The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §281.18 *with change* to the proposed text as published in the May 15, 2020, issue of the *Texas Register* (45 TexReg 3205).

Background and Summary of the Factual Basis for the Adopted Rule

According to §281.1, it is the intent of the TCEQ to establish a general policy for the processing of applications in order to achieve the greatest efficiency and effectiveness possible. However, §281.18 requires notices of application deficiencies to be sent to the applicant via certified, return receipt mail and allows the applicant 30 days to provide a response. The adopted rulemaking amends §281.18 to allow the use of electronic mail (email) for communicating application deficiencies and receiving responses from applicants. The adopted changes modernize communications between the TCEQ and applicants, reduce TCEQ postage costs, and improve the efficiency of application processing.

Section Discussion

§281.18, Applications Returned

The commission adopts the amendment to §281.18(a) to include email as a method of communicating application deficiency notices to applicants and allow the commission to establish a timeframe of less than 30 days for applicants to provide the requested information. The purpose of this change is to reduce the timeframes for obtaining necessary information and to reduce postage costs to the TCEQ. Additionally, the commission amends §281.18(a) by parsing a portion of the requirements into adopted

paragraphs (1) and (2) to improve readability. Adopted §281.18(a)(1) provides the timeframe for the executive director to review the applicant's response to the notice of administrative deficiencies. Adopted §281.18(a)(2) provides the executive director's course of action if the applicant fails to submit the requested information within the established timeframe. At least one deficiency notice must be sent via certified mail, return receipt requested providing the applicant 30 days to respond before an application may be returned.

Final Regulatory Impact Determination

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. 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, 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 rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and the adopted rule is not anticipated to have an adverse effect in a material way on 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 intent of the adopted amendment is to reduce the timeframe for obtaining necessary information

from applicants and reduce postage costs to the TCEQ.

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 Determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether the adopted rulemaking will constitute a taking. Texas Government Code, §2007.002(5), defines a taking as either: 1) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or section 17 or 19, article I, Texas Constitution; or 2) a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The commission determined that this adopted rulemaking will not constitute a taking as that term is defined under Texas Government Code, §2007.002(5). Specifically, the adopted

rulemaking will not affect any landowners' rights in private real property, and there are no burdens that will be imposed on private real property by the adopted rulemaking; it is solely procedural and does not impact real property.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found it is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas Coastal Management Program(CMP), which will require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this adopted rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP; therefore, it is consistent with CMP goals and policies.

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

Public Comment

The commission invited public comment on the adopted rulemaking. The comment period closed on June 16, 2020. The commission received comments from Texas

Molecular Holdings LLC (TM). The commenter was generally in support of the rulemaking but requested clarifications to the rule language.

Response to Comments

Comment

TM is concerned about possible inconsistencies while determining the appropriate amount of time allotted for a response to application deficiencies. To allow the respondent adequate time to arrange a response or request an extension, 10 working days at a minimum should be afforded.

Response

The commission disagrees that a minimum timeframe should be established for emailed deficiency notices. The timeframe for emailed deficiency notices should be determined based on the type and quantity of information requested. If the applicant fails to provide the requested information within the timeframe specified in the emailed notice, the commission will send a second notice via certified mail that provides the applicant an additional 30 days to provide the requested information, as specified in §281.18(a)(2). No changes were made in response to this comment.

Comment

TM recommended revised language in §281.18(a)(1) to clarify the information that the TCEQ is evaluating.

Response

The commission agrees with this comment and revised the rule language as recommended by the commenter.

Comment

TM recommends changing the language in §281.18(a)(2) to clarify that the application will only be returned if the applicant has failed to respond to both the electronically-delivered deficiency notice and the subsequent notice sent via certified mail return receipt, within the specified timeframe required by each notice.

Response

The commission's intent is to require at least one deficiency notice to be sent via certified mail, return receipt requested that allows the applicant 30 days to respond prior to returning an application. The certified letter may be sent as the initial deficiency notice, in which case the application will be returned if the requested information is not received within 30 days. Alternatively, the certified letter may be sent as a second deficiency notice if the requested information is not received within the timeframe specified in the emailed initial deficiency notice. If the certified letter is sent as a second deficiency notice, the application will be returned if the requested information is not received within 30 days from the date of the certified letter. No changes were made in response to this comment.

SUBCHAPTER A: APPLICATIONS PROCESSING

§281.18

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; TWC, §5.128, which authorizes the commission to utilize electronic means of transmission of information, including notices, orders, and decisions issued or sent by the commission; Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §§361.011, 361.017, and 361.024, which establish the commission's jurisdiction over the regulation, management, and control of municipal solid waste, industrial solid waste, and municipal hazardous waste, and authorize the commission to adopt rules consistent with the general purposes of the Solid Waste Disposal Act; and THSC, Solid Waste Disposal Act, §361.018 and THSC, Texas Radiation Control Act, §§401.011, 401.051, and 401.412, which establish the commission's jurisdiction and authorize the commission to adopt rules necessary to carry out its responsibilities to regulate the disposal of radioactive substances and the recovery and processing of source material.

The adopted amendment implements THSC, Chapter 361.

§281.18. Applications Returned.

(a) If an application or petition is received which is not administratively complete, the executive director shall notify the applicant of the deficiencies by electronic mail or certified mail return receipt requested prior to expiration of the applicable review period established by §281.3(a), (b), and (d) of this title (relating to Initial Review).

(1) The executive director will evaluate the applicant's response to the notice of administrative deficiencies within eight working days of receipt and, where applicable, shall prepare a statement of receipt of the application and declaration of administrative completeness in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). For applications for radioactive material licenses, the executive director shall evaluate the applicant's response to the notice of administrative deficiencies within 30 days of receipt.

(2) If the required information is not received from the applicant within the timeframe specified in the deficiency notice, the executive director shall return the incomplete application to the applicant. The executive director shall send at least one deficiency notice via certified mail return receipt requested, providing the applicant 30 days to respond, before an application may be returned.

(b) For applications involving industrial, hazardous, or municipal waste, or for new, renewal, or major amendment applications for radioactive material licenses, the executive director may grant an extension of an additional 60 days beyond the original 30 days allowed under the rule for a total response time of 90 days upon sufficient proof from the applicant that an adequate response cannot be submitted within 30 days. Unless there are extenuating circumstances, if an applicant does not submit an administratively complete application as required by this chapter, the application shall be considered withdrawn. However, if applicable, the applicant is responsible for the cost of any notice provided under §281.17 of this title and the costs of such notice shall be deducted from any filing fees submitted by the applicant prior to return of the incomplete application.