

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Rulemaking Adoption

**AGENDA REQUESTED:** August 20, 2014

**DATE OF REQUEST:** August 1, 2014

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Bruce McAnally, (512) 239-2141

**CAPTION: Docket No. 2013-1913-RUL.** Consideration of the adoption of amendments to Section 11.102, 30 TAC Chapter 11, Contracts; and Section 14.9, 30 TAC Chapter 14, Grants.

The adopted rulemaking would implement House Bill (HB) 586, 83rd Legislature, 2013, Regular Session, to reflect the exemption of sovereign immunity for state-related breach of contract for engineering, architectural, or construction services, or for material related to those professional services as authorized under Texas Civil Practice and Remedies Code, Chapter 114 or the Texas Government Code. The adopted rulemaking would also implement HB 1487, 83rd Legislature, 2013, Regular Session, to reflect the new requirement to make grant awards in excess of \$25,000 available to the public on the agency's generally accessible Internet website, and to state the purpose for which the grant was awarded. The proposed rules were published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2748-2753). (Greg Yturralde, Kenley Maddux) (Rule Project No. 2013-051-011-AS)

Dorca Zaragoza-Stone  

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Deputy Director

John Racanelli  

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Division Director

Bruce McAnally  

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Agenda Coordinator

Copy to CCC Secretary? NO X YES

# **Texas Commission on Environmental Quality**

## **Interoffice Memorandum**

**To:** Commissioners

**Date:** August 1, 2014

**Thru:** Bridget C. Bohac, Chief Clerk  
Richard A. Hyde, P.E., Executive Director

**From:** Dorca Zaragoza-Stone, Deputy Director  
Office of Administrative Services

**Docket No.:** 2013-1913-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 11, Contracts  
Chapter 14, Grants  
HBs 586 and 1487: Resolution of Contract Claims and Posting of Grants on  
Public Website  
Rule Project No. 2013-051-011-AS

### **Background and reason(s) for the rulemaking:**

The rulemaking adoption is part of the implementation of House Bills (HB) 586 and 1487 from the 83rd Legislature, 2013.

HB 586, authored by Representative Paul Workman, amends the Texas Civil Practice and Remedies Code to waive sovereign immunity for the state related to a breach of contract for engineering, architectural, or construction services or for materials related to those professional services. The statute applies only to claims that exceed \$250,000, excluding penalties, costs, expenses, prejudgment interest, and attorney fees, and it removes such claims from the dispute resolution process provided for in Texas Government Code, Chapter 2260.

HB 586 limits any potential damages or damage award to those available under Texas Government Code, Chapter 2260 including: the amount due and owed under the contract, amounts owed for change orders and additional work required to be done under the contract, attorney's fees if the contract allows, and interest as allowed by law. Suits for these claims may only be initiated in state court with venue in the county in which the claim arose or Travis County. Payments and judgments can only be paid from general revenue if specifically appropriated and state property is exempt from seizure associated with a claim under this chapter. State agencies are required to submit a cost of these claims to the legislature on January 1 of each even numbered year.

HB 1487, authored by Representative Linda Harper-Brown, requires state agencies to post notices of state-funded grant awards of \$25,000 or more on an agency's generally accessible Internet website. Agencies must also provide to the Texas Comptroller of Public Accounts (Comptroller) a link to the information to allow the Comptroller to maintain the information on the Comptroller's Internet website through a central Internet portal. HB 1487 adds Texas Government Code, §403.0245.

Commissioners

Page 2

August 1, 2014

Re: Docket No. 2013-1913-RUL

**Scope of the rulemaking:**

The proposed rulemaking amends 30TAC §11.102 and §14.9 to reflect the changes to the Texas Civil Practice and Remedies Code and the Texas Government Code, respectively.

**A.) Summary of what the rulemaking will do:**

Adopted §11.102 would be amended by adding subsection (b)(9) to reflect the exemption from sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services as authorized under Texas Civil Practice and Remedies Code, Chapter 114.

Adopted §14.9 would be amended by adding subsection (f) to reflect the new requirement to make grant awards in excess of \$25,000 available to the public on the agency's generally accessible Internet website, and to state the purpose for which the grant was awarded.

**B.) Scope required by federal regulations or state statutes:**

None.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

None.

**Statutory authority:**

This rulemaking implements HB 586 and HB 1487 from the 83rd Legislature, 2013.

Texas Water Code (TWC), §5.102 – General Powers

TWC, §5.103 – Rules

Texas Civil Practice and Remedies Code, Chapter 114 – Adjudication of Claims Arising Under Written Contracts with State Agencies

Texas Government Code, §403.0245 – Availability of Internet of Certain Information on State Grants

**Effect on the:**

**A.) Regulated community:**

HB 1487 provides the regulated community with additional notice of state-funded grant opportunities and the purpose of those awards.

**B.) Public:**

HB 586 provides entities contracting with the state for engineering, architectural, or construction services or materials related to those services with additional legal avenues by waiving sovereign immunity for certain claims for the purpose of adjudicating a claim for breach of contract.

Commissioners

Page 3

August 1, 2014

Re: Docket No. 2013-1913-RUL

HB 1487 provides the public with additional notice of state-funded grant opportunities and the purpose of those awards.

**C.) Agency programs:**

TCEQ has a small number of “engineering services” contracts affected by this statute, primarily in the Remediation and Air Quality Divisions. There is a low risk that more claims may be made because the process might be seen as more accessible to aggrieved contractors. Sound contract management practices should prevent most potential contract dispute claims.

**Stakeholder meetings:**

The commission did not hold any stakeholder meetings related to this rulemaking; however, a public hearing was held during the comment period on May 6, 2014.

**Public comment:**

The agency did not receive any comments related to this rulemaking.

**Significant changes from proposal:**

There are no changes from the original proposal made to Chapters 11 and 14.

**Potential controversial concerns and legislative interest:**

Previously, contractors, who believe a state agency has breached their mutual contract, could not sue the state agency in court, but were required to use the dispute resolution process found in Texas Government Code, Chapter 2260. The statute does not affect potential liability, but changes the setting in which those claims are disputed from the State Office of Administrative Hearings to a state district court. Very few Texas Government Code, Chapter 2260 claims have been filed against the TCEQ, thus, it is not possible to project how many additional claims TCEQ may face.

**Will this rulemaking affect any current policies or require development of new policies?**

No.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

If this rulemaking does not go forward, then commission rules will not reference the current versions of Texas Civil Practice and Remedies Code, Chapter 114 or Texas Government Code, §403.0245. The commission rules would not reference the current contract dispute resolution policy of the state regarding a breach of contract for engineering, architectural, or construction services or for material related to those professional services. The commission rules would not reflect the requirement to make grant awards in excess of \$25,000 available to the public on the agency’s generally accessible Internet website.

Commissioners  
Page 4  
August 1, 2014

Re: Docket No. 2013-1913-RUL

**Key points in the proposal rulemaking schedule:**

***Texas Register* publication date:** April 11, 2014

**Anticipated Texas Register adoption date:** September 5, 2014

**Anticipated effective date:** September 11, 2014

**Six-month Texas Register filing deadline:** October 11, 2014

**Agency contacts:**

Greg Yturralde, Rule Project Manager, (512) 239-1951, Financial Administration Division

LaTresa Stroud, Manager, Procurements & Contracts, (512) 239-6641

Kenley Maddux, Staff Attorney, (512) 239-1636

Bruce McAnally, Texas Register Coordinator, (512) 239-2141

**Attachments**

House Bill 586

House Bill 1487

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Marshall Coover  
Tucker Royall  
Pattie Burnett  
Office of General Counsel  
Greg Yturralde  
Bruce McAnally

1 AN ACT

2 relating to the waiver of sovereign immunity for certain design and  
3 construction claims arising under written contracts with state  
4 agencies.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Title 5, Civil Practice and Remedies Code, is  
7 amended by adding Chapter 114 to read as follows:

8 CHAPTER 114. ADJUDICATION OF CLAIMS ARISING UNDER WRITTEN  
9 CONTRACTS WITH STATE AGENCIES

10 Sec. 114.001. DEFINITIONS. In this chapter:

11 (1) "Adjudication" of a claim means the bringing of a  
12 civil suit and prosecution to final judgment in county or state  
13 court.

14 (2) "Contract subject to this chapter" means a written  
15 contract stating the essential terms of the agreement for providing  
16 goods or services to the state agency that is properly executed on  
17 behalf of the state agency. The term does not include a contract  
18 that is subject to Section 201.112, Transportation Code.

19 (3) "State agency" means an agency, department,  
20 commission, bureau, board, office, council, court, or other entity  
21 that is in any branch of state government and that is created by the  
22 constitution or a statute of this state, including a university  
23 system or a system of higher education. The term does not include a  
24 county, municipality, court of a county or municipality, special

1 purpose district, or other political subdivision of this state.

2 Sec. 114.002. APPLICABILITY. This chapter applies only to  
3 a claim for breach of a written contract for engineering,  
4 architectural, or construction services or for materials related to  
5 engineering, architectural, or construction services brought by a  
6 party to the written contract, in which the amount in controversy is  
7 not less than \$250,000, excluding penalties, costs, expenses,  
8 prejudgment interest, and attorney's fees.

9 Sec. 114.003. WAIVER OF IMMUNITY TO SUIT FOR CERTAIN  
10 CLAIMS. A state agency that is authorized by statute or the  
11 constitution to enter into a contract and that enters into a  
12 contract subject to this chapter waives sovereign immunity to suit  
13 for the purpose of adjudicating a claim for breach of an express  
14 provision of the contract, subject to the terms and conditions of  
15 this chapter.

16 Sec. 114.004. LIMITATIONS ON ADJUDICATION AWARDS. (a) The  
17 total amount of money awarded in an adjudication brought against a  
18 state agency for breach of an express provision of a contract  
19 subject to this chapter is limited to the following:

20 (1) the balance due and owed by the state agency under  
21 the contract as it may have been amended, including any amount owed  
22 as compensation for the increased cost to perform the work as a  
23 direct result of owner-caused delays or acceleration if the  
24 contract expressly provides for that compensation;

25 (2) the amount owed for written change orders;

26 (3) reasonable and necessary attorney's fees based on  
27 an hourly rate that are equitable and just if the contract expressly

1 provides that recovery of attorney's fees is available to all  
2 parties to the contract; and

3 (4) interest at the rate specified by the contract or,  
4 if a rate is not specified, the rate for postjudgment interest under  
5 Section 304.003(c), Finance Code, but not to exceed 10 percent.

6 (b) Damages awarded in an adjudication brought against a  
7 state agency arising under a contract subject to this chapter may  
8 not include:

9 (1) consequential damages;

10 (2) exemplary damages; or

11 (3) damages for unabsorbed home office overhead.

12 Sec. 114.005. CONTRACTUAL ADJUDICATION PROCEDURES  
13 ENFORCEABLE. Adjudication procedures, including requirements for  
14 serving notices or engaging in alternative dispute resolution  
15 proceedings before bringing a suit or an arbitration proceeding,  
16 that are stated in the contract subject to this chapter or that are  
17 established by the state agency and expressly incorporated into the  
18 contract are enforceable, except to the extent those procedures  
19 conflict with the terms of this chapter.

20 Sec. 114.006. NO WAIVER OF OTHER DEFENSES. This chapter  
21 does not waive a defense or a limitation on damages available to a  
22 party to a contract, other than a bar against suit based on  
23 sovereign immunity.

24 Sec. 114.007. NO WAIVER OF IMMUNITY TO SUIT IN FEDERAL  
25 COURT. This chapter does not waive sovereign immunity to suit in  
26 federal court.

27 Sec. 114.008. NO WAIVER OF IMMUNITY TO SUIT FOR TORT



1 LIABILITY. This chapter does not waive sovereign immunity to a  
2 claim arising from a cause of action for negligence, fraud,  
3 tortious interference with a contract, or any other tort.

4 Sec. 114.009. EMPLOYMENT CONTRACTS EXEMPT. This chapter  
5 does not apply to an employment contract between a state agency and  
6 an employee of that agency.

7 Sec. 114.010. VENUE. A suit under this chapter may be  
8 brought in a district court in:

9 (1) a county in which the events or omissions giving  
10 rise to the claim occurred; or

11 (2) a county in which the principal office of the state  
12 agency is located.

13 Sec. 114.011. LIMITATION ON REMEDIES. Satisfaction and  
14 payment of any judgment under this chapter may not be paid from  
15 funds appropriated to the state agency from general revenue unless  
16 the funds are specifically appropriated for that purpose. Property  
17 of the state or any agency, department, or office of the state is  
18 not subject to seizure, attachment, garnishment, or any other  
19 creditors' remedy to satisfy a judgment taken under this chapter.

20 Sec. 114.012. EXCLUSIVE REMEDY. A claim to which this  
21 chapter applies may not be brought under Chapter 2260, Government  
22 Code, against the state or a unit of state government as defined by  
23 Section 2260.001, Government Code.

24 Sec. 114.013. REPORT. Before January 1 of each  
25 even-numbered year, each state agency shall report to the governor,  
26 the comptroller, and each house of the legislature the cost of  
27 defense to the state agency and the office of the attorney general

1 in an adjudication brought against the agency under a contract  
2 subject to this chapter. Included in the report shall be the amount  
3 claimed in any adjudication pending on the date of the report.

4 SECTION 2. Section 2260.002, Government Code, is amended to  
5 read as follows:

6 Sec. 2260.002. APPLICABILITY. This chapter does not apply  
7 to:

8 (1) a claim for personal injury or wrongful death  
9 arising from the breach of a contract; ~~or~~

10 (2) a contract executed or awarded on or before August  
11 30, 1999; or

12 (3) a claim for breach of contract to which Chapter  
13 114, Civil Practice and Remedies Code, applies.

14 SECTION 3. (a) Chapter 114, Civil Practice and Remedies  
15 Code, as added by this Act, applies only to a claim arising under a  
16 contract executed on or after September 1, 2013. A claim that  
17 arises under a contract executed before September 1, 2013, is  
18 governed by the law applicable to the claim immediately before the  
19 effective date of this Act, and that law is continued in effect for  
20 that purpose.

21 (b) Nothing in this Act is intended to create, rescind,  
22 expand, or limit any waiver of sovereign immunity to suit  
23 applicable to any contract executed before September 1, 2013.

24 SECTION 4. This Act takes effect September 1, 2013.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 586 was passed by the House on May 10, 2013, by the following vote: Yeas 132, Nays 5, 2 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 586 on May 24, 2013, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 586 on May 26, 2013, by the following vote: Yeas 145, Nays 0, 2 present, not voting.

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Chief Clerk of the House

H.B. No. 586

I certify that H.B. No. 586 was passed by the Senate, with amendments, on May 22, 2013, by the following vote: Yeas 29, Nays 2; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 586 on May 26, 2013, by the following vote: Yeas 29, Nays 2.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor

AN ACT

relating to the Internet posting of certain information regarding state grants.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter B, Chapter 403, Government Code, is amended by adding Section 403.0245 to read as follows:

Sec. 403.0245. AVAILABILITY ON INTERNET OF CERTAIN INFORMATION ON STATE GRANTS. (a) In this section, "state agency" has the meaning assigned by Section 403.013.

(b) A state agency that awards a state grant in an amount greater than \$25,000 shall make available to the public on the agency's generally accessible Internet website the purposes for which the grant was awarded. The agency shall provide to the comptroller a link to the information in order for the comptroller to maintain the information on the comptroller's Internet website through a central Internet portal.

SECTION 2. This Act takes effect September 1, 2013.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 1487 was passed by the House on April 25, 2013, by the following vote: Yeas 136, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 1487 on May 23, 2013, by the following vote: Yeas 140, Nays 0, 2 present, not voting.

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Chief Clerk of the House

I certify that H.B. No. 1487 was passed by the Senate, with amendments, on May 17, 2013, by the following vote: Yeas 30, Nays 0.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §11.102 *without change* to the proposed text as published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2748), and will not be republished.

### **Background and Summary of the Factual Basis for the Proposed Rule**

House Bill (HB) 586, 83rd Legislature, effective September 1, 2013, added Chapter 114 to the Texas Civil Practice and Remedies Code.

Texas Civil Practice and Remedies Code, §114.001 defines "adjudication," "contract subject to this chapter," and "state agency."

Texas Civil Practice and Remedies Code, §114.002 applies only to a claim for breach of a written contract for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract.

Texas Civil Practice and Remedies Code, §114.003 provides that a state agency that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of an express provision of the contract, subject to the terms and conditions of Texas Civil

Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.004 provides that the total amount of money awarded in an adjudication brought against a state agency for breach of an express provision of a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 is limited to the following: 1) the balance due and owed by the state agency under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration if the contract expressly provides for that compensation; 2) the amount owed for written change orders or additional work required to carry out the contract; 3) reasonable and necessary attorney's fees based on an hourly rate that are equitable and just if the contract expressly provides for that recovery; and 4) interest at the rate specified by the contract or, if a rate is not specified, the rate for post judgment interest under Texas Finance Code, §304.003(c), (relating to providing that the post judgment interest rate is the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation or 5%, whichever is more, or 15% a year if the prime rate as published by the Board of Governors of the Federal Reserve System is more than 15%), but not to exceed 10%. This section also prohibits damages awarded in an adjudication brought against a state agency arising under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 from including consequential damages, exemplary damages, or damages for unabsorbed



home office overhead.

Texas Civil Practice and Remedies Code, §114.005 provides that adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to Texas Civil Practice and Remedies Code, Chapter 114 or that are established by the state agency and expressly incorporated into the contract are enforceable, except to the extent those procedures conflict with the terms of Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.006 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.

Texas Civil Practice and Remedies Code, §114.007 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to suit in federal court.

Texas Civil Practice and Remedies Code, §114.008 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to a claim arising from a cause of action for negligence, fraud, tortious interference with a contract, or any other

tort.

Texas Civil Practice and Remedies Code, §114.009 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not apply to an employment contract between a state agency and an employee of that agency.

Texas Civil Practice and Remedies Code, §114.010 authorizes a suit under Texas Civil Practice and Remedies Code, Chapter 114 to be brought in a district court in a county in which the events or omissions giving rise to the claim occurred, or a county in which the principal office of the state agency is located.

Texas Civil Practice and Remedies Code, §114.011 prohibits satisfaction and payment of any judgment under Texas Civil Practice and Remedies Code, Chapter 114 from being paid from funds appropriated to the state agency from general revenue unless the funds are specifically appropriated for that purpose. It provides that property of the state or any agency, department, or office of the state is not subject to seizure, attachment, garnishment, or any other creditors' remedy to satisfy a judgment taken under Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.012 provides that the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 is an alternative to the remedy

provided by Texas Government Code, Chapter 2260 (Resolution of Certain Contract Claims Against the State). It requires a party claiming breach of an express provision of the contract to elect to pursue the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 or the remedy provided by Texas Government Code, Chapter 2260. The election is binding and is prohibited from being revoked.

Texas Civil Practice and Remedies Code, §114.013 requires each state agency, before January 1, of each even-numbered year, to report to the governor, the comptroller of public accounts of the State of Texas, and each house of the legislature the cost of defense to the state agency and the office of the attorney general in an adjudication brought against the agency under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114. The report must include the amount claimed in any adjudication pending on the date of the report.

HB 586, 83rd Legislature, effective September 1, 2013, amends Texas Government Code, §2260.002, by adding subsection (3), which exempts a claim for breach of contract to which Texas Civil Practice and Remedies Code, Chapter 114 applies from the remedy authorized under Texas Government Code, Chapter 2260.

### **Section Discussion**

#### *§11.102, Applicability*

Adopted subsection (b)(9) to the rule to reflect the exemption of sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services as authorized under Texas Civil Practice and Remedies Code, Chapter 114 or the Texas Government Code.

### **Final Regulatory Impact Analysis**

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, § 2001.0225, and determined that the adopted amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule." The intent of the adopted rulemaking is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. The changes are not expressly to protect the environment and reduce risks to human health and environment.

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

### **Takings Impact Assessment**

The commission evaluated the adopted rulemaking and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this

amendment is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. Promulgation and enforcement of this adopted amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); 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 regulations. Therefore, there are no burdens imposed on private real property.

### **Consistency with the Coastal Management Program**

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

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a contracting rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on

any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the adopted amendment will not affect any coastal natural resource areas because the rule only affects governmental contracting and is therefore, consistent with CMP goals and policies.

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

### **Public Comment**

The commission held a public hearing on May 6, 2014. The comment period closed on May 12, 2014. The commission did not receive any comments regarding this rule making.

## **CONTRACTS**

### **§11.102**

#### **Statutory Authority**

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The adopted amendment implements requirements in House Bill 586, 83rd Legislature, 2013.

#### **§11.102. Applicability.**

(a) This chapter does not apply to an action of the agency for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(b) This chapter does not apply to contracts:

(1) between the agency and the federal government or its agencies, another state, or another nation;

(2) between the agency and another unit of state government;

(3) between the agency and a local governmental body, or a political subdivision of another state;

(4) between a subcontractor and a contractor;

(5) subject to the Transportation Code, §201.112;

(6) within the exclusive jurisdiction of state or local regulatory bodies;

(7) within the exclusive jurisdiction of federal courts or regulatory bodies;

[or]

(8) for grants of funds from the agency to grantees or subgrantees; or [.]

(9) for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract, in which the amount in controversy is not less than \$250,000.

(c) This subchapter applies to claims for breach of contract against the agency asserted by a contractor under Texas Government Code, Chapter 2260 and to counterclaims of the agency. No employee or agent of the commission is authorized to waive the requirements of this subchapter nor the sovereign immunity of the agency, whether by means of acceptance of goods and services or otherwise.



The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §14.9 *without change* to the proposed text as published in the April 11, 2014, issue of the *Texas Register* (39 TexReg 2751), and will not be republished.

### **Background and Summary of the Factual Basis for the Proposed Rule**

House Bill (HB) 1487, 83rd Legislature, effective September 1, 2013, added §403.0245 to the Texas Government Code. Texas Government Code, §403.0245 requires the commission to post notices of state-funded grant opportunities of \$25,000 or more on the public website. It also requires the commission to provide a link to the Texas Comptroller of Public Accounts (Comptroller) website through a central Internet portal.

### **Section Discussion**

#### *§14.9, Notices*

Adopted subsection (f) reflects the new requirement to make grant awards in excess of \$25,000 available to the public on the agency's generally accessible Internet website, and to state the purpose for which the grant was awarded.

### **Final Regulatory Impact Analysis**

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted

amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule". The intent of the adopted rulemaking is to make certain information easily available to the public. The changes are not expressly to protect the environment and reduce risks to human health and environment.

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

### **Takings Impact Assessment**

The commission evaluated the adopted rulemaking and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment is to make certain information easily available to the public. Promulgation and enforcement of this adopted amendment 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 (constitutionally); 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 regulations. Therefore, there are no burdens imposed on private 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 Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a contracting rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the adopted amendment will not affect any coastal natural resource areas because the rule only affects governmental contracting and is therefore, consistent with CMP goals and policies.

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

**Public Comment**

The commission held a public hearing on May 6, 2014. The comment period closed on May 12, 2014. The commission did not receive any comments regarding this rulemaking.

## **GRANTS**

### **§14.9**

#### **Statutory Authority**

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The adopted amendment implements House Bill 1487, 83rd Legislature, 2013.

#### **§14.9. Notices.**

(a) The executive director shall publish on the state electronic business daily, commonly known as the Texas Marketplace, information regarding any solicitation related to a grant or series of grants, any of which is reasonably expected to exceed \$25,000, to be awarded under this chapter.

(b) The notice will indicate either that the executive director is seeking proposals or applications from potential grant recipients, or that one or more direct awards is anticipated, in accordance with §14.8 of this title (relating to Direct Award).

(c) If one or more direct awards is anticipated, the notice will identify the recipients selected to receive a direct award and will describe the objective and amount of each proposed award.

(d) Following recipient selection and final grant award, except in the case of a previously noted direct award, the executive director shall file a second notice in the state's electronic business daily identifying the successful recipients and indicating the amount of each awarded grant.

(e) In addition, the executive director may publish or broadcast information concerning a grant or grants in any publication, web site, or other forum.

(f) The executive director shall make available to the public on the agency's generally accessible Internet website the purpose for which any grant with a value greater than \$25,000 was awarded.

health service unit, the governing body shall adopt, implement, and enforce procedures for the completion of criminal background checks on all prospective employees that would be considered for assignment to that unit, except for persons currently licensed by this state as health professionals.

(8) (No change.)

(9) Photo identification badge. The governing body shall adopt a policy requiring employees, physicians, contracted employees, and individuals in training who provide direct patient care at the hospital to wear a photo identification badge during all patient encounters, unless precluded by adopted isolation or sterilization protocols. The badge must be of sufficient size and worn in a manner to be visible and must clearly state:

(A) at minimum the individual's first or last name;

(B) the department of the hospital with which the individual is associated;

(C) the type of license held by the individual, if applicable under Title 3, Occupations Code; and

(D) the provider's status as a student, intern, trainee, or resident, if applicable.

(g) - (i) (No change.)

(j) Medical record services. The hospital shall have a medical record service that has administrative responsibility for medical records. A medical record shall be maintained for every individual who presents to the hospital for evaluation or treatment.

(1) - (6) (No change.)

(7) All verbal orders must be dated, timed, and authenticated within 96 [48] hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders.

(A) - (C) (No change.)

(8) - (12) (No change.)

(k) - (n) (No change.)

(o) Nursing services. The hospital shall have an organized nursing service that provides 24-hour nursing services as needed.

(1) - (3) (No change.)

(4) Drugs and biologicals. Drugs and biologicals shall be prepared and administered in accordance with federal and state laws, the orders of the individuals granted privileges by the medical staff, and accepted standards of practice.

(A) (No change.)

(B) All orders for drugs and biologicals shall be in writing, dated, timed, and signed by the individual responsible for the care of the patient as specified under subsection (f)(6)(A) of this section. When telephone or verbal orders must be used, they shall be:

(i) (No change.)

(ii) dated, timed, and authenticated within 96 [48] hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders; and

(iii) (No change.)

(C) (No change.)

(5) - (8) (No change.)

(p) - (y) (No change.)

§133.45. *Miscellaneous Policies and Protocols.*

(a) - (f) (No change.)

(g) Abortion. A hospital that performs abortions shall adopt, implement and enforce policies to:

(1) ensure compliance with HSC, Chapter 171[, Subchapters A and B (relating to Abortion and Informed Consent)];

(2) (No change.)

(h) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401423

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 776-6972

## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

#### CHAPTER 11. CONTRACTS

##### SUBCHAPTER D. RESOLUTION OF CONTRACT CLAIMS

###### 30 TAC §11.102

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §11.102.

Background and Summary of the Factual Basis for the Proposed Rule

The commission is proposing this rulemaking to amend an existing rule pertaining to a sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services.

House Bill (HB) 586, 83rd Legislature, effective September 1, 2013, added Chapter 114 to the Texas Civil Practice and Remedies Code.

Texas Civil Practice and Remedies Code, §114.001 defines "adjudication," "contract subject to this chapter," and "state agency."

Texas Civil Practice and Remedies Code, §114.002 applies only to a claim for breach of a written contract for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract.

Texas Civil Practice and Remedies Code, §114.003 provides that a state agency that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 waives

sovereign immunity to suit for the purpose of adjudicating a claim for breach of an express provision of the contract, subject to the terms and conditions of Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.004 provides that the total amount of money awarded in an adjudication brought against a state agency for breach of an express provision of a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 is limited to the following: 1) the balance due and owed by the state agency under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration if the contract expressly provides for that compensation; 2) the amount owed for written change orders or additional work required to carry out the contract; 3) reasonable and necessary attorney's fees based on an hourly rate that are equitable and just if the contract expressly provides for that recovery; and 4) interest at the rate specified by the contract or, if a rate is not specified, the rate for post judgment interest under Texas Finance Code, §304.003(c) (relating to providing that the post judgment interest rate is the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation or 5%, whichever is more, or 15% a year if the prime rate as published by the Board of Governors of the Federal Reserve System is more than 15%), but not to exceed 10%. This section also prohibits damages awarded in an adjudication brought against a state agency arising under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 from including consequential damages, exemplary damages, or damages for unabsorbed home office overhead.

Texas Civil Practice and Remedies Code, §114.005 provides that adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to Texas Civil Practice and Remedies Code, Chapter 114 or that are established by the state agency and expressly incorporated into the contract are enforceable, except to the extent those procedures conflict with the terms of Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.006 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.

Texas Civil Practice and Remedies Code, §114.007 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to suit in federal court.

Texas Civil Practice and Remedies Code, §114.008 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to a claim arising from a cause of action for negligence, fraud, tortious interference with a contract, or any other tort.

Texas Civil Practice and Remedies Code, §114.009 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not apply to an employment contract between a state agency and an employee of that agency.

Texas Civil Practice and Remedies Code, §114.010 authorizes a suit under Texas Civil Practice and Remedies Code, Chapter 114 to be brought in a district court in a county in which the events or omissions giving rise to the claim occurred, or a county in which the principal office of the state agency is located.

Texas Civil Practice and Remedies Code, §114.011 prohibits satisfaction and payment of any judgment under Texas Civil Practice and Remedies Code, Chapter 114 from being paid from funds appropriated to the state agency from general revenue unless the funds are specifically appropriated for that purpose. It provides that property of the state or any agency, department, or office of the state is not subject to seizure, attachment, garnishment, or any other creditors' remedy to satisfy a judgment taken under Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.012 provides that the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 is an alternative to the remedy provided by Texas Government Code, Chapter 2260 (Resolution of Certain Contract Claims Against the State). It requires a party claiming breach of an express provision of the contract to elect to pursue the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 or the remedy provided by Texas Government Code, Chapter 2260. The election is binding and is prohibited from being revoked.

Texas Civil Practice and Remedies Code, §114.013 requires each state agency, before January 1 of each even-numbered year, to report to the governor, the comptroller of public accounts of the State of Texas, and each house of the legislature the cost of defense to the state agency and the office of the attorney general in an adjudication brought against the agency under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114. The report must include the amount claimed in any adjudication pending on the date of the report.

HB 586, 83rd Legislature, effective September 1, 2013, amends Texas Government Code, §2260.002, by adding subsection (3), which exempts a claim for breach of contract to which Texas Civil Practice and Remedies Code, Chapter 114 applies from the remedy authorized under Texas Government Code, Chapter 2260.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 30 TAC Chapter 14, Grants.

#### Section Discussion

##### *§11.102, Applicability*

The commission proposes to amend §11.102 by adding subsection (b)(9) to reflect the exemption of sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services as authorized under Texas Civil Practice and Remedies Code, Chapter 114 or the Texas Government Code.

#### Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule would update Chapter 11 as required by HB 586, 83rd Legislature. The proposed rule would allow the agency to be sued for a breach of contract for engineering, architectural, construction services, or for materials related to these professional services if claims (exclusive of prejudgment interest, penalties, costs, expenses, and attorney fees) are \$250,000 or more. The proposed rule would implement the requirements of HB 586 some of which include: definitions of terms; limitations



on adjudicated awards; limitations on remedies; and reporting requirements.

The agency solicits contracts for engineering, architectural, and construction services, primarily related to remediation activities (such as Superfund and petroleum storage tank sites) and related site construction activities. In the past five years, contractors filed two claims for \$250,000 or more, but neither of these claims went to the administrative hearing phase. The agency follows state law and state purchasing guidelines when it enters into contracts. The agency also complies with state law and regulations when paying vendors and only withholds payment in accordance with the express contract terms. Therefore, the agency does not anticipate committing a breach of contract. For these reasons, the proposed rule is not expected to have a fiscal impact on the agency.

The proposed rule would not have a fiscal impact on a unit of local government since the proposed rule does not waive sovereign immunity for a local government and have no effects on agency contracts with governmental entities.

#### Public Benefits and Costs

Ms. 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 compliance with state law.

The proposed rule would not have a significant fiscal impact on individuals or large businesses that are vendors of engineering, architectural, and construction services to the agency. The agency, since it complies with all state purchasing laws and regulations and all state payment laws and regulations, does not anticipate breaching any contract or losing a suit for breach of contract. In the event that individuals and businesses providing these services prevail in a breach of contract suit for claims of \$250,000 or more, those individuals and businesses could experience significant, beneficial fiscal impacts under the proposed rule.

#### Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses that are vendors of engineering, architectural, and construction services to the agency. The proposed rule would allow providers of these services to sue the agency if the agency commits a breach of contract and if claims total \$250,000 or more. The agency does not anticipate breaching any contract terms or losing a suit for breach of contract.

#### 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 is required to comply with state law and 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 amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule." The intent of the proposed rulemaking is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. The changes are not expressly to protect the environment and reduce risks to human health and environment.

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 the proposed amendment and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. Promulgation and enforcement of this proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); 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 regulations. Therefore, there are no burdens imposed on private real property.

#### Consistency with the Coastal Management Program

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

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the proposed amendment will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

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 May 6, 2014, at 10 a.m., 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 dis-

cussion 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 Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

#### Submittal of Comments

Written comments may be submitted to Bruce McAnally, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-051-011-AS. The comment period closes May 12, 2013. Copies of the proposed rule-making can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Greg Yturralde, Revenue Operation Manager, at (512) 239-2446.

#### Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The proposed amendment implements requirements in House Bill 586, 83rd Legislature, 2013.

#### §11.102. *Applicability.*

(a) This chapter does not apply to an action of the agency for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(b) This chapter does not apply to contracts:

- (1) between the agency and the federal government or its agencies, another state, or another nation;
- (2) between the agency and another unit of state government;
- (3) between the agency and a local governmental body, or a political subdivision of another state;
- (4) between a subcontractor and a contractor;
- (5) subject to the Transportation Code, §201.112;
- (6) within the exclusive jurisdiction of state or local regulatory bodies;
- (7) within the exclusive jurisdiction of federal courts or regulatory bodies; [or]
- (8) for grants of funds from the agency to grantees or sub-grantees; or[-]
- (9) for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract, in which the amount in controversy is not less than \$250,000.

(c) This subchapter applies to claims for breach of contract against the agency asserted by a contractor under Texas Government Code, Chapter 2260 and to counterclaims of the agency. No employee or agent of the commission is authorized to waive the requirements of

this subchapter nor the sovereign immunity of the agency, whether by means of acceptance of goods and services or otherwise.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 28, 2014.

TRD-201401408

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 239-2141



## CHAPTER 14. GRANTS

### 30 TAC §14.9

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §14.9.

#### Background and Summary of the Factual Basis for the Proposed Rule

The commission is proposing this rulemaking to amend an existing rule pertaining to a state funded grant opportunity notification.

House Bill (HB) 1487, 83rd Legislature, effective September 1, 2013, added §403.0245 to the Texas Government Code. Texas Government Code, §403.0245 requires the commission to post notices of state-funded grant opportunities of \$25,000 or more on the public website. It also requires the commission to provide a link to the Texas Comptroller of Public Accounts (Comptroller) website through a central Internet portal.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 30 TAC Chapter 11, Contracts.

#### Section Discussion

##### §14.9, *Notices*

The commission proposes to amend §14.9 by adding subsection (f) to the rule to reflect the new requirement to make grant awards in excess of \$25,000 available to the public on the agency's generally accessible Internet website and to state the purpose for which the grant was awarded.

#### Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

Per the requirements of HB 1487, 83rd Legislature, the proposed rule amends Chapter 14 to require the notification of grants of \$25,000 or more on the agency's generally accessible public website and provide a link to the Comptroller's website through a central Internet portal, currently known as the Texas Marketplace.

The agency has used currently available resources to establish the required webpage and Internet link, and the proposed rule has not had a significant fiscal impact on the agency.

The proposed rule is not expected to have a significant fiscal impact for local governments. However, it may result in easier access to information for grants of \$25,000 or more. The agency does not anticipate that there will be a significant increase in grant applications since information on grant opportunities (though not as consolidated as per the proposed rule) is currently communicated via other means and funding is limited to predetermined amounts.

#### Public Benefits and Costs

Ms. 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 compliance with state law and greater transparency and communication regarding grant information.

The proposed rule would not have a significant direct fiscal impact on individuals or businesses, but eligible entities may apply for additional grant funds because information of state-funded grants of \$25,000 or more would be easier to find. The proposed rule requires the posting of state-funded grants of \$25,000 or more on the agency's generally accessible public website and the provision of a link to the Comptroller's website through a central Internet portal.

#### Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rule. The proposed rule provides additional communication regarding state-funded grants of \$25,000 or more and may lead more small businesses to apply for state-funded grants.

#### 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 amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule". The intent of the proposed rulemaking is to make certain information easily available to the public. The changes are not expressly to protect the environment and reduce risks to human health and environment.

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 the proposed amendment and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment

is to make certain information easily available to the public. Promulgation and enforcement of this proposed amendment 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 (constitutionally); 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 regulations. Therefore, there are no burdens imposed on private real property.

#### Consistency with the Coastal Management Program

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

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the amendment will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

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 May 6, 2014, at 10 a.m., 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 Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

#### Submittal of Comments

Written comments may be submitted to Bruce McAnally, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-051-011-AS. The comment

period closes May 12, 2014. Copies of the proposed rule-making can be obtained from the commission's Website at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Greg Yturralde, Revenue Operation Manager, at (512) 239-1951.

#### Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The proposed amendment implements House Bill 1487, 83rd Legislature, 2013.

#### §14.9. Notices.

(a) The executive director shall publish on the state electronic business daily, commonly known as the Texas Marketplace, information regarding any solicitation related to a grant or series of grants, any of which is reasonably expected to exceed \$25,000, to be awarded under this chapter.

(b) The notice will indicate either that the executive director is seeking proposals or applications from potential grant recipients, or that one or more direct awards is anticipated, in accordance with §14.8 of this title (relating to Direct Award).

(c) If one or more direct awards is anticipated, the notice will identify the recipients selected to receive a direct award and will describe the objective and amount of each proposed award.

(d) Following recipient selection and final grant award, except in the case of a previously noted direct award, the executive director shall file a second notice in the state's electronic business daily identifying the successful recipients and indicating the amount of each awarded grant.

(e) In addition, the executive director may publish or broadcast information concerning a grant or grants in any publication, website [web site], or other forum.

(f) The executive director shall make available to the public on the agency's generally accessible Internet website the purpose for which any grant with a value greater than \$25,000 was awarded.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 28, 2014.

TRD-201401409

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 239-2141



## CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§114.301, 114.306, 114.307, and 114.309; and the repeal of §114.304.

The repeal of §114.304 and amended §114.307 and §114.309 are proposed to be submitted to the United States Environmen-

tal Protection Agency (EPA) as revisions to the state implementation plan (SIP).

#### Background and Summary of the Factual Basis for the Proposed Rules

The current state regulations for the Regional Low Reid Vapor Pressure (RVP) Gasoline Program, as specified under the Chapter 114 gasoline volatility rules in §114.301, prohibit the sale of all gasoline from gasoline-dispensing facilities that has a RVP greater than 7.8 pounds per square inch (psi) within the 95 central and eastern Texas counties affected by these regulations from June 1 through October 1 of each year. This prohibition applies to all other affected entities in the affected 95 counties from May 1 through October 1 of each year. Low RVP gasoline is refined to have a lower evaporation rate and lower volatility than conventional gasoline. Low RVP gasoline reduces the evaporative emissions generated during vehicle refueling and therefore decreases the emissions of volatile organic compounds (VOC) and other ozone-forming emissions. Reducing emissions of VOC benefits the regional 95-county area and the rest of the state and assists in the attainment and maintenance of the National Ambient Air Quality Standard (NAAQS) for ozone. These rules also prohibit the increased use of methyl-tertiary-butyl-ether (MTBE) in gasoline to comply with the low RVP gasoline requirements during the period of May 1 through October 1 each year over that used in the period May 1 through October 1, 1998, on an average per gallon basis.

The Regional Low RVP Gasoline Program rules, as specified in §114.304, also require all gasoline producers and importers that supply gasoline to the affected counties to register with the TCEQ. In addition, all registered gasoline producers and importers are required, as specified in §114.306, to submit an annual report certifying that the use of MTBE in the gasoline supplied to the affected counties, from May 1 through October 1 of the current reporting year, has not increased on an average per gallon basis from that used during the period of May 1 through October 1, 1998.

The following 95 Texas counties, as specified in §114.309, are affected by the Regional Low RVP Gasoline Program regulations: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The use of MTBE as an oxygenate for compliance with federal reformulated gasoline (RFG) regulations and as a gasoline octane enhancing additive was common when the Regional Low RVP Gasoline Program regulations in Chapter 114 were originally adopted in July 1999. Concerns over the potential MTBE contamination of groundwater and surface water led the commission to adopt the MTBE prohibition specified in §114.301(c) in April 2000 to prevent gasoline producers from increasing the use of MTBE in gasoline to conform to the low RVP requirements.

# Texas Commission on Environmental Quality



## **ORDER ADOPTING AMENDED RULES**

**Docket No. 2013-1913-RUL**

**Rule Project No. 2013-051-011-AS**

On August 20, 2014, the Texas Commission on Environmental Quality (Commission) adopted amended rules in 30 TAC Chapters 11 and 14, concerning Contracts and Grants respectively. The proposed rules were published for comment in the April 11, 2014 issue of the *Texas Register* (39 TexReg 2748 and 2751).

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rules are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rules necessary to comply with *Texas Register* requirements. The adopted rules and the preamble to the adopted rules are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Government Code, § 2001.033.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Date Issued:

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

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Bryan W. Shaw, Ph.D., P.E., Chairman