

The Texas Commission on Environmental Quality (commission) adopts an amendment to §10.7.

Section 10.7 is adopted *without change* to the proposed text as published in the November 22, 2002 issue of the *Texas Register* (27 TexReg 10893) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Previously existing §10.7(a) provided that the chief clerk shall make audio recordings of commission meetings which shall serve as minutes, and that the chief clerk shall keep all recordings in the commission's permanent records. Under Texas Government Code, §551.021(a), a governmental body is required to prepare and keep minutes or make a tape recording of each open meeting of the governmental body. Because of concerns over the feasibility of retaining audio recordings as permanent records, the commission adopts an amendment to the existing rule requiring audio recordings. Rather than requiring audio recordings to serve as the minutes, the rule now requires the chief clerk to prepare written minutes of each commission open meeting.

Texas Government Code, §551.021(b), requires that the minutes must state the subject of each deliberation and indicate each vote, order, decision, or other action taken. The commission adopts amended §10.7(a) to incorporate this statutory language. The adopted rule also requires that the minutes be kept in accordance with the agency's records retention schedule. Although the amendment changes the media of the minutes, the rule requires the agency to make an audio recording of each commission open meeting and retain the recording for ten years unless a longer period is required by Texas Government Code, §441.187(b). Section 441.187(b) provides that a state record may not be destroyed if any litigation, claim, negotiation, audit, open records request, administrative review, or

other action involving the record is initiated before the expiration of the applicable retention period until completion of the action and resolution of all issues that arise from the action.

SECTION DISCUSSION

The adopted amendment to §10.7(a) deletes the language requiring the chief clerk to make audio recordings of commission meetings, which serve as the minutes, and deletes the language requiring the chief clerk to keep all recordings in the commission's permanent records. This deleted language is replaced with language requiring the chief clerk to prepare written minutes of each commission open meeting, which shall state the subject of each deliberation and indicate each vote, order, decision, or other action taken. Section 10.7(a) is also amended to state that the general counsel is authorized to approve the minutes, which shall be kept in accordance with the agency's records retention schedule. Previously existing §10.7(b) is redesignated as subsection (c), in order to accommodate the addition of adopted subsection (b), which states that the agency shall make an audio recording of each commission open meeting which shall be retained for ten years after creation unless a longer retention period is required by Texas Government Code, §441.187(b). Finally, adopted subsection (c) changes "chief clerk" to "agency" in the first sentence, to more accurately reflect duties and responsibilities.

FINAL 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. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures concerning minutes and recordings of commission meetings, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the adopted rule is a major environmental rule, a regulatory impact analysis is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law because federal law does not set standards for the media of commission minutes. This adoption does not exceed an express requirement of state law because it is authorized by Texas Government Code, §551.021. This adoption does not 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 because no delegation agreement addresses the media of commission minutes. Finally, this adoption does not adopt a rule solely under the general powers of the agency, but rather under Texas Government Code, §551.021.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rule is subject to Texas Government Code, Chapter 2007. The specific primary purpose of the

rulemaking is to revise commission rules relating to minutes and recordings of commission meetings. This rule will substantially advance this stated purpose by providing specific procedural requirements relating to making and keeping written minutes and recordings of commission meetings. Accordingly, promulgation and enforcement of the rule will not burden private real property. Further, as explained in this section, the adopted rule does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*) and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. The rulemaking action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (31 TAC Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 *et seq.*).

PUBLIC COMMENT

There was no public hearing held on the proposed rulemaking and there were no written comments submitted during the comment period which closed at 5:00 p.m., December 23, 2002.

CHAPTER 10: COMMISSION MEETINGS

§10.7

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Government Code, §551.021, which requires a governmental body to prepare and keep minutes or make a tape recording of each open meeting of the body.

§10.7. Minutes of Commission Meeting.

(a) The chief clerk shall prepare written minutes of each commission open meeting, which shall state the subject of each deliberation and indicate each vote, order, decision, or other action taken. The general counsel is authorized to approve the minutes, which shall be kept in accordance with the agency's records retention schedule.

(b) The agency shall make an audio recording of each commission open meeting, which shall be retained for ten years after creation, unless a longer retention period is required by Texas Government Code, §441.187(b).

(c) The agency shall not make audio recordings of closed sessions of commission meetings properly held in accordance with the requirements of the Open Meetings Act. Except for a private consultation with an attorney under Open Meetings Act, §551.071, the general counsel or chairman shall keep a certified agenda of each closed session. A certified agenda of a closed session is available for public inspection and copying only under the requirements of Open Meetings Act, §551.104(b)(3).