

The Texas Natural Resource Conservation Commission (commission) proposes new §7.119, Memorandum of Understanding Between the Texas Department of Transportation and the Texas Natural Resource Conservation Commission.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The proposed rule will adopt by reference a Texas Department of Transportation (TxDOT) memorandum of understanding (MOU), streamlining coordination between the commission and TxDOT by consolidating separate MOUs currently in the air regulations (30 TAC §114.250) and in the water regulations (30 TAC §305.521). Rule actions regarding these separate MOUs are proposed in this issue of the *Texas Register*.

The MOU will address transportation planning issues required by Texas Transportation Code, §201.607, between TxDOT and state natural resource agencies, specifically including processing of documents required by the National Environmental Policy Act. The MOU establishes periods for review of documents coordinated under §201.607, and ensures coordination between the agencies on road projects that could have environmental impacts. The full text of the amended MOU is concurrently proposed by TxDOT in 43 TAC §2.23.

A previous proposal for this rule was made on September 12, 2000. A public hearing was previously held on October 24, 2000, at 10:00 a.m. in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin; the hearing was structured for the receipt of oral or written comments by interested persons. The comment period for the proposal on September 12, 2000

closed on November 13, 2000; comments that were received during that comment period will be addressed during this rule adoption, along with any comments received during this second proposal period.

SECTION DISCUSSION

The proposed rule adopts by reference an MOU with TxDOT.

The following sections are included in the MOU.

The *Purpose* section of the MOU outlines TxDOT and commission policy as they apply to the environmental review of transportation projects. The section contains statements as to why 43 TAC §§2.40 - 2.51 considers coordination of transportation projects with natural resource agencies important and how the MOU will facilitate that coordination.

The *Authority* section outlines the governing statutes for both the MOU and the rulemaking requirements of TNRCC and the commission.

The *Definitions* section provides clarification for important terms used in the MOU.

The *Responsibilities* section states the responsibilities of each agency as they apply to the environmental review of transportation projects.

The section on *Provisions Regarding Coordination and Document Review* has two important paragraphs. Paragraph (1) establishes the philosophy and rationale for early and timely actions by the agencies and the necessity for TxDOT districts and commission regional offices to work together. Paragraph (2) defines the most important air and water quality issues selected by commission that require project coordination of environmental documents. For air quality, transportation projects in nonattainment and major metropolitan areas are singled out. For water quality, transportation projects which encroach upon impaired stream segments identified under Clean Water Act, §303(d), the recharge and contributing zones of the Edwards Aquifer, and wetlands requiring Clean Water Act, §401 certification are selected as being important. The paragraph also contains administrative guidance for processing environmental documents.

Two sections entitled *Additional Provisions Regarding Air Quality* and *Additional Provisions Regarding Water Quality* provide for exchange of data and studies to support environmental reviews.

The *Dispute Resolution* section provides a stepwise procedure for resolving disputes.

The *Review of MOU* section calls for review and update every five years, or if necessary due to changes in state or federal law.

Copies of the MOU are available from the commission's Chief Clerk's Office.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for units of state or local government as a result of enforcing or administering the rule.

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PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the section is in effect, the anticipated public benefit will be the consolidation of MOUs, resulting in more efficient coordination of issues between two state agencies.

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SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated to small or micro-businesses because the proposed rulemaking adds no regulatory burden, but only reflects coordination of activities between two state agencies.

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 rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in Texas Government Code, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The proposed rule provides for an MOU which satisfies the need of the commission and TxDOT to coordinate regulatory programs and to ensure that overlapping areas of responsibility are clarified. The rule/MOU places no requirements on the regulated community.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rule under Texas Government Code, §2007.43. The following is a summary of that assessment. The specific purpose of the rule is to establish an MOU between TxDOT and the commission. The rule will substantially advance this purpose by outlining coordination of activities with TxDOT in areas with an overlap of responsibilities. Promulgation and enforcement of the rule will not burden private real property which is the subject of §2007.43, because it pertains to an understanding between state agencies on their joint jurisdiction and on areas of coordination. The understanding places no requirements on the regulated community.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

Staff reviewed the proposed rulemaking to incorporate the MOU in Chapter 7 by reference for consistency with the CAMP goals and policies, in accordance with the rules of the Coastal Coordination Council. The review determined that the action is consistent with the applicable CAMP goals and

policies. The CAMP policy applicable to this proposed rulemaking action is the policy that the commission rule comply with regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area.

Staff determined that the related Chapter 114 and Chapter 305 repeal portions of the rulemaking relate to an action or actions subject to the CAMP. Staff reviewed the repeals for consistency with the CAMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CAMP goals and policies.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held November 27, 2001 at 10:00 a.m. in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact Randall Dillard, Director, Public Information Office, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that services can be provided.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-102-007-AD. Comments must be received by 5:00 p.m., December 3, 2001. For further information, please contact David Parmer, Strategic Assessment Division, at (512) 239-1761. To obtain a draft copy of the TxDOT/TNRCC MOU, please contact Sandra Garcia, Office of Environmental Policy, Analysis, and Assessment, at (512) 239-4626.

STATUTORY AUTHORITY

The new section is proposed under Texas Water Code (TWC), §5.104, which requires the commission to enter into an MOU with any other state agency to clarify and provide for their respective duties, responsibilities, or functions on any matter within their jurisdictions that is not expressly assigned to either agency; Texas Health and Safety Code (THSC), §382.017, and TWC, §5.103, both of which establish the commission's authority to adopt rules; THSC, §382.035, which requires the commission to adopt MOUs with other state agencies by rule; and TWC, §5.105, which establishes commission authority to set policy.

The proposed new section implements TWC, §5.104.

§7.119. Memorandum of Understanding Between the Texas Department of Transportation and the Texas Natural Resource Conservation Commission.

The commission adopts by reference the rules of the Texas Department of Transportation in 43 TAC §2.23 (relating to Memorandum of Understanding with the Texas Natural Resource Conservation Commission).