

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §§25.2, 25.6, and 25.9

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to conform the 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

Proposed §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 of same site clarifies which on-site or in-house environmental laboratories may provide data to the commission without obtaining accreditation. Existing paragraph (20) is proposed to be renumbered as paragraph (21) to accommodate the proposed new definition.

Proposed §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 and on-site and in-house environmental laboratories performing work without compensation for governmental agencies or charitable organizations. These changes incorporate statutory changes made by SB 934.

Proposed §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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are expected for the agency or other units of state and local government as a result of administration or enforcement of the proposed rules.

The proposed amendments implement SB 934, 78th Legislature, 2003, and update NELAC standards currently referenced in existing rules.

Portions of the proposed amendments that implement SB 934 allow the agency to: 1) accept tests and analyses from an unaccredited in-house or on-site laboratory located in another state, if the laboratory is periodically inspected or accredited by that state; 2) accept tests and analyses from an unaccredited in-house or on-site laboratory, if the laboratory is performing the work for another company with a unit located on the same site; and 3) accept tests and analyses from an unaccredited in-house or on-site laboratory that provides results without compensation for governmental agencies or charitable organizations, as long as the laboratory is periodically inspected by the agency. These changes are anticipated to result in less fee revenue collected by the agency to support the laboratory accreditation program, due to fewer laboratories that would be subject to the accreditation criteria.

Current §25.9, Standards for Environmental Testing Laboratory Accreditation, was adopted September 2001 and refers to standards approved by NELAC during May 2001. The reference to NELAC standards adopted May 2001 is out of date. The proposed change brings the reference to NELAC standards up to date. There are no fiscal implications anticipated from this proposed change. Further, the change is necessary for the agency's accreditation program to be consistent with National Environmental Laboratory Accreditation Program standards, as required by Texas Water Code (TWC), §5.802.

House Bill 2912, 77th Legislature, 2001, transferred authority for environmental laboratory accreditation from the Texas Department of Health to the TCEQ and required the agency to implement a laboratory accreditation program consistent with standards adopted by NELAC. The bill further required that all data used by the agency for decisions regarding permits or authorizations, compliance matters, enforcement actions, or corrective actions come from an accredited environmental testing laboratory unless the laboratory is an in-house or on-site lab periodically inspected by the agency, a laboratory accredited under federal law, or the data was for emergency response activities and was not available from an accredited lab.

For the five-year period the proposed amendments are in effect, revenue to the agency is expected to decrease an estimated \$25,000 per year beginning three years after a laboratory accreditation program is operational. House Bill 2912 provided a three-year period for laboratories to become accredited once TCEQ publishes notice in the *Texas Register* that the agency's environmental laboratory accreditation program has met NELAC standards. Once the program is operational, fee revenue would be used to

support the program operations. The estimated loss of future revenue is not expected to have a significant impact on program operations. Any laboratories owned or operated by state or local governments that meet the proposed criteria are expected to realize cost savings from not having to pay accreditation fees, though these cost savings are not expected to be significant.

There are an estimated 12 laboratories (three out-of-state, five on-site or in-house on the site of another company performing work for that company, and four working without compensation for governmental agencies or charities periodically inspected by the agency) that would be affected by the proposed amendments. These laboratories would have been expected to pay administrative and category fees for the type of analyses (such as nonpotable water, solid and chemical materials, metals, and polychlorinated biphenyls (PCBs), etc.) performed by the laboratories. The proposed rules affecting the three out-of-state laboratories are anticipated to result in an estimated revenue loss of \$6,150 per year, proposed rules affecting the on-site or in-house laboratories working for another company are anticipated to result in an estimated revenue loss of \$15,250 per year, and proposed rules affecting the laboratories working without compensation for governmental entities an estimated revenue loss of \$3,200 each year.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement of and compliance with the proposed rules would be compliance with state law.

Cost savings, which are not expected to be significant, are anticipated for businesses or individuals that own or operate certain environmental laboratories as a result of the implementation or enforcement of the proposed amendments. Cost savings would be realized three years after the environmental laboratory accreditation program meets NELAC standards.

There are an estimated 12 laboratories (three out-of-state, five on-site or in-house laboratories on the site of another company performing work for that company, and four working without compensation for governmental agencies or charities periodically inspected by the agency) that would be affected by the proposed amendments. These laboratories would have been expected to pay administrative and category fees for the type of analyses (such as on nonpotable water, solid and chemical materials, metals, and PCBs, etc.) performed by the laboratories. The three out-of-state laboratories are anticipated to save an estimated \$6,150 in accreditation fees each year, the on-site or in-house laboratories working for another company are anticipated to save an estimated \$15,250 in accreditation fees each year, and the laboratories working without compensation for governmental entities may save an estimated \$3,200 in accreditation fees each year.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses. Small or micro-businesses that own or operate environmental laboratories, if any, are expected to realize cost savings due to the implementation of the proposed amendments.

Any cost savings are expected to be the same as those estimated for businesses and individuals.

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, 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 will authorize the commission to accept data from an on-site or in-house environmental testing laboratory that: 2) is located in another state, provided the laboratory is either accredited or inspected by the state; 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. Thus, these rules do not meet the definition of a "major environmental rule."

The proposed 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 proposed 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 proposed 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 that would be implemented through these rules are expressly defined under 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 preliminary assessment indicates that Texas Government Code, Chapter 2007, does not apply to these proposed amendments because the proposed amendments are not a taking as defined in Chapter 2007, nor are they a constitutional taking of private real property. The purpose of the proposed amendments is to implement SB 934, 78th Legislature, 2003, and update NELAC standards currently referenced in existing rules.

Promulgation and enforcement of these proposed rules will not affect private real property which is the subject of the rules because the proposed 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 proposed 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 proposed amendments will not limit the use of real property. Thus, these proposed rules will 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 proposal 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, the proposal is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Comments must be received by 5:00 p.m., March 28, 2005, and should reference Rule Project Number 2004-018-025-AD. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER A: GENERAL PROVISIONS

§25.2, §25.6

STATUTORY AUTHORITY

The amendments are proposed 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 proposed amendments implement TWC, §5.127.

§25.2. Definitions.

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

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

(4) **Certification** - An authorization granted by the executive director to an environmental testing laboratory that [which] analyzes drinking water and which meets requirements of

this subchapter and Subchapter C of this chapter (relating to Environmental Testing Laboratory Certification).

(5) (No change.)

(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 [EPA] certification standards and this chapter. An environmental testing laboratory assessment may include a physical inspection of a laboratory and its operations.

(7) - (19) (No change.)

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

(21) [(20)] **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) [is] inspected at least every three years by the executive director; [and]

(B) located in another state and accredited or periodically inspected by that state [prepares the data for a permit, registration, or other authorization, and the permit, registration, or other authorization was issued by the commission to the operator of the laboratory]; 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 [EPA] to provide analytical data for decisions relating to compliance with the Safe Drinking Water Act;

(3) - (4) (No change.)

SUBCHAPTER B: ENVIRONMENTAL TESTING LABORATORY ACCREDITATION

§25.9

STATUTORY AUTHORITY

The amendment is proposed 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 proposed amendment implements TWC, §5.127.

§25.9. Standards for Environmental Testing Laboratory Accreditation.

Accreditation must [shall] 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 [approved May 2001] and the requirements of this chapter.