

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §1.11, Service on Judge, Parties, and Interested Persons.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission is proposing a number of changes to its procedural rules in this issue of the *Texas Register*. The changes include proposed revisions to Chapters 1, 35, 39, 50, 55, 80, 106, and 116. These chapters contain proposed changes to update and clarify agency rules, to facilitate permit processing and to more clearly set out the responsibilities of those involved in the permitting process. In addition, in part, the changes proposed in this issue of the *Texas Register* are intended to be responsive to comments received during the rulemaking proceedings implementing House Bill (HB) 801 during the summer and early fall of 1999 requesting that the adopted rules be subject to subsequent review to address any deficiencies which became apparent following adoption. (See September 24, 1999 issue of the *Texas Register* (24 TexReg 8190).)

On January 12, 2000, the commission adopted amendments to its procedural rules to implement Senate Bill (SB) 211, including amendments to §1.11, Service on Judge, Parties, and Interested Persons. (See January 28, 2000 issue of the *Texas Register* (25 TexReg 592).) The amendments were intended to mirror provisions of SB 211 which amended Texas Government Code, §2001.42 to provide that a party is presumed to have been notified of a decision or order in a contested case on the third day after notice is mailed by first class mail. Senate Bill 211 did not address when a party is presumed to have been served with a document that has been served by mail by another party in a contested case proceeding or other proceeding before the commission. For the sake of consistency, however, the commission amended

§1.11(d) to provide that service is complete three days after mailing.

However, Texas Rule of Civil Procedure 21a states that service is complete upon deposit in the United States (U.S.) mail. Section 1.11(a) and (b) require participants in commission proceedings to serve a document no later than the day the document is filed with the commission's chief clerk. In many proceedings, there are persons without access to facsimile machines who can only be served by mail. Under §1.11(d) as written, service by mail is complete three days after deposit of the document in the U.S. mail. Therefore, in order to effect timely service no later than the day of filing as required by §1.11(d), it could potentially be argued that a person would be required to mail a document three days before it is filed. To avoid this unintended interpretation of commission rules, the commission proposes amending §1.11(d) to clarify that service is complete upon deposit of a document in the U.S. mail. The proposed amended rule would read as it did prior to the amendments adopted on January 12, 2000. The amendment would also more clearly reflect consistency with the provisions of Texas Rule of Civil Procedure 21a.

SECTION BY SECTION DISCUSSION

Section 1.11(d) is proposed to be amended to provide that service by mail is complete upon deposit of documents in the U.S. mail, rather than three days after mailing as provided under the rule as currently written.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendment is in effect, there will be no significant fiscal implications to units

of state and local government as a result of administration or enforcement of the proposed amendment.

The proposed amendment will clarify when documents are considered served in contested case hearings. The rule currently provides that service by mail is complete three days after being mailed. The proposed rule change provides that service by mail is complete upon mailing. This change will make this rule consistent with other agency procedural rules and Texas Rule of Civil Procedure 21a. The proposed rule change is administrative in nature and is not anticipated to result in any fiscal implications to any affected unit of state or local government.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be to ensure that document filing and service requirements are consistent with other agency rules and with Texas Rule of Civil Procedure 21a.

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SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of the proposed amendment. The proposed amendment will clarify that documents are considered served when they are mailed.

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DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of 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 the statute. “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 rulemaking is procedural in nature and is only intended to clarify the date by which service by mail is complete. Therefore, the rulemaking does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rulemaking pursuant to Texas Government Code, §2007.043. The specific purpose of the rulemaking is to clarify the date by which service by mail is complete. The rulemaking contains procedural rule changes only and does not affect private real property. Therefore, the rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rulemaking is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor does it affect any action or authorization identified in §505.11. The rulemaking concerns only the procedural rules of the commission. Therefore, the rulemaking is not subject to the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal on March 6, 2001 at 10 a.m., Building F, Room 2210, Texas Natural Resource Conservation Commission Complex, 12100 Park 35 Circle, Austin, Texas. The hearings are 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 hearings; however, agency staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-016-035-AD. Comments must be received in writing by 5:00 p.m., March 12, 2001. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules and to set policy by rule; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

The proposed amendment implements TWC, §5.103 and §5.105, and Texas Government Code, §2001.004.

CHAPTER 1: PURPOSE OF RULES, GENERAL PROVISIONS

§1.11

§1.11. Service on Judge, Parties, and Interested Persons.

(a) - (c) (No change.)

(d) Service by mail is complete upon [three days after] deposit of the document, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by courier-receipted delivery is complete upon the courier taking possession. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Service by telephonic document transfer must be followed by serving an extra copy in person, by mail, or by carrier receipted delivery within one day. Judges may impose different service requirements in SOAH proceedings.

(e) - (g) (No change.)