

The Texas Natural Resource Conservation Commission (commission) adopts new §7.102, concerning the Memorandum of Understanding (“MOU”) between the Texas State Soil and Water Conservation Board (board) and the Texas Natural Resource Conservation Commission. New §7.102 is adopted with changes to the proposed text as published in the November 26, 1996 issue of the *Texas Register* (21TexReg 11435).

EXPLANATION OF ADOPTED RULE

The MOU will clarify jurisdictional authority, program responsibility and provide procedural mechanisms for point and non-point source (NPS) programs. The agreement provides a more integrated coordination of effort on matters relating to pollution abatement. There was a 30-day comment period in which no comments were received. However, the two agencies have worked to provide greater clarity as to their respective roles in handling compliance inspections and complaint investigations. The MOU, as adopted, also provides more specific detail as to procedural timeframes in addressing possible enforcement actions. The MOU is in fulfillment of requirements and policy directives found in the Agriculture Code, Title 7, Chapter 20, §201.026.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, §2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to adopt a MOU between the board and the commission. This MOU will define the jurisdictional authority of both agencies for water quality programs and it will provide for

procedural mechanisms relating to water quality protection programs. The MOU will not burden private real property as it does not propose any substantive regulations impacting private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM (CMP)

The executive director has reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the CMP, nor will affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

HEARINGS AND COMMENTERS

The commission did not schedule a public hearing on the proposed rules and none was requested. The commission did not receive any written comments on the proposed rules.

ANALYSIS OF TESTIMONY

Although no comments were submitted, the commission and board felt the need to further clarify their respective roles in the handling of compliance inspections and compliant investigations. The MOU now provides more specific details in addressing those issues as well giving greater information in terms of procedural time frames. Furthermore the MOU has made some minor stylistic changes to the format and structure in order to provide greater clarity as to the two agencies responsibilities. All of the changes made did not affect any new persons and are intended to provide the regulated community greater descriptive information into how the two agencies will address nonpoint source pollution abatement in protecting water quality.

STATEMENT OF STATUTORY AUTHORITY

The new section is adopted under the Water Code, §5.103, which authorizes the commission to adopt rules as necessary for the performance of its functions, and Agriculture Code, Title 7 Chapter 201, §201.026, which provides authorization for a coordination of efforts between the Texas State Soil and Water Conservation Board and the Texas Natural Resource Conservation Commission relating to water quality programs.

§7.102. Adoption of Memoranda of Understanding between The Texas State Soil and Water Conservation Board and The Texas Natural Resource Conservation Commission.

(a) This rule contains the memorandum of understanding ("MOU") between the Texas State Soil and Water Conservation Board and the Texas Natural Resource Conservation Commission, which sets forth the coordination of jurisdictional authority, program responsibility, and procedural mechanisms for point and nonpoint source pollution programs.

(1) Whereas, the Texas State Soil and Water Conservation Board, here within called the Board, is the state agency with the primary responsibility for activities relating to agricultural and silvicultural nonpoint source (NPS) pollution abatement; and

(2) Whereas, the board shall represent the State before the United States Environmental Protection Agency (EPA), or other federal agencies on matters relating to agricultural and silvicultural nonpoint source pollution abatement; and

(3) Whereas, for purposes of this MOU, the board is responsible for NPS pollution abatement activities on all agricultural and silvicultural land as defined by Senate Bill (SB) 503, Texas 73rd State Legislature; and

(4) Whereas, the board has established and implemented a water quality management plan certification program, in accordance with SB 503 of the Texas 73rd State Legislature for agricultural and silvicultural lands; and

(5) Whereas, the Texas Natural Resource Conservation Commission here within known as the commission, is the state agency with primary responsibility for implementing the constitution and laws of the State related to the quality of water and air; and

(6) Whereas, the commission has been designated as the lead agency for the Federal Clean Water Act, §319 program administered by the EPA; and

(7) Whereas, the commission shall coordinate all its activities related to this MOU with the board; and

(8) Whereas, consistent with the intent of Federal Clean Water Act, §319, the board and the commission are committed to the development and implementation of a coordinated NPS pollution program for the State; and

(9) Whereas, for the purpose of this MOU, the commission is responsible for the enforcement of all point source and NPS pollution regulations, including that on agricultural and silvicultural lands; and

(10) Whereas, consistent with Texas law and public policy, the board and commission mutually desire to protect and maintain a high quality environment and the health of the people of the State; and

(11) Now, therefore, in consideration of the following promises, covenants, conditions, and the mutual benefits to accrue to the parties of this MOU, the Parties, desiring to cooperate in function and service agree as follows:

(b) The Texas Natural Resource Conservation Commission agrees to:

(1) Administer, for the State, the Federal Clean Water Act, §319 grant program for NPS pollution. The commission will be responsible for coordinating the preparation of grant work programs.

(2) Execute cooperative agreements and associated amendments, and grant awards and contracts. The commission will be responsible for monitoring implementation of work programs and providing EPA with necessary financial and programmatic reporting information for non-agricultural/silvicultural surface and ground water work program elements.

(3) Implement the provisions of the EPA-approved Federal Clean Water Act, §319 management programs for non-agricultural/silvicultural surface and ground water NPS pollution.

(4) Complete, under current administrative procedures, all projects and programs for which grant funds have been awarded, under Federal Clean Water Act, §319. All future projects and programs implementing the EPA-approved Federal Clean Water Act, §319 management program for agricultural/silvicultural NPS pollution, and supported by §319 federal grants, will be administered by the board via a separate grant with EPA.

(5) Develop and maintain state guidance for all NPS pollution abatement projects other than agricultural or silvicultural NPS pollution projects as described by this MOU and SB 503.

(6) Coordinate with the board those compliance and enforcement actions relative to agricultural and silvicultural pollution.

(7) Provide to the board all current forms, timetables, procedural rules and any policy documents of the commission for addressing and processing citizen complaints related to agricultural and silvicultural pollution.

(8) Provide the board with access to the commission's electronic database for all current agricultural waste management plans.

(9) Investigate and/or monitor compliance of all animal feeding operations (AFO), as defined under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations), other than those covered by subsection (c)(12) of this section.

(10) In response to a general complaint, investigate a facility to determine whether a permit or written authorization under Chapter 321 of this title (relating to Control of Certain Activities by Rule) is required of the facility. If problems are documented or conditions exist which have the potential to adversely impact the environment, the facility owner or operator will have the option of being referred to the board for the purpose of obtaining a certified water quality management plan or obtaining authorization under Chapter 321 of this title from the commission. If the owner or operator of a facility requests referral to the board in order to obtain a certified water quality management plan, the commission will send the board all pertinent documentation within five (5) working days of the investigation.

(11) Retain the responsibility for pursuing any enforcement action related to a violation of a commission rule or order which occurred prior to the facility operator/owner obtaining a certified water quality management plan.

(12) Pursue appropriate enforcement action in accordance with commission rules against any person referred in accordance with subsection (c)(10) of this section.

(c) The Texas State Soil and Water Conservation Board agrees to:

(1) Serve as the recipient of grants from EPA for agricultural and silvicultural NPS pollution projects as described in this MOU and SB 503 and funded through Federal Clean Water Act, §319.

(2) Coordinate directly with the EPA on matters relating to programmatic and financial issues of agricultural and silvicultural projects funded by the board through separate grants from EPA under Federal Clean Water Act, §319. Notify the commission in writing on any decision made that results in a change in the programmatic or financial status of a project.

(3) Provide the EPA with required reports for all agricultural/silvicultural projects funded through the board by the Federal Clean Water Act, §319. Reports will be submitted in accordance with EPA requirements.

(4) Develop and maintain state guidance for agricultural or silvicultural NPS pollution as described by this MOU and SB 503.

(5) Provide to the commission information about agricultural and silvicultural activities required for the annual evaluation of the state's implementation of the NPS Management Plan.

(6) Process citizen complaints related to agricultural and silvicultural NPS pollution in a manner that is consistent with the practices and standards of the commission.

(7) Schedule and conduct management meetings with the EPA to review the status of agricultural and silvicultural NPS pollution project/program activities as negotiated with EPA.

(8) Develop and maintain a current electronic database to track and document the proceedings of all water quality management plans and corrective action plans. Data recorded will include, but not be limited to, the identification of applicant(s), date of application for each plan, and approval date of each plan.

(9) Provide the commission with access to the board's electronic database for all water quality management plans. Software and equipment necessary to facilitate electronic transfer of data should be compatible with that of the commission.

(10) Refer to the commission for possible enforcement action any complaint or violation related to a certified water quality management plan for an AFO, a law or rule relating to agricultural or silvicultural nonpoint source pollution for which the board has determined that the necessary corrective action has not been taken. The board, upon referral, shall provide the commission documentation, including but not limited to, any original documents or "certified copies" of the original documents and hard copies of all photographs, sample analyses, correspondence, records and other documents relating to the complaint.

(11) Provide the commission with documentation (board rules, policies, guidance, etc.) for development, supervision, and monitoring of individual certified water quality management plans.

(12) Investigate complaints and monitor compliance of all AFOs operating under a certified water quality management plan or any facility covered by law or board rule relating to agricultural or silvicultural nonpoint source pollution.

(13) Investigate any complaint received by the board to determine whether such a facility will need to obtain authorization from the commission. Those facilities which are determined to require authorization from the commission under Chapter 321 of this title (relating to Control of Certain Activities by Rule) will be referred to the commission within five (5) working days from the date of investigation. If it is determined that the potential for a water quality violation exists at a facility that does not need authorization under Chapter 321 of this title, and the facility owner/operator does not implement a corrective action plan or does not file an application for a certified water quality management plan to resolve the complaint within 45 days of notification of the investigation outcome, the board shall automatically refer the facility to the commission for possible enforcement action, written authorization, or a permit.

(14) Refer to the Commission for possible enforcement action, complaints which were initially resolved by an agreement to develop a site specific certified water quality management plan for the involved facility and for which the facility owner/operator has not signed such a plan within ninety (90) days of the date their request for planning assistance was approved by the Soil and Water Conservation District.

(15) Refer to the Commission for possible enforcement any complaint received for which there has been an immediate impact to aquatic life. Any investigation by the Board of a complaint related to an AFO holding a certified water quality management plan and for which a violation is documented that causes a situation in which exposure of contaminants to the air, water or land is affecting human health and safety, or will cause serious impact to the environment unless immediate actions are taken, shall be automatically referred to the Commission for possible enforcement action.

(d) Both parties agree to:

(1) Work together to refine the existing process for screening and prioritization of project proposals to be funded under Federal Clean Water Act, §319.

(2) Coordinate efforts in the development and submission of an annual work program to EPA for Federal Clean Water Act, §319, funding.

(3) Maintain each party's existing level of effort required by the EPA for the implementation of §319 programs/projects.

(4) Communicate and coordinate directly with each other and the EPA on matters relating to program/project planning and implementation of NPS pollution activities/projects funded by Federal Clean Water Act, §319.

(5) Provide required reports to the EPA on NPS pollution project activities. Reports will include status of project implementation, summary of information/education activities, monitoring activities, and other outputs satisfactory to EPA.

(6) Meet semi-annually to review and discuss the state's NPS water quality program and to refine agency coordination mechanisms.

(7) Work together to develop criteria for the development of water quality management programs that satisfy the state water quality standards as established by the Commission.

(8) Comply with all relevant state and federal statutes and procedures, and grant conditions, including financial audits, data quality assurance and quality control, and progress reports.

(9) Cooperate on activities related to the implementation of the "Texas State Management Plan for Agricultural Chemicals in Ground Water".

(e) General conditions:

(1) Term of MOU. The term of this MOU shall be from the effective date until termination.

(2) Notice of Termination. Any party may terminate this MOU upon a 90 day written notice to the other party. Both parties agree to fulfill any grant commitments in place at the time of termination. Only upon written concurrence of the other agency can this MOU be modified.

(3) Cooperation of Parties. It is the intention of the board and the commission that the details of providing the services in support of this MOU shall be worked out, in good faith, by both agencies.

(4) Nondiscrimination. Activities conducted under this MOU will be in compliance with the nondiscrimination provisions as contained in Titles VI and VII of the Civil Rights Act of 1964, as amended, the Civil Rights Restoration Act of 1987, and other nondiscrimination statutes, namely Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, and the Americans With Disabilities Act of 1992, which provide that no person in the United States shall, on the grounds of race, color, national origin, age, sex, religion, marital status, or handicap be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance.

(5) Notices. Any notices required by this MOU to be in writing shall be addressed to the respective agency as follows: Texas Natural Resource Conservation Commission, Attn: _____, P.O. Box 13087, Austin, TX 78711-3087 and to the Texas State Soil and Water Conservation Board, Attn: _____, P.O. Box 658, Temple, TX 76503-0658.

(6) Effective Date of MOU. This MOU is effective upon execution by both agencies.

By signing this MOU, the signatories acknowledge that they are acting under proper authority from their governing bodies.

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

Issued in Austin, Texas, on