

The Texas Commission on Environmental Quality (commission) adopts the amendment to §19.3; and adopts new §19.30 *without changes* to the proposed text as published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3783) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

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, provides 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 to §1.10(e), the companion rulemaking, 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 BY SECTION DISCUSSION

The commission adopts a revision to the title of Chapter 19 to include electronic transmittal of information by the commission. The commission also adopts a revision to the applicability language in §19.3 to indicate that §19.3(a) only applies to Subchapters A - C.

The commission adopts new Subchapter D entitled *Electronic Transmission of Information by Commission*, and new §19.30 which provide authority for the commission to transmit information,

including notices, orders, and decisions, electronically notwithstanding any other law or rule. This rule is necessary in order to make clear in commission rules that regardless of any other law or rules to the contrary, the commission may transmit information electronically. Subsection (b) states that a person who provides their email address to the commission for the purpose of providing public comment or receiving notices, orders, or decisions must provide a valid email address to the commission and notify the appropriate commission office in the event there is a change in the email address. Under subsection (c), information provided by electronic means of transmittal, including notices, orders, or decisions, is presumed to have been received by a person if the information is sent by the commission to the most recent email address provided by that person.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 "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 adopted 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 adopted rulemaking does not meet the definition of a "major environmental rule." Even if the adopted rules 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 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 ADOPTED RULES and SECTION BY SECTION DISCUSSION sections. Therefore, this adopted rulemaking does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this adopted rulemaking is to incorporate changes to TWC, §5.128(a) made by HB 3544 and to assist in the implementation of the agency's eBusiness initiative. The adopted rules 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 adopted rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted 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 rulemaking authorizes 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 adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted 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 adopted rulemaking is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on June 10, 2010. The comment period closed on June 14, 2010.

The commission received one comment in support from the Texas Chemical Council (TCC). TCC also expressed concerns about the wording of the rules as proposed and suggested some changes to the proposed rules. The commission received no other comments.

RESPONSE TO COMMENTS

TCC commented that it is generally supportive of eBusiness initiatives as they offer an opportunity to send and receive information in real time. They also minimize the need for transmittal of paper documents and provide electronic means to record and document such transfers.

The commission generally agrees with the commenter about the advantages of eBusiness.

TCC expressed concerns in its comments about transitioning to the use of email for transmitting notices and other information. TCC also expressed concern about which email address the chief clerk will use and commented that most corporate email addresses are individual or employee-specific and that individuals go on vacation, change jobs, and are out of the office for a variety of reasons. TCC also commented that computer servers can fail, individual email boxes have size restrictions and email may not be delivered. TCC commented that due to the reasons stated above, in addition to other reasons, email submission is not a guarantee of delivery and contrasted it with certified mail as an example. TCC further commented that the commission should develop a process for corporations to provide a company-specific email address to the chief clerk's office for receipt of notices and other information and that no email addresses be individual-specific if so desired by the company. TCC suggested that the commission add a provision to its rules that establishes the process for businesses to designate an email address for receipt

of information from the chief clerk's office.

The commission appreciates the comment. The commission responds that a regulated entity is able to designate its preferred company-specific email address on the commission's core data form. The core data form is the mechanism by which the commission collects contact information about the entities it regulates. The primary method for delivery of information from the chief clerk's office is first class mail. First class mail, similar to electronic mail, also does not provide a guarantee of delivery. The commission also responds that certified mail is only used in limited instances by the commission. Those instances typically include situations where proof is needed to show that highly sensitive and/or time sensitive information was received, when it was received, and by whom. At this time, the commission is not electing to send information electronically in lieu of certified mail if the purposes for sending mail certified cannot be served by electronic transmission. The commission made no change to the rules in response to the comment.

TCC also suggested revisions to §1.10(e) to include a statement that electronic transmission will be to a designated address.

The commission appreciates the comment but because §1.10 only applies to documents transmitted to the commission and not to documents transmitted by the commission, the commission respectfully disagrees with the commenter about the need to revise §1.10(e) to state that electronic transmission will be to a designated address. Additionally, as discussed above, businesses and other regulated entities already have a mechanism by which to designate their preferred email address,

by simply entering it on their core data form. Accordingly, the commission made no change in response to this comment.

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 commented that the commission should strive to ensure that the right information gets to the right people at the right time and that this will require development of a sustainable electronic delivery process.

The commission appreciates TCC's concerns and responds that this rulemaking provides the authority for the commission and its various offices to send information electronically but does not require any commission office or program to substitute electronic transmission for hardcopy mailing. Typically, the commission uses certified mail to transmit time sensitive information that could lead to enforcement if not timely addressed by the recipient. Certified mail is also typically used in those instances where proof is needed to show that highly sensitive and/or time sensitive information was received, when it was received, and by whom. At this time, the commission is not electing to send information electronically in lieu of certified mail if the purposes for sending mail certified cannot be served by electronic transmission. The commission has made no changes in response to this comment.

TCC requested that the commission clarify this language from the preamble: "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 the Texas Government Code, §552.137." Specifically, TCC asks the agency to 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.

The commission responds that the statement in the preamble was taken directly from the statute which only pertains to email addresses and not the content of the emailed message. The adopted rules do not affect the confidential status of business information. The commission has made no changes in response to this comment.

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. 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.

The commission responds that "bounce-backs" are noted in the comment field for that individual or entity in the chief clerk's database. If an email is returned undelivered, the chief clerk's staff will check the address against its records. If an error is discovered, they will re-send the email to the correct address. The chief clerk's office follows the same practice for undeliverable emails as it does for returned first class mail. When first class mail is returned, the chief clerk will check the address against commission records and re-send if there was an error. However, if there is no apparent problem with the address, the commission does not attempt to send the mail by other means. The commission made no change in response to this comment.

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. TCC commented that the requirement to update email addresses was not part of the legislation and will add an unnecessary burden to those submitting public comment potentially discouraging submission of comments. TCC further commented that companies or entities submitting comments would need a running log of all rules for which public comments were submitted and that because most comments include a phone contact, the commission could follow up by phone if desired.

The commission responds that the adopted rules do not require an email address owner to identify all submissions made under the previous address when updating its email address. It would simply update its core data form on file with the commission to add the new address. The commission does not view this as unreasonably burdensome. Because the chief clerk's office has no way of knowing whether the addresses in its database are current, imposing this obligation on the address owner is the only way to ensure the database is not populated with obsolete email addresses. The commission made no change in response to this comment.

TCC in its comments suggested that the commission revise §19.30(c) 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 which includes the time and date the information was received.

The commission responds that the only available documentation related to an email transmission

(or failure of) is documentation that the email message was undeliverable. When sending information by first class mail, the only documentation regarding delivery status is the returned letter. The commission made no changes in response to this comment.

SUBCHAPTER A: GENERAL PROVISIONS

§19.3

STATUTORY AUTHORITY

The amendment is adopted 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 amendment implements TWC, §5.128.

§19.3. Applicability.

(a) Subchapters A - C of this chapter apply 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 D: ELECTRONIC TRANSMISSION BY COMMISSION

§19.30

STATUTORY AUTHORITY

The new section is adopted 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 new section implements TWC, §5.128.

§19.30. Electronic Transmission of Information by Commission.

(a) Notwithstanding any other law or rule, the commission may utilize electronic means of transmission of information, including notices, orders, and decisions, issued or sent by the commission.

(b) A person who provides their email address to the commission for the purpose of providing public comment or receiving notices, orders, or decisions must provide a valid email address to the commission and notify the appropriate commission office in the event there is a change in the email address.

(c) Information provided by electronic means of transmittal, including notices, orders, or decisions, is presumed to have been received by a person if the information is sent by the commission to the most recent email address provided by that person.