

The Texas Commission on Environmental Quality (commission) adopts new §7.126 *without change* to the proposed text as published in the October 29, 2004 issue of the *Texas Register* (29 TexReg 10070), and will not be republished.

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

Abandoned and/or deteriorated wells are a potential groundwater contamination source that serve as conduits or channels for contamination to reach groundwater, and larger diameter wells can also be hazardous to human and animal life. The Sunset Advisory Commission Report (February 2002) on the Texas Department of Licensing and Regulation (TDLR) highlighted the lack of manpower to find and close abandoned wells as an issue needing attention. To provide additional resources to find and to properly cap or plug abandoned and/or deteriorated wells, Senate Bill 279, 78th Legislature, 2003, added to the Texas Occupations Code, §1901.257. This section requires the commission and the TDLR to, by rule, adopt or revise a joint memorandum of understanding (MOU) to coordinate efforts of the TDLR, the field operations staff of the commission, and groundwater conservation districts (GCDs), relating to investigative procedures for referrals of complaints regarding abandoned and/or deteriorated wells. The bill also requires each GCD in which an abandoned and/or deteriorated well is located to join the MOU adopted by the commission and the TDLR and provides that GCDs may enforce compliance with statutes relating to the plugging of abandoned and/or deteriorated wells within their boundaries. This rulemaking is an adoption by reference of the complete text of the adopted MOU that was published in the "Adopted Rules" portion of the January 28, 2005, issue of the *Texas Register* by the TDLR as 16 TAC §76.1011 (Memorandum of Understanding between the Texas Department of Licensing and Regulation and the Texas Commission on Environmental Quality).

## SECTION DISCUSSION

New §7.126 is an adoption by reference of the MOU adopted by the TDLR as 16 TAC §76.1011. A description of the adopted MOU in 16 TAC §76.1001 follows.

The MOU begins with a citation to the requirements under Texas Occupations Code, §1901.257(b), which requires the MOU between the two agencies to coordinate the efforts of the TDLR, the field operations staff of the commission, and GCDs, relating to investigative procedures for referrals of complaints regarding abandoned and/or deteriorated wells; under Texas Occupations Code, §1901.257(c), which requires that any GCDs in which an abandoned and/or deteriorated well is located shall join the MOU; and that a GCD may enforce compliance with Texas Occupations Code, §1901.255, concerning abandoned and/or deteriorated wells located in the boundaries of the district. The adopted TDLR rulemaking also indicates that the two agencies have entered into the MOU, and that each GCD in which an abandoned and/or deteriorated well is located is required to join the MOU. Affected GCDs may join by submitting to TDLR a copy of the adopted GCD board action indicating that the GCD has joined this MOU and understands its responsibilities under the MOU and Texas Occupations Code, Chapter 1901.

The adopted TDLR rulemaking outlines the respective responsibilities of each agency and of a GCD that joins the MOU.

*TDLR Responsibilities:*

The MOU requires that the TDLR will investigate abandoned and/or deteriorated well complaints, including referrals received from the commission's field operations staff, unless the complaint is being investigated by a GCD in coordination with TDLR staff. TDLR has the responsibility to coordinate investigations and enforcement efforts with the appropriate GCD for any complaints regarding wells located within the boundaries of a GCD. When abandoned and/or deteriorated wells are observed while TDLR staff are conducting field investigations inside the boundaries of a GCD, the adopted TDLR rulemaking, which is the MOU, requires that a reasonable effort to obtain the landowners' name, mailing address, and latitude and longitude of the well be made, and that the information be referred to the general manager of the appropriate GCD for investigation and possible enforcement action. The MOU specifies that when an abandoned and/or deteriorated well complaint is received, the TDLR will determine if the well is located within a GCD's boundaries and provide a referral to the general manager of the appropriate GCD for investigation and possible enforcement action. TDLR will provide training and technical assistance to GCD staff and the commission's field operations staff on field recognition of an abandoned and/or deteriorated well. Finally, the adopted MOU contains a requirement for the TDLR to annually report to the commission on the status of all complaints provided to the TDLR under the MOU and the number of wells closed as a result of the commission's abandoned and/or deteriorated well complaint referrals.

*Commission Responsibilities:*

The adopted MOU requires that when suspected abandoned and/or deteriorated wells are observed by field operations staff while conducting field investigations, information to allow for identification of the

well, which may include the landowners' name, physical address, and latitude and longitude of the well, be referred to the TDLR. The adopted MOU requires the commission's field operations staff to make a reasonable effort to obtain information needed for the identification of any abandoned and/or deteriorated well. The adopted MOU also requires the commission to provide to the TDLR an updated list of GCDs as they are confirmed, including boundaries and the name and address of district contacts such as the general manager.

*GCD Responsibilities:*

The adopted MOU requires that when a GCD receives a referral from the TDLR of an abandoned and/or deteriorated well, the GCD must respond within 14 calendar days informing the TDLR as to whether the GCD will investigate the referral. The adopted MOU provides that after the GCD has been notified by the TDLR or becomes aware of an abandoned and/or deteriorated well, the GCD may investigate the complaint of an abandoned and/or deteriorated well within the boundaries of the GCD and enforce compliance with Texas Occupations Code, §1901.255. The adopted MOU requires a GCD, that performs an investigation related to an abandoned and/or deteriorated well referred by the TDLR, to notify the TDLR regarding the disposition of the investigation. The MOU provides that any GCD enforcement under Texas Occupations Code, §1901.255 and §1901.256, may be coordinated with the TDLR and that a GCD may communicate with the TDLR regarding any phase of the investigation or enforcement action.

The adopted MOU contains a subsection related to referral and investigation requirements which states that for the purposes of the MOU, a "referral" shall constitute information gathered, compiled, and

forwarded to the TDLR. Written referrals via e-mail or letter shall utilize the appropriate form, provided by the TDLR, and document information on the abandoned and/or deteriorated well, which may include the name of the landowner possessing the abandoned and/or deteriorated well, the physical address of the landowner, the latitude and longitude of the abandoned and/or deteriorated well, and if possible, a photograph of the well. The adopted MOU requires that following the receipt of a referral from the commission, the TDLR will begin landowner notification procedures or follow up investigation or, if the well is inside the boundaries of a GCD, provide a referral to the general manager of the corresponding GCD for investigation and possible enforcement action to assure compliance with Texas Occupations Code, §1901.255.

The term of the MOU is from the date both the TDLR and the commission adopt the MOU by rule.

The MOU provides that the commission or the TDLR may, for any reason, terminate the MOU upon 30 days' notice to the other agency. The MOU also contains a severability statement that should any provision of the MOU be held to be null, void, or for any reason without force or effect, such provision shall be construed as severable from the remainder of this document and shall not affect the validity of all other provisions, which shall remain in full force and effect. The MOU may be amended through rulemaking at any time by mutual consent of the commission and the TDLR.

#### 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." Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

“Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking is to adopt an MOU with the TDLR that will assist the TDLR in plugging abandoned and/or deteriorated wells. The specific intent of the MOU is to coordinate efforts between the commission, the TDLR, and GCDs relating to referrals of complaints regarding abandoned and/or deteriorated wells. The MOU will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, the MOU does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. The MOU does not exceed a standard set by federal law because coordination of efforts to facilitate the closure of abandoned and/or deteriorated wells is not a federal program. This adoption does not exceed an express requirement of state law because it is required by Texas Occupations Code, §1901.257. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law. Finally, this rulemaking is not being adopted on an

emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission assessed the takings impact for the MOU in accordance with Texas Government Code, §2007.043. The commission evaluated the rule and performed an assessment of whether the rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the MOU, as required by Texas Occupations Code, §1901.257, is to coordinate efforts between the commission, the TDLR, and GCDs relating to referrals of complaints regarding abandoned and/or deteriorated wells.

Promulgation and enforcement of the rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the MOU does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the MOU. The MOU merely sets out the requirements of the commission in referring complaints of abandoned and/or deteriorated wells to the TDLR. This act by the commission does not burden, restrict, or limit property rights or reduce the value of land by 25% or more.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rule is consistent with CMP goals and policies because the rulemaking relates only

to groundwater issues, which are not subject to the CMP. The rulemaking will not have direct or significant adverse effect on any coastal natural resource area; the rulemaking will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the rule will not exceed any standard identified in the applicable CMP goals and policies.

#### PUBLIC COMMENT

No public comment was received on the proposed rule nor on the proposal by TDLR that was published concurrently.

**§7.126**

**STATUTORY AUTHORITY**

The new section is adopted under Texas Occupations Code, §1901.257, which requires the commission to enter into an MOU with the TDLR and GCDs relating to investigative procedures for referrals of complaints regarding abandoned and/or deteriorated wells. Additionally, the new section is adopted under Texas Water Code, §5.104, which authorizes the commission to enter into an MOU with any other state agency but requires the MOU to be adopted by rule.

**§7.126. Memorandum of Understanding Between the Texas Department of Licensing and Regulation and the Texas Commission on Environmental Quality.**

The Memorandum of Understanding between the Texas Department of Licensing and Regulation (TDLR) and the Texas Commission on Environmental Quality (commission) regarding the coordination of efforts of the TDLR, the field offices of the commission, and groundwater conservation districts, concerning investigative procedures for referrals of complaints regarding abandoned and/or deteriorated wells is adopted by reference as in complete text in 16 TAC §76.1011 (relating to Memorandum of Understanding between the Texas Department of Licensing and Regulation and the Texas Commission on Environmental Quality). If a copy of this document cannot be obtained from the Internet, a copy can be requested from the Texas Commission on Environmental Quality, Chief Clerk's Office, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-3300.