



How to Apply for Regulatory Flexibility

This guide explains the requirements and processes for participating in the Texas Commission on Environmental Quality's Regulatory Flexibility Program. For approved, proposed alternatives by eligible applicants, the program issues an exemption from state regulations on the control or abatement of pollution. This exemption is referred to as a Regulatory Flexibility Order. While this guide is not a comprehensive explanation of the law and rules, it is intended to clarify issues and answer questions about procedures.

What this guide covers

- What is the Regulatory Flexibility Program?
- How does regulatory flexibility help protect the environment?
- Who is eligible to participate?
- How do I apply for regulatory flexibility?
- What do I need to know about my Regulatory Flexibility Order?
- Where do I get technical assistance?

What is the Regulatory Flexibility Program?

The Texas Water Code (Chapter 5, Section 758) authorizes the TCEQ to exempt from certain state requirements applicants who propose an alternative method or standard to control or reduce (abate) pollution if their alternative:

- is as protective of the environment and the public health as the method or standard required by the state, and
- remains consistent with state and federal environmental laws.

This program is voluntary and approved applicants may receive the exemption in the form of a Regulatory Flexibility Order.

How does regulatory flexibility help protect the environment?

Environmental laws and regulations are critical to protecting the environment. As an enhancement to these legal requirements, we have

adopted rules that promote environmental protection while creating flexibility within a regulatory framework.

We promote innovative regulation that:

- Encourages facility owners and operators to assess and address the pollution they emit or cause, directly and indirectly, to the air, water, and land.
- Encourages facility owners and operators to innovate, set measurable and verifiable goals, and implement the most effective pollution prevention, source-reduction, or other pollution-reduction strategies for their particular facilities, while complying with verifiable and enforceable pollution limits.
- Rewards facility owners and operators who reduce pollution to levels below the minimum required by law.
- Reduces the time and money spent by agencies and facility owners and operators on paperwork and other administrative tasks that do not directly benefit the environment.
- Increases public participation and encourages stakeholder consensus in the development of innovative environmental regulation and in monitoring the environmental performance of projects under this program.
- Encourages facilities and communities to work together to reduce pollution levels below the minimum required by applicable law.
- Offers reasonable technical assistance to facilitate meaningful stakeholder participation.
- Increases trust and communication among agencies, regulated parties, and the public.

Who is eligible to participate?

You are eligible for regulatory flexibility if you are subject to any TCEQ regulation that is related to pollution control or abatement. (Certain members of the regulated community who store, process, treat, or dispose of low-level radioactive materials are ineligible by statute.)

Because the legislation promotes and incentivizes innovative pollution prevention and control methods for those who already comply with legal requirements, you will receive primary consideration if you have demonstrated a history of compliance with environmental requirements. This consideration does not necessarily exclude an applicant with a less-than-perfect compliance record.

You are **not** eligible if you:

- have an unsatisfactory compliance history,
- have been convicted of willfully or knowingly committing an environmental crime in the last three years, or

- have been referred to the Texas or United States attorney general or have incurred a judgment against you in the past five years.

How do I apply for regulatory flexibility?

Applying for regulatory flexibility involves these five stages:

1. preparing the application
2. paying the initial fee and potential cost recovery
3. undergoing the application reviews
4. giving public notice
5. getting approval from TCEQ commissioners

Preparing the application

The TCEQ does **not** have a prescribed application form for regulatory flexibility requests. However, we recommend that you closely follow the application requirements detailed in Title 30, Texas Administrative Code, Subsection 90.21(b), which prescribe inclusion of these elements:

- ***A narrative summary of the proposal.*** The summary should briefly define the proposal, identify where the facility is located, and provide a brief description of how the proposed alternative will be as protective of the environment and the public health as the applicable method or standard that the state currently prescribes. The summary should include the specific statute or rule from which an exemption is being requested. (See a sample template for a proposal summary in the appendix.)
- ***A detailed explanation,*** or demonstration where applicable or available, that the proposed alternative is as protective as the applicable statute or TCEQ rule and is consistent with federal law. Although the legislation encourages testing of innovative approaches, the applicant should furnish sufficient information to allow the TCEQ to determine that the alternative is reasonably likely to be as protective. It should include a statement and supporting documentation regarding compliance with applicable statutes and regulations.
- ***An implementation schedule that clearly defines important dates or key milestones.*** The implementation schedule should include, at a minimum, the project start date, monitoring or measurement schedules, and the project completion date. The application should also describe how records that demonstrate compliance with the Regulatory Flexibility Order will be maintained, and how and when results will be reported to the TCEQ.
- ***An identification of pollutants, if any, that will be transferred as a result of the proposed alternative.*** The TCEQ does not necessarily discourage transfers of pollutants from one medium to another. However, please describe the transfer, the specifics of the

change (such as increased or decreased energy usage, and increased or decreased waste-disposal costs), the benefit of the transfer, and the effects the proposed alternative will have on facility-wide emissions.

Examples of Pollutant Transfers

- **Air to waste:** A baghouse can be installed on the exhaust stack of a combustion process to reduce the amount of particulates released into the air. Though this type of installation reduces air emissions, it may increase waste and energy use.
- **Waste to water:** Operations that use solvent-based parts cleaners can change to aqueous-based cleaners. A change to aqueous-based cleaners reduces or eliminates waste, waste handling, and waste disposal associated with solvent-based cleaners. However, the cleaners may increase the discharge of pollutants or effluent to wastewater-treatment facilities.
- **Water to air:** In chromium plating, evaporators may reduce waste by evaporating water out of the waste stream (the chromic acid can then be returned to the plating bath), but may increase air emissions.
- **Air to air:** In the petrochemical industry, flares are commonly used to destroy combustible organics, reducing their release to the air, but potentially increasing emissions of carbon monoxide and nitrogen oxide.

Note: In many cases, the examples given above result in desirable outcomes. However, it is important to factor in all considerations when proposing a transfer of waste from one medium to another.

- A description of local community participation in the development of the proposal, including:
 - how you identified the stakeholders
 - how you notified the public, including any public notifications
 - what measures you used to ensure open participation and attendance
 - how you communicated and conducted meetings at regular intervals
 - what you did to promote two-way communication.

Examples of public participation

- **Citizen advisory panel:** You could establish or use an existing citizen advisory panel to gain input from the local community. The panel could also serve as a development team for your application.
 - **Workshops on regulatory flexibility:** You could hold workshops early in proposal development to ensure that the local community understands the technical aspects, has ample opportunity to make suggestions or recommendations, and understands the application process and its opportunities for participation.
 - **Public forum:** You could invite local elected officials, city or county administrators, and the local community to participate in a public forum. During the meeting, you could discuss regulatory-flexibility goals, environmental-improvement objectives, and technical innovations.
- Technical review team:** You could appoint technical professionals to serve on an independent team to review your regulatory flexibility proposal. The team could then report to the local community on the technical and environmental merits.

- **Additional information.** Include any supplemental information that can have a bearing in the TCEQ's decision, including:
 - TCEQ or EPA identification numbers, permit numbers, and registration numbers.
 - Case studies, environmental-impact analyses, cost-benefit analyses, or other documentation that verifies your proposal will be at least as protective of the environment and public health as current requirements.
 - Other measures or programs you have implemented that illustrate your commitment to environmental performance and compliance (for example, environmental management systems, employee pollution-prevention workgroups, or citizen advisory panels).

Paying the initial fee and potential cost recovery

The initial \$250 application fee is due when you submit the application. We will not review your application until we receive the fee.

The TCEQ is authorized to recover any costs over the initial application fee for processing applications that are significant and complex. As part of the preliminary review, we will make a determination as to the complexity of the application. If we foresee additional costs to process your application, we will notify you, discuss the cost-recovery process and the hourly rate at which costs will be recovered, and provide you an estimate of the total cost of processing the application before technical review begins.

Submitting the application and fee

Mail the application and fee as follows:

1. an original and two copies of the application, and the \$250 to the TCEQ main office at:
Regulatory Flexibility Program
Cashier's Office, MC-214
Texas Commission on Environmental Quality
PO Box 13087
Austin TX 78711-3087
2. a copy of the application to the appropriate TCEQ regional office

Undergoing the application review

The following stages describe the application process. You can reference the example on page 12, “Template for a Proposal Summary.”

How will my application be processed?

Administrative review and oversight: Upon receipt, a screening-and-oversight committee reviews the application for completeness and forwards it to the appropriate program staff—air, water, or waste—for review. If the application lacks any of the required elements, you will be notified and given an opportunity to submit additional information or, in some cases, to revise and resubmit your application. Applications not meeting minimum requirements will not be processed further. After a technical and legal review, TCEQ personnel prepare draft Regulatory Flexibility Orders for presentation to the commissioners at their agenda meeting.

Technical and legal review: Program personnel will review the proposal, in consultation with a TCEQ attorney. Following this review, the application will be returned to the oversight committee. If the proposal is likely to afford equivalent or better protection, and is consistent with state and federal law or any agreements the TCEQ has with other federal or state agencies, then a proposed Regulatory Flexibility Order will be offered to the commissioners for consideration at their regularly scheduled commission meeting known as the commissioners’ agenda meeting (see “Getting approval from TCEQ commissioners,” below).

Note: Before the general notice of the Commissioner’s Agenda, applicants must give public notice to the community (see “Giving public notice,” below).

If approved, the commissioners will consider and sign a Regulatory Flexibility Order, which may differ from the proposed version.

What issues do we consider when reviewing applications?

Applications will be reviewed to determine if the proposed alternative is as protective of the environment and public health as existing requirements, and is not inconsistent with federal law. The TCEQ will also consider compliance history, as well as your efforts to involve the local community and gain its support in developing the application. The TCEQ also considers these issues:

- Proposed improvements in the efficient use of raw materials, energy, water, or other resources.
- Use of planning processes or techniques to identify opportunities for source reduction or improvements in product life cycle.
- Use of training and incentives to encourage employees to identify opportunities for environmental improvement.
- Protection and enhancement of natural resources.
- Proposed information and reporting systems to track progress toward goals and document improvements (goals are verifiable and enforceable).
- Use of a regulatory impact analysis or cost-benefit analysis to demonstrate that the alternative method or alternative standard is as protective of the environment and public health.
- Demonstration that the alternative method or standard may serve as a model to other regulated entities.

What if my application contains confidential information?

We suggest that you do not submit confidential information in your application. However, if you cannot avoid doing so, describe the confidential information in general, nonconfidential terms throughout the application, as best as possible. You can submit the confidential information as an **attachment** and mark each page "CONFIDENTIAL" or "Confidential Business Information" as appropriate.

Reasons for confidentiality include trade secrecy and other related legal concepts that give businesses the right to preserve the confidentiality of their information to obtain or retain advantages resulting from it.

While the TCEQ will maintain information marked as confidential in a separate file, it is subject to open-records requests from the public. If it receives such a request, the TCEQ will ask the Texas attorney general for an opinion under the Public Information Act (Texas Government Code, Chapter 552). That process will afford you the opportunity to defend your request for confidentiality.

How long will it take to process my application?

Our goal is to process applications within six to 12 months, but there is no official deadline. Processing time may vary depending on the complexity of the proposed alternative and the completeness of the application.

You can help expedite review by specifically addressing each of the requirements detailed in the Regulatory Flexibility Program rules (state "not applicable" for any that do not apply to you). Supply complete and detailed information that will allow the TCEQ to determine whether the proposed alternative is at least as protective as applicable requirements and is consistent with law. Be specific and detailed about the benefits of your proposed alternative, such as how it improves efficiency in the use of raw materials or how it serves as a model to other regulated entities.

Giving public notice

Applicants are required to complete the specific public notice depending on the statute or rule that applies to their proposal.

This requirement is satisfied in one of the following ways:

- **Existing notice requirements.** If the statute or rule for which you are seeking an exemption requires public notice and opportunity for comment or hearing, you must give notice according to the requirements in the original statute or rule and meet the minimum standard below.
- **No existing notice requirements.** If the statute or rule for which you are seeking an exemption does not already require public notice and opportunity for comment or hearing, you must publish notice in a local newspaper of general circulation for readers in and around the subject facility, provide for a 30-day public comment period, and meet the minimum standard below.

What should I include in my notice?

In addition to the notice requirements above, you must, at a minimum, include:

- A brief description or summary of the proposal, a description of the business conducted at the facility, and a summary of the activity to which the proposed alternative applies so the public understands the current process or activity and the potential impact of the proposed alternative.
- Your name and address, and, if different, the location of the facility for which regulatory flexibility is being requested, so that the public may request additional information about the proposal.
- The name and address of the TCEQ so the public understands where to send comments on the proposal.
- The name, address, and telephone number of the TCEQ's contact in the Regulatory Flexibility Program who can give additional information or answer questions.
- A brief description of the public comment procedures, and the time and place of any public meeting or public hearing.
- The TCEQ deadline and process for submitting comments or requests for a hearing.

Getting approval from TCEQ commissioners

Once your application is reviewed, and you have given public notice, the TCEQ commissioners will review the draft Regulatory Flexibility Order for your proposal at an agenda meeting. Any request for a hearing will be considered at this time, concurrent with their review of the proposed order.

Once you receive formal notification that your proposal is approved, you can begin implementation. If your proposal is not approved, you may revise and resubmit it (starting the application process from the beginning).

Items on commission agendas are online at <www.tceq.state.tx.us/goto/agendas>. (You can also search for the keyword “agendas.”) Marked agendas contain the decisions made at the meeting.

What I need to know about my Regulatory Flexibility Order

Now that you have a Regulatory Flexibility Order, you need to know how it may impact your status as a regulated entity.

The terms of a Regulatory Flexibility Order

Terms of Regulatory Flexibility Orders (also called authorizations) vary. We will determine an appropriate length of time necessary to demonstrate the effectiveness of an alternative means of pollution control or abatement. The terms will not exceed existing permits or other authorizations.

How does regulatory flexibility affect permitting?

In most cases, Regulatory Flexibility Orders will supersede existing provisions in permits or other authorizations. Therefore, existing permits or authorizations will not need to be amended or modified. In the event an authorization affects the requirements of an existing permit, please bring that potential impact to the TCEQ’s attention early in the application process to address how to comply with both the proposed order and all provisions of the permit. To resolve any conflicts, the TCEQ may address the conflict in the proposed order or suggest applicable permit amendments. If your permit is modified or renewed after the Order has been approved or before the Order expires, the provisions and implications of the order should be addressed in the permit request or application.

How do I change, renew, or terminate a Regulatory Flexibility Order?

To change or amend the authorization

If you need to amend your Regulatory Flexibility Order, submit a request in the same manner that you would submit a new application, including, at a minimum:

- a brief explanation and justification for the change
- the effect the change will have on the alternative method being used
- any changes to information submitted in the original application (for example, changes to the implementation schedule)
- the initial \$250 application fee

To renew the authorization

Submit a renewal application in the same manner that you submit a new application (including the initial \$250 application fee). Doing this at least 180 days before the expiration of your original Regulatory Flexibility Order allows you to continue operating under the existing order until the TCEQ makes a determination on your renewal request.

To terminate the authorization

You may terminate the authorization if you determine the alternative method or standard does not meet the compliance criteria, or for any other reasons you choose.

Ensure that you will be in compliance with all applicable statutes, rules, and preexisting permit or authorization terms at the time your Regulatory Flexibility Order is terminated.

What happens if the TCEQ finds the alternative unsuccessful?

If the TCEQ determines the alternative is unsuccessful or the terms of the Regulatory Flexibility Order are being violated, we may notify you of the TCEQ's intent to revoke the order.

If you disagree with the decision to revoke the order, you have 30 days to request a show-cause hearing to contest it before the commission at its agenda meeting. If the commission decides to revoke the order, it may allow the executive director to provide a transition period to allow you to come into compliance with all applicable statutes, TCEQ rules, and preexisting permit or authorization terms.

Is the order automatically terminated if I have a violation?

The TCEQ may examine violations of the order, case by case, according to its standard procedures for inspection and enforcement. Violations do not automatically result in termination.

Where do I get technical assistance?

The TCEQ offers assistance to applicants for preparing applications.

Get help preparing your application

The TCEQ recommends you schedule a **presubmission conference** to help clarify application requirements, applicable standards, fees, public notice requirements, impacts on your existing permits, and potential opposition to the proposal.

Request a presubmission conference by contacting the Regulatory Flexibility Program at:

(mail)

Regulatory Flexibility Program
Small Business and Environmental Assistance, MC 108
Texas Commission on Environmental Quality
PO Box 13087
Austin TX 78711-3087

(e-mail) p2@tceq.texas.gov

(phone) 512-239-3100

Get technical assistance designed for small businesses

If your facility is a small business (100 employees or fewer), the TCEQ's Small Business and Local Government Assistance Program can help you understand and navigate through the application process. Call our staff at 800-447-2827 or visit www.TexasEnviroHelp.org.

Example

Template for a Proposal Summary

When summarizing your proposal for regulatory flexibility, you should address all of the items listed below. You may include any other information you believe is important, but clear and concise applications will facilitate faster processing.

Name of the Facility

Include the facility name that is commonly known in the local community as well as the facility name or other identifying information used to report to the TCEQ.

Location of the Facility

This should be the legal mailing address or physical location of the facility, not a post office box or other central mailing address.

Brief Description of the Proposal

Briefly describe how your proposal changes the current operations of your facility.

Statute or Rule

Specifically identify all statutes or TCEQ rules from which you are requesting an exemption.

Brief Description of How the Proposal Meets Minimum Criteria

Briefly describe how your proposal will be more protective of the environment and public health than the current statute or TCEQ rule.

Important Note Regarding Public Notice

If you are already subject to specific public notice requirements under existing rules or statutes, participating in this process and preparing this summary **does not waive** those requirements. If you plan to include this summary when giving public notice, you must include information on how interested persons can learn more about your proposal. For example, you could include the name, title, and telephone number of your company's contact person. (See "Giving public notice" for additional guidance.)