

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §7.103, concerning a Memorandum of Understanding (MOU) between the Texas Parks and Wildlife Department (TPWD) and the TNRCC. New §7.103 is adopted without changes to the proposed text as published in the January 3, 1997 issue of the *Texas Register* (22 TexReg 24), and will not be republished.

EXPLANATION OF ADOPTED RULE

The MOU establishes a formal mechanism by which the two agencies can improve coordination and collaboration regarding the regulation of aquaculture facilities. The agreement establishes an effective system for interagency review of applications, lays out procedures for the exchange of information regarding aquaculture issues, facilitates on-site visits and responses to emergency situations, and eliminates duplication of effort between the two agencies.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment pursuant to Texas Government Code, §2007.043, the following is a summary of that Assessment. The specific purpose of the rules is to adopt a MOU between the commission and TPWD concerning the regulation of aquaculture facilities. The rules will substantially advance this specific purpose by clarifying the respective duties of the two agencies in the regulation of aquaculture facilities. Promulgation and enforcement of these rules will not burden private real property because they do not restrict or limit the owner's right to the property that would otherwise exist in the absence of the rulemaking.

HEARINGS AND COMMENTERS

The commission did not schedule a public hearing on the proposed rules and none was requested. The commission received one comment on the proposed rules during the comment period which closed on February 3, 1997. The one commenter, Texas Aquaculture Association (TAA), did not generally support or oppose the proposal, but suggested changes.

ANALYSIS OF TESTIMONY

TAA opposed the provision stating that a new exotic species permit will not be issued by TPWD to any aquaculture facility that proposes to discharge wastewater until the commission authorizes the discharge or otherwise determines that no authorization is necessary. TAA asserts that most facilities having exotic species permits discharge little, if any, wastewater, and will be required to get acknowledgment from the commission that no authorization is required every time they seek annual renewal of the exotic species permit. TAA further commented that TPWD will now have two opportunities to deny renewal or issuance of an exotic species permit. Specifically, TAA stated that the issuance of a wastewater discharge permit from the commission is unrelated to the possession of an exotic aquatic animal or plant and it is illogical and unnecessary to link the two permitting processes together.

The commission responds that only those facilities that propose to discharge wastewater are subject to the provision that requires that a discharge authorization be obtained prior to the issuance of an exotic species permit. The commission staff will in many cases be participating in the TPWD inspection of the facility, at which time it would be determined whether or not the facility needs authorization from the commission. Because of the concurrent processes and

coordination between the two agencies, the issuance of the exotic species permits should not be appreciably delayed by this MOU provision.

The commission also comments that the authorization to hold and produce exotic species is related to the discharge of wastewater. For example, the production of exotic species in the past has resulted in outbreaks of disease not endemic to the state of Texas.

STATUTORY AUTHORITY

This new section is adopted under the Texas Water Code, §5.104, which authorizes the commission to enter into a MOU with any other state agency to clarify and provide for their functions on any matter within their jurisdictions.

In addition, this new section is adopted under the Texas Water Code §5.102, which provides the commission with general powers to carry out duties under the Texas Water Code, and §5.103, which provides the commission with the authority to adopt any rule necessary to carry out the powers and duties of the Texas Water Code and other laws of this state.

§7.103. Memorandum of Understanding (MOU) Between the Texas Natural Resource Conservation Commission (commission) and the Texas Parks and Wildlife Department (TPWD).

(a) Need for agreement.

(1) Both the commission and the TPWD seek to ensure that regulation of aquaculture is conducted in a manner that is both collaborative and responsible.

(2) The commission and TPWD are concerned about issues relating to the raising of non-native aquatic species and the attendant concern about escapement into natural ecosystems, including the introduction of disease into natural ecosystems.

(3) The commission and TPWD are concerned about the quality of wastewater discharges from aquaculture facilities and their effects on receiving waters in reservoirs, streams, bays and estuaries.

(4) The commission and TPWD seek to establish an interagency review procedure for applications requesting authorization to discharge wastewater from aquaculture facilities.

(5) The commission and TPWD seek to institute an effective system by which coordination and collaboration can be achieved to expedite enforcement actions in response to

discharges from aquaculture facilities that are found to contain contagious disease that may impact state waters.

(6) Section 5.104 of the Texas Water Code authorizes the commission to enter into a memorandum of understanding with any other state agency.

(7) It is the intention of this MOU to provide a formal mechanism by which TPWD may review and provide feedback on aquaculture issues that are subject to regulation by the commission and that have the potential to affect natural resources within the jurisdiction of TPWD. This exchange of information would assist the commission in making environmentally sound decisions, and would improve coordination between the commission and TPWD.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise:

(1) Aquaculture - The business of producing or rearing aquatic species (fish, crustaceans, and other organisms in either fresh or marine waters) utilizing ponds, lakes, fabricated tanks and raceways, or other similar structures.

(2) Memorandum of Understanding (MOU) - A formal document that clarifies and provides for the respective duties, responsibilities or functions of the state agencies who are signatories on any matter or matters under their jurisdiction that are not expressly assigned to either one of them.

(c) Responsibilities.

(1) The commission. The responsibilities of the commission relate primarily to its role as the natural resource agency with primary responsibility over conservation of natural resources and the protection of the environment, pursuant to §5.012 of the Texas Water Code.

(A) The commission has general jurisdiction over the state's water quality program including issuance of waste discharge permits, water quality planning, and enforcement of water quality rules, standards, orders, and permits.

(B) The commission seeks to maintain the quality of water in the state consistent with public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, and the economic development of the state, and to require the use of all reasonable methods to implement this policy.

(C) The commission is responsible for review of applications and subsequent issuance of waste discharge permits, temporary orders, emergency orders, and registrations for authorization by rule.

(2) TPWD. The responsibilities of TPWD relate primarily to its functions as a natural resource agency, including its resource protection functions, as designated by §12.001 of the Parks and Wildlife Code.

(A) TPWD is the state agency with primary responsibility for protecting the state's fish and wildlife resources.

(B) TPWD provides recommendations that will protect fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects.

(C) TPWD provides information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources.

(D) TPWD regulates the taking, possession and conservation of all kinds of marine life and other aquatic life.

(E) TPWD regulates the introduction of fish, shellfish, and aquatic plants into public water, pursuant to §66.015(b) of the Texas Parks and Wildlife Code.

(F) TPWD regulates the importation, possession and placing into state water of harmful or potentially harmful exotic species of fish, shellfish or aquatic plants, pursuant to §66.007(a) of the Texas Parks and Wildlife Code.

(G) TPWD is responsible for review of applications and subsequent issuance of permits relating to the importation, possession and placing into state water of harmful or potentially

harmful exotic species of fish, shellfish or aquatic plants, pursuant to §66.007(a) of the Texas Parks and Wildlife Code.

(d) Provisions. This MOU is to facilitate the coordination and collaboration between the commission and TPWD with regard to aquaculture facilities.

(1) The executive director will provide notification to TPWD of each application received which requests authorization for the discharge or disposal of wastewater from aquaculture facilities. Notification shall be mailed within 14 days of the stamped date of receipt. Notification shall contain basic information on the proposed operation, including facility location, name(s) of receiving water body, proposed flow rate and other similar descriptive information so that TPWD may complete an initial assessment of the proposed operation. Within 30 days of the date of transmittal of notification, unless additional information is required, TPWD will complete its initial assessment and;

(A) provide the executive director with recommendations designed to protect fish and wildlife resources, or

(B) indicate that it has no comments. If no comments are received within 30 days, the executive director will conclude that there are no comments and continue its normal processing of the application.

(2) Upon receipt of a request by TPWD for additional information, the executive director will immediately provide such information so long as it is contained in the application materials. If additional information is not included in the application materials, and the information is necessary for TPWD to make its evaluation, the executive director will request such additional information from the applicant and provide it to TPWD as it becomes available. If no information is forthcoming from the applicant, the executive director will determine whether the application is technically sufficient without such information. The executive director may then either file the application and draft permit with the Office of Chief Clerk within the processing time frames identified in agency rules or, in the event that the executive director determines that this additional information is essential to complete its technical review, determine whether it is appropriate to either suspend processing or deem the application incomplete and return it to the applicant.

(3) Upon receipt of additional information from the executive director, TPWD will have 30 days to complete its review and either make its final recommendations or indicate that it has no comments. If nothing is received within 30 days, the executive director will conclude that there are no comments and continue its normal processing of the application.

(4) The scope of review by TPWD may include, but is not limited to: consideration of especially sensitive receiving water conditions (aquatic habitat), impacts of the discharge on substrate (scouring, sedimentation) and water transparency, alteration of receiving water flow characteristics, existing or attainable biological and recreational uses, discharge rate and volume, and the likelihood of disease transmission.

(5) Comments received from TPWD will be considered by the executive director in making decisions on applications requesting authorization for the discharge or disposal of wastewater from aquaculture facilities. TPWD's comments will be evaluated in conjunction with all other applicable factors and will be incorporated by the executive director whenever it is consistent with the commission's responsibilities. In accordance with the responsibilities of the commission as described in this document, the executive director reserves the right to determine the final disposition of applications. Upon making its preliminary recommendation regarding an application, the executive director will provide a response to TPWD that contains a copy of the draft permit, draft order, or final decision on an exemption or registration, and documentation providing an explanation for any of TPWD's comments that were not incorporated.

(6) A new exotic species permit will not be issued by TPWD to any aquaculture facility that proposes to discharge wastewater until a commission waste discharge permit or other authorization has been issued or it is determined that the facility is exempted from such requirements.

(7) An interagency work group will be formed whose function will be to meet at least annually to address aquaculture issues relating to water quality, fish and wildlife resources, receiving stream habitat and uses. This work group will serve to strengthen coordination of the commission and TPWD activities related to the aquaculture industry and provide a conduit for shared information. The work group shall be composed of members of each agency and staffed at levels which are mutually agreeable as adequate to accomplish the stated goals. Each agency shall designate a primary contact person for this group and notify the other agency of any changes to the primary contact person.

(8) The executive director and TPWD will coordinate studies related to applications that request authorizations for the discharge and disposal of wastewater. This may include on-site visits, receiving water assessments, sample collection, data analysis and related activities. Notification of the activity noted above will be communicated to the appropriate office at the other agency at least five days prior or as soon as is practicable. TPWD will notify the appropriate commission Regional Office and Wastewater Permits Section. The executive director will notify TPWD Resource Protection Regional Office and headquarters.

(9) The executive director and TPWD will strive to coordinate responses to emergency conditions, investigation of unauthorized waste discharges, and compliance inspections of aquaculture facilities. The executive director and TPWD will provide notice to each other regarding site inspections, so as to allow the other agency to participate if desired. Notifications of scheduled compliance inspections will be communicated to the appropriate office of the other agency at least five days beforehand. Notification of other activities will be communicated as soon as practicable. TPWD will notify the commission Regional Office and the executive director will notify TPWD Resource Protection Regional Office.

(e) General conditions.

(1) The term of this MOU shall be from the effective date until termination of this agreement. Any amendment to the MOU shall be made by mutual agreement of the parties and shall be adopted by rule by both parties.

(2) Each party shall adopt by rule the MOU. All amendments shall also be adopted by rule. This MOU, and any subsequent amendment, shall become effective 20 days after the date on which the rule is filed in the office of the Secretary of State.

(3) By signing this MOU, the signatories acknowledge that they are acting upon proper authority from their governing bodies.

(4) Any party may terminate this MOU so long as it provides notice in writing to the other party 90 days in advance of the termination.

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.

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