

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §7.103.

Amendments to §7.103 are adopted *with changes* to the text as published in the December 3, 2021, issue of the *Texas Register* (46 TexReg 8197), and, therefore, the rule will be republished. Non-substantive changes to the adopted text are made to conform to *Texas Register* formatting requirements.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking adoption will implement portions of Senate Bill (SB) 703, 87th Legislature, Regular Session, which removed the Texas Department of Agriculture's (TDA) roles and responsibilities related to regulation of the aquaculture industry. Previously, the TCEQ, the TDA, and the Texas Parks and Wildlife Department (TPWD) coordinated on regulating the aquaculture industry. This multi-agency coordination is codified in a Memorandum of Understanding (MOU) in 30 Texas Administrative Code (TAC) §7.103. This rulemaking will revise the MOU to remove the TDA from this multi-agency coordination.

Additionally, this rulemaking adoption will make additional updates to the MOU, based on TCEQ rule changes related to the aquaculture industry since the MOU was last adopted. These include repeal of the permit-by-rule and exemptions in Chapter 321, Subchapter O, and the issuance of the Aquaculture General Permit Number

TXG130000.

Section Discussion

The commission adopts revisions throughout the rule to remove all references to the TDA, in accordance with SB 703, which removed the TDA's roles and responsibilities related to regulation of the aquaculture industry. Additionally, the commission adopts revisions throughout the rule to change the commission's name from the Texas Natural Resource Conservation Commission to the TCEQ. The commission also adopts revisions throughout the rule to improve readability and the overall structure of the rule.

Lastly, the commission adopts revisions throughout the rule to remove references to registrations and exemptions issued by the TCEQ to the aquaculture industry because the TCEQ repealed the regulations in Chapter 321, Subchapter O, that provided for these types of authorizations. These authorization types have been replaced by the Aquaculture General Permit Number TXG130000.

The commission adopts minor clarifications and revisions to subsection (a) as noted above regarding revisions throughout the rule.

The commission adopts revisions to subsection (b) to update the definition of "Aquaculture" consistent with the definition in the Aquaculture General Permit

Number TXG130000 and to remove the definition of “Memorandum of Understanding” because this definition is not included in other MOUs.

The commission adopts revisions to subsection (c) to add references to additional applicable state statutes that establish TCEQ and TPWD authorities.

The commission adopts revisions to subsection (d) to establish coordination activities regarding renewal and amendment of the Aquaculture General Permit Number TXG130000. The adopted revisions will also revise procedures related to TPWD requesting additional information from applicants rather than from the TCEQ during their review of Notices of Intent (NOI) and individual permit applications. Additional adopted revisions to this subsection will revise the timing of when, in the permitting process, the TCEQ must send applications to the TPWD, and remove the TCEQ’s requirement to develop guidelines for a site assessment environmental report for new commercial shrimp facilities located within the coastal zone. The report guidelines have been developed and the TCEQ’s individual permit application form requires new commercial shrimp facilities located within the coastal zone to develop and submit a site assessment report.

The commission adopts removal of subsection (e) relating to the executive review committee and adopts new subsection (e) relating to other coordination activities that were previously included as part of subsection (d). The executive review committee is

being removed because SB 703 removed the requirement for an executive review committee. The TCEQ and TPWD would continue coordination effort via the interagency workgroup as described in new subsection (e)(3).

The commission adopts amendments to subsection (f) to revise the effective date of the MOU to coordinate with the effective date of the rule and to remove the requirement for the agency governing bodies to sign the MOU. The governing bodies will each adopt the rule to signify their agreement to the MOU requirements.

Final Regulatory Impact Analysis

The commission reviewed the rulemaking adoption in light of the regulatory analysis requirements of Texas Government Code (TGC), §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is defined as 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 rulemaking adoption does not meet the definition of "Major environmental rule" because it is not specifically intended to protect the environment or reduce risks to

human health from environmental exposure. Rather, this rulemaking adoption is intended to implement an interagency review procedure for applications requesting authorization to discharge wastewater from aquaculture facilities and coordinate enforcement actions in response to discharges from aquaculture facilities. The rulemaking adoption will also implement portions of SB 703, which removed the TDA's roles and responsibilities related to regulation of the aquaculture industry. This rulemaking adoption should 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. Therefore, the commission finds that this rulemaking adoption is not a "Major environmental rule."

Furthermore, the rulemaking adoption does not meet any of the four applicability requirements listed in TGC, §2001.0225(a). TGC, §2001.0225 only applies to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, the rulemaking adoption does not exceed a standard set by federal law,

rather it addresses the process for the TCEQ and TPWD to coordinate the regulation of aquaculture facilities within the federal law and authority delegated to the state.

Likewise, the rulemaking adoption does not exceed an express requirement of state law nor exceed a requirement of a delegation agreement because state law expressly authorizes it. Finally, the rulemaking adoption was not developed solely under the general powers of the agency because it is also authorized under TWC, §5.104, which authorizes TCEQ to enter into an MOU with any other state agency, and Texas Agriculture Code, §134.031, which directs the TCEQ and TPWD to enter into an MOU.

Under TGC, §2001.0225, only a "Major environmental rule" requires a regulatory impact analysis. Because the rulemaking adoption does not constitute a "Major environmental rule," a regulatory impact analysis is not required.

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

Takings Impact Assessment

The commission evaluated the rulemaking adoption and performed analysis of whether the rulemaking adoption constitutes a taking under TGC, §2007.043. The specific purpose of the rulemaking adoption is to improve coordination between the TCEQ and TPWD and facilitate an exchange of information to assist the TCEQ in

making environmentally sound decisions. The rulemaking adoption will substantially advance this stated purpose by updating the current MOU between the TCEQ and TPWD. The rulemaking adoption provides a formal mechanism by which the TPWD may review and provide feedback on aquaculture issues that are subject to regulation by the TCEQ and have the potential to affect natural resources and the regulation of aquaculture within the jurisdiction of the TPWD.

Promulgation and enforcement of the rulemaking adoption will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject regulations will not affect a landowner's rights in private real property because this rulemaking will not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Thus, this rule will not impose burdens on private real property because the rulemaking adoption neither relates to, nor has any impact on the use or enjoyment of private real property, and there will be no reduction in value of the property as a result of this rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption 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 rulemaking adoption is not

subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The commission held a public hearing on January 4, 2022. The comment period closed on January 5, 2022. No public comments were received.

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Statutory Authority

The rule is adopted under Texas Water Code (TWC), §5.102, concerning general powers of the commission; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its power and duties; TWC, §5.104, which authorizes the Texas Commission on Environmental Quality (TCEQ) to enter into a Memorandum of Understanding (MOU) with any other state agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which establishes the commission's jurisdiction over all aspects of establishing and controlling the quality of waters of the state with all power necessary or convenient to carry out the responsibilities of that jurisdiction; and Texas Agriculture Code, §134.031, which requires the TCEQ and the Texas Parks and Wildlife Department to enter into an MOU for the regulation of matters relating to aquaculture.

The adopted rule implements portions of Senate Bill 703, 87th Legislature, Regular Session.

§7.103. Memorandum of Understanding (MOU) between the Texas Commission on Environmental Quality (TCEQ) and the Texas Parks and Wildlife Department (TPWD) Regarding the Regulation of Aquaculture.

(a) Need for agreement.

(1) The Texas Commission on Environmental Quality (TCEQ) and Texas Parks and Wildlife Department (TPWD) seek to ensure that regulation of aquaculture is conducted in a manner that is both collaborative and responsible.

(2) The TCEQ and TPWD are concerned about issues relating to the raising of non-native aquatic species and their potential for escape into natural ecosystems, including the introduction of disease into natural ecosystems.

(3) The TCEQ and TPWD 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 TCEQ and TPWD seek to implement an interagency review procedure for applications requesting authorization to discharge wastewater from aquaculture facilities.

(5) The TCEQ and TPWD seek to implement 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 TCEQ to enter into an MOU with any other state agency.

(7) Texas Agriculture Code, §134.031, directs the TCEQ and TPWD 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 the TPWD may review and provide feedback on aquaculture issues that are subject to regulation by the TCEQ and that have the potential to affect natural resources and the regulation of aquaculture within the jurisdiction of the TPWD. This exchange of information would assist the TCEQ in making environmentally sound decisions and would improve coordination between the TCEQ and TPWD.

(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, mollusks, or any other organisms, excluding aquatic plants and algae, living in either fresh or marine waters) utilizing ponds, lakes, cages, fabricated tanks and raceways, or other similar structures.

(2) Application--A request submitted by an aquaculture facility to the TCEQ for authorization to discharge under an individual permit or a Notice of Intent (NOI) to seek authorization under a general permit.

(c) Responsibilities.

(1) The responsibilities of the TCEQ 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 TCEQ has general jurisdiction over the state's water quality program including issuance of wastewater discharge permits, water quality planning, and enforcement of water quality rules, standards, orders, and permits, under Texas Water Code, §5.013.

(B) The TCEQ 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 TCEQ is responsible for review of wastewater applications and issuance of wastewater discharge permits.

(2) The responsibilities of the TPWD relate primarily to its functions as a natural resource agency, including its resource protection functions, as designated by the Texas Parks and Wildlife Code, §12.001 and §12.0011.

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

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

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

(F) The 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), and is responsible for review of applications and subsequent issuance of permits relating to these activities.

(d) Coordination procedures for wastewater discharge applications and permits.

(1) Coordination procedures for the Aquaculture General Permit Number TXG130000 and associated NOIs.

(A) During renewal or amendment of the Aquaculture General Permit, the TCEQ will provide the initial draft permit to the TPWD for review and comment prior to submitting the draft to EPA for review and approval.

(i) Within 45 days of the date of receipt of the initial draft permit, the TPWD will complete its initial assessment, and by letter shall provide the TCEQ with formal written recommendations designed to protect fish and wildlife resources or indicate that it has no comments.

(ii) If the TCEQ does not receive formal written comments from the TPWD within 45 days of the date of receipt of the initial draft permit, the TCEQ will conclude that there are no comments and continue processing of the general permit renewal or amendment.

(iii) Formal written comments received from the TPWD will be considered by the TCEQ in developing the final draft permit. The TPWD's comments will be evaluated in conjunction with all other applicable factors and will be incorporated by the TCEQ whenever it is consistent with the TCEQ's responsibilities. In accordance with the responsibilities of the TCEQ as described in subsection (c)(1) of this section, the TCEQ reserves the right to determine the requirements of the final draft permit. Concurrent with submission of the final draft permit to EPA, the TCEQ will provide a copy of the final draft permit to the TPWD.

(B) The TCEQ will provide copies of all NOIs to the TPWD within 14 days of the date of receipt.

(i) Within 45 days of the date of receipt of the NOI by the TPWD, the TPWD will complete its initial assessment, and by letter shall provide the TCEQ with formal written recommendations designed to protect fish and wildlife resources; indicate that it has no comments; or notify the TCEQ that it has requested additional information from the applicant. If TPWD requires additional information to make its evaluation, then the TPWD may request such additional information from the applicant within 45 days of the date of receipt of the NOI.

(ii) Except as provided by paragraph (3)(B) of this subsection, if the TCEQ does not receive a response from the TPWD within 45 days of

TPWD receipt of the NOI, the TCEQ will conclude that there are no comments and continue processing of the application.

(iii) Formal written comments received from the TPWD will be considered by the TCEQ in determining whether to grant authorization under the general permit or require the applicant to seek authorization under an individual permit. The TPWD's comments will be evaluated in conjunction with all other applicable factors consistent with the TCEQ's responsibilities. In accordance with the responsibilities of the TCEQ as described in subsection (c)(1) of this section, the TCEQ reserves the right to determine the final disposition of the NOI.

(2) Coordination procedures for individual permit applications.

(A) The TCEQ will provide to the TPWD a copy of each individual permit application file received which requests authorization to discharge wastewater from aquaculture facilities within 14 days of the TCEQ administrative review completion. The application file 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 the TPWD may complete an initial assessment of the proposed operation.

(B) Within 45 days of the date of receipt of the permit application file, the TPWD will complete its initial assessment, and by letter shall provide the TCEQ with formal written recommendations designed to protect fish and wildlife resources; indicate that it has no comments; or notify the TCEQ that it has requested additional information from the applicant. If TPWD requires additional information to make its evaluation, then the TPWD may request such additional information from the applicant within 45 days of the date of receipt of the permit application file.

(C) Except as provided by paragraph (3)(B) of this subsection, if the TCEQ does not receive a response from the TPWD within 45 days of the TPWD receipt of the permit application file, the TCEQ will conclude that there are no comments and continue processing of the application.

(D) Formal written comments received from the TPWD will be considered by the TCEQ in developing the final draft permit. The TPWD's comments will be evaluated in conjunction with all other applicable factors and will be incorporated by the TCEQ whenever it is consistent with the TCEQ's responsibilities. In accordance with the responsibilities of the TCEQ as described in subsection (c)(1) of this section, the TCEQ reserves the right to determine the requirements of the final draft permit. Upon making a preliminary recommendation regarding an application, the TCEQ will provide a response to the TPWD that contains a copy of the final draft

permit and documentation providing an explanation on why any of the TPWD's comments were not incorporated.

(3) Coordination procedures applicable to all applications.

(A) The scope of review by the 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 the TPWD.

(B) If the TPWD requests additional information from the applicant, the TPWD will request that the applicant provide a copy of the information to the TCEQ. If the applicant does not provide the additional information to the TPWD within 30 days of a request, the TCEQ will determine whether it is appropriate to either suspend processing the application or return it to the applicant. Upon receipt of additional information from the applicant, the TPWD will have 30 days to complete its review and either make final recommendations to the TCEQ or indicate that it has no comments. If formal written comments are not received from the TPWD within 30 days

of receipt of the additional information, the TCEQ will conclude that there are no comments and continue processing of the application.

(C) The TCEQ will consider guidelines developed by the TPWD with input from the TCEQ and stakeholders identifying sensitive aquatic habitat within the coastal zone when reviewing wastewater discharge applications for new aquaculture facilities or expansion of existing facilities in the coastal zone.

(D) The TCEQ and TPWD will strive to provide each other notification of public meetings and contested case hearings that relate to aquaculture applications.

(e) Other coordination activities.

(1) The TPWD shall, within 120 days of the date of adoption of this MOU, review the wastewater discharge application forms and provide proposed changes that are necessary to obtain relevant information for the TPWD's review. The TCEQ will solicit feedback from the TPWD each time the TCEQ revises the forms related to aquaculture facilities.

(2) A new exotic species permit will not be issued by the TPWD to any aquaculture facility that proposes to discharge wastewater until a TCEQ wastewater

discharge permit or other authorization has been issued or it is determined that the facility is exempted from such requirements.

(3) An interagency work group will be formed, whose function will be to coordinate on matters related to aquaculture to aid in ensuring that proposed wastewater discharges will not adversely affect bays, estuaries, or other water in the state. This work group will 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 between the TCEQ and TPWD 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 agency of any changes to the primary contact person.

(4) The TCEQ and TPWD will coordinate studies related to applications that request authorizations for the discharge 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. The TPWD will notify the appropriate TCEQ regional office and the Wastewater Permitting Section Manager. The TCEQ will notify the TPWD Water Quality Program.

(5) The TCEQ and TPWD will strive to coordinate responses to emergency conditions, investigation of unauthorized wastewater discharges, and compliance inspections of aquaculture facilities for wastewater discharges. The TCEQ and TPWD will provide notice to each other at least five days prior to conducting a site inspection related to wastewater discharges, so as to allow the other agency to participate if desired. The TPWD will notify the appropriate TCEQ regional office and the TCEQ will notify the TPWD Water Quality Program.

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

(f) General conditions.

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

(2) Each party shall adopt the MOU by rule, including subsequent amendments. This MOU, and any subsequent amendment, shall become effective on the effective date of the rule.

(3) 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.