing may, at the discretion of the Commission, be afforded an employing unit upon its written request, in any case involving tax liability or any question relating to contributions or reimbursements. Hearings under this section shall continue to be termed Rule 13 Hearings. The written request for hearing may be filed by hand delivery, mail, common carrier, facsimile (fax) transmission, or other method approved by the Agency in writing, at a local tax office or the Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778-0001.

(b) The Commission may on its own motion set a hearing to secure the facts to establish the status of any individual or employing unit under any section of the Act.

(c) The Commission may designate a representative to preside over the hearing. Hearings shall be conducted by telephone conference call unless the supervisor of the hearing officers or the supervisor's designee determines that an in-person hearing is necessary. The hearings will be scheduled and, if an in-person hearing, held at a place designated by the supervisor of the hearings officers or the supervisor's designee in accordance with paragraphs (1)-(3) of this section and the applicable provisions in this chapter.

(1) Written notice of the date and time of the hearings shall be given to the parties, and the location if it is an in-person hearing, at least 10 days before the date of the hearing; but if a setting at an earlier date is requested by an individual or employing unit, the supervisor of the hearings officers or the supervisor's designee may at the supervisor's discretion grant that request, if the granting of the request will not prejudice the rights of any other party to the proceedings, including the Agency itself. The notice shall be mailed to the parties at their last-known addresses.

(2) In these proceedings before a hearings officer, all parties shall be given an opportunity for full, fair, and impartial hearing. The hearings shall be conducted in the manner deemed most suitable to ascertain the facts and to determine the rights of the parties. All testimony taken shall be under oath and subject to the right of cross-examination by any adverse party, and it shall be recorded. When necessary, the hearing officer may order the taking of depositions. The submission of written briefs, affidavits, and other written memoranda may be required.

(3) A witness, whose attendance at a hearing is required, may be allowed a fee and mileage on the same basis and to the same extent as is provided for witnesses under §815.18 of this chapter (relating to General Rules for Both Appeal Stages).

(d) The Commission, following each hearing, shall issue a decision, which shall resolve the questions involving tax liability or any question relating to contributions or reimbursements which arose at the hearing. Copies of written decisions of the Commission shall be furnished the parties to the hearings.

(e) A decision of the Commission shall become final 30 days after the date of mailing unless, within the 30 day-period, the proceeding is either reopened by a Commission order or by a party to the proceeding filing a written motion for reconsideration in accordance with the provisions of subsection §815.17(g) of this chapter (relating to General Rules for Both Appeal Stages). The motion for reconsideration is sent to the address listed in the decision. A decision is not binding on a person who was not a party to a proceeding conducted under this section.

§815.128. Group Accounts.

(a) Two or more eligible reimbursing employers may file a joint application with the Agency for establishment of a group account on forms furnished by the Agency, upon application being filed. The application shall be filed upon a form furnished by the Agency and shall not be valid until approved by an authorized representative of the Agency in writing.

(b) The application shall identify and authorize an individual to act as the group's representative. The individual shall be authorized by all members of the group to maintain records, to prepare and sign reports, to secure and furnish a surety bond for the group when directed by the Agency, to furnish information to the Agency pertaining to the group and its members, to collect and to pay all reimbursements and other amounts due to the Agency, to specify those members that have failed to submit payments due, and to assist the Agency in securing unpaid amounts due to the Agency from a member or members of the group.

(c) When the group account's application has been approved by the Agency in writing, the group account shall be established and remain active for not less than two years or until terminated. Application to terminate the group account after two years shall be made by the group representative no later than December 1 to be effective at the beginning of the next calendar year.

(d) At the discretion of the Agency, the group account may be terminated at the end of a calendar year for failure to: file reports accurately and timely; furnish information pertaining to the group or its members; furnish a surety bond when requested; or pay reimbursements, penalties, and other amounts due from the group.

(e) Each member shall be liable for reimbursement of benefits paid and other amounts which accrue after the group account has been terminated in accordance with total wages paid by each member and by the group during the last quarter that the group account was active and in which wages were paid.

(f) Addition of a new member or members to the group shall not be valid unless a joint application, approved by all members of the group, to add the member or members is filed with the Agency. The application shall be filed upon a form furnished by the Agency, upon application being made therefor, and shall be valid if approved in writing by an authorized representative of the Agency. The application shall be effective as of the beginning of the calendar quarter in which the Agency receives the application and each new member or new members of the group shall be liable for reimbursements during that and succeeding calendar quarters to the same extent as those members previously a part of the group.

(g) Withdrawal of an active member or members shall be valid as of the end of a calendar quarter provided that a joint application for withdrawal of the member or members is filed with and approved by the Agency during the quarter. The remaining member or members of the group account shall be liable for reimbursements during succeeding calendar quarters for all benefits paid which are attributable to service in the employ of withdrawn members. The application shall be filed upon a form furnished by the Agency, upon application being made therefor, and shall not be valid until approved by an authorized representative of the Agency in writing. At the discretion of the Agency, the application may be denied if the group account has failed to pay all reimbursements and other amounts due to the Agency on the date that the withdrawal application is filed.

(h) "Total wages paid" with respect to determining liability for amounts due by members of a group means total payment of "wages" as defined in the Act, except that the $9,000 limitation in the Act, §201.082 shall not be applicable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2000.

TRD-200007310
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: November 6, 2000
Proposal publication date: July 21, 2000
For further information, please call: (512) 463-2573

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CHAPTER 817. CHILD LABOR
SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §817.6

The Texas Workforce Commission adopts new §817.6, relating to Child Labor Law appeals of preliminary determination orders to the Special Hearings Department, without changes to the proposed text as published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6965). The text will not be republished.

The purpose of the new rule is to provide notice of and a cross-reference to rules relating to the appeals processes in Child Labor Law hearings. The Child Labor Law hearings conducted by the Special Hearings Department are subject to the Unemployment Insurance Rules, found at Title 40 Texas Administrative Code (TAC), Chapter 815. The use of the Unemployment Insurance appeal process is required by Texas Labor Code §51.033(g). The cross-reference in the Child Labor Rules is added to provide clarification to the public regarding the statutorily required appeals processes.

Background: Texas Labor Code Chapter 51, Employment of Children (Child Labor Law), provides for the implementation of rules and laws relating to the employment of children. The Child Labor Law ensures that a child is not employed in an occupation or manner that is detrimental to the child's safety, health, or well-being. More specifically, the Child Labor Law sets forth provisions including, but not limited to, the following:

minimum age;

performers in motion pictures or theatrical, radio, or television productions;

hours of employment;

hardship exemptions;

hazardous occupations;

operation of motor vehicle for certain commercial purposes;

inspections and collection of information relating to the employment of children;

civil and criminal penalties for failure to comply with the Child Labor Law;

offenses and penalties for the initial investigation process; and

the appeals processes regarding offenses and penalties assessed.

No comments were received on the proposed rule.

The new rule is adopted under Texas Labor Code §§51.023, 301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Texas Workforce Commission's services and activities.

The adopted rule affects the Texas Labor Code, Title 2.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2000.

TRD-200007306
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: November 6, 2000
Proposal publication date: July 21, 2000
For further information, please call: (512) 463-8812

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CHAPTER 821. TEXAS PAYDAY RULES
SUBCHAPTER C. WAGE CLAIMS

40 TAC §821.45

The Texas Workforce Commission adopts amendments to §821.45, relating to appeals of Payday Law preliminary wage determination orders, without changes to the proposed text as published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6966). The text will not be republished.

The purpose of the amendments is to provide notice of and a cross-reference to the location of the rules used relating to appeal hearings under the Act. The Payday Law hearings conducted by the Special Hearings Department are subject to the Unemployment Insurance Rules, found at Title 40 Texas Administrative Code (TAC), Chapter 815. The use of the Unemployment Insurance appeal process is required by Texas Labor Code §61.058(a). The cross-reference in the Payday Rules is added to provide clarification to the public regarding the statutorily required appeals processes.

Background: Texas Labor Code, Chapter 61, Payment of Wages (Payday Law), provides for the implementation of rules and laws relating to payment of wages. The Payday Law provides for the adjudication of wage claims by certain employees asserting claims against certain employers in Texas regarding wages that are due and unpaid. More specifically, the Payday Law sets forth provisions, including, but not limited to, the following:

designation of paydays;

payment on days other than on paydays;

payment after termination of employment;

payment of commissions and bonuses;

form of payment;

delivery of payment;

deductions from wages;

filing a wage claim;

penalties for failure to pay wages;

the initial investigation process; and

appeals processes regarding wages claimed unpaid and due.

No comments were received on the rules.

The amended rule is adopted under Texas Labor Code §§61.002(a)(2), 301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary relating to the Payday Law and for the effective administration of the Texas Workforce Commission's services and activities.

The adopted rule affects the Texas Labor Code, Title 2.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 17, 2000.

TRD-200007307
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: November 6, 2000
Proposal publication date: July 21, 2000
For further information, please call: (512) 463-2573

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action

The Commissioner of Insurance at a public hearing held October 19, 2000, at 10:00 a.m. under Docket No. 2459 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street, Austin, Texas adopted amendments proposed by Staff to amend the Texas Addendum to the Fire Suppression Rating Schedule (Texas Addendum) which would establish credit points for compressed air foam systems. Staff's petition was filed on September 5, 2000; notice of this petition (Reference No. P-0900-22-I) was published in the September 15, 2000, issue of the *Texas Register* (25 TexReg 9235).

The Commissioner adopted the proposal as noticed in the September 15, 2000, issue of the Texas Register, with grammatical and other changes to the amended Texas Addendum as follows: The credit and reporting requirements under the Texas Fire Incident Reporting System (TEXFIRS) in section TX-B have been clarified to note that the monthly reports must be submitted for each month of the twelve-month period to receive credit for the twelve months, and to state that the reports must use an acceptable TEXFIRS format that meets all data submission requirements of the State Fire Marshal's Office. Also in that section, the reference to an approved training program through the Texas State Fire Marshal's Office has been deleted to conform to current practice. Further, under section TX-C, Public Fire Safety Education, the reference to the "Fire Prevention Education Section" has been deleted to reflect the broader reference to the Texas Commission on Fire Protection. Additionally, in section TX-E, Compressed Air Foam System (CAFS), the requirements of the compressed air foam systems have been revised to note that the apparatus must have a minimum of a 20 gallon foam tank for Class A foam instead of a 25 gallon foam tank to accommodate the current existence of such apparatus, and the requirement in that section that at least one apparatus equipped with a CAFS unit must respond on all structure fires has been clarified to apply to "all structure fires on first alarm assignment" and to note its application to situations when multiple apparatus are assigned to respond to a structure fire on first alarm assignment. The adopted rules: (i) implement Senate Bill 1610, 76th Legislature, which provides that the use of compressed air foam technology in fire fighting equipment shall constitute a reduction in hazard by policyholders; (ii) revise the Texas Addendum to add an additional 1.5 credit points for compressed air foam systems, thus raising the total possible additional credit points from 5.0 to 6.5; and (iii) update the Texas Addendum in its references to the State Fire Marshal's office and through editorial and clarifying changes and through requiring monthly-only reporting under the Texas Fire Incident Reporting System.

The adoption amends the Texas Addendum as follows:

(1) Adds an additional 1.5 credit points for compressed air foam systems which will raise the total possible additional Texas credit points from 5.0 to 6.5.

(2) Establishes eligibility for points for compressed air foam systems by requiring the following criteria to be met:

Apparatus meets general criteria in NFPA 1901 for use for structural fire fighting (Class A Pumper);

Apparatus has a minimum 500 gpm fire pump;

Apparatus has a minimum 120 scfm air compressor, permanently mounted;

Apparatus has a minimum 2.5 gpm Class A foam concentrate pump;

Apparatus has a minimum 20 gallon foam tank for Class A Foam;

At least one apparatus equipped with CAFS unit must respond on all structure fires on first alarm assignment

Note: Where multiple apparatus are assigned to respond to a structure fire on the first alarm assignment, this means that out of 3 (or more) apparatus initially responding from the assigned area, at least one of the apparatus must be equipped with CAFS unit; and

All applications of Class A Foam must be in accordance with manufacturer's specifications.

(3) Updates the Texas Addendum in its references to the State Fire Marshal's office and through editorial and clarifying changes and through requiring monthly-only reporting under the Texas Fire Incident Reporting System. The amendments are more particularly set forth in the Texas Addendum that is attached hereto as Exhibit A and made a part hereof for all purposes.

The Commissioner of Insurance has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.33, 5.96, 5.98, and 5.101. The Texas Addendum as adopted by the Commissioner of Insurance is on file in the Chief Clerk's Office of the Texas Department of Insurance

under Reference No. P-0900-22-I and is incorporated by reference into Commissioner's Order No. 00-1185.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with the Insurance Code, Article 5.96(h), the Department will notify all insurers affected by this action of this adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that amendments to the Texas Addendum, as described herein and set forth in the exhibit attached to this Order and incorporated into this Order by reference, be adopted and applicable to be effective on and after November 18, 2000

TRD-200007473
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 24, 2000

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) files this notice of intention to review and proposes the readoption of Chapter 122, Federal Operating Permits. This review of Chapter 122 is proposed in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

The commission adopted Chapter 122, Federal Operating Permits, to implement the federal operating permits program required by Part 70 of Chapter I, Title 40, Code of Federal Regulations (40 CFR). The United States Environmental Protection Agency (EPA) promulgated 40 CFR Part 70 to implement Title V of the 1990 Amendments to the Federal Clean Air Act (FCAA), enacted on November 15, 1990, which directed the EPA to establish the minimum requirements for a state operating permit program. Chapter 122 was originally adopted in 1993, and amended in 1997, 1999, and 2000 to address: deficiencies identified in the EPA's proposed and final interim approval notices, changes to state statutes, amendments to federal rules, the addition of new federal rules, comments received during each of these rule amendments, correction of outdated statutory references, clarifications to portions of the rule, and agency regulatory reform initiatives. The EPA granted the commission interim federal operating permit approval (interim approval) on June 25, 1996, and as specified in the May 22, 2000, *Federal Register*, the EPA authorized interim approved programs to continue operating under that approval through December 2001.

Chapter 122 is organized into eight subchapters: Subchapter A (Definitions); Subchapter B (Permit Requirements); Subchapter C (Initial Permit Issuances, Revisions, Reopenings, and Renewals); Subchapter D (Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition); Subchapter E (Acid Rain Permits); Subchapter F (General Operating Permits); Subchapter G (Periodic Monitoring); and Subchapter H (Compliance Assurance Monitoring).

More specifically, Subchapter B contains provisions for general requirements, applicability, permit applications, permit content, and miscellaneous provisions. Initial permit issuances, permit revisions, permit reopenings, and permit renewals provisions are contained in Subchapter C. Subchapter D specifies provisions for public announcement, public notice, affected state review, notice and comment hearing, notice of proposed final action, EPA review, and public petition. Subchapter E incorporates by reference 40 CFR Part 72 (Permits Regulation), 40 CFR Part 74 (Sulfur Dioxide Opt-ins), and 40 CFR Part 76, (Acid Rain Nitrogen Oxides Emission Reduction Program) to implement an acid rain program that meets the requirements of FCAA, Title IV, except as otherwise specified. This subchapter also identifies application due dates and has provisions for acid rain permit revisions. Subchapter F includes procedural requirements for: general operating permits, executive director issuance of general operating permits, authorization to operate, application revision provisions, renewal of authorization to operate, and notice and hearing provisions. In addition, Subchapter F contains provisions for six specific general operating permits. Subchapter G provides a streamlined regulatory mechanism for the implementation of periodic monitoring; and, Subchapter H provides the executive director with the regulatory structure necessary to implement compliance assurance monitoring.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 122 continue to exist. The rules in Chapter 122 are needed to implement provisions of state and federal statutes, including the Texas Health and Safety Code, Chapter 382, (Texas Clean Air Act); Texas Water Code, Chapters 5 and 7; and the FCAA, Titles IV (Acid Deposition Control) and V (Permits). In addition, Chapter 122 is needed to meet the requirements of the EPA's interim approval.

Chapter 122 also implements various relevant portions of federal regulations including: 40 CFR Part 64 (Compliance Assurance Monitoring), 40 CFR Part 70 (State Operating Permit Programs), 40 CFR Part 72 (Permits Regulation), 40 CFR Part 74 (Sulfur Dioxide Opt-ins), and

40 CFR Part 76, (Acid Rain Nitrogen Oxides Emission Reduction Program). In addition, Chapter 122 provides a compliance and enforcement mechanism for federal rules including, but not limited to: 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans); 40 CFR Part 52 (Approval and Promulgation of Implementation Plans); 40 CFR Part 59 (National Volatile Organic Compound Emission Standards for Consumer and Commercial Products); 40 CFR Part 60 (Standards of Performance for New Stationary Sources); 40 CFR Part 61 (National Emission Standards for Hazardous Air Pollutants); and 40 CFR Part 63 (National Emission Standards for Hazardous Air Pollutants for Source Categories).

Specifically, each subchapter under Chapter 122 implements the TCAA, including §§382.015-382.017, which provide for power to enter property; monitoring requirements, examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.0205, which provides the commission authority to protect against adverse effects related to acid deposition; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission the authority to issue federal operating permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513-382.0515 and 382.0517, which provide authority for the commission to establish and enforce permit conditions; to require sampling monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054-382.0543, which provide for federal operating permits; administration and enforcement of federal operating permits; issuance of federal operating permits and appeal of delays; and review and renewals of federal operating permits; §382.056, which provides for notice of intent to obtain a permit or permit review, and provides for permit hearings for federal operating permits; §§382.0561-382.0564, which provide for federal operating permit public hearings; notices of decision for federal operating permits; public petition of federal operating permits to the administrator; and notification to other governmental entities for federal operating permits; §382.061, which provides for delegation of powers and duties under §§382.051-382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under the Texas Water Code (TWC), including §5.103, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TWC and other laws of this state; §5.105, which provides the commission with the authority to establish and approve commission policy; §5.122 which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001-7.358, which provide for enforcement.

All Subchapters under Chapter 122 implement FCAA, §502 (Permit Programs). Subchapters B and C implement relevant requirements of FCAA, §503 (Permit Applications), and FCAA, §504 (Permit Requirements and Conditions). Subchapter D implements relevant requirements under FCAA, §503 (Permit Applications) and §505 (Notification to Administrator and Contiguous States). Subchapter E implements acid rain related portions of FCAA, §503 (Permit Applications); FCAA, §504 (Permit Requirements and Conditions); FCAA, §505 (Notification to Administrator and Contiguous States); and FCAA, §506(b) (Permits Implementing Acid Rain Provisions). Subchapter E also implements FCAA, §408 (Permits and Compliance Plans). Subchapter F provides regulatory requirements to implement FCAA, §504(d) (General Permits). Subchapter G implements 40 CFR §70.6(a)(3)(i)(B) relating to periodic monitoring. Subchapters G and H implement the requirements under FCAA, §504(b) (Monitoring and Analysis). Subchapter H implements the requirements of FCAA, §114(a)(3), concerning enhanced monitoring and compliance certifications and 40 CFR Part 64 (Compliance Assurance Monitoring).

The commission's review identified that revisions to Chapter 122 may be necessary in order to receive full program approval from the EPA. The commission intends to propose revisions to Chapter 122 for this approval in another rulemaking action in the near future. The basis for these potential revisions were specified in the June 25, 1996, *Federal Register* (61 FR 32693), and May 22, 2000 *Federal Register* (65 FR 32035). In the first notice, the EPA issued the commission interim approval and identified deficiencies that must be resolved prior to obtaining full program approval. In the second notice, the EPA announced that programs with interim approval, will expire on December 1, 2001, and that full program approval submittal packages must be received by the EPA on or before June 1, 2001. Failure to obtain full program approval could result in the EPA implementing the program in Texas as allowed under the FCAA, §502(d) (Submission and Approval) and/or sanctions which the EPA is allowed to administer under FCAA, §502(i) (Administration and Enforcement).

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The commission invites public comment on whether the reasons for the rules in Chapter 122 continue to exist. Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-036-122-AI. Comments must be received in writing by 5:00 p.m., December 4, 2000. For further information or questions concerning this proposal, please contact Jill Burditt, Policy and Regulations Division, at (512) 239-0560.

TRD-200007485
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

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The Texas Natural Resource Conservation Commission (commission) files this notice of intention to review and proposes the readoption of Chapter 301, Levee Improvement Districts, District Plans of Reclamation, and Levees and Other Improvements. This review is proposed in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. A review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 301 provides for procedures for formation of levee improvement districts and planning and review requirements for drainage and reclamation activity subject to the commission's jurisdiction under Texas Water Code (TWC), Chapter 16, Provisions Generally Applicable to Water Development, and Chapter 57, Levee Improvement Districts. Subchapter A of Chapter 301 sets forth general provisions and definitions, describes required approvals, and refers to the agency's enforcement options. Subchapter B describes procedures concerning formation of levee improvement districts and procedures for obtaining approval of district plans of reclamation. Subchapter

C describes requirements for obtaining approval of levees and other improvements. Subchapter D describes notice and hearing procedures. Subchapter E provides for issuance of emergency orders and indicates other actions that may be taken regarding unauthorized levees and other improvements. Subchapter F concerns application and other fees.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review of the rules under Chapter 301 and determined that the reasons for adopting these rules continue to exist. These rules are based on the general rulemaking authority granted the commission in TWC, §5.103 and the directive in TWC, §16.236 to make and enforce rules regarding levee safety. Fundamentally, the chapter enables the commission to efficiently carry out responsibilities and duties regarding levee improvement districts assigned to it by the Legislature as set forth in TWC, Chapters 16 and 57.

The commission's review of Chapter 301 has also revealed that the chapter needs updating to replace references to this agency's predecessor, the Texas Water Commission, and to reflect additional enforcement powers authorized by amendment to TWC, §16.237. The commission intends to propose to make these and any other needed changes in another rulemaking in the near future.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The commission invites public comments on whether the reasons for the rules in Chapter 301 continue to exist. The commission invites comments, however, on any corrections or other revisions that could be considered in the aforementioned future rulemaking.

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-024-301-WT. Comments must be received by 5:00 p.m., December 4, 2000. For further information or questions concerning this proposal, please contact Auburn Mitchell, Policy and Regulations Division, at (512) 239-1873.

TRD-200007486
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

♦ ♦ ♦

Records Management Interagency Coordinating Council

Title 13, Part 4

The Records Management Interagency Coordinating Council (RMICC) proposes a formal review of its rules with the submission of this notice of intention to review 13 TAC Chapters 50 and 51. This review is pursuant to Texas Government Code §2001.039, concerning Agency Review of Existing Rules.

During this review RMICC will determine if the need still exists for the rules in Chapters 50 and 51. Any amendments to the existing rules as a result of this review will appear in the Proposed Rules section of the *Texas Register.*

Please submit written comments no later than December 15, 2000. Comments may be directed to RMICC, C/O Erica McKewen, Texas State Library and Archives Commission, P.O. Box 12927, Austin, Texas, 78711, or e-mail emckewen@tsl.state.tx.us.

TRD-200007447
Dan Procter
Officer
Records Management Interagency Coordinating Council
Filed: October 23, 2000

♦ ♦ ♦

Adopted Rule Reviews

Texas Workers' Compensation Commission

Title 28, Part 2

In accordance with the General Appropriation Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature, and pursuant to the notice of intention to review published in the August 4, 2000, issue of the *Texas Register* (25 TexReg7361), the Texas Workers' Compensation Commission (the commission) has assessed whether the reason for adopting or readopting these rules continues to exist. No comments were received regarding the review of these rules.

Chapter 152. Attorney's Fees

§152.1 Attorney Fees: General Provisions

§152.2 Attorney Fees: Representation of Claimants

§152.3 Approval or Denial of Fee by the Commission

§152.4 Guidelines for Legal Services Provided to Claimants and Carriers

§152.5 Allowable Expenses

As a result of the review, the Commission has determined that the reason for adoption of the rules continues to exist. Therefore, the Commission readopts Chapter 152. If the Commission determines that any of these rules should be revised or repealed, the repeal or revisions of the rules will be accomplished in accordance with the Administrative Procedure Act.

TRD-200007400
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: October 20, 2000

♦ ♦ ♦

Texas Workforce Commission

Title 40, Part 20

The Texas Workforce Commission (Commission) adopts the review of §801.1 and §801.2 regarding Local Workforce Development Boards, in accordance with the Texas Government Code §2001.039.

The proposed Notice of Intention to Review was published in the June 16, 2000, issue of the *Texas Register* (25 TexReg 5950).

The Commission received no comments regarding the review.

The Commission believes that the reasons for adopting these rules continue to exist. The purposes of the rules are to set forth the requirements for formation of Boards, to address unforeseen circumstances relating to Boards, and to afford flexibility in order to comply with the intent of the governing statutes and rules relating to Texas Government Code Chapter 2308.

The Commission adopted amendments to §801.1 concerning the Local Workforce Development Boards were published in the October 27, 2000, issue of the *Texas Register* (25 TexReg 10756).

For information about the Commission please visit our web page www.twc.state.tx.us.

TRD-200007444

J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Filed: October 23, 2000

♦ ♦ ♦

TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word “Figure” followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

FIGURE: 28 TAC §21.2106(b)(1)

NOTICE OF CERTAIN MANDATORY BENEFITS

This notice is to advise you of certain coverage and/or benefits provided by your contract with [name of carrier].

Mastectomy or Lymph Node Dissection

Minimum Inpatient Stay: If due to treatment of breast cancer, any person covered by this plan has either a mastectomy or a lymph node dissection, this plan will provide coverage for inpatient care for a minimum of:

(a) 48 hours following a mastectomy, and

(b) 24 hours following a lymph node dissection.

The minimum number of inpatient hours is not required if the covered person receiving the treatment and the attending physician determine that a shorter period of inpatient care is appropriate.

Prohibitions: We may not (a) deny any covered person eligibility or continued eligibility or fail to renew this plan solely to avoid providing the minimum inpatient hours; (b) provide money payments or rebates to encourage any covered person to accept less than the minimum inpatient hours; (c) reduce or limit the amount paid to the attending physician, or otherwise penalize the physician, because the physician required a covered person to receive the minimum inpatient hours; or (d) provide financial or other incentives to the attending physician to encourage the physician to provide care that is less than the minimum hours.

If any person covered by this plan has questions concerning the above, please call [name of carrier] at [customer service or related department phone number], or write us at [carrier's customer service or related department address].

Form Number 349 Mastectomy

FIGURE: 28 TAC §21.2106(b)(2)

NOTICE OF CERTAIN MANDATORY BENEFITS

This notice is to advise you of certain coverage and/or benefits provided by your contract with [name of carrier].

Coverage and/or Benefits for Reconstructive Surgery After Mastectomy-Enrollment

Coverage and/or benefits are provided to each covered person for reconstructive surgery after mastectomy, including:

(a) all stages of the reconstruction of the breast on which mastectomy has been performed;

(b) surgery and reconstruction of the other breast to achieve a symmetrical appearance; and

(c) prostheses and treatment of physical complications, including lymphedemas, at all stages of mastectomy.

The coverage and/or benefits must be provided in a manner determined to be appropriate in consultation with the covered person and the attending physician.

[Include any specific deductibles, copayments, and/or coinsurance applicable to the coverage and/or benefits, which may not be greater than the deductibles, copayments and/or coinsurance applicable to other coverage and/or benefits under the health benefit plan.]

Prohibitions: We may not (a) offer the covered person a financial incentive to forego breast reconstruction or waive the coverage and/or benefits shown above; (b) condition, limit, or deny any covered person's eligibility or continued eligibility to enroll in the plan or fail to renew this plan solely to avoid providing the coverage and/or benefits shown above; or (c) reduce or limit the amount paid to the physician or provider, nor otherwise penalize, or provide a financial incentive to induce the physician or provider to provide care to a covered person in a manner inconsistent with the coverage and/or benefits shown above.

If any person covered by this plan has questions concerning the above, please call [name of carrier] at [customer service or related department phone number], or write us at [carrier's customer service or related department address].

Form Number 1764 Reconstructive Surgery After Mastectomy-Enrollment

FIGURE: 28 TAC §21.2106(b)(3)

NOTICE OF CERTAIN MANDATORY BENEFITS

This notice is to advise you of certain coverage and/or benefits provided by your contract with [name of carrier].

Coverage and/or Benefits for Reconstructive Surgery After Mastectomy-Annual

Your contract, as required by the federal Women's Health and Cancer Rights Act of 1998, provides benefits for mastectomy-related services including reconstruction and surgery to achieve symmetry between the breasts, prostheses, and complications resulting from a mastectomy (including lymphedema).

If any person covered by this plan has questions concerning the above, please call [name of carrier] at [customer service or related department phone number], or write us at [carrier's customer service or related department address].

Form Number 1764 Reconstructive Surgery After Mastectomy-Annual

FIGURE: 28 TAC §21.2106(b)(4)

NOTICE OF CERTAIN MANDATORY BENEFITS

This notice is to advise you of certain coverage and/or benefits provided by your contract with [name of carrier].

Examinations for Detection of Prostate Cancer

Benefits are provided for each covered male for an annual medically recognized diagnostic examination for the detection of prostate cancer. Benefits include:

(a) a physical examination for the detection of prostate cancer; and
(b) a prostate-specific antigen test for each covered male who is
(1) at least 50 years of age; or
(2) at least 40 years of age with a family history of prostate cancer or other prostate cancer risk factor.

If any person covered by this plan has questions concerning the above, please call [name of carrier] at [customer service or related department phone number], or write us at [carrier's customer service or related department address].

Form Number 258 Prostate

FIGURE: 28 TAC §21.2106(b)(5)

NOTICE OF CERTAIN MANDATORY BENEFITS

This notice is to advise you of certain coverage and/or benefits provided by your contract with [name of carrier].

Inpatient Stay following Birth of a Child

For each person covered for maternity/childbirth benefits, we will provide inpatient care for the mother and her newborn child in a health care facility for a minimum of:
(a) 48 hours following an uncomplicated vaginal delivery, and
(b) 96 hours following an uncomplicated delivery by cesarean section.

This benefit does not require a covered female who is eligible for maternity/childbirth benefits to (a) give birth in a hospital or other health care facility or (b) remain in a hospital or other health care facility for the minimum number of hours following birth of the child.

If a covered mother or her newborn child is discharged before the 48 or 96 hours has expired, we will provide coverage for postdelivery care. Postdelivery care includes parent education, assistance and training in breast-feeding and bottle-feeding and the performance of any necessary and appropriate clinical tests. Care will be provided by a physician, registered nurse or other appropriate licensed health care provider, and the mother will have the option of receiving the care at her home, the health care provider's office or a health care facility.

[*In-home postdelivery care language, if applicable, is to be inserted here.*]

Prohibitions. We may not (a) modify the terms of this coverage based on any covered person requesting less than the minimum coverage required; (b) offer the mother financial incentives or other compensation for waiver of the minimum number of hours required; (c) refuse to accept a physician's recommendation for a specified period of inpatient care made in consultation with the mother if the period recommended by the physician does not exceed guidelines for prenatal care developed by nationally recognized professional associations of obstetricians and gynecologists or pediatricians; (d) reduce payments or reimbursements below the usual and customary rate; or (f) penalize a physician for recommending inpatient care for the mother and/or the newborn child.

If any person covered by this plan has questions concerning the above, please call [name of carrier] at [customer service or related department phone number], or write us at [carrier's customer service or related department address].

Form Number 102 Maternity

Figure: 31 TAC Chapter 711 Preamble-1

total aggregate withdrawals from the well (in AF/annum) during the historical period	÷	the total number of years during the historical period inclusive of and after the date of initial installation of the well, irrespective of whether withdrawals may have been made in any year

Figure: 31 TAC Chapter 711 Preamble-2

total aggregate withdrawals from the well (in AF/annum) during the historical period which were put to beneficial use	÷	the total number of years during the historical period inclusive of and after the date of initial installation of the well, irrespective of whether withdrawals may have been made in any year

Figure: 31 TAC §711.172(b)(1)

total aggregate withdrawals from the well (in AF/annum) during the historical period which were put to beneficial use	÷	the total number of years during the historical period inclusive of and after the date of initial installation of the well, irrespective of whether withdrawals may have been made in any year

Figure: 31 TAC §711.172(g)(4)

PA-1 Factor	=	$\frac{\text{total of all MHUs - 450,000 AF/annum}}{\text{total of all MHUs}}$

Figure: 31 TAC §711.172(g)(5)

PA-1 amount	=	MHU	–	(PA-1 Factor	x	MHU)

Figure: 31 TAC §711.172(g)(7)

PA-2 Factor	=	(total of remaining PA-1 amounts + total of remaining SUAs) - 450,000 AF/annum total of remaining PA-1 amounts + total of remaining SUAs

Figure: 31 TAC §711.172(g)(8)(A)

PA-2 amount	=	(PA-1 amount + SUA)	–	(PA-2 Factor	x	(PA-1 amount + SUA))

Figure: 31 TAC §711.172(g)(8)(B)

PA-2 amount	=	PA-1 amount	–	(PA-2 Factor	x	PA-1 amount)

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of October 12, 2000, through October 19, 2000. The public comment period for these projects will close at 5:00 p.m. on November 25, 2000.

FEDERAL AGENCY ACTIONS:

Applicant: City of Corpus Christi; Location: The project site is located along the outfall ditch of Salt Flats from the intersection of IH 37 and the Crosstown Freeway north to the Corpus Christi Ship Channel, Corpus Christi, Nueces County, Texas. Approximate UTM coordinates: Zone 14; Easting: 656900; Northing: 3075550-3077200. CCC Project No.: 00-0359-F1; Description of Proposed Action: The applicant proposes to perform a number of maintenance improvements to an existing drainage ditch known as the "Salt Flats System." The applicant proposes to shape, by dragline, the existing earthen ditch from station 5+20 to station 12+87; remove existing concrete bottom in a 26 foot wide section and place new concrete bottom to grade; install an additional 8- by 26-foot section and place new concrete bottom to grade; install an additional 8- by 6-foot concrete box culvert at Port Avenue Bridge; install new railroad bridges at stations 13+36 and 25+20; and widen the concrete-lined channel from station 17+10 to 23+10 to match the same width on either side. These improvements are to help alleviate flooding during heavy rains that occur upstream of the railroad trestles in the area of Leopard and Brownlee streets. Type of Application: U.S.A.C.E. permit application #22169 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Reliant Energy HL&P Location: The project site is located at mile marker 29.2 in the Houston Ship Channel, between Mitchell Bay and Alexander Island, in Harris County, Texas. Approximate UTM coordinates: Zone 15; Easting: 304000; Northing: 3290000. CCC Project No.: 00-0360-F1; Description of Proposed Action: The applicant proposes to construct two aerial transmission towers, one on either side of the Houston Ship Channel, to support a 138kv electric power line. Both towers will measure 325 feet tall, and the bases will be 92 feet long by 33 feet wide. Type of Application: U.S.A.C.E. permit application #22164 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

Applicant: John W. Johnson; Location: The project site is located at the Fulton Beach Marina, 112 Casterline Drive, Fulton, Aransas County, Texas. Approximate UTM coordinates: Zone 14; Easting: 693125; Northing: 3105300. CCC Project No.: 00-0361-F1; Description of Proposed Action: The applicant proposes to add 20 finger piers to the marina to enable parking of boats. All piers would be three feet wide with 1/4 inch board spacing. The length would vary between 20, 25, and 50 feet. Two existing piers, measuring 4- by 35 feet and 3- by 50 feet respectively, are grandfathered. Type of Application: U.S.A.C.E. permit application #22083 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

Applicant: Texas Parks and Wildlife Department; Location: The project site is located in wetlands adjacent to the Houston Ship Channel, along State Highway 134, south of the San Jacinto State Park, in Harris County, Texas. CCC Project No.: 00-0362-F1; Description of Proposed Action: The applicant proposes to construct a new water plant. The plant would be located immediately south of the San Jacinto State Park and would require fill material in an approximately 2.8-acre area. The purpose of the proposed project is to provide permanent potable water for the State Park. Approximately 50 percent of the impacted area consists of wetlands adjacent to Santa Anna Bayou and the Houston Ship Channel. Type of Application: U.S.A.C.E. permit application #21810 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Davis Petroleum Corporation; Location: The project site is located at drill well No. 5 in Galveston Bay, State Tract 251, Chambers

County, Texas. CCC Project No.: 00-0364-F1; Description of Proposed Action: The applicant proposes to install, operate and maintain structures and drill well No. 5 in Galveston Bay, State Tract 251. Water depth at the work site is 10 feet. Type of Application: U.S.A.C.E. permit application #21364(01)/008 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Davis Petroleum Corporation; Location: The project site is located at drill well No. 4, in Galveston Bay, State Tract 252, Chambers County, Texas. CCC Project No.: 00-0367-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain structures and drill well No. 4 in Galveston Bay, State Tract 252. Water depth at the work sites is 10 feet. Type of Application: U.S.A.C.E. permit application #21364(01)/009 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: AIMCOR, Inc.; Location: The project site is located at AIMCOR's existing facility on the Texas City Ship Channel, in Texas City, Galveston County, Texas. CCC Project No.: 00-0370-F1; Description of Proposed Action: The applicant proposes to amend Permit No. 16686(08) to include the construction of four new breasting dolphins at their ship dock and two new tripods for berthing barges at their barge dock. The existing steel sheet pile bulkhead will be removed after the new dolphins have been installed. The applicant also proposes to amend the permit to change the location of the previously authorized crane platform. Type of Application: U.S.A.C.E. permit application #16686(09) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

Applicant: Oiltanking Beaumont, Inc.; Location: The project site is located on the descending right bank of the Neches River, approximately 0.5 mile upstream from the upper end of the McFadden Bend Cutoff, at the Oiltanking Beaumont facility, 6275 Highway 347, in Beaumont, Jefferson County, Texas. CCC Project No.: 00-0371-F1; Description of Proposed Action: The applicant proposes to amend Permit No. 21826(01) to include the construction of a new dock loading platform, including a new pipeway and walkway; the installation of two new ship breasting dolphins and two new ship mooring dolphins; and the performance of mechanical and/or hydraulic maintenance dredging of the new dock. The dredged material will be placed in previously authorized Corps placement areas Nos. 23, 24, 25, and/or 26. No wetlands or vegetated shallows will be impacted by the proposed work. Type of Application: U.S.A.C.E. permit application #21826(02) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review. Further information for the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at (512) 475-0680.

TRD-200007521
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: October 25, 2000

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Comptroller of Public Accounts

Notice of Consultant Contract Award

Notice of Award: Pursuant to Chapter 2254, Subchapter A, Texas Government Code, the Comptroller of Public Accounts (Comptroller) publishes this notice of contract awards.

The notice of request for proposals (RFP #108b) was published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6416).

The contractors will assist Comptroller in conducting appraisals of various classes of real property in connection with the Comptroller's Annual Property Value Study and providing other related services, as directed by the Comptroller.

Contracts were awarded to:

AMF Appraisal Group, Inc., AMF Professional Building, 402 Simonton, Suite 100, Conroe, Texas 77301. The total amount of this contract is $31,773.00. The term of this contract is September 1, 2000 thru December 31, 2000. AMF Appraisal Group, Inc. was awarded a second contract for a total amount of $218,980.00. The term of this contract is September 1, 2000 thru May 31, 2001.

Daniel J. Garrett, 2909 Crossroads Drive, Longview, Texas 75605. The total amount of the contract is $33,892.00. The term of this contract is September 1, 2000 thru December 31, 2000.

Stotts Appraisal Services, 15001 N. Brentwood, Channelview, Texas 77530. The total amount of the contract is $33,892.00. The term of this contract is September 1, 2000 thru December 31, 2000.

Real Property Counselors, Inc., P.O. Box 202973, Austin, Texas 78720. The total amount of the contract is $47,231.00. The term of this contract is September 1, 2000 thru May 31, 2001.

Pyles Whatley Corporation, 11551 Forest Central Drive, Dallas, Texas 75243. The total amount of the contract is $30,502.00. The term of this contract is September 1, 2000 thru December 31, 2000.

Atrium Real Estate Services, 2305 Hancock Drive, Austin, Texas 78756. The total amount of the contract is $94,048.00. The term of this contract is September 1, 2000 thru December 31, 2000.

These projects will involve periodic reporting.

TRD-200007528
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 25, 2000

♦ ♦ ♦

Notice of Consultant Contract Award

Notice of Award: Pursuant to Chapter 2254, Subchapter A, Texas Government Code, the Comptroller of Public Accounts (Comptroller) publishes this notice of contract awards.

The notice of request for proposals (RFP #108c) was published in the July 14, 2000, issue of the *Texas Register* (25 TexReg 6838).

The contractors will provide professional out-of-state unclaimed property auditing services to the Comptroller by conducting audits of out-of-state unclaimed property holders and providing other related services, as directed by the Comptroller.

One contract each was awarded to:

Affiliated Computer Services, Inc., dba ACS Unclaimed Property Clearinghouse, Inc., 3 Center Plaza, 7th Floor, Boston, Massachusetts 02108. The total amount of the contract is not to exceed twelve

percent of the cash value of the net unclaimed property received by Comptroller as a direct result of an audit by contractor. The term of this contract is September 1, 2000 thru August 31, 2001.

The National Abandoned Property Processing Corporation, 570 Lexington Avenue, 22nd Floor, New York, New York 10022. The total amount of the contract is not to exceed twelve percent of the cash value of the net unclaimed property received by Comptroller as a direct result of an audit by contractor. The term of this contract is September 1, 2000 thru August 31, 2001.

Audit Services, U.S., L.L.C., 1250 Old Henderson Road, Suite B, Columbus, Ohio 43220. The total amount of the contract is not to exceed twelve percent of the cash value of the net unclaimed property received by Comptroller as a direct result of an audit by contractor. The term of this contract is September 1, 2000 thru August 31, 2001.

These projects will involve periodic reporting.

TRD-200007527
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 25, 2000

♦ ♦ ♦

Notice of Contract Award

Notice of Award: Pursuant to Section 2254, Subchapter A, Texas Government Code and Chapter 54, Subchapter F, Texas Education Code, the Comptroller of Public Accounts (Comptroller) announces this notice of contract award.

The notice of request for proposals (RFP #108f) was published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6415).

The contractor will assist Comptroller in providing certified public accountant services for the purpose of performing a financial audit of the Texas Prepaid Higher Education Tuition Program.

The contract is awarded to McConnell & Jones LLP, 11 Greenway Plaza, Suite 2902, Houston, Texas 77046. The total amount of the contract is not to exceed $30,150. The contract was executed October 19, 2000. The term of the contract is October 19, 2000 through August 31, 2001.

TRD-200007526
David R. Brown
Assistant General Counsel for Contracts
Notice of Contract Award
Filed: October 25, 2000

♦ ♦ ♦

Notice of Contract Award

Notice of Award: Pursuant to Chapter 54, Subchapter F, Texas Education Code, the Comptroller of Public Accounts (Comptroller) announces this notice of contract award.

The notice of request for proposals (RFP #108d) was published in the June 30, 2000, issue of the *Texas Register* at (25 TexReg 6415).

The contractor will provide outside legal counsel to the Texas Prepaid Higher Education Tuition Board ("Board") for the Board's prepaid higher education tuition program.

The contract is awarded to Clark, Thomas & Winters, P.C, 700 Lavaca, Suite 1200, Austin, Texas 78701. The total amount of the contract is not to exceed $50,000. The contract was executed October 19, 2000. The term of the contract is October 19, 2000 through August 31, 2001.

TRD-200007525
David R. Brown
Assistant General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 25, 2000

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/30/00 - 11/05/00 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.09 for the period of 10/30/00 - 11/05/00 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200007453
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 24, 2000

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Credit Union Department

Application for a Merger or Consolidation

Notice is given that the following application has been filed with the Texas Credit Union Department and is under consideration:

An application was received from GTX Credit Union (Houston) seeking approval to merge with O.C.A.W. of Texas Federal Credit Union (Pasadena) with GTX Credit Union being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas, 78752-1699.

TRD-200007472
Harold E. Feeney
Commissioner
Credit Union Department
Filed: October 24, 2000

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Texas Department of Criminal Justice

Notice of Award

The Texas Department of Criminal Justice hereby gives notice of a Contract Award for the Texas Youth Commission Fiscal Year 2000-2001 Building Program, Requisition Number: 696-FD-0-R002.

The Contract was awarded to Schaumburg & Polk, 8865 College St., Suite 100, Beaumont, Texas 77707, on October 13, 2000, Contract Number: 696-TY-1-2-C0042, for a dollar amount of $109,276.

TRD-200007495
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: October 25, 2000

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Texas Commission for the Deaf and Hard of Hearing

Request for Proposal

The purpose of this Invitation for Bid (IFB) is to secure bids which shall result in a contract between the Texas Commission for the Deaf and Hard of Hearing (TCDHH) and a vendor for development of sign language interpreter test materials and psychometric services.

NOTE: Texas Commission for the Blind (TCB) completes administrative functions including purchasing for TCDHH. This contract shall be with TCDHH. TCDHH shall be responsible for approving all work completed under the contract and all payments made to the awarded vendor.

The Board for Evaluation of Interpreters (BEI) was created as an advisory body in 1980 as part of the enabling legislation that re-established the Texas Commission for the Deaf, now known as the Texas Commission for the Deaf and Hard of Hearing (TCDHH). This legislation gave the Commission authority to establish a program for the testing and certification of interpreters who have demonstrated varying levels of proficiency in sign language interpreting. The BEI board was given responsibility to design and develop a system for interpreter evaluation and certification (Chapter 81, Human Resources Code, Section 81.007).

SCOPE OF WORK

TCDHH has five separate phases of work for which bids are being solicited. These phases are: Job Analysis, Written Test Development, Performance Test Development, Evaluation/Evaluator Training, and Statistical Analysis Services.

TCB expects to post this solicitation on the Texas Marketplace (www.marketplace.state.tx.us) on approximately November 3, 2000. If internet access is not available or a hard copy of the solicitation is preferable, a request may be submitted by facsimile or e-mail:

By facsimile: (512) 377-0647

By E-Mail: Elizabeth.Ward@tcb.state.tx.us

All bid responses must be postmarked or hand-delivered no later than December 4, 2000 at 3:00 p.m. to Ms. Elizabeth Ward, Contract Specialist, Texas Commission for the Blind, 4800 N. Lamar, Suite 360, Austin, Texas 78756.

TRD-200007492
David W. Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Filed: October 24, 2000

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Texas Education Agency

Public Notice Announcing the Availability of the Proposed Texas Individuals with Disabilities Education Act (IDEA) Eligibility Document: State Policies and Procedures (Formerly Known As the State Plan)

Purpose and scope of the state policies and procedures and their relation to Part B of the Individuals with Disabilities Education Act (IDEA). As a result of changes to the IDEA, all states must ensure that the state has on file with the Secretary (United States Department of Education) policies and procedures, including relevant regulations, or other documents that demonstrate that the state meets all of the eligibility requirements of the IDEA, Section 612(a). A state may do this by either: (1) submitting revisions or changes to the State Plan that is currently on file with the Department of Education to ensure that meet all of the eligibility requirements of the IDEA, Section 612(a), as amended by the IDEA Amendments of 1997 and implementing regulations; or (2) submitting an intact document that includes all the documents that are required under the IDEA, Section 612(a).

Based on the extensive changes to the IDEA, recent changes to state statute, and the need to revise current commissioner's rules for special education, the State of Texas (Texas Education Agency) has chosen to submit an intact document that includes all the documents that are required under the IDEA, Section 612(a).

The Proposed IDEA Texas Eligibility Document contains assurance statements, federal regulations, state statutes, State Board of Education rules, State Board for Educator Certification rules, current and proposed commissioner's rules, and additional agency procedures necessary to implement the IDEA Amendments of 1997 (and implementing regulations) in Texas.

Availability of the state policies and procedures. The Proposed Texas IDEA Eligibility Document is available on the Texas Education Agency (TEA) Special Education Web Page at: http://www.tea.state.tx.us/special.ed/eligdoc/index.html. The Proposed Texas IDEA Eligibility Document may be reviewed and/or downloaded from this web page address. In addition, documents to assist in submitting public comments are also available for downloading at the same site. Copies of the Proposed Texas IDEA Eligibility Document will be mailed to statewide advocate and school organizations. The Proposed Texas IDEA Eligibility Document will also be available at the following locations:

(1) The TEA, 1701 North Congress Ave., Austin, Texas 78701. Parties interested in reviewing the Texas IDEA Eligibility Document should contact the Division of Special Education at (512) 463-9414.

(2) Each of the twenty (20) Education Service Centers (ESCs). Parties interested in reviewing the Texas IDEA Eligibility Document should contact the special education director at their nearest education service center.

Schedule of Public Hearings. Public Hearings on the Proposed Texas IDEA Eligibility Document will be held November 27 through December 1, 2000, over the Texas Education Telecommunications Network (TETN) at the following times and locations statewide: (1) Austin, Region XIII ESC - TETN Room, 5701 Springdale Road, (512) 919-5313, Wednesday, November 29, 2000, 8:30-11:15 a.m.; (2) Edinburg, Region I ESC - TETN Room, 1900 West Schunior, (956) 984-6000, Wednesday, November 29, 2000, 8:30-11:15 a.m.; (3) El Paso, Region XIX ESC - TETN Room, 6611 Boeing Drive, (915) 780-1919, Friday, December 1, 2000, noon-2:45 p.m. (Mountain Standard Time); (4) Houston, Region IV ESC - TETN Room, 7145 West Tidwell, (713) 462-7708, Thursday, November 30, 2000, 8:30-11:15 a.m.; (5) Lubbock, Region XVII ESC - TETN Room, 1111 West Loop 289, (806) 792-4000, Monday, November 27, 2000, 8:30-11:15 a.m.; and (6) Richardson, Region X ESC - TETN Room, 400 East Spring Valley, (972) 348-1700, Monday, November 27, 2000, 8:30-11:15 a.m.

Each public hearing participant will be given three minutes to present his or her comments. Public hearing participants are encouraged (not required) to provide the agency with a paper copy of their testimony. An individual requiring additional special assistance or directions to the hearing location should call the contact number for the public hearing location he or she is planning to attend. Copies of the Proposed Texas IDEA Eligibility Document will also be made available at the public hearings.

Note on Public Hearings in Austin, Edinburg, Houston, Lubbock, and Richardson: Registration to provide testimony at one or more of the public hearings will take place on-site at the hearing location beginning at 8:15 a.m. and continue throughout the hearing time. There will not be an opportunity to register to speak prior to the hearing. Speakers will present in the order of their registration. Speaker registration will end at 11:15 a.m.

Note on Public Hearing in El Paso: Registration to provide testimony at the public hearing will take place on-site at the hearing location beginning at 11:45 a.m. (Mountain Standard Time) and continue throughout the hearing time. There will not be an opportunity to register to speak prior to the hearing. Speakers will present in the order of their registration. Speaker registration will end at 2:45 p.m. (Mountain Standard Time).

Procedures for submitting written comments about the policies and procedures. The TEA will accept written comments pertaining to the Proposed Texas IDEA Eligibility Document by electronic mail (e-mail) at: sped@tea.tetn.net and by regular mail through the US Postal Service to: Mr. Gene Lenz, TEA, Division of Special Education, 1701 North Congress Ave., Austin, Texas 78701-1494.

Timetable for submitting the policies and procedures to the Secretary for approval. After review and consideration of all public comments, the TEA will make necessary/appropriate modifications and will submit the Texas IDEA Eligibility Document on or before December 8, 2000. After the Secretary approves the Texas IDEA Eligibility Document, the TEA will give notice in newspapers or other media, or both, that the policies and procedures are approved. The notices will name places throughout the state where the policies and procedures will be available for access by any interested person.

For more information, contact the TEA Division of Special Education, Room 6-127, 1701 North Congress Avenue, Austin, Texas 78701; by telephone at (512) 463-9414; by fax at (512) 463-9560; or by e-mail at sped@ tea.tetn.net.

TRD-200007519
Criss Coudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: October 25, 2000

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Request for Applications Concerning Academics 2000 Local Improvement Grants

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-00-049 from school districts, shared services arrangements of school districts, and open- enrollment charter schools. Under this RFA, applicants must work in collaboration with institutions of higher learning, nonprofit organizations, regional education service centers, and/or community entities to develop district and campus level plans for local improvement and to implement local improvement initiatives on individual campuses, including professional development that incorporates effective instructional strategies and methodologies. Applications may also include preservice education strategies. The primary objective of grants awarded under this RFA is to improve early childhood and elementary education so that students in prekindergarten through sixth grade are fully proficient in the core academic subject areas of reading, writing, mathematics, social studies, and science. Applicants should refer to the RFA for a full description of the eligibility requirements and restrictions.

A school district or open-enrollment charter school must serve as the fiscal agent for a grant awarded under this RFA. A regional education service center may serve as the fiscal agent but only for a rural school district or shared services arrangement comprised entirely of rural school districts. A regional education service center may not serve as a fiscal agent under any other circumstances. An application submitted by a school district must be signed by the district superintendent and the president of the local board of trustees. An application for a shared services arrangement must be approved by the superintendent and board of trustees of all participating districts. An application submitted by an open-enrollment charter school must be signed by the Chief Operating Officer of the school and the president of the local board of trustees.

Description. Academics 2000 local grant programs must integrate effective, research-based instructional strategies and methodologies that will provide prekindergarten through sixth grade students with intensive instruction in the core academic subject areas. The essential components of research-based programs are described in the RFA. Activities funded with Academics 2000 grants must be limited to promoting instructional and academic improvement in the core academic subject areas for prekindergarten through sixth grade students.

The required funding category for this RFA is local improvement, and it consists of three subcategories: planning, implementation of local improvement initiatives, and professional development. An optional funding category is preservice education, including how to work effectively with parents and the community to improve the achievement of prekindergarten through sixth grade students in the core academic subject areas.

Dates of Project. All services and activities related to this RFA will be conducted within specified dates. Applicants should plan for a starting date of no earlier than June 1, 2001, and an ending date of no later than May 31, 2002.

Project Amount. This RFA will be used to award local improvement grants to approximately 100 recipients with an anticipated funding range between $175,000 and $425,000 for a project period of 12 months. In addition, major urban districts (as defined in this RFA) are eligible to apply for an award of $1,000,000. These will be one-year grants with no continuation funding available. This project is funded 100% from Goals 2000: Educate America Act federal funds ($25,966,663).

Selection Criteria. Applications will be selected based on reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant program and the extent to which the application addresses the primary objective of promoting achievement in the core academic subject areas for students in prekindergarten through sixth grade. Selected applications must also meet the minimum requirement of collaboration with an institution of higher learning or a nonprofit organization in the design, development, and provision of professional development activities.

The selection criteria and the review process are specified in the RFA. TEA reserves the right to select from the highest-ranking proposals those that address all requirements in the RFA and that are most advantageous to the project.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs incurred before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or to pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-00-049 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tmail.tea.state.tx.us. Please refer to the RFA number in your request. Provide your name, complete mailing address, and phone number including area code. This RFA will also be posted on the Texas Education Agency web site at http://www.tea.state.tx.us/grant/announcements/grants2.cgi for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Dr. Rachel Harrington, Academics 2000 Subgrant Program, TEA, (512) 463-9315.

Deadline for Receipt of Applications. An application must be received in the Document Control Center of TEA by 5:00 p.m. (Central Time), Thursday, January 25, 2001, to be considered for funding.

TRD-200007518

Criss Cloudt

Associate Commissioner, Policy Planning and Research

Texas Education Agency

Filed: October 25, 2000

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State Employee Charitable Campaign

Legal Notice - State Campaign Manager Applications

The State Policy Committee of the State Employee Charitable Campaign is seeking applications for state campaign manager from agencies meeting eligibility requirements found in Texas Government Code Annotated, Section 659.131 et seq. (Vernon 1994 & Supp. 1998). Applications are available from, and questions may be referred to, the current state campaign manager, (512) 478-6601. Applications must be received at 823 Congress Ave., Suite 1103, Austin, Texas, 78701, no later than 3:00 p.m. on Friday, December 15, 2000.

TRD-200007536

State Employee Charitable Campaign

Filed: October 25, 2000

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Texas Department of Health

Licensing Action for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Houston	Stewart & Stevenson Service Inc	L05267	Houston	00	10/04/00
Throughout Tx	Chappell Hill Logging Systems	L05374	Chappell Hill	00	10/10/00

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Abilene	Abilene Cardiology Consultants PA	L04315	Abilene	21	10/10/00
Abilene	Abilene Diagnostic Clinic PLLC	L05101	Abilene	06	10/09/00
Abilene	Hendrick Medical Center	L02433	Abilene	65	10/05/00
Alvin	Amoco Chemical Company	L01422	Alvin	52	10/03/00
Big Springs	Scenic Mountain Medical Center	L00763	Big Springs	38	10/10/00
Bowie	Bowie Hospital Authority	L02327	Bowie	13	10/09/00
College Station	Texas A&M University	L00448	College Station	102	10/02/00
Corpus Christi	Associates in Heart Disease	L05023	Corpus Christi	04	10/13/00
Corpus Christi	Spohn Health System Spohn Hospital	L02357	Corpus Christi	18	09/29/00
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	62	09/29/00
Corpus Christi	Syncor International Corporation	L04043	Corpus Christi	27	10/13/00
Dallas	Columbia Hospital at Medical City Dallas Subsidiary LP	L01976	Dallas	127	10/03/00
Denton	Columbia Medical Center of Denton Subsidiary LP	L02764	Denton	40	10/04/00
Denton	Network Cancer Care of Denton	L05348	Denton	01	09/29/00
El Paso	Allegiance Healthcare Corporation Convertors Custom/Sterile Division	L02407	El Paso	22	10/11/00
Euless	COR Specialty Associates of North Texas	L05062	Euless	09	10/13/00
Farmers Branch	Cardiovascular Consultants LLP	L04627	Farmers Branch	03	10/09/00
Fort Worth	Consultants in Radiology PA	L05014	Fort Worth	10	10/02/00
Fort Worth	Texas Steel Company	L00163	Fort Worth	38	10/05/00
Garland	Garland Community Hospital	L02333	Garland	20	10/09/00
Garland	Litton Electro Optic Systems	L02155	Garland	29	10/13/00
Houston	Baker Hughes INTEQ	L04452	Houston	31	10/09/00
Houston	Ben Taub General Hospital	L01303	Houston	51	10/12/00
Houston	Harris County Hospital District	L04412	Houston	23	09/29/00
Houston	Houston Northwest Medical Center	L02253	Houston	48	10/13/00
Houston	Rice University Department of Biomedical Engineering MS 142	L00631	Houston	23	10/12/00
Houston	Westhollow Technology Center	L02116	Houston	40	09/29/00
Huntsville	Sam Houston State University	L00873	Huntsville	17	10/13/00

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
La Porte	Fina Oil & Chemical Company	L04640	La Porte	07	10/05/00
Longview	Good Shepherd Medical Center	L02411	Longview	61	10/03/00
Lubbock	Covenant Medical Center	L00483	Lubbock	109	09/29/00
Lubbock	Texas Tech University Environmental Health and Safety	L01536	Lubbock	64	10/10/00
Lufkin	Piney Woods Healthcare System LP	L01842	Lufkin	39	10/05/00
Mcallen	Valley Cardiology PA	L04692	Mcallen	08	10/10/00
Mineral Wells	Palo Pinto General Hospital	L01732	Mineral Wells	22	10/02/00
Mont Belvieu	Exxonmobil Chemical	L03119	Mont Belvieu	23	10/04/00
New Braunfels	Cemex USA	L02809	New Braunfels	22	10/05/00
Orange	Central Pharmacy Services Inc	L04785	Orange	17	10/04/00
Pasadena	Air Products Manufacturing	L04560	Pasadena	07	10/05/00
Pasadena	Goodyear Tire & Rubber Company	L04321	Pasadena	06	10/09/00
Pasadena	Superior Testing Services	L05145	Pasadena	14	10/03/00
Rockdale	TU Electric – Sandow Station	L04075	Rockdale	05	10/11/00
San Antonio	Methodist Healthcare System of San Antonio	L00594	San Antonio	152	10/12/00
San Antonio	Methodist Healthcare System of San Antonio LTD	L02266	San Antonio	72	10/09/00
The Woodlands	Enchira Biotechnology Corporation	L04773	The Woodlands	07	10/05/00
The Woodlands	Zonagen Inc	L04464	The Woodlands	09	10/04/00
Throughout Tx	Arias & Kezar Inc	L04964	San Antonio	13	10/05/00
Throughout Tx	Baker Oil Tools	L03272	Houston	24	10/04/00
Throughout Tx	Berry Fabricators	L01575	Corpus Christi	39	10/09/00
Throughout Tx	Component Sales and Service Inc	L02243	Houston	19	09/29/00
Throughout Tx	Goolsby Testing Laboratories Inc	L03115	Humble	68	10/13/00
Throughout Tx	HVJ Associates Inc	L03813	Houston	16	10/05/00
Throughout Tx	Longview Inspection Inc	L01774	Houston	158	10/04/00
Throughout Tx	Mandes Inspection & Testing Services Inc	L05220	Houston	16	10/11/00
Throughout Tx	Metco	L03018	Houston	101	10/05/00
Throughout Tx	Oceaneering International Inc Solus Schall Division	L04463	Houston	23	10/11/00
Throughout Tx	Raytheon Company	L00946	Dallas	83	09/27/00
Throughout Tx	Rone Engineers	L02356	Dallas	18	10/05/00
Throughout Tx	Southern Services Inc	L05270	Lake Jackson	09	10/05/00
Throughout Tx	VIA NDT Engineering and Testing	L04322	Channelview	49	10/09/00
Tyler	East Texas Medical Center	L00977	Tyler	80	09/28/00
Tyler	Stewart Regional Blood Center	L04826	Tyler	04	10/13/00
Victoria	Citizens Medical Center	L00283	Victoria	62	10/11/00
Victoria	E I Dupont De Nemours & Company	L00386	Victoria	70	10/09/00
Wichita Falls	North Texas Isotopes	L04810	Wichita Falls	04	10/03/00
Wichita Falls	North Texas Isotopes	L04810	Wichita Falls	05	10/10/00

Location	Name	License #	City	Amend -ment #	Date of Action
Beeville	Christus Spohn Health System Corporation	L04510	Beeville	10	09/29/00
Bellaire	Steen NDT Supply Inc	L04915	Bellaire	05	10/06/00
Dumas	Memorial Hospital	L03540	Dumas	16	10/13/00
Fort Worth	Fort Worth Osteopathic Hospital Inc	L00730	Fort Worth	46	10/09/00
Seguin	Structural Metals	L02188	Seguin	14	10/09/00
Throughout Tx	Alpha Process Sales Inc	L03305	Sugar Land	09	10/13/00
Throughout Tx	Continental Airlines	L02718	Houston	31	10/13/00
Throughout Tx	H & B Contractors LTD	L04911	McGregor	05	09/29/00
Throughout Tx	Petroleum Perforators Inc	L01314	Alice	13	10/13/00
Throughout Tx	Troxler Electronic Laboratories	L01296	Arlington	34	10/09/00

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Aliquipa PA	Berthold Systems Inc	L04597	Aliquipa PA	06	10/03/00
Austin	Renaissance Instruments	L05097	Austin	02	10/09/00

DENIALS OF NEW LICENSE APPLICATIONS:

Location	Name	License #	City	Amend -ment #	Date of Action
Dallas	Damon Consulting		Dallas		10/10/00

In issuing new licenses and amending and renewing existing licenses, the Texas Department of Health, Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with Title 25 Texas Administrative Code (TAC) Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the license(s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a licensee, applicant, or "person affected" within 30 days of the date of publication of this notice. A "person affected" is defined as a person who is a resident of a county, or a county adjacent to the county, in which the radioactive materials are or will be located, including any person who is doing business or who has a legal interest in land in the county or adjacent county, and any local government in the county; and who can demonstrate that he has suffered or will suffer actual injury or economic damage. A licensee, applicant, or "person affected" may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200007454
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 24, 2000

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Notice of Emergency Cease and Desist Order Issued on Paul A. Vaughan, M.D.

Notice is hereby given that the Bureau of Radiation Control (bureau) ordered Paul A. Vaughan, M.D. (registrant-R17970) of Dallas to cease and desist performing lumbo-sacral spine (AP) procedures with the Raytheon x-ray unit (Model Number RME 325; Serial Number 1-12-81- 11) until the exposure at skin entrance is within regulatory limits. The bureau determined that continued radiation exposure to patients in excess of that required to produce a diagnostic image constitutes an immediate threat to public health and safety, and the existence of an emergency. The order will remain in effect until the bureau authorizes the registrant to perform the procedure.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200007455
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: October 24, 2000

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Texas Department of Housing and Community Affairs

Notice of Administrative Hearing (MHD1998001677UI)

Manufactured Housing Division

Wednesday, November 8, 2000, 1:00 p.m.

State Office of Administrative Hearing, Stephen F. Austin Building, 1700 North Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. William E. Grayson dba Grayson's Mobile Home Transport to hear alleged violations of §4(f) and §7(d) of the Act and §80.51 and §80.125(e) of the Rules regarding installation of a manufactured home without obtaining, maintaining or possessing a valid installer's license and improper installation of the manufactured home. SOAH 332-01-0181. Department MHD1998001677UI.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas, 78711-2489, (512) 475-3589.

TRD-200007531
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 25, 2000

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Texas Department of Human Services

Public Notice of Open Solicitation #3 for Parmer County

Pursuant to Title 2, Chapters 22 and 32 of the Human Resources Code and 40 TAC §19.2324, the Texas Department of Human Services (TDHS) is announcing the reposting of the open solicitation period for the construction of a 90-bed nursing facility in **Parmer County, County #185**, identified in the **August 18, 2000,** issue of the *Texas Register* (25 TexReg 8087). Medicaid contracted nursing facility occupancy rates in Parmer County exceed the threshold (90% occupancy) in each of six months in the continuous period of **July 1999 through December 1999**. The county occupancy rates for each month of that period were: **93.1%, 91.5%, 91.7%, 94.7%, 94.0%, 94.3%**. Potential contractors seeking to construct a 90-bed nursing facility in the above referenced county must submit a written reply (as described in 40 TAC §19.2324) to TDHS, Joe D. Armstrong, Facility Enrollment, Long Term Care-Regulatory, Mail Code (E-342), P.O. Box 149030, Austin, Texas 78714-9030. Upon receipt of a reply from a potential contractor, as specified in 40 TAC §19.2324, TDHS will place a notice in the *Texas Register* to announce the closing date of the reopened solicitation period.

TRD-200007490
Paul Leche
General Counsel
Texas Department of Human Services
Filed: October 24, 2000

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Public Notice of Open Solicitation #3 for San Jacinto County

Pursuant to Title 2, Chapters 22 and 32 of the Human Resources Code and 40 TAC §19.2324, the Texas Department of Human Services (TDHS) is announcing the reposting of the open solicitation period for the construction of a 90-bed nursing facility in **San Jacinto County, County #204**, identified in the **May 21, 1999,** issue of the *Texas Register* (24 TexReg 3882). Medicaid contracted nursing facility occupancy rates in San Jacinto County exceed the threshold (90% occupancy) in each of six months in the continuous period of **June 1998 through November 1998**. The county occupancy rates for each month of that period were: **94.7%, 98.2%, 98.2%, 96.9%, 96.6%, 97.5%**. Potential contractors seeking to construct a 90-bed nursing facility in the above referenced county must submit a written reply (as described in 40 TAC §19.2324) to TDHS, Joe D. Armstrong, Facility Enrollment, Long Term Care-Regulatory, Mail Code (E-342), P.O. Box 149030, Austin, Texas 78714-9030. Upon receipt of a reply from a potential contractor, as specified in 40 TAC §19.2324, TDHS will place a notice in the *Texas Register* to announce the closing date of the reopened solicitation period.

TRD-200007491
Paul Leche
General Counsel
Texas Department of Human Services
Filed: October 24, 2000

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Texas Department of Insurance

Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application to change the name of WISCONSIN MORTGAGE ASSURANCE CORPORATION to MGIC INDEMNITY CORPORATION, a foreign fire and casualty company. The home office is in Milwaukee, Wisconsin.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200007524
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: October 25, 2000

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Notice of Public Hearing 2000 Texas Title Insurance Biennial Hearing DOCKET NOS. 2470 and 2471

Notice is hereby given that a hearing will be held before the Commissioner of Insurance. The hearing will consist of a rulemaking phase and a ratemaking phase. The rulemaking phase, under Docket No. 2470, will be for the consideration of rules, forms, and endorsements, and related matters not having primary rate implications. The ratemaking phase, under Docket No. 2471, will be for the consideration of fixing the premium rate and other matters with direct rate implications. The hearing for the rulemaking phase will begin at 9:00 a.m., in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, on December 27, 2000, and continue thereafter at dates, times, and places designated by the commissioner until conclusion. The hearing for the ratemaking phase will begin at 9:00 a.m., in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, on December 29, 2000, and continue thereafter at dates, times, and places designated by the commissioner until conclusion. The commissioner may conduct both phases of the hearing; provided, however, that the ratemaking phase of the hearing can be conducted by the State Office of Administrative Hearings in accordance with Article 1.33B, Texas Insurance Code at the direction of the commissioner or at the written request of any person seeking admission as a party to the ratemaking phase of the hearing. The commissioner shall certify which matters have rate implications to be considered in the rate making phase of the hearing.

Authority, Jurisdiction, Statutes and Rules Involved

The Commissioner of Insurance has jurisdiction over the promulgation of rules and premium rates, over amendments to or promulgation of approved forms, and over other matters set out in this notice pursuant to Texas Insurance Code, Section 31.021 and Articles 9.01, 9.02, 9.07, and 9.21, and pursuant to the Texas Administrative Code, Title 28, Chapter 9. The procedure of the hearing will be governed by the Rules of Practice and Procedure before the Department of Insurance (Texas Administrative Code, Title 28, Chapter 1, Subchapter A) and the Administrative Procedure Act (Texas Gov't Code, Ch. 2001).

Matters to be Considered

The commissioner will consider testimony presented and information filed by title insurers, title agents, the Office of Public Insurance Counsel, Texas Department of Insurance staff, and other interested parties relating to the following issues:

Docket 2470

Form and Rulemaking Phase

Item 2000-1 - Submission by Texas Land Title Association to adopt a new First Loss Endorsement (Form T-__).

Item 2000-2 - Submission by Texas Land Title Association to adopt a new Last Dollar Endorsement (FormT-__).

Item 2000-3 - Submission by Texas Land Title Association to adopt a new Mortgagee Policy Aggregation Endorsement (T-__).

Item 2000-4 - Submission by Texas Land Title Association to adopt a new Planned Unit Development Endorsement (T-__).

Item 2000-5 - Submission by Texas Land Title Association to amend Procedural Rule P-9, Endorsement of Owner or Mortgagee Policies.

Item 2000-6 - Submission by Texas Land Title Association to adopt a new Restrictions, Encroachments, Minerals Endorsement (T-__).

Item 2000-7 - Submission by Texas Land Title Association to adopt a new procedural rule (P-__) for the proposed new Restrictions, Encroachments, Minerals Endorsement.

Item 2000-8 - Submission by Texas Land Title Association to adopt a Texas Short Form Residential Policy of Title Insurance (T-2R) and Addendum (T-2R Addendum).

Item 2000-9 - Submission by Texas Land Title Association to amend Procedural Rule P-1 to make reference to direct operations and the proposed new Texas Short Form Residential Mortgagee Policy.

Item 2000-10 - Submission by Texas Land Title Association to adopt a new procedural rule (P-__) to implement the proposed new Texas Short Form Residential Mortgagee Policy.

Item 2000-11 - Submission by Texas Land Title Association to amend Schedules A and B of the Commitment for Title Insurance (Form T-7).

Item 2000-12 - Submission by Texas Land Title Association to amend Procedural Rule P-17, Electronically Produced Endorsement Forms.

Item 2000-13-Submission by Texas Land Title Association to amend paragraph 1 of the Conditions and Stipulations of the Texas Owner Policy of Title Insurance (Form T-1).

Item 2000-14-Submission by Texas Land Title Association to amend the Leasehold Owner Policy Endorsement (Form T-4).

Item 2000-15-Submission by Texas Land Title Association to amend the Residential Leasehold Endorsement (Form T-4R).

Item 2000-16-Submission by Texas Land Title Association to amend the Leasehold Mortgagee Policy Endorsement (Form T-5).

Item 2000-17-Submission by Texas Land Title Association and Texas Society of Professional Surveyors to amend Procedural Rule P-2, Amendment to Exception to Area and Boundaries.

Item 2000-18 - Submission by Stewart Title Guaranty Company, Office of Public Insurance Council, First American Title Insurance Company, and First American Title Insurance Company of Texas to amend Procedural Rule P-2, Amendment to Exception to Area and Boundaries.

Item 2000-19 - Submission by Stewart Title Guaranty Company to amend the Commitment for Title Insurance (T-7).

Item 2000-20 - Submission by Stewart Title Guaranty Company, First American Title Insurance Company, and First American Title Insurance Company of Texas to adopt a new Residential Homeowner's Endorsement (T-10).

Item 2000-21 - Submission by Stewart Title Guaranty Company to adopt a new procedural rule (P-__) authorizing the issuance of the proposed Residential Homeowner's Endorsement.

Item 2000-22- Submission by Stewart Title Guaranty Company to adopt a Residential Homeowner's Endorsement Waiver (Form T-__).

Item 2000-23 - Submission by Office of Public Insurance Counsel to amend the Commitment for Title Insurance (T-7).

Item 2000-24 - Submission by Office of Public Insurance Counsel to adopt a Deletion of Amendment form (T-__) concerning the area and boundaries exception.

Item 2000-25 - Submission by Office of Public Insurance Counsel to amend Procedural Rule P-2, Amendment of Exceptions to Area and Boundaries.

Item 2000-26 - Submission by Texas Department of Insurance to amend Minimum Standards, Specific Instructions and Report Forms for Audit of Trust Funds Required of Texas Title Insurance Agents, Direct Operations, Title Attorneys and Attorneys Licensed as Escrow Officers.

Item 2000-27 - Submission by Texas Department of Insurance to amend Procedural Rule P-22 to be more consistent with Procedural Rules P-1 and P-24.

Item 2000-28 - Submission by Texas Department of Insurance to amend Procedural Rule P-27, Disbursement from Trust Fund Accounts.

Item 2000-29 - Submission by Texas Department of Insurance to amend Procedural Rule P-28 to correct a typographical error.

Item 2000-30 - Submission by Texas Department of Insurance to adopt new Procedural Rule P-32 regarding document retention.

Item 2000-31 - Submission by Texas Department of Insurance to adopt new Procedural Rule P-50 regarding home equity loans closed by lenders not licensed as title agents.

Item 2000-32 - Submission by Texas Department of Insurance to amend the Texas Title Insurance Statistical Plan.

Complete copies of the agenda items may be obtained from the Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104. Notwithstanding the foregoing, the department reserves the right any time to propose for adoption, pursuant to Texas Insurance Code Section 31.02, Article 9.07(e), and the Administrative Procedure Act, any rule for the regulation of title insurance.

Docket 2471

Ratemaking Phase

Item 2000-33 - Submission by Texas Land Title Association to adopt a Schedule of Basic Premium Rates for Title Insurance for the next calendar year and subsequent years until changed, and in so doing consider

the expense and loss experience of the industry so as to establish a rate which is reasonable to the public and nonconfiscatory to title insurance companies and title insurance agents.

Item 2000-34 - Submission by Texas Land Title Association to amend Rate Rule R-11, Mortgagee Policy Endorsement.

Item 2000-35 - Submission by Texas Land Title Association to adopt a new rate rule (R-__) establishing premiums for the proposed new Restrictions, Encroachments, Minerals Endorsement.

Item 2000-36 - Submission by Texas Land Title Association to adopt new Rate Rule R-27, Texas Residential Limited Coverage Residential Junior Mortgagee Policy.

Item 2000-37 - Submission by Stewart Title Guaranty Company to amend Rate Rule R-16, Amendment of Exception to Area and Boundaries.

Item 2000-38 -Submission by Stewart Title Guaranty Company to adopt a new rate rule (R-__) establishing a premium for the proposed new Residential Homeowner's Endorsement.

Item 2000-39 - Submission by Office of Public Insurance Counsel to adopt a new procedural rule concerning proposed reissue rates (P-__).

Item 2000-40 - Submission by Office of Public Insurance Counsel to adopt a new rate rule concerning reissue rates (R-__).

Item 2000-41 - Submission by Office of Public Insurance Counsel to amend Rate Rule R-5 to address reissue rates.

Item 2000-42 -Submission by Office of Public Insurance Counsel to amend Rate Rule R-16 regarding area and boundaries.

Item 2000-43 - Submission by Texas Department of Insurance to amend Rate Rule R-2 to address tax free exchanges under Internal Revenue Code §1031.

In the Ratemaking Phase the parties shall consider and provide evidence on all relevant and necessary points, including but not limited to:

1. The impact of changing property values and sales prices from 1981 through 1999 on title premium revenues, independent of changes in title premium rates.

2. The impact of changing numbers of title insurance transactions from 1981 through 1999 on title premium revenues and expenses, independent of title premium rates, with reference to the separate experience of underwriters, affiliated agents, independent agents and direct agent operations and with reference to changes in different types of transactions (original, refinance, residential, commercial).

3. The annual growth in total title agent and title underwriter expenses from 1981 through 1999 generally and in comparison to: premium growth; relevant measures of inflation, such as the consumer price index or one or more of its sub-indices; or any other relevant measure. Reference the separate experience of underwriters, affiliated agents, independent agents and direct agent operations.

4. Factors and forces causing title agent and title underwriter expenses to grow at annual rates greater than, equal to or less than relevant annual rates of inflation from 1981 to the present, with reference to the separate experience of underwriters, affiliated agents, independent agents and direct agent operations.

5. The historical and projected future impact of increasing automation on title insurance premiums, expenses, losses and profitability, with reference to the separate experience of underwriters, affiliated agents, independent agents and direct agent operations.

6. The historical and projected future impact of consolidation of title insurers and title agents within the title insurance industry including title insurer and title agent mergers and acquisitions, as well as the effect of failures and start-ups on title insurance premiums, expenses, losses and profitability.

7. The changes in number of market participants by type of market and type of participants (underwriters, affiliate agents, independent agents and direct agent operations), from 1981 to the present in the aggregate and by county, including analysis of the causes and impacts of changes in the numbers over time.

8. The impact of the phenomenon known as reverse competition, generally described as competition which has the effect of raising rather than lowering prices to consumers because competitive efforts on the part of insurers and agents are directed towards the "producers" of business (realtors, real estate developers, lenders, attorneys, etc.) rather than the ultimate consumers of title insurance. Reference structural market incentives for increases in the number of market participants independent of changes in the value of services provided to consumers, excessive promotional and other acquisition expenses, and rebates.

9.The continuing relevance of the 1986 report of the title insurance advisory group.

10. The degree to which expenses are fixed or variable in relation to premium volume with reference to type or size of entity (underwriters, affiliated agents, independent agents and direct agent operations) and the type of transaction (original, refinance, residential, commercial).

11. Alternative ratemaking methodologies which consider the impact of changes in property values, the number of transactions and any other relevant factors on premium, expenses, losses and profitability. For example, consider the projection of future expenses and premium separately with specific adjustments for expense inflation, number of transactions and change in property values.

12. Alternative methodologies for limiting overall expenses so as to effectively disallow the portion of reported title industry expenses reasonably associated with the impact of reverse competition.

13. Alternative projections of losses, including simple linear and exponential trends and models which incorporate additional independent variables.

14. Alternative title insurance profit models.

15. Alternative methodologies for determining an appropriate split of title premium between title agents and underwriters.

16. The impact of the premium split, changed or not, on future title premiums, with reference to any variations in impact depending upon the ratemaking methodology employed.

17. The reasonableness of including or excluding, in the determination of an appropriate split of title premium between title agents and underwriters, the amount of expenses disallowed in determining the overall rate level.

18. The appropriateness of different agent/underwriter revenue split percentages with reference to the revenue and revenue requirements of large versus small volume title agents and of urban versus rural title agents.

19. The comparison of the cost to consumers for title insurance in Texas to the cost to consumers for title insurance in other states. In this comparison, costs for the title search, abstracting and examination prior to closing; the closing or settlement fee; and any post closing certification or abstract costs should be considered.

20. The impact which profits earned on escrow functions, tax certificates, recording fees, and other miscellaneous charges should have in establishing title insurance profit margins.

21. The effect on rates of removing non-recurring expenses, such as those related to Y2K compliance, and an estimate of the amount of those non-recurring expenses.

Commissioner's Policies

The commissioner's policies regarding the setting of rates for title insurance provided for under Art. 9.07, Texas Insurance Code are set out below. This policy statement, however, is not intended to limit the type of evidence a party may offer at the hearing. The pertinent commissioner's policies are as follows:

It is the commissioner's policy to consider all relevant evidence and issues in making a determination of rates. To ensure a complete record, the commissioner shall:

(a) take official notice of Commissioner's Order 00-0534 dated May 15, 2000 and entitled "In the Matter of the 1998 Texas Title Insurance Biennial Rate Hearing Docket Number 2394."

(b) take official notice of Commmisioner's Order 98-0620 dated May 27, 1998 and entitled "In the Matter of the 1996 Texas Title Insurance Biennial Rate Hearing Docket Number 2279."

(c) ensure that exhibits accompanying testimony from the parties' witnesses, including their underlying work papers, are submitted and are made available in both paper and electronic format. The format should be 3.5 inch high density diskette in a DOS or Windows spreadsheet or other format readable by a machine running DOS or Windows. Parameters, assumptions and references to underlying data should be identifiable in the electronic exhibits.

(d) take official notice of the 1986 report of the title insurance advisory group.

Motions for Admission as a Party to Ratemaking Phase

Anyone who wishes to participate in the hearing as a party for the ratemaking phase must file a motion for admission as a party by 5:00 p.m. on November 9, 2000.

Pre-Hearing Conference

An initial pre-hearing conference will be held before the General Counsel of the Department at 1:00 p.m. on November 28, 2000, in room 102 of the first floor of the William P. Hobby, Jr. State Office Building, 333 Guadalupe St., Austin, Texas 78701. The pre-hearing conference will be held for the following purposes:

(1) ruling on the motions for admission of parties; and,

(2) such other matters as may aid in the simplification of the proceedings.

Subsequent pre-hearing conferences will be scheduled as necessary to rule on other matters as may aid in the simplification of the proceedings.

Conduct of the Hearing

Each page of any exhibit offered in evidence at a hearing before the Commissioner of Insurance, including prefiled testimony, must be numbered consecutively at the center of the bottom margin, be on 81/2" by 11" paper, and must be three-hole-punched along the left margin. The front page of each exhibit should indicate that the exhibit would be part of the record of a public hearing before the Commissioner of Insurance and should identify the subject of the hearing, the docket number, the date of the hearing, and the party offering the exhibit. On the front page, the party offering the exhibit should also describe the exhibit and leave a space for numbering the exhibit. For example:

Public Hearing before the Department of Insurance

Subject of Hearing:

Docket No. xxxx

Date: _____

Party: _____

Exhibit # _____

Description of Exhibit _____

Parties offering exhibits into evidence at the hearing should be prepared with sufficient copies of each proposed exhibit to furnish the following:

1.the original exhibit, which will be tendered to the Commissioner for marking and retention for the official record, after which the attorneys shall use an exact photocopy of such marked exhibit in the examination of the witness; and

2. one copy each for every other party admitted to the hearing; and

3. six copies to be filed with the Office of Chief Clerk of TDI.

All deadlines in this notice are subject to change at the Commissioner's discretion to the extent permitted by statute and rule.

TRD-200007421
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: October 20, 2000

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Grayhawk Financial and Benefits Services, Inc., a domestic third party administrator. The home office is Addison, Texas.

Application for admission to Texas of Metro Care, L.L.C., a foreign third party administrator. The home office is Rockville, Maryland.

Application for admission to Texas of MSaver Resources, L.L.C., a foreign third party administrator. The home office is Wilmington, Delaware.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200007532
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: October 25, 2000

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Lamar University

Faculty Salary Equity RFP

Lamar University in Beaumont, Texas is submitting this Pre-Proposal Announcement in order to search for any consulting firms interested

in providing Lamar with professional services in Faculty Salary Equity. If you are interested in receiving an RFP (Request for Proposal) with detailed specifications and criteria, please contact Jack Tenner at (409) 880-1783 or tennejd@lub002.lamar.edu or fax a request to (409) 880-8247, attention: Jack Tenner. Deadline for making requests for RFP is November 20, 2000 and please include your mailing address with reference to: RFP12152000. **Note: All RFP's will be mailed on November 21, 2000 and proposals returned by December 15, 2000 by 5:00 p.m.**

TRD-200007422
Mike Ferguson, Jr.
Vice President for Finance and Operations
Lamar University
Filed: October 20, 2000

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Texas Lottery Commission

Instant Game No. 180 - "12 WAYS TO CELEBRATE"

1.0 Name and Style of Game.

A. The name of Instant Game No. 180 is "12 WAYS TO CELEBRATE". The play style of the game is "Get 2 like symbols, win prize shown for that game."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 180 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 180.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: holly symbol, snowman symbol, ornament symbol, flake symbol, bell symbol, tree symbol, dove symbol, cap symbol, drum symbol, sack symbol, angel symbol, cane symbol, fire symbol, cookie symbol, present symbol, light symbol, bow symbol, wreath symbol, horn symbol, stocking symbol, candle symbol, deer symbol, sleigh symbol, star symbol, $1.00, $2.00, $3,00, $5.00, $10.00, $20.00, $24.00, $25,00, $50.00, $60.00, $100, $500, $1,000, $10,000, and $50,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows: Table 1 of this section

graphic

Figure 1:16 TAC GAME NO. 180 - 1.2D

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are: Table 2 of this section.

graphic

Figure 2:16 TAC GAME NO. 180 - 1.2E

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000 0000 00000.

G. Low-Tier Prize - A prize of $5,00, $8.00, $10.00, $12.00, $20.00 or $24.00.

H. Mid-Tier Prize - A prize of $50.00, $60.00, $75.00, $100, or $500.

I. High-Tier Prize - A prize of $1,000, $10,000 or $50,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (180), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 124 within each pack. The format will be: 180-000 0001-000.

L. Pack - A pack of "12 WAYS TO CELEBRATE" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one. Tickets 000 will be on the top page and ticket 001 will be on the next page and so forth with ticket 74 on the last page.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "12 WAYS TO CELEBRATE" Instant Game No. 180 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "12 WAYS TO CELEBRATE" Instant Game is determined once the latex on the ticket is scratched off to expose thirty-six (36) play symbols. If a player gets 2 like symbols, the player wins the prize shown for that game. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 36 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 36 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 36 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 36 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate games on a ticket (in any order).

C. No duplicate non-winning prize symbols on a ticket.

D. No more than two like non-winning play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "12 WAYS TO CELEBRATE" Instant Game prize of $5.00, $8.00, $10.00, $12.00, $20.00, $24.00, $50.00, $60.00, $75.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $60.00, $75.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "12 WAYS TO CELEBRATE" Instant Game prize of $1,000, $10,000 or $50,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "12 WAYS TO CELEBRATE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "12 WAYS TO CELEBRATE" Instant Game, the Texas Lottery shall deliver to an

adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "12 WAYS TO CELEBRATE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,040,000 tickets in the Instant Game No. 180. The expected number and value of prizes in the game are as follows: Table 3 of this section

graphic

Figure 3:16 TAC GAME NO. 180- 4.0

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 180 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 180, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200007502
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 25, 2000

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Instant Game No. 181 - "Gold Fever"

1.0 Name and Style of Game.

A. The name of Instant Game No. 181 is "GOLD FEVER". The play style is "Match any of "Your Numbers" to either "Winning Number," win prize shown for that number. Get a "gold bar" symbol and win 5 times the amount for that prize."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 181 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 181.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, gold bar symbol, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000, and $5,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows: Table 1 of this section

graphic

Figure 1:16 TAC GAME NO. 181 - 1.2D

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are: Table 2 of this section.

graphic

Figure 2:16 TAC GAME NO. 181 - 1.2E

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000 0000 00000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $100.

I. High-Tier Prize - A prize of $1,000 or $5,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (181), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 181-000 0001-000.

L. Pack - A pack of "GOLD FEVER" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five. Tickets 000 and 004 will be on the top page and ticket 005 and 009 will be on the next page and so forth with ticket 245 and 249 on the last page.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "GOLD FEVER" Instant Game No. 181 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "GOLD FEVER" Instant Game is determined once the latex on the ticket is scratched off to expose ten (10) play symbols. If a player matches any of "Your Numbers" to either "Winning Number," the player wins the prize shown for that number. If a player gets a "gold bar" symbol, the player wins 5 times the amount for that prize. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 10 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. No duplicate non-winning play symbols on a ticket.

B. No duplicate non-winning prize symbols on a ticket.

C. Consecutive non-winning tickets will not have identical play data, spot for spot.

D. No duplicate Winning Number symbols on a ticket.

E. The Gold symbol will never appear more than once on a ticket.

F. The Gold symbol will be a win only as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "GOLD FEVER" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "GOLD FEVER" Instant Game prize of $1,000 or $5,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "GOLD FEVER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "GOLD FEVER" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "GOLD FEVER" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 60,000,000 tickets in the Instant Game No. 181. The expected number and value of prizes in the game are as follows: Table 3 of this section

graphic

Figure 3:16 TAC GAME NO. 181- 4.0

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 181 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 181, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

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Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 25, 2000

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Instant Game No. 195 - "TRIPLE ACTION"

1.0 Name and Style of Game.

A. The name of Instant Game No. 195 is "TRIPLE ACTION". The play style of Game 1 is "Win prize shown each time YOUR CARD beats the DEALER'S CARD. Get a "joker" symbol and automatically win triple the prize shown. The play style of Game 2 is "Match either HOUSE CHIP to any of YOUR CHIPS, win prize shown for that chip." Reveal a "$" symbol in the YOUR CHIPS location and win TRIPLE the prize amount for that chip. The play style of Game 3 is "Match Your Lucky Dollar Amounts to the Prize Amount in the center and win that prize. Get a "star" symbol and win TRIPLE the Prize Amount in the center."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 195 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 195.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, A, K, Q, J, Joker symbol, star symbol, dollar symbol, $1.00, $2.00, $3,00, $4.00, $5.00, $10.00, $24.00, $50.00, $100, $500, $1,000, and $50,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows: Table 1 of this section

graphic

Figure 1:16 TAC GAME NO. 195 - 1.2D

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are: Table 2 of this section.

graphic

Figure 2:16 TAC GAME NO. 195 - 1.2E

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000 0000 00000.

G. Low-Tier Prize - A prize of $3.00, $4.00, $5.00, $10.00, $24.00.

H. Mid-Tier Prize - A prize of $100 or $500.

I. High-Tier Prize - A prize of $1,000 or $50,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (195), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 124 within each pack. The format will be: 195-000 0001-000.

L. Pack - A pack of "TRIPLE ACTION" Instant Game tickets contain 125 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one. Ticket 000 will be on the top page and ticket 001 will be on the next page and so forth with ticket 124 on the last page.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE ACTION" Instant Game No. 195 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLE ACTION" Instant Game is determined once the latex on the ticket is scratched off to expose twenty-seven (27) play symbols. In Game 1, if any of Your Cards beats the Dealer's Card, the player wins the prize shown. If the player gets a "joker" symbol, the player automatically wins triple the prize shown. In Game 2, if the player matches either House Chip to any of Your Chips, the player wins the prize shown. If the player reveals a "dollar" symbol in the Your Chips location, the player wins triple the prize amount for that chip. In Game 3, if the player matches Your Lucky Dollar Amounts to the Prize Amount in the center, the player wins that prize. If the player gets a "star" symbol, the player wins triple the Prize Amount in the center. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 27 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 27 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 27 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 27 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The triple feature will only appear in each game as dictated by the prize structure.

C. Not all prize symbols can win in each game but each are allowed to appear in all locations when it is a non-winning symbol.

D. No duplicate non-winning card symbols on a ticket on Game 1.

E. No duplicate non-winning prize symbols in Game 2.

F. No duplicate non-winning Your Chips play symbols on a ticket in Game 2.

G. No duplicate House Chips play symbols on a ticket in Game 2.

H. No duplicate non-winning Your Lucky Dollar amounts in Game 3.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE ACTION" Instant Game prize of $3.00, $4.00, $5.00, $10.00, $24.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "TRIPLE ACTION" Instant Game prize of $1,000, or $50,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE ACTION" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLE ACTION" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLE ACTION" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,040,000 tickets in the Instant Game No. 195. The expected number and value of prizes in the game are as follows: Table 3 of this section

graphic

Figure 3:16 TAC GAME NO. 195- 4.0

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 195 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 195, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200007504
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 25, 2000

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Instant Game No. 215 - "Break the Bank"

1.0 Name and Style of Game.

A. The name of Instant Game No. 215 is "BREAK THE BANK." The play style of Game 1 is "If any of Your Numbers match one of the 3 Lucky Numbers, win prize shown for that number." The play style of Game 2 is "Get a "dollar bill stack" symbol and win that prize automatically."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 215 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 215.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, dollar bill stack, $1.00, $2.00, $4.00, $6.00, $10.00, $20.00, $50.00, $200, $1,000, $3,000, and $30,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows: Table 1 of this section

graphic

Figure 1:16 TAC GAME NO. 215 - 1.2D

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are: Table 2 of this section.

graphic

Figure 2:16 TAC GAME NO. 215 - 1.2E

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000 0000 00000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $200.

I. High-Tier Prize - A prize of $1,000, $3,000, or $30,000.

J. Bar Code - A 19 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (215), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will b: 215-0000001-000.

L. Pack - A pack of "BREAK THE BANK" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 and 001 will be on the top page and ticket 002 and 003 will be on the next page and so forth with ticket 248 and 249 on the last page.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "BREAK THE BANK" Instant Game No. 215 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "BREAK THE BANK" Instant Game is determined once the latex on the ticket is scratched off to expose nineteen (19) play symbols. In Game 1, if any of "Your Numbers" match one of the 3 "Lucky Numbers," the player wins prize shown for that number. In Game 2, If the player gets a "dollar bill stack" symbol, the player wins that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 19 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 19 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 19 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 19 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Non-winning prize symbols will not match a winning prize symbol on a ticket.

C. No duplicate Lucky Numbers on a ticket.

D. There will be no correlation between the matching symbols and the prize amount.

E. The auto win symbol will never appear more than once on a ticket.

F. No duplicate non-winning play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "BREAK THE BANK" Instant Game prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00, $50.00 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "BREAK THE BANK" Instant Game prize of $1,000, $3,000 or $30,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "BREAK THE BANK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "BREAK THE BANK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "BREAK THE BANK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 50,160,000 tickets in the Instant Game No. 215. The expected number and value of prizes in the game are as follows: Table 3 of this section

graphic

Figure 3:16 TAC GAME NO. 215- 4.0

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 215 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 215, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200007505
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 25, 2000

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Instant Game No. 220 - "TRIPLE BLACKJACK"

1.0 Name and Style of Game.

A. The name of Instant Game No. 220 is "TRIPLE BLACKJACK". The play style of the game is "If Your Hand beats Their Hand, win prize shown for that hand. Reveal a "$$$" symbol in Your Hand and win triple the prize shown for that hand automatically."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 220 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 220.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, $$$, $1.00, $2.00, $3,00, $5.00, $10.00, $15.00, $20.00, $30.00, $60.00, $200, $1,000, and $21,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows: Table 1 of this section

graphic

Figure 1:16 TAC GAME NO. 220 - 1.2D

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are: Table 2 of this section.

graphic

Figure 2:16 TAC GAME NO. 220 - 1.2E

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000 0000 00000.

G. Low-Tier Prize - A prize of $2.00, $3.00, $5,00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $30.00, $60.00 or $200.

I. High-Tier Prize - A prize of $1,000, or $21,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (220), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 220-0000001-000.

L. Pack - A pack of "TRIPLE BLACKJACK" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 and 001 will be on the top page and ticket 002 and 003 will be on the next page and so forth with tickets 248 and 249 on the last page.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE BLACKJACK" Instant Game No. 220 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TRIPLE BLACKJACK" Instant Game is determined once the latex on the ticket is scratched off to expose twenty-four (24) play symbols. If "YOUR HAND" beats "THEIR HAND", the player wins the prize shown for that hand. If the player reveals a "$$$" symbol in "YOUR HAND", the player wins triple the prize shown for that hand automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 24 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 24 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 24 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 24 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. No duplicate non-winning Hands on a ticket.

B. No duplicate non-winning prize symbols on a ticket.

C. Consecutive non-winning tickets will not have identical play data, spot for spot.

D. No ties in a hand.

E. The tripler symbol ($$$) will never appear more than once on a ticket.

F. The tripler symbol ($$$) will appear only on intended winning tickets.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE BLACKJACK" Instant Game prize of $2.00, $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $60.00, or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $60.00 or $200 ticket. In the event the Texas Lottery Retailer

cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "TRIPLE BLACKJACK" Instant Game prize of $1,000, or $21,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE BLACKJACK" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TRIPLE BLACKJACK" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TRIPLE BLACKJACK" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,040,000 tickets in the Instant Game No. 220. The expected number and value of prizes in the game are as follows: Table 3 of this section

graphic

Figure 3:16 TAC GAME NO. 220- 4.0

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 220 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 220, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200007507
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 25, 2000

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Instant Game No. 221 - Rake in the Cash

1.0 Name and Style of Game.

A. The name of Instant Game No. 221 is "RAKE IN THE CASH". The play style of the game is "Match any of Your Numbers to either Lucky Number, win prize for that number. Reveal a "money bags" symbol and win triple the prize shown.

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 221 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 221.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, money bag, $1.00, $2.00, $3,00, $5.00, $10.00, $15.00, $20.00, $30.00, $60.00, $200, $1,000, and $10,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows: Table 1 of this section

graphic

Figure 1:16 TAC GAME NO. 221 - 1.2D

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are: Table 2 of this section.

graphic

Figure 2:16 TAC GAME NO. 221 - 1.2E

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000 0000 00000.

G. Low-Tier Prize - A prize of $2.00, $3.00, $5,00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $30.00, $60.00 or $200.

I. High-Tier Prize - A prize of $1,000, or $10,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (221), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 221-000 0001-000.

L. Pack - A pack of "RAKE IN THE CASH" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 and 001 will be on the top page and ticket 002 and 003 will be on the next page and so forth with tickets 248 and 249 on the last page.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RAKE IN THE CASH" Instant Game No. 221 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RAKE IN THE CASH" Instant Game is determined once the latex on the ticket is scratched off to expose twenty-two (22) play symbols. If a player matches any of "Your Numbers" to either "Lucky Number", the player wins the prize for that number. If a player reveals a "money bags" symbol, the player wins triple the prize shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 22 Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. No duplicate non-winning Your Number play symbols on a ticket.

B. No duplicate non-winning prize symbols on a ticket.

C. Consecutive non-winning tickets will not have identical play data, spot for spot.

D. No duplicate Lucky Number symbols on a ticket.

E. The tripler symbol will never appear more than once on a ticket.

F. The tripler symbol will appear only on intended winning tickets.

2.3 Procedure for Claiming Prizes.

A. To claim a "RAKE IN THE CASH" Instant Game prize of $2.00, $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $60.00, or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $30.00, $60.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "RAKE IN THE CASH" Instant Game prize of $1,000, or $10,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RAKE IN THE CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RAKE IN THE CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RAKE IN THE CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,040,000 tickets in the Instant Game No. 221. The expected number and value of prizes in the game are as follows: Table 3 of this section

graphic

Figure3:16 TAC GAME NO. 221- 4.0

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 221 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 221, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200007506
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 25, 2000

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Texas Department of Mental Health and Mental Retardation

Notice of Request for Applications

On November 6, 2000, the Texas Department of Mental Health and Mental Retardation and the Texas Commission on Alcohol and Drug Abuse (collectively referred to as the "State") will issue a Request for Applications (RFA) from eligible behavioral health organizations (BHO) to provide or arrange for the provision of mental health and chemical dependency treatment services in the NorthSTAR Program.

The NorthSTAR program is a managed behavioral healthcare program serving Medicaid eligible and medically indigent individuals residing in the service area of Dallas, Collin, Hunt, Ellis, Navarro, Rockwall and Kaufman counties. The NorthSTAR contract based on this RFA will be a full-risk capitated arrangement between the State and the selected BHO.

Interested persons may obtain a copy of the complete RFA beginning at 1:00 p.m. on November 6, 2000, from the following website: http://www.tcada.state.tx.us/NorthSTAR/ or by contacting: Dave Wanser, Ph.D., NorthSTAR Director, Texas Department of Mental Health and Mental Retardation, 909 West 45th Street, Austin, Texas, 78751, or by calling Becky Balfour, NorthSTAR Administrative Assistant, at (512) 206-4675.

Any BHO intending to submit an application must first submit a Letter of Intent by November 20, 2000, in accordance with the RFA. A potential applicant's conference will be held November 17, 2000, at the time and place specified in the RFA.

Potential applicants may submit questions pertaining to the RFA in writing to Dave Wanser at the address shown above. All questions must be received by Dave Wanser no later than 5:00 p.m. on November 28, 2000.

Applications must be received by the State in accordance with the RFA no later than 5:00 p.m., January 17, 2001.

This notice is also referenced in the Electronic State Business Daily at http://www.texas-one.org/.

TRD-200007496
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: October 25, 2000

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Public Hearing Notice on Reimbursement Rates for Rehabilitative Services

The Health and Human Services Commission and the Texas Department of Mental Health and Mental Retardation will conduct a joint public hearing to receive public comment on the proposed reimbursement rates for rehabilitative services effective January 1, 2001 through December 31, 2001. The joint hearing will be held in compliance with Title 1, Texas Administrative Code, Chapter 355, Subchapter F, §355.702(h), which requires a public hearing on proposed reimbursement rates for medical assistance programs.

The public hearing will be held on Monday, November 13, 2000, at 9:30 am in the auditorium of the TDMHMR Central Office building (Building 2) at 909 West 45th Street, Austin, Texas, 78751.

Written comments may be submitted to MH & MR Services Rate Setting, Health and Human Services, c/o Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas, 78711-2668, or faxed to (512) 206-5693. Hand deliveries will be accepted at 909 West 45th Street, Austin, Texas 78751. Comments must be received by noon on Monday, November 13, 2000. Interested parties may obtain a copy of the reimbursement briefing package by calling the MH & MR Services Rate Setting at (512) 206-5753.

Persons requiring an interpreter for the deaf or hearing impaired or other accommodation should contact Tom Wooldridge by calling (512) 206-5753 or the TDY phone number of Texas Relay, which is 1-800-735-2988, at least 72 hours prior to the hearing.

TRD-200007529
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: October 25, 2000

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Public Hearing Notice on Reimbursement Rates for Services Coordination

The Health and Human Services Commission and the Texas Department of Mental Health and Mental Retardation will conduct a joint public hearing to receive public comment on the proposed extension of current reimbursement rates for providing service coordination effective September 1, 2000, through December 31, 2000 and proposed new reimbursement rates for service coordination effective January 1, 2001 through December 31, 2001. The joint hearing will be held in compliance with Title 1, Texas Administrative Code, Chapter 355, Subchapter F, §355.702(h), which requires a public hearing on proposed reimbursement rates for medical assistance programs.

The public hearing will be held on Monday, November 13, 2000, at 8:30 am in the auditorium of the TDMHMR Central Office building (Building 2) at 909 West 45th Street, Austin, Texas, 78751.

Written comments may be submitted to MH & MR Services Rate Setting, Health and Human Services, c/o Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas, 78711-2668, or faxed to (512) 206-5693. Hand deliveries will be accepted at 909 West 45th Street, Austin, Texas, 78751. Comments must be received by noon on Monday, November 13, 2000. Interested parties may obtain a copy of the reimbursement briefing package by calling the MH & MR Services Rate Setting at (512) 206-5753.

Persons requiring an interpreter for the deaf or hearing impaired or other accommodation should contact Tom Wooldridge by calling (512) 206-5753 or the TDY phone number of Texas Relay, which is 1-800-735-2988, at least 72 hours prior to the hearing.

TRD-200007530

Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: October 25, 2000

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Texas Natural Resource Conservation Commission

Correction of Error

The Texas Natural Resource Conservation Commission (TNRCC) proposed the repeal of 30 TAC §7.103, Memorandum of Understanding regarding aquaculture. The notice appeared in the October 20, 2000, *Texas Register* (25 TexReg 10439).

Due to an error in the preamble, the deadline for comments about the proposal was incorrectly published as "November 13". The correct date is November 20, 2000. On page 10441 under the subheading "SUBMITTAL OF COMMENTS" the sentence should read as follows.

"All comments must be received by 5:00 p.m. on November 20, 2000 and should reference Rule Log Number 1999-035-007-WT."

TRD-200007549

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Correction of Error

The Texas Natural Resource Conservation Commission (TNRCC) published a Notice of Public Hearing, concerning chlordane in Clear Creek . The notice appeared in the October 20, 2000, *Texas Register* (25 TexReg 10585). The notice contained an error.

On page 10586, in the second from last paragraph, second sentence, the reference number is incorrect. The sentence should read as follows.

All comments must be received by 5:00 p.m., November 20, 2000, and should reference 2000-1129-TML."

In the last sentence of the same paragraph, the commission's web site is listed incorrectly. The sentence should read as follows.

"Copies of the document summarizing these proposed TMDLs can be obtained via the commission's Web Site at www.tnrcc.state.tx.us/water/quality/tmdl, or by calling Patrica Durón, at (512) 239-6087.

TRD-200007550

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Enforcement Orders

A default order was entered regarding MOHAMMAD ISLAM, SHAZIA SHAHAB AND SYED RAZI DBA B & L FOOD STORE, Docket No. 1998-1281-PST-E; SOAH Docket No. 582-99-2087 on October 5, 2000, assessing $7,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting William Puplampu, Staff Attorney at (512) 239-0677, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WINNETT OIL COMPANY, GERALD WINNETT AND FRANCILLE WINNETT, Docket No. 1997-1094-PST-E; SOAH Docket No. 1997-1094-PST-E on October 17, 2000, assessing $34,715 and $42,286 in administrative penalties with $45,686 deferred.

Information concerning any aspect of this order may be obtained by contacting Richard O'Connell, Staff Attorney at (512) 239-5528, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding DALWORTH OIL CO., INC., Docket No. 1998-0406-PST-E; SOAH Docket No. 582-99-2449 on October 10, 2000, assessing $8,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David A. Speaker, Staff Attorney at (512) 239-2548, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding RICHARD W. SMITH, JR., Docket No. 1998-0233-MSW-E; SOAH Docket No. 582-99-2891on October 06, 2000, assessing $14,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Richard O'Connell, Staff Attorney at (512) 239-3400, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HARTLEY WATER SUPPLY CORPORATION, Docket No. 1997-1085-PWS-E; PWS No. 1030010 on October 5, 2000, assessing $7,563 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Joshua Olszewski, Staff Attorney at (512) 239-3645, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NICHOLAS HALLINAN, Docket No. 1998-0464-SLG-E; No TNRCC ID No. on October 5, 2000, assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Sumner, Staff Attorney at (512) 239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PAUL KEEFER JR., Docket No. 1999-0530-MSW-E; TNRCC MSW Unauthorized Site No. 455040097 on October 9, 2000, assessing $15,000 in administrative penalties with $14,400 deferred.

Information concerning any aspect of this order may be obtained by contacting John Sumner, Staff Attorney at (512) 239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Richard Dinscore, Docket No. 1999-1386-OSS-E; SOAH Docket No. 582- 00-1285 on October 9, 2000, assessing $844 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting William Puplampu, Staff Attorney at (512) 239-2029, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF NOME, Docket No. 2000-0195-PWS-E; PWS No. 1230039 on October 9, 2000, assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jaime Garza, Enforcement Coordinator at (512) 239-1406, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding THE OUTPOST, INC. & B&L, LLC DBA NANNIE'S BISCUIT & BAKERY, Docket No. 2000-0357-PWS-E; PWS No. 0750035 on October 9, 2000, assessing $1,250 in administrative penalties with $250 deferred.

Information concerning any aspect of this order may be obtained by contacting Jaime Garza, Enforcement Coordinator at (512) 239-1406, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SOUTH ROAD WATER SUPPLY CORPORATION, Docket No. 2000-0214-PWS-E; PWS No. 0270028 on October 9, 2000, assessing $563 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Mead, Enforcement Coordinator at (512) 239-6010, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding U.S. LIQUIDS OF TEXAS, INC., Docket No. 2000-0326-SLG-E; Sludge Transporter Registration No. 22718 on October 9, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting David VanSoest, Enforcement Coordinator at (512) 239-0468, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding R.B. WICKER TIRE & RUBBER COMPANY, Docket No. 1999- 1466-AIR-E; TNRCC Air Account No. EE-1224-M on October 9, 2000, assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Booker Harrison, Staff Attorney at (512) 239-4113, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ORTEGA CONSTRUCTION COMPANY, INCORPORATED, Docket No. 1999-0887-AIR-E; Air Account No. EE-1854-T on October 9, 2000, assessing $3,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Booker Harrison, Staff Attorney at (512) 239-4113, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MITCHELL GAS SERVICES, L.P., Docket No. 2000-0387-AIR- E; Air Account No. ND-0063-F on October 9, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Kara Dudash, Enforcement Coordinator at (915) 698-6104, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BORAL BRICKS, INCORPORATED, Docket No. 2000-0362- AIR-E; Air Account No. RL-0010-N on October 9, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BORGER ENERGY ASSOCIATES, L.P., Docket No. 2000-0359- AIR-E; Air Account No. HW-0081-I on October 9, 2000, assessing $13,750 in administrative penalties with $2,750 deferred.

Information concerning any aspect of this order may be obtained by contacting Shawn Hess, Enforcement Coordinator at (806) 353-9251, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LA PORTE METHANOL COMPANY, L.P., Docket No. 2000- 0287-AIR-E; Air Account No. HX-2302-N on October 9, 2000, assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Rohit Bali, Enforcement Coordinator at (713) 767-3750, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MILLENNIUM RAIL, INC., Docket No. 1999-1230-AIR-E; Account No. HH-0008-M on October 9, 2000, assessing $24,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Carolyn Lind, Enforcement Coordinator at (903) 535-5145, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MITCHELL GAS SERVICES, L.P., Docket No. 2000-0263-AIR- E; Air Account No. CN-0010-D on October 9, 2000, assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Mark Newman, Enforcement Coordinator at (915) 655-9479, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NATURAL GAS PIPELINE CO. OF AMERICA, Docket No. 2000-0338-AIR-E; Air Account No. JE-0157-G on October 9, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Susan Kelly, Enforcement Coordinator at (409) 898-3838, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TEXAS CRUDE ENERGY, INC., Docket No. 2000-0431-AIR-E; Air Account No. NE-0062-T on October 9, 2000, assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Gary McDonald, Enforcement Coordinator at (361) 825-3122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding STERLING CHEMICALS INC., Docket No. 2000-0479-IHW-E; SWR No. 30285 on October 9, 2000, assessing $15,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Sherman, Enforcement Coordinator at (713) 767-3600, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding STOLTHAVEN HOUSTON, INC., Docket No. 2000-0358-IWD- E; TPDES No. 03129 on October 9, 2000, assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KMCO, INC., Docket No. 2000-0514-MWD-E; TPDES Permit No. 02712-000 (formerly WQ Permit No. 02712-000) on October 9, 2000, assessing $2,700 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michelle Harris, Enforcement Coordinator at (512) 239-0492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding THE CITY OF MARLIN, Docket No. 2000-0121-MWD-E; WQ Permit No. 10110-002 on October 9, 2000, assessing $15,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Karen Berryman, Enforcement Coordinator at (512) 239-2172, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF ROARING SPRINGS, Docket No. 1999-0653-MWD-E; WQ Permit No. 10260-001 on October 9, 2000, assessing $1,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Brian Lehmkuhle, Enforcement Coordinator at (512) 239-4482, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WEST HARRIS COUNTY MUD NO. 17, Docket No. 2000-0342- MWD-E; WQ Permit No. 12247-001 on October 9, 2000, assessing $3,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michelle Harris, Enforcement Coordinator at (512) 239-0492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding GULSHAN ENTERPRISES, INC., Docket No. 1998-0107-PST-E; TNRCC ID Nos. 39647 and 39714 on October 9, 2000, assessing $16,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gloria Stanford, Enforcement Coordinator at (512) 239-1871, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CIRCLE BAR AUTO/TRUCK PLAZA, LLC, Docket No. 2000- 0190-PST-E; PST Facility ID No. 64553 on October 9, 2000, assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RUDOLPH'S INC., Docket No. 2000-0139-PST-E; Facility ID Nos. 30432, 30433, 30444, and 30436 on October 9, 2000, assessing $16,300 in administrative penalties with $3,260 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Baumgartner, Enforcement Coordinator at (361) 825-3312, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BORAL BRICKS, INCORPORATED, Docket No. 2000-0455- AIR-E; Air Account No. HH-0018-J on October 9, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HONDO CREEK CATTLE COMPANY, LTD, Docket No. 2000- 0279-AGR-E; WQ Permit No. NO 01497 on October 5, 2000, assessing $7,200 in administrative penalties with $1,440 deferred.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (512) 239-4493, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MR JOHN HAFLIGER DBA TIERRA BLANCA PROPERTIES, Docket No. 1999-0855-AGR-E; WQ Permit No. 03343 on October 5, 2000, assessing $5,500 in administrative penalties with $1,100 deferred.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (512) 239-4493, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CENTRAL BOWIE COUNTY WATER SUPPLY CORPORATION, Docket No. 2000-0136-PWS-E; PWS ID No. 0190024 on October 5, 2000, assessing $313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HALLIBURTON ENERGY SERVICES, INC., Docket No. 2000- 0333-PWS-E; PWS No. 1011560 on October 5, 2000, assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LOHN WATER SUPPLY CORPORATION, Docket No. 2000- 0334-PWS-E; PWS No. 1540002 on October 5, 2000, assessing $1,563 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NEW TOWN WATER CORPORATION, Docket No. 2000-0322- PWS-E; PWS No. 0450023 on October 5, 2000, assessing $1,563. in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GERALD S CALVERT AND RANDY RUSSELL DBA OAK RIDGE MOBILE HOME PARK, Docket No. 2000-0197-PWS-E; PWS No. 0200183 on October 5, 2000, assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding VV WATER SUPPLY SYSTEM, INC., Docket No. 2000-0061- PWS-E; PWS No. 0610052 on October 5, 2000, assessing $3,688 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JOHN LEININGER AND HARVEST FELLOWSHIP COMMUNITY CHURCH, Docket No. 1999-1550-EAQ-E; Program ID No. 1263 on October 5, 2000, assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Brian Lehmkuhle, Enforcement Coordinator at (512) 239-4482, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PEMARCO, INC., Docket No. 2000-0099-EAQ-E; Edwards Aquifer File Nos. 98092301 and 98092401 on October 5, 2000, assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at (512) 239-0572, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FRIEDE GOLDMAN OFFSHORE TEXAS, L.P., Docket No. 2000-0701-MLM-E; Air Account No. OC-0376-V; SWR Nos. 23492 and 81891, Enforcement ID Nos. 13697 and 13484 on October 5, 2000, assessing $29,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Richard O'Connell, Staff Attorney at (512) 239-5528, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF CORPUS CHRISTI, Docket No. 1999-1376-MLM-E; Account No. NE-0034-B; MSW Permit No. 423A on October 5, 2000, assessing $83,300 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Mead, Enforcement Coordinator at (512) 239-6010, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HERITAGE FINANCIAL GROUP, INC., Docket No. 1999-0592- MLM-E; PWS ID No. 1020061; WQ Permit No. 13522-001 on October 5, 2000, assessing $9,950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gilbert Angelle, Enforcement Coordinator at (512) 239-4489, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CAL-TEX LUMBER COMPANY, INC., Docket No. 2000-0053- AIR-E; Air Account No. NA-OO55-O on October 5, 2000, assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CHEVRON U.S.A. INCORPORATED, Docket No. 2000-0439- AIR-E; Air Account Nos. WC-0083-I and WC-0084-G on October 5, 2000, assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Tel Croston, Enforcement Coordinator at (512) 239-5717, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CLEMSA LUMBER COMPANY, Docket No. 1999-1564-AIR-E; Air Account No. AC-0051-B on October 5, 2000, assessing $17,500 in administrative penalties with $3,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Susan Kelley, Enforcement Coordinator at (409) 898-3838, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ECHO PRODUCTION, INC., Docket No. 2000-0464-AIR-E; Air Account No. HE-0012-I on October 5, 2000, assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Kara Dudash, Enforcement Coordinator at (915) 698-6104, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ENGINEERED CARBONS, INC, Docket No. 2000-0188-AIR-E; Air Account No. 0C-0020-R on October 5, 2000, assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laura Clark, Enforcement Coordinator at (409) 898-3838, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KELLY-MOORE PAINT COMPANY, INC., Docket No. 2000- 0227-AIR-E; Air Account No. TA-0203-D on October 5, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Wendy Penland, Enforcement Coordinator at (817) 588-5867, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LOUISIANNA-PACIFIC CORPORATION, Docket No. 2000- 0081-AIR-E; Air Account No. JC-0058-I; Air Permit No.22377 on October 5, 2000, assessing $5,625 in administrative penalties with $1,125 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy VanCleave, Enforcement Coordinator at (512) 239-0667, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding OIL PATCH SANDBLAST AND PAINT, LTD, Docket No. 2000-0015-AIR-E; Air Account No. HX-1323-M on October 5, 2000, assessing $8,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sheila Smith, Enforcement Coordinator at (512) 239-1670,

Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SAN MIGUEL ELECTRIC COOPERATIVE, INC., Docket No. 2000-0283-AIR-E; Air Account No. AG-OOO7-G on October 5, 2000, assessing $57,200 in administrative penalties with $11,440 deferred.

Information concerning any aspect of this order may be obtained by contacting Malcolm Ferris, Enforcement Coordinator at (210) 403-4061,Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SEA-DAN RANCHES, Docket No. 2000-0255-AIR-E; Air Account No. CB-0083-L on October 5, 2000, assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Gary McDonald, Enforcement Coordinator at (361) 825-3122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding STERICYCLE, INC., Docket No. 2000-0226-AIR-E; Air Account No. KB-0006-V on October 5, 2000, assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Wendy Penland, Enforcement Coordinator at (512) 239-6750, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding UNITED PETROLEUM TRANSPORTS, INC., Docket No. 2000- 0168-AIR-E; Air Account No. EE-1056-J on October 5, 2000, assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Corey Burke, Enforcement Coordinator at (512) 239-5259, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SOLUTIA, INC., Docket No. 2000-0304-IHW-E; SWR No. 30138; Permit No. HW-50189 on October 5, 2000, assessing $9,000 in administrative penalties with $1,800 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Sherman, Enforcement Coordinator at (713) 767-3600, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF ATLANTA, Docket No. 1999-1582-MWD-E; WQ Permit No. 10338-001; NPDES Permit No. TX0032344 on October 5, 2000, assessing $4,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BC UTILITIES INC, Docket No. 2000-0249-MWD-E; WQ Permit No. 11145-001; NPDES No. TX0067539 on October 5, 2000, assessing $11,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding THE LEROY AND DOROTHY BROWN FAMILY LIMITED PARTNERSHIP, Docket No. 2000-0285-MWD-E; TPDES Permit No. 11357-001 on October 5, 2000, assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Terry Murphy, Enforcement Coordinator at (512) 239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HARRIS COUNTY MUD NO. 150, Docket No. 2000-0106- MWD-E; WQ Permit No. 11863-001; NPDES Permit No. TX0072893 on October 5, 2000, assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF INGLESIDE, Docket No. 1999-1304-MWD-E; WQ Permit No. 10422-001; NPDES Permit No. TX0020401 on October 5, 2000, assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting John Mead, Enforcement Coordinator at (512) 239-6010, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF PEARLAND, Docket No. 1999-1488-MWD-E; WQ Permit No. 10134-002 on October 5, 2000, assessing $101,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF WINNSBORO, Docket No. 2000-0024-MWD-E; WQ Permit No. 10319-002; NPDES Permit No. TX0054658 on October 5, 2000, assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (512) 239-4493, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ORVEL CASEY, Docket No. 2000-0282-OSI-E; OSS Facility Installer ID No. OS6282 on October 5, 2000, assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Julia McMasters, Enforcement Coordinator at (512) 239-5839, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EVANS SYSTEMS, INC. DBA BOOGIE'S MINI MART, Docket No. 2000-0125-PST-E; PST Facility ID No. 0036871 on October 5, 2000, assessing $1,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Trina Lewison, Enforcement Coordinator at (713) 767-3607, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CRYSTAL BEACH CORPORATION, Docket No. 1999-1419- PST-E; PST Facility ID No.

0003909 on October 5, 2000, assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Carl Schnitz, Enforcement Coordinator at (512) 239-1892, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding AQUASOURCE UTILITY INC DBA COUNTRYSIDE ESTATES WASTEWATER TREATMENT FACILITY, Docket No. 2000-0090-MWD-E; WQ Permit No. 11249-001 on October 5, 2000, assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting Laura Clark, Enforcement Coordinator at (409) 898-3838, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200007482
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

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Notice of a Proposed General Permit Authorizing the Discharge of Storm Water, and Certain Types of Non-Storm Water

Under §26.040 of the Texas Water Code; the Texas Natural Resource Conservation Commission (TNRCC) proposes to issue a general permit (Proposed General Permit No. TXR050000) covering eligible storm water, and certain types of non-storm water, discharges into water in the state. The proposed general permit covers the entire state of Texas. Discharges into water in the state are allowed by the proposed general permit under §26.040 of the Texas Water Code.

DRAFT GENERAL PERMIT. The Executive Director has prepared a draft general permit, which groups industrial activities into thirty (30) sectors of similar activities, based on Standard Industrial Classification (SIC) codes. Point source discharges of storm water, and certain types of non-storm water, are eligible for authorization under the proposed general permit only if the industrial activity is described by one of the thirty sectors, and the discharge meets the effluent limitations applicable to that sector of industrial activity. The general permit also requires all entities covered by this general permit to develop and implement a storm water pollution prevention plan. Non-storm water discharges that are not specifically listed in the general permit are not authorized by the general permit.

The executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) according to Coastal Coordination Council (CCC) regulations, and has determined that the action is consistent with applicable CMP goals and policies.

A copy of the draft general permit and fact sheet are available for viewing and copying at the TNRCC Office of the Chief Clerk located at the TRNCC's Austin office, at 12100 Park 35 Circle, Building F. These documents are also available at the TNRCC's sixteen (16) regional offices, and are available at http://www.tnrcc.state.tx.us/permitting/waterperm/wwperm/industry.html

PUBLIC COMMENTS/PUBLIC MEETING. You may submit public comments or request a public meeting about this general permit. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. The TNRCC may hold a public meeting if the executive director determines that there is a significant degree of public interest in the application. If a public meeting is held, the public comment deadline will be extended to the end of the public meeting. A public meeting is not a contested case hearing.

Written public comments or requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 30 days from the date this notice is published in the *Texas Register*.

APPROVAL PROCESS. After the comment period, the Executive Director will consider all the public comments and prepare a response. The response to comments will be mailed to everyone who submitted public comments or who requested to be on a mailing list for this general permit. The general permit will then be set for the Commissioners' consideration at a scheduled Commission meeting.

MAILING LISTS. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific general permit; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing lists to which you wish to be added and send your request to the TNRCC Office of the Chief Clerk at the address above. Unless you otherwise specify, you will be included only on the mailing list for this specific general permit.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Further information may also be obtained by calling the TNRCC Storm Water Hotline at (512) 239-3700.

TRD-200007481
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

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Notice of Application for Approval of an Amendment to a Plan of Reclamation

Notice is given that Dallas County Flood Control District Number 1 seeks approval of an amended plan of reclamation, pursuant to Section 57.156 of the Texas Water Code, to include all improvements and modifications that have been completed since the original Plan of Reclamation. These deviations include: levee closures, erosion control improvements, drop structure repairs, channel grading, mowing, replacing riprap, clearing and grubbing, removing silt, and placement of fill material and drainage structures. In addition to the above, the District will perform: 1) the construction of a channel section from Valley View Lane to the Dallas/ Tarrant County Line; 2) modification to the inflow system and sump from Valley View Lane to Rock Island Road; and 3) excavation of an earthen channel with drainage improvement and erosion protection structures from Rock Island Road to Shady Grove Road.

The project is located at 32° 50' N latitude 97° 01' W longitude, in western Dallas County, between the City of Dallas and City of Fort Worth south of DFW Airport. The general boundaries are US 183 to the north, Shady Grove Road to the south, Dallas-Tarrant County Line to the west and Hardrock and Gilbert Roads to the east. The District is approximately 80 percent within the corporate limits of the City of Irving and

20 percent in the City of Grand Prairie. Dallas County Flood Control District Number 1 (DCFCD#1) is amending its January 24, 1984 TNRCC approved Plan of Reclamation by itemizing variations from the approved Plan of Reclamation. The District deviated from the original Plan of Reclamation, under emergency conditions and proposed corrective construction improvements, by conducting repairs and maintenance such as: levee closures, erosion control improvements, drop structure repairs, channel grading, mowing, replacing riprap, clearing and grubbing, removing silt, and placement of fill material and drainage structures.

If the amended plans are approved by the Commission, construction will begin immediately and construction will be completed within ten years from the date of Commission approval. The application for approval of the preliminary plans was received by the Texas Natural Resource Conservation Commission on July 24, 2000. The application has been designated as Application No. RE-0321. The Executive Director reviewed the application and, in accordance with Texas Natural Resource Conservation Commission Rules 30 TAC Section 281 and 301.51, and declared it to be administratively complete. The Executive Director may approve the plans within 10 days of the publication of this notice in the *Texas Register.*

For information concerning technical aspects of the permit, contact James Mirabal, MC 160, TNRCC, P.O. Box 13087, Austin, Texas 78711-3087. Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-200007488
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

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Notice of Minor Amendment

For The Period of October 23, 2000

APPLICATION. The City of Brownsville, P.O. Box 911, Brownsville, TX 78520, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a minor amendment to Permit No. MSW 1273 which would authorize the use of a geosynthetic clay liner (GCL) as an alternate to a compacted clay liner as the lower component of the composite liner system at the City of Brownsville Landfill. The application is subject to the goals and policies of the Texas Coastal Management Program (CMP) and must be consistent with the applicable CMP goals and policies. This Type I municipal solid waste facility is located approximately 3 miles northeast of Brownsville, 1.3 miles northeast of the State Highway 4/FM Highway 511 intersection, 2 miles northeast of Brownsville International Airport, and 0.8 mile south of Warehouse Road, in Cameron County. The Executive Director of the TNRCC has prepared a draft permit which, if approved, will authorize a minor amendment to this permit under the terms described above. PUBLIC COMMENT. Written comments concerning this minor amendment may be submitted to the TNRCC, Chief Clerk's Office, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 telephone (512) 239-3300. Comments must be received no later than 10 days from the date this notice is mailed. Written comments must include the following: (1) your name (or for a group or association, the name of an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the permit number; and (3) the location of your property relative to the applicant's operations. INFORMATION. Individual members of the public who wish to inquire about the information contained in this notice may contact the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-200007483
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

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Notice of Water Rights Applications

Notice is given that TXU MINING COMPANY, 1601 Bryan Street, Dallas, Texas, 75201-3411, applicant, seeks a water use permit pursuant to Texas Water Code (TWC) §11.121 and 30 Texas Administrative Code Rule §295.1, et seq. The application and fees were received on July 10, 2000, and additional information necessary to process the application was received on September 15, 2000. The application was declared administratively complete on September 22, 2000. The applicant seeks authorization to divert and use not to exceed 680 acre-feet of water per annum from within the Mill Creek Watershed and the mine permit boundary for the Oak Hill Lignite Mining Area in Rusk County from Boggy Branch, Todd Branch, Dry Creek and Dogwood Creek, tributaries of Mill Creek, and from several un-named tributaries of Mill Creek, tributary of Cherokee Bayou, tributary of the Sabine River, Sabine River Basin, for use at the mine site. Diversion will occur anywhere in the watershed upstream of a point on Mill Creek at Latitude 32.296°N Longitude 94.730°W also bearing S 87.78°W, 2473 feet from the SE corner of the Jacob Taylor Survey Abstract No. A-775 approximately 10.8 miles NNE of Henderson and 2.9 miles NW of Oak Hill, Texas. The combined maximum diversion rate for the water to be used will not exceed 6000 gpm (13.4 cfs). This water is to be used for dust suppression and other mining related activities. The applicant has indicated that as an estimated 5600 ac-ft of ground water per year will be developed from de-watering activities within the watershed during mining operations and pumped to a sedimentation pond for clarification and ultimate discharge into Mill Creek, they will become a net producer of water to the Mill Creek watershed.

Notice is given that TEXAS UTILITIES ELECTRIC COMPANY, 1601 Bryan Street, Dallas, Texas 75201, applicant, seeks an amendment to Certificate of Adjudication No. 05-4649, pursuant to §11.122, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §295.1, et seq. Application No. 05-4649A, by Texas Utilities Electric Company, was received on July 16, 1999, and was declared administratively complete on January 25, 2000. The Executive Director recommends that public notice of the application be given pursuant to 30 TAC §295.152. Pursuant to 30 TAC §295.153, this notice is being mailed to all water right owners of record in the Sabine River Basin. Certificate of Adjudication No. 05-4649, includes authorization for Texas Utilities Electric Company to maintain a dam and reservoir (known as Martin Lake) on Martin Creek, tributary of the Sabine River, and to impound therein not to exceed 56, 500 ac-ft of water. The dam is in Panola and Rusk Counties and was constructed to create a reservoir for the purpose of operating Martin Lake steam electric station. Owner is authorized to divert and consumptively use not to exceed 6,250 ac-ft water/ year from the reservoir for each of three 750 megawatt power units, for a total of 18,750 ac-ft water/ year for industrial (power generation) purposes. The certificate also indicates that upon installation of a fourth 750 megawatt power unit, owner may divert an additional 6,250 ac-ft of water for a total of not to exceed 25,000 ac-ft per year for industrial (power generation) purposes. Special Condition 5.A., in the certificate indicates that "Owner shall provide the facilities necessary (including pumps) to pass good quality water through the dam at all times. To provide for

downstream domestic, livestock, and natural streamlife needs, owner shall make sufficient releases from the reservoir in a manner approved by the Commission to maintain a minimum flow of 3.0 cfs at or in the vicinity of the Santa Fe railroad bridge crossing over Martin Creek about 4.7 stream miles downstream from the dam. From time to time as conditions change, the Commission may modify the minimum flow quantity to be maintained from reservoir releases. Special Condition 5. G. and 5. H., in the certificate indicate that not to exceed 39, 300 acre-feet of water can be impounded within the conservation storage of the reservoir prior to the installation of a fourth megawatt power unit, and not to exceed 56, 500 acre-feet of water can be impounded within the conservation storage of the reservoir after the installation of a fourth megawatt power unit. The applicant seeks to amend Certificate No. 05-4649 to: a. Delete the language now included in paragraphs 2.USE A. and B. which requires the operation of four 750 megawatt power units to allow the consumptive use of not to exceed 25, 000 ac-ft/year for industrial (power generation) purposes so that the "use" paragraph will now indicate that "Owner is authorized to divert and consumptively use not to exceed 25, 000 acre- feet of water per annum for industrial purposes (power generation) purposes". b. Delete the aforesaid Special Conditions 5. G. and 5. H. Add the following to the aforesaid Special Condition 5.A. : "When the level of Martin Creek Reservoir is above elevation 304 Mean Sea Level (MSL) and equal to or less than 305 MSL, owner shall make sufficient releases from the reservoir to maintain a minimum flow of 1.5 cfs at or in the vicinity of the Santa Fe railroad crossing over Martin Creek about 4.7 stream miles downstream from the dam until the reservoir level recovers to above 305 MSL for a period of two weeks. When the level of the reservoir is 304 MSL or below, owner shall suspend releases from the reservoir. When the reservoir level recovers to above 304 MSL for a period of two weeks owner shall make sufficient releases from the reservoir to maintain a minimum flow of 1,5 cfs at or in the vicinity of the above-described Santa Fe railroad crossing". The applicant is requesting changing the language included in paragraphs 2. USE A. and B., and deleting paragraphs 5. SPECIAL CONDITIONS G. and H., related to the need of four 750 megawatt power units before 25, 000 acre-feet may be diverted and used, because when the water use permit for the certificate was issued in 1971 for the Martin Lake Steam Electric Station (MLSES), the science for large solids fuels pollution control technology was still evolving and the wet scrubbers for SOý removal were the first in the State and optimal operations for this system were not developed. Since the initial design, the plant has added six additional (and larger) scrubber towers which have increased the plant water needs in order to ensure that SOý emissions meet TNRCC air quality requirements. The applicant has indicated that in addition to the scrubber water use, other aspects of the original design have changed. Although the plant has optimized the recycling of the water for on-site use, the quantity of miscellaneous water use required from the reservoir is higher due to the changes in environmental regulations and the applicant's efforts to minimize wastewater releases. A major part of minimizing wastewater releases is reducing the accumulation of rainfall in on-site ponds in order to avoid high pond level releases from storm water runoff where previously, the pond recharge from rainfall was incorporated into the overall plant water balance. The applicant also indicates that as a result of the above changes, the three constructed units at Martin Lake require the equivalent of water anticipated for four units at the time the Martin Lake water rights were granted. The applicant also states that since Martin Lake Reservoir was constructed by TXU Electric for the sole purpose of operating MLSES and no other entity holds water rights in Martin Lake, this amendment request would not impact other water rights users. The applicant is requesting to add language to Special Condition 5.A to allow more flexible reservoir operations during drought conditions similar to that experienced in 1996 and 1998. The applicant has also indicated that they will respond to the needs of downstream water users needs in times of drought to lessen the impact of drought on all users.

Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions to the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

SAN ANTONIO WATER SYSTEM, c/o Chief of Water Resources, 1001 E. Market Street, San Antonio, Texas 78298-2449, applicant seeks a permit pursuant to §11.121 and §11.042 of the Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §295.1, et seq. The applicant seeks authorization to use the bed and banks of the San Antonio River to convey its privately-developed Edwards Aquifer groundwater- based effluent for subsequent diversion and transport through pipeline to a point on the river upstream of the discharge point for instream use purposes. The present source of streamflow at the headwaters of the San Antonio River is Edwards Aquifer groundwater pumped from applicant's well field. In order to conserve Edwards Aquifer water for essential municipal uses, applicant will reduce or eliminate the discharge of this well water into the river and maintain streamflow with its privately-developed groundwater-based effluent. This application is for a re- circulation system intended to maintain streamflow in the San Antonio River upstream of the discharge point of the effluent. The applicant will discharge the effluent at a maximum rate of 9 cfs (4039 gpm) into the San Antonio River, San Antonio River Basin, Bexar County, at a point (Discharge Point 1) authorized by applicant's TPDES Permit No. 10137-008, 3.2 miles north of the Bexar County Courthouse, N 80°W, 539.97 feet from the USGS Benchmark SAR4=D1967 (Tuleta Street and Broadway), also being 29.462° N Latitude and 98.468°W Longitude. A maximum of 720 acre-feet per annum of discharged

effluent is to be diverted at a maximum rate of 1 cfs (450 gpm) from a point on the river approximately 790 feet downstream of Discharge Point No. 1 and N 49°W, 1066.05 feet from said USGS Benchmark, also being 29.464°N Latitude and 98.469°W Longitude. The water will then be conveyed by pipeline to a point upstream of Discharge Point No. 1, said point being located N 44°W, 983.24 feet from said USGS Benchmark, also being 29.464°N Latitude and 98.467°W Longitude, and subsequently discharged into the San Antonio River. The applicant has indicated that the discharge volume and rate at Discharge Point No. 1 will always exceed the diversion volume and rate at the diversion point plus carriage losses during any 24 hour period. The applicant has estimated a 0.06% carriage loss in the 790 foot stretch of the river between Discharge Point No. 1 and the diversion point. Pursuant to 30 TAC §295.161, this notice is being sent to TNRCC Public Interest Counsel and the Texas Parks and Wildlife Department.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by November 24, 2000. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by November 24, 2000. The Executive Director can consider an approval of the application unless a written request for a contested case hearing is filed by November 24, 2000. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement [I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested amendment which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the requested amendment and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103 at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687- 4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200007484
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

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Notice - Statement of Intent to Withdraw

A RESOLUTION

Stating the intent of the Texas Natural Resource Conservation Commission (commission) to withdraw the proposed rule regarding Ground Support Equipment (GSE) upon finalization of three agreements with Continental Airlines, Inc., Southwest Airlines Co., and the City of Houston and adoption of those agreements as part of the Houston/Galveston State Implementation Plan (SIP). Docket Number 2000-1148-MISC

WHEREAS, on August 9, 2000, the commission approved for publication of and hearing upon proposed revisions to the SIP concerning the attainment demonstration for the Houston/Galveston ozone nonattainment area. The proposed SIP revisions contain control strategies, results of photochemical modeling, and technical documentation in support of the attainment demonstration and rely, in part, upon a strategy for reduction in emissions of nitrogen oxides (NO_x) from sources at airports within the Houston/Galveston nonattainment area; and

WHEREAS, on August 9, 2000, the commission approved for proposal a rule, and corresponding revisions to the SIP for ozone control, which would require reductions in emissions of NO_x from ground support equipment operating at airports within the Houston/Galveston nonattainment area. This proposed rule was published in the *Texas Register* on August 25, 2000, (25 TexReg 8222); and

WHEREAS, on August 9, 2000, the commission approved for publication an Agreed Order with Continental Airlines, Inc., and corresponding revisions to the SIP for ozone control, which would make federally enforceable certain emission reductions of NO_x from sources at the George Bush Intercontinental Airport in Houston, Harris County, Texas; and

WHEREAS, on August 23, 2000, the commission approved for publication a Memorandum of Agreement with the City of Houston, and corresponding revisions to the SIP for ozone control, which would make federally enforceable certain emission reductions of NO_x from sources at the George Bush Intercontinental Airport, William P. Hobby Airport, and Ellington Field in Houston, Harris County, Texas; and

WHEREAS, on October 6, 2000, the commission approved for publication an Agreed Order with Southwest Airlines Co., and corresponding revisions to the SIP for ozone control, which would make federally enforceable certain emission reductions of NO_x from sources at the William P. Hobby Airport in Houston, Harris County, Texas; and

WHEREAS, the total reductions of NO_x which would be achieved by the agreements with Continental Airlines, Inc., Southwest Airlines Co., and the City of Houston (together referred to as "the agreements") are equivalent to the reductions which would be achieved by the proposed GSE rule for the Houston/Galveston area; and

WHEREAS, on October 18, 2000, the commission approved the agreements with Continental Airlines, Inc. and the City of Houston; and

WHEREAS, notice and comment period on the last of the agreements, Southwest Airlines Co., ends November 15, 2000; and

WHEREAS, the commission anticipates consideration for adoption of revisions to the SIP concerning the attainment demonstration for the Houston/Galveston ozone nonattainment area in December 2000;

NOW THEREFORE, BE IT RESOLVED, that the Texas Natural Resource Conservation Commission intends to withdraw the proposed GSE rule for the Houston/Galveston area upon approval of the agreements with Continental Airlines, Inc., Southwest Airlines Co., and the City of Houston and adoption of revisions to the SIP concerning the attainment demonstration for the Houston/Galveston ozone nonattainment area which include the agreements. The commission also approves this resolution for publication in the *Texas Register*.

TRD-200007401

Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 20, 2000

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Proposal for Decision

The State Office Administrative Hearing issued a Proposal for Decision and Order to the Texas Natural Resource Conservation Commission on October 18, 2000. Executive Director of the Texas Natural Resource Conservation Commission, Petitioner v. Ashraf Ibrahim and Essra Corp , dba Que Paso Store Respondent; SOAH Docket No. 582-00-0853;TNRCC Docket No.1999-1473-PST-E. In the matter to be considered by the Texas Natural Resource Conservation Commission on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105 TNRCC PO Box 13087 Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Doug Kitts, Chief Clerk's Office, (512) 239-3317.

TRD-200007480
Doug Kitts
Agenda Coordinator
Texas Natural Resource Conservation Commission
Filed: October 24, 2000

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Public Notice

The Texas Natural Resource Conservation Commission (TNRCC or commission) is required under the Texas Solid Waste Disposal Act, Health and Safety Code, Chapter 361, as amended (the "Act"), to annually publish a state registry that identifies facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The most recent registry listing of these facilities was published in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4944).

Pursuant to §361.184(a), the commission must publish a notice of intent to list a facility on the state registry of state Superfund sites in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located. With this publication, the TNRCC hereby gives notice of a facility or area that the executive director has determined eligible for listing, and which the executive director proposes to list on the state registry. By this publication, the TNRCC also gives notice pursuant to the Act, §361.1855, that it proposes a land use other than residential as appropriate for the facility identified below. The TNRCC proposes a commercial/industrial land use designation. Determination of future land use will impact the remedial investigation and remedial action for the site.

This publication also specifies the general nature of the potential endangerment to public health and safety or the environment as determined by information currently available to the executive director. This notice of intent to list this facility was also published on November 3, 2000, in the *Palestine Herald Press*.

The facility proposed for listing is the Tucker Oil Refinery/Clinton Manges Refinery site, located along the east side of U.S. Highway 79 in the rural community of Tucker, approximately 9 miles west of Palestine in Anderson County, Texas. The approximate geographic coordinates of the site are 35° 40' 38" North Longitude and 95° 44' 32" West Latitude.

Section 361.184(a) requires that the notice specify "the general nature of the potential endangerment to public health and safety or the environment as determined by information available to the executive director at that time."

The facility known as the Tucker Oil Refinery/Clinton Manges Refinery site is located along the east side of U.S. Highway 79 in the rural community of Tucker, approximately 9 miles west of Palestine in Anderson County. The land use surrounding the site is a mixture of rural and residential. The site is bounded on the north by a public water supply well, on the east by the Union Pacific Railroad and rural land, on the south by a residential property and on the west by U.S. Highway 79 and rural residential land.

Also located on the west side of the site is a possible location of a former gasoline service station that is not believed to have been associated with the refinery site. The facility consists of an inactive and dismantled oil refinery situated on approximately 9.249 acres of land. An additional 2.2 acres, which housed a small frame office building for the refinery operations, is located directly across U.S. Highway 79 to the west. Other tracts of land located adjacent to the refinery tract, may have been connected to the operations. Oil was refined at the site as early as 1940 and operations continued through a succession of owners until 1981.

On November 4, 1981, an application for permit renewal was submitted for the refinery under the name Clinton Manges Oil and Refining Company. The permit renewal carried an expiration date of June 30, 1982, however the refinery never operated under the permit renewal, having last processed crude oil in July of 1981. On February 4, 1983, the refinery National Pollutant Discharge Elimination System permit was terminated at the request of Clinton Manges Oil and Refining Company. The facility was sold for scrap metal salvage in 1994. Salvage operations were completed in late December 1995.

On March 28, 2000, the U.S. Environmental Protection Agency (EPA) referred the site to the State of Texas Superfund program for any future action. In June 2000, the TNRCC identified benzene, ethylbenzene, xylene, toluene, and napthalene in the groundwater at the site.

A public meeting will be held Thursday, December 7, 2000, at 7:00 p.m., at the Tucker Volunteer Fire Department Station House, located in Tucker on the south side of U.S. Highway 79, one-quarter mile west of the intersection of FM 645 and U.S. Highway 79. The purpose of this meeting is to obtain additional information regarding the site relative to its eligibility for listing on the state registry, identify additional potentially responsible parties, and obtain public input and information regarding the appropriate use of land on which the facility subject of this notice is located. The public meeting will be legislative in nature and not a contested case hearing under the Texas Administrative Procedure Act (Texas Government Code, Chapter 2001).

Written comments may also be submitted to the attention of Alonzo Arredondo, Superfund Cleanup Section, Remediation Division, MC-143, P.O. Box 13087, Austin, Texas, 78711-3087, telephone number (512) 239-2145. All written comments must be received by the commission on or before Thursday, December 7, 2000.

The executive director of the TNRCC prepared a brief summary of the commission's records regarding this site. This summary and a portion of the records for this site, including documents pertinent to the executive director's determination of eligibility, are available for review at Palestine Public Library, 1101 North Cedar Street, Palestine, Texas 75801, telephone number (903) 729-4121, during regular business hours. Copies of the complete public record file may be obtained

during regular business hours at the TNRCC Records Management Center, Building D, Room 190, 12100 Park 35 Circle, Austin, Texas 78753; telephone numbers (800) 633-9363 or (512) 239-2920. (Handicapped parking is available on the east side of Building D, convenient to access ramps that are between Building D and Building E.) Photocopying of file information is subject to payment of a fee.

TRD-200007375
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 19, 2000

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Texas Parks and Wildlife Department

Notice of Public Hearing

This is a notice of a public hearing and opportunity for public comment regarding the application of Texas Tech University at Junction (TTU) for a Texas Parks and Wildlife Sand and Gravel Permit. TTU has applied for a permit to stabilize and restore the east bank of the South Llano River adjacent to the TTU facility in Kimble County. The proposed project site is approximately sixteen miles downstream from the highway 377 South crossing, and approximately two and one-half miles upstream from the Loop 481 crossing. Gravel will be moved from the west bank of the current channel. Overall, approximately 14,000 cubic yards of rock and gravel will be cut and filled. Approximately 144,000 square feet of river bottom will be disturbed. The duration of the disturbance is expected to be about ten to twelve days. The area will be revegetated once the rock and gravel work is complete.

The hearing will be held on November 28, 2000, at 1:00 p.m. in the cafeteria at the TTU facility in Junction. The purpose of the hearing is to receive public comment on the proposed application. The hearing is not a contested case hearing under the Administrative Procedure Act. Public comment may be submitted at the hearing orally or in writing. Written public comment will be accepted until thirty days after the publication of this notice in the newspaper or the *Texas Register*, whichever is later, and should be submitted to: Mr. Rollin MacRae, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, TX, 78744, fax (512) 389-8059, e-mail rollin.macrae@tpwd.state.tx.us. This notice is also being mailed to alongshore property owners listed in the application. To review a copy of the application or with any questions, please contact Mr. MacRae.

TRD-200007493
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Filed: October 24, 2000

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Public Utility Commission of Texas

Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application for transfer of a certificate of convenience and necessity on September 20, 2000, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.101 (Vernon 1998, Supplement 2000).

Docket Style and Number: Application for Sale, Transfer, or Merger of Central Power and Light Company, Docket Number 23054.

The Application: Central Power and Light Company, a Texas electric operating company of American Electric Power Company, Inc. (AEP-CPL) filed an application for sale of a substation facility and approximately 200 feet of transmission line to South Texas Electric Cooperative, Inc. (STEC). There are no territorial certificate rights affected by this transaction.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989.

TRD-200007425
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 20, 2000

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 19, 2000, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151-54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Telera Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 23164 before the Public Utility Commission of Texas.

Applicant intends to provide specific forms of intrastate local exchange and interexchange telecommunications services primarily for business customers including switched local exchange services including carrier access, and 1+ and 101XXXX outbound dialing; toll-free inbound dialing, and data services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company, Verizon Southwest (formerly known as GTE Southwest, Inc.), United Telephone Company of Texas, Inc., and Central Telephone Company of Texas, doing business as Sprint.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas, 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 8, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200007434
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 23, 2000

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on October 17, 2000, to amend a certificated service area boundary in Uvalde County pursuant to §§14.001, 37.051, and 37.054, 37.056, 37.057 of the Public

Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998, Supplement 2000) (PURA). A summary of the application follows.

Docket Style and Number: Joint Application of Central Power and Light Company and Medina Electric Cooperative, Inc. to Amend Certificated Service Area Boundaries Within Uvalde County. Docket Number 23159.

The Application: Central Power and Light Company and Medina Electric Cooperative, Inc. (Applicants) filed a joint application to amend a certificated service area boundary in Uvalde County. The service boundary amendment is requested to clarify and simplify the boundary lines between the utilities to reduce confusion for customers, homebuilders, and developers.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. The deadline for intervention in the proceeding will be established. The commission should receive a letter requesting intervention on or before the intervention deadline.

TRD-200007426
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 20, 2000

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition on September 11, 2000, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Utopia Exchange for Expanded Local Calling Service, Project Number 23017.

The petitioners in the Utopia exchange request ELCS to the exchanges of Bandera, D'Hanis, Hondo, Sabinal, and Uvalde.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than November 8, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200007424
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 20, 2000

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Public Notice of Workshop Regarding Implementation of House Bill 1777

The Public Utility Commission of Texas (commission) will hold a workshop regarding Implementation of House Bill 1777 (HB 1777), on Wednesday, November 8, 2000, at 9:30 a.m. in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas, 78701. Project Number 22909, *Discussion and Possible Rulemaking Relating to Outstanding HB 1777 Implementation Issues*, has been established for this proceeding.

Prior to the workshop, a list of issues for discussion will be posted on the commission's website at http:\\www.puc.state.tx.us. This notice is not a formal notice of proposed rulemaking; however, participation at the workshop will assist the commission in developing related rules.

Questions concerning the workshop or this notice should be referred to Alyssa Eacono, Network Analyst, Telecommunications Division, (512) 936-7381; or Michelle Lingo, Attorney, Policy Development Division, (512) 936-7217. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200007374
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 19, 2000

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Railroad Commission of Texas

Notice of Public Meeting to Receive Comment on the Draft Study of Oil and Gas Naturally Occurring Radioactive Material (NORM)

The Railroad Commission of Texas (Commission) has determined that a meeting to receive comment on the referenced draft study is in the public interest. The meeting will be held on Wednesday, November 8, 2000, from 1:30 p.m. until 3:30 p.m., in the William B. Travis State Office Building, Room 1-100, 1701 North Congress Avenue, Austin, Texas.

Background: The 76th Texas Legislature, by rider to the General Appropriations Act, directed the Commission to perform a study on the effectiveness of existing state rules and regulations related to the detection, control and disposal of oil and gas naturally occurring radioactive material (NORM) waste and to report the findings of the study to the Governor and the Legislature on or before December 1, 2000. The rider further specifies that the Commission is to coordinate its efforts with the Texas Department of Health (TDH), the Texas Natural Resource Conservation Commission (TNRCC), the House Committee on Energy Resources, and the Senate Committee on Natural Resources. Status reports were prepared and distributed in December of 1999, April of 2000, and September of 2000.

Preliminary Findings and Recommendations: Oil and gas operators generally are complying with existing oil and gas NORM regulations; however, the data did not definitively verify the full extent of compliance. Recommend development and initiation of a compliance inspection program to enhance compliance, targeting specific areas identified in the study.

Adequate regulations exist to protect human health and the environment. No new regulatory requirements are recommended at this time. Amendment of current regulations should only be considered after evaluation of the proposed compliance inspection program.

Further education of the general public, oil and gas operators and used oilfield equipment and pipe dealers about the possible existence of oil and gas NORM and distribution of information concerning where oil and gas NORM has been found at levels above the regulatory limits will enhance compliance. Recommend development of a package of information to be placed on the Commission's website.

Public Meeting. The first part of the meeting will consist of a very brief overview of the study by Commission staff. We will also review certain ground rules with respect to the conduct of the meeting. The

second part of the meeting will consist of public comment. During the comment period, members of the public may voice concerns or comments. The public is encouraged to present written comments at the meeting, or may send written comments by mail before the meeting to: Leslie Savage, Environmental Services, Railroad Commission of Texas, P.O. Box 12967, Austin, TX 78711-2967 (Fax 512/463-6780).

The purpose of the meeting is to receive public comment. Agency staff will not respond to the comments at the meeting, but will take all applicable comments received into consideration while finalizing the NORM study. For further information, please contact Leslie Savage at 512/463-7308 or David Cooney at 512/463-6977, or visit the Commission website at www.rrc.state.tx.us.

TRD-200007402

Mary Ross McDonald

Deputy General Counsel, Office of General Counsel

Railroad Commission of Texas

Filed: October 20, 2000

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Texas Department of Transportation

Correction of Error

The Texas Department of Transportation proposed amendments 43 TAC §§31.26 and 31.31, and 31.42. among other rules that appeared in the October 13, 2000, *Texas Register* (25 TexReg 10340). The proposed publication contain the following errors.

On page 10349, §31.26(b) - In the second sentence, which begins "Section 5307..." the number "5307" should be underlined as new language.

On page 10349, §31.31(b)(2) - The text, as well as the paragraph number, should be underlined as new language.

On page 10356, §31.42(b)(19) - "Part 605" is existing language, and should not be shown as strikethrough text or be enclosed in square brackets.

TRD-200007551

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Public Notice

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site - http://www.dot.state.tx.us - click on Aviation, click on Aviation Public Hearing. Or, contact Karon Wiedemann, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4520 or (800) 68 PILOT.

TRD-200007501

Bob Jackson

Deputy General Counsel

Texas Department of Transportation

Filed: October 25, 2000

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Texas Turnpike Authority Division of the Texas Department of Transportation

Notice of Award-#86-ORFP5001

Pursuant to Government Code 2254, Subchapter A, the Texas Turnpike Authority, a division of the Texas Department of Transportation publishes this notice of a consultant contract award for providing professional engineering services.

The request for qualifications for multiple professional civil consulting engineering firms was published in the September 30, 1999, issue of the *Texas Register* (25 TexReg 1909).

The consultants will serve as Section Engineers for performing detailed analyses and designs, and for preparing construction Plans, Specifications, and Estimates (PS & E) for the potential Turnpike Projects located in northern Travis and southern Williamson Counties. The engineering firms selected for these services are Kellogg Brown & Root, Inc., HNTB Corporation, PBS & J, Parson Brinckerhoff Quade & Douglas, Inc., Rodriguez & Huggins, Inc., Sverdrup Civil, Inc., Carter & Burgess, Inc., Earth Tech, Inc., and WSBC Civil Engineers, Inc. The total value of each contract is $10,000,000 and the contract terms are from November 24 through December 8, 1999, until January 1, 2010.

TRD-200007497

Phillip Russell

Director

Texas Turnpike Authority Division of the Texas Department of Transportation

Filed: October 25, 2000

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Notice of Award-#86-ORFP5008

Pursuant to Government Code 2254, Subchapter A, the Texas Turnpike Authority, a division of the Texas Department of Transportation publishes this notice of a consultant contract award for providing professional engineering services.

The request for qualifications for design/development procurement management services was published in the February 23, 2000, issue of the *Texas Register* (25 TexReg 1909).

The consultant will provide design/development procurement management services as related to the solicitation of qualifications and proposals from private entities to enter into exclusive development agreements with the TTA to design, develop, operate, and maintain the proposed US 183-A and SH 130 turnpike projects (collectively, the "Turnpike") in central Texas. The engineering firm selected for these services is HDR Engineering, Inc. The total value of the contract is $1,650,000 and the contract term is August 25, 2000, until August 25, 2010.

TRD-200007498

Phillip Russell

Director

Texas Turnpike Authority Division of the Texas Department of Transportation

Filed: October 25, 2000

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Notice of Award-#86-ORFP5009

Pursuant to Government Code 2254, Subchapter A, the Texas Turnpike Authority, a division of the Texas Department of Transportation publishes this notice of a consultant contract award for providing professional engineering services.

The request for qualifications for Right of Way acquisition services was published in the March 17, 2000, issue of the *Texas Register* (25 TexReg 1909).

The consultants will provide right of way acquisition and real estate related services. The firms are to serve as contractors for the TTA in the acquisition of real property, relocation of displacees, demolition

of improvements and other activities associated with property acquisition by a condemning authority. The firms selected for these services are Crossland Acquisition, Inc., Lockwood, Andrews & Newnam, Inc., and Pinnacle Consulting Management Group, Inc. The total value of each contract is $2,000,000 and their contract terms are August 9 and 11, 2000, until August 9 and 11, 2005.

TRD-200007499
Phillip Russell
Director
Texas Turnpike Authority Division of the Texas Department of Transportation
Filed: October 25, 2000

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Notice of Award-#86-ORFP8010

Pursuant to Government Code 2254, Subchapter A, the Texas Turnpike Authority, a division of the Texas Department of Transportation publishes this notice of a consultant contract award for providing professional engineering services.

The request for qualifications for toll plaza architectural services was published in the March 17, 2000, issue of the *Texas Register* (25 TexReg 1909).

The consultant will provide architectural services for toll plaza design and landscaping for the Central Texas Turnpike Project currently be studied by the TTA. The engineering firm selected for these services is HNTB Corporation. The total value of the contract is $10,000,000 and the contract term is July 20, 2000, until July 20, 2010.

TRD-200007500
Phillip Russell
Director
Texas Turnpike Authority Division of the Texas Department of Transportation
Filed: October 25, 2000

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Texas Veterans Land Board

Notice of Contract Award

In the July 7, 2000, edition of the *Texas Register* (25 TexReg 6618) the Texas Veterans Land Board (VLB) published a Request for Proposals (RFP) seeking proposals from entities desiring to participate in the management and operation of Texas State Veterans Homes in selected sites in four different cities - Temple, Floresville, Bonham and Big Spring. The homes are long-term care facilities for Texas veterans needing skilled nursing care. A management agreement for the new Frank M. Tejeda Texas State Veterans Home located in Floresville, Texas has been awarded to the Wilson County Memorial Hospital District. The VLB will publish in the *Texas Register* announcements of contract awards for the three remaining homes as they occur.

TRD-200007405
Larry R. Soward
Chief Clerk, General Land Office
Texas Veterans Land Board
Filed: October 20, 2000

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Texas Workforce Commission

Request for Proposals

NO. PPRD 00-20

SMART JOBS/WORKFORCE ALLOCATION METHODOLOGY ASSESSMENT

OCTOBER 2000

A. PROPOSAL DESCRIPTION

The Texas Workforce Commission is soliciting proposals from qualified organizations to develop a detailed cost allocation plan for the Smart Jobs Program and assess area in the Workforce Division for potential allocations. Eligible applicants include CPA's or CPA firms.

B. AUTHORIZATION TO AWARD CONTRACT

TWC is authorized to issue this RFP and award contracts under Section 302.002(c), Texas Government Code.

C. AVAILABLE FUNDING

Not to exceed $50,000 for a 3-month period to begin immediately after the award of said agreement.

D. ELIGIBLE APPLICANTS

Applicants submitting proposals must complete a Request for Proposal (RFP) Package and provide required documentation as requested in the application in order to be considered eligible.

E. PROJECT SCHEDULE

Application submission deadline is November 13, 2000. The anticipated contract effective date is December 1, 2000.

F. SCORING CRITERIA

The evaluation criteria for this RFP and their relative weights for scoring are: Experience in developing allocation plan 60 points, Experience with federal grant regulations 15 points, Experience in assessment of program allocation bases 10 points, and Proposed Budget and Ability to Complete Deliverables, 15 points.

G. SELECTION, NOTIFICATION AND NEGOTIATION PROCESS

TWC will use competitive negotiation to determine awards. Proposals will be evaluated and tentatively ranked by TWC. Applicants submitting superior proposals may be invited to make oral presentations to TWC.

H. PAYMENT

The basis of payment for this award shall be reimbursement of actual allowable cost up to budgeted levels and subject to budget limitations.

I. TWC'S CONTACT PERSON

For further information and to request a package for RFP PPRD 00-20, contact Glenn Smith, Program Specialist, Texas Workforce Commission; Mail Address: 101 E. 15th Street, Room 316T, Austin, Texas 78778-0001; Street Address: Room 316-T, 1117 Trinity, Austin, Texas 78778-0001, Telephone: (512) 463-9992, Email: glenn.smith@twc.state.tx.us.

TRD-200007369
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Filed: October 18, 2000

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