

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of existing §7.103, Memorandum of Understanding (MOU) between the Texas Natural Resource Conservation Commission (commission) and the Texas Parks and Wildlife Department (TPWD), regarding the regulation of aquaculture. In addition, the commission adopts new §7.103, Memorandum of Understanding (MOU) between the commission, TPWD, and the Texas Department of Agriculture (TDA), regarding the regulation of aquaculture. Section 7.103 is adopted *with changes* to the proposed text published in the October 20, 2000 issue of the *Texas Register* (25 TexReg 10439).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 873, 76th Legislature, 1999, amended Texas Agriculture Code, Chapter 134 by adding §134.031 which directs the commission, TPWD, and TDA to develop an MOU to coordinate the regulation of matters related to aquaculture. An existing MOU between the commission and TPWD governs some, but not all, of the activities in the legislatively-mandated MOU and does not include TDA as a participant. This adopted rulemaking repeals the existing MOU and replaces it with a new MOU that incorporates legislative changes affecting the regulation of aquaculture production facilities by the commission, TPWD, and TDA.

Senate Bill 873 requires that the agencies establish, through an MOU, an application review committee (ARC) to review wastewater discharge authorization applications by aquaculture facilities to ensure that the proposed discharge will not adversely affect a bay, an estuary, or other water in the state. The committee will be comprised of one representative from each of the three agencies.

The new MOU delineates each agency's responsibilities under the MOU, outlines coordination procedures for the review of individual permit applications, registration applications, requests for exemption, and notices of intent to be covered under a general permit, and establishes the operating procedures and scope of the ARC.

SECTION BY SECTION DISCUSSION

Existing §7.103(a) - (e), Memorandum of Understanding between the Texas Natural Resource Conservation Commission and the Texas Parks and Wildlife Department, is repealed.

The adopted new §7.103(a) sets forth the need for the MOU as a mechanism for facilitating coordination among the commission, TPWD, and TDA on issues related to the regulation of aquaculture facilities.

The adopted new §7.103(b) defines the terms "aquaculture," "MOU," and "application" as they are used within the MOU.

In order to reduce ambiguity, the commission has deleted the phrase "unless the context clearly indicated otherwise" from the first sentence of the section.

Adopted new §7.103(c) sets forth the responsibilities of each agency pertaining to licensing and regulation of aquaculture facilities within the state.

Adopted new §7.103(d) sets forth the coordination procedures for review of applications by aquaculture facilities for authorization to discharge wastewater under individual permits and registrations, requests for exemption, and notices of intent to be covered under a general permit to discharge wastewater.

In order to clarify the proposal, the commission has modified this section. In §7.103(d)(1)(B), the word “the” was inserted in the second sentence prior to the word “additional.” The phrase “contested case hearings” was inserted in §7.103(d)(3)(K).

Adopted new §7.103(e) establishes the ARC, defines the committee’s authority, and establishes the committee’s operating and meeting procedures. The section provides that the ARC will be comprised of one individual from each of the three agencies and has the authority to review any request by an aquaculture facility for authority to discharge wastewater or for an exemption when disputes among the agencies cannot be resolved at the staff level. The section also sets forth the right of each agency to take any action it deems necessary to protect its legal authority under state law regardless of any provision in the MOU.

In order to clarify the proposal, the commission has modified this section. In §7.103(e)(4)(A)(vi) the phrase “comment of the other parties” was changed to the phrase “comment by the other parties.”

Adopted new §7.103(f) sets forth general conditions including the term of the MOU and amendment procedures.

REGULATORY IMPACT ASSESSMENT

The commission reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The rulemaking will not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking will formalize the procedures for cooperation among the commission, TPWD, and TDA on issues related to the regulation of aquaculture facilities. The rulemaking does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. Even if the rule were a major environmental rule, §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. The rulemaking does not meet any of these four criteria, and therefore, is not subject to Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The adoption of this rule is to set forth the procedures by which the commission, TPWD, and TDA coordinate on issues related to the

regulation of aquaculture facilities. The rule will substantially advance this purpose by setting forth detailed procedures for such interaction including initial notification, document exchange, comments, and meetings. The rule will not burden private real property and the action under the rule does not constitute a taking because the MOU only sets forth procedures by which the commission, TPWD, and TDA will coordinate on issues related to the regulation of aquaculture.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking, both the proposed repeal of the existing MOU and the proposed adoption of the new MOU, and determined that the rule is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC § 505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rule is not subject to the CMP.

HEARING AND COMMENTERS

The public comment period closed on November 20, 2000. No public hearing was held. Written comments were received from Fred B. Werkenthin, Jr. representing the Texas Aquaculture Association (TAA). TAA suggested changes to the rulemaking as stated in the ANALYSIS OF TESTIMONY.

ANALYSIS OF TESTIMONY

On §7.103(a), TAA commented that from their point of view, the MOU is needed, in part, because of the long turnaround time between application for an authorization to discharge and the granting of that

authorization by the commission. TAA notes that the MOU does not address this need. TAA also notes that the commission has failed to adopt the aquaculture general permit.

The commission does not agree with this comment. The purpose of the MOU is not to establish application review timelines for the commission, but rather to provide for the coordination of the regulation of matters related to aquaculture between the commission, TPWD, and TDA. The timelines for administrative and technical review of all wastewater applications, including aquaculture application, are governed by other commission rules in Chapter 281. The provisions within the MOU are not intended to extend processing time for aquaculture wastewater applications. Additionally, this rulemaking does not address the aquaculture general permit. No change was made to the proposed rule in response to this comment.

On §7.103(a), TAA states that in permitting aquaculture facilities, the commission permits aquaculture discharges by a “seat-of-the-pants” approach because of a lack of information about receiving water quality as well as effluent limitations, best management practices, and effluent treatment needed to comply with Texas Surface Water Quality Standards regarding suspended solids.

The commission does not agree with this comment. The scope of the MOU is limited to the coordination of aquaculture permitting among the three state agencies. The MOU does not dictate permitting criteria under the Texas Surface Water Quality Standards, and therefore, this comment is beyond the scope of this rulemaking. However, wastewater discharge permits for individual aquaculture facilities, like all other commission individual wastewater permits, address

all pollutants of concern, including suspended solids, and will include limits designed to ensure discharges meet the Texas Surface Water Quality Standards. Information and data from the United State Environmental Protection Agency and stakeholders is considered in the development and issuance of individual aquaculture permits. No change was made to the proposed rule in response to this comment.

On §7.103(a), TAA commented that the MOU implies a heightened threat to the environment posed by aquaculture discharges and TAA states that aquaculture facilities are benign in comparison to other discharge facilities.

The commission disagrees with this comment. The commission does not intend to imply that wastewater discharges from aquaculture in general pose a greater threat to the environment than other types of wastewater discharges. However, the commission notes that the legislature in Senate Bill 873, 76th Legislature, 1999, required the commission to establish permit conditions relating to suspended solids that are adequate to prevent: 1) potential significant adverse response in aquatic organisms, changes in flow patterns of receiving waters, or untimely filling of bays with settled solids; or 2) a potential significant adverse response in aquatic plants from attenuation of light by suspended solids in discharges. As such, the legislature noted that there could be adverse environmental impacts associated with the wastewater discharges from aquaculture facilities. No change was made to the proposed rule in response to this comment.

On §7.103(a), TAA notes that the MOU refers to disease management as one of the reasons for the MOU and that disease management is already adequately handled in TPWD rules.

The commission disagrees with this comment. The MOU outlines the existing authority related to aquaculture among the three agencies and does not purport to convey additional authority to TPWD regarding disease management. Because disease management falls with the jurisdiction of TPWD, a party to the MOU, the MOU addresses disease management. No change was made to the proposed rule in response to this comment.

On §7.103(b), TAA notes that the MOU defines the term “application” as an individual permit or registration, notice of intent, and request for determination of exempt status. TAA believes that the generic use of the term application is confusing and that the MOU should define each type of authorization separately to reduce confusion. TAA suggests that, with National Pollutant Discharge Elimination System delegation, registrations are no longer an option available to the regulated community, and therefore, should be removed from the MOU.

The commission disagrees with this comment. The term “application” is defined to include an individual permit or registration, notice of intent, and request for determination of exempt status in order to eliminate the need to refer to those different mechanisms for obtaining authorization individually. The commission notes that each method of obtaining authorization is different and involves separate procedures for doing so. However, for purposes of the MOU, they can be

referred to collectively as an “application.” No change was made to the proposed rule in response to this comment.

The commission notes that although a registration is not currently available to obtain Texas Pollutant Discharge Elimination System (TPDES) authorization, the commission wishes to retain flexibility by including registrations in the MOU in case at some time in the future the commission decides to readopt Chapter 321, Subchapter O for TPDES purposes. No change was made to the proposed rule in response to this comment.

On §7.103(d)(1), TAA believes that the proposed rule should shorten the time for final action on a request for an exemption. TAA states that as currently drafted, the commission could take 120 days to declare a facility exempt.

The commission disagrees with this comment. Generally, requests for exemptions are processed well within 60 days. However, in the event additional information is requested of the applicant by the commission, TPWD, or TDA, due to the lack of information in the application, the review of the exemption may take up to 120 days. No change was made to the proposed rule in response to this comment.

On §7.103(d)(1), TAA suggests having the applicant copy TPWD and the Texas Department of Agriculture with copies of applications, rather than having the commission forward copies of applications, in order to reduce processing time.

The commission disagrees with this comment. Although the commission agrees that it may appear to be beneficial for the applicant to provide a copy to TPWD and TDA, the commission may not impose such a requirement through an MOU since an MOU is intended to provide for the coordination of the regulation of matters related to aquaculture among the three agencies and is not intended to impose additional requirements on applicants. In addition, TDA and TPWD may not intend to begin reviewing the application until the application is administrative complete; therefore, any benefit of the applicant providing the application directly to TDA and TPWD may be marginal. No change was made to the proposed rule in response to this comment.

On §7.103(d)(1), TAA believes that the rules should be amended to require the executive director to do its analysis on the request for an exemption or Notice of Intent (NOI) during the time period which TPWD and TDA are reviewing the application. TAA believes that the executive director should not “suspend” processing while TPWD and TDA are reviewing the application. TAA suggests that §7.103(d)(1)(A)(ii) be modified to allow the NOI or exemption to be approved within the 45-day time or shortly thereafter, if no comments are received from TPWD and TDA.

The commission disagrees with this comment. The MOU does not require, and the commission does not intend to suspend processing of an application pending receipt of any comments from TDA and TPWD. The commission intends that technical review of an application continue during this time period. No change was made to the proposed rule in response to this comment.

TAA suggests that the language of §7.103(d)(2) be clarified to require that TPWD and TDA complete their initial assessment within 45-days of the notification letter. TAA expresses concern about processing time and states that the timetable allows 119 days or more before the proposed rule requires the commission to continue the normal processing of the application. TAA believes that the rule should be clarified to require that the three agencies perform concurrent processing.

The commission disagrees with this comment. The commission believes that TPWD and TDA need as much as 45 days to determine whether or not additional information is required.

Therefore, the MOU will not be changed to require the entire review be complete within 45 days even if additional information is necessary. The commission intends that the technical review of an application will continue during the time period in which TPWD and TDA are reviewing the application. No change was made to the proposed rule in response to this comment.

TAA questions whether §7.103(d)(3)(A) expands TPWD's review beyond the scope of the Texas Water Quality Standards. TAA suggests that, if this is the case, TPWD should engage in rulemaking that defines the criteria for TPWD's analysis.

The commission disagrees with this comment. TPWD's review is based on its jurisdiction under the Parks and Wildlife Code. To the extent that TPWD's review and comments go beyond the scope of the commission's authority, the commission is not required to, and does not intend to, consider those comments based on §7.103(d)(3)(C) of the MOU. That section states that TPWD's and TDA's comments will be evaluated in conjunction with all other applicable factors and will be

incorporated by the executive director whenever consistent with the commission responsibilities.

Any comments by TPWD and TDA that are not consistent with the commission's responsibilities will not be incorporated. No change was made to the proposed rule in response to this comment.

TAA believes that the development of sensitive aquatic habitat guidelines by TPWD under §7.103(d)(3)(D) may require rulemaking.

The commission disagrees with this comment. The Texas Agriculture Code, §134.031(d), specifically authorizes the development of guidelines. Additionally, TPWD does not have general rulemaking authority and cannot develop rules without specific authorization from the legislature to do so. No change was made to the proposed rule in response to this comment.

TAA believes that §7.103(d)(3)(F) should be modified to allow TPWD to issue an exotic species permit to a facility that is in the process of obtaining a wastewater discharge authorization if the owner is willing to operate the facility as a "no-discharge facility" until the wastewater discharge authorization is obtained. TAA believes that TDA should be able to issue a license to the facility if the facility is operated on a no-discharge basis until the wastewater discharge authorization is obtained.

The commission disagrees with this comment. Existing TPWD rules 31 TAC §57.134 prohibits the issuance of an exotic species permit before a facility receives a wastewater discharge permit or an exemption, from the commission if the facility is designed such that a discharge of waste into or adjacent to water in the state will or is likely to occur. Additionally, Texas Agriculture Code,

§134.011(d), prohibits TDA from issuing a license to a new aquaculture facility until the facility has been authorized or exempted by the commission to dispose of wastewater. The proposed changes are beyond the scope of the MOU and requires a change to TPWD rules and statute. No change was made to the proposed rule in response to this comment.

On §7.103(e), TAA commented that consideration by the ARC be limited to individual wastewater discharge permit applications only, not exemptions or NOIs. TAA suggests that the ARC consider an application within the first 15 days of the 45-day review period. TAA does not believe that the rule contains a deadline for request for consideration of a particular matter by the ARC.

The commission disagrees with this comment. The Texas Agriculture Code, §134.031(c), provides for the ARC to review applications for wastewater discharge authorization to ensure that the proposed discharge will not adversely affect a bay, an estuary, or other waters in the state. The statute does not limit the ARC's review to only individual permit applications. The commission disagrees that the ARC should consider an application within the first 15 days of the 45-day review period because such review by the ARC, prior to receipt of comments by TPWD and TDA, would be premature. No change was made to the proposed rule in response to this comment.

On §7.103(e)(4)(B), TAA believes that in the event that a matter before the ARC cannot be unanimously resolved, that issue should be forward to the commissioners of the commission. TAA believes that referring the matter to other officials of the three agencies will result in further delays.

The commission disagrees with this comment. Referral of a potentially contested issue for resolution by the commission at such an early stage, prior to notice of the application and the holding of a contested case hearing to develop an evidentiary record, would be improper because other potentially interested parties would not have been notified and had an opportunity to provide input on the decision. Under the MOU, if the ARC does not reach a unanimous decision, the matter will be referred to “officials of the agencies” to resolve the issue. By this, the commission intends that the matter will be referred to the applicable division directors for resolution. No change was made to the proposed rule in response to this comment.

TAA notes that the draft rules were prepared without stakeholder input.

The commission agrees that the MOU was prepared without stakeholder input; however, the commission disagrees that stakeholder input would have been appropriate. This MOU is intended to be a coordinating mechanism among the three agencies for regulating aquaculture facilities. As such, it establishes procedures amongst the three agencies to facilitate such regulation. The MOU does not impose new regulatory requirements on aquaculture facilities; therefore, input by stakeholders was not deemed to be necessary in drafting the proposed rule. However, the commission notes that any interested person can provide comment on the proposed rule. No change was made to the proposed rule in response to this comment.

STATUTORY AUTHORITY

The existing MOU is repealed under the Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties.

Chapter 7: MEMORANDA OF UNDERSTANDING

§7.103

§7.103. Memorandum of Understanding (MOU) between the Texas Natural Resource Conservation Commission (commission) and the Texas Parks and Wildlife Department (TPWD).

Chapter 7: MEMORANDA OF UNDERSTANDING

§7.103

STATUTORY AUTHORITY

The new section is adopted under the TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties. Additionally, the new section is adopted under TWC, §5.104, which authorizes the commission to enter into an MOU with any other state agency and requires the MOU to be adopted by rule, and Texas Agriculture Code, §134.031, which requires the commission, TPWD, and TDA to enter into an MOU for the regulation of matters related to aquaculture.

§7.103. Memorandum of Understanding (MOU) between the Texas Natural Resource Conservation Commission (commission), the Texas Parks and Wildlife Department (TPWD), and the Texas Department of Agriculture (TDA).

(a) Need for agreement.

(1) The commission, TPWD, and TDA seek to ensure that regulation of aquaculture is conducted in a manner that is both collaborative and responsible.

(2) The commission, TPWD, and TDA are concerned about issues relating to the raising of non-native aquatic species and the attendant concern about escape into natural ecosystems, including the introduction of disease into natural ecosystems.

(3) The commission, TPWD, and TDA are concerned about the quality of wastewater discharges from aquaculture facilities and their effects on receiving waters in reservoirs, streams, bays, and estuaries.

(4) The commission, TPWD, and TDA seek to establish an interagency review procedure for applications requesting authorization to discharge wastewater from aquaculture facilities.

(5) The commission, TPWD, and TDA seek to institute an effective system by which coordination and collaboration can be achieved to expedite enforcement actions in response to discharges from aquaculture facilities that are found to contain contagious disease that may impact state waters.

(6) Texas Water Code, §5.104, authorizes the commission to enter into an MOU with any other state agency.

(7) Texas Agriculture Code, §134.031, directs the commission, TPWD, and TDA to enter into an MOU for the regulation of matters relating to aquaculture.

(8) It is the intention of this MOU to provide a formal mechanism by which TPWD and TDA may review and provide feedback on aquaculture issues that are subject to regulation by the commission and that have the potential to affect natural resources and the regulation of aquaculture within the jurisdiction of TPWD or TDA. This exchange of information would assist the commission in making environmentally sound decisions and would improve coordination between the commission, TPWD, and TDA.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings.

(1) **Aquaculture** - The business of producing or rearing aquatic species (fish, crustaceans, and other organisms in either fresh or marine waters) utilizing ponds, lakes, fabricated tanks and raceways, or other similar structures.

(2) **Memorandum of Understanding (MOU)** - A formal document that clarifies and provides for the respective duties, responsibilities, or functions of the state agencies who are signatories on any matter or matters under their jurisdiction that are not expressly assigned to either one of them.

(3) **Application** - A request submitted by an aquaculture facility to the commission for authorization to discharge under an individual permit or registration; a Notice of Intent (NOI) to seek authorization under a general permit; or a request for an exemption.

(c) Responsibilities.

(1) The commission. The responsibilities of the commission relate primarily to its role as the natural resource agency with primary responsibility over conservation of natural resources and the protection of the environment, under Texas Water Code, §5.012.

(A) The commission has general jurisdiction over the state's water quality program including issuance of waste discharge permits, water quality planning, and enforcement of water quality rules, standards, orders, and permits.

(B) The commission seeks to maintain the quality of water in the state consistent with public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, and the economic development of the state, and to require the use of all reasonable methods to implement this policy.

(C) The commission is responsible for review of NOIs and requests for exemption, and review of applications and subsequent issuance of waste discharge permits, temporary orders, emergency orders, and registrations.

(2) TPWD. The responsibilities of TPWD relate primarily to its functions as a natural resource agency, including its resource protection functions, as designated by the Parks and Wildlife Code, §12.001.

(A) TPWD is the state agency with primary responsibility for protecting the state's fish and wildlife resources.

(B) TPWD provides recommendations that will protect fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct developmental projects.

(C) TPWD provides information on fish and wildlife resources to any local, state, and federal agencies or private organizations that make decisions affecting those resources.

(D) TPWD regulates the taking, possession, and conservation of all kinds of marine life and other aquatic life.

(E) TPWD regulates the introduction of fish, shellfish, and aquatic plants into public water, under Texas Parks and Wildlife Code, §66.015(b).

(F) TPWD regulates the importation, possession, and placing into state water of harmful or potentially harmful exotic species of fish, shellfish, or aquatic plants, under Texas Parks and Wildlife Code, §66.007(a).

(G) TPWD is responsible for review of applications and subsequent issuance of permits relating to the importation, possession, and placing into state water of harmful or potentially

harmful exotic species of fish, shellfish, or aquatic plants, under Texas Parks and Wildlife Code, §66.007(a).

(3) TDA. The responsibilities of TDA relate primarily to its functions as a regulatory agency that oversees the licensing and regulation of aquaculture operations under Texas Agriculture Code, Chapter 134.

(A) TDA is responsible for establishing recordkeeping requirements for commercial aquaculture facilities.

(B) TDA is responsible for the review of applications and subsequent issuance of aquaculture licenses under Texas Agriculture Code, Chapter 134, to aquaculture facilities that produce and sell cultured species.

(C) TDA is responsible for the review of applications and subsequent issuance of aquaculture licenses under Texas Agriculture Code, Chapter 134, for fish farm vehicles selling cultured species from the vehicle.

(d) Provisions. This MOU is to facilitate the coordination and collaboration between the commission, TPWD, and TDA with regard to aquaculture facilities.

(1) Coordination procedures for NOIs, applications for registrations, and requests for exemptions.

(A) The executive director will provide copies of all NOIs, registration applications, and requests for exemption to TPWD and TDA within 14 days of the stamped date of receipt.

(i) Within 45 days of the date of receipt of the NOI, registration application, or request for exemption, by TPWD and TDA, each will complete its initial assessment, and by letter shall:

(I) provide the executive director with formal written recommendations designed to protect fish and wildlife resources; or

(II) indicate that it has no comments; or

(III) request additional information from the commission.

(ii) If the commission does not receive formal written comments from TPWD or TDA within 45 days of the date of receipt of the NOI, registration application, or request for exemption, by TPWD and TDA, the executive director will conclude that there are no comments and continue normal processing of the application.

(B) Upon receipt of a request from TPWD or TDA for additional information, the executive director will immediately provide such information if it is contained in the application materials. If the additional information is not included in the application materials, and if the information is necessary for TPWD or TDA to make its evaluation, the TPWD or TDA will request such additional information from the applicant, notify the executive director of this request, and ask the applicant to send a copy of its reply to the commission. If the applicant does not provide the additional information to the TPWD or TDA within 30 days of a request, the TPWD or TDA may request that the executive director suspend processing of the application. If the executive director determines that this additional information is essential to complete the technical review, the executive director will determine whether it is appropriate to either suspend processing or deem the application incomplete and return it to the applicant.

(C) Upon receipt of additional information from the executive director or the applicant, the TPWD and TDA will each have 30 days to complete its review and either make final recommendations or indicate by letter that it has no comments. If formal written comments or additional information is not received from the TPWD or TDA within 30 days, the executive director will conclude that there are no comments and will continue normal processing of the application.

(2) Coordination procedures for individual permit applications.

(A) The executive director will provide notification to TPWD and TDA of each application received which requests individual permit authorization for the discharge or disposal of

wastewater from aquaculture facilities. Notification shall be transmitted within 14 days of a request received from either TPWD or TDA, or after the permit application has been assigned to a permit writer. Notification shall include a copy of the application and any comments, memoranda, letters, or other information incorporated in the application file following date of application receipt so that TPWD and TDA may complete an initial assessment of the proposed operation.

(i) Within 45 days of the date of receipt of notification by TPWD and TDA, each will complete its initial assessment, and by letter shall:

(I) provide the executive director with formal written recommendations designed to protect fish and wildlife resources; or

(II) indicate that it has no comments; or

(III) request additional information from the commission.

(ii) If the commission does not receive formal written comments from TPWD or TDA within 45 days of the date of receipt of the notification by TPWD and TDA, the executive director will conclude that there are no comments and continue normal processing of the application.

(B) Upon receipt of a request from TPWD or TDA for additional information, the executive director will immediately provide such information if it is contained in the application materials. If additional information is not included in the application materials, and if the information is necessary for TPWD or TDA to make its evaluation, the TPWD or TDA will request such additional information from the applicant, notify the executive director of this request, and ask the applicant to send a copy of its reply to commission. If the applicant does not provide the additional information to the TPWD or TDA within 30 days of a request, the TPWD or TDA may request that the executive director suspend processing of the application. If the executive director determines that this additional information is essential to complete the technical review, the executive director will determine whether it is appropriate to either suspend processing or deem the application incomplete and return it to the applicant.

(C) Upon receipt of additional information from the executive director or applicant, the TPWD and TDA will each have 30 days to complete its review and either make final recommendations or indicate that it has no comments. If formal written comments are not received from the TPWD or TDA within 30 days, the executive director will conclude that there are no comments and continue normal processing of the application.

(D) In coordination with the TPWD and TDA, the commission shall, within 120 days of the date of adoption of this MOU, establish guidelines for a site assessment environmental report for new commercial shrimp facilities located within the coastal zone. This report shall describe the existing environmental conditions at the proposed site including aquatic habitat and the conditions of water in

the state into which a discharge is proposed. The report must provide an assessment of any potential impacts of wastewater discharges on sensitive aquatic habitats in the area of the proposed site, and significant impacts related to the construction or operation of the facility, and any mitigation actions proposed by the applicant.

(3) Coordination procedures applicable to all applications.

(A) The scope of review by TPWD may include, but is not limited to: consideration of especially sensitive receiving water conditions (aquatic habitat); impacts of the discharge on substrate (scouring, sedimentation) and water transparency; alteration of receiving water flow characteristics; existing or attainable biological and recreational uses; discharge rate and volume; and the likelihood of disease transmission. Comments may be addressed directly to the applicant by TPWD.

(B) The scope of review by TDA may include, but is not limited to, whether or not an application for the discharge or disposal of wastewater from aquaculture facilities should be approved.

(C) Formal written comments received from TPWD and TDA will be considered by the executive director in making decisions on applications requesting authorization for the discharge or disposal of wastewater from aquaculture facilities. TPWD's and TDA's comments will be evaluated in conjunction with all other applicable factors and will be incorporated by the executive director whenever it is consistent with the commission's responsibilities. In accordance with the responsibilities of the commission as described in this document, the executive director reserves the right to determine

the final disposition of applications. Upon making a preliminary recommendation regarding an application, the executive director will provide a response to TPWD and TDA that contains a copy of the initial draft permit, draft order, or final decision on an exemption or registration, and documentation providing an explanation on why any of TPWD's and TDA's comments were not incorporated. A final draft permit will be transmitted to the TPWD and the TDA.

(D) TPWD shall, within 120 days of the date of adoption of this MOU, develop guidelines identifying sensitive aquatic habitat within the coastal zone. TPWD will provide the guidelines it develops to the executive director and TDA. The executive director will consider the sensitive aquatic habitat guidelines when reviewing wastewater discharge applications for new aquaculture facilities or expansion of existing facilities in the coastal zone.

(E) TPWD shall, within 120 days of the date of adoption of this MOU, develop guidelines which list the type of information it needs from permit applicants, in addition to the commission wastewater permit application, in order to make a determination as to whether the proposed discharges will not adversely affect a bay, an estuary, or other water in the state. This additional information will be used during the review of the permit application. The TPWD will develop these guidelines with input from the stakeholders, the commission, and TDA. When the guidelines are finalized by TPWD, the agencies will make them available to stakeholders and applicants, and it is expected that the requested information will routinely be required as part of any wastewater discharge application. It is understood that occasions may arise when information beyond that which is listed in the guidelines may be required by TPWD.

(F) A new exotic species permit will not be issued by TPWD to any aquaculture facility that proposes to discharge wastewater until a commission waste discharge permit or other authorization has been issued or it is determined that the facility is exempted from such requirements.

(G) TDA will provide a copy of each aquaculture license application received to the commission and TPWD. An aquaculture license will not be issued by TDA to any aquaculture facility until a commission waste discharge permit or other authorization has been issued, or it is determined that the facility is exempted from such requirements.

(H) An interagency work group will be formed whose function will be to meet at least annually to address aquaculture issues relating to water quality, fish and wildlife resources, and receiving stream habitat and uses. This work group will serve to strengthen coordination of the commission, TPWD, and TDA activities related to the aquaculture industry and provide a conduit for shared information. The work group shall be composed of members of each agency and staffed at levels which are mutually agreeable as adequate to accomplish the stated goals. Each agency shall designate a primary contact person for this group and notify the other agencies of any changes to the primary contact person.

(I) The executive director and TPWD will coordinate studies related to applications that request authorizations for the discharge and disposal of wastewater. This may include on-site visits, receiving water assessments, sample collection, data analysis and related activities. Notification of these activities will be provided at least five days prior to the activity or as soon as is practicable.

TPWD will notify the appropriate commission regional office and the Wastewater Permitting Section.

The executive director will notify TPWD Resource Protection Regional Office and headquarters.

(J) The executive director and TPWD will strive to coordinate responses to emergency conditions, investigation of unauthorized waste discharges, and compliance inspections of aquaculture facilities. The executive director and TPWD will provide notice to each other regarding site inspections, so as to allow the other agency to participate if desired. Notifications of scheduled compliance inspections will be provided at least five days before the inspection. Notification of other activities will be provided as soon as practicable. TPWD will notify the commission regional office and the executive director will notify TPWD Resource Protection Regional Office.

(K) The executive director, TPWD, and TDA will strive to provide to each agency notification of public meetings, public hearings, and contested case hearings that relate to aquaculture applications.

(L) The executive director and TPWD will continue to develop and provide to applicants, permit conditions and, as appropriate, guidance related to disease, quarantine conditions, and emergency plans.

(e) Application Review Committee.

(1) Purpose.

(A) The application review committee (ARC) will review wastewater discharge authorization applications to ensure that the proposed discharges will not adversely affect a bay, an estuary, or other water in the state.

(B) The commission, TPWD, and TDA recognize the importance of integrating and coordinating among themselves to ensure that this ultimate goal, stated in subparagraph (A) of this paragraph, is achieved.

(C) In order to accomplish this, the ARC will function as a forum for discussion, answering questions and resolving differences, in an attempt to come to consensus regarding the controls needed to meet the ultimate goal.

(D) The ARC shall primarily be used as a means for settling unresolved disputes concerning aquaculture between the agencies.

(2) Membership.

(A) Each agency, the commission, TPWD, and TDA, will appoint one member to the ARC.

(B) Each agency shall appoint an alternate member of the committee.

(C) If a member or alternate is unable to attend a meeting, then that member or alternate will temporarily delegate his or her decision-making authority to other staff of that agency for that meeting only.

(D) At meetings of the ARC, technical specialists representing the agencies may participate in or contribute to the committee's discussions and other activities.

(E) Within two weeks of the adoption of this MOU, each agency will inform the other two agencies of the member and alternates.

(F) An agency may change its member or alternate by providing notice to each of the other members and alternates.

(3) Applicability. The ARC may consider any wastewater discharge application when disputes can not be resolved at the staff level.

(4) Functioning of the ARC.

(A) Meetings.

(i) Meetings will be on an as needed basis.

(ii) Any member of the ARC may request a meeting of the committee to consider one or more discharge applications.

(iii) Any meeting of the ARC to consider a specific discharge permit application should, whenever possible, be requested prior to the public notice of the application and preliminary decision.

(iv) It is the responsibility of the member requesting the meeting to notify all the members and alternates, and to establish a mutually agreeable meeting time and location.

(v) The meeting shall take place within seven calendar days of the request.

(vi) It is the responsibility of the agency requesting the meeting to take minutes of the meeting, to provide the minutes for review and comment by the other parties, and to provide a final version of the minutes which reflects any comments received.

(B) Decision making. The ARC will strive for unanimous consent on all decisions. In the event that unanimous agreement cannot be reached among members of the committee, the matter under consideration may be referred to officials of the agencies for resolution in an expeditious manner. The agencies agree that, while recognizing the areas of expertise and authority of

the members, decision-making deliberations will focus on the agencies' mutual purpose of ensuring that the proposed discharge will not adversely affect a bay, an estuary, or other water in the state.

(C) Confidentiality. The ARC supports an open government policy and it is understood and agreed that information subject to public disclosure under the Texas Public Information Act shall be released upon written request.

(f) General conditions.

(1) The term of this MOU shall be from the effective date until termination of this agreement. Any amendment to the MOU shall be made by mutual agreement of the parties and shall be adopted by rule by all parties.

(2) Each party shall adopt the MOU by rule. All amendments shall also be adopted by rule. This MOU, and any subsequent amendment, shall become effective 20 days after the date on which the rule is filed in the Office of the Secretary of State.

(3) By signing this MOU, the signatories acknowledge that they are acting upon proper authority from their governing bodies.

(4) Reservation of rights. Each agency has and reserves the right to take whatever actions necessary to pursue or preserve any legal remedies available to that agency, and nothing in this MOU is intended to waive or foreclose any such right.