

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §7.119, *Memorandum of Understanding Between the Texas Department of Transportation and the Texas Natural Resource Conservation Commission*, without change to the proposed text as published in the October 26, 2001 issue of the *Texas Register* (26 TexReg 8477) and will not be republished.

New §7.199 will be submitted to the United States Environmental Protection Agency as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The rule will adopt by reference a Texas Department of Transportation (TxDOT) memorandum of understanding (MOU), streamlining coordination between the commission and TxDOT by consolidating separate MOUs currently in the air regulations (30 TAC §114.250) and in water regulations (30 TAC §305.521). Rule actions regarding these separate MOUs are proposed in this issue of the *Texas Register*.

The MOU will address transportation planning issues required by Texas Transportation Code, §201.607, between TxDOT and state natural resource agencies, specifically including processing of documents required by the National Environmental Policy Act. The MOU establishes periods for review of documents coordinated under §201.607, and ensures coordination between the agencies on road projects that could have environmental impacts. As a result of comments received, the rule language for new §7.119 has not changed, but changes were made to the text of the MOU. The full

text of the amended MOU is concurrently adopted in this issue of the *Texas Register* by TxDOT in 43 TAC §2.23.

SECTION DISCUSSION

The rule adopts by reference an MOU with TxDOT. The following sections are included in the MOU.

The *Purpose* section of the MOU outlines TxDOT and commission policy as they apply to the environmental review of transportation projects. The section contains statements explaining why 43 TAC §§2.40 - 2.51, TxDOT considers coordination of transportation projects with natural resource agencies important and how the MOU will facilitate that coordination.

The *Authority* section outlines the governing statutes for both the MOU and the rulemaking requirements of the commission.

The *Definitions* section provides clarification for important terms used in the MOU.

The *Responsibilities* section states the responsibilities of each agency as they apply to the environmental review of transportation projects.

The MOU section on *Provisions Regarding Coordination and Document Review* has two important paragraphs. Paragraph (1) establishes the philosophy and rationale for early and timely actions by the agencies and the necessity for TxDOT districts and commission regional offices to work together.

Paragraph (2) defines the most important air and water quality issues selected by the department and the commission that require project coordination of environmental documents. For air quality, transportation projects in nonattainment and major metropolitan areas are singled out. For water quality, transportation projects which encroach upon impaired stream segments identified under federal Clean Water Act (CWA), §303(d), the recharge and contributing zones of the Edwards Aquifer, and wetlands requiring CWA, §401 are certification selected as being most important. The paragraph also contains administrative guidance for processing environmental documents.

Two sections entitled, *Additional Provisions Regarding Air Quality* and *Additional Provisions Regarding Water Quality* provide for exchange of data and studies to support environmental reviews.

The *Dispute Resolution* section provides a stepwise procedure for resolving disputes.

The *Review of MOU* section calls for review and update every five years, or if necessary due to changes in state or federal law.

Copies of the MOU are available from the commission's Chief Clerk's Office.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and 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 the Texas

Government Code, and it does not meet any of the four applicability requirements listed in §2001.0225(a). These four requirements are: 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. The proposed rulemaking provides for an MOU which satisfies the need of the commission and TxDOT to coordinate regulatory programs and to ensure that overlapping areas of responsibility are clarified. The rulemaking/MOU places no requirements on the regulated community.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rule under Texas Government Code, §2007.43. The specific purpose of the rule is to establish an MOU between TxDOT and the commission. The rule will substantially advance this purpose by outlining coordination of activities with TxDOT in areas with an overlap of responsibilities. Promulgation and enforcement of the rule will not burden private real property which is the subject of §2007.43, because it pertains to an understanding between state agencies on their joint jurisdiction and on areas of coordination. The understanding places no requirements on the regulated community.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

Staff reviewed the rulemaking for incorporation of the MOU in Chapter 7 by reference for consistency with the Texas Coastal Management Program (CMP) goals and policies, in accordance with the rules of the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), as well as the commission's rules in 30 TAC Chapter 281, Subchapter B, *Consistency with the Coastal Management Program*. The review determined that the action is consistent with the applicable CMP goals and policies. The CMP policies applicable to this rulemaking action includes the policy that the commission rule comply with regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal area and that the commission rules comply with CMP goals in 31 TAC §501.12, and specifically §501.12(7), which is to insure that agency and subdivision decision-making affecting Coastal Natural Resource Areas (CNRAs) is efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs. The commission solicited comments on the consistency determination. No comments were received on the consistency determination.

HEARINGS AND COMMENTERS

Proposals for this rule were published September 29, 2000 (25 TexReg 9863) and October 26, 2001 (26 TexReg 8496). Public hearings were previously held on October 24, 2000 and November 27, 2001. The comment period for the proposal of September 29, 2000 closed on November 13, 2000, and the comment period for the proposal of October 26, 2001 closed on December 3, 2001. One person attended the hearing held on October 24, 2000, and no persons were present at the hearing of November 27, 2001. No comments were received during either hearing or the November 27, 2001

comment period on the adoption of §7.119. Comments were received from one individual during the September 29, 2000 comment period and are addressed in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

With regard to subsection (a)(1)(A), (B), and (E) of the MOU, an individual requested adding and defining language that explains TxDOT policy. With regard to subsection (a)(2)(C) and (E) of the MOU, the individual requested defining language that explains TNRCC policy. This language includes the words *common sense*, *good science*, and *meaningful*.

The commission disagrees with these comments. The “policy” paragraphs are statements of the policies of each agency and are meant to be broad, general statements reflecting the area of jurisdiction and purpose provided by the legislature. These statements are provided in the MOU as background and do not directly impact the obligations of each agency under the MOU. The commission believes that the terms *common sense*, *good science*, and *meaningful* are commonly understood and do not need definition.

With regard to subsection (a)(4), an individual requested a definition for the word *sound* as it applies to value of environmental decision-making that TxDOT would obtain from commission reviews of TxDOT projects. Concerning subsection (h) of the MOU, the individual felt that the MOU needed to define the term *good faith efforts* as the language applies to resolution of disputes between TxDOT and the commission.

The commission agrees with the spirit of ensuring that sound, good faith efforts are made in commission environmental reviews of TxDOT projects and the resolution of disputes, but disagrees with the need to change the MOU language. The words are in common use, but each situation will have to be resolved on the merits of the issue under discussion and the applicable laws and jurisdiction of each agency.

With regard to subsection (c)(1) of the MOU, an individual requested that the time for the start of construction be defined because without the definition, the decision when to start construction would be left open and subject to abuse.

The commission disagrees with this comment. The start of construction is not a critical element in the MOU. The MOU encourages TxDOT to submit the necessary environmental documents to TNRCC for review early in the project development process (subsection (e)(1)(A)) in order to consider the environmental issues associated with the project and to avoid or minimize impacts in a timely manner. TxDOT must comply with a significant number of regulatory-directed steps in the transportation planning process prior to receiving project approval. The commission, however, does not have regulatory jurisdiction over most of these steps. At a later stage, not addressed by the MOU, the commission does have regulatory approval over the various environmental permits and certifications associated with the project. Therefore, the commission does not believe that a definition for the start of construction is necessary.

In regards to subsection (d)(1)(A) and (D) of the MOU, an individual requested substitution of *possible* for *practicable* when TxDOT is attempting to avoid, minimize, or compensate for anticipated environmental impacts of transportation projects; and removing *when possible* as a modification to TxDOT's responsibility for preservation of the environment. In regards to subsection (e)(1)(A)(iii) of the MOU, the individual requested removal of the word *practicable* and substitution of the word *possible* when during TxDOT and TNRCC coordination on a transportation project, efforts are made to avoid and minimize impacts to environmental resources.

The commission disagrees with these comments. Statutory, financial, and jurisdictional constraints often prevent either TxDOT or TNRCC from prevention or mitigation of every possible environmental impact.

In regards to subsection (e)(1)(B), an individual felt that the language encouraging early coordination of projects between TxDOT District Offices and TNRCC Regional Offices should be eliminated because TNRCC Regional Offices are overworked and not specifically trained to handle TxDOT issues.

The commission disagrees with this comment; however the language describing the relationship between TxDOT District Offices and TNRCC Regional Offices has been changed to clarify the extent of these activities. The language will be amended to encourage TxDOT District Offices to contact TNRCC Regional Offices on local and regional environmental issues. In the event that the TNRCC Regional Office is unable to provide the requested information, TxDOT District Offices will be referred to the Central Office in Austin.

Concerning subsection (e)(1)(C) of the MOU, the individual requested removal of the words *when appropriate* when TxDOT and the commission are soliciting public input concerning plans and actions affecting environmental quality.

The commission agrees with this comment and has changed the MOU language.

Concerning subsection (e)(2)(A)(ii) of the MOU, the individual requested removal of the language *special requests by TNRCC*, as it applies to the requirement for TxDOT to furnish to the commission environmental documentation to evaluate air quality issues dealing with the construction of single occupancy vehicle projects on new locations and increased single occupancy vehicle highway capacity in major metropolitan areas.

The commission agrees with this comment and has changed the MOU language.

Concerning subsection (e)(2)(A)(iii)(I), the individual felt that the MOU must address CWA, §401 and §404 responsibilities.

The commission agrees with this comment and has added language to the MOU requiring projects with CWA, §401 certification to be sent to the commission for review.

CHAPTER 7: MEMORANDUM OF UNDERSTANDING

§7.119

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.104, which requires the commission to enter into an MOU with any other state agency to clarify and provide for their respective duties, responsibilities, or functions on any matter within their jurisdictions that is not expressly assigned to either agency; THSC, §382.017, and TWC, §5.103, both of which establish the commission's authority to adopt rules; THSC, §382.035, which requires the commission to adopt MOUs with other state agencies by rule; and TWC, §5.105, which establishes commission authority to set policy.

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

The commission adopts by reference the rules of the Texas Department of Transportation in 43 TAC §2.23 (relating to Memorandum of Understanding with the Texas Natural Resource Conservation Commission).