

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

EXPLANATION OF PROPOSED 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 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 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 proposed chapter and the authority under which the commission is proposing the new chapter.

Section 90.2, concerning Applicability and Eligibility, establishes that the proposed 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 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 a Regulatory Flexibility Order, 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 conditions under which additional fees may be assessed for regulatory flexibility applications. Additional fees may be assessed in two situations: first, if the application requires an amendment or modification to an existing permit, the executive director may require the applicant to pay a fee equal to the application fee for such permit amendment or modification; and second, if the executive director determines that the application is significant and complex, he 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

provision provides for consistent assessment of fees associated with permit amendments and modifications. In addition, it allows the commission to recover costs associated with the review and approval of applications, particularly those that 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 its procedural rules found in 30 TAC §50.17. In addition, this section establishes 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 provision 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 a Regulatory Flexibility Order. 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 proposed 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 a Regulatory Flexibility Order. 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 Regulatory Flexibility Order, 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 a Regulatory Flexibility Order, and in the event a Regulatory Flexibility Order 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 executive director. This section provides that if the Regulatory Flexibility Order 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 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 Regulatory Flexibility Order 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 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 that the commission 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.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be an increase in costs associated with the review and approval of applications for regulatory flexibility orders. This increase will be similar to a modest increase in the level of permit modification or amendment activity agency-wide. The actual costs of processing the applications will depend on both the number and type of projects for which application is made, and the opportunity to make such application is voluntary. No estimates of the actual costs of processing applications under these proposed sections has been made; however, the total cost impact is not anticipated to be significant on an agency-wide basis. These

sections also provide for the recovery of costs through nominal application fees and specific cost recovery provisions for more complex projects. Although total costs are not anticipated to be significant on an agency-wide basis, these costs will be potentially offset by the provision for recovery of costs from applicants. There are no costs imposed on units of local government. A unit of local government operating regulated facilities that would be eligible to participate as a party to a regulatory flexibility order would be affected in the same manner as any other facility owner or operator. The costs of participation imposed under these sections are the costs of preparation of an application meeting the requirements proposed under these sections and the payment of any fees for the recovery of processing costs.

PUBLIC BENEFIT

Mr. Minick has also determined that for each year of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be more cost-effective compliance with existing statutory and regulatory requirements for the protection of environmental quality and human health and safety. The proposed sections have an effect on eligible owners or operators on a strictly voluntary basis and no required economic costs are imposed on any person, including small businesses, complying with the sections as proposed. Owners or operators electing to seek an order for regulatory flexibility under these sections will realize costs attributable to the preparation of an application and justification that the proposal is consistent with the proposed requirements and statutory provisions. In addition, costs will be imposed as a result of payment of an application fee for all applicants and the payment of specific recoverable costs for some applicants. The proposed \$250 application fee is not anticipated to represent a significant economic cost to most

applicants. The number of total applications that may be anticipated is not known; however, it is not expected that a significant number of applicants will meet the requirements of a complex application that calls for the imposition of an agreement for recovery of costs. In no instance are the potential costs to an applicant anticipated to exceed the actual economic benefits that should accrue as a result of operating a facility under the flexible permitting authority conveyed by an order issued under these rules.

REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed 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 goal of this proposal 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. This proposal does not create or impose any additional burdens on the regulated community.

This proposal 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, this proposal is expected to have a positive affect on the economy and the environment.

This proposal 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.

Regulatory Flexibility Orders (RFOs) issued under this proposal may create additional requirements for applicants, such as reporting or record keeping, beyond those already contained in the TNRCC'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.

TAKINGS IMPACT STATEMENT

The commission has prepared a takings impact assessment for these proposed 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 Senate Bill 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.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking 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, and will, therefore, require that applicable goals and policies of the CMP be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules under 31 TAC §505.22 and has found the proposed rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. CMP goals applicable to the proposed 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 proposed 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 proposed 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 seeks public comment on the consistency of the proposed rules.

PUBLIC HEARING

A public hearing on the proposal will be held June 2, 1998, at 2:00 p.m. in Room 2210 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, TNRCC Office of Policy and Regulatory Development, 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., June 8, 1998, and should reference Rule Log Number 97166-090-AD. For further information, please contact Sherman Krause, Office of Pollution Prevention and Recycling, (512) 239-4746, or Jim Dodds, Office of Policy and Regulatory Development, (512) 239-1119.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The new sections are proposed 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.

The proposed new sections implement Texas Water Code, §5.123.

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 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 proposed 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.

The proposed new sections implement Texas Water Code, §5.123.

§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 proposed monitoring and reporting 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.

(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 TNRCC regional office for the region in which the facility is located.

§90.12. Additional Fees; Cost Recovery.

(a) If the executive director determines that a Regulatory Flexibility Order (RFO) would constitute an amendment or modification to one or more existing permits, the executive director may require the applicant to pay a fee equal to the application fee for such permit amendment or modification.

(b) The executive director may determine that the application for an RFO 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.

(c) 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.

(d) 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.

(e) 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 Part shall be consistent with the procedures set forth in §50.17 of this title (relating to Commission Actions).

(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 the newspaper of largest 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 consistent with Chapter 55 of this title (relating to Request for Contested Case Hearings; Public Comment).

(3) The public comment period shall end 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, in his sole discretion, 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) An RFO may be terminated by the commission at any time it determines that this subchapter or the terms of the RFO have been violated, or that the RFO no longer conforms to §90.10(b)(2) of this title (relating to Application for a Regulatory Flexibility Order).

(2) The commission shall notify the recipient of the RFO, in writing, of the decision to terminate the RFO.

(3) The commission may specify an appropriate and reasonable transition period to allow the recipient to come into full compliance with all existing agency requirements, including time to apply for any necessary agency permits or other authorizations.