

The Texas Natural Resource Conservation Commission (commission) proposes new §7.124, Natural Resource Trustees Memorandum of Understanding (MOU). This proposed MOU is between the commission and state and federal natural resource trustees.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission, Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the United States Department of the Interior are all natural resource trustees (Trustees).

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 a 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 proposed 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

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

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

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

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

Section 7.124(e) sets forth and defines certain terms used in the MOU.

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

Section 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 participating 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.

Section 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.

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

Section 7.124(j) sets forth the procedures by which a Trustee may exit or reenter the ERA and ESA processes.

Section 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.

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

Section 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.

Section 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.

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

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

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

#### FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined for the first five-year period the proposed rule is in effect, there will be no significant fiscal impacts for units of state and local government as a result of administration or enforcement of the proposed rule. The proposed rule would create a MOU between the state and federal natural resource trustees regarding ERAs and ESAs conducted under the TRRP rules in Chapter 350.

The Trustees consist of the commission, Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the United States Department of the Interior.

The proposed MOU specifies the procedures by which the agency and the Trustees will interact regarding the ERA and the ESA processes under the TRRP rules, ensuring a rapid response to releases of potentially hazardous materials. The MOU procedures include notification, document exchange, opportunity for comments, and coordination of meetings.

Beginning May 1, 2000, accidents involving a release of potentially hazardous chemicals of concern (COC) come under the TRRP rules if the spill is not cleaned up within six months, if the party responsible for the spill requests that the cleanup be handled under the TRRP rules, or if the type of

spill is already covered by the TRRP rules. If the accident is handled under the TRRP rules, then an ERA is performed to characterize the ecological status of the affected property and to ensure that proper corrective actions are taken to protect the environment. If the ERA concludes that there is unacceptable ecological risk, then ecological protective concentration levels (PCLs) are established. The PCL identifies what levels of each COC can remain at the affected property without creating an unacceptable risk to the environment.

If COCs are proposed to be left at the affected property in excess of established ecological PCLs, an ESA must be conducted. An ESA is a risk management process which evaluates the present and predicted impacts to the environment associated with different remediation alternatives, and provides clear justification for leaving COCs in place above established PCLs. In order to perform an ESA, an individual must request permission from the executive director. The executive director must then consult with the Trustees and make the decision whether an ESA is appropriate (determining whether COCs are to be left in place above established PCLs).

The proposed rule only sets forth procedures for a MOU between the agency and the Trustees. No additional fiscal implications are anticipated for units of state and local government as a result of the proposed rule because the TRRP rules already cover the specific requirements of ERAs and ESAs. Additionally, the commission anticipates there will be no additional costs to persons responsible for the release of COCs as a result of this rule because the proposed rulemaking does not add any additional regulatory requirements, besides what is related to the MOU, that are not already included in the TRRP rules.

#### PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be the establishment of an effective process for facilitating the coordination of the Trustees and their interaction in the ERA and ESA processes, which should help ensure timely and efficient cleanups under the TRRP rules. Additionally, the ESA process could likely result in the setting aside of unimpacted ecological habitat or the creation of new ecological habitat resulting in net environmental gain for the public.

There will be no additional fiscal implications to individuals and businesses as a result of administration and enforcement of the proposed rule because the creation of a MOU is an administrative action that has no fiscal impact to any individual or business. Additionally, the commission anticipates there will be no additional costs to persons responsible for the release of COCs as a result of this rule because the proposed rulemaking does not add any additional regulatory requirements, besides what is related to the MOU, that are not already included in the TRRP rules.

The proposed rule would create a MOU between the agency and the Trustees regarding ERAs and ESAs conducted under the TRRP rules. The proposed MOU sets forth the procedures for interaction between the commission and the Trustees, which includes: notification, document exchange, opportunity for comments, and coordination of meetings.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-business as a result of implementing the proposed rule because the creation of a MOU is an administrative action that has no fiscal impact to any small or micro-business. The commission anticipates there will be no additional costs to persons responsible for the release of COCs as a result of this rule because the proposed rulemaking does not add any additional regulatory requirements, besides what is related to the MOU, that are not already included in the TRRP rules. There are no known small or micro-businesses that would be adversely affected by implementation of the proposed rule.

The proposed rule would create a MOU between the commission and the Trustees regarding ERAs and ESAs conducted under the TRRP rules. The proposed MOU sets forth the procedures for interaction between the commission and the Trustees, which includes: notification, document exchange, opportunity for comments, and coordination of meetings.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed 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 proposal 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 proposed rule will formalize the requirement and procedures for cooperation between the Trustees regarding ERA and ESA matters. The proposed 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 proposed rule pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this proposed 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 proposed rule will substantially advance this specific purpose by setting forth detailed procedures for such interaction including initial notification, document exchange, comments, and meetings. The proposed rule will not burden private real property and the action under the proposed rule does not constitute a takings.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed 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 proposed rule is not subject to the CMP.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments must be received by 5:00 p.m. on October 23, 2000 and should reference Rule Log Number 2000-012-007-AD. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

#### STATUTORY AUTHORITY

The new section is proposed under 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 proposed under TWC, §5.104 and Texas Health and Safety Code, §361.016, which provide the commission with the authority to enter into a MOU.

The proposed new section implements the procedures by which the executive director and the natural resource trustees will interact regarding the ERA and the ESA processes under Chapter 350 concerning the TRRP.

**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 damage 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);”

(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 which have undergone corrective actions where 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 the development of TNRCC-approved ecological PCLs, 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.

(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 Trustee 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 re-entry to the ecological risk assessment or ecological services analysis process, the Trustee involvement shall be prospective only and may not challenge previous decisions regarding the ecological risk assessment and ecological services analysis.

(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 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.

(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. 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.