

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts new §7.127.

Section 7.127 is adopted *without change* to the proposed text as published in the August 10, 2012 issue of the *Texas Register* (37 TexReg 5984) and, therefore, will not be republished.

### **Background and Summary of the Factual Basis for the Adopted Rule**

House Bill (HB) 451, passed by the 82nd Legislature, 2011, requires the commission to adopt rules to implement a "Don't Mess with Texas Water" Program to help prevent illegal dumping that affects surface water of Texas. The legislation requires the commission to coordinate with the Texas Department of Transportation (TxDOT) on aspects of the program. Adopting a Memorandum of Understanding (MOU) will help the TCEQ and TxDOT to implement the Program more efficiently.

### **Section Discussion**

Adopted new §7.127 defines the responsibilities of both the TCEQ and TxDOT in implementing the Don't Mess with Texas Water Program. TCEQ staff worked directly with TxDOT staff to draft the language in adopted new §7.127.

### **Final Regulatory Impact 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 Texas Government Code, §2001.0225, because the rule is not a "major environmental rule" and it does not meet the applicability criteria in Texas Government Code, §2001.0225(a) even if it were considered to be a "major environmental rule." 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 rule is intended to protect the environment by preventing illegal dumping by placing signs on major highway water crossings to provide notice of how to report illegal dumping. The rule does not create any new restrictions or prohibitions against dumping, but it provides notice of how to report illegal dumping. The rule is not a major environmental rule because it is not expected to 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.

Furthermore, even if the adopted rule did meet the definition of a major environmental rule, the rule is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in Texas Government Code,

§2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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. The rulemaking does not meet any of these requirements. First, in explicating the TxDOT and TCEQ's responsibilities in implementing a Don't Mess with Texas Water Program, the adopted rule does not exceed a standard set by federal law. Second, the rule does not exceed the express requirement of Texas Water Code (TWC), §26.053. Third, there is no delegation agreement that would be exceeded by the rule. Fourth, the commission does not adopt this rule solely under the commission's general powers but under specific authority of TWC, §26.053.

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

### **Takings Impact Assessment**

The commission evaluated the rule and performed an assessment of whether the

adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the adopted rule is to delineate the responsibilities of TxDOT and TCEQ in implementing the Don't Mess with Texas Water Program as required under TWC, §26.053. Promulgation of the rule would be neither a statutory nor a constitutional taking of private real property because the rule does not affect private real property. This adopted rule will impose no burdens on private real property. In addition, the rulemaking 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. Therefore, this 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 §505.11(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 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 on the Coastal Management Program.

**Public Comment**

The commission held a public hearing on August 30, 2012, at 2:00 p.m. Commission staff members were available before and after the hearing to address specific questions from those who attended the hearing. The comment period closed on September 10, 2012. The commission did not receive any comments on the proposed rule.

**§7.127**

**Statutory Authority**

The new section is adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; TWC, §5.104(b), which authorizes the commission to enter into a Memorandum of Understanding (MOU) with any other state agency and to adopt by rule any MOU between the commission and the other state agency; TWC, §26.011, which provides the commission with the authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and under Texas Health and Safety Code, §§361.011, 361.017 and 361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act.

This rulemaking implements TWC, §26.053, which requires the commission to adopt rules to implement a program to help prevent illegal dumping that affects surface water of Texas. TWC, §26.053 requires the commission to coordinate with the Texas Department of Transportation (TxDOT) on aspects of the program. Adopting a MOU will help the TCEQ and TxDOT to implement the Program more efficiently.

**§7.127. Memorandum of Understanding between the Texas Commission on Environmental Quality and the Texas Department of Transportation.**

(a) Background and Purpose.

(1) Texas Water Code (TWC), §26.053, relating to the creation of the Don't Mess with Texas Water Program (Program), was enacted by House Bill 451, 82nd Legislature, 2011 and became effective September 1, 2011. Under TWC, §26.053, the Texas Commission on Environmental Quality (TCEQ) is required to establish a program to prevent illegal dumping that affects the surface waters of the state by placing signs on major highway water crossings that notify drivers of a toll-free number, established by the TCEQ, to call to report illegal dumping. TWC, §26.053(d) requires the Texas Department of Transportation (TxDOT) to cooperate with TCEQ in the placement of the signs along state highways and TWC, §26.053(e) requires TxDOT to post such a Program sign when the previously posted sign identifying the crossing or prohibiting dumping at the crossing is scheduled to be replaced. Under state law, TxDOT is responsible for posting signs along state highways under its jurisdiction. Counties, cities, and other local governments are responsible for placing signs along highways, roads, and streets under their respective jurisdictions.

(2) The purpose of this Memorandum of Understanding is to develop a framework of cooperation between TCEQ and TxDOT for the implementation of TWC, §26.053.

(b) TCEQ shall:

(1) identify major highway water crossings on which signs are to be placed under subsection (c)(1) of this section, prioritize those locations for the placement of the signs, giving priority to the locations that will have the greatest impact on preventing illegal dumping that affects the surface waters of the state, and provide a prioritized list of those locations to TxDOT;

(2) coordinate with TxDOT on the design and quantity of Program signs and a timeline for the fabrication and installation of Program signs on the state highway rights of way; and

(3) coordinate with local governments concerning their participation in the Program and provide information about the requirements of the location of, and a local government's obligation to pay for, install, and maintain, a Program sign on a highway under the jurisdiction of the local government and the requirement of obtaining a license to use TxDOT's registered "Don't Mess with Texas®" slogan.

(c) TxDOT shall:

(1) provide and install on state highways under the jurisdiction of TxDOT a total of not more than 20 Program signs, in accordance with the priority list of locations provided under subsection (b)(1) of this section, as soon as practicable and before those signs are scheduled to be replaced, as required by TWC, §26.053(e);

(2) coordinate with TCEQ on the design and quantity of Program signs and a timeline for the fabrication and installation of Program signs on the state highway rights of way;

(3) coordinate with TCEQ and local governments on the placement of any additional signs paid for by local governments and placed along state highways, roads, and streets under the jurisdiction of the local governments;

(4) work with each local government that is approved by TCEQ and TxDOT to provide, install, and maintain a Program sign for the local government to obtain a license for the use of the Don't Mess with Texas® slogan on the Program sign;  
and

(5) maintain the Program signs that are placed along state highways under the jurisdiction of TxDOT.

(d) General conditions.

(1) A modification of this agreement must be made by mutual consent of the parties and only by the issuance of a written modification, signed and dated by authorized officials.

(2) This agreement is effective upon execution of both agencies.