

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** September 24, 2010

Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Docket No.: 2010-0162-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 1, Purpose of Rules, General Provisions
Chapter 19, Electronic Reporting; Electronic Transmission of Information by Commission
Rule Project No. 2009-049-019-LS

Background and reason(s) for the rulemaking:

The new section and amendment in Chapter 19 will enable the commission to implement House Bill (HB) 3544 sponsored by Representative Lucio during the 81st legislative session. The bill amended Texas Water Code (TWC), §5.128 and authorized the commission to transmit information electronically. Because the statute is permissive and not mandatory, without a rule change, the commission would need to abide by its existing rules, including any rules that might be construed to prohibit the electronic transmittal of information. This rulemaking would supersede any rules that would otherwise prevent the commission from sending information, including notices, orders, and decisions electronically. The amendment to §1.10 will add electronic filing as a method of filing with the Chief Clerk's office. Electronic filing is currently authorized pursuant to a waiver by the General Counsel in accordance with §1.10(h). The amendment provides that the rule authorizing electronic filing supplements other procedural rules of the commission which specify methods for filing but which do not include electronic filing. The amendment to §1.10 did not arise from HB 3544, but it does implement the agency's eBusiness initiative.

Scope of the rulemaking:

A) Summary of what the rulemaking will do: The rulemaking will expand the scope of Chapter 19 to include electronic transmission of information by the commission. It will provide superseding authority for the commission to transmit information electronically notwithstanding agency rules that require hardcopies or mailing by a certain method, i.e., using the United States Postal Service as the carrier. The rulemaking will also put into rule an already existing authorization for electronic filing of documents with the Chief Clerk's office.

B) Scope required by federal regulations or state statutes: The scope of the statute is very broad and includes information issued or sent by the commission. Similar to the statute, the changes to Chapter 19 would not mandate electronic transmittal of information, but would authorize it to the extent consistent with applicable federal requirements.

C) Additional staff recommendations that are not required by federal law or state statute: It is unknown whether electronic notices for permit applications would be allowable under the commission's federally authorized, delegated, or approved programs. Accordingly, if the commission wants to obtain the maximum possible savings in time and resources under HB 3544, the commission should engage in discussions with representatives from EPA to ensure electronic notices may be issued for commission programs that are federally authorized, delegated, or approved.

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Statutory authority:

The adopted new section and amendments are authorized by TWC, §5.128, Electronic Reporting to Commission; Electronic Transmission of Information by Commission; Reduction of Duplicate Reporting.

Effect on the:

A) Regulated community: Most medium to large regulated entities and their representatives are already conducting business electronically, so this will likely not have a significant impact on their operations.

B) Public: Many members of the public are already communicating electronically and will likely not be significantly impacted by a change in agency procedures regarding transmission of information. Individuals without access to computers or the internet will not be affected because they can continue receiving information from the commission by traditional means.

C) Agency programs: The impact on agency programs will include changes for the Chief Clerk's office regarding the collection of email addresses and electronic issuance of notices. These changes have been anticipated and planned for. Additionally, there will be an increase on staff time to keep email addresses current and handle/process "returned" email. Electronic filing with the Chief Clerk's office is already authorized and is an ongoing method of filing documents, so there will be no impact on agency programs from this part of the rulemaking.

Stakeholder meetings:

No stakeholder meetings were held.

Public comment:

The commission received one comment from the Texas Chemical Council (TCC).

TCC commented that it is generally supportive of eBusiness initiatives but expressed concerns about transitioning to the use of email for transmitting notices and other information.

TCC commented that email submission is not a guarantee of delivery and that email may not be delivered for a variety of reasons including the fact that most corporate email addresses are individual or employee specific and that individuals can be out of the office due to vacations or change of jobs; computer servers can fail; and individual email boxes have size restrictions.

TCC suggested that the commission should develop a process to be put in the rules for corporations to provide a company-specific email address for receipt of notices and other information and that no email addresses be individual-specific if so desired by the company.

TCC commented that its members are concerned that emailed notices may be missed for a variety of reasons and that they might be subject to enforcement if time sensitive information is not received and addressed appropriately.

TCC requested that the commission clarify its intent concerning confidential business information. TCC further states that it assumes the agency's statement means the actual email address cannot be confidential but that any business information contained in the email can remain confidential when so designated. TCC commented that the commission should be required to retain documentation that the email was received and did not "bounce-back" due to server restrictions or other issues.

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TCC also commented that in the event an email is undeliverable, the commission should be required to send the notice or other document using the United States Postal Service.

TCC also commented that the commission should delete language requiring that persons who provide public comment notify the commission in the event their email address changes because it adds an unnecessary burden to those submitting public comment, potentially discouraging submission of comments. This would require companies or entities submitting comments to maintain a running log of all rules for which public comments were submitted. Because most comments include a phone contact, the commission could follow up by phone.

TCC suggested that the commission revise the rules to state that information sent by the commission is presumed to have been received if it was sent to the designated email address and the commission has a valid electronic confirmation of receipt.

Significant changes from proposal:

No changes from proposal.

Potential controversial concerns and legislative interest remaining after proposal and public comment:

There is no known legislative interest other than a phone call received last year by the Office of Legal Services from a staff member in Senator Uresti's office inquiring about the status of e-notice to legislators. This same staff member had worked on eBusiness issues while working as an intern at the TCEQ.

HB 3544 also amended Texas Government Code, §552.137 by creating an additional exception to that section of the Public Information Act which addresses confidentiality of email addresses. It provides email addresses provided to a governmental body for the purpose of providing public comment on, or receiving notices relating to, an application, or receiving orders or decisions, are not covered by the confidentiality and non-disclosure provisions of Texas Government Code, §552.137. While the change in the confidentiality of certain email addresses is not part of this rulemaking, it should be noted that as the agency enhances its eBusiness capabilities, many of the email addresses that meet the criteria in Texas Government Code, §552.137 will be subject to disclosure under that section.

Will this rulemaking affect any current policies or require development of new policies?

Under this rulemaking, the agency would need to consider which types of information that it transmits would be appropriate for electronic transmission. Because electronic filing with the Chief Clerk's office is already authorized and is an ongoing method of filing documents, this part of the rulemaking does not represent a change in current policy.

What are the consequences if this rulemaking does not go forward? Are there alternative to rulemaking?

The consequences of the rulemaking not going forward would be that the commission will only be able to partially implement HB 3544. Because the statute is permissive and does not mandate electronic transmission of information by the commission, the commission would need to follow any rules that conflict with it. There are no known alternatives to rulemaking if the commission desires to achieve the greatest amount of savings from eBusiness initiatives by the rulemaking.

Because electronic filing with the Chief Clerk's office is currently authorized pursuant to a waiver by the General Counsel in accordance with §1.10(h), there are no consequences for this part of the rulemaking if this rulemaking does not go forward.

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Key points in adoption rulemaking schedule:

***Texas Register* proposal publication date: May 14, 2010**
Anticipated *Texas Register* publication date: November 5, 2010
Anticipated effective date: November 11, 2010
Six-month *Texas Register* filing deadline: November 12, 2010

Agency contacts:

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Attachments
HB 3544

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