

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

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Existing §10.7(a) provides 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 proposes to amend the existing rule requiring audio recordings. Rather than requiring audio recordings to serve as the minutes, the proposal would require 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 proposes to amend §10.7(a) to incorporate this statutory language. The proposal would also require that the minutes be kept in accordance with the agency's records retention schedule. Although the proposed amendment changes the media of the minutes, the commission proposes to require 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 proposed 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 proposed to be 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 proposed to be 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. Existing §10.7(b) is proposed to be redesignated as subsection (c), in order to accommodate the addition of proposed 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, proposed subsection (c) would change "chief clerk" to "agency" in the first sentence, to more accurately reflect duties and responsibilities.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist in the Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed amendment is in effect, there will be no significant fiscal implications for the agency or any other unit of state government as a result of administration or

enforcement of the proposed amendment. The proposed amendment is procedural in nature and only affects the commission.

The proposed amendment would require the commission to maintain written minutes of each commission open meeting, in lieu of the existing method utilizing audio tapes. The written minutes would be maintained in accordance with the commission's records retention schedule. Audio recordings of each commission open meeting will still be retained for at least ten years, but will not be considered the official minutes of the meeting. No significant fiscal implications are anticipated for the commission or any other unit of state or local government due to implementation of the proposed amendment.

#### 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 access to the minutes for commission open meetings via written or audio recordings.

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#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed amendment, which would require the commission to maintain written minutes of each commission open meeting, in lieu of the existing method utilizing audio tapes. The written minutes would be maintained in accordance with the commission's records retention schedule. Audio recordings of each commission open meeting will still be retained for at least ten years, but will not be considered the official minutes of the meeting. No fiscal implications are anticipated for any small or micro-business due to implementation of the proposed amendment.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed 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 proposed 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 proposed rule is a major environmental rule, a draft 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 propose to adopt a rule solely under the general powers of the agency. This proposal does not exceed a standard set by federal law because federal law does not set standards for the media of commission minutes. This proposal does not exceed an express requirement of state law because it is authorized by Texas Government Code, §551.021. This proposal 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. This proposal does not adopt a rule solely under the general powers of the agency, but rather under Texas Government Code, §551.021. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking action and performed a preliminary analysis of whether the proposed rule is subject to Texas Government Code, Chapter 2007. The specific primary purpose of the proposed rulemaking is to revise commission rules relating to minutes and recordings of commission meetings. This proposed 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 proposed 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 proposed 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 proposed 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 proposed 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.*). Interested persons may submit comments on the consistency of the proposed amendment with the CMP during the public comment period.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, 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 2002-067-009-AD. Comments must be received by 5:00 p.m., December 23, 2002. For further information contact Ray Henry Austin, Policy and Regulations Division, at (512) 239-6814.

## CHAPTER 10: COMMISSION MEETINGS

### §10.7

#### STATUTORY AUTHORITY

The amendment is proposed 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.

The proposed amendment implements TWC, §5.103 and §5.105; and Texas Government Code, §551.021.

#### **§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. [The chief clerk shall make audio recordings of commission

meetings, which shall serve as the minutes. The chief clerk shall keep all recordings in the commission's permanent records.]

(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) [(b)] The agency [chief clerk] 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 [the] 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).

