The Texas Commission on Environmental Quality (TCEQ or agency) adopts the amendment to §7.117.

Section 7.117 is adopted *without changes* to the proposed text as published in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2975).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The memorandum of understanding (MOU) between the TCEQ and the Texas Railroad Commission (RRC) was last updated in May, 1998, and since that time, statutory changes and several agency reorganizations have occurred requiring the MOU to be revised. This includes the transfer of the uranium mining program from the Department of State Health Services to the TCEQ, as well as internal agency organizational changes. In addition, Senate Bill (SB) 1387, 81st Legislature, 2009, was passed concerning carbon dioxide injection with respect to geologic sequestration, which also requires an MOU between the TCEQ and the RRC. The revised MOU is now adopted by reference in 30 TAC Chapter 7. The full text of the MOU is adopted within RRC rules 16 TAC §3.30, concerning Memorandum of Understanding between the Railroad Commission of Texas and the Texas Natural Resource Conservation Commission.

SECTION DISCUSSION

§7.117, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Natural Resource Conservation Commission

The section is adopted to change the agency's name from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality. The MOU referenced in this section, 16 TAC §3.30, is amended by the RRC. The titles of both sections are amended to conform to this

change.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as defined in that statute. 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. The specific intent of the adopted rule is to update the MOU between the RRC and the TCEQ to clarify jurisdiction of the respective agencies pursuant to statutory changes and agency reorganizations. In House Bill (HB), 1407, Section 10, 67th Legislature, 1981, a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7, required the Texas Department of Water Resources, the Texas Department of Health, and the RRC to execute an MOU specifying in detail these agencies' interpretation of the division of jurisdiction among the agencies over waste materials that result from or are related to activities associated with the exploration for and the development, production, and refining of oil or gas, and to amend the MOU at any time that the agencies find it to be necessary. The original MOU between the agencies became effective January 1, 1982. The MOU was revised effective December 1, 1987, to reflect legislative clarification of the RRC's jurisdiction over oil and gas wastes and the Texas Water Commission's, successor to the Texas Department of Water Resources, jurisdiction over industrial and hazardous wastes. SB 1604, 80th Legislature, 2007, gave the TCEQ jurisdiction over certain activities associated with radioactive materials and requires the TCEQ and the RRC to adopt an MOU to define the duties of each agency

with respect to radioactive materials. SB 1387 addressed the regulation of the injection and storage of carbon dioxide and requires the TCEQ and the RRC, by rule, to amend the MOU in 16 TAC §3.30 or enter into a new MOU. The agencies have determined that it is now necessary and must revise the MOU found in 16 TAC §3.30, in a concurrent rulemaking to clarify jurisdictional boundaries, reflect legislative changes in agency responsibility, and incorporate the legislative mandates of SB 1604 and SB 1387. The adopted rule does not meet the definition of a major environmental rule because the adopted rule only explains existing agency responsibilities rather than creates substantive requirements to protect the environment. The intent of the rule is merely to clarify and explain jurisdiction of the respective agencies. Because the intent of the rule does not create or require actions for the purpose of protecting the environment or reducing risks to human health from environmental exposure, the adopted rule is not an environmental rule. Additionally, the adopted rule does not meet the definition of a major environmental rule because it is not anticipated that the adopted rule will 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 because the adopted rule merely explicates jurisdiction of the respective agencies and does not impose new requirements. Finally, the adopted rule action does not meet any of the four applicability requirements for a major environmental rule listed in Texas Government Code, §2001.0225(a). Texas Government Code, §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. In this case, the adopted rule does not meet any of these applicability requirements.

First, in explicating jurisdiction of the respective agencies, the adopted rule does not exceed a standard set by federal law. Second, the adopted rule does not exceed an express requirement of state law, because HB 1407, Section 10, which appeared as a footnote to the Texas Solid Waste Disposal Act, Texas Civil Statutes, Article 4477-7 expressly mandated creation of the MOU including a mandate to amend the MOU at any time that the agencies find it to be necessary. SB 1604 requires the TCEQ and the RRC to adopt an MOU to define the duties of each agency, and SB 1387 requires both agencies, by rule, to amend the MOU in 16 TAC §3.30 or enter into a new MOU. Third, the adopted rule 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. Fourth, the commission does not adopt this rule solely under the commission's general powers but under specific authority as explained under the second point. Therefore, the commission concludes that the adopted rule does not meet the definition of a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to update the MOU between the RRC and the TCEQ to clarify jurisdiction of the respective agencies pursuant to statutory changes and agency reorganizations. The adopted rule interprets and clarifies continuing historic statutory jurisdiction as well as recently enacted statutory

jurisdiction of the TCEQ and the RRC found in multiple statutes. The adopted rulemaking would substantially advance this stated purpose by providing one reference point interpreting the jurisdiction of the respective agencies.

Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of public or private real property because the adopted rule does not affect real property. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. The adopted rule merely clarifies and explains jurisdiction of the respective agencies. Therefore, the adopted rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §5.05.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the Coastal Management Program.

PUBLIC COMMENT

The RRC of Texas held a public hearing on May 11, 2010, in Austin, Texas and received no oral comments. The comment period closed on May 17, 2010. The commission received written comments from the Carbon Sequestration Council (CSC), on behalf of Environmental Defense Fund, Occidental Petroleum Corporation, ConocoPhillips, Denbury Resources, Texas Oil & Gas Association, Shell Exploration & Production Company, and BP Alternative Energy North America.

CSC expressed appreciation to the agencies for the diligent and exemplary work in developing the amendments to the MOU.

RESPONSE TO COMMENTS

CSC commented that 16 TAC §3.30(e)(6)(F) should be added to the MOU to reflect that the agencies can work together on issues beyond the determination of the proper permitting agency or the production of the letter from the TCEQ on proposed carbon dioxide projects. CSC commented that the new subparagraph should state that the agencies agree to cooperate in their respective areas of expertise and knowledge in a manner that allows the permitting process to proceed efficiently and effectively. CSC commented that 16 TAC §3.30(e)(6)(F) should state: "The TCEQ and the RRC agree to work together when required to provide input to the other on applications by letters or other means so that each agency provides the benefits of its particular areas of expertise and knowledge of the other-regarding the geologic settings, circumstances and methodologies of any specific proposed project while fulfills its respective responsibilities in a manner that allows the processing of applications to proceed efficiently and effectively without unwarranted efforts or expense by either agencies or applicants, using existing documentation and submission to the permitting agency as appropriate in order to minimize required additional paperwork and processing expenses."

The commission responded that both agencies appreciate the support of this rulemaking to update the MOU. The agencies agree that TCEQ and RRC staff can and should cooperate and collaborate within their areas of expertise and knowledge to assure efficient and effective permitting of carbon dioxide storage projects under Texas Water Code, §27.041 or §27.011; however, the agencies do not believe that the suggested MOU language is needed to prompt such collaboration that may be necessary and that the suggested language could be interpreted to restrict the ability of the agencies to obtain needed information from each other or from a permit applicant. No changes were made in response to this comment.

§7.117

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The amendment is adopted under the Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361; the Texas Radiation Control Act, THSC, Chapter 401; TWC, Chapter 26; and the Injection Well Act, TWC, Chapter 27. The amendment is adopted under THSC, §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; THSC, §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; and TWC, §27.019, concerning Rules, Etc., which authorizes the commission to adopt rules required for the performance of the commission's responsibilities under the Injection Well Act.

The adopted amendment implements THSC, §§361.016, 401.069, and 401.414; and TWC, §5.104 and §27.049.

§7.117. Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality.

The Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality, concerning cooperation and the division of jurisdiction between the agencies regarding wastes that result from, or are related to, activities associated with the

exploration, development, and production of oil, gas, or geothermal resources, and the refining of oil, is adopted by reference as adopted in Texas Railroad Commission rule 16 TAC §3.30 (concerning Memorandum of Understanding between the Railroad Commission of Texas 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.