

The Texas Commission on Environmental Quality (commission) adopts amendments to §§25.2, 25.6, and 25.9 *without changes* to the proposed text as published in the February 25, 2005, issue of the *Texas Register* (30 TexReg 1006) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted rules is to conform existing rules with statutory changes made by Senate Bill (SB) 934, 78th Legislature, 2003, and to refer to more recent laboratory accreditation standards adopted by the National Environmental Laboratory Accreditation Conference (NELAC).

SECTION BY SECTION DISCUSSION

Adopted §25.2, Definitions, adds new paragraph (20) to define same site as all structures, other appurtenances, and improvements located on one or more contiguous properties. The definition clarifies which on-site or in-house environmental laboratories may provide data to the commission without obtaining accreditation. Previously existing paragraph (20) is renumbered as paragraph (21) to accommodate the new definition.

Adopted §25.6, Conditions Under Which the Commission May Accept Analytical Data, amends paragraph (1) to revise subparagraph (B) concerning on-site and in-house environmental laboratories located in other states and accredited or periodically inspected by those states and adds subparagraph (C) concerning on-site and in-house environmental laboratories performing work for companies with units located at the same site or performing work without compensation for governmental agencies or charitable organizations. These changes incorporate statutory changes made by SB 934.

Adopted §25.9, Standards for Environmental Testing Laboratory Accreditation, replaces the phrase “approved May 2001” with “Chapters 3, 4, and 5, adopted July 2002, and Chapters 1, 2, and 6, adopted June 2003” to refer to the most recent laboratory accreditation standards adopted by NELAC.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, Chapter 2001, §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. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking has two major components. First, it authorizes the commission to accept data from an on-site or in-house environmental testing laboratory that: 1) is located in another state, provided the laboratory is either accredited or inspected by the state; and 2) prepares data for another company with a unit located on the same site, or prepares the data without compensation for a governmental or charitable organization. Second, the rulemaking changes a reference to laboratory accreditation standards to reflect more recent standards adopted by the NELAC. These amendments do not meet the definition of a “major environmental rule.”

The adopted rules implement SB 934, 78th Legislature, 2003. These rules are not a major environmental rule and do not meet any of the four applicability requirements that apply to a major environmental rule. Under Texas Government Code, Chapter 2001, §2001.0225, these adopted rules

do not exceed a standard set by federal law or a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The United States Environmental Protection Agency does not have a federal program for laboratory accreditation nor does it establish requirements for states implementing their own laboratory accreditation program. The adopted rules do not exceed a standard set by federal law nor exceed the requirement of a delegation agreement because there is no federal authority regarding laboratory accreditation.

These revisions do not adopt a rule solely under the general powers of the commission and do not exceed an express requirement of state law. The requirements implemented through these rules are expressly defined under Texas Water Code (TWC), Chapter 5, Subchapter R, which requires the commission to enact rules governing the accreditation of environmental laboratories.

TAKINGS IMPACT STATEMENT ASSESSMENT

The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to these adopted amendments because the amendments are not a taking as defined in Chapter 2007 or a constitutional taking of private real property. The purpose of the adopted amendments is to implement SB 934, 78th Legislature, 2003, and update referenced NELAC standards.

Promulgation and enforcement of these adopted rules will not affect private real property, which is the subject of the rules because the amendments will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. The rules only

apply to environmental testing laboratories that submit data to the commission for use in its decisions.

Property values will not be decreased, because the amendments will not limit the use of real property.

Thus, these rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking and found that the adoption is not a rulemaking subject to the Texas Coastal Management Program (CMP) because the rulemaking is neither identified in 31 TAC §505.11, nor will it affect any action or authorization identified in §505.11. Therefore, this rulemaking is not subject to the CMP.

PUBLIC COMMENT

The comment period closed on March 28, 2005. The commission received no comments.

SUBCHAPTER A: GENERAL PROVISIONS

§25.2, §25.6

STATUTORY AUTHORITY

The amendments are adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; §5.802 and §5.805, which require the agency to adopt rules for the administration of the laboratory accreditation program; and SB 934, 78th Legislature, 2003.

The adopted amendments implement TWC, §5.127.

§25.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Accreditation** - An authorization granted by the executive director to an environmental testing laboratory that meets requirements of this subchapter and Subchapter B of this chapter (relating to Environmental Testing Laboratory Accreditation).

(2) **Accrediting authority** - An agency recognized by the National Environmental Laboratory Accreditation Program (NELAP) that grants accreditation on behalf of a state, territory, or federal agency.

(3) **Analyte** - A constituent for which an environmental sample is analyzed.

(4) **Certification** - An authorization granted by the executive director to an environmental testing laboratory that analyzes drinking water and which meets requirements of this subchapter and Subchapter C of this chapter (relating to Environmental Testing Laboratory Certification).

(5) **Environmental testing laboratory** - A scientific laboratory that performs analyses to determine the chemical, molecular, or pathogenic components of environmental media for regulatory compliance.

(6) **Environmental testing laboratory assessment** - The process used by an accrediting or certifying authority to measure the performance, effectiveness, and conformity of an environmental testing laboratory to the National Environmental Laboratory Accreditation Conference (NELAC) accreditation or United States Environmental Protection Agency certification standards and this chapter. An environmental testing laboratory assessment may include a physical inspection of a laboratory and its operations.

(7) **Fields of accreditation** - The matrix, technology, method, and analyte or analyte group for which an environmental testing laboratory may be accredited.

(8) **Fields of certification** - The methods and analytes for which an environmental testing laboratory may be certified. The methods and analytes are used in a commission decision relating to compliance with the Safe Drinking Water Act.

(9) **In-house environmental testing laboratory** - An environmental testing laboratory that provides analytical data to its operator for a commission decision relating to:

(A) permits or other authorizations issued to the laboratory's operator;

(B) compliance matters and enforcement actions taken concerning the laboratory's operator; or

(C) corrective actions taken by the laboratory's operator to satisfy statutes, rules, or commission orders.

(10) **Laboratory personnel** - Individuals who manage, perform, maintain, or verify the work or the quality of the work at the environmental testing laboratory.

(11) **Matrix** - Sample type, including drinking water; nonpotable water; solid and chemical materials; air and emissions; and biological tissue.

(12) **Mobile environmental testing laboratory** - An environmental testing laboratory capable of being moved from one site to another site.

(13) **National Environmental Laboratory Accreditation Conference (NELAC)** - The voluntary organization of state, territorial, and federal environmental officials and interest groups whose primary purpose is to establish mutually acceptable national standards for accrediting environmental testing laboratories.

(14) **National Environmental Laboratory Accreditation Program (NELAP)** - The environmental testing laboratory accreditation program including NELAC.

(15) **On-site environmental testing laboratory** - An in-house environmental testing laboratory located at a regulated entity.

(16) **Operator** - An individual authorized to act on behalf of the environmental testing laboratory.

(17) **Primary accreditation** - Accreditation of an environmental testing laboratory according to NELAC standards and the requirements of this chapter.

(18) **Proficiency test sample** - A sample, the composition of which is unknown by an environmental testing laboratory or the individual performing the analysis. The sample is used to evaluate whether the laboratory and analyst can produce results within the specified acceptance criteria.

(19) **Quality system** - A structured and documented management system describing the policies, objectives, principles, organizational authority, responsibilities, accountability, and implementation plan of an organization for ensuring the quality of its work processes, products, and services. The quality system provides the framework for planning, implementing, and assessing work performed by the environmental testing laboratory for quality assurance and quality control.

(20) **Same site** - All structures, other appurtenances, and improvements located on one or more contiguous properties.

(21) **Secondary accreditation** - Accreditation granted by the executive director to an environmental testing laboratory that has been granted primary accreditation by another NELAP accrediting authority.

§25.6. Conditions Under Which the Commission May Accept Analytical Data.

The commission may accept analytical data provided by an environmental testing laboratory, for any matter under the commission's jurisdiction relating to permits or other authorizations, compliance matters, enforcement actions, or corrective actions, that is not accredited according to this chapter if the laboratory:

(1) is an on-site or in-house environmental testing laboratory that is:

(A) inspected at least every three years by the executive director;

(B) located in another state and accredited or periodically inspected by that state; or

(C) inspected at least every three years by the executive director and is performing work:

(i) for another company with a unit located on the same site; or

(ii) without compensation for a governmental agency or a charitable organization.

(2) is accredited under federal law, including certification by the United States Environmental Protection Agency to provide analytical data for decisions relating to compliance with the Safe Drinking Water Act;

(3) provides analytical data necessary for emergency response activities and the required analytical data are not otherwise available from an environmental testing laboratory accredited according to this chapter or federal law; or

(4) provides analytical data for which the commission does not offer accreditation.

SUBCHAPTER B: ENVIRONMENTAL TESTING LABORATORY ACCREDITATION

§25.9

STATUTORY AUTHORITY

The amendment is adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; and §5.802 and §5.805, which require the agency to adopt rules for the administration of the laboratory accreditation program.

The adopted amendment implements TWC, §5.802 and §5.805.

§25.9. Standards for Environmental Testing Laboratory Accreditation.

Accreditation must be based on an environmental testing laboratory's conformance to National Environmental Laboratory Accreditation Conference standards, Chapters 3, 4, and 5, adopted July 2002, and Chapters 1, 2, and 6, adopted June 2003 and the requirements of this chapter.