

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: December 5, 2012

DATE OF REQUEST: November 16, 2012

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Bruce McAnally, (512) 239-2141

CAPTION: Docket No. 2011-1260-RUL. Consideration of the adoption of the amendment to Section 7.117 of 30 TAC Chapter 7, Memorandum of Understanding (MOU).

The adoption would implement Article 2 of House Bill 2694, 82nd Legislature, 2011, Regular Session, which transferred from the TCEQ to the Railroad Commission of Texas (RRC), effective September 1, 2011, those duties pertaining to responsibility of preparing groundwater protection advisory/recommendation letters and issuing to permit applicants for geologic storage of anthropogenic carbon dioxide a letter of determination stating that drilling and operating the carbon dioxide injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata and that the formation or stratum to be used for the geologic storage facility is not freshwater sand. The rulemaking would adopt by reference a revised MOU between the RRC and TCEQ. The proposed rules were published in the August 24, 2012, issue of the Texas Register (37 TexReg 6524). (Kari Bourland, Don Redmond) (Rule Project No. 2011-037-007-WS)

Ashley Forbes for Brent Wade

Deputy Director

Earl Lott

Division Director

Bruce McAnally

Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: November 16, 2012

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Brent Wade, Deputy Director
Office of Waste

Docket No.: 2011-1260-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 7, Memoranda of Understanding
HB 2694 (Article 2): RRC Transfer
Rule Project No. 2011-037-007-WS

Background and reason(s) for the rulemaking:

This rulemaking is part of the implementation of Article 2 of House Bill (HB) 2694, 82nd Legislature, 2011, by Representative Wayne Smith. HB 2694, Article 2 transferred from the Texas Commission on Environmental Quality (TCEQ) to the Railroad Commission of Texas (RRC) duties relating to the protection of groundwater resources from oil and gas associated activities. Specifically, HB 2694, Article 2 amended Natural Resources Code to revise §91.011 and add §§91.0115, 91.020, and 91.1015 and amended Texas Water Code (TWC), §27.033. The law transferred from the TCEQ to the RRC, effective September 1, 2011, those duties pertaining to responsibility of preparing groundwater protection advisory/recommendation letters. These letters contained TCEQ's recommendations for depth of surface casing for the following activities under jurisdiction of the RRC: oil and gas wells and disposal wells injecting oil and gas wastes. In addition, responsibility for determinations that drilling and operating anthropogenic carbon dioxide injection wells will not injure freshwater strata and that the formation or stratum to be used is not a freshwater sand was transferred to the RRC. The TCEQ's Surface Casing Program and staff transferred to the RRC effective September 1, 2011.

Scope of the rulemaking:

The rulemaking amends 30TAC §7.117 to adopt by reference a revised Memoranda of Understanding (MOU) between the RRC and the TCEQ. The RRC has adopted a revised RRC and TCEQ MOU in RRC rule 16 TAC §3.30 to reflect the transfer of duties related to groundwater protection from the TCEQ to the RRC. The amended MOU was adopted by the RRC on March 20, 2012, and was effective May 1, 2012 (see April 6, 2012, issue of the *Texas Register* (37 TexReg 2385)).

Due to delays in the RRC's adoption of concurrent amendments to their rules, the repeal of 30 TAC Chapter 339, relating to Groundwater Protection Recommendation Letters and Fees, will be considered at a later date.

A.) Summary of what the rulemaking will do:

Re: Docket No. 2011-1260-RUL

The amendment to §7.117 adopts by reference the revised MOU between the RRC and TCEQ. This revision will update commission rules to reference the current version of the MOU.

B.) Scope required by federal regulations or state statutes:

The state statutes transferred from the TCEQ to the RRC duties relating to the protection of groundwater resources from oil and gas associated activities. Effective September 1, 2011, the law transferred those duties pertaining to responsibility of preparing groundwater protection advisory/recommendation letters from TCEQ to the RRC.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

This rulemaking implements TCEQ's sunset bill, HB 2694, 82nd Legislature, 2011.

Effect on the:

A.) Regulated community:

Effective September 1, 2011, the regulated community no longer needs to seek letters from TCEQ prior to receiving an RRC permit.

B.) Public:

None.

C.) Agency programs:

Effective September 1, 2011, TCEQ no longer has responsibility for duties related to groundwater protection advisory/recommendation letters. Staff and fees associated with these letters have been transferred from TCEQ to the RRC.

Stakeholder meetings:

No.

Public comment:

The comment period closed on September 24, 2012. No comments were received.

Significant changes from proposal:

No changes from rule proposal have been made.

Potential controversial concerns and legislative interest:

None.

Commissioners
Page 3
November 16, 2012

Re: Docket No. 2011-1260-RUL

Does this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this rulemaking does not go forward then commission rules will not reference the current version of the MOU between the RRC and TCEQ.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: August 24, 2012
Anticipated Texas Register publication date: December 21, 2012
Anticipated effective date: December 27, 2012
Six-month Texas Register filing deadline: February 24, 2013

Agency contacts:

Kari Bourland, Rule Project Manager, 239-6137, Waste Permits Division
Don Redmond, Staff Attorney, 239-0612
Bruce McAnally, Texas Register Coordinator, 239-2141

Attachments

House Bill 2694

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Tucker Royall
Office of General Counsel
Kari Bourland
Bruce McAnally

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §7.117 *without change* to the proposed text as published in the August 24, 2012, issue of the *Texas Register* (37 TexReg 6524) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

The Memorandum of Understanding (MOU) between the TCEQ and the Railroad Commission of Texas (RRC) was last updated in August 2010. House Bill (HB) 2694, Article 2, the TCEQ Sunset Legislation, passed by the 82nd Legislature, 2011, and signed by the governor, transferred from the TCEQ to the RRC duties relating to the protection of groundwater resources from oil and gas associated activities. Specifically, HB 2694, Article 2, amended Natural Resources Code to revise §91.011 and add §§91.0115, 91.020, and 91.1015 and amended Texas Water Code (TWC), §27.033. The law transfers from the TCEQ to the RRC, effective September 1, 2011, those duties pertaining to the responsibility of preparing groundwater protection advisory/recommendation letters. Since the transfer, the RRC has been responsible for providing surface casing and/or groundwater protection recommendations for oil and gas activities under the jurisdiction of the RRC.

In addition, HB 2694, Article 2, amended TWC, §27.046, transferring from the TCEQ to the RRC the responsibility of issuing, to permit applicants for geologic storage of anthropogenic carbon dioxide (CO₂), a letter of determination stating that drilling and

operating the anthropogenic CO₂ injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in that area and that the formation or stratum to be used for the geologic storage facility is not freshwater sand.

On September 1, 2011, the TCEQ's Surface Casing Program and staff transferred to the RRC. The RRC renamed the program the Groundwater Advisory Unit, and it is located in the William B. Travis Building, 1701 North Congress, Austin, Texas.

The commission adopts the amendment to §7.117 to adopt by reference a revised MOU between the RRC and the TCEQ. The RRC has adopted an amendment to 16 TAC §3.30, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality, to reflect the changes in law made under HB 2694, Article 2 (see April 6, 2012, issue of the *Texas Register* (37 TexReg 2385)). The specific MOU provisions are in 16 TAC §3.30, while Chapter 7, Memoranda of Understanding, incorporates by reference the rules in 16 TAC §3.30.

A corresponding rulemaking repealing 30 TAC Chapter 339, Groundwater Protection Recommendation Letters and Fees, will be published in a future issue of the *Texas Register*.

Section Discussion

§7.117, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality

The RRC has amended the MOU between the RRC and the TCEQ to reflect the changes in law made under HB 2694, Article 2 (16 TAC §3.30). The amended MOU was adopted by the RRC on March 20, 2012, and was effective May 1, 2012. The adopted amendment to §7.117 reflects the amendment to 16 TAC §3.30 as adopted by the RRC.

Final Regulatory Impact Determination

The commission reviewed the rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the rule is to update the reference to the MOU between the RRC and TCEQ, to clarify jurisdiction of the respective agencies pursuant to statutory changes from HB 2694. HB 1407, §10, 67th Legislature, 1981, a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, required the Texas Department of Water Resources, the Texas

Department of Health, and the RRC to execute an MOU specifying in detail these agencies' interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas, and to amend the MOU at any time that the agencies find it to be necessary. The original MOU between the agencies became effective January 1, 1982. The MOU was revised effective December 1, 1987, to reflect legislative clarification of the RRC's jurisdiction over oil and gas wastes and the Texas Water Commission's, successor to the Texas Department of Water Resources, jurisdiction over industrial and hazardous wastes. Senate Bill (SB) 1604, 80th Legislature, 2007, gave TCEQ jurisdiction over certain activities associated with radioactive materials and requires the TCEQ and the RRC to adopt an MOU to define the duties of each agency in respect to radioactive materials. The MOU was revised in 2010 to reflect statutory requirements regarding the jurisdiction over certain radioactive materials and the geologic sequestration of CO₂. And, in 2012 the MOU was revised to reflect jurisdictional changes required by HB 2694 that transferred duties from the commission to the RRC relating to the protection of groundwater resources from certain oil and gas and geologic sequestration activities regulated by the RRC.

The rule does not meet the definition of a major environmental rule because the rule only explains existing agency responsibilities rather than create substantive requirements to protect the environment. The rule references the MOU which is used to

clarify and explain jurisdiction of the respective agencies. Because the intent of the rule does not create or require actions for the purpose of protecting the environment or reducing risks to human health from environmental exposure, the rule is not an environmental rule.

Additionally, the rule does not meet the definition of a major environmental rule because it is not anticipated that the rule will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rule merely explicates jurisdiction of the respective agencies and does not impose new requirements.

Finally, the rulemaking action does not meet any of the four applicability requirements for a major environmental rule listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. In this case, the rule does not meet any of these applicability requirements. First, in explicating jurisdiction of the

respective agencies, the rule does not exceed a standard set by federal law. Second, the rule does not exceed an express requirement of state law, because HB 1407, §10, 67th Legislature, 1981, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7 expressly mandated creation of the MOU including a mandate to amend the MOU at any time that the agencies find it to be necessary. SB 1604, 80th Legislature, 2007, requires TCEQ and the RRC to adopt an MOU to define the duties of each agency. Third, the rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not adopt this rulemaking solely under the commission's general powers but under specific authority as explained under the second point above. Therefore, the commission concludes that the adopted rule does not meet the definition of a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the rule and performed an assessment of whether the rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose

of the rule is to update the reference to the MOU between the RRC and TCEQ used to clarify and explain jurisdiction of the respective agencies pursuant to statutory changes.

Promulgation and enforcement of the rule would be neither a statutory nor a constitutional taking of public or private real property because the rule does not affect real property. Because the rule does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. The rule merely updates the reference to the MOU, which is used to clarify and explain jurisdiction of the respective agencies. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §5.05.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking is not subject to the Texas Coastal Management Program.

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

regarding the consistency of this rulemaking with the Coastal Management Program.

Public Comment

The comment period closed on September 24, 2012. No comments were received.

§7.117

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The amendment is adopted under the Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361; the Texas Radiation Control Act, THSC, Chapter 401; TWC, Chapter 26; and the Injection Well Act, TWC, Chapter 27. The amendment is adopted under THSC, §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; THSC, §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; and TWC, §27.019, concerning Rules, Etc., which authorizes the commission to adopt rules required for the performance of the commission's responsibilities under the Injection Well Act.

The adopted amendment implements THSC, §361.016, concerning Memorandum of Understanding by Commission, which requires the commission to adopt by rule any memorandum of understanding between the commission and any other state agency; THSC, §401.069 and §401.414, concerning Memorandum of Understanding and Memoranda of Understanding, which require the commission and the RRC to adopt a memorandum of understanding by rule regarding the agencies' duties under the Texas

Radiation Control Act; TWC, §5.104, concerning Memoranda of Understanding, which authorizes the commission to adopt by rule any memorandum of understanding between the commission and any other state agency; TWC, §27.049, concerning Memorandum of Understanding, which requires the commission and the RRC to amend the existing memorandum of understanding in 16 TAC §3.30 or enter a new memorandum of understanding; and HB 2694, 82nd Legislature, 2011.

§7.117. Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality.

The Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality, concerning cooperation and the division of jurisdiction between the agencies regarding wastes that result from, or are related to, activities associated with the exploration, development, and production of oil, gas, or geothermal resources, and the refining of oil, is adopted by reference as adopted in Texas Railroad Commission rule 16 TAC §3.30 (concerning Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality) effective May 1, 2012. If a copy of this document cannot be obtained from the internet, a copy can be requested from the Texas Commission on Environmental Quality, Chief Clerk's Office, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-3300.

Texas Commission on Environmental Quality



ORDER ADOPTING AMENDED RULE

Docket No. 2011-1260-RUL

On December 5, 2012, the Texas Commission on Environmental Quality (Commission) adopted an amended rule in 30 TAC Chapter 7, Memoranda of Understanding. The proposed rule was published for comment in the August 24, 2012, issue of the *Texas Register* (37 TexReg 6524).

IT IS THEREFORE ORDERED BY THE COMMISSION that the rule is hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rule and preamble necessary to comply with *Texas Register* requirements. The adopted rule and the preamble to the adopted rule are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Government Code, § 2001.033.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Issued date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman

Filed with the Office of the Secretary of State on August 9, 2012.

TRD-201204214

Sara Waitt

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: September 23, 2012

For further information, please call: (512) 463-6327



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 7. MEMORANDA OF UNDERSTANDING

30 TAC §7.117

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §7.117.

Background and Summary of the Factual Basis for the Proposed Rule

The Memorandum of Understanding (MOU) between the TCEQ and the Railroad Commission of Texas (RRC) was last updated in August 2010. House Bill (HB) 2694, Article 2, passed by the 82nd Legislature, 2011, and signed by the governor, transferred from the TCEQ to the RRC duties relating to the protection of groundwater resources from oil and gas associated activities. Specifically, HB 2694, Article 2 amended Natural Resources Code to revise §91.011 and add §§91.0115, 91.020, and 91.1015 and amended Texas Water Code (TWC), §27.033. The law transfers from the TCEQ to the RRC, effective September 1, 2011, those duties pertaining to the responsibility of preparing groundwater protection advisory/recommendation letters. Since the transfer, the RRC has been responsible for providing surface casing and/or groundwater protection recommendations for oil and gas activities under the jurisdiction of the RRC.

In addition, HB 2694, Article 2 amended TWC, §27.046, transferring from the TCEQ to the RRC the responsibility of issuing, to permit applicants for geologic storage of anthropogenic carbon dioxide (CO₂), a letter of determination stating that drilling and operating the anthropogenic CO₂ injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in that area and that the formation or stratum to be used for the geologic storage facility is not freshwater sand.

The TCEQ's Surface Casing Program and staff transferred to the RRC effective September 1, 2011. The RRC's Surface Casing Program has been renamed the Groundwater Advisory Unit, and is now located in the William B. Travis Building, 1701 North Congress, Austin.

The commission proposes to amend §7.117 to adopt by reference a revised MOU between the RRC and the TCEQ. The RRC has adopted an amendment to 16 TAC §3.30, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality, to reflect the changes in law made under HB 2694, Article 2 (see April 6, 2012, issue of the *Texas Register* (37 TexReg 2385)). The specific

MOU provisions are in 16 TAC §3.30, while Chapter 7, Memoranda of Understanding, incorporates by reference the rules in 16 TAC §3.30.

A corresponding rulemaking repealing 30 TAC Chapter 339, Groundwater Protection Recommendation Letters and Fees, is published in this issue of the *Texas Register*.

Section Discussion

§7.117, *Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality*

The RRC has amended the MOU between the RRC and the TCEQ to reflect the changes in law made under HB 2694, Article 2 (16 TAC §3.30). The amended MOU was adopted by the RRC on March 20, 2012, and was effective May 1, 2012. The proposed amendment to §7.117 reflects the amendment to 16 TAC §3.30 as adopted by the RRC.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or the RRC as a result of administration or enforcement of the proposed rule. The proposed rule would have no fiscal impact on other state agencies or units of local government.

The proposed rulemaking would amend §7.117 to adopt by reference a revised MOU between the RRC and the TCEQ that complies with the requirements of HB 2694, Article 2, the agency's Sunset Bill. As required by the HB 2694, the TCEQ's Surface Casing Program, funding and staff, transferred to the RRC effective September 1, 2011, and the preparation of groundwater protection advisory/recommendation letters became the responsibility of the RRC. These letters contain recommendations for the depth of surface casing for oil and gas wells and disposal wells injecting oil and gas wastes. In addition, the MOU transfers the responsibility of determining that drilling and operating anthropogenic CO₂ injection wells will not injure freshwater strata and that the formation or stratum used for injection is not a freshwater sand stratum. The RRC adopted the revised MOU on March 20, 2012, and the agency is required to adopt the MOU to reflect its current jurisdiction over waste materials.

As a part of the proposed rulemaking, the agency is also proposing the repeal of Chapter 339, since the duties related to these letters are now the responsibility of the RRC. The fiscal impact of the proposed repeal is covered under a separate, but related fiscal note.

The proposed rulemaking would not have a significant fiscal impact on the agency. Other state agencies and units of local government would not experience any fiscal impact under the proposed rule. On September 1, 2011, the agency transferred 9.0 full-time employees and \$931,256 in fee revenue and annual costs out of the Water Resource Management Account No. 153 to the RRC.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law.

The proposed rule would not have a fiscal impact on individuals. Individuals do not typically participate in the types of activities that would be governed by the proposed rulemaking.

Adopting the RRC MOU via the proposed rulemaking is not expected to increase or decrease costs for large businesses or small businesses. The RRC would be responsible for enforcing regulations pertaining to groundwater protection for oil and gas activities and geologic storage of anthropogenic CO₂ instead of the agency. The RRC is expected to recover the cost of providing this type of groundwater protection through fee collection, but those costs are not expected to be significantly higher or lower than the cost of such protection in the past.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rule is to update the reference to the MOU between the RRC and TCEQ to clarify jurisdiction of the respective agencies pursuant to statutory changes from HB 2694. HB 1407, §10, 67th Legislature, 1981, a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, required the Texas Department of Water Resources, the Texas Department of Health, and the RRC to execute an MOU specifying in detail these agencies' interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas, and to amend the MOU at any time that the agencies find it to be necessary. The original MOU between the agencies became effective January 1, 1982. The MOU was revised effective December 1, 1987, to reflect legislative clarification of the RRC's jurisdiction over oil and gas wastes and the Texas Water Commission's, successor to the Texas Department of Water Resources, jurisdiction over industrial and hazardous wastes. SB 1604, 80th Legislature, 2007, gave TCEQ jurisdiction over certain activities associated with radioactive materials

and requires the TCEQ and the RRC to adopt an MOU to define the duties of each agency in respect to radioactive materials. The MOU was revised in 2010 to reflect statutory requirements regarding the jurisdiction over certain radioactive materials and the geologic sequestration of CO₂. And, in 2012 the MOU was revised to reflect jurisdictional changes required by HB 2694 that transferred duties from the commission to the RRC relating to the protection of groundwater resources from certain oil and gas and geologic sequestration activities regulated by the RRC.

The proposed rule does not meet the definition of a major environmental rule because the proposed rule only explains existing agency responsibilities rather than create substantive requirements to protect the environment. The proposed rule references the MOU which is used to clarify and explain jurisdiction of the respective agencies. Because the intent of the rule does not create or require actions for the purpose of protecting the environment or reducing risks to human health from environmental exposure, the proposed rule is not an environmental rule.

Additionally, the proposed rule does not meet the definition of a major environmental rule because it is not anticipated that the proposed rule will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rule merely explicates jurisdiction of the respective agencies and does not impose new requirements.

Finally, the proposed rulemaking action does not meet any of the four applicability requirements for a major environmental rule listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. In this case, the proposed rule does not meet any of these applicability requirements. First, in explicating jurisdiction of the respective agencies, the proposed rule does not exceed a standard set by federal law. Second, the proposed rule does not exceed an express requirement of state law, because HB 1407, §10, 67th Legislature, 1981, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7 expressly mandated creation of the MOU including a mandate to amend the MOU at any time that the agencies find it to be necessary. SB 1604, 80th Legislature, 2007, requires TCEQ and the RRC to adopt an MOU to define the duties of each agency. Third, the proposed rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Fourth, the commission does not propose this rulemaking solely under the commission's general powers but under specific authority as explained under the second point above. Therefore, the commission concludes that the proposed rule does not meet the definition of a major environmental rule.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rule and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to update the reference to the MOU between the RRC and TCEQ used to clarify and explain jurisdiction of the respective agencies pursuant to statutory changes.

Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of public or private real property because the proposed rule does not affect real property. Because the proposed rule does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. The proposed rule merely updates the reference to the MOU, which is used to clarify and explain jurisdiction of the respective agencies. Therefore, the proposed rule will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §5.05.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Submittal of Comments

Written comments may be submitted to Bruce McNally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-037-007-WS. The comment period closes September 24, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Kari Bourland, Waste Permits Division, (512) 239-6137.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is proposed under the Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361; the Texas Radiation Control Act, THSC, Chapter 401; TWC, Chapter 26; and the Injection Well Act, TWC, Chapter 27. The amendment is proposed under THSC, §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; THSC, §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; and TWC, §27.019, concerning Rules, Etc., which authorizes the commission to adopt rules required for the performance of the commission's responsibilities under the Injection Well Act.

The proposed amendment implements THSC, §361.016, concerning Memorandum of Understanding by Commission, which requires the commission to adopt by rule any memorandum of understanding between the commission and any other state agency; THSC, §401.069 and §401.414, concerning Memorandum of Understanding and Memoranda of Understanding, which require the commission and the RRC to adopt a memorandum of understanding by rule regarding the agencies' duties under the Texas Radiation Control Act; TWC, §5.104, concerning Memoranda of Understanding, which authorizes the commission to adopt by rule any memorandum of understanding between the commission and any other state agency; TWC, §27.049, concerning Memorandum of Understanding, which requires the commission and the RRC to amend the existing memorandum of understanding in 16 TAC §3.30 or enter a new memorandum of understanding; and HB 2694, 82nd Legislature, 2011.

§7.117. Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality.

The Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality, concerning cooperation and the division of jurisdiction between the agencies regarding wastes that result from, or are related to, activities associated with the exploration, development, and production of oil, gas, or geothermal resources, and the refining of oil, is adopted by reference as adopted in Texas Railroad Commission rule 16 TAC §3.30 (concerning Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality) effective May 1, 2012. If a copy of this document cannot be obtained from the internet, a copy can be requested from the Texas Commission on Environmental Quality, Chief Clerk's Office, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-3300.

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 August 10, 2012.

TRD-201204222

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: September 23, 2012

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

CHAPTER 339. GROUNDWATER PROTECTION RECOMMENDATION LETTERS AND FEES

30 TAC §§339.1 - 339.3

(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 Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Commission on Environmental Quality (TCEQ, commission or agency) proposes the repeal of §§339.1 - 339.3.

Background and Summary of the Factual Basis for the Proposed Repeals

on private property from meeting requirements related to dam safety
if the dam:

(1) at maximum capacity impounds less than 500 acre-
feet;

(2) has a hazard classification of low or significant;

(3) is located in a county with a population of less
than 215,000; and

(4) is not located inside the corporate limits of a
municipality.

(e-2) Notwithstanding Subsection (e-1), an owner of a dam
shall comply with operation and maintenance requirements
established by commission rule.

(e-3) This subsection and Subsections (e-1) and (e-2) expire
August 31, 2015.

ARTICLE 2. TRANSFER OF CERTAIN DUTIES TO THE RAILROAD COMMISSION

SECTION 2.01. Section 91.011, Natural Resources Code, is

amended to read as follows:

Sec. 91.011. CASING. (a) Before drilling into the oil or gas bearing rock, the owner or operator of a well being drilled for oil or gas shall encase the well with good and sufficient wrought iron or steel casing or with any other material that meets standards adopted by the commission, particularly where wells could be subjected to corrosive elements or high pressures and temperatures, in a manner and to a depth that will exclude surface or fresh water from the lower part of the well from penetrating the oil or gas bearing rock, and if the well is drilled through the first into the lower oil or gas bearing rock, the well shall be cased in a manner and to a depth that will exclude fresh water above the last oil or gas bearing rock penetrated.

(b) The commission shall adopt rules regarding the depth of well casings necessary to meet the requirements of this section.

SECTION 2.02. Subchapter B, Chapter 91, Natural Resources

H.B. No. 2694
Code, is amended by adding Section 91.0115 to read as follows:

Sec. 91.0115. CASING; LETTER OF DETERMINATION. (a) The commission shall issue, on request from an applicant for a permit for a well to be drilled into oil or gas bearing rock, a letter of determination stating the total depth of surface casing required for the well by Section 91.011.

(b) The commission may charge a fee in an amount to be determined by the commission for a letter of determination.

(c) The commission shall charge a fee not to exceed \$75, in addition to the fee required by Subsection (b), for processing a request to expedite a letter of determination. Money collected under this subsection may be used to study and evaluate electronic access to geologic data and surface casing depths under Section 91.020.

SECTION 2.03. Subchapter B, Chapter 91, Natural Resources Code, is amended by adding Section 91.020 to read as follows:

H.B. No. 2694

Sec. 91.020. ELECTRONIC GEOLOGIC DATA. The commission shall work cooperatively with other appropriate state agencies to study and evaluate electronic access to geologic data and surface casing depths necessary to protect usable groundwater in this state.

SECTION 2.04. Subchapter D, Chapter 91, Natural Resources Code, is amended by adding Section 91.1015 to read as follows:

Sec. 91.1015. GROUNDWATER PROTECTION REQUIREMENTS. The commission shall adopt rules to establish groundwater protection requirements for operations that are within the jurisdiction of the commission, including requirements relating to the depth of surface casing for wells.

SECTION 2.05. Section 27.033, Water Code, is amended to read as follows:

Sec. 27.033. LETTER OF DETERMINATION [~~FROM EXECUTIVE DIRECTOR~~]. A person making application to the railroad commission for a permit under this chapter shall submit with the application a

H.B. No. 2694

letter of determination from the railroad commission [~~from the executive director~~] stating that drilling and using the disposal well and injecting oil and gas waste into the subsurface stratum will not endanger the freshwater strata in that area and that the formation or stratum to be used for the disposal is not freshwater sand.

SECTION 2.06. Section 27.046, Water Code, is amended to read as follows:

Sec. 27.046. LETTER OF DETERMINATION [~~FROM EXECUTIVE DIRECTOR~~]. (a) The railroad commission may not issue a permit under rules adopted under this subchapter until the railroad commission issues to the applicant for the permit [~~provides to the railroad commission~~] a letter of determination [~~from the executive director~~] stating that drilling and operating the anthropogenic carbon dioxide injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in

that area and that the formation or stratum to be used for the geologic storage facility is not freshwater sand.

(b) To make the determination required by Subsection (a), the railroad commission [~~executive director~~] shall review:

- (1) the area of review and corrective action plans;
- (2) any subsurface monitoring plans required during injection or post injection;
- (3) any postinjection site care plans; and
- (4) any other elements of the application reasonably required in order for the railroad commission [~~executive director~~] to make the determination required by Subsection (a).

(c) The railroad commission shall adopt rules to implement and administer this section.

SECTION 2.07. Section 5.701(r), Water Code, is repealed.

SECTION 2.08. (a) The Railroad Commission of Texas shall adopt rules to implement the changes in law made by this article

not later than March 1, 2012.

(b) A rule, form, policy, or procedure of the Texas Commission on Environmental Quality related to the changes in law made by this article continues in effect as a rule, form, policy, or procedure of the Railroad Commission of Texas and remains in effect until amended or replaced by that agency.

ARTICLE 3. PUBLIC INTEREST

SECTION 3.01. Subchapter F, Chapter 5, Water Code, is amended by adding Section 5.239 to read as follows:

Sec. 5.239. PUBLIC EDUCATION AND ASSISTANCE. (a) The executive director shall ensure that the agency is responsive to environmental and citizens' concerns, including environmental quality and consumer protection.

(b) The executive director shall develop and implement a program to:

(1) provide a centralized point for the public to access

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.30

The Railroad Commission of Texas (Commission) adopts amendments to §3.30, relating to Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ), with two changes to the text published in the December 30, 2011, issue of the *Texas Register* (36 TexReg 9147). The adopted changes are in subsection (e)(7)(B)(ii) to correct a typographical error and in subsection (g) to specify the effective date.

The Commission received no comments on the proposed amendments.

The memorandum of understanding (MOU) between the TCEQ and the RRC (or Commission) was last updated substantively in August 2010. Article 2 of House Bill (HB) 2694, passed by the 82nd Texas Legislature and signed by the Governor, transferred from the TCEQ to the RRC duties relating to the protection of groundwater resources from oil and gas associated activities. Specifically, the law transfers from the TCEQ to the RRC, effective September 1, 2011, those duties pertaining to the responsibility of preparing groundwater protection advisory/recommendation letters. After the transfer, the RRC will be responsible for providing surface casing and/or groundwater protection recommendations for oil and gas activities under the jurisdiction of the RRC.

In addition, Article 2 of HB 2694 amended Texas Water Code, §27.046, transferring from the TCEQ to the RRC the responsibility of issuing to permit applicants for geologic storage of anthropogenic carbon dioxide a letter of determination stating that drilling and operating the anthropogenic carbon dioxide injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in that area and that the formation or stratum to be used for the geologic storage facility is not freshwater sand.

The TCEQ's Surface Casing Program and staff transferred to the RRC effective September 1, 2011. The RRC's Surface Casing Program has been renamed the Groundwater Advisory Unit and is now located in the William B. Travis Building, 1701 North Congress, Austin. The Commission adopts these amendments to §3.30, while the TCEQ will adopt concurrent amendments to 30 TAC §7.117 (relating to Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality) to incorporate by reference the amendments to §3.30.

The Commission will propose amendments to other rules to comply with Article 2 of HB 2694 in a future rulemaking procedure.

The Commission amends subsection (a)(4) and (5) and subsection (g) to revise the dates on which the agencies amended the MOU. The adopted effective date is May 1, 2012.

The Commission amends §3.30(e)(7)(B) to reflect the transfer from TCEQ to RRC required under HB 2694 of the duties relating to groundwater protection letters and to include the definition of underground sources of drinking water currently in TCEQ's regulations at 30 TAC §331.2 (relating to Definitions).

The Commission amends §3.30(e)(9), relating to anthropogenic carbon dioxide storage, to delete the sentence stating that interagency coordination of review and processing of a permit application for injection of carbon dioxide for geologic storage under Texas Water Code, Chapter 27, Subchapter C-1, shall include application review by and production of a letter from the TCEQ's executive director as specified under Texas Water Code, §27.046. HB 2694 amended Texas Water Code, §27.046, to replace references to the executive director of TCEQ with references to the RRC.

The Commission adopts the amendments to §3.30 under Texas Water Code, §26.131, which gives the Commission jurisdiction over pollution of surface or subsurface waters from oil and gas exploration, development, and production activities; Texas Water Code, Chapter 27, which authorizes the Commission to adopt and enforce rules relating to injection wells and, specifically, Texas Water Code, §27.033, as amended by HB 2694, which transfers to the RRC from the TCEQ the function of preparing a letter of determination, stating that drilling and using the disposal well and injecting oil and gas waste into the subsurface stratum will not endanger the freshwater strata in that area and that the formation or stratum to be used for the disposal is not freshwater sand, to accompany an application for a permit for a disposal well; Texas Natural Resources Code, §81.052, which authorizes the Commission to adopt all necessary rules for governing persons and their operations under the jurisdiction of the Commission under Texas Natural Resources Code, §81.051; Texas Natural Resources Code, §85.201, which authorizes the Commission to make and enforce rules for the conservation of oil and gas and prevention of waste of oil and gas; Texas Natural Resources Code, §85.202, which authorizes the Commission to adopt rules to prevent waste of oil and gas in producing operations; Texas Natural Resources Code, §91.101, which authorizes the Commission to adopt rules relating to the various oilfield operations, including the discharge, storage, handling, transportation, reclamation, or disposal of oil and gas waste; and Texas Natural Resources Code §91.602, which authorizes the Commission to adopt and enforce rules relating to the generation, transportation, treatment, storage, and disposal of oil and gas hazardous waste.

Texas Water Code, §26.131; Chapter 27 and §27.033, as amended by HB 2694; and §§29.001 - 29.053; and Texas Natural Resources Code, §§81.052, 85.042(b), 85.201, 85.202, 91.101, and 91.602 are affected by the adopted amendments.

Statutory authority: Texas Water Code, §26.131; Chapter 27 and §27.033, as amended by HB 2694; and §§29.001 - 29.053; and Texas Natural Resources Code, §§81.052, 85.042(b), 85.201, 85.202, 91.101, and 91.602.

Cross-reference to statute: Texas Water Code, §26.131; Chapter 27 and §27.033, as amended by HB 2694; and §§29.001 - 29.053; and Texas Natural Resources Code, §§81.052, 85.042(b), 85.201, 85.202, 91.101, and 91.602.

Issued in Austin, Texas, on March 20, 2012.

§3.30. *Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ).*

(a) Need for agreement. Several statutes cover persons and activities where the respective jurisdictions of the RRC and the TCEQ may intersect. This rule is a statement of how the agencies implement the division of jurisdiction.

(1) Section 10 of House Bill 1407, 67th Legislature, 1981, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, provides as follows: On or before January 1, 1982, the Texas Department of Water Resources, the Texas Department of Health, and the Railroad Commission of Texas shall execute a memorandum of understanding that specifies in detail these agencies' interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas. The agencies shall amend the memorandum of understanding at any time that the agencies find it to be necessary.

(2) Texas Health and Safety Code, §401.414, relating to Memoranda of Understanding, requires the Railroad Commission of Texas and the Texas Commission on Environmental Quality to adopt a memorandum of understanding (MOU) defining the agencies' respective duties under Texas Health and Safety Code, Chapter 401, relating to radioactive materials and other sources of radiation. Texas Health and Safety Code, §401.415, relating to oil and gas naturally occurring radioactive material (NORM) waste, provides that the Railroad Commission of Texas shall issue rules on the management of oil and gas NORM waste, and in so doing shall consult with the Texas Natural Resource Conservation Commission (now TCEQ) and the Department of Health (now Department of State Health Services) regarding protection of the public health and the environment.

(3) Texas Water Code, Chapters 26 and 27, provide that the Railroad Commission and TCEQ collaborate on matters related to discharges, surface water quality, groundwater protection, underground injection control and geologic storage of carbon dioxide. Texas Water Code, §27.049, relating to Memorandum of Understanding, requires the RRC and TCEQ to adopt a new MOU or amend the existing MOU to reflect the agencies' respective duties under Texas Water Code, Chapter 27, Subchapter C-1 (relating to Geologic Storage and Associated Injection of Anthropogenic Carbon Dioxide).

(4) The original MOU between the agencies adopted pursuant to House Bill 1407 (67th Legislature, 1981) became effective January 1, 1982. The MOU was revised effective December 1, 1987, May 31, 1998, and again on August 30, 2010, to reflect legislative clarification of the Railroad Commission's jurisdiction over oil and gas wastes and the Texas Natural Resource Conservation Commission's (the combination of the Texas Water Commission, the Texas Air Control Board,

and portions of the Texas Department of Health) jurisdiction over industrial and hazardous wastes.

(5) The agencies have determined that the revised MOU that became effective on August 30, 2010, should again be revised to further clarify jurisdictional boundaries and to reflect legislative changes in agency responsibility.

(b) General agency jurisdictions.

(1) Texas Commission on Environmental Quality (TCEQ) (the successor agency to the Texas Natural Resource Conservation Commission).

(A) Solid waste. Under Texas Health and Safety Code, Chapter 361, §§361.001 - 361.754, the TCEQ has jurisdiction over solid waste. The TCEQ's jurisdiction encompasses hazardous and non-hazardous, industrial and municipal, solid wastes.

(i) Under Texas Health and Safety Code, §361.003(34), solid waste under the jurisdiction of the TCEQ is defined to include "garbage, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities."

(ii) Under Texas Health and Safety Code, §361.003(34), the definition of solid waste excludes "material which results from activities associated with the exploration, development, or production of oil or gas or geothermal resources and other substance or material regulated by the Railroad Commission of Texas pursuant to Section 91.101, Natural Resources Code. . . ."

(iii) Under Texas Health and Safety Code, §361.003(34), the definition of solid waste includes the following until the United States Environmental Protection Agency (EPA) delegates its authority under the Resource Conservation and Recovery Act, 42 United States Code (U.S.C.) §6901, et seq., (RCRA) to the RRC: "waste, substance or material that results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the EPA. . . ."

(iv) After delegation of RCRA authority to the RRC, the definition of solid waste (which defines TCEQ's jurisdiction) will not include hazardous wastes arising out of or incidental to activities associated with gasoline plants, natural gas or natural gas liquids processing plants, or reservoir pressure maintenance or repressurizing plants. The term natural gas or natural gas liquids processing plant refers to a plant the primary function of which is the extraction of natural gas liquids from field gas or fractionation of natural gas liquids. The term does not include a separately located natural gas treating plant for which the primary function is the removal of carbon dioxide, hydrogen sulfide, or other impurities from the natural gas stream. A separator, dehydration unit, heater treater, sweetening unit, compressor, or similar equipment is considered a part of a natural gas or natural gas liquids processing plant only if it is located at a plant the primary function of which is the extraction of natural gas liquids from field gas or fractionation of natural gas liquids. Further, a pressure maintenance or repressurizing plant is a plant for processing natural gas for reinjection (for reservoir pressure maintenance or repressurization) in a natural gas recycling project. A compressor station along a natural gas pipeline system or a pump station along a crude oil pipeline system is not a pressure maintenance or repressurizing plant.

(B) Water quality.

(i) Discharges under Texas Water Code, Chapter 26. Under the Texas Water Code, Chapter 26, the TCEQ has jurisdiction over discharges into or adjacent to water in the state, except for discharges regulated by the RRC.

(ii) Storm water. TCEQ has jurisdiction over storm water discharges that are required to be permitted pursuant to Title 40 Code of Federal Regulations (CFR) Part 122.26, except for discharges regulated by the RRC. Discharge of storm water regulated by TCEQ may be authorized by an individual Texas Pollutant Discharge Elimination System (TPDES) permit or by a general TPDES permit. These storm water permits may also include authorizations for certain minor types of non-storm water discharges.

(I) Storm water associated with industrial activities. The TCEQ regulates storm water discharges associated with certain industrial activities under individual TPDES permits and under the TPDES Multi-Sector General Permit, except for discharges associated with industrial activities under the jurisdiction of the RRC.

(II) Storm water associated with construction activities. The TCEQ regulates storm water discharges associated with construction activities, except for discharges from construction activities under the jurisdiction of the RRC.

(III) Municipal storm water discharges. The TCEQ has jurisdiction over discharges from regulated municipal storm sewer systems (MS4s).

(IV) Combined storm water. Except with regard to storage of oil, when a portion of a site is regulated by the TCEQ, and a portion of a site is regulated by the EPA and RRC, storm water authorization must be obtained from the TCEQ for the portion(s) of the site regulated by the TCEQ, and from the EPA and the RRC, as applicable, for the RRC regulated portion(s) of the site. Discharge of storm water from a facility that stores both refined products intended for off-site use and crude oil in aboveground tanks is regulated by the TCEQ.

(iii) State water quality certification. Under the Clean Water Act (CWA) Section 401 (33 U.S.C. Section 1341), the TCEQ performs state water quality certifications for activities that require a federal license or permit and that may result in a discharge to waters of the United States, except for those activities regulated by the RRC.

(iv) Commercial brine extraction and evaporation. Under Texas Water Code, §26.132, the TCEQ has jurisdiction over evaporation pits operated for the commercial production of brine water, minerals, salts, or other substances that naturally occur in groundwater and that are not regulated by the RRC.

(C) Injection wells. Under the Texas Water Code, Chapter 27, the TCEQ has jurisdiction to regulate and authorize the drilling, construction, operation, and closure of injection wells unless the activity is subject to the jurisdiction of the RRC. Injection wells under TCEQ's jurisdiction are identified in 30 TAC §331.11 (relating to Classification of Injection Wells) and include:

(i) Class I injection wells for the disposal of hazardous, radioactive, industrial or municipal waste that inject fluids below the lower-most formation which within 1/4 mile of the wellbore contains an underground source of drinking water;

(ii) Class III injection wells for the extraction of minerals including solution mining of sodium sulfate, sulfur, potash, phosphate, copper, uranium and the mining of sulfur by the Frasch process;

(iii) Class IV injection wells for the disposal of hazardous or radioactive waste which inject fluids into or above formations that contain an underground source of drinking water; and

(iv) Class V injection wells that are not under the jurisdiction of the RRC, such as aquifer remediation wells, aquifer recharge wells, aquifer storage wells, large capacity septic systems, storm water drainage wells, salt water intrusion barrier wells, and closed loop geothermal wells.

(2) Railroad Commission of Texas (RRC).

(A) Oil and gas waste.

(i) Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, wastes (both hazardous and non-hazardous) resulting from activities associated with the exploration, development, or production of oil or gas or geothermal resources, including storage, handling, reclamation, gathering, transportation, or distribution of crude oil or natural gas by pipeline, prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel, are under the jurisdiction of the RRC, except as noted in clause (ii) of this subparagraph. These wastes are termed "oil and gas wastes." In compliance with Texas Health and Safety Code, §361.025 (relating to exempt activities), a list of activities that generate wastes that are subject to the jurisdiction of the RRC is found at §3.8(a)(30) of this title (relating to Water Protection) and at 30 TAC §335.1 (relating to Definitions), which contains a definition of "activities associated with the exploration, development, and production of oil or gas or geothermal resources." Under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of oil and gas naturally occurring radioactive material (NORM) waste that constitutes, is contained in, or has contaminated oil and gas waste.

(ii) Hazardous wastes arising out of or incidental to activities associated with gasoline plants, natural gas or natural gas liquids processing plants or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TCEQ until the RRC is authorized by EPA to administer RCRA. When the RRC is authorized by EPA to administer RCRA, jurisdiction over such hazardous wastes will transfer from the TCEQ to the RRC.

(B) Water quality.

(i) Discharges. Under Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 26, the RRC regulates discharges from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, including transportation of crude oil and natural gas by pipeline, and from solution brine mining activities. Discharges regulated by the RRC into or adjacent to water in the state shall not cause a violation of the water quality standards. While water quality standards are established by the TCEQ, the RRC has the responsibility for enforcing any violation of such standards resulting from activities regulated by the RRC. Texas Water Code, Chapter 26, does not require that discharges regulated by the RRC comply with regulations of the TCEQ that are not water quality standards. The TCEQ and the RRC may consult as necessary regarding application and interpretation of Texas Surface Water Quality Standards.

(ii) Storm water. When required by federal law, authorization for storm water discharges that are under the jurisdiction of the RRC must be obtained through application for a National Pollutant Discharge Elimination System (NPDES) permit with the EPA and authorization from the RRC, as applicable.

(I) Storm water associated with industrial activities. Where required by federal law, discharges of storm water associated with facilities and activities under the RRC's jurisdiction must be

authorized by the EPA and the RRC, as applicable. Under 33 U.S.C. §1342(1)(2) and §1362(24), EPA cannot require a permit for discharges of storm water from "field activities or operations associated with {oil and gas} exploration, production, processing, or treatment operations, or transmission facilities" unless the discharge is contaminated by contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of the facility. Under §3.8 of this title (relating to Water Protection), the RRC prohibits operators from causing or allowing pollution of surface or subsurface water. Operators are encouraged to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water to help ensure protection of surface water quality during storm events.

(II) Storm water associated with construction activities. Where required by federal law, discharges of storm water associated with construction activities under the RRC's jurisdiction must be authorized by the EPA and the RRC, as applicable. Activities under RRC jurisdiction include construction of a facility that, when completed, would be associated with the exploration, development, or production of oil or gas or geothermal resources, such as a well site; treatment or storage facility; underground hydrocarbon or natural gas storage facility; reclamation plant; gas processing facility; compressor station; terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility; a carbon dioxide geologic storage facility under the jurisdiction of the RRC; and a gathering, transmission, or distribution pipeline that will transport crude oil or natural gas, including natural gas liquids, prior to refining of such oil or the use of the natural gas in any manufacturing process or as a residential or industrial fuel. The RRC also has jurisdiction over storm water from land disturbance associated with a site survey that is conducted prior to construction of a facility that would be regulated by the RRC. Under 33 U.S.C. §1342(1)(2) and §1362(24), EPA cannot require a permit for discharges of storm water from "field activities or operations associated with {oil and gas} exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities" unless the discharge is contaminated by contact with any overburden, raw material, intermediate product, finished product, byproduct, or waste product located on the site of the facility. Under §3.8 of this title (relating to Water Protection), the RRC prohibits operators from causing or allowing pollution of surface or subsurface water. Operators are encouraged to implement and maintain BMPs to minimize discharges of pollutants, including sediment, in storm water during construction activities to help ensure protection of surface water quality during storm events.

(III) Municipal storm water discharges. Storm water discharges from facilities regulated by the RRC located within an MS4 are not regulated by the TCEQ. However, a municipality may regulate storm water discharges from RRC sites into their MS4.

(IV) Combined storm water. Except with regard to storage of oil, when a portion of a site is regulated by the RRC and the EPA, and a portion of a site is regulated by the TCEQ, storm water authorization must be obtained from the EPA and the RRC, as applicable, for the portion(s) of the site under RRC jurisdiction and from the TCEQ for the TCEQ regulated portion(s) of the site. Discharge of storm water from a terminal facility where crude oil is stored prior to refining and at which refined products are stored solely for use at the facility is under the jurisdiction of the RRC.

(iii) State water quality certification. The RRC performs state water quality certifications, as authorized by the Clean Wa-

ter Act (CWA) Section 401 (33 U.S.C. Section 1341) for activities that require a federal license or permit and that may result in any discharge to waters of the United States for those activities regulated by the RRC.

(C) Injection wells. The RRC has jurisdiction over the drilling, construction, operation, and closure of the following injection wells.

(i) Disposal wells. The RRC has jurisdiction under Texas Water Code, Chapter 27, over injection wells used to dispose of oil and gas waste. Texas Water Code, Chapter 27, defines "oil and gas waste" to mean "waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources, waste arising out of or incidental to the underground storage of hydrocarbons other than storage in artificial tanks or containers, or waste arising out of or incidental to the operation of gasoline plants, natural gas processing plants, or pressure maintenance or repressurizing plants. The term includes but is not limited to salt water, brine, sludge, drilling mud, and other liquid or semi-liquid waste material." The term "waste arising out of or incidental to drilling for or producing of oil, gas, or geothermal resources" includes waste associated with transportation of crude oil or natural gas by pipeline pursuant to Texas Natural Resources Code, §91.101.

(ii) Enhanced recovery wells. The RRC has jurisdiction over wells into which fluids are injected for enhanced recovery of oil or natural gas.

(iii) Brine mining. Under Texas Water Code, §27.036, the RRC has jurisdiction over brine mining and may issue permits for injection wells.

(iv) Geologic storage of carbon dioxide. Under Texas Water Code, §27.011 and §27.041, and subject to the review of the legislature based on the recommendations made in the preliminary report described by Section 10, Senate Bill No. 1387, Acts of the 81st Legislature, Regular Session (2009), the RRC has jurisdiction over geologic storage of carbon dioxide in, and the injection of carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir and over a well used for such injection purposes regardless of whether the well was initially completed for that purpose or was initially completed for another purpose and converted.

(v) Hydrocarbon storage. The RRC has jurisdiction over wells into which fluids are injected for storage of hydrocarbons that are liquid at standard temperature and pressure.

(vi) Geothermal energy. Under Texas Natural Resources Code, Chapter 141, the RRC has jurisdiction over injection wells for the exploration, development, and production of geothermal energy and associated resources.

(vii) *In-situ* tar sands. Under Texas Water Code, §27.035, the RRC has jurisdiction over the *in situ* recovery of tar sands and may issue permits for injection wells used for the *in situ* recovery of tar sands.

(c) Definition of hazardous waste.

(1) Under the Texas Health and Safety Code, §361.003(12), a "hazardous waste" subject to the jurisdiction of the TCEQ is defined as "solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §6901, et seq.)." Similarly, under Texas Natural Resources Code, §91.601(1), "oil and gas hazardous waste" subject to the jurisdiction of the RRC is defined as an "oil and gas waste that is a hazardous waste as defined by the administrator of the United

States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§6901, et seq.)."

(2) Federal regulations adopted under authority of the federal Solid Waste Disposal Act, as amended by RCRA, exempt from regulation as hazardous waste certain oil and gas wastes. Under 40 Code of Federal Regulations (CFR) §261.4(b)(5), "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy" are described as wastes that are exempt from federal hazardous waste regulations.

(3) A partial list of wastes associated with oil, gas, and geothermal exploration, development, and production that are considered exempt from hazardous waste regulation under RCRA can be found in EPA's "Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes," 53 FedReg 25,446 (July 6, 1988). A further explanation of the exemption can be found in the "Clarification of the Regulatory Determination for Wastes from the Exploration, Development and Production of Crude Oil, Natural Gas and Geothermal Energy," 58 FedReg 15,284 (March 22, 1993). The exemption codified at 40 CFR §261.4(b)(5) and discussed in the Regulatory Determination has been, and may continue to be, clarified in subsequent guidance issued by the EPA.

(d) Jurisdiction over waste from specific activities.

(1) Drilling, operation, and plugging of wells associated with the exploration, development, or production of oil, gas, or geothermal resources. Wells associated with the exploration, development, or production of oil, gas, or geothermal resources include exploratory wells, cathodic protection holes, core holes, oil wells, gas wells, geothermal resource wells, fluid injection wells used for secondary or enhanced recovery of oil or gas, oil and gas waste disposal wells, and injection water source wells. Several types of waste materials can be generated during the drilling, operation, and plugging of these wells. These waste materials include drilling fluids (including water-based and oil-based fluids), cuttings, produced water, produced sand, waste hydrocarbons (including used oil), fracturing fluids, spent acid, workover fluids, treating chemicals (including scale inhibitors, emulsion breakers, paraffin inhibitors, and surfactants), waste cement, filters (including used oil filters), domestic sewage (including waterborne human waste and waste from activities such as bathing and food preparation), and trash (including inert waste, barrels, dope cans, oily rags, mud sacks, and garbage). Generally, these wastes, whether disposed of by discharge, landfill, land farm, evaporation, or injection, are subject to the jurisdiction of the RRC. Wastes from oil, gas, and geothermal exploration activities subject to regulation by the RRC when those wastes are to be processed, treated, or disposed of at a solid waste management facility authorized by the TCEQ under 30 TAC Chapter 330 are, as defined in 30 TAC §330.3(148) (relating to Definitions), "special wastes."

(2) Field treatment of produced fluids. Oil, gas, and water produced from oil, gas, or geothermal resource wells may be treated in the field in facilities such as separators, skimmers, heater treaters, dehydrators, and sweetening units. Waste that results from the field treatment of oil and gas include waste hydrocarbons (including used oil), produced water, hydrogen sulfide scavengers, dehydration wastes, treating and cleaning chemicals, filters (including used oil filters), asbestos insulation, domestic sewage, and trash are subject to the jurisdiction of the RRC.

(3) Storage of oil.

(A) Tank bottoms and other wastes from the storage of crude oil (whether foreign or domestic) before it enters the refinery are

under the jurisdiction of the RRC. In addition, waste resulting from storage of crude oil at refineries is subject to the jurisdiction of the TCEQ.

(B) Wastes generated from storage tanks that are part of the refinery and wastes resulting from the wholesale and retail marketing of refined products are subject to the jurisdiction of the TCEQ.

(4) Underground hydrocarbon storage. The disposal of wastes, including saltwater, resulting from the construction, creation, operation, maintenance, closure, or abandonment of an "underground hydrocarbon storage facility" is subject to the jurisdiction of the RRC, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" have the meanings set out in Texas Natural Resources Code, §91.201.

(5) Underground natural gas storage. The disposal of wastes resulting from the construction, operation, or abandonment of an "underground natural gas storage facility" is subject to the jurisdiction of the RRC, provided that the terms "natural gas" and "storage facility" have the meanings set out in Texas Natural Resources Code, §91.173.

(6) Transportation of crude oil or natural gas.

(A) Jurisdiction over pipeline-related activities. The RRC has jurisdiction over matters related to pipeline safety for pipelines in Texas, as referenced in §8.1 of this title (relating to General Applicability and Standards) pursuant to Chapter 121 of the Texas Utilities Code and Chapter 117 of the Texas Natural Resources Code. The RRC has jurisdiction over spill response and remediation of releases from pipelines transporting crude oil, natural gas, and condensate that originate from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC is responsible for water quality certification issues related to construction and operation of pipelines used to transport crude oil, natural gas, and condensate on an oil and gas lease, and from exploration and production facilities to the refinery gate. The RRC has jurisdiction over waste generated by construction and operation of pipelines transporting carbon dioxide.

(B) Crude oil and natural gas are transported by railcars, tank trucks, barges, tankers, and pipelines. The RRC has jurisdiction over waste from the transportation of crude oil by pipeline, regardless of the crude oil source (foreign or domestic) prior to arrival at a refinery. The RRC also has jurisdiction over waste from the transportation by pipeline of natural gas, including natural gas liquids, prior to the use of the natural gas in any manufacturing process or as a residential or industrial fuel. The transportation wastes subject to the jurisdiction of the RRC include wastes from pipeline compressor or pressure stations and wastes from pipeline hydrostatic pressure tests and other pipeline operations. These wastes include waste hydrocarbons (including used oil), treating and cleaning chemicals, filters (including used oil filters), scraper trap sludge, trash, domestic sewage, wastes contaminated with polychlorinated biphenyls (PCBs) (including transformers, capacitors, ballasts, and soils), soils contaminated with mercury from leaking mercury meters, asbestos insulation, transite pipe, and hydrostatic test waters.

(C) The TCEQ has jurisdiction over waste from transportation of refined products by pipeline.

(D) The TCEQ also has jurisdiction over wastes associated with transportation of crude oil and natural gas, including natural gas liquids, by railcar, tank truck, barge, or tanker.

(7) Reclamation plants.

(A) The RRC has jurisdiction over wastes from reclamation plants that process wastes from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, such as lease tank bottoms. Waste management activities of reclamation plants for other wastes are subject to the jurisdiction of the TCEQ.

(B) The RRC has jurisdiction over the conservation and prevention of waste of crude oil and therefore must approve all movements of crude oil-containing materials to reclamation plants. The applicable statute and regulations consist primarily of reporting requirements for accounting purposes.

(8) Refining of oil.

(A) The management of wastes resulting from oil refining operations, including spent caustics, spent catalysts, still bottoms or tars, and American Petroleum Institute (API) separator sludges, is subject to the jurisdiction of the TCEQ. The processing of light ends from the distillation and cracking of crude oil or crude oil products is considered to be a refining operation. The term "refining" does not include the processing of natural gas or natural gas liquids.

(B) The RRC has jurisdiction over refining activities for the conservation and the prevention of waste of crude oil. The RRC requires that all crude oil streams into or out of a refinery be reported for accounting purposes. In addition, the RRC requires that materials recycled and used as a fuel, such as still bottoms or waste crude oil, be reported.

(9) Natural gas or natural gas liquids processing plants (including gas fractionation facilities) and pressure maintenance or repressurizing plants. Wastes resulting from activities associated with these facilities include produced water, cooling tower water, sulfur bead, sulfides, spent caustics, sweetening agents, spent catalyst, waste hydrocarbons (including used oil), asbestos insulation, wastes contaminated with PCBs (including transformers, capacitors, ballasts, and soils), treating and cleaning chemicals, filters, trash, domestic sewage, and dehydration materials. These wastes are subject to the jurisdiction of the RRC under Texas Natural Resources Code, §1.101. Disposal of waste from activities associated with natural gas or natural gas liquids processing plants (including gas fractionation facilities), and pressure maintenance or repressurizing plants by injection is subject to the jurisdiction of the RRC under Texas Water Code, Chapter 27. However, until delegation of authority under RCRA to the RRC, the TCEQ shall have jurisdiction over wastes resulting from these activities that are not exempt from federal hazardous waste regulation under RCRA and that are considered hazardous under applicable federal rules.

(10) Manufacturing processes.

(A) Wastes that result from the use of natural gas, natural gas liquids, or products refined from crude oil in any manufacturing process, such as the production of petrochemicals or plastics, or from the manufacture of carbon black, are industrial wastes subject to the jurisdiction of the TCEQ. The term "manufacturing process" does not include the processing (including fractionation) of natural gas or natural gas liquids at natural gas or natural gas liquids processing plants.

(B) The RRC has jurisdiction under Texas Natural Resources Code, Chapter 87, to regulate the use of natural gas in the production of carbon black.

(C) Biofuels. The TCEQ has jurisdiction over wastes associated with the manufacturing of biofuels and biodiesel. TCEQ Regulatory Guidance Document RG-462 contains additional information regarding biodiesel manufacturing in the state of Texas.

(11) Commercial service company facilities and training facilities.

(A) The TCEQ has jurisdiction over wastes generated at facilities, other than actual exploration, development, or production sites (field sites), where oil and gas industry workers are trained. In addition, the TCEQ has jurisdiction over wastes generated at facilities where materials, processes, and equipment associated with oil and gas industry operations are researched, developed, designed, and manufactured. However, wastes generated from tests of materials, processes, and equipment at field sites are under the jurisdiction of the RRC.

(B) The TCEQ also has jurisdiction over waste generated at commercial service company facilities operated by persons providing equipment, materials, or services (such as drilling and work over rig rental and tank rental; equipment repair; drilling fluid supply; and acidizing, fracturing, and cementing services) to the oil and gas industry. These wastes include the following wastes when they are generated at commercial service company facilities: empty sacks, containers, and drums; drum, tank, and truck rinsate; sandblast media; painting wastes; spent solvents; spilled chemicals; waste motor oil; and unused fracturing and acidizing fluids.

(C) The term "commercial service company facility" does not include a station facility such as a warehouse, pipeyard, or equipment storage facility belonging to an oil and gas operator and used solely for the support of that operator's own activities associated with the exploration, development, or production activities.

(D) Notwithstanding subparagraphs (A) - (C) of this paragraph, the RRC has jurisdiction over disposal of oil and gas wastes, such as waste drilling fluids and NORM-contaminated pipe scale, in volumes greater than the incidental volumes usually received at such facilities, that are managed at commercial service company facilities.

(E) The RRC also has jurisdiction over wastes such as vacuum truck rinsate and tank rinsate generated at facilities operated by oil and gas waste haulers permitted by the RRC pursuant to §3.8(f) of this title (relating to Water Protection).

(12) Mobile offshore drilling units (MODUs). MODUs are vessels capable of engaging in drilling operations for exploring or exploiting subsea oil, gas, or mineral resources.

(A) The RRC and, where applicable, the EPA, the U.S. Coast Guard, or the Texas General Land Office (GLO), have jurisdiction over discharges from an MODU when the unit is being used in connection with activities associated with the exploration, development, or production of oil or gas or geothermal resources.

(B) The TCEQ and, where applicable, the EPA, the U.S. Coast Guard, or the GLO, have jurisdiction over discharges from an MODU when the unit is being serviced at a maintenance facility.

(C) Where applicable, the EPA, the U.S. Coast Guard, or the GLO has jurisdiction over discharges from an MODU during transportation from shore to exploration, development or production site, transportation between sites, and transportation to a maintenance facility.

(e) Interagency activities.

(1) Recycling and pollution prevention.

(A) The TCEQ and the RRC encourage generators to eliminate pollution at the source and recycle whenever possible to avoid disposal of solid wastes. Questions regarding source reduction and recycling may be directed to the TCEQ Small Business and Environmental Assistance (SBEA) Division, or to the RRC. The TCEQ

may require generators to explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the RRC at a facility regulated by the TCEQ; similarly, the RRC may explore source reduction and recycling alternatives prior to authorizing disposal of any waste under the jurisdiction of the TCEQ at a facility regulated by the RRC.

(B) The TCEQ SBEA Division and the RRC will coordinate as necessary to maintain a working relationship to enhance the efforts to share information and use resources more efficiently. The TCEQ SBEA Division will make the proper TCEQ personnel aware of the services offered by the RRC, share information with the RRC to maximize services to oil and gas operators, and advise oil and gas operators of RRC services. The RRC will make the proper RRC personnel aware of the services offered by the TCEQ SBEA Division, share information with the TCEQ SBEA Division to maximize services to industrial operators, and advise industrial operators of the TCEQ SBEA Division services.

(2) Treatment of wastes under RRC jurisdiction at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K, (relating to Storage, Treatment, and Reuse Procedures for Petroleum-Substance Contaminated Soil).

(A) Soils contaminated with constituents that are physically and chemically similar to those normally found in soils at leaking underground petroleum storage tanks from generators under the jurisdiction of the RRC are eligible for treatment at TCEQ regulated soil treatment facilities once alternatives for recycling and source reduction have been explored. For the purpose of this provision, soils containing petroleum substance(s) as defined in 30 TAC §334.481 (relating to Definitions) are considered to be similar, but drilling muds, acids, or other chemicals used in oil and gas activities are not considered similar. Generators under the jurisdiction of the RRC must meet the same requirements as generators under the jurisdiction of the TCEQ when sending their petroleum contaminated soils to soil treatment facilities under TCEQ jurisdiction. Those requirements are in 30 TAC §334.496 (relating to Shipping Procedures Applicable to Generators of Petroleum-Substance Waste), except subsection (c) which is not applicable, and 30 TAC §334.497 (relating to Recordkeeping and Reporting Procedures Applicable to Generators). RRC generators with questions on these requirements should contact the TCEQ.

(B) Generators under RRC jurisdiction should also be aware that TCEQ regulated soil treatment facilities are required by 30 TAC §334.499 (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Treatment, or Disposal Facilities) to maintain documentation on the soil sampling and analytical methods, chain-of-custody, and all analytical results for the soil received at the facility and transported off-site or reused on-site.

(C) The RRC must specifically authorize management of contaminated soils under its jurisdiction at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations.

(D) All waste, including treated waste, subject to the jurisdiction of the RRC and managed at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K will remain subject to the jurisdiction of the RRC. Such materials will be subject to RRC regulations regarding final reuse, recycling, or disposal.

(E) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities authorized by the TCEQ under 30 TAC Chapter 334, Subchapter K.

(3) Processing, treatment, and disposal of wastes under RRC jurisdiction at facilities authorized by the TCEQ.

(A) As provided in this paragraph, waste materials subject to the jurisdiction of the RRC may be managed at solid waste facilities under the jurisdiction of the TCEQ once alternatives for recycling and source reduction have been explored. The RRC must specifically authorize management of wastes under its jurisdiction at facilities regulated by the TCEQ. The RRC may grant such authorizations by rule, or on an individual basis through permits or other written authorizations. In addition, except as provided in subparagraph (B) of this paragraph, the concurrence of the TCEQ is required to manage "special waste" under the jurisdiction of the RRC at a facility regulated by the TCEQ. The TCEQ's concurrence may be subject to specified conditions.

(B) A facility under the jurisdiction of the TCEQ may accept, without further individual concurrence, waste under the jurisdiction of the RRC if that facility is permitted or otherwise authorized to accept that particular type of waste. The phrase "that type of waste" does not specifically refer to waste under the jurisdiction of the RRC, but rather to the waste's physical and chemical characteristics. Management and disposal of waste under the jurisdiction of the RRC is subject to TCEQ's rules governing both special waste and industrial waste.

(C) If the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization, individual written concurrences from the TCEQ shall be required to manage wastes under the jurisdiction of the RRC at TCEQ regulated facilities. Recommendations for the management of special wastes associated with the exploration, development, or production of oil, gas, or geothermal resources are found in TCEQ Regulatory Guidance document RG-3. (This is required only if the TCEQ regulated facility receiving the waste does not have approval to accept the waste included in its permit or other authorization provided by the TCEQ.) To obtain an individual concurrence, the waste generator must provide to the TCEQ sufficient information to allow the concurrence determination to be made, including the identity of the proposed waste management facility, the process generating the waste, the quantity of waste, and the physical and chemical nature of the waste involved (using process knowledge and/or laboratory analysis as defined in 30 TAC Chapter 335, Subchapter R (relating to Waste Classification)). In obtaining TCEQ approval, generators may use their existing knowledge about the process or materials entering it to characterize their wastes. Material Safety Data Sheets, manufacturer's literature, and other documentation generated in conjunction with a particular process may be used. Process knowledge must be documented and submitted with the request for approval.

(D) Domestic septage collected from portable toilets at facilities subject to RRC jurisdiction that is not mixed with other waste materials may be managed at a facility permitted by the TCEQ for disposal, incineration, or land application for beneficial use of such domestic septage waste without specific authorization from the TCEQ or the RRC. Waste sludge subject to the jurisdiction of the RRC may not be applied to the land at a facility permitted by the TCEQ for the beneficial use of sewage sludge or water treatment sludge.

(E) TCEQ waste codes and registration numbers are not required for management of wastes under the jurisdiction of the RRC at facilities under the jurisdiction of the TCEQ. If a receiving facility requires a TCEQ waste code for waste under the jurisdiction of the RRC, a code consisting of the following may be provided:

(i) the sequence number "RRCT";

(ii) the appropriate form code, as specified in 30 TAC Chapter 335, Subchapter R, §335.521, Appendix 3 (relating to Appendices); and

(iii) the waste classification code "H" if the waste is a hazardous oil and gas waste, or "R" if the waste is a nonhazardous oil and gas waste.

(F) If a facility requests or requires a TCEQ waste generator registration number for wastes under the jurisdiction of the RRC, the registration number "XXXRC" may be provided.

(G) Wastes that are under the jurisdiction of the RRC need not be reported to the TCEQ.

(4) Management of nonhazardous wastes under TCEQ jurisdiction at facilities regulated by the RRC.

(A) Once alternatives for recycling and source reduction have been explored, and with prior authorization from the RRC, the following nonhazardous wastes subject to the jurisdiction of the TCEQ may be disposed of, other than by injection into a Class II well, at a facility regulated by the RRC; bioremediated at a facility regulated by the RRC (prior to reuse, recycling, or disposal); or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous wastes that are chemically and physically similar to oil and gas wastes, but excluding soils, media, debris, sorbent pads, and other clean-up materials that are contaminated with refined petroleum products.

(B) To obtain an individual authorization from the RRC, the waste generator must provide the following information, in writing, to the RRC: the identity of the proposed waste management facility, the quantity of waste involved, a hazardous waste determination that addresses the process generating the waste and the physical and chemical nature of the waste, and any other information that the RRC may require. As appropriate, the RRC shall reevaluate any authorization issued pursuant to this paragraph.

(C) Once alternatives for recycling and source reduction have been explored, and subject to the RRC's individual authorization, the following wastes under the jurisdiction of the TCEQ are authorized without further TCEQ approval to be disposed of at a facility regulated by the RRC, bioremediated at a facility regulated by the RRC, or reclaimed at a crude oil reclamation facility regulated by the RRC: nonhazardous bottoms from tanks used only for crude oil storage; unused and/or reconditioned drilling and completion/workover wastes from commercial service company facilities; used and/or unused drilling and completion/workover wastes generated at facilities where workers in the oil and gas exploration, development, and production industry are trained; used and/or unused drilling and completion/workover wastes generated at facilities where materials, processes, and equipment associated with oil and gas exploration, development, and production operations are researched, developed, designed, and manufactured; unless other provisions are made in the underground injection well permit used and/or unused drilling and completion wastes (but not workover wastes) generated in connection with the drilling and completion of Class I, III, and V injection wells; wastes (such as contaminated soils, media, debris, sorbent pads, and other cleanup materials) associated with spills of crude oil and natural gas liquids if such wastes are under the jurisdiction of the TCEQ; and sludges from washout pits at commercial service company facilities.

(D) Under Texas Water Code, §27.0511(g), a TCEQ permit is required for injection of industrial or municipal waste as an injection fluid for enhanced recovery purposes. However, under §27.0511(h), the RRC may authorize a person to use nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes without obtaining a permit from the TCEQ. The use or disposal of radioactive material under this subparagraph is subject to the applicable requirements of Texas Health and Safety Code, Chapter 401.

(5) Drilling in landfills. The TCEQ will notify the Oil and Gas Division of the RRC and the landfill owner at the time a drilling application is submitted if an operator proposes to drill a well through a landfill regulated by the TCEQ. The RRC and the TCEQ will cooperate and coordinate with one another in advising the appropriate parties of measures necessary to reduce the potential for the landfill contents to cause groundwater contamination as a result of landfill disturbance associated with drilling operations. The TCEQ requires prior written approval before drilling of any test borings through previously deposited municipal solid waste under 30 TAC §330.15 (relating to General Prohibitions), and before borings or other penetration of the final cover of a closed municipal solid waste landfill under 30 TAC §330.955 (relating to Miscellaneous). The installation of landfill gas recovery wells for the recovery and beneficial reuse of landfill gas is under the jurisdiction of the TCEQ in accordance with 30 TAC Chapter 330, Subchapter I (relating to Landfill Gas Management). Modification of an active or a closed solid waste management unit, corrective action management unit, hazardous waste landfill cell, or industrial waste landfill cell by drilling or penetrating into or through deposited waste may require prior written approval from TCEQ. Such approval may require a new authorization from TCEQ or modification or amendment of an existing TCEQ authorization.

(6) Coordination of actions and cooperative sharing of information.

(A) In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the TCEQ at a facility permitted by the RRC, the TCEQ is responsible for enforcement actions against the generator or transporter, and the RRC is responsible for enforcement actions against the disposal facility. In the event that a generator or transporter disposes, without proper authorization, of wastes regulated by the RRC at a facility permitted by the TCEQ, the RRC is responsible for enforcement actions against the generator or transporter, and the TCEQ is responsible for enforcement actions against the disposal facility.

(B) The TCEQ and the RRC agree to cooperate with one another by sharing information. Employees of either agency who receive a complaint or discover, in the course of their official duties, information that indicates a violation of a statute, regulation, order, or permit pertaining to wastes under the jurisdiction of the other agency, will notify the other agency. In addition, to facilitate enforcement actions, each agency will share information in its possession with the other agency if requested by the other agency to do so.

(C) The TCEQ and the RRC agree to work together at allocating respective responsibilities. To the extent that jurisdiction is indeterminate or has yet to be determined, the TCEQ and the RRC agree to share information and take appropriate investigative steps to assess jurisdiction.

(D) For items not covered by statute or rule, the TCEQ and the RRC will collaborate to determine respective responsibilities for each issue, project, or project type.

(E) The staff of the RRC and the TCEQ shall coordinate as necessary to attempt to resolve any disputes regarding interpretation of this MOU and disputes regarding definitions and terms of art.

(7) Groundwater.

(A) Notice of groundwater contamination. Under Texas Water Code, §26.408, effective September 1, 2003, the RRC must submit a written notice to the TCEQ of any documented cases of groundwater contamination that may affect a drinking water well.

(B) Groundwater protection letters. The RRC provides letters of recommendation concerning groundwater protection.

(i) For recommendations related to normal drilling operations, shot holes for seismic surveys, and cathodic protection wells, the RRC provides geologic interpretation identifying fresh water zones, base of usable-quality water (generally less than 3,000 mg/L total dissolved solids, but may include higher levels of total dissolved solids if identified as currently being used or identified by the Texas Water Development Board as a source of water for desalination), and include protection depths recommended by the RRC. The geological interpretation may include groundwater protection based on potential hydrological connectivity to usable-quality water.

(ii) For recommendations related to injection in a non-producing zone, the RRC provides geologic interpretation of the base of the underground source of drinking water. Underground source of drinking water is defined as an aquifer or its portions which supplies drinking water for human consumption; or in which the groundwater contains fewer than 10,000 milligrams per liter total dissolved solids; and which is not an exempted aquifer.

(8) Emergency and spill response.

(A) The TCEQ and the RRC are members of the state's Emergency Management Council. The TCEQ is the state's primary agency for emergency support during response to hazardous materials and oil spill incidents. The TCEQ is responsible for state-level coordination of assets and services, and will identify and coordinate staffing requirements appropriate to the incident to include investigative assignments for the primary and support agencies.

(B) Contaminated soil and other wastes that result from a spill must be managed in accordance with the governing statutes and regulations adopted by the agency responsible for the activity that resulted in the spill. Coordination of issues of spill notification, prevention, and response shall be addressed in the State of Texas Oil and Hazardous Substance Spill Contingency Plan and may be addressed further in a separate Memorandum of Understanding among these agencies and other appropriate state agencies.

(C) The agency (TCEQ or RRC) that has jurisdiction over the activity that resulted in the spill incident will be responsible for measures necessary to monitor, document, and remediate the incident.

(i) The TCEQ has jurisdiction over certain inland oil spills, all hazardous-substance spills, and spills of other substances that may cause pollution.

(ii) The RRC has jurisdiction over spills or discharges from activities associated with the exploration, development, or production of crude oil, gas, and geothermal resources, and discharges from brine mining or surface mining.

(D) If TCEQ or RRC field personnel receive spill notifications or reports documenting improperly managed waste or contaminated environmental media resulting from a spill or discharge that is under the jurisdiction of the other agency, they shall refer the issue to the other agency. The agency that has jurisdiction over the activity that resulted in the improperly managed waste, spill, discharge, or contaminated environmental media will be responsible for measures necessary to monitor, document, and remediate the incident.

(9) Anthropogenic carbon dioxide storage. In determining the proper permitting agency in regard to a particular permit application for a carbon dioxide geologic storage project, the TCEQ and the RRC will coordinate by any appropriate means to review proposed locations, geologic settings, reservoir data, and other jurisdictional criteria specified in Texas Water Code, §27.041.

(f) Radioactive material.

(1) Radioactive substances. Under the Texas Health and Safety Code, §401.011, the TCEQ has jurisdiction to regulate and license:

(A) the disposal of radioactive substances;

(B) the processing or storage of low-level radioactive waste or NORM waste from other persons, except oil and gas NORM waste;

(C) the recovery or processing of source material;

(D) the processing of by-product material as defined by Texas Health and Safety Code, §401.003(3)(B); and

(E) sites for the disposal of low-level radioactive waste, by-product material, or NORM waste.

(2) NORM waste.

(A) Under Texas Health and Safety Code, §401.415, the RRC has jurisdiction over the disposal of NORM waste that constitutes, is contained in, or has contaminated oil and gas waste. This waste material is called "oil and gas NORM waste." Oil and gas NORM waste may be generated in connection with the exploration, development, or production of oil or gas.

(B) Under Texas Health and Safety Code, §401.412, the TCEQ has jurisdiction over the disposal of NORM that is not oil and gas NORM waste.

(C) The term "disposal" does not include receipt, possession, use, processing, transfer, transport, storage, or commercial distribution of radioactive materials, including NORM. These non-disposal activities are under the jurisdiction of the Texas Department of State Health Services under Texas Health and Safety Code, §401.011(a).

(3) Drinking water residuals. A person licensed for the commercial disposal of NORM waste from public water systems may dispose of NORM waste only by injection into a Class I injection well permitted under 30 TAC Chapter 331 (relating to Underground Injection Control) that is specifically permitted for the disposal of NORM waste.

(4) Management of radioactive tracer material.

(A) Radioactive tracer material is subject to the definition of low-level radioactive waste under Texas Health and Safety Code, §401.004, and must be handled and disposed of in accordance with the rules of the TCEQ and the Department of State Health Services.

(B) Exemption. Under Texas Health and Safety Code, §401.106, the TCEQ may grant an exemption by rule from a licensing requirement if the TCEQ finds that the exemption will not constitute a significant risk to the public health and safety and the environment.

(5) Coordination with the Texas Radiation Advisory Board. The RRC and the TCEQ will consider recommendations and advice provided by the Texas Radiation Advisory Board that concern either agency's policies or programs related to the development, use, or regulation of a source of radiation. Both agencies will provide written response to the recommendations or advice provided by the advisory board.

(6) Uranium exploration and mining.

(A) Under Texas Natural Resources Code, Chapter 131, the RRC has jurisdiction over uranium exploration activities.

(B) Under Texas Natural Resources Code, Chapter 131, the RRC has jurisdiction over uranium mining, except for *in situ* recovery processes.

(C) Under Texas Water Code, §27.0513, the TCEQ has jurisdiction over injection wells used for uranium mining.

(D) Under Texas Health and Safety Code, §401.2625, the TCEQ has jurisdiction over the licensing of source material recovery and processing or for storage, processing, or disposal of by-product material.

(g) Effective date. This Memorandum of Understanding, as of its May 1, 2012, effective date, shall supersede the prior Memorandum of Understanding among the agencies, dated August 30, 2010.

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 March 20, 2012.

TRD-201201468

Mary Ross McDonald

Acting Executive Director

Railroad Commission of Texas

Effective date: May 1, 2012

Proposal publication date: December 30, 2011

For further information, please call: (512) 475-1295



PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER S. WHOLESALE MARKETS

The Public Utility Commission of Texas (commission) adopts the repeal of §25.507, relating to Electric Reliability Council of Texas (ERCOT) Emergency Interruptible Load Service (EILS), without changes to the proposed text and new §25.507, relating to Electric Reliability Council of Texas (ERCOT) Emergency Response Service (ERS), with changes to the proposed text as published in the December 30, 2011, issue of the *Texas Register* (36 TexReg 9150). The new rule expands the repealed rule to include dispatchable distributed generation that is not registered with ERCOT as a generation resource and consequently changes the name of the service to ERS. In addition the new rule promotes reliability through energy emergencies through provisions that provide ERCOT flexibility in the implementation and administration of ERS. The new rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). Project Number 39948 is assigned to this proceeding.

The commission received comments on the proposed rule changes from Exelon Generation, LLC (Exelon), Enchanted Rock, Ltd. (Enchanted Rock), North America Power Partners (NAPP), CMC Steel Texas (CMC), Chaparral Steel (Chaparral), Luminant Energy Company (Luminant), Frontier Associates (Frontier), EnerNOC, Inc. (EnerNOC), Nucor Steel - Texas (Nucor), Electric Reliability Council of Texas (ERCOT), Public Citizen, Alliance for Retail Markets (ARM), Texas Industrial En-

ergy Consumers (TIEC), Steering Committee of Cities Served by ONCOR (ONCOR Cities), EnergyConnect, Inc. (ECI), NRG Energy, Inc. (NRG), Texas Competitive Power Advocates (TCPA), and the Lone Star Chapter of Sierra Club (Sierra Club).

After notice in the *Texas Register*, commission staff conducted a public hearing on January 31, 2012. Verbal comments were received at that hearing from EnerNOC, Sierra Club, NRG, Chaparral, and Public Citizen.

To the extent ERCOT is referenced in this rule or this order the term refers to the professional staff of the Electric Reliability Council of Texas rather than to the Stakeholder process at ERCOT.

(1) Issues Relating to the Pricing Mechanism for ERS

In the preamble to the Proposal for Publication in this project the commission requested comment regarding the pricing mechanism for ERS. Specifically, the commission asked the following question: "The current EILS rule provides for "pay as bid" settlement, which is different from other ERCOT services that typically use a market clearing price mechanism. Should the rule require ERCOT to use a particular mechanism, or should the rule leave this to ERCOT's discretion?"

NAPP recommended that the commission require ERCOT to use a market clearing price mechanism, arguing that this mechanism would help attract additional resources while retaining current pricing safeguards. Alternatively, NAPP recommended that, if the commission is concerned about moving to a market clearing price mechanism until more resources are bidding in the market, the commission could establish a trigger at a certain number of megawatts of capacity procured, at which point ERCOT would be required to establish a market clearing price mechanism.

CMC Steel also recommended that the commission require ERCOT to adopt a market clearing price mechanism, stating that it would increase participation in the ERS program.

Chaparral argued that the current pay-as-bid pricing mechanism creates upward pressure on bidding, as no market participant wants to feel as if it has "left money on the table." A market clearing price mechanism, on the other hand would tend to reduce bid offers, thus reducing the overall cost of the service. Chaparral believes that the market clearing price mechanism should be required in the rule, rather than left to ERCOT's discretion, as the primary focus of ERCOT is ensuring the reliable operation of the grid rather than optimizing market design.

Frontier stated that the ERS market is not yet sufficiently developed to permit a market clearing price mechanism and recommended that the commission direct ERCOT to develop a uniform price for ERS that would be pegged at between 75% and 90% of the price for responsive reserve service.

EnerNOC stated that the market clearing price mechanism, rather than "pay as bid," is more efficient, as it is for procuring electric energy, and fair, stating that there is no reason that other customer-providers should receive higher or lower prices for the service they provide.

Nucor stated that the rule should require ERCOT to use a clearing mechanism instead of the current "pay as bid" process. Nucor stated that the pay as bid process places a damper on ERS participation because pressure to make a bid that is low enough to be chosen may be substantially lower than the value of ERS in a given emergency situation, which has the effect of suppressing participation. Nucor also offered a third approach as an al-