

# TEXAS DEPARTMENT OF AGRICULTURE

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**OPINION COMMITTEE**

TODD STAPLES  
COMMISSIONER

FILE # ML-47173-12  
I.D. # 47173

November 14, 2012

The Honorable Greg Abbott  
Attorney General of Texas  
Office of the Attorney General  
209 West 14<sup>th</sup> Street  
Austin, Texas 78701

**RQ-1100-GA**

RE: Authority of the Texas Prescribed Burning Board to accept a self-insurance program for a political subdivision or agency of the state in full satisfaction of any insurance requirements set by the board pursuant to Chapter 153 of the Natural Resources Code

Dear General Abbott:

The Texas Department of Agriculture (TDA) requests an opinion from your office regarding the authority of the Texas Prescribed Burning Board (PBB) to accept a self-insurance program of a political subdivision or agency of the state in full satisfaction of any insurance requirements set by the PBB pursuant to Chapter 153 of the Natural Resources Code.<sup>1</sup>

This request is made in relation to an application from an employee of the City of Austin seeking certification as a Texas Private Certified and Insured Prescribed Burn Manager pursuant to Title 4, Part 13, Chapter 227, Subchapter A, Section 227.6 of the Texas Administrative Code (TAC).

TDA requests an opinion on the following questions:

1. Does the PBB have authority to accept a self-insurance program of a political subdivision or agency of the state in full satisfaction of any insurance requirements set by the PBB pursuant to Chapter 153 of the Natural Resources Code?
2. If the PBB grants certification to an employee of a governmental unit, may the employee, acting in his/her official capacity as an agent of the governmental unit, or the governmental unit be held liable in at least the minimum amounts required for liability insurance in Section 153.082 of the Natural Resources Code for damages arising out of prescribed burning activities?
3. If PBB has the authority to accept a self-insurance program for purposes of certification, does PBB or TDA have the discretion to deny certification to an employee of a governmental unit, assuming all other requirements of the statute are met?



## *Background*

The PBB regulates certified and insured prescribed burn managers who utilize prescribed burning for agricultural and land management purposes through a certification program to ensure that they have the proper training, experience and financial responsibility. The PBB does this by requiring applicants to meet the standards for certification set out in program rules, including training and experience. TDA legal has been tasked by the PBB with reviewing an applicant's insurance policy to verify that it meets the requirements set out in Section 153.082 of the Natural Resources Code, along with Title 4, Part 13, Sections 226.4 and 227.6 of the Texas Administrative Code. Assuming an applicant pays the fee for certification, has requisite experience and training, and files an insurance policy that meets statutory and program requirements, the PBB approves the application and TDA issues a certification to the applicant.

### *1. Analysis – The PBB's Authority to Accept Self-Insurance of a Governmental Unit*

Section 153.046(5) of the Natural Resources Code requires the PBB to establish minimum insurance requirements for certified and insured prescribed burn managers. Additionally, Section 153.047(5) of the Natural Resources Code states:

*Minimum standards established by the board for prescribed burning must:*

*(5) include minimum insurance requirements for certified and insured prescribed burn managers.*

The PBB set minimum insurance requirements for certified and insured prescribed burn managers through adoption of 4 TAC §226.4, which provides:

*The certified prescribed burn manager conducting a prescribed burn shall carry or be covered by:*

- (1) at least \$1 million of liability insurance coverage for each single occurrence of bodily injury to or destruction of property; and*
- (2) with a policy period minimum aggregate limit of at least \$2 million.*

In setting minimum insurance requirements, the PBB adopted the insurance coverage requirements set forth in Section 153.082 of the Natural Resources Code, which states:

*The limitation on liability under Section 153.081 does not apply to an owner, lessee, or occupant of agricultural land unless the certified and insured prescribed burn manager conducting a burn on the land has liability insurance coverage:*

- (1) of at least \$1 million for each single occurrence of bodily injury or death, or injury to or destruction of property; and*
- (2) with a policy period minimum aggregate limit of at least \$2 million.*

The utilization of the insurance requirements set forth by the legislature in Section 153.082 is consistent with the requirements of Section 311.011(b) of the Government Code, which provides:

*Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.*

The Texas Supreme Court has made it clear that if a statute uses a term with a particular meaning or assigns a particular meaning to a term, the court is bound by the statutory usage. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). The court further states:

*We further consider statutes as a whole rather than their isolated provisions. . . . We presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. Id.*

Accordingly, the adoption of the insurance coverage requirements in Section 153.082 of the Natural Resources Code by the PBB in fulfillment of the board's duties set forth in Section 153.046(5) of the Government Code was within the PBB's authority and in harmony with applicable rules pertaining to statutory construction.

Section 2259.031(a) of the Government Code states that a governmental unit may establish a self-insurance fund to protect the governmental unit and its officers, employees, and agents from any insurable risk or hazard. A governmental unit is defined as a: state agency or institution; a local government; or an entity acting on behalf of a state agency or institution of local government. Section 2259.001(1), Government Code. Local government means a municipality or other political subdivision of this state or a combination of political subdivisions, including a combination created under Chapter 791. Section 2259.001(2), Government Code.

The dilemma faced by the PBB in construing Section 153.082 of the Natural Resources Code is the legislature's use of the word "policy" in Section 153.082(2), which states that the certified and insured prescribed burn manager conducting a burn has insurance coverage "*with a policy period minimum aggregate limit of at least \$2 million.*"

According to the Insurance Risk Management Institute, Inc., a "policy" is a written contract of insurance between the insurer and the policyholder. It is typically composed of a declarations page, policy form, and endorsements or riders that amend the policy form. See <http://www.irmi.com/online/insurance-glossary/terms/p/policy.aspx>.

Thus, in the context of insurance, the term "policy" has acquired a technical or particular meaning, and specifically refers to the contract between the insurer and the policyholder. Despite the provisions of Chapter 2259 of the Government Code, it would appear that the use of the word "policy" in Section 153.082(2) of the Government Code prohibits the PBB from accepting a self-insurance program of a political subdivision or agency of the state in full satisfaction of the insurance requirements set forth in 4 TAC §226.4.

Hence, TDA, on behalf of the PBB, seeks an opinion from your office on whether the PBB has authority to accept a self-insurance program for a political subdivision or agency of the state in full satisfaction of any insurance requirements set by the PBB pursuant to Chapter 153 of the Natural Resources Code.

## *2. Analysis – Responsibility of a Governmental Unit for Damages*

Sections 153.046(5), 153.047(5), and 153.082 of the Natural Resources Code, construed together, and in context of Chapter 153 as a whole, reflect a legislative intent that a certified and insured prescribed burn manager be financially capable of responding to liability claims of third parties, in at least the minimum amounts set for liability insurance -- \$1 million per occurrence and \$2 million in aggregate.

The PBB, along with TDA, underwent sunset review by the 81<sup>st</sup> Legislature. The house bill analysis, bill analysis for the enrolled version, and the bill analysis accompanying the senate report for TDA's sunset bill, Senate Bill 1016, 81<sup>st</sup> Legislature<sup>ii</sup>, reflect that the legislature was concerned that certified and insured prescribed burn managers show financial responsibility and maintain adequate insurance to cover damages arising out of prescribed burning activities.

The house bill analysis for S.B. 1016 provides:

*C.S.S.B. 1016 requires the agency to renew prescribed burn manager certifications every two years. The bill changes the title of "certified prescribed burn manager" to "certified and insured prescribed burn manager," and allows such a certified prescribed burn manager to conduct a burn in a county in which a state of emergency or state of disaster has been declared by the Governor or President, as long as that Declaration does not expressly prohibit all outdoor burning.*

The bill analysis for the enrolled version of S.B. 1016 states:

*Prescribed burning serves a need in Texas for controlling vegetative fuels that can contribute to wildfires and for managing land to maintain or restore ecosystems. Regulation of certified prescribed burn managers is intended to ensure that those responsible for conducting these burns have the training, experience, and financial responsibility to protect the interests of land owners. (emphasis added.)*

The bill analysis accompanying the senate committee report for S.B. 1016 states:

*SECTION 2.05. Amends Section 153.046, Natural Resources Code, to require the board to develop a comprehensive training curriculum for certified and insured prescribed burn managers; establish standards for certification, recertification, and training for certified and insured prescribed burn managers; and establish minimum insurance requirements for certified and insured prescribed burn managers.*

The PBB recognizes that a governmental unit is immune from tort liability unless the Legislature has waived immunity. *Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). Further, Section 2259.002 of the Government Code provides that the establishment and maintenance of a self-insurance program by a governmental unit is not a waiver of immunity or of a defense of the governmental unit or its employees.

A waiver of sovereign immunity must be effected by clear and unambiguous language. Tex. Gov't Code § 311.034; *Oncor Electric Delivery Company, LLC v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 849 (Tex. 2012). Chapter 153 of the Natural Resources Code does not contain a "clear and unambiguous" waiver of sovereign immunity.

Additionally, prescribed burning activities do not appear to *clearly and unambiguously* fit within the statutory waivers of sovereign immunity contained in the Texas Tort Claims Act, Sections 101.021 and 101.0215 of the Civil Practice and Remedies Code. Even if a court were to find that the Texas Tort Claims Act waives sovereign immunity against a governmental unit for claims or suits arising out of prescribed burning activities, the limitation on damages set forth in Section 101.023 of the Civil Practices and Remedies Code is far less than the minimum liability insurance amounts prescribed by Section 153.082 of the Natural Resources Code.

Hence, in order to clarify its rights, responsibilities, and duties with respect to this matter, TDA, on behalf of the PBB, seeks an opinion from your office on whether an employee of a governmental unit acting in his/her official capacity as an agent of the governmental unit, licensed as a certified and insured prescribed burn manager, or a governmental unit, may be held liable for damages to third parties arising out of prescribed burning activities in at least the minimum amounts required for liability insurance in Section 153.082 of the Natural Resources Code.

3. *Analysis – Discretion to Deny Certification to an Employee of a Governmental Unit Because of Policy Considerations.*

Just as important as whether PBB has the authority to accept a self-insurance program, is whether PBB or TDA has the discretion to deny certification to an employee of a governmental unit because of policy considerations. An example of such a discretionary policy would be one that prohibits self-insurance in situations where sovereign immunity might act as a bar to, or limitation on, payment of valid claims, in at least the amounts set forth in 4 TAC 226.4, that arise out of prescribed burning activities by a certified and insured prescribed burn manager.

Section 153.048(b) of the Natural Resources Code states that:

*The board shall certify a person as a prescribed burn manager if the person:*

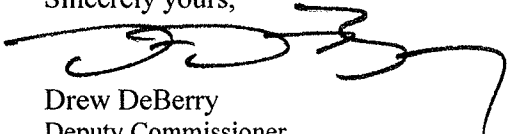
- (1) applies to the board for certification;*
- (2) demonstrates completion of an approved training program by an approved instructor; and*
- (3) pays a fee to the board in an amount determined by the board.*

Section 311.016 of the Government Code states that the use of the word “shall” imposes a duty, while use of the word “may” creates discretionary authority or grants permission or a power.

Since the legislature used the word “shall” instead of “may” in Section 153.048(b) of the Natural Resources Code, it appears the board has no discretion to deny a certification to an employee of a governmental unit who submits an application supported by a self-insurance program, provided the employee meets the requirements of Subsections (1) through (3) of Section 153.048(b) of the Natural Resources Code.

Hence, in order to clarify their rights, responsibilities, and duties with respect to this matter, the PBB and TDA seek an opinion from your office on whether PBB or TDA has the discretion to deny certification to an employee of a governmental unit because sovereign immunity might act as a bar to, or limitation on, payment of valid claims that arise out of prescribed burning activities by that employee.

Sincerely yours,



Drew DeBerry  
Deputy Commissioner

DD/DAH/spd

<sup>1</sup> Section 153.041(a) of the Natural Resources Code establishes the PBB as a board within TDA; hence, TDA is requesting this opinion.

<sup>ii</sup> Chapter 506 (S.B. 1016), Acts of the 81st Legislature, Regular Session, 2009 (referred to as “S.B. 1016”).