The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §7.119 *without change* to the proposed text as published in the June 7, 2013, issue of the *Texas Register* (38 TexReg 3495), and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking is adopted in order to update, by reference, the commission's memorandum of understanding (MOU) with the Texas Department of Transportation (TxDOT) regarding TCEQ environmental reviews of TxDOT highway (transportation) projects. The updates are required to implement the following statutes and legislation.

Texas Transportation Code, §201.607(a) requires TxDOT and each state agency that is responsible for the protection of the natural environment, which includes the TCEQ, to revise their MOU that relates to the review of the potential environmental effect of a highway project. Texas Transportation Code, §201.607(b) requires TxDOT and the TCEQ to adopt, by rule, all revisions to the MOU. In addition, Texas Transportation Code, §201.607(a)(5), as amended in Section 1 of Senate Bill (SB) 548, Section 18 of SB 1420, and Section 1 of House Bill (HB) 630, 82nd Legislature, 2011, requires that the MOU specify that comments submitted to TxDOT later than the available 45-day review period will be considered by TxDOT to the extent possible. In addition, Section 5 of SB 548, Section 18 of SB 1420, and Section 5 of HB 630 require that the MOU be updated.

TxDOT and the TCEQ have negotiated updated MOU language. TxDOT has adopted the updated MOU in 43 TAC Chapter 2, Subchapter I. This rulemaking adopts 43 Texas Administrative Code (TAC) §§2.301 - 2.308 by reference.

Section-by-Section Discussion

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

The commission adopts the amendment to §7.119 to update the TCEQ adoption by reference of its MOU with TxDOT and to change the title to "Memorandum of Understanding Between the Texas Department of Transportation and the Texas Commission on Environmental Quality."

Until TxDOT recently amended its rules, the MOU was in 43 TAC §2.23. In a recent rulemaking, TxDOT repealed this section and moved the MOU to new 43 TAC §§2.301 - 2.308, organized the MOU into sections, and adopted the updated MOU, including changing the title of the MOU to Memorandum of Understanding with the Texas Commission on Environmental Quality.

TxDOT has amended the MOU between TxDOT and the TCEQ to reflect the changes in law made under Section 1 of SB 548, Section 18 of SB 1420, and Section 1 of HB 630 and additional changes agreed to by the TCEQ and TxDOT. The amended MOU was

adopted by TxDOT on April 26, 2013, and is effective as of May 16, 2013. The adopted amendment to §7.119 adopts, by reference, 43 TAC §§2.301 - 2.308.

The TCEQ adopted the updated MOU by reference in order for TCEQ rules to reflect the changes in the MOU that were required by legislation and to improve the clarity of the MOU, including the environmental review process.

The following is a discussion of changes that were made in the recent adoption by TxDOT of the updated MOU.

Adopted New §2.301, Purpose, formerly §2.23(a), provides for a formal mechanism as required by Texas Transportation Code, §201.607, by which the TCEQ reviews transportation projects that have the potential to affect resources within its jurisdiction. In addition, the MOU promotes the mutually beneficial sharing of information between TxDOT and the TCEQ. It also allows TxDOT to coordinate additional transportation projects that are not specifically required to be coordinated under the MOU. This section has been streamlined by deleting §2.23(a)(1) and (2), that stated the policies of TxDOT and the TCEQ; deleting §2.23(a)(3) that referenced TxDOT rules that relate to the review of TxDOT environmental projects; and moving the reference regarding authority for the MOU to its own section. Also, this section and the rest of the rules were amended to update the TCEQ's name from the Texas Natural Resource

Conservation Commission (TNRCC).

Adopted New §2.302, Authority, formerly §2.23(b), sets forth the statutory authority in the Texas Transportation Code, the Texas Water Code, and the Texas Health and Safety Code for TxDOT and TCEQ to enter into the MOU. The section was renumbered.

Adopted New §2.303, Definitions, formerly §2.23(c), contains definitions of various terms used in the MOU. New definitions have been added: Assessment units; Environmental report; Environmental review document; Federal Highway Administration transportation project; Impaired assessment unit; Maintenance area; Total maximum daily load (TMDL); TMDL Implementation Plan (I-Plan); and Transportation enhancement. Certain definitions have been deleted: Districts; Environmental documents; Inspection and Maintenance Program; Memorandum of Understanding; Metropolitan Planning Organization (MPO); Mitigation; National Environmental Policy Act of 1969 (NEPA); Project development; Right of way; Single occupancy vehicle; Statewide Transportation Improvement Plan (STIP); Transportation Improvement Plan (TIP); and TxDOT environmental rules. Some definitions have been revised or modified: The United States Environmental Protection Agency (EPA); Maintenance (changed to Maintain or maintenance); Non-attainment counties (changed to Non-attainment area); State Implementation Plan (SIP); TNRCC (changed to TCEQ); TxDOT; and Transportation projects (changed to Transportation project).

Adopted New §2.304, Responsibilities, formerly §2.23(d), sets forth the statutory responsibilities of TxDOT and TCEQ that are relevant to the purpose of the MOU. It contains portions of repealed §2.23(d)(1) and (2)(A) and (B), and consolidates and streamlines the responsibilities of each agency.

Adopted New §2.305, Coordination during Environmental Review Process, combines elements of repealed §2.23(e) regarding coordination and document review (including triggers for coordination). This section sets forth new procedures in §2.305(a)(1) and (2), *Applicability*, for determining whether the department is required to coordinate a given transportation project with TCEQ. TxDOT will not coordinate a project that TxDOT classifies as a categorical exclusion, blanket categorical exclusion, or programmatic categorical exclusion under §2.81 or §2.82. TxDOT will coordinate a project for which TxDOT prepares an environmental assessment unless TxDOT has already coordinated an environmental report (discussed below) concerning the project and certain other conditions are met. TxDOT will coordinate a project for which TxDOT prepares an environmental impact statement. TxDOT will coordinate a reevaluation concerning a project if the earlier coordination concerning the project is no longer valid as a result of changes in the project.

Section 2.305(a) removes the general information formerly in §2.23(e)(1) about early identification and coordination with the TCEQ to assess potential environmental concerns and about encouraging public input. The TxDOT rules, in 43 TAC Chapter 2, Subchapter E, Public Participation, contain information regarding public input. Section 2.305(a) adds more detail to the requirements for submitting documents to TCEQ for review. TxDOT is allowed to coordinate an environmental report with TCEQ. This document is a report, form, checklist, or other documentation analyzing an environmental issue in the context of a specific transportation project or presenting a thorough summary of an environmental study conducted in support of an environmental review document, or demonstrating compliance with a specific environmental requirement. The rules that were recently adopted by TxDOT authorize a project sponsor to prepare an environmental report and submit it for technical review before the environmental review document is completed (see 43 TAC §2.45). Similarly, the amended MOU allows, but does not require, TxDOT to coordinate an environmental report with TCEQ. For projects for which TxDOT prepares an environmental assessment, the MOU would allow TxDOT to satisfy coordination requirements by coordinating an environmental report provided all of the conditions in proposed §2.305(a)(2)(B) are met. For projects necessitating environmental impact statements, the MOU no longer requires TxDOT to provide the preliminary environmental/scoping document to TCEQ for review, but it does still require that TxDOT supply the TCEQ

draft and final environmental impact statements for review. It adds the requirement that TxDOT supply supplemental environmental impact statements for review.

Section 2.305(b) contains triggers for determining when coordination is required for projects for which TxDOT prepares an environmental assessment. Use of these triggers will allow TCEQ to focus its resources on reviewing those projects most likely to adversely affect natural resources. This subsection revised the *repealed §2.23(e)(2)(A)(i)* and *(ii)* dealing with air quality and water quality triggers. The four air quality triggers were narrowed to one trigger covering projects that add capacity in a nonattainment or maintenance area of the state. The water quality triggers are now more detailed and incorporate some of the new definitions that are included in the updated MOU. As required in the previous MOU, projects requiring Tier II individual Clean Water Act Section 401 certification will use procedures as defined in the most recent version of the MOU between the United States Army Corps of Engineers and TCEQ. Section 2.305(b)(2)(B) expands the Edwards Aquifer trigger to cover transition zones in addition to the recharge and contributing zones of the Edwards Aquifer. Under the amended MOU, TxDOT shall provide the location of the project within the Edwards Aquifer and include a statement that projects and associated activities will comply with the Edwards Aquifer rules and any applicable TCEQ guidance documents.

Section 2.305(b)(2)(C) revised the language in repealed §2.23(e)(2)(A)(ii)(I), which stated that coordination was to be for "projects which may encroach upon threatened or impaired stream segments designated under Clean Water Act, §303(d) and/or are five miles upstream from the designated stream segment". The new §2.305(b)(2)(C) states that the trigger covers projects located within five miles of an impaired assessment unit and within the watershed of the impaired assessment unit. The determination of whether an assessment unit is impaired must be based on the most recent TCEQ integrated report, including a §303(d) list approved by the EPA. TxDOT will identify impaired assessment units using publicly available information from the TCEQ. To identify the watersheds of any impaired assessment unit, TxDOT may use a variety of publicly available map resources and data, or the 12-digit hydrologic unit codes produced by the United States Geologic Service. The language in the amended MOU requires TxDOT to provide specific information as to the location of the project in the watershed of the impaired assessment unit and specific information regarding the impaired assessment units.

The MOU now specifies that for impaired assessment units with EPA-approved TMDLs, TxDOT must provide "the name and date of the EPA-approved TMDL and if applicable, the TCEQ-approved I-Plan, and a statement that the project and associated activities will be implemented, operated, and maintained in a manner that is consistent with the approved TMDL or approved I-Plan." For impaired assessment units without EPA-

approved TMDLs, TxDOT will include "a statement that the project and associated activities will be implemented, operated, and maintained using best management practices to control the discharge of pollutants from the project site."

Section 2.305(c) includes a general provision concerning compliance with law, which was previously set out with more specifics in §2.23(e)(2)(B), and the computation of time. The amended MOU authorizes TxDOT (but not a local government) to conduct the coordination of environmental reviews with TCEQ.

Section 2.305(d)(1) streamlines the review process by requiring TxDOT and the TCEQ to submit their documents and comments by e-mail. As in the previous version of the MOU, the TCEQ shall submit its comments within 30 days of receiving the documents for review. In the previous MOU, the TCEQ could request a 30-day extension of the review period. In accordance with SB 548, SB 1420, and HB 630, the MOU now limits the TCEQ to a total of 45 possible days for the review period, by limiting the possible extension period to 15 days.

Section 2.305(d)(2) specifies that if TxDOT coordinates the review of an environmental report for a project for which it prepares an environmental assessment, the TCEQ can request that TxDOT also coordinate the environmental assessment. Section 2.305(d)(3)

specifies that TxDOT will respond in writing to the TCEQ comments and will ensure that the final version of the environmental review document describes the results of any coordination with and comments made by the TCEQ. As required by SB 548, SB 1420, and HB 630, the amended MOU specifies that comments submitted to TxDOT after the comment deadline will be considered by TxDOT to the extent possible.

Adopted New §2.306, Exchange of Air Quality Information, continues to require the TCEQ to provide specified air quality information to TxDOT and adds that the TCEQ will provide proposed and existing locations of roadside air monitors. *Repealed §2.23(g), Additional provisions regarding water quality*, of the previous version of the MOU, referenced the Interagency Cooperation Contract as it related to coordination and compliance with the 30 TAC Chapter 213 rules regarding the Edwards Aquifer Protection Program. In the amended MOU, the reference to the contract was deleted because the application review addressed in the contract is not part of the environmental review process addressed in the MOU.

Adopted New §2.307, No Waiver of Rights, states that TCEQ reserves all rights it has to enforce relevant laws and that the parties intend that TCEQ's participation in this MOU does not have the effect of waiving those rights or the requirements of any laws that apply to the projects covered by the MOU. Also, the parties agree that the MOU does not preclude either party from making any legal argument. This section streamlines

Repealed §2.23(h), Dispute resolution, which provided for a period of 45 days to resolve any disputes between the two agencies. The new section deletes the time set aside for dispute resolution and the requirement that if TxDOT proceeded with a proposed transportation project in conflict with the TCEQ comments, TxDOT would submit to the TCEQ "a complete and detailed justification demonstrating full compliance with all federal and state rules, regulations, and laws." Instead, the amended MOU specifies elsewhere that TxDOT will respond in writing to the TCEQ's comments and ensure that the environmental review document describes the results of any coordination with and comments made by the TCEQ.

Adopted New §2.308, Review of MOU, remains generally the same as *repealed* §2.23(i) of the previous version of the MOU. It expresses the intent of TxDOT and the TCEQ to update the MOU in the future as required by Texas Transportation Code, §201.607, or as necessitated by a change in state and federal law or a change in the state implementation plan. It removes the statement that if TxDOT and the TCEQ cannot reach agreement on the language for an amendment, either party may require dispute resolution under the requirements in the MOU for dispute resolution, which, as mentioned above, were removed from the amended MOU.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended 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.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by portions of SB 548, SB 1420, and HB 630. Those changes require that the MOU between TxDOT and the TCEQ specify that TCEQ review and comments be completed within 45 days of receiving the MOU. All three bills also specify that comments submitted to the TxDOT later than the period agreed to by the agencies will be considered by the TxDOT to the extent possible. The rulemaking also updates language in the MOU, including, but not limited to, definitions triggers for TCEQ review, and the review process.

The rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rule will not 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 cost of complying with the adopted rule is not expected to be significant with respect to the economy.

Furthermore, the adopted rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This rule does not exceed a standard set by federal law, rather it addresses the process for environmental review performed by the TCEQ for TxDOT, as mandated under state law. Second, the adopted rulemaking does not exceed an express requirement of state law. Third, the adopted rulemaking 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. Finally, the adopted rulemaking is not proposed solely under the general powers of the agency, but specifically under Texas Transportation Code, §201.607, which requires TxDOT and the TCEQ to update their MOU.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. TCEQ did not receive any comments

on the 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 updated MOU between the TxDOT and the TCEQ regarding TCEQ environmental reviews of TxDOT highway projects. The MOU required updating due to statutory changes and to improve the clarity of the MOU, including the environmental review process.

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 explain the process for the TCEQ's environmental reviews of TxDOT highway projects and additional cooperation between TxDOT and the TCEQ. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(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 adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. TCEQ did not receive any comments on the CMP determination.

Public Comment

The comment period closed on July 8, 2013. The commission did not receive any comments regarding this rulemaking.

§7.119

Statutory Authority

This amendment is adopted under Texas Water Code (TWC), §5.102, which establishes the general authority of the Texas Commission on Environmental Quality (TCEQ, commission) necessary to carry out its jurisdiction; §5.103, which establishes that the commission, by rule, shall establish and approve all general policy of the commission; §5.104, which establishes the authority of the commission to enter memoranda of understanding with any other state agency and adopt by rule the memoranda of understanding; §5.105, which establishes the general authority of the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state; Texas Health and Safety Code, §382.035, Memorandum of Understanding, which requires the commission to adopt, by rule, any memorandum of understanding between the commission and another state agency in relation to the Texas Clean Air Act; and Texas Transportation Code, §201.607, Environmental, Historical, or Archeological Memorandum of Understanding, which requires the Texas Department of Transportation and the TCEQ to examine and revise their memorandum of understanding relating to the TCEQ review of highway projects for potential environmental effects.

The adopted amendment implements requirements in Sections 1 and 5 of Senate Bill

(SB) 548, Section 18 of SB 1420, and Sections 1 and 5 of House Bill 630, 82nd Legislature, 2011. In addition, the adopted amendment implements requirements in Texas Transportation Code, §201.607.

§7.119. Memorandum of Understanding Between the Texas Department of Transportation and the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission].

The commission adopts by reference the rules of the Texas Department of Transportation in 43 TAC §§2.301 - 2.308 [§2.23] (relating to Memorandum of Understanding with the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission]).