



MEMORANDUM

DATE August 29, 2013

TO Veterinary Medical Board

FROM Sue Geranen Executive Officer
DCA/Veterinary Medical Board

SUBJECT Minimum Standards Update

Background:

The proposed language updates the minimum standards of veterinary practice to current practice standards as well as provides additional protection to consumers in areas that were not previously covered in the minimum standards of practice.

The initial Notice of proposed changes was published on August 26, 2011 and two subsequent 15-day Notices were issued on January 4, 2012 and February 22, 2012.

The Office of Administrative Law (OAL) disapproved the rulemaking file on December 20, 2012. In its disapproval, OAL addressed several areas that the Board "...did not meet the necessity and clarity standards...and the final statement of reasons did not contain an adequate summary and response to each of the comments submitted..." including a recommendation to clarify CCR sections 2030.05 and 2032.05¹.

The Board's Administrative Committee reviewed OAL's disapproval recommendations on January 7, 2013 and staff issued a Notice of Modified Language, Notice of Proposed Language, and Notice of Documents Added to the Rulemaking File on January 11, 2013 in response to OAL's concerns.

It was believed at that time that the Board's motion at the October 2011 regulatory hearing was sufficient to move forward with the January 2013 Notice. The Board reviewed the 15-day Notice and amendments to the language at its January 30, 2013 meeting.

Staff issued a subsequent 15-day Notice on June 12, 2013 to clarify a technical issue with the January 2013 Notice.

Staff resubmitted the disapproved file to OAL on August 16, 2013. In its initial review OAL noted the Board did not formally adopt at their January 2013 meeting the 15-day Notice of Modified Text, Notice of Proposed Language, and Notices of Documents Added to Rulemaking File that includes amendments to CCR sections 2030.05 and 2032.05.

OAL determined, because amendments made to CCR sections 2030.05 and 2032.05 were substantive, the Board should have made a motion to adopt the 15-day Notice at its January 2013 Board meeting. OAL has recommended the Board formally adopt the 15-day Notice of Modified Text, Notice of Proposed Language, and Notices of Documents Added to Rulemaking File.

¹ See attached excerpt of OAL's Decision of Disapproval of Regulatory Action, "1. Section 2030.05..." and "2. Section 2032.05..."

Action Requested:

Review and approve 15-day Notice of Modified Text, Notice of Proposed Language, and Notices of Documents Added to Rulemaking File.

Motion – Approve the 15-day Notice of Modified Text, Notice of Proposed Language, and Notices of Documents Added to Rulemaking File and direct staff to complete the rulemaking process.

**Title 16. Professional and Vocational Regulations
Division 20. Veterinary Medical Board**

AVAILABILITY OF MODIFIED TEXT

NOTICE IS HEREBY GIVEN that the Veterinary Medical Board has proposed modifications to the text of sections 2030.05 and 2032.05. This regulatory proposal was the subject of a regulatory hearing on October 17, 2011. A copy of the modified text is enclosed.

A number of changes were made to the regulation text during the Office of Administrative Law review of this action that were nonsubstantial or solely grammatical in nature pursuant to Government Code section 11346.8(c). These changes do not require public notice and are not subject to public comment. Examples of the types of changes include the following:

1. Added Civil Code Section 1834.5 as citation reference to CCR section 2030.1 and 2030.2
2. Inserted missing existing language in CCR section 2030.2(b) and 2030.2(b)(5)(A).
3. Spelled out "veterinarian-client-patient relationship" in CCR section 2032.15.
4. Renumbered subdivisions in CCR section 2037(1), (2), and (3) to (a), (b), and (c)

Any person who wishes to comment on the proposed modifications may do so by submitting written comments on or before January 25, 2013 to the following:

Name:	Ethan Mathes
Address:	Veterinary Medical Board 2005 Evergreen Street, Suite 2250
Telephone No.:	916-263-2622
E-Mail Address:	ethan.mathes@dca.ca.gov

Please note any comments should be restricted to the most recent modifications made to the proposed regulations. The Board is not required to respond to comments received in response to this notice on other aspects of the proposed regulations. Any comments previously submitted remain in the rulemaking file.

DATED: January 11, 2013

ETHAN MATHES
Administrative Programs Coordinator
Veterinary Medical Board

Title 16. Professional and Vocational Regulations
Division 20. Veterinary Medical Board

*Changes to the previously modified language are shown in
bolded double strikeout for deleted text and bolded double underline for new text.*

2030.05. Minimum Standards - ~~Managing~~ Licensee Manager.

(a) A Licensee Manager is the California licensed veterinarian named as the ~~Managing~~ Licensee Manager on a facility's premises permit.

(b) The Licensee Manager is responsible for ensuring that the premises for which he/she is manager complies with the requirements in Sections 4853, 4854, 4855 and 4856 of the Business and Professions Code, Division 2, Chapter 11, Article 3. The Licensee Manager is responsible for ensuring that the physical and operational components of a premises meet the minimum standards of practice as set forth in sections 2030 ~~and through~~ 2032.5 of the California Code of Regulations, Title 16, Division 20, Article 4.

(c) The Licensee Manager is responsible for ensuring that no unlicensed activity is occurring within the premises or in any location where any function of veterinary medicine, veterinary surgery or veterinary dentistry is being conducted off the premises under the auspices of this premises license.

(d) The Licensee Manager shall maintain whatever physical presence is reasonable within the facility to ensure that the requirements in (a) - (c) are met.

(e) Each licensed veterinarian shall be responsible for their individual violations of the **Veterinary Medicine p**Practice **a**Act or any regulation adopted thereunder.

NOTE: Authority cited: Section 4808, Business and Professions Code. Reference: Sections 4853 and 4883 Business and Professions Code.

2032.05. Humane Treatment.

When treating a patient, a veterinarian shall use appropriate and humane ~~methods care of~~ **anesthesia, analgesia and sedation** to minimize pain and distress **before, during, and after performing any procedure(s)** ~~during and after any procedures.~~

NOTE: Authority cited: Sections 4808, Business and Professions Code. Reference: Section 4826 and 4883, Business and Professions Code.

**Title 16. Professional and Vocational Regulations
Division 20. Veterinary Medical Board**

AVAILABILITY OF DOCUMENTS ADDED TO RULEMAKING FILE

NOTICE IS HEREBY GIVEN that the following document(s) are being added to the rulemaking record for the regulatory proceeding concerning Title 16, Division 20, California Code of Regulations (CCR) sections 2030.05 and 2032.05:

1. Statement of Reasons
2. Precedent Decision 2005-01
3. Final Statements of Reasons from 1989 Rulemaking File, Section 2037 – Dental Operations Defined
4. Letter from Assembly Member Bruce Bronzan, dated July 9, 1990, to Governor George Deukmejian
5. Letter from Governor George Deukmejian, dated July 20, 1990, to Assembly Member Bruce Bronzan

The above documents are now available for public inspection and/or comment until January 25, 2013 at the following location:

Contact:	Ethan Mathes
Address:	Veterinary Medical Board 2005 Evergreen Street, Suite 2250
Telephone No.:	916-263-2622
E-Mail Address:	ethan.mathes@dca.ca.gov

DATED: January 11, 2013

ETHAN MATHES
Administrative Programs Coordinator
Veterinary Medical Board

**Title 16. Professional and Vocational Regulations
Division 20. Veterinary Medical Board**

AVAILABILITY OF DOCUMENTS ADDED TO RULEMAKING FILE

NOTICE IS HEREBY GIVEN that the following document(s) are being added to the rulemaking record for the regulatory proceeding concerning Title 16, Division 20, California Code of Regulations (CCR) sections 2030, 2030.05, 2030.1, 2030.2, 2030.3, 2032.05, 2032.1, 2032.15, 2032.2, 2032.25, 2032.3, 2032.35, 2032.4, and 2037:

1. Statement of Reasons
2. Precedent Decision 2005-01
3. Final Statements of Reasons from 1989 Rulemaking File, Section 2037 – Dental Operations Defined
4. Letter from Assembly Member Bruce Bronzan, dated July 9, 1990, to Governor George Deukmejian
5. Letter from Governor George Deukmejian, dated July 20, 1990, to Assembly Member Bruce Bronzan

The above documents are available for public inspection and/or comment until

June 26, 2013 at the following location:

Contact:	Ethan Mathes
Address:	Veterinary Medical Board 2005 Evergreen Street, Suite 2250 Sacramento, CA 95815
Telephone No.:	916-263-2622
E-Mail Address:	ethan.mathes@dca.ca.gov

DATED: June 7, 2013

ETHAN MATHES
Administrative Programs Coordinator
Veterinary Medical Board

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - ...
- (b) Persons shall be presumed to be “directly affected” if they:
- (1) are legally required to comply with the regulation;
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

There are two regulatory provisions in the Board’s proposed action that do not meet the clarity standard.

1. Section 2030.05(b) is Unclear.

The proposed adoption of section 2030.05(b) would provide:

(b) The Licensee Manager is responsible for ensuring that the premise [sic] for which he/she is manager complies with the requirements in Sections 4853, 4854, 4855 and 4856 of the Business and Professions Code, Division 2, Chapter 11, Article 3. The Licensee Manager is responsible for ensuring that the physical and operational components of a premise [sic] meet the minimum standards of practice as set forth in sections 2030 and 2032.5 of the California Code of Regulations, Title 16, Division 20, Article 4.
[Emphasis added.]

The problem with this regulatory provision is that it should probably state “sections 2030 through 2032.5,” not sections 2030 “and” 2032.5, or subdivision (b) of section 2030.05 should refer to all of the title 16 regulations that implement Business and Professions Code sections 4853, 4854, 4855 and 4856 and that pertain to “physical and operational components of a premise[s].” Otherwise, it appears that sections 2030 and 2032.5 are underinclusive of regulations that implement Business and Professions Code sections 4853, 4854, 4855 and 4856, which a licensee manager is required to comply with as provided earlier in subdivision (b). As a result, there is an internal inconsistency in section 2030.05(b), making it reasonably and logically subject to interpretation that would have more than one meaning, which does not satisfy the clarity standard based on title 1, California Code of Regulations, section 16(a)(1). Section 2030.05(b) would be unclear to anyone directly affected by it as to which title 16 regulations they would need to comply with.

Note that Business and Professional Code section 4853(b) defines “premises” very broadly, as follows:

(b) "Premises" for the purpose of this chapter shall include a building, kennel, mobile unit, or vehicle. ...

Because of this broad definition of “premises,” the Board regulations that implement Business and Professional Code sections 4853 and 4854, which refer to regulations adopted by the Board relating to veterinary “premises,” clearly include most of the regulations in this action, as well as other title 16 regulations that have to do with veterinary premises beyond just sections 2030 and 2032.5. For example, title 16, California Code of Regulations, sections 2030.1 (minimum standards for small animal fixed premises), 2030.2 (small animal mobile clinic), and 2030.3 (small animal vaccination clinic) all implement Business and Professions Code sections 4853 and 4854 and include provisions related to the “physical and operational components of a premise[s].” Additionally, Business and Professions Code sections 4855 and 4856 pertain to record keeping requirements of animals receiving veterinary services, which would at a minimum include title 16, California Code of Regulations, section 2032.3, a section that is being amended in this action, as its provisions are related to “operational components of a premise[s].”

Modifying the text in section 2030.05(b) to change the “and” to “through” so that it reads “sections 2030 through 2032.5,” or to identify all of the regulations that implement “physical and operational components of a premise[s]” in Business and Professions Code sections 4853, 4854, 4855 and 4856, would be a substantial change. The Board will need to modify section 2030.05(b) to resolve the inherent inconsistency of the proposed text. This will require the Board to provide the modified text to the public in a 15-day notice and public comment period pursuant to Government Code section 11346.8(c) and title 1, California Code of Regulations, section 44.

2. Section 2032.05 is Unclear.

The proposed adoption of section 2032.05 would provide:

When treating a patient, a veterinarian shall use appropriate and humane methods of anesthesia, analgesia and sedation to minimize pain and distress.
[Emphasis added.]

The plain language of this provision appears to state that a veterinarian shall use an anesthesia, analgesia, or sedative whenever treating an animal, at least when an animal exhibits signs of pain or distress. The rulemaking file is not clear that this is the intended result of the proposed adoption of section 2032.05. The necessity statement in the initial statement of reasons for this section provides the following:

The proposed regulation was moved from section 2032.4 so that it separately and specifically defines the overall need for humane treatment of animals.

There is no clear description in this statement of an intent that some form of anesthesia will be required on an animal any time an animal exhibits signs of pain or distress. Additionally, the statement fails to elicit any intent for section 2032.05 other than some vague “need for humane treatment of animals,” which may or may not require the use of anesthesia. Based on other things stated in the record (e.g., comments from veterinarians), it would appear that veterinarians have discretion in the use of anesthesia, but it is unclear whether the Board intended in this section for

the use of anesthesia, analgesia and sedation to be discretionary or required. As such, section 2032.05 is at odds with the clarity standard based on title 1, California Code of Regulations, section 16(a)(2), because the language of the regulation inherently conflicts with the Board's statement of the effect of the regulation.

OAL discussed this provision with the Board's staff to determine what the effect of section 2032.05 was intended to be. The Board has taken this issue under advisement and will clarify in its supplement to the initial statement of reasons what the effect of section 2032.05 is supposed to be, and, if needed, will modify this section in a 15-day notice and public comment period. Alternatively, the Board may remove section 2032.05 from this action and retain the language in section 2032.4.

C. INSUFFICIENT SUMMARY AND RESPONSE TO COMMENTS IN THE FINAL STATEMENT OF REASONS

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a 45-day comment period prior to adoption of a proposed regulatory action (Gov. Code, secs. 11346.4 and 11346.5), and at least a 15-day comment period whenever an agency makes substantial and sufficiently related changes to the 45-day text (Gov. Code, sec 11346.8(c)). By requiring the state agency to summarize and respond in the record to any comments received during a comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input.

Government Code section 11346.9(a) provides that an agency proposing regulations shall prepare and submit to OAL a "final statement of reasons." One of the required contents of the final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9(a)(3) requires that the final statement of reasons include:

(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action....

Furthermore, where an agency makes substantial, but sufficiently related changes to its original regulatory proposal and provides notice of the changes pursuant to Government Code section 11346.8(c), that statutory provision specifically includes the following requirement:

(c) ... Any written comments received regarding the change must be responded to in the final statement of reasons required by [Government Code] Section 11346.9.

In this rulemaking action, the Board provided a public comment period for its originally proposed 45-day text, a comment period for the addition of its amended initial statement of reasons to the rulemaking file, and two public comment periods in subsequent modifications of