

The Texas Natural Resource Conservation Commission (commission) adopts the amendments to §90.1, Purpose, and §90.10, Application for a Regulatory Flexibility Order. The amendment to §90.1 is adopted *with change* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3471). The amendment to §90.10 is adopted *without change* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts these revisions to Chapter 90 in order to implement statutory changes to Texas Water Code (TWC), §5.123, Regulatory Flexibility, redesignated as TWC, §5.758, Regulatory Flexibility. The commission is also readopting, in concurrent action, Chapter 90 (added by Acts 1999, 76th Legislature, Chapter 1499, §1.11(a)). The notice of the intention to readopt the chapter was published in the Rule Review section of the June 14, 2002, issue of the *Texas Register* (27 TexReg 5259).

The rulemaking implements House Bill (HB) 2912, §4.02 (77th Legislature, 2001). HB 2912, §4.02, amended TWC, §5.123 and redesignated it as the new TWC, §5.758. The amendments, which became effective on September 1, 2001, require that applicants demonstrate that the alternative control measures provide greater protection for the environment and the public health, compared with the specific requirements that would otherwise apply, and that applicants present documented evidence that benefits to environmental quality will occur as a result of the alternative. TWC, §5.123 previously required that an exemption proposed be “at least as” protective as the specific requirement being exempted and did not require documented evidence. This rulemaking amends §90.10(b) to conform with amended language in the TWC requiring that proposals to control pollution by alternative methods

or standards be more protective than the existing rules or laws, and that applicants must provide documented evidence that benefits to environmental quality will occur as a result of the alternative.

New TWC, §5.758 is intended to allow entities currently regulated by the commission the flexibility to use alternative methods to meet statutory or regulatory requirements. The amendments require that the benefits gained through the alternative methods are greater than the current requirements, and that the applicants provide documented evidence that the benefits will occur through the alternative methods.

SECTION BY SECTION DISCUSSION

Section 90.1 is amended to correct the TWC citation from §5.123 to §5.758. The references to §5.127 and §5.131 in this section were inadvertently proposed for omission and are reinstated in adoption.

Section 90.10(b)(2)(A) is amended to require that the detailed explanation in applications for regulatory flexibility show that the alternate methods or standards would be more protective of the environment.

A new subsection (b)(3) requires that a regulatory flexibility order application show documented evidence of the benefits to environmental quality that will result from the proposal. All subsequent paragraphs in subsection (b) are renumbered.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute.

Although the intent of the rulemaking is to protect the environment or reduce risks to human health from environmental exposure, and because it is part of a voluntary program offering flexibility to the regulated community, it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. In addition to not being a major environmental rule, the rulemaking also does not meet any of the four applicability requirements listed in §2001.0225(a). The rules do not exceed a standard set by federal law because there are no relevant or applicable federal standards. The rulemaking does not exceed a requirement of a state law because it is a direct implementation of a specific state law. The rulemaking does not exceed a requirement of a delegation agreement or contract between a state and an agency because there are no corresponding relevant or applicable delegation agreements. Finally, the rulemaking is not adopted solely under the general powers of the agency because it is adopted as part of an implementation of a specific state law codified at TWC, §5.758.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed a preliminary assessment of whether the rules constitute a takings under Texas Government Code, Chapter 2007. This section of the preamble constitutes the assessment required under §2007.043.

The purpose of this rulemaking is to implement a statutory provision which requires that a request for exemption under Chapter 90 be more protective of the environment than the method or standard that would otherwise apply, and that the petition include documented evidence of the resulting benefits to environmental quality. The commission believes that the amendments substantially advance this

purpose because they require any proposed alternative to be “more protective” instead of “at least as protective,” as the method or standard that would otherwise apply, and also require that the application include documented evidence of the benefits to environmental quality. There are no burdens imposed on private real property, and the benefits to society are the added protection of health, welfare, and the environment.

Promulgation and enforcement of these rules is neither a statutory nor a constitutional taking of private real property. Specifically, the rules do not burden real property, 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. Because this rulemaking implements a statutory mandate to make the regulatory requirements more stringent for obtaining a regulatory flexibility order, there is no alternative action that could accomplish this specific purpose.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program, since this rulemaking affects provisions for all types of permits issued by the commission. The Coastal Coordination Act requires that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission determined that the rules are in accordance with 31 TAC §505.22, and found that the rulemaking is consistent with the applicable CMP goals and policies.

The goals of the CMP are: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests. The policies of the CMP in 31 TAC §501.14 implement these goals.

The specific CMP goals applicable to these rules require that rules governing permits shall require systems that are permitted by the commission to be located, designed, operated, inspected, and maintained to prevent release of pollutants that may adversely affect coastal waters. Promulgation and enforcement of these rules will not violate any standards identified in the applicable CMP goals because the standards specified in the rules require that flexibility can only be provided when an applicant clearly demonstrates that the variance requested is more protective than the requirements of a rule or law that would otherwise apply to the system. There are several policies in §501.14 that govern permits conditions for which regulatory flexibility could be sought from the commission. However, since the amendments require that applicants show greater protectiveness in any application submitted, the amendments are consistent with the CMP policies.

PUBLIC COMMENT

A public hearing on this rulemaking was held on May 20, 2002 in Austin, and no oral comments were received. The public comment period ended on May 28, 2002, and no written comments were received.

SUBCHAPTER A: PURPOSE, APPLICABILITY, AND ELIGIBILITY

§90.1

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC. The amendment is also adopted under TWC, §5.758, which requires the commission to establish the procedure to obtain a regulatory flexibility exemption.

§90.1. Purpose.

The purpose of this chapter is to implement the commission's authority under Texas Water Code, §5.758, to provide regulatory flexibility to an applicant who proposes an alternative method or alternative standard to control or abate pollution; §5.127, relating to Environmental Management Systems; and §5.131, relating to Environmental Management Systems.

SUBCHAPTER B: GENERAL PROVISIONS

§90.10

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC. The amendment is also adopted under TWC, §5.758, which requires the commission to establish the procedure to obtain a regulatory flexibility exemption.

§90.10. Application for a Regulatory Flexibility Order.

(a) An application for a Regulatory Flexibility Order (RFO) must be submitted to the executive director.

(b) The application must, at a minimum, include:

(1) a narrative summary of the proposal, including the specific statutes or commission rules for which an exemption is being sought;

(2) a detailed explanation, including a demonstration as appropriate, that the proposed alternative is:

(A) more protective of the environment and the public health than the method or standard prescribed by the statute or commission rule that would otherwise apply; and

(B) not inconsistent with federal law, including any requirement for a federally approved or authorized program;

(3) documented evidence of the benefits to environmental quality that will result from the proposal;

(4) an implementation schedule which includes a proposal for monitoring, recordkeeping, and/or reporting, where appropriate, of environmental performance and compliance under the RFO;

(5) an identification, if applicable, of any proposed transfers of pollutants between media;

(6) a description of efforts made or proposed to involve the local community and to achieve local community support;

(7) an application fee of \$250; and

(8) any other information requested from the applicant by the executive director during the application review period.

(c) The application must be signed by the applicant or its duly authorized agent and must certify that all information is true, accurate, and complete to the best of that person's knowledge.

(d) The applicant shall submit an original and two copies of the signed application to the executive director for review, and shall send one additional copy to the commission's regional office for the region in which the facility is located.