

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §90.1, Purpose, and §90.10, Application for a Regulatory Flexibility Order.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission proposes 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 proposing, in concurrent action, to review the rules in Chapter 90 (added by Acts 1999, 76th Legislature, Chapter 1499, §1.11(a)). The notice of the intention to review can be found in the Rule Review section of this issue of the *Texas Register*.

The proposed 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 the benefits will occur. 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 proposed rulemaking will amend §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 rule or law, and that applicants must provide documented evidence that benefits will occur. 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 proposed amendments will require that the benefits gained through the alternative methods are greater than the current requirements, and that the applicant provide documented evidence that the benefits will occur through the alternative methods.

SECTION BY SECTION DISCUSSION

Section 90.1 is proposed to be amended to correct the TWC citation from §5.123 to §5.758.

Section 90.10(b)(2)(A) is proposed to be 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) is proposed to require 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 proposed to be renumbered.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendments are in effect, there may be fiscal implications, which could be significant, for units of state and local government that voluntarily seek regulatory flexibility orders. However, the commission anticipates the costs resulting from voluntary participation in the program would likely be offset by anticipated economic benefits to be gained from receiving authority to operate a facility under a regulatory flexibility order. The proposed amendments would only affect

units of state and local government that decide to voluntarily apply for regulatory flexibility orders. All other units of state and local government would not be affected by this rulemaking.

This rulemaking is intended to implement certain provisions of HB 2912 (an Act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001. In order to qualify for regulatory flexibility orders, the bill requires all applicants after September 1, 2001 to provide documented evidence which demonstrates that the provisions of the proposed alternative control measures would provide greater environmental protection compared to existing commission requirements. The commission currently requires an applicant to provide a narrative description of the alternative control measure, and a demonstration that the proposal would provide environmental protection equivalent to existing requirements.

All units of state and local government that operate equipment required to comply with pollution standards under the commission's air, water, or waste permit programs could apply for regulatory flexibility orders. The only exception would be low-level radioactive waste storage, handling, or disposal facilities, which would not be allowed to seek regulatory flexibility under this chapter.

The commission anticipates the only potential additional costs to applicants applying for voluntary regulatory flexibility orders will be costs associated with environmental and engineering testing. Although testing is not a specific requirement, the commission anticipates applicants will have to perform some type of testing beyond what is currently required in order to provide the commission with sufficient evidence that the proposals will exceed existing commission requirements. It is not known

how many applicants conducted environmental and engineering testing in the past. The commission estimates there will be a wide range in testing costs, depending on the complexity and scope of the proposal. Testing costs are estimated to range from \$100 for simple water analysis testing to over \$250,000 for complex hazardous waste combustion testing.

The commission anticipates that units of state and local government that decide to apply for regulatory flexibility orders will take these costs into consideration; therefore, the increased testing costs are not anticipated to exceed the actual economic benefits to be gained from receiving authority to operate a facility under a regulatory flexibility order. The proposed amendments are not anticipated to pose a significant fiscal implication for the commission. Since the program was implemented in 1997, the commission has received seven applications for regulatory flexibility. The annual number of regulatory flexibility order applications submitted to the commission are not anticipated to increase significantly due to implementation of the proposed amendments.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be potentially increased environmental protection due to the requirement that proposals for regulatory flexibility must exceed existing commission environmental standards.

This rulemaking is intended to implement certain provisions of HB 2912, 77th Legislature, 2001. In order to qualify for regulatory flexibility orders, the bill requires all applicants after September 1, 2001 to provide documented evidence which demonstrates that the alternative control measures would provide greater environmental protection compared to existing commission requirements. The commission currently requires an applicant to provide a narrative description of the alternative control measure, and a demonstration that the proposal would provide environmental protection equivalent to existing requirements.

All individuals and businesses that operate equipment required to comply with pollution standards under the commission's air, water, or waste permit programs could apply for regulatory flexibility orders. The only exception would be low-level radioactive waste storage, handling, or disposal facilities, which would not be allowed to seek regulatory flexibility under this chapter.

The commission anticipates the only potential additional costs to applicants applying for voluntary regulatory flexibility orders will be costs associated with environmental and engineering testing. Although testing is not a specific requirement, the commission anticipates applicants will have to perform some type of testing beyond what is currently required in order to provide the commission with sufficient evidence that the proposals will exceed existing commission requirements. It is not known how many applicants conducted environmental and engineering testing in the past. The commission estimates there will be a wide range in testing costs, depending on the complexity and scope of the proposals. Testing costs are estimated to range from \$100 for simple water analysis testing to over \$250,000 for complex hazardous waste combustion testing.

The commission anticipates that individuals and businesses that decide to apply for regulatory flexibility orders will take these costs into consideration; therefore, the increased testing costs are not anticipated to exceed the actual economic benefits to be gained from receiving authority to operate a facility under a regulatory flexibility order. Since the program was implemented in 1997, the commission has received seven applications for regulatory flexibility, six of which were submitted by large businesses. The annual number of regulatory flexibility order applications submitted to the commission are not anticipated to increase significantly due to implementation of the proposed amendments.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications to small or micro-businesses, which may be significant, that voluntarily choose to apply for a regulatory flexibility order. This rulemaking is intended to implement certain provisions of HB 2912, 77th Legislature, 2001, which requires applicants seeking regulatory flexibility orders after September 1, 2001 to provide documented evidence which demonstrates that the alternative control measure would provide greater environmental protection compared to existing commission requirements. The commission currently requires an applicant to provide a narrative description of the alternative control measure, and a demonstration that the proposal would provide environmental protection equivalent to existing requirements.

All small and micro-businesses that operate equipment required to comply with pollution standards under the commission's air, water, or waste permit programs could apply for regulatory flexibility orders. The only exception would be low-level radioactive waste storage, handling, or disposal facilities, which would not be allowed to seek regulatory flexibility under this chapter.

The commission anticipates the only potential additional costs to applicants applying for voluntary regulatory flexibility orders will be costs associated with environmental and engineering testing.

Although testing is not a specific requirement, the commission anticipates applicants will have to perform some type of testing beyond what is currently required in order to provide the commission with sufficient evidence that the proposals will exceed existing commission requirements. It is not known how many applicants conducted environmental and engineering testing in the past. The commission estimates there will be a wide range in testing costs, depending on the complexity and scope of the proposals. Testing costs are estimated to range from \$100 for simple water analysis testing to over \$250,000 for complex hazardous waste combustion testing.

The commission anticipates that small and micro-businesses that decide to apply for regulatory flexibility orders will take these costs into consideration; therefore, the increased testing costs are not anticipated to exceed the actual economic benefits to be gained from receiving authority to operate a facility under a regulatory flexibility order. Since the program was implemented in 1997, the commission has received seven applications, one of which was from a small business. The annual number of regulatory flexibility order applications submitted to the commission are not anticipated to increase significantly due to implementation of the proposed amendments.

The following is an analysis of the costs per employee for small and micro-businesses that voluntarily elect to apply for a regulatory flexibility order and have to pay approximately \$50,000 for testing to support the claims of the application. Small and micro-businesses are defined as having fewer than 100 or 20 employees respectively. A small business would have to pay up to an additional \$500 per employee, while a micro-business would have to pay up to an additional \$2,500 per employee to comply with the proposed amendments.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking 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 proposed rules do not

exceed a standard set by federal law because there are no relevant or applicable federal standards. The proposed rulemaking does not exceed a requirement of a state law because it is a direct implementation of a specific state law. The proposed 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. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether the rules would 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 proposed 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 proposed amendments would 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 proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed 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. The commission invites public comment on this takings assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC Chapter 505, §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 proposed rules are in accordance with 31 TAC §505.22, and found that the proposed 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 proposed 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 proposed amendments require that applicants show greater protectiveness in any application submitted, the amendments are consistent with the CMP policies.

The commission seeks public comment on the consistency of the proposed rules with applicable CMP goals and policies.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on May 20, 2002 at 10:00 a.m., in Building F, Room 2210 at the commission's central office located at 12100 Park 35 Circle. The hearing will be

structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-073-090-AD. Comments must be received by 5:00 p.m., May 28, 2002. For further information or questions concerning this proposal, please contact Joseph Thomas, Office of Environmental Policy, Analysis, and Assessment, (512) 239-4580.

SUBCHAPTER A: PURPOSE, APPLICABILITY, AND ELIGIBILITY

§90.1

STATUTORY AUTHORITY

The amendment is proposed 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 proposed under TWC, §5.758, which requires the commission to establish the procedure to obtain a regulatory flexibility exemption.

The proposed amendment implements TWC, §5.758.

§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 [Texas Water Code (TWC), §5.123, Regulatory Flexibility; §5.127, Environmental Management Systems; and §5.131, Environmental Management Systems].

SUBCHAPTER B: GENERAL PROVISIONS

§90.10

STATUTORY AUTHORITY

The amendment is proposed 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 proposed under TWC, §5.758, which requires the commission to establish the procedure to obtain a regulatory flexibility exemption.

The proposed amendment implements TWC, §5.758.

§90.10. Application for a Regulatory Flexibility Order.

(a) (No change.)

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

(1) (No change.)

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

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

(B) (No change.)

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

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

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

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

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

(8) [(7)] any other information requested from the applicant by the executive director

during the application review period.

(c) - (d) (No change.)