

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §§19.1, 19.3, 19.10, 19.12, and 19.14. Sections 19.1 and 19.10 are adopted *with changes* to the proposed text as published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7235). Sections 19.3, 19.12, and 19.14 are adopted *without changes* to the proposed text and will not be republished.

The new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas State Implementation Plan and as part of a program approval application for all of the commission's federally authorized, delegated, or approved programs.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the rules is to implement the United States Environmental Protection Agency's (EPA) new Cross Media Electronic Reporting Rule (CROMERR) as published in the October 13, 2005, issue of the *Federal Register* (70 FR 59848 – 59889), which became effective January 11, 2006. EPA finalized CROMERR to establish the framework for federal acceptability of electronic reports from regulated entities in order to satisfy specific document submission requirements from EPA regulations. Since states are delegated or authorized to implement certain federal programs, states must seek EPA approval to accept electronic documents for environmental programs that EPA has delegated, authorized, or approved states to administer in accordance with CROMERR. CROMERR does not require that any document or report be submitted electronically and it does not require that states receive electronic documents or reports. CROMERR establishes electronic reporting as an acceptable regulatory alternative, and establishes requirements to assure that electronic documents are as legally enforceable as their paper counterparts. Where states intend to receive documents or reports

electronically, CROMERR specifies criteria for their acceptable submission, in order to ensure federal enforceability. Because CROMERR impacts the commission's authorized programs, creating Chapter 19 in 30 TAC to apply to all of those programs will minimize the need to revise rules for every authorized program now and in the future if EPA amends CROMERR. The process by which the TCEQ must obtain authorization for its electronic reporting program is generally the same process the agency follows in seeking approval for its environmental permitting programs. In the case of CROMERR, however, EPA has established a streamlined process that TCEQ can use to obtain such approval. That process includes a technical paper outlining how TCEQ's electronic document receiving system, and any known future enhancements, meets the requirements of CROMERR. The application must also include certification from the Office of the Attorney General that the rules and statutes in force in Texas are adequate to meet the requirements of CROMERR. This certification cannot take place until after the TCEQ rulemaking is effective. The TCEQ has until October 13, 2007, to apply for approval to continue accepting electronic reports and applications for authorized programs for which the agency is currently receiving electronic reporting. The EPA has 75 days to determine whether the documents are administratively complete. Once the EPA determines that Texas has an administratively complete package, they have 360 days to determine if Texas has met the requirements of CROMERR. If EPA does not respond within the time frame, the system is automatically approved. For federally authorized programs not currently utilizing an electronic receiving system, there is no deadline specified; however, these programs may not initiate such systems until the agency receives approval under CROMERR.

The rules establish a system for authorized programs to accept electronic submittal of reports, permit applications, and other specified documents using the commission's electronic document receiving system. These rules establish that a person, as defined in 30 TAC §3.2(25), Definitions, who fails to comply with electronic reporting procedures will be subject to the same level of enforcement as one who fails to submit written documents as required.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules and guidelines and to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, August 2006.

The commission adopts new Chapter 19, Electronic Reporting, to comply with the EPA's new CROMERR as published in the October 13, 2005, issue of the *Federal Register* (70 FR 59848 – 59889), which became effective January 11, 2006. The commission adopts the rules to define 11 terms, outline the applicability of the rules, explain the process of electronic signatures, and describe enforcement remedies for noncompliance.

Subchapter A - General Provisions

§19.1. Definitions.

Section 19.1 incorporates the definitions for: authorized program; copy of record; electronic document; electronic document receiving system; electronic signature; electronic signature agreement; electronic signature device; federal program; state program; handwritten signature; and signatory.

Since proposal, the commission added that obligations on the individual's part are included within the electronic signature agreement.

§19.3. Applicability.

Section 19.3 sets forth the applicability of Chapter 19 to persons who submit electronic final documents to the commission to comply with regulation. This section also affirms that the chapter will apply to federally authorized programs and to state programs for which the commission has announced on its public Web site that it is accepting specified electronic documents. A person may submit documents electronically only if such announcement has been made. Electronic documents must be submitted to the commission according to the requirements of Chapter 19 and following the requirements of the commission's electronic document receiving system. The commission also adopts this rule to affirm that documents submitted via facsimile, magnetic, or optical media are not subject to Chapter 19, consistent with CROMERR, and are therefore exempt from the requirements of this chapter.

Subchapter B – Electronic Reporting Requirements

§19.10. Use of Electronic Document Receiving System.

Section 19.10 sets forth the mandate that applicable electronic documents must be submitted according to the requirements of Chapter 19 using the commission's electronic document receiving system. It further affirms a person may not allow another individual to use the electronic signature device unique to his or her signature. Since proposal, the commission added that individuals desiring to use an electronic signature device must execute an electronic signature agreement with handwritten wet ink signature or by using an electronic identity verification system utilized by the commission.

§19.12. Authorized Electronic Signature.

Section 19.12 affirms that when the electronic signature device is used to create an individual's electronic signature, the code or mechanism must be unique to that individual at the time the signature is created and the individual must be uniquely entitled to use it. The section also sets forth the directive that a signatory will protect the electronic signature device from compromise and promptly report any evidence discovered that the device has been compromised. An electronic signature device is compromised if the code or mechanism is available for use by any other individual. It further requires that electronic documents must bear a valid electronic signature if a signature would be required by the regulatory program on the paper document. This rulemaking stipulates an electronic signature on an electronic document is valid if: it has been created with an electronic signature device that the signatory is uniquely entitled to use for signing; the device has not been compromised; and the signatory is authorized to sign the document. This section establishes that the signatory intended to sign the document and submit it to the commission by the presence of an electronic signature.

§19.14. Enforcement.

Section 19.14 affirms that an electronic signature is the legal equivalent of a handwritten signature. Section 19.14 affirms that a person is subject to appropriate penalties, fines, or other remedies under the commission rules or applicable statutes for failure to comply with a reporting requirement if the individual reports electronically and fails to comply with the applicable provisions for electronic reporting. This section affirms that nothing in Chapter 19 limits the use of electronic documents or information derived from electronic documents as evidence in enforcement proceedings.

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 the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the Texas Government Code. A “major environmental rule” is 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. The primary purpose of this rulemaking action is to implement the EPA’s new CROMERR as published in the *Federal Register* on October 13, 2005. The primary goal of this rulemaking is to allow the commission to establish a voluntary system for the receipt of electronic documents under the commission’s federally authorized programs and designated state programs and to provide standards of compliance and enforcement. The rulemaking is procedural in nature and does not address environmental risks or exposures. Therefore, the rulemaking does not constitute a major environmental rule, and thus is not subject to a formal regulatory analysis. The commission solicited public comment on the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the rulemaking action under Texas Government Code, §2007.043. The specific primary purpose of this rulemaking is to implement the EPA’s CROMERR and provide standards of compliance and enforcement for the commission to receive electronic reports and other documents under federally authorized programs and designated state

programs. Promulgation and enforcement of the adopted rules will not affect private real property, because the adopted rulemaking is related to the commission's procedural rules, rather than substantive requirements. Implementation of the amendments will not result in any taking of real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program. The commission invited public comment regarding the consistency of the rules with the CMP. No comments were received regarding the consistency of the rules with the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The adopted rules may affect owners and operators subject to the federal operating permits program. If the executive director, in the future, announces that it will accept certain reports required by operating permits electronically, owners and operators will have the option to use the commission's electronic document receiving system in lieu of submitting paper documentation.

PUBLIC COMMENT

The proposal was published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7235). The commission held a public hearing on October 3, 2006 and on December 4, 2006. The comment

period closed on December 4, 2006. The commission received comments from the Environmental Protection Agency (EPA).

RESPONSE TO COMMENTS

EPA supported adding the proposed Electronic Reporting regulations to the SIP and other air programs and congratulated Texas on being the first to propose such air regulations. EPA noted that the state's proposal does not address the National Emission Standards for Hazardous Air Pollutants for source categories (40 CFR Part 63). EPA commented that the proposed definition for electronic signature agreement does not appear to reference the requirements of proposed §19.12 nor does the proposed §19.12 appear to reference the proposed definition. EPA further stated that the definition lacks acknowledgement of an individual's obligations connected with preventing compromise of the electronic signature device (§19.1).

The commission did not make any changes to the rule in response to the comment regarding the National Emission Standards for Hazardous Air Pollutants because it is outside the scope of the rulemaking which is to specifically address electronic reporting. The commission agrees with EPA's other comments and has added to the definition that obligations on the individual's part are included within the electronic signature agreement. The commission also made a change to §19.10(b) to state that individuals desiring to use an electronic signature device must execute an electronic signature agreement with handwritten wet ink signature or by using an electronic identity verification system utilized by the commission. The commission appreciates EPA's support.

SUBCHAPTER A: GENERAL PROVISIONS

§19.1, §19.3

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, which allows the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state; §5.128, which authorizes the commission to encourage the use of electronic reporting; §26.011, which authorizes the commission to adopt rules regulating water quality; §26.345, which authorizes the commission to adopt rules regulating petroleum storage tanks; §27.019, which authorizes the commission to adopt rules regulating underground injection wells; §28.011, which authorizes the commission to make and enforce rules for the protection of underground water; §26.040, which authorizes the commission to adopt rules necessary to implement a general permit program for water quality; and §37.002, which authorizes the commission to adopt rules for the occupational licensing and registration program; Texas Health and Safety Code, §382.017, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act; §341.031, which authorizes the commission to adopt and enforce rules regulating public drinking water and implementing the Federal Safe Drinking Water Act; §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; §361.121, which requires the commission to establish an electronic reporting system for holders of permits for the land application of sludge; §371.028, which authorizes the commission to adopt rules regulating management of used oil; and §374.051, which authorizes the commission to adopt rules to administer and enforce the dry cleaner

program, and the Texas Business and Commerce Code, §43.007 (electronic document recognition), which provides legal recognition of electronic records, electronic signatures, and electronic contracts.

The adopted new sections implement Texas Water Code, §5.128, relating to electronic reporting; and CROMERR, the federal program for electronic reporting, 40 Code of Federal Regulations Parts 3, 9, 51, 60, 70, 71, 123, 142, 145, 162, 233, 257, 258, 271, 281, 403, 501, 745, and 763.

§19.1. Definitions.

In addition to the terms defined in Chapter 3 of this title (relating to Definitions), the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Authorized program**--A federal program that the United States Environmental Protection Agency (EPA) has delegated, authorized, or approved the State of Texas to administer, or a program that the EPA has delegated, authorized, or approved the State of Texas to administer in lieu of a federal program, under other provisions of 40 Code of Federal Regulations and such delegation, authorization, or approval has not been withdrawn or expired.

(2) **Copy of record**--A true and correct copy of an electronic document received by an electronic document receiving system, which can be viewed in a human-readable format that clearly and

accurately associates all the information provided in the electronic document with descriptions or labeling of the information. A copy of record includes:

(A) all electronic signatures contained in or associated with that document;

(B) the date and time of receipt; and

(C) any other information used to record the meaning of the document or the circumstances of its receipt.

(3) **Electronic document**--Any information that is submitted in digital form to satisfy requirements of an authorized program or other designated state programs. Information may include data, text, sounds, codes, computer programs, software, or databases.

(4) **Electronic document receiving system**--A set of apparatus, procedures, software, or records used to receive electronic documents.

(5) **Electronic signature**--Any information in digital form that is included in or associated with an electronic document for the purpose of expressing the same meaning and intention as would a handwritten signature if affixed to an equivalent paper document with the same reference to the same content.

(6) **Electronic signature agreement**--A document drafted by the executive director and signed by an individual with respect to an electronic signature device that the individual will use to create his or her electronic signature and whereon the individual acknowledges the obligations connected with preventing compromise of the electronic signature device.

(7) **Electronic signature device**--A code or other mechanism that is used to create electronic signatures.

(8) **Federal program**--Any program administered by the United States Environmental Protection Agency under any provision of 40 Code of Federal Regulations.

(9) **State program**--Any program, other than a federal program administered by the United States Environmental Protection Agency under any provision of 40 Code of Federal Regulations, that is implemented by the commission under the Texas Water Code, Texas Health and Safety Code, and other laws of the State of Texas.

(10) **Handwritten signature**--The scripted name or legal mark of an individual, made by that individual with a marking or writing instrument such as a pen or stylus and executed or adopted with the present intention to authenticate a writing in a permanent form.

(11) **Signatory**--An individual authorized to and who signs a document using a format acceptable to the commission.

§19.3. Applicability.

(a) This chapter applies to:

(1) persons, as defined in §3.2 of this title (relating to Definitions), and signatories who submit official, final electronic documents to the commission to satisfy requirements of:

(A) authorized programs for which the executive director has announced on the commission's public Web site that the commission is accepting specified electronic documents; or

(B) state programs for which the executive director has announced on the commission's public Web site that the commission is accepting specified electronic documents;

(2) the commission's electronic document receiving system and other software applications implemented, revised, or modified as announced by the commission; and

(3) authorized programs and state programs for which the executive director has announced on the commission's public Web site that the commission is accepting specified electronic documents.

(b) This chapter does not apply to:

(1) documents submitted via facsimile; or

(2) electronic documents submitted via magnetic or optical media such as diskette,
compact disc, digital video disc, or tape.

SUBCHAPTER B: ELECTRONIC REPORTING REQUIREMENTS

§§19.10, 19.12, 19.14

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, which allows the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state; §5.128, which authorizes the commission to encourage the use of electronic reporting; §26.011, which authorizes the commission to adopt rules regulating water quality; §26.040, which authorizes the commission to adopt rules necessary to implement a general permit program for water quality; §26.345, which authorizes the commission to adopt rules regulating petroleum storage tanks; §27.019, which authorizes the commission to adopt rules regulating underground injection wells; §28.011, which authorizes the commission to make and enforce rules for the protection of underground water; and §37.002, which authorizes the commission to adopt rules for the occupational licensing and registration program; Texas Health and Safety Code, §382.017, which authorizes the commission to adopt rules consistent with the policy and purpose of the Texas Clean Air Act; §341.031, which authorizes the commission to adopt and enforce rules regulating public drinking water and implementing the Federal Safe Drinking Water Act; §361.024, which authorizes the commission to adopt rules for the management and control of solid waste; §361.121, which requires the commission to establish an electronic reporting system for holders of permits for the land application of sludge; §371.028, which authorizes the commission to adopt rules regulating management of used oil; and §374.051, which authorizes the commission to adopt rules to administer and enforce the dry cleaner

program, and the Texas Business and Commerce Code, §43.007 (electronic document recognition), which provides legal recognition of electronic records, electronic signatures, and electronic contracts.

The adopted new sections implement Texas Water Code, §5.128, relating to electronic reporting; and CROMERR, the federal program for electronic reporting, 40 Code of Federal Regulations Parts 3, 9, 51, 60, 70, 71, 124, 142, 145, 162, 233, 257, 258, 271, 281, 403, 501, 745, and 763.

§19.10. Use of Electronic Document Receiving System.

(a) When the executive director has announced on the commission's public Web site that it is accepting specified electronic documents, individuals who submit to the commission electronic documents to satisfy requirements of authorized programs or designated state programs must use the commission's electronic document receiving system.

(b) Individuals desiring to use an electronic signature device must execute an electronic signature agreement with handwritten wet ink signature or by using an electronic identity verification system utilized by the commission.

(c) Authorized signatories may not allow another individual to use the electronic signature device unique to his or her signature.

§19.12. Authorized Electronic Signature.

(a) When the electronic signature device is used to create an individual's electronic signature, the code or mechanism must be unique to that individual at the time the signature is created and the individual must be uniquely entitled to use it. Signatories shall:

(1) protect the electronic signature device from compromise; and

(2) report to the commission any evidence that the device has been compromised, within one business day of the discovery.

(b) An electronic signature device is compromised if the code or mechanism is available for use by any other individual.

(c) An electronic document must bear the valid electronic signature of a signatory if that signatory is required under the authorized program or the state program to sign the paper document for which the electronic document substitutes.

(d) An electronic signature on an electronic document is valid if it has been created with an electronic signature device that the identified signatory is uniquely entitled to use for signing that document; the device has not been compromised; and the signatory is an individual who is authorized to

sign the document by virtue of his or her legal status and/or his or her relationship to the entity on whose behalf the signature is executed.

(e) The presence of an electronic signature on an electronic document submitted to the commission establishes that the signatory intended to sign the electronic document and to submit it to the commission to fulfill the purpose of the electronic document.

§19.14. Enforcement.

(a) An electronic signature on an electronic document submitted to the commission is the legal equivalent of a handwritten signature on a paper document submitted to the commission.

(b) Persons, as defined in §3.2 of this title (relating to Definitions), and signatories are subject to penalties, fines, and other remedies under commission rules or applicable statutes for failure to comply with a reporting requirement of the commission if the person or signatory reports electronically and fails to comply with the applicable provisions of this chapter, applicable statutes, commission rules, and the electronic participation agreement.

(c) Nothing in this chapter limits the use of an electronic document, copy of record, or information derived from electronic documents as evidence in enforcement proceedings.