

The Texas Commission on Environmental Quality (TCEQ or commission) 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 Railroad Commission of Texas (RRC) was last updated in August 2010. House Bill (HB) 2694, Article 2, passed by the 82nd Legislature, 2011, and signed by the governor, transferred from the TCEQ to the RRC duties relating to the protection of groundwater resources from oil and gas associated activities. Specifically, HB 2694, Article 2 amended Natural Resources Code to revise §91.011 and add §§91.0115, 91.020, and 91.1015 and amended Texas Water Code (TWC), §27.033. The law transfers from the TCEQ to the RRC, effective September 1, 2011, those duties pertaining to the responsibility of preparing groundwater protection advisory/recommendation letters. Since the transfer, the RRC has been responsible for providing surface casing and/or groundwater protection recommendations for oil and gas activities under the jurisdiction of the RRC.

In addition, HB 2694, Article 2 amended TWC, §27.046, transferring from the TCEQ to the RRC the responsibility of issuing, to permit applicants for geologic storage of anthropogenic carbon dioxide (CO<sub>2</sub>), a letter of determination stating that drilling and operating the anthropogenic CO<sub>2</sub> injection well for geologic storage or operating the geologic storage facility will not injure any freshwater strata in that area and that the

formation or stratum to be used for the geologic storage facility is not freshwater sand.

The TCEQ's Surface Casing Program and staff transferred to the RRC effective September 1, 2011. The RRC's Surface Casing Program has been renamed the Groundwater Advisory Unit, and is now located in the William B. Travis Building, 1701 North Congress, Austin.

The commission proposes to amend §7.117 to adopt by reference a revised MOU between the RRC and the TCEQ. The RRC has adopted an amendment to 16 TAC §3.30, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality, to reflect the changes in law made under HB 2694, Article 2 (see April 6, 2012, issue of the *Texas Register* (37 TexReg 2385)). The specific MOU provisions are in 16 TAC §3.30, while Chapter 7, Memoranda of Understanding, incorporates by reference the rules in 16 TAC §3.30.

A corresponding rulemaking repealing 30 TAC Chapter 339, Groundwater Protection Recommendation Letters and Fees, is published in this issue of the *Texas Register*.

### **Section Discussion**

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

The RRC has amended the MOU between the RRC and the TCEQ to reflect the changes in law made under HB 2694, Article 2 (16 TAC §3.30). The amended MOU was adopted by the RRC on March 20, 2012, and was effective May 1, 2012. The proposed amendment to §7.117 reflects the amendment to 16 TAC §3.30 as adopted by the RRC.

**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 rule is in effect, no significant fiscal implications are anticipated for the agency or the RRC as a result of administration or enforcement of the proposed rule. The proposed rule would have no fiscal impact on other state agencies or units of local government.

The proposed rulemaking would amend §7.117 to adopt by reference a revised MOU between the RRC and the TCEQ that complies with the requirements of HB 2694, Article 2, the agency's Sunset Bill. As required by the HB 2694, the TCEQ's Surface Casing Program, funding and staff, transferred to the RRC effective September 1, 2011, and the preparation of groundwater protection advisory/recommendation letters became the responsibility of the RRC. These letters contain recommendations for the depth of surface casing for oil and gas wells and disposal wells injecting oil and gas wastes. In addition, the MOU transfers the responsibility of determining that drilling and operating anthropogenic CO<sub>2</sub> injection wells will not injure freshwater strata and

that the formation or stratum used for injection is not a freshwater sand stratum. The RRC adopted the revised MOU on March 20, 2012, and the agency is required to adopt the MOU to reflect its current jurisdiction over waste materials.

As a part of the proposed rulemaking, the agency is also proposing the repeal of Chapter 339, since the duties related to these letters are now the responsibility of the RRC. The fiscal impact of the proposed repeal is covered under a separate, but related fiscal note.

The proposed rulemaking would not have a significant fiscal impact on the agency. Other state agencies and units of local government would not experience any fiscal impact under the proposed rule. On September 1, 2011, the agency transferred 9.0 full-time employees and \$931,256 in fee revenue and annual costs out of the Water Resource Management Account No. 153 to the RRC.

### **Public Benefits and Costs**

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law.

The proposed rule would not have a fiscal impact on individuals. Individuals do not typically participate in the types of activities that would be governed by the proposed

rulemaking.

Adopting the RRC MOU via the proposed rulemaking is not expected to increase or decrease costs for large businesses or small businesses. The RRC would be responsible for enforcing regulations pertaining to groundwater protection for oil and gas activities and geologic storage of anthropogenic CO<sub>2</sub> instead of the agency. The RRC is expected to recover the cost of providing this type of groundwater protection through fee collection, but those costs are not expected to be significantly higher or lower than the cost of such protection in the past.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule.

### **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 rule is required to comply with state law and 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 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 reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed 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 proposed rule is to update the reference to the MOU between the RRC and TCEQ to clarify jurisdiction of the respective agencies pursuant to statutory changes from HB 2694. HB 1407, §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 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 in respect to radioactive materials. The MOU was revised in 2010 to reflect statutory requirements regarding the jurisdiction over certain radioactive materials and the geologic sequestration of CO<sub>2</sub>. And, in 2012 the MOU was revised to reflect jurisdictional changes required by HB 2694 that transferred duties from the commission to the RRC relating to the protection of groundwater resources from certain oil and gas and geologic sequestration activities regulated by the RRC.

The proposed rule does not meet the definition of a major environmental rule because the proposed rule only explains existing agency responsibilities rather than create substantive requirements to protect the environment. The proposed rule references the MOU which is used 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 proposed rule is not an environmental rule.

Additionally, the proposed rule 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 rule 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 HB 1407, §10, 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, 80th Legislature, 2007, requires TCEQ and the RRC to adopt an MOU to define the duties of each agency. 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 above. Therefore, the commission concludes that the proposed rule does not meet the definition of a major environmental rule.

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 rule and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007.

The specific purpose of the proposed rule is to update the reference to the MOU between

the RRC and TCEQ used to clarify and explain jurisdiction of the respective agencies pursuant to statutory changes.

Promulgation and enforcement of the proposed rule 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 proposed rule 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 rule merely updates the reference to the MOU, which is used to clarify and explain jurisdiction of the respective agencies. Therefore, the proposed rule 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this

preamble.

### **Submittal of Comments**

Written comments may be submitted to Bruce McAnally, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-037-007-WS. The comment period closes September 24, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Kari Bourland, Waste Permits Division, (512) 239-6137.

**§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; TWC, Chapter 26; and the Injection Well Act, TWC, Chapter 27. The amendment is proposed 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 proposed amendment implements THSC, §361.016, concerning Memorandum of Understanding by Commission, which requires the commission to adopt by rule any memorandum of understanding between the commission and any other state agency; THSC, §401.069 and §401.414, concerning Memorandum of Understanding and Memoranda of Understanding, which require the commission and the RRC to adopt a memorandum of understanding by rule regarding the agencies' duties under the Texas

Radiation Control Act; TWC, §5.104, concerning Memoranda of Understanding, which authorizes the commission to adopt by rule any memorandum of understanding between the commission and any other state agency; TWC, §27.049, concerning Memorandum of Understanding, which requires the commission and the RRC to amend the existing memorandum of understanding in 16 TAC §3.30 or enter a new memorandum of understanding; and HB 2694, 82nd Legislature, 2011.

**§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) effective May 1, 2012. 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.