

The Texas Commission on Environmental Quality (commission) proposes an amendment to §1.10.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

House Bill (HB) 3544 enacted by the 81st Legislature amended Texas Water Code (TWC), §5.128 by removing statutory obstacles to the agency's eBusiness initiative. The eBusiness initiative was a commission wide effort to evaluate processes that involved the commission's use of paper and determine whether those functions could instead be performed electronically. One of the most significant items identified in that process was issuance of notices and other documents by the chief clerk's office. HB 3544 authorizes but does not require the commission to utilize electronic means of transmission of information including notices, orders, and decisions issued or sent by the commission. Many agency rules regarding these documents expressly require that they be mailed and there are many rules that further require the United States Postal Service to be the carrier. The rulemaking, as further described, will provide authority for the agency to send these items electronically. The rulemaking does not apply to the transmittal of information by offices of the commission such as the executive director and the Office of Public Interest Counsel when those offices are transmitting information in their capacity as parties in contested case hearings before the State Office of Administrative Hearings (SOAH) or proceedings before the commission. The applicable procedural rules and SOAH orders will continue to apply under those circumstances. HB 3544 also amended Texas Government Code, §552.137 by creating an additional exception to that section which addresses confidentiality of email addresses. It provides that 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. The change to Texas Government Code, §552.137 is self implementing and therefore not included as part of this rulemaking; however, it

will affect the commission's implementation of this rulemaking by changing its practice regarding disclosure of emails.

The amendment will add electronic filing as a method for filing with the chief clerk's office. This change did not arise from HB 3544, but it does implement the agency's eBusiness initiative. In order to utilize the chief clerk's electronic filing system, documents must be associated with an active docket number assigned by the commission. Because the electronic filing of documents with the chief clerk does not involve documents being filed in order to satisfy federal requirements under federally delegated, authorized, or approved programs, this rule change does not affect the commission's electronic reporting system, the State of Texas Environmental Electronic Reporting System, known as STEERS, which received federal approval from the United States Environmental Protection Agency under its Cross-Media Electronic Reporting Rule, known as CROMERR.

SECTION DISCUSSION

The amendment to §1.10(c) will add electronic filing as a method for filing documents where appropriate with the chief clerk's office. The rule 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(d) provides that persons using the chief clerk's designated electronic filing system must also comply with any other instructions set forth by the chief clerk on the commission's website. The amendment to §1.10(e) provides that for documents filed using the chief clerk's designated electronic filing system, the time of filing is upon receipt by the system as evidenced by the system's confirmation email, or the commission's integrated database.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The proposed rule explicitly allows parties to submit documents electronically if they are associated with an active docket number. Since July 2009, the agency has allowed the electronic filing of these documents by waiving requirements to file documents by United States mail, facsimile, or hand delivery as provided by current rule. The proposed rule is not expected to have a fiscal impact on other state agencies or local governments since they have been allowed to file documents electronically since July 2009.

The proposed rule is part of the agency's eBusiness Initiative. A separate rulemaking addresses the fiscal implications of the implementation of the provisions of HB 3544, 81st Legislature, which allows the agency to evaluate the use of electronic means to issue notices and other documents.

The proposed rule amends Chapter 1 by explicitly allowing the electronic filing of documents associated with an active docket number. Electronic filing of these documents is currently allowed because current filing requirements have been waived. The proposed rule will provide more clarity regarding the submission of documents associated with an active docket number. Parties that have submitted such documentation in the past by non-electronic means could experience cost savings in efficiency and for postage, delivery, and copy costs if they choose to file electronically. However, any cost savings is not expected to be significant. The amount of cost savings will depend on the amount of documentation submitted and the business practices of each party.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be clarity in agency rules regarding the electronic filing of documents associated with an active docket number.

The proposed rule explicitly permits electronic filing of documents that the agency has allowed to file electronically since July 2009 by waiving requirements for their filing by United States mail, facsimile, or hand delivery. Since electronic filing has been allowed by waiver, the proposed rule is not expected to have a significant fiscal impact on individuals or businesses. If individuals or business have not previously used electronic means to file documents associated with a docket number, they could see savings associated with efficiency gains, postage costs, copy costs, and delivery costs. These savings are not expected to be significant, but the amount of savings will depend on the amount of documentation submitted and the business practices of each party.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule explicitly permits electronic filing of documents that the agency has allowed to file electronically since July 2009 by waiving requirements for their filing by United States mail, facsimile, or hand delivery. If a small business has not used electronic filing previously, it could see the same type of cost savings as those experienced by individuals or large businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

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 rulemaking does not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "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 specific intent of the proposed rulemaking is to amend the commission's rules to incorporate the current practice of allowing the filing of certain documents electronically with the chief clerk's office, and to incorporate the changes made by HB 3544 to TWC, §5.128(a) which authorize the commission to "utilize electronic means of transmission of information, including notices, orders, and decisions issued or sent by the commission." Therefore, the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if the proposed rule met the definition of a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) 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; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking would provide authority for the commission to transmit information electronically and provide the option for electronic filing of certain documents with the chief clerk's office as described in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES and SECTION BY SECTION DISCUSSION sections. Therefore, this proposed rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rulemaking is to incorporate changes to TWC, §5.128(a) made by HB 3544 and assist in implementation of the agency's eBusiness initiative. The proposed rule will substantially advance this stated purpose by incorporating

into the commission's rules the provisions of this statute which authorize the commission to electronically transmit information and add to the rules the option for persons to file certain documents electronically with the chief clerk's office.

Nevertheless, the commission further evaluated the proposed rule and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, this rule would authorize the commission to transmit information electronically and allow persons to file certain documents electronically, and would not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more. Therefore, the proposed rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on June 10, 2010 at 10:00 AM in Building E, room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is 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 hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-049-019-LS. The comment period closes June 14, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact

Margaret Ligarde, Office of Legal Services, (512) 239-3426.

§1.10

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning general powers of the commission; and §5.103 and §5.105, which establish the commission's general authority to adopt rules.

The proposed amendment implements TWC, §5.128.

§1.10. Document Filing Procedures.

(a) All documents to be considered in a commission meeting or by judges in contested cases shall be filed with the chief clerk. Hearing requests and responses shall also be filed with the chief clerk.

(b) If a docket number has been assigned, it should appear on the first page of all filed documents.

(c) Documents shall be filed by United States mail, facsimile, [or] hand delivery, or, when appropriate, the chief clerk's designated electronic filing system. If a person files a document by facsimile, he or she must file with the chief clerk the appropriate number of copies by mail or hand delivery within three days. The provision for electronic filing in this rule is intended to supplement other procedural rules of the commission that specify methods for filing but which do not include electronic filing as described herein.

(d) The original or one copy of a document shall be filed, except for documents to be considered

at a commission meeting. For documents, other than documents filed using the chief clerk's designated electronic filing system, to be considered at a commission meeting, seven copies or fewer, as prescribed by the chief clerk [Chief Clerk] or general counsel [General Counsel], shall be filed. In addition to any other applicable requirements, persons using the chief clerk's designated electronic filing system shall comply with instructions as set forth by the chief clerk on the commission's website for electronically filed documents regarding number of copies.

(e) For documents other than documents filed using the chief clerk's designated electronic filing system, the [The] time of filing is upon receipt by the chief clerk as evidenced by the date stamp affixed to the document by the chief clerk, or as evidenced by the date stamp affixed to the document or envelope by the commission mail room, whichever is earlier. For documents filed using the chief clerk's designated electronic filing system, the time of filing is upon receipt by the electronic filing system, as evidenced by the system's confirmation email or the commission's integrated database.

(f) The chief clerk shall accept all documents presented for filing. The chief clerk's acceptance is not a determination that a document meets filing deadlines or other requirements.

(g) If the requirements of this section are not followed, the commission, or a judge in a State Office of Administrative Hearings (SOAH) proceeding, may choose not to consider the documents. In the absence of a waiver under subsection (h) of this section, the commission may choose not to consider documents filed within two days of a commission meeting.

(h) The judge may waive one or more of the requirements of this section, or impose additional

filing requirements in SOAH proceedings. The commission or general counsel may waive one or more of the requirements of this section, or impose additional filing requirements for commission meetings.

- (i) This section does not apply to offers of evidence during a hearing.