

The Texas Natural Resource Conservation Commission (commission or agency) adopts new §7.124, Natural Resource Trustees Memorandum of Understanding (MOU). This MOU is between the commission and the state and federal natural resource trustees. Section 7.124 is adopted *with changes* to the proposed text as published in the October 13, 2000 issue of the *Texas Register* (25 TexReg 10294).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The agency, Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the United States Department of the Interior are all designated to act on behalf of the public as trustees for natural resources (Trustees) pursuant to several environmental statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 United States Code (USC) §§9601 et seq.; the Clean Water Act (CWA), 33 USC §§1251 et seq.; and the Oil Pollution Act of 1990 (OPA), 33 USC §§2701 et seq.

In September of 1999, the commission adopted Chapter 350, the Texas Risk Reduction Program (TRRP) rules. These rules and the preamble to the rules (24 TexReg 7436) reference certain interactions between the executive director and the Trustees in regard to an ecological risk assessment (ERA) and an ecological services analysis (ESA).

Specifically, the preamble to the TRRP rules states that the Trustees plan to develop an MOU that facilitates the coordination of the Trustees and their interaction in the ERA and ESA processes. The preamble also states that the Trustees may choose to participate in the ERA process to ensure that

natural resources under their jurisdiction are adequately protected and that the agency will notify the Trustees of affected property with chemicals of concern which remain after a particular stage of development within the Tier 2 screening-level ERA.

Additionally, §350.33(a)(3)(B) and §350.77(f)(2) require the executive director to consult with the Trustees prior to approval of a person's request to conduct an ESA. Furthermore, §350.33(a)(3)(B) requires the person to conduct any compensatory ecological restoration and other activities associated with the ESA with the approval of and in cooperation with the Trustees.

Thus, this MOU sets forth the procedures by which the agency and the Trustees will interact regarding the ERA and the ESA processes under the TRRP rules.

SECTION BY SECTION DISCUSSION

Adopted §7.124(a) sets forth the purpose of the MOU as facilitating the interactions between the agency and the Trustees in the ERA and the ESA processes.

Adopted §7.124(b) names the parties to the MOU as the agency, Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the United States Department of the Interior.

Adopted §7.124(c) recites the authority, both state and federal, by which the parties enter into the MOU.

Adopted §7.124(d) sets forth and defines acronyms used in the MOU.

Adopted §7.124(e) sets forth and defines certain terms used in the MOU. In response to comments, the following sentence was added to the end of the definition of Paragraph 7 (§7.124(e)(2)) to provide both clarity and flexibility if the TRRP rules are amended or replaced: "Any reference in this MOU to Paragraph 7 shall not only include the current 30 TAC §350.77(c)(7) but also the point at which the equivalent actions occur under other TNRCC risk reduction rules in the event that TRRP is amended or replaced and the specific reference is revised."

Adopted §7.124(f) sets forth the procedure by which each Trustee designates a primary and secondary contact to facilitate interaction under the MOU.

Adopted §7.124(g) sets forth the procedure by which the agency and the Trustees will interact during the ERA process. The first step in this process is the agency's initial notification to the Trustees. The agency then sends pertinent documents to Trustees which elect to participate on a particular affected property. Trustees then have an opportunity to comment on the ERA for that affected property. This section also sets forth the process for the coordination of the parties on any meetings pertaining to the ERA. In response to comments, the last sentence of the first paragraph in this subsection was revised to read as follows: "Furthermore, the Trustees acknowledge that the potential for continuing injury to ecological resources should be negligible at sites where the remedial decisions were based on appropriate application of the proposed ecological risk assessment process." Additionally, in response to comments, the first sentence in §7.124(g)(1) was revised to read as follows: "After the TNRCC

learns through a person's submittal that the ecological risk assessment at an affected property has progressed to Paragraph 7 and prior to approval of the ecological risk assessment by the TNRCC, the TNRCC Trustee shall provide timely notification to the other Trustees."

Adopted §7.124(h) sets forth the procedure by which the agency and the Trustees will interact during the ESA process. This section is divided into two main parts, with a small third part outlining how a Trustee may waive its role in the ESA process. The first part establishes the interaction process when the executive director is consulting with the Trustees, as required, prior to approval of a person's request to conduct an ESA. This process is very similar to the interaction under the ERA process, with notification, document exchange, opportunity for comments, and coordination of meetings. The second part addresses the parties' interaction while the ESA is actually being conducted, including performance of any compensatory restoration. In response to comments, the second sentence in §7.124(h)(2)(C) was revised to read as follows: "The agreement will include issues such as the payment of Trustees' costs associated with the ecological risk assessment and ecological services analysis processes, public participation requirements, and a mechanism for addressing natural resource damages liability, as applicable."

Adopted §7.124(i) explains that certain procedures under subsections (g) and (h)(1) may be combined to achieve efficiencies.

Adopted §7.124(j) sets forth the procedures by which a Trustee may exit or re-enter the ERA and ESA processes. In response to comments, the last sentence of §7.124(j)(1) was revised and another sentence

added as follows: "However, upon a deferred entry or a re-entry to the ecological risk assessment or ecological services analysis processes, the Trustee involvement in the TRRP process shall be prospective only and may not challenge previous decisions regarding the ecological risk assessment and ecological services analysis. Additionally, a Trustee may not challenge joint decisions made within the TRRP process on the ecological risk assessment or ecological services analysis during that Trustee's prior participation in the process."

Adopted §7.124(k) sets forth the requirements for notifying or coordinating with the agency's project manager prior to certain activities on an affected property. In response to comments, "site visits" was added as one example of Trustee activities.

Adopted §7.124(l) states that the natural resource Trustees' 1995 Memorandum of Agreement governs issues, responsibilities, or activities not specifically addressed in this MOU.

Adopted §7.124(m) explains that the MOU does not compromise or affect any legal rights of the parties or narrow the scope of any party's authority or jurisdiction unless it is specifically stated in the MOU. In response to comments, the following sentence was added: "This MOU does not compromise or affect any rights of the parties with regard to natural resource damage actions."

Adopted §7.124(n) explains that the MOU may not be the basis for third party challenges or appeals and that it does not create any rights or causes of action in any persons not parties to the MOU.

Adopted §7.124(o) clarifies that the MOU does not obligate the parties to expend funds beyond those appropriated.

Adopted §7.124(p) allows for the termination and amendment of the MOU pursuant to appropriate rulemaking.

Adopted §7.124(q) allows the MOU to be signed in counterparts and identifies the effective date as the date of the last signature.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and has 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 that statute. The adopted rule would not adversely effect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule will formalize the requirement and procedures for cooperation between the Trustees and the agency regarding ERA and ESA matters. The adopted rule does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. Section 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.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this adopted rule is to set forth the procedures by which the agency and the natural resource Trustees will interact regarding the ERA and the ESA processes under the TRRP rules. The adopted rule will substantially advance this specific purpose by setting forth detailed procedures for such interaction including initial notification, document exchange, comments, and meetings. The adopted rule will not burden private real property and the action under the adopted rule does not constitute a taking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

HEARINGS AND COMMENTERS

There were no public hearings held on this rulemaking. Campbell, George, and Strong, L.L.P. (CGS); Groundwater Services, Incorporated (GSI); Texas Chemical Council (TCC); and Texas Oil and Gas

Association (TxOGA) all submitted written comments recommending changes to the MOU.

ANALYSIS OF TESTIMONY

TCC and TxOGA commented that the commission should re-evaluate the MOU six months after implementation to give the agencies and stakeholders an opportunity to identify areas for improvement in the process.

The commission agrees that a review of the MOU based on practical experience would be beneficial. However, the suggested review period is too short to meaningfully evaluate the MOU process as a whole. The commission agrees that the agency will re-evaluate the MOU two years after adoption.

TCC and TxOGA commented that a statement in the fiscal note of the proposal preamble referencing "...accidents involving a release of potentially hazardous chemicals of concern..." was unclear and should be changed to read, "...incidents involving a release of chemicals of concern...".

The commission agrees with the comment but the change is not reflected in this preamble because the fiscal note, as is the usual practice, is not included in the adoption preamble.

TCC, TxOGA, and CGS commented that a statement in the preamble regarding chemicals of concern (COCs) left in place was not accurate and should be clarified.

The commission agrees with the recommended revision so that the sentence should read as follows, “If COCs are proposed to be left at the affected property in excess of established ecological PCLs with the potential for continuing exposure, an ESA must be conducted.” However, this sentence was contained in the fiscal note of the proposal preamble and, as is the usual practice, the fiscal note is not included in the adoption preamble.

TCC and TxOGA commented that the Trustees have not included in the MOU any language that would acknowledge that a person’s successful completion of the ESA process (with or without restoration) resolves a person’s natural resource damages (NRD) liability for future ecological injuries. TCC and TxOGA further commented that this sentiment is included in the preamble to the TRRP rules (24 TexReg 7529 - 7531) and in the final interim ERA guidance document (see §5.3.2). TCC and TxOGA commented that they interpreted this language to say that after Trustees' reasonable costs are reimbursed, a person is resolved of NRD liability for future ecological injuries. TCC and TxOGA recommended that the MOU include language consistent with preamble language that recognizes that the Trustees will not pursue an action for future ecological injuries in the NRD law context when a person successfully completes the ESA process.

Similarly, CGS commented that the preamble of the MOU should clearly indicate that a person’s participation in the ESA and performance of compensatory ecological restoration will, in effect, completely resolve that person’s potential liability for future ecological injuries that are recoverable under NRD law (CERCLA, OPA, CWA, and any other federal or state law). CGS further commented that this was the underlying agreement for the Trustees’ inclusion throughout the ESA process and is

reflected in the comments submitted to the TRRP rules by several Trustees. CGS commented that the preamble of the TRRP rules echoes this sentiment by stating that “(t)hrough Trustee involvement, it is the intent of the commission to provide finality to the level of restoration required to compensate for future ecological injuries associated with a given risk management decision.” Additionally, CGS commented that the exception pointed out in the preamble to the TRRP rules relates solely to the Trustees' ability to recover their reasonable assessment costs. CGS commented that at the September 1, 2000 meeting with representatives from the Trustee agencies to discuss the draft of this MOU, they were told by several of the Trustee representatives that the agencies never agreed that a person who partakes in the ESA process and provides compensatory restoration for future ecological risks would have essentially resolved his/her potential NRD liabilities for future ecological injuries. CGS further commented that this was completely contrary to agreements struck at arms length with the Trustees, the agency, and industry stakeholders over the prior two plus years and was in conflict with the Trustees' own comments on the TRRP rules.

The commission disagrees with the comments that Trustee involvement in the ESA is a de facto settlement of NRD liability for future ecological injuries. In fact, the adoption preamble to the TRRP rules stated that the “..commission disagrees with the Campbell, George, and Strong comments pertaining to the Trustees involvement in the ESA being considered a de facto settlement of natural resource damages (NRD) for future ecological injuries.” (24 TexReg 7531)

The fact that the Trustees' costs of assessment are not specifically addressed in the ESA process and are clearly a statutory component of NRD liability is only one reason that Trustee involvement in the ESA does not result in an automatic settlement of NRD liability for future

ecological injuries. The statutes and regulations pertaining to NRD are complex and involve specific components not addressed in the ESA process. Some examples of these specific components are the development of Damage Assessment Restoration Plans, alternatives analyses, public participation requirements, and the Trustees' reasonable costs of assessment. Although the ESA process and the NRD assessment process have similarities, these processes are not one and the same. Involvement in one process cannot be interpreted as automatic satisfaction of the other process. The ESA process was not written to address all of the components of NRD liability. Additionally, settlements and liability releases are inherently case specific and language stating that some action is a settlement or a release for a third party is not appropriate for an MOU that is primarily procedural in nature and not binding upon any third party. Additionally, the commission disagrees that this was the underlying agreement for the Trustees' inclusion in the ESA process. As stated in the adoption preamble to the TRRP rules, "It is only the presumed Trustee involvement which gives the commission a comfort level in including the ESA option in the rule." (24 TexReg 7530) It is still the intent of the commission, through Trustee involvement, to provide finality to the level of restoration required to compensate for future ecological injuries associated with a given risk management decision. Additionally, the Trustees intend to offer a person the opportunity of resolving their NRD liability through a formal written settlement agreement concurrent with their participation in the ESA process.

GSI commented that §7.124(a)(4), (g), and (h)(2)(C) could cause confusion between risk and injury because risk does not equate to injury. GSI further commented that the ERA process is designed to address potential ecological risks at sites managed under the TRRP rules and a finding of ecological risk

(i.e., COC concentrations above ecological protective concentration levels (PCLs)) does not indicate that ecological injury will occur or that liability for NRD has been incurred. GSI recommended that a definition of "ecological injury" or "natural resource damages" be added to the MOU which clarifies that a finding of ecological risk does not indicate that ecological injury has occurred or will occur.

The commission agrees that risk does not necessarily indicate that ecological injury has occurred or will occur. However, the commission disagrees with GSI's recommendation because definitions such as those suggested are not appropriate in a coordination document and may cause confusion if they conflict with similar definitions in substantive rules or statutes. Additionally, the MOU does not state a position contrary to the one stated by GSI. Although the commission agrees that risk does not necessarily indicate that ecological injury has occurred or will occur, risk does indicate the potential for ecological injury (service losses). As §5.3.2 of the agency's ERA guidance jointly developed with stakeholders states, "For expediency and cost-effectiveness, it is the intention of the ESA process that risk estimation and remedial effects be used to determine potential ecological services losses." (Guidance for Conducting Ecological Risk Assessments at Remediation Sites in Texas, August 28, 2000) For these reasons, the commission has made no changes in response to these comments.

GSI commented that the last sentence of the first paragraph in §7.124(g) implies that the Trustees do not acknowledge that the potential for continuing injuries should be negligible at those sites where the appropriate application of the ERA process indicates that no corrective action is required. GSI recommended that the sentence be revised to acknowledge negligible future injury at both sites where

corrective action has been completed and sites where corrective action is not required.

The commission agrees with the comment and the sentence has been revised appropriately.

GSI, TCC, and TxOGA commented on the trigger and timing of Trustee notification in §7.124(g). GSI commented that the trigger for Trustee notification (i.e., conservative $HQ > 1$) is not directly related to the potential for injury to ecological resources and therefore is not an appropriate trigger for notification. GSI further commented that with appropriate application of the ERA process, only development of ecological PCLs (Paragraph 9) provides a reasonable indication of potential injury to ecological resources and that requiring Trustee notification for sites which proceed to Paragraph 7, but not Paragraph 9, will make it more difficult for the Trustees to identify sites which pose a risk for future injury to ecological resources and to focus available resources on those sites. GSI recommended that the trigger for Trustee notification be modified to include only sites which progress to calculation of ecological PCLs (i.e., Paragraph 9 in the current TRRP rules).

TCC and TxOGA commented that Step 7 is too early in the process for notification because PCLs developed from Step 7 assumptions are still conservative and should not be a litmus test for review. Additionally, TCC and TxOGA commented that notification is more appropriate when the decision has been made to leave concentrations of COCs that exceed an appropriately derived ecological PCL in place where these environmental levels have the potential for continuing exposure. TCC and TxOGA recommended that notification only be required when concentrations of COC's above an appropriately derived ecological PCL are left in place with the potential for continuing exposure and that §7.124(e)(2)

and (g) should be deleted.

The commission disagrees with the comments on the trigger and timing of notification because Paragraph 7 (Step 7) is directly related to the potential for injury to ecological resources and is therefore an appropriate trigger for notification. The Trustees originally believed that it would be appropriate to be notified much earlier in the process. The proposal preamble to the TRRP rules suggested notification after the initial Tier 2 screening step (Paragraph 2) (24 TexReg 2232). Due to public comments on the proposed TRRP rules saying that this was too early in the process for notification, the adoption preamble to the TRRP rules stated that the Trustees would be notified prior to the development of PCLs, which occurs at Paragraph 9 (24 TexReg 7455). Paragraph 7 was chosen as a compromise because it is the point at which less conservative assumptions are utilized and Trustee involvement at that stage helps to ensure that their jurisdictional resources are adequately protected. Paragraph 7 was determined to be the latest point in the process in which the Trustees could become involved and not question what had occurred in the previous steps. Although the Trustees will be notified after the agency learns through a person's submittal that an ERA has progressed to Paragraph 7, the scope of the Trustees' involvement in the TRRP process for an affected property will be determined on a case-by-case basis. For these reasons, the commission has made no changes in response to these comments.

TCC and TxOGA also recommended that, at a minimum, PCLs derived under the following conditions should be acceptable and not trigger notification: 1) the LOAEL and NOAEL differ by a factor of ten

or less, and 2) the midpoint or less between these values is used as the effect level.

The commission disagrees with this comment because it is in direct conflict with a previous commitment that the commission has with the Trustees, as stated in the adoption preamble of the TRRP rules (24 TexReg 7455), that the Trustees would be notified prior to development of ecological PCLs. While the commission agrees that this reasoning may be an appropriate method for *deriving* PCLs, it is not an appropriate trigger for notification. The Trustees should be involved at an earlier point in the process to insure that the process is reliable and the assumptions used in the development of the LOAEL and NOAEL PCLs are valid. For these reasons, the commission has made no changes in response to these comments.

TCC and TxOGA commented that although they agree that Trustees should be notified when it is beneficial, they do not believe that the notification needs to be formal and routine. TCC and TxOGA commented that the mechanism proposed by the MOU for notification is administratively burdensome, wastes resources from the different agencies and industry, and would result in many more sites being subject to review than would benefit from additional scrutiny. TCC and TxOGA further commented that formalizing the notification process adds a new step in the remediation process and adds additional responsibilities on agency staff. Additionally, TCC and TxOGA commented that the Trustees' involvement in the risk assessment process will increase the cost of remediation to both agencies and the regulated community without an increase in benefit.

The commission disagrees that the notification adds a new step to the remediation process because

notification is currently taking place under the present process, albeit in a much less systematic manner. In many ways, having an agreed upon and recognized process will make it easier for the agencies involved to carry out their duties to the public. The commission also disagrees that there is no added benefit in having the Trustees involved in the risk assessment process. The Trustees will bring certain expertise to that process to help ensure that a person's actions are ecologically protective and are not second guessed at a later period in time. It should also be noted that simply because the Trustees are notified of a site, it does not necessarily mean that the site will undergo additional Trustee scrutiny. As is true currently, the Trustees must focus their finite resources on a select number of sites. For these reasons, the commission has made no changes in response to these comments.

GSI commented that the notification sentence in §7.124(g)(1) is confusing because the person will typically submit a single report.

The commission has revised this sentence in response to GSI's comment.

GSI also commented that linking the notification trigger directly to the current TRRP rules is problematic because any revision to the TRRP rules will require revision to the MOU.

The commission agrees that this could be problematic but determined that the specific reference to Paragraph 7 is important for clarity. Therefore, a sentence was added to the end of the definition of Paragraph 7 (§7.124(e)(2)) to provide both clarity and flexibility if the TRRP rules are amended

or replaced.

CGS commented on the "TNRCC-approved ecological PCLs" language in §7.124(g)(1). CGS commented that the TRRP rules never state that the ecological PCLs must be approved by the agency.

The commission has revised the sentence in response to another comment and the language at issue was removed. However, the commission disagrees with CGS' comment that ecological PCLs do not have to be approved by the agency under the TRRP rules. In fact, approval of PCLs is an inherent and principal point of the TRRP rules. For example, §350.2(a) of the TRRP rules states: "All actions undertaken and demonstrations required by this chapter must be performed and documented to the reasonable satisfaction of the executive director." Additionally, the figure contained in §350.3(4) illustrates the procedural requirements for the TRRP rules and identifies submittal of the response action plan with the affected property assessment report for agency approval as a step in this process. Pursuant to §350.91(b)(7), ecological PCLs would be submitted and approved as part of the Affected Property Assessment Report.

TCC, TxOGA, and CGS commented that the sentence in §7.124(g) that states that the ERA should be conducted in a "...manner that is designed to result in the protection of ecological receptors that may be subject to management by federal and state agencies..." is superfluous and potentially conflicts with the ERA guidance. TCC, TxOGA, and CGS further commented that the focus of the ERA is on ecological risks first and it is not designed to address Trustee resources in every case. TCC and TxOGA recommended removing the sentence from the MOU.

The commission does not agree that the sentence is superfluous or that it potentially conflicts with ERA guidance. The sentence is not superfluous because it is important to the Trustees that the MOU contain such an acknowledgment about a process in which they agree that the potential for continuing injury to ecological resources should be negligible if the remedial decisions were based on appropriate application of the ERA process. The sentence (with minor modification) was actually taken from §3.13 of the agency's ecological guidance document which was negotiated amongst the agency, the Trustees, and industry stakeholders (Guidance for Conducting Ecological Risk Assessments at Remediation Sites in Texas, August 28, 2000). The substantially similar sentence from the guidance reads as follows: “The ERA should be conducted in a manner that results in the protection of ecological receptors subject to management by other federal and state agencies and consistent with these agencies statutory authority.” The commission has made no changes in response to this comment.

TCC, TxOGA, and CGS commented that the sentence in §7.124(g)(1)(B) that references the "deadline constraints of the TNRCC remedial/corrective action project manager" in the context of initial notification should be revised to replace "constraints" with "requirements."

The commission has made no changes in response to this comment. The commission considers the word “constraints” to be more appropriate in this context and notes that the word preference does not affect the tight deadlines that the Trustees are required to meet throughout the ERA process.

TCC, TxOGA, and CGS commented that the person submitting the request should be entitled to a copy of the comments submitted by the Trustees to the agency ecological risk assessor in §7.124(h)(1)(C).

TCC and TxOGA recommended that language be added so that the person gets a copy of the comments submitted by the Trustees.

The commission agrees that the person should be entitled to the written comments concerning the Trustees' recommendation on a person's request to perform an ESA. Such comments will be made available upon request. It should be noted, however, that Trustee comments may be revised or withdrawn as a result of comment compilation meetings between the Trustees and the agency ecological risk assessors.

TCC, TxOGA, and CGS commented on the Trustee interaction in §7.124(h)(2)(A). TCC, TxOGA, and CGS commented that if the Trustees cannot all agree, then the MOU should allow for the process to continue if at least one of the Trustees agrees and the risk of going forward without the other Trustees is the person's. TCC and TxOGA recommended adding language so that the process can continue even if only one Trustee agrees.

The commission disagrees with the comment that a person should be able to continue in the ESA process if multiple Trustees have chosen to participate and only one Trustee agrees to go forward. This is why a Trustee may not arbitrarily determine that a person should not move forward, but must provide a reasoned justification if they decide not to approve a person's ESA. The Trustee process in Texas is consensus-based which leads to better finality for the person. Additionally, the risk inherent in moving forward with one Trustee is not only the person's risk but is also a risk to the other Trustees' claim should they decide to pursue different compensation. However, if only a

single Trustee chooses to become involved with a site, the person may move forward with only that participating Trustee's approval. For these reasons, the commission has made no changes in response to these comments.

TCC and TxOGA commented that they support the formation of the Trustee Technical Team (TTT) in §7.124(h)(2)(B) and find the requirements of authority and expertise necessary for participation to be conducive to the efficient completion of ecological risk/ecological services evaluations. TCC, TxOGA, and CGS commented that the TTT process seems fairly elaborate and needs to align itself with the TRRP process and Figure 5-4 in the ecological guidance document.

The commission disagrees with the comment that the TTT process is fairly elaborate. The Trustees have successfully used a similar process for many years on other interactions and it has adapted well to a variety of sites and circumstances. The commission does not agree that the TTT process is inconsistent with the TRRP process or Figure 5-4 in the ecological guidance document. For these reasons, the commission has made no changes in response to these comments.

GSI, TCC, TxOGA, and CGS commented on the written agreement referenced in §7.124(h)(2)(C). GSI commented that negotiation of site-specific written agreements between the Trustees and the person at a significant portion of the sites proceeding with an ESA is impractical and has the potential to cause significant delays in the ESA process. GSI recommended adding language to indicate the (limited) situations where the Trustees would attempt to negotiate a written agreement prior to proceeding with an ESA and clarifying that the failure of the person to reach written agreement with the Trustees will

not limit the person's ability to proceed with the ESA and will not effect the timing of the ESA process. GSI also recommended clarifying that entry into the ESA process does not necessarily indicate that any NRD have occurred and that payment of Trustees' costs and public participation are not required under the TRRP rules.

TCC and TxOGA commented that it must be clear that a person can use the ESA without ever addressing NRD at a site and the Trustees should not hold back approval in the process if the person simply wants to deal with his/her remedial obligations. TCC further commented that the Trustees should not pursue payment of costs associated with the risk assessment because they are serving as technical experts providing support to TNRCC to insure that the natural resources under their jurisdiction are adequately protected. TCC recommended that the second sentence in §7.124(h)(2)(C) be revised to delete any reference to the ERA and add the words "as appropriate" to the end of the sentence. CGS commented that the inclusion of a written agreement should be eliminated because the entire process is predicated on the fact that the ERA and risk management requirements are derived from the agency's authority to require remedial actions for the protection of "human health and the environment" and though similar, it is not a process for the Trustees to assert and pursue claims for NRD. CGS further commented that under no event should a person be required to enter into an agreement with the Trustees for the performance of an ESA under the TRRP rules and if the person has no intention of addressing his or her potential NRD liabilities, then the Trustees must not withhold approval or participation in the ESA process based solely on that fact.

The commission responds that a responsible party may use an ESA without addressing NRD at

their own risk of duplicative expenses associated with investigation of NRD's, risk of additional or alternative compensation for past lost use, and public rejection of the compensatory ecological restoration in a NRD context. The commission also responds that the Trustees will not prevent approval of an acceptable ESA based solely on whether or not an NRD agreement is reached with responsible party. It is neither the commission's nor the Trustees' intent to *require* an agreement, but to simply allow persons the opportunity of resolving their NRD liability in an efficient manner at the same time they are moving through the ESA process. For this reason, the commission agrees with TCC's recommendation to add "as applicable" to the end of the second sentence in §7.124(h)(2)(C). However, for settlement of any NRD liability, entry into a formal written agreement with the Trustees will be necessary. The commission disagrees with TCC's comment that the Trustees should not pursue payment of costs associated with the risk assessment because the Trustees' involvement in the risk assessment is assessment work and thus the costs of that work are recoverable under NRD statutes and regulations.

GSI also recommended adding language to §7.124(h)(2)(C) to clarify that entry into the ESA process does not necessarily indicate that any NRD have occurred.

This comment has been previously addressed under an earlier comment of GSI's pertaining to risk and injury.

Additionally, GSI recommended adding language to clarify that payment of Trustees' costs and public

participation are not required under the TRRP rules.

The commission responds that the payment of Trustees' costs is a function of federal and state law and is not the subject of this MOU. As to public participation, it is required under certain parts of the TRRP rules, may be required by statute depending upon specific program requirements (e.g., state superfund), and is required if the person would like to resolve their NRD liability in conjunction with the ESA process. As to payment of Trustees' costs, the TRRP rules do not require the payment of such costs, but the adoption preamble to the TRRP rules does state that the "...commission recognizes that the Trustees' reasonable costs of assessment are a statutory component of NRD liability." (24 TexReg 7531) Therefore, the commission determined that the recommended statements may lead to confusion and are not necessary in a primarily procedural agreement among the participating agencies.

TCC, TxOGA, CGS commented that the dispute resolution process in §7.124(h)(2)(D) cannot interfere with remedial time frames established by the Texas Natural Resource Conservation Commission Remedial/Corrective Actions Project Manager (TNRCC PM). TCC and TxOGA recommended that language should be included in the MOU so that dispute resolution does not interfere with time frames established by TNRCC PM.

The commission has made no changes as a result of these comments for several reasons: 1) the dispute resolution process only applies to Trustee coordination and approval of the ESA and does not apply to Trustee involvement in the ERA or in the ESA consultation process; 2) the dispute

resolution process holds the parties to extremely tight time frames to facilitate an efficient ESA process; and 3) in the negotiation of the MOU, this result was the best compromise that could be reached between all the signatories to the MOU.

TCC, TxOGA, CGS commented on the Trustee re-entry and early exit from the process in §7.124(j). TCC and TxOGA commented that overall, as a tool facilitating such timely resolution, the proposed MOU provides authority and time lines to the lead agency (TNRCC) to initiate and carry on the process independent of the Trustees, should any or all Trustees elect not to participate. TCC and TxOGA further commented that they support §7.124(j)(1) concerning re-entry where Trustee involvement is prospective only and the Trustee may not challenge previous decisions as being an important provision that should be kept in the MOU. TCC, TxOGA, and CGS commented that after a Trustee withdraws, it loses its right to challenge decisions made on the ERA or ESA during its participation in the group. TCC and TxOGA recommended language clarifying that the Trustee loses its right to challenge decisions made on the ERA or ESA during its participation in the group when the Trustee withdraws.

In response to these comments, the sentence at issue in §7.124(j)(1) has been revised and an additional sentence added to clarify that a Trustee may not challenge joint decisions made within the TRRP process on the ERA or ESA during that Trustee's prior participation in the process.

TCC, TxOGA, and CGS commented that it is unclear what is meant in §7.124(k) by "Trustee activities" on affected properties. TCC and TxOGA recommended that the MOU provide examples of "Trustee activities" on the property.

In response to these comments, an example of site visits has been added to the sentence at issue.

TCC and TxOGA commented that it should be recognized in §7.124(m), Reservation of rights, that rights are affected if a person goes through the ESA with the cooperation of Trustee parties. TCC and TxOGA recommended that language be added to the MOU to reflect that rights are affected if a person goes through the ESA with cooperation of the Trustees. Specifically, TCC and TxOGA recommended that the sentence be changed to read, "...this MOU does not compromise or affect any legal rights of the parties *or persons undergoing an ESA*, nor does it narrow the scope of any party's authority or jurisdiction." CGS commented that it should be recognized that the rights of the Trustees are affected if a person goes through the ESA with the cooperation of the Trustees.

As this is a procedural MOU amongst five specific parties, the commission has made no changes in response to these comments. The Trustees did not think it appropriate to address a third party's rights in the MOU's reservation of rights provision. The commission also disagrees that the rights of the Trustees are affected if a person goes through the ESA process and that issue is not presented by this MOU between governmental entities. To clarify this issue, the Trustees have added an additional sentence to §7.124(m).

On §7.124(o), Appropriated funds, TCC and TxOGA commented that, although not directly related to this provision, they believe that inappropriate notification and Trustee involvement in the ERA process will increase costs for remediation projects for both the agencies involved and the person.

Although the comment does not relate to this provision, the commission disagrees that the notification and Trustee involvement in the ERA process will necessarily increase costs for remediation projects for both the agencies involved and the person. As the adoption preamble to the TRRP rules states, “Persons may benefit from timely Trustee involvement in the Ecological Risk Assessment process through decreased costs associated with the coordination of risk assessment and injury determination, reduction of residual natural resources injury, and timely resolution of natural resource damages liability.” (24 TexReg 7455)

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties. Additionally, the new section is adopted under TWC, §5.104 and Texas Health and Safety Code, §361.016, which provide the commission with the authority to enter into an MOU.

CHAPTER 7: MEMORANDA OF UNDERSTANDING

§7.124

§7.124. Natural Resource Trustees Memorandum of Understanding.

(a) Purpose. The Texas Risk Reduction Program (TRRP) rules (30 Texas Administrative Code (TAC) Chapter 350) and the preamble to those rules (24 TexReg 7436) reference certain interactions between the Texas Natural Resource Conservation Commission (TNRCC) and the natural resource trustees (Trustees) in regard to an ecological risk assessment and an ecological services analysis. The purpose of this memorandum of understanding (MOU) is to facilitate these interactions between the TNRCC and the Trustees in both these processes. In addition, the parties recognize the following as pertinent to the development of this MOU.

(1) The TNRCC is the agency of the State of Texas given the primary responsibility for implementing the constitution and laws of the state relating to the conservation of natural resources and the protection of the environment.

(2) As public trustees for natural resources, the Trustees have statutory authority to pursue claims for injury to, destruction of, or loss of natural resources as a result of a release of a hazardous substance or a discharge of oil, seek restoration or replacement of such natural resources, and pursue recovery of reasonable assessment costs.

(3) Due to some dependent and even overlapping responsibilities, it is beneficial for the TNRCC and the Trustees to coordinate on the performance of certain tasks concerning the ecological risk assessment and ecological services analysis.

(4) Integration of natural resource damages considerations into risk reduction decisions may efficiently and cost effectively resolve certain natural resource damages liability and alleviate the need for further investigations or legal proceedings.

(b) Parties. The parties to this MOU are as follows:

- (1) TNRCC, both as administrator of TRRP and a natural resource trustee;
- (2) Texas Parks and Wildlife Department, solely as a natural resource trustee;
- (3) Texas General Land Office, solely as a natural resource trustee;
- (4) National Oceanic and Atmospheric Administration of the United States Department of Commerce, solely as a natural resource trustee; and
- (5) United States Department of the Interior, solely as a natural resource trustee.

(c) Authorities.

(1) The Trustees enter into this MOU in accordance with the legal authorities provided to each Trustee by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 United States Code (USC) §§9601 et seq.; the Clean Water Act (CWA), 33 USC §§1251 et seq.; the Oil Pollution Act of 1990 (OPA), 33 USC §§2701 et seq.; the National Contingency Plan, 40 Code of Federal Regulations (CFR) Part 300; the Natural Resource Damage Assessment Regulations, 43 CFR Part 11; and 15 CFR Part 990; and any other applicable laws or authorities.

(2) The State of Texas Trustees also enter into this MOU in accordance with the legal authorities provided by the Texas Natural Resources Code, Oil Spill Prevention and Response Act of 1991, §40.107; the Texas Natural Resource Damage Assessment Regulations, 31 TAC Chapter 20; and any other applicable laws or authorities.

(3) The TNRCC additionally enters into this MOU in accordance with the legal authority provided to it by the Texas Water Code, §5.104 and Texas Health and Safety Code, §361.016.

(d) Acronyms.

(1) COCs - chemicals of concern;

(2) CFR - Code of Federal Regulations;

(3) CERCLA - Comprehensive Environmental Response, Compensation, and Liability Act;

(4) CWA - Clean Water Act;

(5) LOAEL - lowest observed adverse effect level;

(6) MOA - memorandum of agreement;

(7) MOU - memorandum of understanding;

(8) NOAEL - no observed adverse effect level;

(9) OPA - Oil Pollution Act of 1990;

(10) PCLs - protective concentration levels;

(11) TAC - Texas Administrative Code;

(12) TNRCC - Texas Natural Resource Conservation Commission;

(13) TRRP - Texas Risk Reduction Program;

(14) TNRCC PM - Texas Natural Resource Conservation Commission

Remedial/Corrective Actions Project Manager; and

(15) TTT – Trustee technical team.

(e) Definitions. Any words not specifically defined herein which are defined in 30 TAC §350.4, shall have the same meaning as defined in that section.

(1) **Person** - An individual, corporation, organization, government, or governmental subdivision or agency, business trust, partnership, association, or any other legal entity utilizing the TRRP rules or any other equivalent TNRCC rules.

(2) **Paragraph 7** - 30 TAC §350.77(c)(7) corresponds to a point in the Tier 2 screening-level ecological risk assessment where the initial risk estimate is refined based on the use of less conservative exposure assumptions. Paragraph 7 is a requirement that the person must perform as part of the Tier 2 screening-level ecological risk assessment if the assessment progresses past 30 TAC §350.77(c)(6). Paragraph 7 reads as follows: (The person shall:) “...justify the use of less conservative assumptions to adjust the exposure and repeat the hazard quotient exercise in paragraph (6) of this subsection, once again eliminating COCs that pose no unacceptable risk and adding comparisons to the LOAELs for those COCs indicating a potential risk (i.e., NOAEL hazard quotient >1); however, when multiple members of a class of COCs are present which exert additive effects, it is also appropriate to utilize an ecological hazard index methodology (if all COCs are eliminated at this point, the ecological risk assessment process ends and the items listed in paragraphs (8) - (9) of this subsection are not required);” Any reference in this MOU to

Paragraph 7 shall not only include the current 30 TAC §350.77(c)(7) but also the point at which the equivalent actions occur under other TNRCC risk reduction rules in the event that TRRP is amended or replaced and the specific reference is revised.

(3) **Trustees** - The federal agencies as designated by the President of the United States and the state agencies as designated by the Governor of the State of Texas pursuant to the OPA and CERCLA to act on behalf of the public as trustees of natural resources (e.g., water, air, land, wildlife).

(4) **Parties** - The signatories to this MOU as specified in subsection (b) of this MOU.

(f) **Trustee contacts.** The TNRCC Natural Resource Trustee Program (TNRCC Trustee) shall designate a primary TNRCC Trustee contact in writing to the other Trustees no later than ten calendar days after the effective date of this MOU. The TNRCC shall designate a secondary TNRCC Trustee contact in the initial notifications of both an ecological risk assessment and an ecological services analysis. Each of the other Trustees shall designate a primary and a secondary contact in writing to the other Trustees no later than ten calendar days after the effective date of this MOU. Initial notifications and all subsequent electronic mail correspondence shall be sent to both the primary and secondary contacts for each Trustee. The TNRCC Trustee shall send copies of pertinent documents to the primary contacts by regular mail (unless an alternate contact or method is identified in advance). A Trustee may change its primary or secondary contact by providing the other Trustees not less than ten calendar days written notice of such change.

(g) Ecological risk assessment process. The preamble to TRRP rules (24 TexReg 7455) states that the Trustees may choose to participate in the ecological risk assessment process to ensure that natural resources under their jurisdiction are adequately protected. The preamble also states that the TNRCC will notify the Trustees of affected property with chemicals of concern (COCs) which remain after a particular stage of development within the Tier 2 screening-level ecological risk assessment. The purpose of an ecological risk assessment is to characterize the ecological setting of the affected property, identify complete or reasonably anticipated to be completed exposure pathways and representative ecological receptors, scientifically eliminate COCs that pose no unacceptable risk, and develop protective concentration levels (PCLs) for selected ecological receptors where warranted. The parties agree that an ecological risk assessment should be conducted in a manner that is designed to result in the protection of ecological receptors that may be subject to management by federal and state agencies. Furthermore, the Trustees acknowledge that the potential for continuing injury to ecological resources should be negligible at sites where the remedial decisions were based on appropriate application of the proposed ecological risk assessment process.

(1) Initial notification. After the TNRCC learns through a person's submittal that the ecological risk assessment at an affected property has progressed to Paragraph 7 and prior to approval of the ecological risk assessment by the TNRCC, the TNRCC Trustee shall provide timely notification to the other Trustees. The parties agree that further evaluation of ecological risk at an affected property is not warranted for purposes of making response or corrective action decisions under the TRRP rules when: 1) an appropriately applied ecological risk assessment is conducted consistent with the most recent TNRCC guidance on the subject at the time the ecological risk assessment is performed; and 2)

the affected property does not progress to Paragraph 7.

(A) Method of initial notification. Notification by the TNRCC Trustee shall be provided via electronic mail, or via another mutually agreed upon method, to the primary and secondary contacts for each Trustee.

(B) Content of initial notification. The initial notification shall include the affected property name, location, status of the ecological risk assessment, and to the extent practical, the type of habitat, receptors at risk, COCs, and other relevant information necessary to allow the Trustees to evaluate their level of interest in the affected property. The TNRCC secondary contact, the TNRCC ecological risk assessor, and the deadline constraints of the TNRCC remedial/corrective actions project manager (TNRCC PM) shall also be provided in the initial notification.

(C) Trustee response to initial notification. A written response (electronic mail is acceptable) from each Trustee to the initial notification must be provided to both the primary and secondary TNRCC Trustee contacts within five working days of the initial notification. This response shall specifically state the Trustee's intent as to whether or not the Trustee chooses to participate in the ecological risk assessment process. In the event that any Trustee fails to respond within the five working days, the TNRCC will proceed as if the Trustee chose not to participate in the ecological risk assessment process for that affected property. Subsection (j) of this MOU explains how a Trustee may enter the process at a later date.

(2) Documents. After the timely receipt of a Trustee's written intent to participate in the ecological risk assessment process, the TNRCC Trustee shall send copies of pertinent documents to the primary contacts by regular mail (unless an alternate contact or method is identified in advance). The TNRCC Trustee shall provide the primary and secondary contacts with electronic mail notification (unless an alternate method of notification has been mutually agreed to in advance) that the documents have been mailed. The TNRCC shall provide documents in a timely manner to ensure that the Trustees have the maximum time available for the review of documents. The TNRCC Trustee shall coordinate the review of ecological risk assessment work plans, reports, and other relevant documents with the Trustees.

(3) Trustee comments. Unless otherwise mutually agreed, the participating Trustees shall submit a unified set of written comments, if any, on the ecological risk assessment to the TNRCC ecological risk assessor. Trustee comments on ecological risk assessment documents must be technically defensible and relevant to the ecological risk assessment process.

(A) Deadline for comments and extensions.

(i) The Trustees shall have 20 calendar days from the date of postmark on any documents received to respond to both the TNRCC Trustee contacts with comments. This time period may be reduced to coincide with a deadline of less than 20 calendar days if necessary to meet the TNRCC PM's deadline. In the event that a greater period of time is available, as determined by the TNRCC PM, an extended deadline shall be provided to the Trustees.

(ii) The Trustees may request an extension of the comment period of up to seven calendar days by writing (electronic mail is acceptable) to both the TNRCC Trustee contacts not less than three calendar days prior to the comment deadline. The TNRCC may, in its sole discretion, grant or deny such requests for extensions. The TNRCC will respond to all participating Trustees regarding such requests within 24 hours after receipt. If the Trustees do not receive a response from the TNRCC, the request for an extension is presumed to be denied.

(iii) In the event that any Trustee fails to provide comments within the prescribed deadline (including any extension), the TNRCC will proceed as if the Trustee has no comments.

(B) Reconciliation of comments. Prior to submitting comments to the TNRCC ecological risk assessor, the participating Trustees shall first coordinate all comments among themselves and provide a unified Trustee response through a mutually agreed upon Trustee representative. In the event that the TNRCC ecological risk assessor or TNRCC PM disagrees with any comments provided by the Trustees, the TNRCC will make diligent efforts to reach resolution between the parties. The TNRCC ecological risk assessor shall be responsible for coordinating the resolution of conflicting comments and shall schedule and coordinate comment resolution meetings as appropriate. Each participating Trustee's primary contact shall be copied on all ecological risk assessment related correspondence to the person and shall be provided copies of all ecological risk assessment related correspondence from the person to the TNRCC. In the event that differences cannot be resolved, the Trustees maintain the right to independently provide comments to the TNRCC PM and/or person

conducting the ecological risk assessment, either as a unified group of two or more Trustees or as a single Trustee.

(C) Recognition of comments. The TNRCC ecological risk assessor shall evaluate the Trustee comments and the TNRCC PM shall incorporate them into the TNRCC's response to the person, as appropriate. The TNRCC shall use its regulatory authority to ensure that the incorporated Trustee comments are recognized in the development of the ecological risk assessment. If any Trustee comments are not incorporated, the Trustees shall be informed.

(4) Coordination of meetings. After the timely receipt of a Trustee's written intent to participate in the ecological risk assessment process, the TNRCC shall, to the extent practical, coordinate with the Trustees concerning their availability at least ten calendar days in advance of meetings concerning the ecological risk assessment. The TNRCC shall provide the Trustees notification of the ecological risk assessment meetings via electronic mail or via another mutually agreed upon method. The TNRCC and the Trustees shall work together to ensure that all parties to this MOU which are participating in the ecological risk assessment process have input into that process and that reasonable timelines are established and met to ensure that Trustee involvement in the ecological risk assessment does not impede progression of the ecological risk assessment. In the event that any participating Trustee is unable to attend a meeting concerning the ecological risk assessment, any absent Trustee shall contact the other Trustees to obtain information regarding the meeting, and if necessary, shall contact the TNRCC ecological risk assessor within a reasonable time after the meeting to be briefed on the issues discussed.

(h) Ecological services analysis process. The TRRP rules require that the TNRCC consult with the Trustees prior to approval of a person's request to conduct an ecological services analysis (30 TAC §350.33(a)(3)(B) and §350.77(f)(2)). Furthermore, TRRP rules also require the person to conduct any compensatory ecological restoration and other activities associated with the ecological services analysis with the approval of and in cooperation with the Trustees (30 TAC §350.33(a)(3)(B)). The parties agree that an ecological services analysis must be conducted whenever concentrations of COCs which exceed ecological PCLs are proposed to be left in place with the potential for continuing exposure in accordance with 30 TAC §350.33(a)(3)(B).

(1) Consultation on person's request to perform an ecological services analysis. Although the following sets forth a separate process for consultation on a person's request to perform an ecological services analysis, subsection (i) of this MOU explains how the processes under subsections (g) and (h)(1) of this MOU may be combined to achieve efficiencies.

(A) Notification. After the TNRCC receives a person's written request to perform an ecological services analysis, the TNRCC Trustee shall provide timely notification to the other Trustees.

(i) Method of notification. Notification by the TNRCC Trustee shall be provided via electronic mail, or via another mutually agreed upon method, to the primary and secondary contacts for each Trustee.

(ii) Content of notification. The notification shall include the affected property name, location, the fact that the person is requesting to perform an ecological services analysis, and to the extent practical, the type of habitat, receptors at risk, COCs, and other relevant information necessary to evaluate the level of interest in the affected property. The TNRCC secondary contact, the TNRCC ecological risk assessor, and the deadline constraints of the TNRCC PM shall also be provided in the notification.

(iii) Trustee response to notification. A written response (electronic mail is acceptable) from each Trustee to the notification must be provided to both the TNRCC Trustee contacts within five working days of the notification. This response shall specifically state the Trustee's intent as to whether or not the Trustee chooses to be consulted on the person's request to perform an ecological services analysis. In the event that any Trustee fails to respond within the five working days, the TNRCC will proceed as if the Trustee chose not to participate in the consultation on the person's request to perform an ecological services analysis. Subsection (j) of this MOU explains how a Trustee may enter the process at a later date.

(B) Documents and other information. After the timely receipt of a Trustee's written intent to be consulted on the person's request to perform an ecological services analysis, the TNRCC Trustee shall send copies of pertinent documents to the primary contacts by regular mail (unless an alternate contact or method is identified in advance). The TNRCC Trustee shall provide the primary and secondary contacts with electronic mail notification that the documents have been mailed.

(i) The TNRCC shall provide documents in a timely manner to ensure that the Trustees have the greatest time available for the review of documents. The TNRCC Trustee shall coordinate the review of such documents with the Trustees.

(ii) Any participating Trustee may make a request for additional information not less than three calendar days prior to the comment deadline, but such request must be very specific as to the type of information requested.

(C) Trustee comments. Unless otherwise mutually agreed, the participating Trustees shall submit a unified set of written comments, if any, on the person's request to perform an ecological services analysis to the TNRCC ecological risk assessor. Trustee comments must be technically defensible and relevant to the ecological services analysis process. Such Trustee responses shall specifically include a statement of each participating Trustee's recommendation for approval or disapproval of the person's request to perform an ecological services analysis. If feasible, the Trustee responses shall also include any response action recommendations for the affected property. If the person's request to perform an ecological services analysis is not recommended for approval by any Trustee, a reasoned explanation must be provided.

(i) Deadline for comments and extensions. The Trustees shall have 20 calendar days from the date of postmark on any documents received to respond to the TNRCC primary and secondary contacts with comments. The TNRCC may request that the Trustees respond within a shorter time. In the event that a greater period of time is available, as determined by the TNRCC PM,

an extended deadline shall be provided to the Trustees. The Trustees may request an extension of the comment period of up to seven calendar days by writing (electronic mail is acceptable) to the TNRCC primary and secondary contacts not less than three calendar days prior to the comment deadline. The TNRCC may, in its sole discretion, grant or deny such requests for extensions. The TNRCC will respond to all participating Trustees regarding such requests within 24 hours after receipt. If the Trustees do not receive a response from the TNRCC, the request for an extension is presumed to be denied. In the event that any Trustee fails to provide comments within the prescribed deadline (including any extension), the TNRCC will proceed as if the Trustee concurs with the TNRCC's decision on the person's request to perform an ecological services analysis.

(ii) Reconciliation of comments. Prior to submitting comments to the TNRCC, the participating Trustees shall first coordinate all comments among themselves and provide a unified Trustee response through a mutually agreed upon Trustee representative. In the event that the TNRCC ecological risk assessor or TNRCC PM disagrees with any comments provided by the Trustees, the TNRCC shall make diligent efforts to reach resolution between the parties. The TNRCC ecological risk assessor shall be responsible for coordinating the informal resolution of conflicting comments and shall schedule and coordinate comment resolution meetings as appropriate. Each participating Trustee's primary contact shall be copied on all ecological services analysis related correspondence to the person and shall be provided copies of all ecological services analysis related correspondence from the person to the TNRCC. In the event that differences cannot be resolved, the Trustees maintain the right to independently provide comments to the TNRCC PM and/or person requesting to conduct the ecological services analysis, either as a unified group of two or more Trustees

or as a single Trustee.

(iii) Recognition of comments. The TNRCC ecological risk assessor shall evaluate the Trustee comments and the TNRCC PM shall incorporate them into the TNRCC's response to the person, as appropriate. The TNRCC PM shall inform the person in writing of the results of the TNRCC/Trustee consultation and shall copy the Trustees on such correspondence. If any Trustee comments are not incorporated, the Trustees shall be informed.

(D) Coordination of meetings. After the timely receipt of a Trustee's written intent to participate in the consultation on the person's request to perform an ecological services analysis, the TNRCC shall, to the extent practical, coordinate with the Trustees concerning their availability at least ten calendar days in advance of meetings concerning the person's request to perform an ecological services analysis. The TNRCC shall provide the Trustees notification of these meetings via electronic mail or via another mutually agreed upon method. The TNRCC and the Trustees shall work together to ensure that all parties to this MOU which are participating in the ecological services analysis process have input into that process and that reasonable time lines are established and met to ensure that Trustee involvement in the ecological services analysis does not impede progression of the ecological services analysis. In the event that any participating Trustee is unable to attend a meeting concerning the ecological services analysis, any absent Trustee shall contact the other Trustees to obtain information regarding the meeting and if necessary, shall contact the TNRCC ecological risk assessor within a reasonable time after the meeting to be briefed on the issues discussed.

(2) Ecological services analysis cooperation and approval process. To enhance the coordination between the Trustees and the person and provide efficiencies in the development of the ecological services analysis, the Trustees will initiate a dialogue with the person in a timely manner to establish the nature and scope of a cooperative ecological services analysis. The Trustees will maintain open communications with the person and actively participate in the entire ecological services analysis.

(A) Trustee interaction. Unless otherwise specified herein, cooperation between the Trustees in the development, review, and approval of the ecological services analysis shall be consistent with the September 1995 Memorandum of Agreement between the Trustees. The Trustees shall strive for consensus on all decisions related to the development and implementation of the ecological services analysis. The Trustees shall coordinate their efforts to ensure a single unified Trustee position is provided on all written comments/statements to the person.

(B) Trustee technical team (TTT). For each affected property involving significant participation by two or more Trustees, the Trustees shall create a TTT to which a representative shall be designated by each Trustee. The Trustees agree to designate representatives to the TTT who, at a minimum, have: 1) the level of knowledge and expertise needed to effectively guide the ecological services analysis process; and 2) the level of authority necessary to make decisions on issues presented to the TTT. The TTT shall be responsible for, among other things, communications with the person, outlining the scope and objectives of the ecological services analysis with the person, identifying additional data needs, reviewing and approving ecological services analysis reports and work plans, overseeing implementation of such plans, and certifying the satisfactory completion of the

compensatory ecological restoration, where appropriate. The TTT may take any other actions as necessary to carry out its duties under this MOU. The TNRCC Trustee shall act as Trustee team leader unless otherwise agreed to by all Trustees. The Trustee team leader shall be responsible for, among other things, the coordination and monitoring of the progress of the development of technical comments, and implementation of the ecological services analysis. The Trustee team leader shall also be responsible for the scheduling of meetings of the TTT and notifying TTT members of those meetings on a timely basis, preparing agendas for those meetings, acting as a central contact point for the TTT, and establishing and maintaining records and relevant documents related to the ecological services analysis. The Trustee team leader may delegate any of his or her duties to another Trustee with the concurrence of the TTT. The duties of the Trustee team leader do not provide the Trustee team leader with any decision-making rights beyond those normally held by each Trustee member of the TTT.

(i) Approval and performance of the ecological services analysis. The Trustees agree that the TTT shall act timely to either approve the ecological services analysis or disapprove with comments which may include a recommendation for additional work. This process shall be repeated each time the revised ecological services analysis report is resubmitted until the ecological services analysis report is approved, rejected, or is withdrawn. If the TTT cannot reach agreement with the person or the person fails to perform the ecological services analysis as proposed, the Trustees shall refer the affected property back to the TNRCC for further decisions on remedial/corrective action. The TNRCC PM shall be kept informed of all TTT activities, shall be copied on all comments, and shall be invited to participate in all meetings with the person concerning performance of the ecological services analysis.

(ii) Approval and completion of the compensatory ecological restoration. Upon reaching a final decision on all reports which involve compensatory ecological restoration, the Trustees shall provide a written statement to the person and the TNRCC PM of the Trustees' final decision. When the compensatory ecological restoration is completed consistent with Trustee-approved criteria, the TTT shall also provide a written statement to both the person and the TNRCC PM certifying satisfactory completion of the compensatory ecological restoration. If the compensatory ecological restoration is not completed to the Trustees' satisfaction, the Trustees shall refer the affected property back to the TNRCC for further decisions on remedial/corrective action.

(C) Agreement. Where determined appropriate by the Trustees, the Trustees shall pursue a written agreement with a person conducting an ecological services analysis to govern Trustee coordination with that person. The agreement will include issues such as the payment of Trustees' costs associated with the ecological risk assessment and ecological services analysis processes, public participation requirements, and a mechanism for addressing natural resource damages liability, as applicable.

(D) Dispute resolution. In the event of a dispute between any of the parties concerning activities under subsection (h)(2) of this MOU, the Trustee contacts shall attempt to resolve the dispute informally. If the dispute is not resolved informally at the Trustee contact level, any Trustee may invoke the following dispute resolution procedures by sending notice to all primary Trustee contacts involved in the dispute. Such notice must include a brief description of the disputed issue(s) and acceptable alternatives for resolution. The Trustee contacts shall elevate the dispute to the

appropriate first tier agency representatives with successive elevations to second tier agency representatives and third tier agency representatives as necessary.

(i) Within four calendar days after receiving the notice invoking dispute resolution, the Trustees involved in the dispute shall designate the names and titles of their first, second, and third tier agency representatives via electronic mail (or another mutually agreed upon method) to all primary Trustee contacts involved in the dispute.

(ii) Within 14 calendar days after receiving the notice invoking dispute resolution, the first tier agency representatives involved in the dispute shall discuss the disputed issue(s), assisted by other technical or legal staff as appropriate. If the disputed issue(s) cannot be resolved by the first tier agency representatives within the 14 calendar days after receiving the notice, the disputed issue(s) shall be elevated by the first tier agency representatives to the second tier agency representatives within five calendar days after the expiration of the discussion period. The second tier agency representatives shall have 14 calendar days within which to discuss and attempt to resolve the disputed issue(s), assisted by other technical or legal staff as appropriate. If the disputed issue(s) cannot be resolved by the second tier agency representatives within the 14 calendar days after it is elevated, the disputed issue(s) shall be elevated by the second tier agency representatives to the third tier agency representatives within five calendar days after the expiration of the discussion period. The third tier agency representatives shall have 14 calendar days within which to discuss and attempt to resolve the disputed issue(s), assisted by other technical or legal staff as appropriate. If the third tier agency representatives cannot resolve the dispute, then the dispute resolution process is terminated and each

agency may proceed independently according to its rights under state and federal law.

(iii) Each Trustee may automatically obtain one 14-calendar-day extension in this process by sending notice of such to all primary Trustee contacts involved in a particular dispute. Additionally, the 14-calendar-day period may be extended by mutual agreement of all Trustees involved in a particular dispute.

(3) Waiver of a Trustee's role in the ecological services analysis process. If a Trustee has waived its involvement in the ecological services analysis process outlined in this MOU (either specifically or through failure to respond to notification within the required time frame) and has not reentered the process pursuant to subsection (j) of this MOU, then the Trustee has waived its role in the ecological services analysis process as set forth by TRRP rules, specifically 30 TAC §350.33(a)(3)(B) and §350.77(f)(2).

(i) Efficiencies. The parties recognize that due to the nature of a person's submittal, efficiencies may be gained by combining the notification and other processes under subsections (g) and (h)(1) of this MOU. Any such combined notification shall be clearly identified as such and shall serve to satisfy both of these subsections.

(j) Trustee re-entry and early exit from process.

(1) If a Trustee has waived its involvement in the ecological risk assessment or ecological services analysis process (either specifically or through failure to respond to notification within the required time frame), the Trustee may resume its involvement in the process by advising the TNRCC Trustee in writing (electronic mail *not* acceptable) of its intent to participate in subsequent notification and coordination activities. However, upon a deferred entry or a re-entry to the ecological risk assessment or ecological services analysis processes, the Trustee involvement in the TRRP process shall be prospective only and may not challenge previous decisions regarding the ecological risk assessment and ecological services analysis. Additionally, a Trustee may not challenge joint decisions made within the TRRP process on the ecological risk assessment or ecological services analysis during that Trustee's prior participation in the process.

(2) Likewise, a Trustee participating in the ecological risk assessment or ecological services analysis process may decline future involvement by advising the TNRCC Trustee in writing (electronic mail *not* acceptable) of its intent not to participate in future notification and coordination activities.

(3) In the event that all the Trustees have waived involvement in the ecological services analysis process (either specifically or through failure to respond to notification within the required time frame), the TNRCC Trustee shall provide oversight of and approval or disapproval with comments on the compensatory ecological restoration and other activities associated with the ecological services analysis.

(k) Affected property activities. The Trustees shall promptly notify the TNRCC PM prior to initiating any Trustee activities (e.g., site visits) on an affected property and shall coordinate with the TNRCC PM on any such activities which may affect the remedial/corrective action at an affected property.

(l) September 1995 Memorandum of Agreement. Any Trustee activities, issues, or responsibilities not specifically addressed herein, shall be governed by the September 1995 Memorandum of Agreement between the Trustees.

(m) Reservation of rights. Except as specifically stated herein, this MOU does not compromise or affect any legal rights of the parties, nor does it narrow the scope of any party's authority or jurisdiction. This MOU does not compromise or affect any rights of the parties with regard to natural resource damage actions.

(n) Third party challenges or appeals. The rights and responsibilities contained in this MOU may not be the basis of any third party challenge or appeal. Nothing in this MOU creates any rights or causes of action in persons not parties to this MOU.

(o) Appropriated funds. Nothing in this MOU shall be construed as obligating the United States, the State of Texas, or any public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

(p) Termination and amendment. This MOU shall terminate by written agreement of all the parties. Any party may withdraw from this MOU for any reason. In the event that any party withdraws from the MOU, it must provide written notice to the other parties. In the event of such withdrawal, the MOU remains in full force and effect for the remaining parties. This MOU may also be amended by written agreement of all the parties. Any termination, withdrawal, or amendment must be preceded by appropriate rulemaking.

(q) Effective date and signatures. This MOU may be signed by each of the parties in two or more counterparts which together shall constitute one and the same document and shall become effective upon the date of last signature.