

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

Background and Summary of the Factual Basis for the Proposed 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) would help the TCEQ and TxDOT to implement the program more efficiently.

Section Discussion

Proposed 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 proposed new §7.127.

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 other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule consists of an MOU between the TCEQ and TxDOT. The MOU would implement HB 451, which requires the TCEQ to create a program to prevent illegal dumping that affects the surface waters of Texas. The program will place signs on major highway crossings that notify drivers of a toll-free number to call to report illegal dumping. The MOU will outline the responsibilities of both agencies in implementing this program. TCEQ will be required to: establish a toll-free telephone number that forwards calls to the appropriate law enforcement agency; coordinate participation with local governments; coordinate the placement of signs with TxDOT. TxDOT will be required to post signs compliant with the program when previously posted signs identifying a major highway crossing or prohibiting illegal dumping are scheduled to be replaced.

Units of local government would not be required to participate in the program, and therefore, the proposed rule is not expected to have a significant fiscal impact on these governmental entities. A local government choosing to participate in the program could incur additional costs for law enforcement or cleanup of illegal dumping sites. Although authorized by HB 451, the TCEQ does not anticipate requiring local governments to contribute to the cost of the toll-free number.

TxDOT is expected to incur the cost of producing, placing, and maintaining signs that comply with the requirements of the program. However, the proposed rules is not

expected to have a significant fiscal impact on TxDOT since signs are only required to be placed in the appropriate locations when a previously posted sign is scheduled to be replaced.

The agency is not expected to incur significant increases in cost unless there is a significant increase in the reporting of illegal dumping. Assuming an average of ten calls per month and an average call time of five minutes, the cost of a toll-free telephone number is expected to range from \$11 to \$16 per year. The agency plans to use currently available resources to implement the program.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed new rules is in effect, the public benefit anticipated from the changes seen in the proposed rule would be a possible decrease in illegal dumping and greater protection of the surface waters of the state.

The proposed rule is not expected to have a direct fiscal impact on individuals and businesses. Individuals and businesses that illegally dump waste could experience indirect impacts of the proposed rule if there is increase enforcement against illegal activities as a result of increased reporting.

Individuals and businesses that reside in the jurisdiction of local governments that voluntarily participate in the program are also not expected to experience a significant fiscal impact under the proposed rule. Any increased law enforcement costs to participate in this voluntary program are expected to be approved by businesses and individuals through voter participation in local elections.

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 businesses would have the same ability to approve any increase in law enforcement costs incurred by a local government that voluntarily participates in the program through local elections.

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 rules 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 rules 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 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 proposed 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 proposed 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 proposed 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 propose this rulemaking solely under the commission's general powers but under specific authority of TWC, §26.053.

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 rule and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the proposed 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 proposed rule will impose no burdens on private real property. In addition, the proposed 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 proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(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 proposed rules 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.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 30, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. 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 Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, 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 2012-012-007-AD. The comment period closes September 10, 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. For further information, please contact Cynthia Carter, Pollution Prevention and Education Unit, at (512) 239-0989.

§7.127

Statutory Authority

The new section is proposed 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 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 (THSC), §§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.

The proposed 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 Memorandum of Understanding (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.