

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

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 proposed rulemaking will occur in both the RRC rules, as well as the TCEQ rules. However, the specific MOU provisions are currently in 16 TAC Chapter 3 (concerning Oil and Gas Division) while 30 TAC Chapter 7 (concerning Memoranda of Understanding) incorporates by reference the rules in 16 TAC Chapter 3.

#### SECTION DISCUSSION

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

The section is being amended by changing 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 (concerning Memorandum of Understanding between the Railroad

Commission of Texas and the Texas Natural Resource Conservation Commission), is concurrently being amended by the RRC. The titles of both sections will also be amended to conform to this change.

**FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT**

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rulemaking is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule. The proposed rulemaking updates the MOU between the RRC and the agency as required by SB 1604, 80th Legislature, 2007, and SB 1387, 81st Legislature, 2009. The agency will not require additional resources to implement the proposed rulemaking.

SB 1604 required the agency 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. SB 1604 gave the agency jurisdiction over certain activities associated with radioactive materials, and SB 1387 addressed the regulation of the injection and storage of carbon dioxide. Instead of creating a separate MOU for carbon dioxide sequestration, the RRC and the agency are proposing to amend the MOU found in 16 TAC §3.30 in a concurrent rulemaking to incorporate legislative mandates and clearly identify the jurisdiction of the two agencies. The MOU proposed in separate rulemakings will define jurisdiction over: waste materials associated with the exploration for and the development, production, and refining of oil and gas; carbon dioxide sequestration; and activities that generate recycling and sewage. The proposed rulemaking will incorporate the MOU in 16 TAC by reference and will not have a significant fiscal impact on the agency or units of local government.

#### PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be compliance with state law and a clear understanding on the jurisdiction of each agency and the activities they regulate.

The proposed rule incorporates by reference a revised MOU between the agency and the RRC that is being proposed concurrently in a separate rulemaking. Since the proposed rule is administrative in nature, no fiscal impacts are anticipated for individuals or large businesses.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses since the proposed rule incorporates by reference a revised MOU between the RRC and the agency that is being proposed concurrently in a separate rulemaking.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

#### 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 rulemaking 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

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking 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 proposed 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. Section 10 of House Bill (HB) 1407, 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 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 have proposed to revise the MOU found in 16 TAC §3.30 in a concurrent rulemaking to clarify jurisdictional boundaries, reflect legislative changes in agency responsibility, and to incorporate the legislative mandates of SB 1604 and SB 1387.

The proposed rulemaking does not meet the definition of a major environmental rule because the proposed rulemaking only explains existing agency responsibilities rather than creates substantive requirements to protect the environment. The intent of the rulemaking is merely to clarify and explain jurisdiction of the respective agencies. Because the intent of the rulemaking does not create or require actions for the purpose of protecting the environment or reducing risks to human health from environmental exposure, the proposed rule is not an environmental rule.

Additionally, the proposed rulemaking does not meet the definition of a major environmental rule because it is not anticipated that the proposed 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 proposed rule merely explicates jurisdiction of the respective agencies and does not impose new requirements.

Finally, the proposed rulemaking 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 proposed rulemaking does not meet any of these applicability requirements. First, in explicating jurisdiction of the respective agencies, the proposed rule does not exceed a standard set by federal law. Second, the proposed rule does not exceed an express requirement of state law, because Section 10 of HB 1407, 67th Legislature, 1981, 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 proposed 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 propose this rulemaking solely under the commission's general powers but under specific authority as explained under the second point. Therefore, the commission concludes that the proposed rule does not meet the definition of a major environmental rule.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed 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 proposed 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 proposed rulemaking would substantially advance this stated purpose by providing one reference point interpreting the jurisdiction of the respective agencies.

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of public or private real property because the proposed 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 proposed rulemaking merely clarifies and explains jurisdiction of the respective agencies. Therefore, the proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

Program.

#### ANNOUNCEMENT OF HEARING

The RRC will hold a public hearing on this proposal in Austin on May 11, 2010 at 1:30 PM in the William Travis Building, Room 1-100, at the RRC located at 1701 North Congress Avenue. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact the Personnel Office of the RRC by mail at P. O. Box 12967, Austin, Texas 78711-2967 or by telephone at (512) 463-6981 or Telecommunication Devices for the Deaf, (512) 463-7284. Requests should be made at least two weeks before the scheduled meeting.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-055-007-PR. The comment period closes May 17, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Cari-

Michel La Caille, Waste Permits Division, by phone at (512) 239-6479.

**§7.117**

**STATUTORY AUTHORITY**

The amendment is proposed 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 proposed under the Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361, the Texas Radiation Control Act; THSC, Chapter 401, concerning Radioactive Materials and Other Sources of Radiation; TWC, Chapter 26, concerning Water Quality Control; and the Injection Well Act, TWC, Chapter 27, concerning Injection Wells. The amendment is also proposed under THSC, §361.024, concerning Rules and Standards, 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 proposed 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 [Texas Natural Resource Conservation Commission].**

The Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission], 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 [Texas Natural Resource Conservation Commission]). If a copy of this document cannot be obtained from the internet, a copy can be requested from the Texas Commission on Environmental Quality [Texas Natural Resource Conservation Commission], Chief Clerk's Office, P.O. Box 13087, Austin, Texas 78711-3087, (512) 239-3300.