

The Texas Commission on Environmental Quality (commission) proposes an amendment to §19.3; and new §19.30.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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, 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. Because these rule changes address the flow of information out of the commission and do not involve information being transmitted to the commission by regulated entities, they do 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 proposes to revise the title of Chapter 19 to include electronic transmittal of information by the commission. The commission also proposes to revise the applicability language in §19.3 to indicate that §19.3(a) only applies to Subchapters A - C.

The commission proposes new Subchapter D entitled *Electronic Transmission of Information by the Commission*, and new §19.30 to 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.

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 rules are in effect, fiscal implications, although not anticipated to be significant, are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules authorize the agency to transmit information, including notices, orders, and decisions, electronically. The proposed rules are expected to reduce printing and postage costs for the agency. The proposed rules are not expected to have a fiscal impact on other state agencies or local governments.

The proposed rules implement provisions of HB 3544 which authorize the agency to utilize electronic means to transmit information including notices, orders, and decisions issued or sent by the agency. Many current agency rules regarding these documents expressly require that they be mailed. The proposed rules amend Chapter 19 by changing the title of the chapter and adding new Subchapter D to address electronic transmission of information, including notices, orders, and decisions.

The proposed rules are expected to save printing and postage costs for the agency, but they are not expected to have any fiscal impact on other state agencies or local governments. The proposed rules are permissive in nature and do not require the commission to send information electronically. The agency will coordinate with the United States Environmental Protection Agency to determine whether electronic transmission will be approved in lieu of mailed notices, orders, and decisions for any federally authorized, approved, and delegated programs. If electronic transmission is determined to be appropriate for federal

programs, the agency estimates that it could experience an annual reduction of 2.6 million pages of paper, and savings in postage and printing costs could be as much as \$250,000 (\$18,000 in printing and \$232,000 in postage). If electronic transmission is not allowed for federal programs, then agency savings for state notices, orders, and decisions could still be as much as \$75,000.

The proposed rules are not expected to have a significant fiscal impact on other state agencies or local governments since they do not place additional requirements on regulated entities and since most regulated entities are currently capable of receiving electronic transmissions of information.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be savings of natural resources and administrative costs of the agency while continuing to ensure effective communication of notices, orders, and decisions.

The proposed rules are not expected to have a significant fiscal impact on businesses and individuals since they provide the agency with an additional method of transmitting information which could reduce agency administrative costs. Most regulated entities are expected to be currently capable of receiving electronically transmitted information, and the proposed rules are not expected to have a fiscal impact for businesses or individuals.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules provide the agency with an additional method of transmitting information to regulated entities and do not place additional requirements on the regulated community.

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 rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are 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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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 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 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 proposed rulemaking would provide authority for the commission to transmit information electronically 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. The proposed 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.

Nevertheless, the commission further evaluated the proposed rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the proposed rules 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, these rules would authorize the commission to transmit information 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 rules do 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 May 17, 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.

SUBCHAPTER A: GENERAL PROVISIONS

§19.3

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.

§19.3. Applicability.

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

§19.30

STATUTORY AUTHORITY

The new section 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 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.