

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §§90.1, 90.2, 90.10, 90.12, 90.14, 90.16, 90.18, and 90.20, concerning Regulatory Flexibility.

Sections 90.2, 90.10, 90.12, 90.14, 90.16, and 90.20 are adopted with changes to the proposed text as published in the May 8, 1998, issue of the *Texas Register* (23 TexReg 4519). Sections 90.1 and 90.18 are adopted without changes and will not be republished.

EXPLANATION OF ADOPTED RULES

Senate Bill (SB) 1591, 75th Legislature, 1997, provides the commission with the authority to exempt an applicant from a requirement of a statute or commission rule related to the control or abatement of pollution if the applicant applies an alternative method or standard that is at least as protective of the environment and is not inconsistent with federal law. This authority provides for the use of innovative methods of compliance that could potentially result in greater environmental performance. SB 1591 further directs the commission to specify by rule the procedure for obtaining an exemption, which must include public notice and public participation provisions.

The purpose of this rulemaking is to comply with the requirements of SB 1591 by establishing Regulatory Flexibility Order (RFO) application requirements and provisions for public notice/public participation.

Section 90.1, concerning Purpose, states the purpose of the new chapter, which is to provide regulatory flexibility to an applicant who proposes an alternative method or alternative standard to control or abate pollution. This section clearly identifies the objective of the adopted chapter and the authority under which the commission is adopting the new chapter.

Section 90.2, concerning Applicability and Eligibility, establishes that the adopted chapter applies to anyone subject to an environmental statute or commission rule. This section also establishes that persons referred to the attorney general and who incur a judgment, and persons convicted of willfully or knowingly committing an environmental crime are ineligible for three years. The program is a voluntary program meant for those persons who have demonstrated a willingness to comply with environmental requirements. The eligibility requirements were therefore written to allow persons with a less than perfect compliance history to remain eligible, while specifically excluding persons who are guilty of major or willful infractions.

Section 90.10, concerning Application for a Regulatory Flexibility Order, specifies the procedures for applying for an RFO, establishes minimum requirements for the application, and establishes a \$250 application fee. Minimum requirements were developed to ensure consistency in applications received by the commission, to ensure consistency in the review of those applications, and to minimize the amount of time spent requesting additional information from the applicant.

Section 90.12, concerning Additional Fees; Cost Recovery, establishes a provision for additional fees if the executive director determines that the application is significant and complex. Under this provision, the executive director may require the applicant to enter into a cost recovery agreement in order for the commission to recover all costs associated with the review and approval of the application. This allows the commission to recover costs associated with the review and approval of applications, particularly those that require changes to existing permits or authorizations, or otherwise require extensive staff time and commission resources.

Section 90.14, concerning Commission Action on Application, establishes that the commission will act on the application consistent with provisions found in 30 Texas Administrative Code (TAC) Chapter 50, Subchapter B, concerning Action by the Commission, as applicable. Section 90.14 provides that the commission will consider, during review of the application, the applicant's compliance history and efforts made to achieve local community participation and support. This section was included to clearly indicate how the application will be processed and to ensure that potential applicants understand that their compliance history and efforts to involve the local community will be a factor in consideration of the proposal. Compliance history is important because it gives an indication of the applicant's ability or willingness to comply with an RFO. Local community participation is important because it identifies the preferences of the community relative to the proposal, exposes issues of importance to those in the locality, and provides the applicant with the information needed to address any potential community concerns prior to entering the application process.

Section 90.16, concerning Public Notice, Comment, and Hearing, establishes public notice and participation requirements. Public notice is divided into three segments: the first provides that applicants must comply with public notice requirements associated with the statute or commission rule for which they are seeking an exemption; the second establishes public notice requirements if the statute or commission rule for which an applicant is requesting an exemption does not require public notice; and the third allows for the use of alternative public notice, provided the alternative is reasonably likely to provide greater public notice and opportunity for participation. In addition, this section establishes minimum requirements for public notice. The public notice provision was divided into three segments because it is meant to provide for the greatest or most effective means of public notice. In addition, in light of the fact that the adopted rule is meant to provide flexibility, the alternative notice provision is meant to allow for the use of an alternative, provided that the alternative is likely to be more effective.

Section 90.18, concerning Amendment/Renewal, establishes the procedures for amending or renewing an RFO. This section specifies that an application for amendment or renewal may be filed in the same manner as a new application. In addition, this section provides that if an application for renewal is submitted at least 180 days prior to the expiration date of the current RFO, the applicant can continue to operate under the existing order until such time as a decision is made on the renewal application. This provision clarifies the procedures for amending or renewing an RFO, and in the event an RFO expires, provides that the applicant can continue to operate under that order provided the renewal application is submitted within the specified time frame. This minimizes the chance of the applicant being penalized because the commission does not act on the renewal application prior to expiration of the order.

Section 90.20, concerning Termination, details termination procedures by the recipient and the commission. This section provides that if the RFO is terminated by the recipient, then the recipient must be in compliance with all existing statutes or commission rules at the time of termination.

Termination language was included to allow the recipient to terminate the order in the event that the alternative does not result in an environmental or economic benefit. The recipient is required to immediately be in full compliance with existing statutes or commission rules, because it could operate under the RFO until such time as it is able to operate in full compliance with existing statutes or commission rules.

The commission may terminate the order if it finds that the recipient is not in compliance with the order or if the alternative is not or ceases to be at least as protective of the environment or public health, or becomes inconsistent with federal requirements. This section provides the recipient 30 days to request a show cause hearing before the commission to contest the decision to terminate. This section also provides that the executive director may grant a reasonable grace period to allow the recipient to come into full compliance with all existing statutes or commission rules. Otherwise, the recipient would be in immediate noncompliance upon termination.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has 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 the Code, and it does not meet any of the four applicability requirements listed in §2001.0225(a).

The specific goal of these rules is to provide flexibility from existing statutes and commission rules, provided the proposed alternative is at least as protective as the statute or commission rule it replaces. These rules do not create or impose any additional burdens on the regulated community.

This rulemaking 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. On the contrary, these rules are expected to have a positive effect on the economy and the environment.

This rulemaking will not exceed any state or federal requirement or a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government.

RFOs issued under these rules may create additional requirements for applicants, such as reporting or recordkeeping, beyond those already contained in the commission's rules. However, since the program is voluntary, no additional requirements will be imposed on the regulated community at large. RFOs may be surrendered at any time, without penalty, provided all existing requirements are met.

The commission did not receive any public comments on the Draft Regulatory Impact Analysis.

TAKINGS IMPACT STATEMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to implement the commission's authority under Texas Water Code, §5.123, to provide regulatory

flexibility to an applicant who proposes an alternative method or standard to control or abate pollution. The rules will substantially advance this specific purpose by establishing application and public notice/public participation procedures as required by SB 1591, 75th Legislature, 1997 (the legislation authorizing and requiring the commission to develop a regulatory flexibility program). Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the Regulatory Flexibility Program is strictly voluntary, and therefore does not impose any burden. Applicants should be fully aware of any additional burdens as a result of program participation, and have the opportunity to withdraw at any time.

The commission did not receive any public comments on the Takings Impact Assessment.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the adopted rulemaking and found that the rulemaking is identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), and will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11.

The commission has prepared a consistency determination for the adopted rules under 31 TAC §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the adopted rule include: 1) protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 2) ensuring sound management of all coastal resources by

allowing for compatible economic development and multiple human uses of the coastal zone; 3) balancing the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; 4) coordinating agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 5) making agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and 6) making coastal management processes visible, coherent, accessible, and accountable to the people of Texas by providing for public participation in the ongoing development and implementation of the Texas CMP.

CMP policies applicable to the adopted rules include the policies in the following policy categories:

Category 3 - Discharges of Wastewater and Disposal of Waste from Oil and Gas Exploration and Production Activities; Category 4 - Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; Category 6 - Discharge of Municipal and Industrial Wastewater to Coastal Waters; Category 7 - Nonpoint-source Water Pollution; Category 8 - Development in Critical Areas; Category 10 - Dredging and Dredged Material Disposal and Placement; Category 13 - Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; Category 17 - Emission of Air Pollutants; Category 18 - Appropriations of Water; Category 19 - Levee and Flood Control Projects; Category 20 - Policy for Major Actions; and Category 21 - Administrative Policies.

Promulgation and enforcement of these rules will not violate any standards identified in the applicable CMP goals and policies because the adopted rules are by definition consistent with the goals and policies of the CMP because any alternative must be shown to be consistent with federal law and to be at least as protective of human health and the environment as the rule for which an alternative is requested; and procedures are established for public notice, comment, and hearing.

The commission did not received any public comment on the consistency of these rules with the Coastal Management Plan.

HEARING AND COMMENTERS

A public hearing on these rules was held in Austin on June 2, 1998, and the public comment period closed on June 8, 1998. No oral comments were received at the public hearing, but written comments were submitted by Texas Association of Business and Chambers of Commerce (TABCC), Texas Chemical Council (TCC), United States Environmental Protection Agency (EPA), Henry, Lowerre, Johnson, Hess & Frederick (Henry, Lowerre), Texas Utilities Services (TU), and Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll). Comments were submitted in regard to the following categories: Public Notice/Participation, Application Requirements, Terminology, Fees, Renewal, Termination, Scope of Flexibility, Procedures, and Eligibility.

GENERAL COMMENTS

TU, TCC, and TABCC expressed support for the rules, but recommended changes. Brown McCarroll did not express support or opposition to the rules, but recommended changes. The EPA expressed

support for reinvention and partnership efforts between the two agencies, but expressed concerns over the scope of flexibility that might be granted under these rules and recommended changes. Henry, Lowerre expressed opposition to the rules, suggested limitations to the scope of the program, and recommended changes.

SPECIFIC COMMENTS

PUBLIC NOTICE/PARTICIPATION

The TABCC commented that the public notice requirements included in §90.16(b) could be costly for small businesses. Specifically, the commenter mentioned the requirement to publish notice in a newspaper of largest general circulation. The TABCC suggested that the notice be published in a newspaper of general circulation, but not necessarily the largest circulation. In addition, the TABCC suggested that the rule allow notice to be placed in the classified advertising or legal section. Finally, the TABCC commented that small businesses could not utilize §90.16(c), because it only allows an alternative notice procedure that would provide greater public notice, and therefore, would result in a greater cost to the applicant.

The commission agrees, and believes that publication in a newspaper of general circulation is sufficient. The commission believes that there is no qualitative difference between the classified, advertising, or legal sections of the newspaper, and has therefore decided that notice should be allowed in any of these sections. The commission does not agree that §90.16(c) would necessarily result in a greater cost to the applicant, and suggests that other lower cost methods of public notice may be available, including alternate publication, radio broadcast, placarding, etc. Such proposals will be reviewed on a case-by-case basis, as provided for in §90.16(c).

The TABCC commented that §90.16(b)(2) contains more onerous public notice, comment, and hearing requirements for the applicant than would have been required under the rule for which the applicant is seeking flexibility.

The commission acknowledges the TABCC's comments, but does not agree with its concerns. The commission believes that the public notice, comment, and hearing procedures laid out in the rule are appropriate, and believes that providing meaningful opportunities for public participation is appropriate. If a rule for which an applicant is seeking an exemption contains public notice, comment, and hearing requirements, then §90.16(b)(2) does not apply.

The TCC commented that community involvement should vary, depending on the type of regulatory flexibility being sought, and that applicants should be encouraged to discuss proposals at local citizen advisory panels as appropriate.

The commission agrees that local community involvement should vary, depending on the scope of the proposal. Although the rule language does not, strictly speaking, require local community support, efforts made to achieve local community participation and support will be a factor in the decision by the commission to approve or deny the proposal. To the degree citizen advisory panels are available, the commission encourages utilizing those as a mechanism to inform and involve the public.

The TCC commented that public notice and public participation requirements are inconsistent and duplicative, may require applicants to go beyond regular public notice processes, and that a notice and comment type of hearing should suffice for an RFO.

The commission disagrees. Except for changes to §90.16(b)(2), concerning public comment, the commission believes that the public notice, comment, and hearing procedures laid out in the rules are appropriate. The public participation procedures in the rule reference the existing procedures for the underlying requirements. Where there are no existing public notice requirements, the commission believes that providing meaningful opportunities for public participation is appropriate.

Henry, Lowerre commented that §90.16(a) requires applicants to comply with all public notice and participation requirements associated with the statutes or commission rules for which the applicant is seeking an exemption; however, the statutes and commission rules provide for no notice or participation requirements for RFOs. Therefore, Henry, Lowerre believes that the rules do not meet the public notice or participation requirements of Texas Water Code, §5.123.

The commission disagrees. An applicant seeking an exemption from statutes or commission rules which contain public notice and participation requirements must comply with those requirements. It is not necessary for those requirements to specify public notice and participation requirements for RFOs. They apply to specific activities undertaken which are affected by those rules, and a

request for an exemption from those rules would be an activity which requires public notice and participation in accordance with those rules.

Henry, Lowerre commented that limiting comments to 30 days after the notice is given is not appropriate, and does not allow the public to submit comments on the proposed action of the executive director. The commenter stated that after notice is given, many changes could be made to the application and the position of the executive director, and that the proposed approval of the RFO should be subject to public notice, comment, and possibly a hearing.

The commission acknowledges Henry, Lowerre's concerns. Although orders issued by the commission do not provide for public notice of the final order, the public will be able to follow development of RFOs during the process and will be able to comment during the commission agenda in which the proposal is considered. In the event substantial changes have been made to the application from the time of public notice to consideration during commission agenda, the public has the opportunity to address this issue and ask the commission to consider asking for additional public notice.

Henry, Lowerre commented that the requirement for "greater public notice and opportunity for participation" under §90.16(c) was not defined, and that such alternative notice and participation could possibly violate EPA requirements for federally delegated programs. The commenter further stated that the rules do not provide guidance on when alternative public notice and participation can be authorized by the commission.

The commission acknowledges Henry, Lowerre's concerns and reiterates that each proposal will be considered on a case-by-case basis. This will allow for comprehensive review to determine if greater public notice will be provided under the proposed alternative. Additional guidance is not needed in the rule to ensure that EPA requirements are met. The statute requires an exemption to not be inconsistent with federal law. The proposed rule provides that the application must demonstrate that an exemption will not be inconsistent with federal law, including any requirement for a federally approved or authorized program. This includes any federal requirements for public notice and participation.

TU suggested that the alternative public notice provisions in §90.16(c)(2) allow for equivalent, and not only greater, public notice and opportunity for participation than §90.16(a) or (b) provides.

The commission disagrees. The focus of these rules is to provide dual opportunities for improved environmental performance and decreased costs. The commission believes that if a variance is to be granted from standard notice requirements already duly set out by statute and rule, it should only be granted if the variance will result in improved notice.

Brown McCarroll commented that §90.16(b) should not provide for a public hearing for an alternative method of compliance when one is not required for the original method of compliance.

The commission agrees. It was the commission's intent to provide an opportunity for public comment, but not for a hearing, in cases under §90.16(b). The language has been modified to clarify this intent.

APPLICATION REQUIREMENTS

The TABCC commented that small businesses will be reluctant to certify that “all information is true, accurate, and complete,” as required in §90.10(c), because of a lack of confidence where environmental compliance is concerned. In addition, Brown McCarroll suggested that the certification be modified to read “to the best of my [the applicant's] knowledge, the application information is true, accurate and complete.”

The commission agrees, and the language in §90.10(c) has been modified to read as follows: “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.”

The TCC commented that the language of §90.10(3) could be construed to mean that some type of continuous monitoring is required. The TCC suggested revisions which would allow recordkeeping and/or reporting to suffice when appropriate.

The commission agrees that the language is unclear and has made the following change to §90.10(3): “an implementation schedule which includes a proposal for monitoring, *record-*

keeping, and/or reporting, where appropriate, of environmental performance and compliance under the RFO.”

Henry, Lowerre commented that three copies of the application, as required by §90.10(c), is not a sufficient number of copies. The commenter suggested that the rule require the submittal of eight to ten copies and the placement of one application in a public facility accessible to the public in the affected area.

The commission disagrees that eight to ten copies of applications are necessary. Section 90.10(d) is consistent with or more stringent than other commission rules relating to submission of applications, and the commission does not want to mandate the generation of unnecessary copies which may go unused. The commission agrees that copies should be made available to the public in the affected area. This is accomplished by requiring that a copy be sent to the appropriate regional office. An original copy will also be maintained in the Central Records file in the central office. Interested persons can review or procure copies from Central Records.

Henry, Lowerre commented that the rules do not contain adequate quality control provisions, such as a quick revocation process, requirements for engineer seals on applicable materials, and a requirement for engineer certification.

The commission acknowledges Henry, Lowerre’s comments, but points out that 30 TAC §305.66(f) provides for revocation of a permit if the permit holder or applicant made a false or

misleading statement in connection with an application. This rule is applicable to RFOs, because an RFO meets the definition of permit in 30 TAC §3.2. Otherwise, termination of RFOs is sufficiently handled under §90.20. Requirements for engineer seals and certifications will be required on a case-by-case basis as appropriate to the request being considered.

TERMINOLOGY

The TABCC and Brown McCarroll expressed reservations about the use of the word "exemption" in §90.10(b)(1) and §90.16(a), and suggested that a more accurate word or phrase be used to describe this alternative method of compliance. Brown McCarroll suggested that the term "exemption" be dropped and the term "alternative compliance method" be substituted to reflect the fact that the applicant does not seek an exemption from compliance, but rather a different method of compliance.

The commission acknowledges the concern, but the term "exemption" is taken verbatim from the statutory language of Texas Water Code, §5.123. If granted, an RFO would provide an exemption from a requirement of a statute or commission rule regarding the control or abatement of pollution, and not an exemption from regulatory compliance.

Brown McCarroll commented that the phrase "incurring a judgment" is overly broad and could be construed to include agreed settlements.

The commission disagrees, and believes that the term “judgment” does not encompass agreed administrative settlements. A judgment in the context of these rules includes only final actions of a court of law as a result of a referral to the Texas or United States attorneys general.

FEES

The TCC commented that the preamble discussion of §90.12, which states that additional fees may be assessed if the application requires a permit amendment, is unclear and a separate and additional amendment should not be required.

The commission agrees. The language in the preamble and rule have been modified to simplify the fee structure. Specifically, §90.12(a) has been deleted from the rule.

RENEWAL

The TCC commented that RFOs should not require renewal unless they necessitate changes to a permit.

The commission disagrees. Because of the innovative nature of the Regulatory Flexibility Program, the commission believes that it is appropriate and prudent to review RFOs on a periodic basis. Renewal of RFOs will be considered on a case-by-case basis with factors including, but not limited to, compliance with original RFO, demonstration that the alternative is at least as protective of the environment and public health, and the expiration date of any underlying permit or authorization, as applicable.

TERMINATION

The TCC commented that the commission should terminate an RFO only if there is a substantial violation of the order or subchapter.

The commission disagrees. In the event an RFO holder disagrees with a commission initiated termination, the RFO holder may request a show cause hearing before the commission, as provided in newly revised §90.20(b).

Henry, Lowerre commented that the rules provide for renewal of RFOs, but not for a termination or life of such RFO. In addition, it commented that RFOs which allow for changes to the operation of a facility that is authorized by a permit or other commission authorization should expire with the permit or authorization.

The commission acknowledges Henry, Lowerre's comment concerning termination dates. The commission intends to review each application on a case-by-case basis and establish a termination date based on the issue or request. Each order will establish a termination date as appropriate.

In the event an RFO allows for changes to the operation of a facility that is authorized by a permit or other commission authorization, that order shall include a termination date which does not extend past the termination date of such permit or authorization unless such permit or authorization is renewed.

Brown McCarroll suggested providing some mechanism of notice and comment opportunity to the RFO holder prior to the termination of the RFO.

The commission agrees, and has modified the provisions of §90.20(b)(1) to give notice of intent to terminate and give the holder of the RFO an opportunity to request a show cause hearing before the commission.

SCOPE OF FLEXIBILITY

The EPA submitted several comments addressing the scope of the Regulatory Flexibility Program. Specifically, the EPA expressed concerns regarding the use of the Regulatory Flexibility Program to vary federal requirements or state requirements which implement federal program requirements, and the phrase “not inconsistent with federal law,” which, according to the EPA, could be interpreted to allow the commission to vary federally approved programs without EPA approval. The commenter recommended a language change to §90.2(a) similar to language in the national pollutant discharge elimination system (NPDES) Memorandum of Agreement to clarify this issue. In addition, EPA recommended language referring applicants seeking a variance to federal requirements to federal reinvention mechanisms.

The commission acknowledges EPA’s comments and reiterates that orders entered under the authorizing statute, Water Code, §5.123, and this rule will not conflict with legal requirements for federally delegated or authorized programs. Neither the authorizing statute nor this rule authorizes the commission to grant an exemption that is inconsistent with the requirements for a

federally approved program. The attorney general of Texas has so informed EPA, in his letter dated March 13, 1998, concerning the commission's application for NPDES authorization. As EPA points out in its comment, to vary the required elements of a federally authorized program without federal approval would violate (that is, be inconsistent with) federal law. As the attorney general noted, the authorizing statute does not authorize this. The sentence from the proposed NPDES Memorandum of Agreement cited by EPA is a restatement of the law; it neither narrows nor expands the authority granted by Texas Water Code, §5.123. Except as specified in other interagency agreements, applications received by the commission which affect federally authorized or delegated programs will be forwarded to EPA for a consistency review in accordance with the terms of Texas Water Code, §5.123.

Henry, Lowerre commented that the commission should initially limit the scope of the rules and provide flexibility only through the permit process. The commenter suggested that the commission could gain experience with the process before it receives a flood of applications for which, according to them, there are no clear rules.

The commission acknowledges Henry, Lowerre's comments concerning the scope of flexibility. The commission's intent is to address a variety of issues consistent with SB 1591, which relate to environmental regulation, and to promote improvement of the environment. The commission believes it was the legislature's intent to implement a broad-based regulatory flexibility program.

Henry, Lowerre commented that an RFO issued to a facility operating under a standard air exemption, general water permit, permit-by-rule, production area authorization, or any other exception to individual permits would violate the rule establishing the exception and disqualify the facility from the rule. To change a specific requirement with an RFO would eliminate the use of the general permit and require an individual permit. The commenter stated that the rules should specifically exclude these types of authorizations.

The commission acknowledges Henry, Lowerre's concern; however, it also reiterates its intent to implement a broad-based regulatory flexibility program in accordance with the language in SB 1591. The commission emphasizes that each application will be reviewed on a case-by-case basis to ensure that it is at least as protective of the environment and not inconsistent with federal law.

Henry, Lowerre commented that the Regulatory Flexibility Program should exclude requirements under the Texas Audit Privilege Law, recordkeeping or reporting requirements, water quality standards, and minimum technology requirements.

The commission disagrees. The rulemaking provides for the use of innovative methods of compliance that could potentially result in greater environmental performance. Therefore, except for compliance history reasons, the commission has not restricted the activities which could be subject to an RFO. In addition, water quality standards and some minimum technology requirements are federally-based. The statute provides that an exemption not be inconsistent with federal law, and the rules provide that a demonstration be made in the application that an

exemption will not be inconsistent with federal law, including any requirement for a federally-approved or authorized program. Each application will be reviewed and judged on a case-by-case basis.

PROCEDURES

Henry, Lowerre commented that the rules do not contain guidance on commission approval of applications. Specifically, it commented that §90.14(a) references 30 TAC §50.17, which does not provide actual procedures for approval or denial of RFO applications. Additionally, it commented that the rule lacked a provision specifying when motions for rehearing or motions for reconsideration are required.

The commission acknowledges Henry, Lowerre's concerns. Each application will be processed in accordance with the provisions set forth in Chapter 50, Subchapter B of the commission rules, as applicable.

Henry, Lowerre commented that although §90.14(b) allows the commission to consider compliance history in its decision to approve or deny an application, it does not indicate how compliance history will be provided to the commission, or what that compliance history would include.

The commission acknowledges Henry, Lowerre's comments. The commission has procedures in place for compiling compliance histories and will use that protocol. Each application will be considered on a case-by-case basis. Compliance history will be one factor for the commission to

consider in weighing the advantages against the risks of each proposal. The commission also has the ability to request compliance history information under §90.10(b)(7).

Henry, Lowerre commented that the rules need to provide for compliance and enforcement by requiring easy access to the RFO, provisions for self-reporting of violations, and routine compliance inspections by commission inspectors.

The commission acknowledges Henry, Lowerre's concerns, but it intends for RFOs to be maintained in the same way as all permits, copies of which are located in the Central Office of the agency, as well as in the regional office where the facility is located. This procedure is already in practice, and does not need to be established by rule. RFOs meet the definition of permit and are subject to self-reporting and compliance requirements applicable to all permits.

Henry, Lowerre commented that the commission should not allow the use of the Regulatory Flexibility Program to avoid repeat violations. The commenter suggested that requirements for which a notice of violation was issued should not be eligible for regulatory flexibility.

The commission acknowledges Henry, Lowerre's concern, but expects to receive innovative, pilot project-type applications that could potentially result in greater compliance and environmental improvement. The commission does not envision, nor intend to allow, RFOs to be used as a means merely to circumvent enforcement.

ELIGIBILITY

Brown McCarroll commented that not all misdemeanor convictions of environmental laws should be grounds for automatic ineligibility under the rules. The commenter suggested, instead, that only willful or knowing criminal offenses should trigger automatic ineligibility.

The commission agrees, and has modified the language in §90.2 to provide for knowing or willful violations of environmental law. Evidence of negligent or reckless violations of environmental laws will be considered by the commission under §90.14(b) when deciding whether to issue an RFO.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.123, which authorizes the commission to exempt an applicant from a requirement of a statute or commission rule regarding the control or abatement of pollution if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard that is at least as protective of the environment and the public health and is not inconsistent with federal law. Texas Water Code, §5.123, requires the commission to adopt rules specifying the procedure for obtaining an exemption and requires that the rules provide for public notice and public participation.

CHAPTER 90

REGULATORY FLEXIBILITY

SUBCHAPTER A : PURPOSE, APPLICABILITY, AND ELIGIBILITY

§90.1, §90.2

§90.1. Purpose.

The purpose of this chapter is to implement the commission's authority under Texas Water Code, §5.123, to provide regulatory flexibility to an applicant who proposes an alternative method or alternative standard to control or abate pollution.

§90.2. Applicability and Eligibility.

(a) This chapter applies to any statute or commission rule regarding the control or abatement of pollution, except that it does not apply to requirements for storing, handling, processing, or disposing of low-level radioactive materials.

(b) Any person subject to any statute or commission rule regarding the control or abatement of pollution may be eligible to receive a Regulatory Flexibility Order, except that:

(1) a person who has been referred to the Texas or United States Attorney General, and has incurred a judgment, is ineligible for a period of three years from the date the judgment was final;

(2) a person who has been convicted of willfully or knowingly committing an environmental crime in this state or any other state is ineligible for a period of three years from the date of the conviction.

SUBCHAPTER B : GENERAL PROVISIONS

§§90.10, 90.12, 90.14, 90.16, 90.18, 90.20

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.123, which authorizes the Texas Natural Resource Conservation Commission (commission) to exempt an applicant from a requirement of a statute or commission rule regarding the control or abatement of pollution if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard that is at least as protective of the environment and the public health and is not inconsistent with federal law. Texas Water Code, §5.123, requires the commission to adopt rules specifying the procedure for obtaining an exemption and requires that the rules provide for public notice and public participation.

§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) at least as protective of the environment and the public health as 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) an implementation schedule which includes a proposal for monitoring, record-keeping, and/or reporting, where appropriate, of environmental performance and compliance under the RFO;

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

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

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

(7) 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.

§90.12. Additional Fees; Cost Recovery.

(a) The executive director may determine that the application for a Regulatory Flexibility Order constitutes a significant and complex application for which the recovery of all reasonable costs for review and approval by the commission is appropriate. Upon notice to the applicant of such finding, the applicant shall execute a cost recovery agreement in a form approved by the executive director.

(b) Final consideration of an application by the commission is contingent on the applicant's agreement to pay the reasonable costs of review, as determined by the executive director.

(c) If an application is withdrawn prior to the commission's consideration of the application, the executive director may void the cost recovery agreement and retain the initial application fee.

(d) The executive director shall determine the commission's costs to administer this chapter, establish rates to recover those costs, and publish the rates in the *Texas Register*. The rates established under this section shall not exceed the rates established by the commission under Health and Safety Code, §361.613 or Chapter 333 of this title (relating to Voluntary Cleanup Programs).

§90.14. Commission Action on Application.

(a) Commission action on an application under this chapter shall be consistent with the provisions set forth in Chapter 50, Subchapter B of this title (relating to Action by the Commission), as applicable.

(b) The commission may consider in its decision, among other factors, the applicant's compliance history and efforts made to involve the local community and achieve local community support.

§90.16. Public Notice, Comment, and Hearing.

(a) The applicant shall comply with all public notice, comment, and hearing requirements associated with the statute or commission rule for which the applicant is seeking an exemption, except as provided in subsection (b) or (c) of this section.

(b) If the statute or commission rule for which an applicant is seeking flexibility does not require public notice, or an opportunity for comment or hearing, the following requirements shall apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located or proposed to be located. The notice shall be published within 30 days after submittal of the application. Notice under this section shall not be smaller than that normally used in the newspaper's classified advertising section.

(2) The commission shall accept public comment for 30 days after the last publication of the notice of application.

(c) Alternative public notice.

(1) An applicant may request to provide public notice and an opportunity for comment or hearing in an alternative manner to the requirements of subsection (a) or (b) of this section.

(2) The executive director may authorize alternative public notice and participation opportunities if he determines that the alternative is reasonably likely to provide greater public notice and opportunity for participation than subsection (a) or (b) of this section.

(d) Notice under this section shall, at a minimum, include:

(1) a brief description of the proposal and of the business conducted at the facility or activity described in the application;

(2) the name and address of the applicant and, if different, the location of the facility for which regulatory flexibility is sought;

(3) the name and address of the commission;

(4) the name, address, and telephone number of a commission contact person from whom interested persons may obtain further information;

(5) a brief description of the public comment procedures, and the time and place of any public meeting or public hearing; and

(6) the date by which comments or requests for hearing must be received by the commission.

§90.18. Amendment/Renewal.

(a) An application for amendment or renewal of a Regulatory Flexibility Order (RFO) may be filed in the same manner as an original application under this subchapter.

(b) If renewal procedures have been initiated at least 180 days prior to the RFO expiration date, the existing RFO will remain in effect, and will not expire until commission action on the application for renewal is final.

§90.20. Termination.

(a) By the recipient.

(1) A recipient of a Regulatory Flexibility Order (RFO) may terminate the RFO at any time by sending a notice of termination to the executive director by certified mail.

(2) The recipient must be in compliance with all existing statutes or commission rules at the time of termination.

(b) By the commission.

(1) Noncompliance with the terms and conditions of an RFO, Texas Water Code, §5.123, or any provision of this chapter, may result in the RFO being voided, except that the recipient of the RFO shall be given written notice of the noncompliance and provided an opportunity not less than 30 days from the date the notice was mailed to show cause why the RFO should not be voided. Procedures for requesting a show cause hearing before the commission shall be included in the written notice.

(2) In the event an RFO becomes void, the executive director may specify an appropriate and reasonable transition period to allow the recipient to come into full compliance with all existing commission requirements, including time to apply for any necessary agency permits or other authorizations.