

The Texas Commission on Environmental Quality (commission) proposes new §7.126.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Abandoned and/or deteriorated water 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 man power to find and close abandoned water 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 offices 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 water wells within their boundaries. This rulemaking is a proposed adoption by reference of the complete text of the MOU that is being proposed simultaneously in the "Proposed Rules" portion of this 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

Proposed new §7.126 is an adoption by reference of the MOU proposed by the TDLR as 16 TAC §76.1011. A description of the proposed 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 offices 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 proposed 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 proposed TDLR rulemaking outlines the respective responsibilities of each agency and of a GCD that joins the MOU.

TDLR Responsibilities:

The MOU proposes that the TDLR will investigate abandoned and/or deteriorated well complaints, including referrals received from the commission's regional field offices, unless the complaint is being investigated by a GCD in coordination with TDLR staff. TDLR is proposed to have 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 proposed 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 the information be referred to the general manager of the appropriate GCD for investigation and possible enforcement action. The MOU proposes 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 would 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 proposed 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 proposal 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 proposed 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 proposed 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 proposed to be from the date both the TDLR and the commission adopt the MOU by rule. The proposal provides that the commission or the TDLR may, for any reason, terminate the MOU upon 30 days notice to the other agency. The proposed 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 TDLR rulemaking proposes that the MOU may be amended through rulemaking proposal and adoption at any time by mutual consent of the commission and the TDLR.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that, for the first five-year period the proposed rule is in effect, no major fiscal implications are anticipated for

the agency or other units of state or local government as a result of administration or enforcement of the proposed new rule. Minor fiscal implications for GCDs related to board actions may occur, but those costs are part of the normal operating expenditures for a district.

Abandoned and deteriorated water wells are potential sources of groundwater contamination because they can serve as conduits for contaminants to reach groundwater. Abandoned and deteriorated wells can also be hazardous to human and animal life when not properly capped or plugged. To provide additional resources to find and to properly cap or plug these wells, Senate Bill 279 added Texas Occupations Code, §1901.257. This new addition to the Texas Occupations Code requires the TDLR and the commission by rule, to adopt or revise a joint MOU to coordinate efforts related to the investigative procedures of the TDLR, field offices of the commission, and GCDs for referring complaints regarding abandoned and/or deteriorated wells. Each GCD, in which abandoned and/or deteriorated wells are located, must join the MOU. This proposed rulemaking adopts, by reference, the complete text of the MOU that is currently being proposed by the TDLR as 16 TAC §76.1011 in this issue of the *Texas Register*.

The MOU formalizes the current practices and operations of the TDLR, the commission, and GCDs when addressing the need to find and to cap or plug abandoned and/or deteriorated wells. TDLR has a specific responsibility to provide training to the commission's field operations staff on field recognition of abandoned and/or deteriorated wells and to specify reporting forms to be used. Also, the TDLR must provide an annual report to the commission on the status of abandoned and/or deteriorated wells that the commission has reported to the TDLR. TDLR does not anticipate any fiscal impact as a result

of the proposed rule. The commission does not anticipate any fiscal impact in reporting complaints of abandoned and/or deteriorated wells found during the course of its normal investigations. The proposed rule does require GCDs to be a party to the proposed MOU. There may be minimal fiscal impacts associated with board actions taken to become a party to the MOU. These costs would be the costs a GCD board would incur as a normal cost of business associated with drafting, posting, taking and responding to comment, and adoption of any proposed action. These costs vary by GCD depending on the operating procedures of the district. Once a GCD is notified of an abandoned and/or deteriorated well, the district has the option to investigate on its own or rely on the TDLR to investigate the referral. Any investigation costs a GCD might incur are optional costs.

Under current rules, any state entity, local government, or private party who owns an abandoned and/or deteriorated well is obligated to pay the costs for properly closing that well. The proposed rulemaking does not change that obligation.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed new rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be the closure of more abandoned and/or deteriorated wells resulting from more coordinated efforts among the TDLR, the commission, and GCDs, to report, investigate and enforce appropriate closure methods.

Groundwater quality protection will be enhanced as these wells are closed.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

A small or micro-business is defined as having fewer than 100 or 20 employees respectively. No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule.

A small or micro-business is obligated to pay the costs for properly closing an abandoned and/or deteriorated well under current rules. The proposed rule does not change that obligation.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of 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." 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 proposed 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 proposed 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 propose to 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 proposal does not exceed an express requirement of state law because it is required by Texas Occupations Code, §1901.257. This proposal 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 proposal 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 proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has assessed the takings impact for the proposed MOU in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment.

The commission evaluated the proposed rule and performed an assessment of whether the proposed rule constitutes a takings under Texas Government Code, Chapter 2007. The specific purpose of the proposed 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 proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed rule will not exceed any standard identified in the applicable CMP goals and policies.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2004-059-007-AD. Comments must be received by 5:00 p.m., November 29, 2004. For further information, please contact Mary Ambrose of the Policy and Regulations Division at (512) 239-2268 or Joseph Thomas of the Policy and Regulations Division, at (512) 239-4580.

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STATUTORY AUTHORITY

The new section is proposed 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 proposed 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.

The proposed new section implements the MOU that was negotiated between the TDLR and the commission.

§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.