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Guidance for Conducting a Regulatory Impact Analysis for Rules

Office of Policy and Regulatory Development

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

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Guidance for Conducting a Regulatory Impact Analysis for Rules

This Guidance Document is intended to assist TNRCC staff in preparing Regulatory Impact Analyses for rulemaking. This guidance is not regulation and should not be used as such.

Prepared by
Office of Policy and Regulatory Development



Barry R. McBee, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
John M. Baker, *Commissioner*

Dan Pearson, *Executive Director*

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I. Background

A. Senate Bill 633 (SB 633)

SB 633 states that before adopting a major environmental rule, the commission must prepare a regulatory impact analysis (RIA) that: (1) identifies the problem the rule is intended to address; (2) determines whether a new rule is necessary to address the problem; and (3) considers the benefits and costs of the rule in relationship to state agencies, local governments, the public, the regulated community, and the environment. The bill applies to rules that are proposed on or after September 1, 1997.

Prior to SB 633, Texas law required only a limited consideration of the fiscal impacts of proposed regulations. This consideration was addressed in the fiscal note and public benefit determination required under Government Code §2001.024. In 1995, the Senate passed SB 978, which would have required an agency adopting an environmental regulation to conduct a cost-benefit analysis prior to adoption of a rule. The bill died in the House and became the subject of a Senate Natural Resources Committee interim study charge.

The committee recommended that the legislature adopt a broader approach to information gathering on major environmental regulations. The recommended approach avoids placing a "price tag" on benefits to the environment and human health, focusing instead on full disclosure of information, assumptions, and data on which the proposing agency has based its justification for proposing the rule.

SB 633 provides the framework that state agencies must follow when preparing an RIA for certain environmental rules.

B. Applicability

The applicability of SB 633 is limited by several provisions within the bill. First, a rule must meet the definition of a "major environmental rule" which is defined as 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. Next, the bill applies only to a major environmental rule that 1) exceeds a standard set by federal or state law, 2) exceeds a requirement of a federal delegation agreement or contract, or 3) is adopted solely under the general rulemaking authority of the adopting agency. Finally, the bill does not apply to state agency rules that are adopted on an emergency basis.

C. Legal Challenge

SB 633 also allows a person who submitted comments during the public comment period to challenge the validity of a major environmental rule that is not proposed and adopted in accordance with the procedural requirements of the bill by filing an action for declaratory judgment under Texas Government Code §2001.038 not later than the 30th day after the effective date of the rule. A court may invalidate a rule if it finds that the rule was not proposed and adopted in accordance with the procedural requirements of the bill.

II. TNRCC Regulatory Impact Analysis (RIA)

A. The Procedure for Completing an RIA

The procedure for completing an RIA for a rulemaking project involves the four basic components discussed below. Each component in the process can be completed by simply following the instructions on the RIA Checklist (See Appendix B).

One unique aspect of the RIA process is that it requires an analysis at both the proposal and adoption stages. At proposal, the rulemaking team is required to prepare a draft RIA addressing certain issues outlined in SB 633. At adoption, the team must address any comments received regarding the draft RIA and then prepare a final RIA for inclusion in the adoption preamble.

1) APPLICABILITY

The first step in the process involves determining whether or not a full RIA is required for a particular rulemaking. The requirement to conduct an RIA applies only to "major environmental rules" that meet certain other requirements. Also, an RIA is not required for emergency rulemakings.

If a rulemaking team completes the applicability section of the RIA Checklist and determines that a full RIA is not required for their rulemaking, then the team need not complete the remaining sections of the checklist. The first section of the RIA Checklist, the *Short RIA*, should simply be submitted to Strategic Planning and Appropriations along with the fiscal note request form. Strategic Planning will provide a brief statement regarding the results of the rulemaking team's applicability determination, which will be placed in a new section of the proposal preamble titled "Draft Regulatory Impact Analysis."

If the team determines that a full RIA is required, then the rest of the checklist (*Full RIA*) must be completed and submitted with the fiscal note request form. The RIA Checklist should also be turned in to the Texas Register Team with the rest of the rule package.

2) RIA REQUIREMENTS DURING THE PROPOSAL AND ADOPTION PROCESS

SB 633 lists a number of issues and requirements that must be considered by the agency as it prepares an RIA for a major environmental rulemaking. This section of the RIA Checklist is intended to remind the rulemaking team of the issues that must be taken into account during the preparation of an RIA and when they should be considered during the RIA process.

3) RIA REQUIREMENTS AT PROPOSAL

The preparation of the draft RIA for proposal is the heart of the RIA process. The rulemaking team prepares the draft RIA by responding to the statements in the RIA Checklist and completing the fiscal note request form. Using the information provided, Strategic Planning & Appropriations assembles the "Fiscal Note," "Public Benefit," and "Draft Regulatory Impact Analysis" sections for the proposal preamble, along with a statement inviting public comment on the draft RIA.

4) RIA REQUIREMENTS AT ADOPTION

After the close of public comments, the rulemaking team prepares the final RIA and responds to any comments that were received on the draft RIA. As opposed to the draft RIA, which is basically a presentation of the costs, benefits, and alternatives for a proposed rule, the final RIA is a justification and explanation of why the final rule is the best alternative, both in terms of environmental results and cost-effectiveness. The rulemaking team should track the language in SB 633 as much as possible when preparing the final findings and justification. The final RIA and responses to any comments on the draft RIA should be sent to Strategic Planning and Appropriations for review and then included in the adoption preamble in a new section of the preamble entitled "Final Regulatory Impact Analysis."

The procedure can be summarized as follows (see flowchart, Appendix A):

1. Program staff fills out a concept paper explaining the background of the proposed rulemaking.
2. The concept paper is presented to the Rules and Policy Review Committee (RPRC) for approval to proceed with rulemaking, and a rulemaking team is assigned.
3. The rulemaking team proceeds with rule development and follows the instructions in the RIA Checklist to determine whether a *Short RIA* or *Full RIA* is required.
4. For a rulemaking that requires only a *Short RIA*, the rulemaking team completes the applicability portion (Section I) of the RIA Checklist and submits it to Strategic Planning and Appropriations along with the fiscal note request form. Strategic Planning will provide a brief statement for the proposal preamble, and then the RIA Checklist is submitted to the Texas Register Team with the rest of the proposal package.
5. For any rulemaking that requires a *Full RIA*, the rulemaking team completes the process and proposal portions (Sections II and III) of the RIA Checklist and submits it along with a fiscal note request form to Strategic Planning & Appropriations.
6. Strategic Planning & Appropriations prepares the "Fiscal Note," "Public Benefit," and "Draft Regulatory Impact Analysis" sections for the proposal preamble.
7. After the public comment period has ended, the rulemaking team, in consultation with Strategic Planning & Appropriations, completes the adoption portion (Section IV) of the

RIA Checklist, prepares the final RIA, and responds to any comments that are received regarding the proposed RIA.

8. The final RIA and responses to any comments on the proposed RIA are included in the adoption preamble in a new section titled "Final Regulatory Impact Analysis."

B. Additional Guidance for Completing an RIA

The following sections are intended to be used as an interpretive and explanatory guidance for completing the RIA Checklist (See Appendix B). To allow for easier reference, the sections and subsections below are numbered to correspond to the sections and subsections of the RIA Checklist.

1. Applicability

- a. The requirements of SB 633 apply only to rules that meet the definition of a "major environmental rule." This definition contains two separate requirements that must both be met for the definition to apply. "Major environmental rule" means a rule:
 - 1) the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure; **and**
 - 2) 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.

Most procedural and administrative rules are not specifically intended to protect the environment or to reduce risks to human health. Therefore, most procedural and administrative rulemakings usually will not be subject to RIA requirements. Also, if a proposed rule would streamline or clarify existing rules or make existing rules more cost-effective, its specific intent is probably related to economics or regulatory reform as opposed to environmental protection.

If a rule is specifically intended to protect the environment or to reduce risks to human health, then the second part of the definition of "major environmental rule" requires the rulemaking team to determine whether a rule may have a material adverse effect on the economy, productivity, competition, jobs, the environment, or public health and safety.

The determination that a rule will have an adverse effect is fairly straightforward. However, the determination of whether or not the effect will be material is more subjective. Therefore, the rulemaking team must be able to document the

consideration given to whether a rule is anticipated to have a "material" adverse effect.

The dictionary defines "material" as "having real importance or great consequence." This requirement should rule out proposals that result in incidental or insignificant impacts.

One approach to determining whether an effect is material is to consider both the magnitude and the scope of the effect. It may be appropriate to consider that two different rules could both be equally material if one had a measurable statewide effect on most businesses and another had a more significant effect on a smaller number of businesses.

The use of the word "may" indicates that the team does not have to determine **positively** that the rule will have a material adverse effect. If there is a reasonable expectation that the rule would result in a material adverse effect, the rule should be considered a "major environmental rule."

- b. The requirements of SB 633 apply only to a major environmental rule the result of which is to:
- exceed a standard set by federal law, unless the rule is specifically required by state law;
 - exceed an express requirement of state law, unless the rule is specifically required by federal law;
 - exceed 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; or
 - adopt a rule solely under the general powers of the agency instead of under a specific state law.

When making a determination of whether a rule exceeds a standard set by federal law, an express requirement of state law, or a requirement of a delegation agreement, the rulemaking team should consider why the rule is being adopted and the legal authority under which it is adopted. For example, suppose that the Texas Clean Air Act directs the commission to do whatever is necessary to make sure that the state meets the National Ambient Air Quality Standards set by the federal government. The commission writes a rule that would allow an area in the state to meet the federal standards. The team could conclude that a full RIA is not required because the rule does not exceed a standard set by federal law.

Now assume the same facts, but this time, the commission writes a rule that would actually control air emissions beyond the level necessary to meet the federal air standards. In this case, the team should conclude that the rule exceeds a standard set by federal law.

The next step would be to determine whether the rule is specifically required by state law. If the state law specifically spelled out the numerical standards that the commission was to enforce, or if the law told the commission to adopt standards that were higher than the federal standards, the team could conclude that a full RIA is not necessary because the rule is specifically required by state law. However, if state law simply told the commission to adopt air quality standards, the team should conclude that a full RIA is required because the rule exceeds federal standards and is not specifically required by state law.

The rulemaking team should also bear in mind that the standard of federal law or the express requirement of state law may involve operational or performance standards rather than numerical standards. For example, suppose there is a performance standard under state law requiring that leachate from industrial solid waste facilities must be prevented from contaminating groundwater. Even though this requirement does not establish a specific numerical limitation, it is still considered to be a "standard set by federal law" or an "express requirement of state law" to which the proposed rule must be compared to determine applicability of the RIA requirements. In determining whether a rule exceeds an operational or performance standard, the rulemaking team will need to consider whether the proposed rule is a reasonable way to implement the federal or state requirement consistent with the perceived intent of the statute.

There may also be situations in which a rulemaking team is implementing a requirement of state law for which there is no relevant federal requirement. In this situation, the team should answer "no" to the statement regarding exceeding a standard set by federal law because there is no relevant federal requirement. The applicability of the RIA requirements should instead be determined based on one of the other applicability statements, such as exceeding an express requirement of state law or adopting a rule solely under the general powers of the agency.

When determining whether a rule is adopted solely under the general powers of the agency instead of under a specific state law, the rulemaking team should consider the type of statutory authority on which the rulemaking is based. The commission's general authority to adopt rules to carry out its powers and duties under the laws of the state is found in Water Code §5.103 and Health and Safety Code §382.017. Very specific authority may be found in various statutes that prescribe exactly what rules the agency is to adopt. Between these two extremes there will be room for varying interpretations of whether a rule is being proposed under a specific state law. For example, if a statute authorizes the agency to adopt standards for

operating a solid waste management facility, then it may be argued that a rule imposing such an operating standard is proposed under specific state law, even if the statute does not establish numerical environmental quality criteria or direct the agency to adopt any specific operating criteria. In these instances, it may be necessary to look at both the statutory construction and the legislative history and intent.

- c. The requirements of SB 633 do not apply to emergency rulemakings that are being adopted to protect the environment or to reduce risks to human health from environmental exposure; however, emergency rules expire after 180 days and may be renewed once for an additional 180 days, and if the rule is to be permanently adopted, it must go through the normal commission rulemaking process, and the RIA requirements would then be applicable.

2. RIA Requirements During the Proposal and Adoption Process

This section of the RIA Checklist is intended to remind the rulemaking team of several statutory issues and requirements that must be considered as the rulemaking team is completing an RIA for a rule. Government Code §2001.0225(e), added by SB 633, lists the purpose of the bill and also three specific requirements that must be addressed when completing an RIA. The rulemaking team should keep these statutory requirements in mind as they complete the RIA Checklist. In addition, it is a good idea to track the language of the bill as much as possible when preparing the final regulatory analysis for the adoption preamble to show that the commission considered all of the statutory requirements as it completed the RIA.

3. RIA Requirements at Proposal

- a. This section of the RIA Checklist describes the specific issues that must be addressed in the draft regulatory analysis. The rulemaking team should prepare a response for each of the requirements listed in the section. Some of the requirements listed on the RIA Checklist will overlap with the information requested on the fiscal note request form; however, the team should confirm that both forms are completely filled out so that Strategic Planning and Appropriations will have all of the information needed to compile the "Fiscal Note," "Public Benefit," and "Draft Regulatory Impact Analysis" sections of the proposal preamble. The new "Draft Regulatory Impact Analysis" section will be added to all proposal preambles. If an RIA is not required for a particular rulemaking, Strategic Planning will insert a few sentences stating that the rulemaking team considered the RIA requirements and determined that an RIA was not required for the subject rulemaking.

For the purposes of conducting an RIA under SB 633, "benefit" and "cost" are defined as follows:

--"Benefit" means a reasonably identifiable, significant, direct or indirect, favorable effect, including a quantifiable or nonquantifiable environmental, health, or economic effect, that is expected to result from implementation of a rule.

--"Cost" means a reasonably identifiable, significant, direct or indirect, adverse effect, including a quantifiable or nonquantifiable environmental, health, or economic effect, that is expected to result from implementation of a rule.

- b. The rulemaking team should confirm that the draft RIA in the proposal preamble includes a statement inviting public comment and stating that all comments will be addressed in the final RIA.
- c. SB 633 requires that all information in the draft RIA be provided in such a manner that a reasonable person can identify the impacts of the proposed rule. The rulemaking team should make every effort to ensure that each part of the draft RIA is clearly stated in understandable terms.

4. RIA Requirements at Adoption

- a. In the final regulatory analysis that is published in the adoption preamble, SB 633 requires a specific finding that "compared to the alternative proposals considered and rejected, the rule will result in the best combination of effectiveness in obtaining the desired results and of economic costs not materially greater than the costs of any alternative regulatory method considered." In other words, the final rule should offer the most "bang for the buck" versus the other regulatory alternatives considered by the rulemaking team.

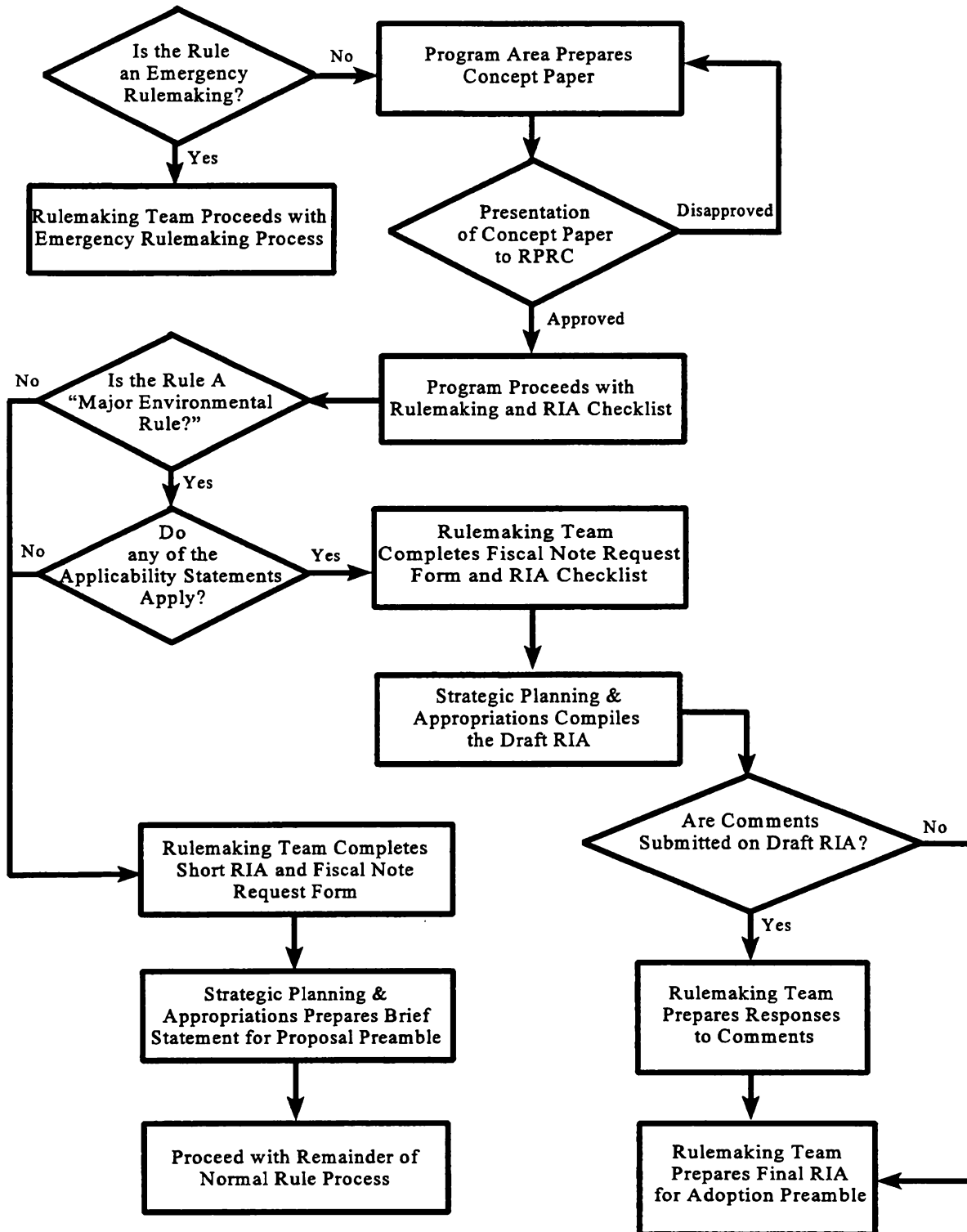
The final regulatory analysis should restate the rulemaking team's findings by tracking the language of the statute, and it should provide a brief explanation and justification to support those findings. In addition, the final regulatory analysis should mention that the rulemaking team addressed the other statutory considerations required by SB 633.

- b. Any comments received on the draft RIA should be addressed in the adoption preamble in the "Analysis of Testimony" section along with the other comments on the rule. Comments should be summarized and responded to in the same manner as regular comments, with each comment in a separate paragraph, and its corresponding response in bold type.

After the rulemaking team has prepared the final RIA and has responded to comments, the rulemaking team should send a copy of the language to Strategic Planning and Appropriations for review and comment.

APPENDICES

Regulatory Impact Analysis Process for Rules



APPENDIX B - RIA CHECKLIST



**REGULATORY IMPACT ANALYSIS
CHECKLIST FOR RULES**

Rule/Project No: _____

Short Title: _____

OPRD Contact Person: _____

Program Contact Person: _____

Legal Services Contact Person: _____

Type of RIA Performed: SHORT RIA or FULL RIA (Delete one)

As instructed in the RIA Guidance Document, complete this form as part of the Regulatory Impact Analysis. Written answers or explanations should be made in the space provided. Supporting information can be obtained from the program area's concept paper.

I. Applicability [Complete all three parts.]

- 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.

Does the proposal meet the definition of "major environmental rule?" YES NO

If "no," briefly explain:

- B. The RIA requirement applies only to a major environmental rule for which one of the following statements is true. Please respond to each of the following and cite any relevant and applicable authority:

This proposal exceeds a standard set by federal law and is not specifically required by state law. YES NO

Briefly explain:

This proposal exceeds an express requirement of state law and is not specifically required by federal law. YES NO

Briefly explain:

This proposal exceeds 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. YES NO

Briefly explain:

This proposal adopts a rule solely under the general powers of the agency instead of under a specific state law. YES NO

Briefly explain:

- C. Is this rulemaking being proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure? YES NO

If you answered "yes" to Section I.A., "yes" to any statement in Section I.B., **AND** "no" to Section I.C., complete the rest of this checklist and choose "FULL RIA" at the top of this form. Otherwise, STOP HERE and choose "SHORT RIA" at the top of this form.

II. RIA Requirements During the Proposal and Adoption Process

- A. The purpose of the RIA is to identify for the public and the regulated community the information that was considered by the agency, the information that the agency determined to be relevant and reliable, and the assumptions and facts on which the agency made its regulatory decision.

In preparing the draft RIA for proposal and the final RIA for adoption (as appropriate), did the rulemaking team consider the purpose of the RIA? YES NO

- B. In making its final regulatory decision (with regard to the draft or final RIA), did the rulemaking team assess: (1) all information submitted to it, whether quantitative or qualitative, consistent with generally accepted scientific standards; (2) actual data where possible; and (3) assumptions that reflect actual impacts that the regulation is likely to impose? YES NO

- C. Prior to final adoption of the rule, did the rulemaking team's completed RIA: (1) identify the problem the rule is intended to address; (2) determine whether a new rule is necessary to address the problem; and (3) consider the benefits and costs of the proposed rule in relationship to state agencies, local governments, the public, the regulated community, and the environment? YES NO

The rulemaking team is required by SB 633 to consider the requirements reflected in the questions above. If you answered "no" to any of these questions, reconsider your completed RIA in light of the above requirements.

III. RIA Requirements at Proposal

- A. Strategic Planning and Appropriations will incorporate into the fiscal note a draft RIA describing the anticipated effects of the proposed rule. The draft RIA must include, at a minimum, responses to the following requirements.

1. Identify the benefits that the agency anticipates from adoption and implementation of the rule, including reduced risks to human health, safety, or the environment.
2. Identify the costs that the agency anticipates state agencies, local governments, the public, and the regulated community will experience after implementation of the rule.
3. Describe the benefits and costs anticipated from implementation of the rule in as quantitative a manner as feasible, but including a qualitative description when a quantitative description is not feasible or adequately descriptive.
4. Describe reasonable alternative methods for achieving the purpose of the rule that were considered by the agency and provide reasons for rejecting those alternatives in favor of the proposed rule.
5. Identify the data and methodology used in performing the analysis required by SB 633.

6. Provide an explanation of whether the proposed rule specifies a single method of compliance, and, if so, explain why the agency determines that a specified method of compliance is preferable to adopting a flexible regulatory approach, such as a performance-oriented, voluntary, or market-based approach.

- B. Has the rulemaking team stated in the proposal preamble that there is an opportunity for public comment on the draft RIA and that all comments will be addressed in the publication of the final RIA? YES NO
- C. Has all information in the draft RIA been provided in such a manner that a reasonable person reading the analysis would be able to identify the impacts of the proposed rule? YES NO

IV. RIA Requirements at Adoption

- A. Has the rulemaking team determined that, compared to the alternative proposals considered and rejected, the rule will result in the best combination of effectiveness in obtaining the desired results and of economic costs not materially greater than the costs of any alternative regulatory method considered? YES NO

If "no," consider alternative regulatory methods. If "yes," insert in the adoption preamble a new section titled "Final Regulatory Impact Analysis," and restate the rulemaking team's findings as stated above along with a brief justification and explanation of the findings.

- B. Were any comments received in response to the draft RIA published in the proposal? YES NO

If "yes," include in the adoption preamble under "Analysis of Testimony" a summary of each comment received and a response to each comment explaining why the agency agrees or disagrees with the comment.

APPENDIX C - EXAMPLES OF RIA ANALYSIS



**REGULATORY IMPACT ANALYSIS
CHECKLIST FOR RULES**

Rule/Project No: 97123-456-WS

Short Title: Financial Responsibility Reqts for Petroleum Underground Storage Tanks

OPRD Contact Person: Carmen Policy

Program Contact Person: Pete T. Roleum

Legal Services Contact Person: Elliot Laws

Type of RIA Performed: FULL RIA

As instructed in the RIA Guidance Document, complete this form as part of the Regulatory Impact Analysis. Written answers or explanations should be made in the space provided. Supporting information can be obtained from the program area's concept paper.

I. Applicability [Complete all three parts.]

- 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.

Does the proposal meet the definition of "major environmental rule?" YES NO

If "no," briefly explain:

- B. The RIA requirement applies only to a major environmental rule for which one of the following statements is true. Please respond to each of the following and cite any relevant and applicable authority:

This proposal exceeds a standard set by federal law and is not specifically required by state law. YES NO

Briefly explain: There is currently no specific federal program or federal standard directly analogous to the proposed financial responsibility

requirements for petroleum underground storage tanks, therefore, the proposed rules do not exceed any federal standard.

This proposal exceeds an express requirement of state law and is not specifically required by federal law. YES NO

Briefly explain: The proposed financial responsibility requirements for petroleum underground storage tanks exceed an express requirement found in state law. The Texas Superfund Amendments and Reauthorization Act of 1986 (TXSARA) amended Sections 9003(c) and (d) of Subtitle I to mandate that the commission establish financial responsibility requirements for UST owners and operators to assure the costs of corrective action and third-party liability caused by sudden and nonsudden accidental releases from USTs. TXSARA also made other changes to Subtitle I affecting financial responsibility, including establishment of a \$1 million per occurrence minimum assurance level for USTs at facilities engaged in petroleum production, refining, or marketing, and for USTs which handle substantial amounts of petroleum; the proposed rule increases this minimum assurance level to \$1.5 million and expands its application to include all facilities handling over 500 gallons of petroleum.

This proposal exceeds 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. YES NO

Briefly explain: There is no delegation agreement or contract directly applicable to the proposed rules, and the rules do not exceed any requirement of an affected delegated program.

This proposal adopts a rule solely under the general powers of the agency instead of under a specific state law. YES NO

Briefly explain: The proposed rules are adopted under the Texas Superfund Amendments and Reauthorization Act of 1986 (TXSARA), Sections 9003(c) and (d) of Subtitle I.

C. Is this rulemaking being proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure? YES NO

If you answered "yes" to Section I.A., "yes" to any statement in Section I.B., **AND** "no" to Section I.C., complete the rest of this checklist and choose "FULL RIA" at the top of this form. Otherwise, STOP HERE and choose "SHORT RIA" at the top of this form.

II. RIA Requirements During the Proposal and Adoption Process

- A. The purpose of the RIA is to identify for the public and the regulated community the information that was considered by the agency, the information that the agency determined to be relevant and reliable, and the assumptions and facts on which the agency made its regulatory decision.

In preparing the draft RIA for proposal and the final RIA for adoption (as appropriate), did the rulemaking team consider the purpose of the RIA? YES NO

- B. In making its final regulatory decision (with regard to the draft or final RIA), did the rulemaking team assess: (1) all information submitted to it, whether quantitative or qualitative, consistent with generally accepted scientific standards; (2) actual data where possible; and (3) assumptions that reflect actual impacts that the regulation is likely to impose? YES NO

- C. Prior to final adoption of the rule, did the rulemaking team's completed RIA: (1) identify the problem the rule is intended to address; (2) determine whether a new rule is necessary to address the problem; and (3) consider the benefits and costs of the proposed rule in relationship to state agencies, local governments, the public, the regulated community, and the environment? YES NO

The rulemaking team is required by SB 633 to consider the requirements reflected in the questions above. If you answered "no" to any of these questions, reconsider your completed RIA in light of the above requirements.

III. RIA Requirements at Proposal

- A. Strategic Planning and Appropriations will incorporate into the fiscal note a draft RIA describing the anticipated effects of the proposed rule. The draft RIA must include, at a minimum, responses to the following requirements.

1. Identify the benefits that the agency anticipates from adoption and implementation of the rule, including reduced risks to human health, safety, or the environment.

The proposed rule is associated with a variety of potential economic benefits that can be placed in three categories: 1) resource allocation; 2) willingness to pay for distributional goals; and 3) reductions in cleanup costs, environmental and health

damage, UST releases, and business disruptions. If the financial responsibility requirements induce firms to consider the full costs of UST releases as part of their real production costs (i.e., cost internalization), the result may be an improvement in the allocative efficiency of UST users. Since allocative efficiency improvements result in improvements for the population in the aggregate, the population can be expected to be willing to pay for this improvement. Similarly, the population also could be willing to pay for progress toward distributional goals (i.e., be willing to incur some cost to ensure that the UST owners and operators and the consumers of goods whose production involves the use of USTs and who benefit from the use of the USTs also bear the costs of that activity).

Small firms that use insurance to meet their financial responsibility requirements may be more inclined to report releases from their USTs promptly, whereas firms without insurance may be reluctant to report releases out of a fear that the costs associated with the release could force the firms out of business. In addition, firms having to obtain insurance will have to meet insurers' eligibility requirements (e.g., improved leak detection and tank upgrading), thus reducing the likelihood of releases.

Meeting insurers' eligibility criteria is estimated to save \$2.49 billion in corrective action costs over 30 years. Over the long term, the imposition of the financial responsibility requirements also reduces the economic disruptions caused by the bankruptcy of firms unable to meet the costs of performing corrective action or satisfying third-party liability awards. After 15 years, the number of surviving outlets is 14 percentage points higher if financial responsibility requirements are imposed.

2. Identify the costs that the agency anticipates state agencies, local governments, the public, and the regulated community will experience after implementation of the rule.

There are three main cost elements in the combined total costs of the financial responsibility and technical standards requirements: costs related to the tank replacement and upgrading and to leak detection; costs related to performing corrective action; and the costs of procuring financial assurance mechanisms. The costs of procuring financial assurance mechanisms do not include the costs related to performing corrective action because these costs are accounted for separately. They also do not include the costs of satisfying third-party liability awards because such costs would be incurred even if the technical standards and the financial responsibility requirements were not promulgated.

The present value of the combined real resource costs of the technical standards and the financial responsibility requirements over 30 years is \$70.28 billion. \$38.83 billion of these costs represent the costs of tank replacement, tank upgrading, and leak detection. \$29.49 billion of these costs represent the costs of performing corrective action. \$1.96 billion of these costs represent the real resource costs of financial assurance mechanisms. A portion of these costs (e.g., the costs of tank upgrading and replacement, and the costs of procuring insurance) would be incurred even if the technical standards and financial responsibility requirements were not promulgated.

In the retail motor fuel marketing sector, economic impacts are measured in terms of the percentage of existing outlets surviving 5, 10, and 15 years after the imposition of regulations. Through year five, 57 percent of existing small-firm-owned outlets would survive if only the technical requirements were imposed. (Small firms are defined as firms with less than \$4.6 million in annual sales.) Assuming the imposition of technical and financial responsibility requirements, 55 percent of existing outlets survive, if all small firms obtain insurance. By year fifteen, 34 percent of outlets would survive the imposition of technical requirements and 47 percent would survive the imposition of both technical and financial responsibility requirements, if all small firms obtain insurance. Thus, by year fifteen, the imposition of the financial responsibility requirements has a beneficial impact on the survival of small-firm-owners and operators.

Small-firm-owned outlets that do not have existing releases and that can afford improved leak detection and tank upgrading or replacement costs are better able to survive with insurance than without it. Those small-firm-owned outlets with existing releases and outlets owned by financially-marginal small firms will exit the industry more quickly with the imposition of the financial responsibility requirements than with the imposition of the technical standards alone.

3. Describe the benefits and costs anticipated from implementation of the rule in as quantitative a manner as feasible, but including a qualitative description when a quantitative description is not feasible or adequately descriptive.

The benefits and costs described above include a quantitative description.

4. Describe reasonable alternative methods for achieving the purpose of the rule that were considered by the agency and provide reasons for rejecting those alternatives in favor of the proposed rule.

The commission considered a number of alternative regulatory approaches for accomplishing the goals of the proposed rule. The commission looked at several different forms of financial assurance and in each case attempted to choose the most flexible approach that would still provide adequate and reliable financial assurance for the costs of UST releases, based on the following considerations: 1) the certainty that funds will be available; 2) the sufficiency of funds to cover the costs of releases; and 3) the availability of funds for corrective action and third-party liability. In some cases, the proposed rule allows the regulated entity to choose between a number of alternate forms of showing financial responsibility. The regulatory alternative rejected by the commission was to specify in each case exactly which form of financial assurance would be accepted by the commission. The commission also chose to implement the proposed regulatory requirements in phases to allow the regulated community time to make any changes that are necessary to comply with the new requirements.

5. Identify the data and methodology used in performing the analysis required by SB 633.

This regulation is estimated to apply to 1.5 million underground storage tanks (USTs) containing petroleum located at 468,000 separate facilities. For the purpose of this analysis, the regulated community was divided into four major sectors: retail motor fuel marketing, agriculture, local government entities, and general industry. Retail motor fuel marketing is the largest single affected sector and includes 193,000 retail motor fuel outlets owned by approximately 90,000 firms. The agricultural sector includes all farms owning USTs with capacities of more than 1,100 gallons; approximately 46,000 USTs located at 30,500 farms meet this definition. Local government entities own approximately 62,000 USTs at 29,000 facilities. For the purposes of this analysis, the general industry sector includes all other sectors (i.e., sectors other than retail motor fuel marketing, governments, and agriculture) where USTs are located. Firms in the general industry sector range from large manufacturing concerns to small retail operations. The general industry sector is estimated to contain 642,000 USTs at 192,000 facilities owned by approximately 137,000 firms.

Following are the key assumptions used to estimate the costs and other impacts of this regulation:

- All owners who qualify for self-insurance use this mechanism to satisfy their financial responsibility requirements and incur real resource costs for developing and maintaining the required records and reports.
- All firms or local governments currently insured for corrective action and compensation of third-parties will maintain their insurance to comply with this regulation.
- Firms or local governments that are not currently insured and that cannot use the financial test of self-insurance will attempt to obtain insurance (rather than other financial assurance mechanisms) to comply with this regulation.
- Insurance will only be available to firms or local governments meeting insurers' criteria for insurability. The RIA presents regulatory costs assuming that all firms and local governments that do not currently have insurance or pass the financial test are able to get insurance by meeting insurers' criteria for insurability (i.e., upgrading or replacing tanks greater than 15 years old and instituting suitable leak detection measures).
- Insurance premium costs are estimated by assuming that premiums will be double the expected value of corrective action and third-party liability costs for the USTs covered.

6. Provide an explanation of whether the proposed rule specifies a single method of compliance, and, if so, explain why the agency determines that a specified method of compliance is preferable to adopting a flexible regulatory approach, such as a performance-oriented, voluntary, or market-based approach.

The proposed rule provides flexibility, where possible, to increase the feasibility of compliance by the regulated community, while at the same time requiring adequate and reliable financial assurances. Subtitle I specifically allows flexibility in establishing per-occurrence levels of assurance for USTs at facilities not engaged in petroleum production, refining, or marketing, and for aggregate levels of assurance. The commission has carefully considered where to allow flexibility in the financial

responsibility program while ensuring adequate protection for covering the costs of petroleum UST releases.

Finally, to the extent possible, this rule should promote expansion of existing assurance mechanisms and development of new ones to achieve maximum compliance by UST owners and operators through market-based mechanisms. The commission recognizes the current limited availability of financial assurance mechanisms and the difficulty many owners and operators will have in complying with the requirements, at least initially. However, insurance coverage is available now to some UST owners and operators, and a number of state funds are becoming available. The commission has constructed the proposed rule to promote timely compliance by all owners and operators and to encourage the market to develop additional assurance mechanisms.

- B. Has the rulemaking team stated in the proposal preamble that there is an opportunity for public comment on the draft RIA and that all comments will be addressed in the publication of the final RIA? YES NO
- C. Has all information in the draft RIA been provided in such a manner that a reasonable person reading the analysis would be able to identify the impacts of the proposed rule? YES NO

IV. RIA Requirements at Adoption

- A. Has the rulemaking team determined that, compared to the alternative proposals considered and rejected, the rule will result in the best combination of effectiveness in obtaining the desired results and of economic costs not materially greater than the costs of any alternative regulatory method considered? YES NO

If "no," consider alternative regulatory methods. If "yes," insert in the adoption preamble a new section titled "Final Regulatory Impact Analysis," and restate the rulemaking team's findings as stated above along with a brief justification and explanation of the findings.

- B. Were any comments received in response to the draft RIA published in the proposal? YES NO

If "yes," include in the adoption preamble under "Analysis of Testimony" a summary of each comment received and a response to each comment explaining why the agency agrees or disagrees with the comment.



REGULATORY IMPACT ANALYSIS CHECKLIST FOR RULES

Rule/Project No: 96143-335-WS

Short Title: Nonhazardous Industrial Solid Waste Permit Exemptions

OPRD Contact Person: Jace Houston

Program Contact Person: Wayne Harry

Legal Services Contact Person: Robin Smith

Type of RIA Performed: SHORT RIA

As instructed in the RIA Guidance Document, complete this form as part of the Regulatory Impact Analysis. Written answers or explanations should be made in the space provided. Supporting information can be obtained from the program area's concept paper.

I. Applicability [Complete all three parts.]

- 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.

Does the proposal meet the definition of "major environmental rule?" YES NO

If "no," briefly explain: The specific intent of the proposed rules is to clarify certain language in the commission's rules related to permitting requirements for certain nonhazardous industrial solid waste management activities, to establish permit exemptions from certain requirements for nonhazardous industrial solid waste management, and to lift the 50-mile limit to store nonhazardous industrial solid waste without a permit. The specific intent of the rules is related to reg reform and cost-effectiveness, rather than protection of human health and the environment. Also, the proposed rules should have a positive impact on the economy and the environment.

- B. The RIA requirement applies only to a major environmental rule for which one of the following statements is true. Please respond to each of the following and cite any relevant and applicable authority:

This proposal exceeds a standard set by federal law and is not specifically required by state law. YES NO

Briefly explain: There are no federal nonhazardous industrial solid waste rules analogous to the proposed rules. Because there are no analogous federal standards, the proposed rules do not exceed any federal standard.

This proposal exceeds an express requirement of state law and is not specifically required by federal law. YES NO

Briefly explain: The proposed rules clarify certain existing rules and add permit exemptions for certain nonhazardous industrial solid waste activities. These changes bring existing rules in line with the requirements of Texas Health and Safety Code §361.061 and §361.090 and do not exceed an express requirement of state law.

This proposal exceeds 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. YES NO

Briefly explain: These proposed rules are not subject to a delegation agreement or contract.

This proposal adopts a rule solely under the general powers of the agency instead of under a specific state law. YES NO

Briefly explain: These proposed rules are adopted under and implement Texas Health and Safety Code §§361.017, 361.024, 361.061, and 361.091, which state that the commission shall be responsible for the management of industrial solid waste and may require permits or other controls for solid waste management activities, and which also describe the circumstances in which the commission may and may not issue permits.

C. Is this rulemaking being proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure? YES NO

If you answered "yes" to Section I.A., "yes" to any statement in Section I.B., AND "no" to Section I.C., complete the rest of this checklist and choose "FULL RIA" at the top of this form. Otherwise, STOP HERE and choose "SHORT RIA" at the top of this form.

PREAMBLE WITH SHORT RIA

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §335.1 and §335.2, concerning industrial solid waste.

EXPLANATION OF PROPOSED RULE

The purpose of the proposed rules is to clarify the commission's regulations regarding permitting requirements for certain nonhazardous industrial solid waste management activities and to establish permit exemptions from certain requirements for nonhazardous industrial solid waste management activities that are inappropriately more stringent than the requirements for similar hazardous waste management activities. These amendments are proposed in response to three separate regulatory reform proposals received from outside entities and in response to proposals from commission staff. The commission has identified two issues to be addressed in order to more appropriately regulate nonhazardous industrial solid waste management activities. The commission proposes: (1) to clarify that a permit is not required to store, process, or dispose of nonhazardous industrial solid waste on property owned or controlled by the owner or operator of the generating facility within 50 miles of the plant or operation from which the waste results; (2) to adopt off-site nonhazardous industrial solid waste management permit exemptions that are similar to current hazardous waste permit exemptions and permits-by-rule; and (3) to lift the 50-mile limit to store nonhazardous industrial solid waste without a permit.

* * *

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 no significant fiscal implications for state government as a result of administration or enforcement of the rules. The result of clarifying and revising certain requirements for the management of industrial nonhazardous waste and making industrial nonhazardous waste requirements more consistent with hazardous waste requirements where appropriate will reduce the potential number of applications for permits. Some reduction in workload for the commission could result, however, the actual number of applications affected is not anticipated to be large and the effects on the commission are not anticipated to be significant. There are no fiscal implications for units of local government, except those that may operate waste management units subject to the provisions of these sections. For these local governments, the fiscal implications of these sections will be equivalent to those for any affected public or private entity.

PUBLIC BENEFIT

Mr. Minick has also determined that for each of the first five years the sections as proposed are in effect, the public benefit anticipated as a result of administration of and compliance with the sections will be clarification of permit requirements for industrial waste management, improved consistency of permit requirements for nonhazardous industrial waste relative to

hazardous waste and more cost-effective regulation of industrial solid waste and protection of human health and the environment. The extension of certain hazardous waste permit exemptions to the corresponding nonhazardous waste management activities should result in a savings to the regulated community while encouraging proper waste management practices. There are no economic costs anticipated to any person, including any small business, required to comply with these sections as proposed.

DRAFT REGULATORY IMPACT ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of the rule is to revise the commission's regulations regarding permitting requirements for certain nonhazardous industrial solid waste management activities and to establish permit exemptions from certain requirements for nonhazardous industrial solid waste management activities that are inappropriately more stringent than the requirements for similar hazardous waste management activities. The rules will substantially advance this specific purpose by: (1) clarifying that a permit is not required to store, process, or dispose of nonhazardous industrial solid waste on property owned or controlled by the owner or operator of the generating facility within 50 miles of the plant or operation from which the waste results; (2) adopting off-site nonhazardous industrial solid waste management permit exemptions that are similar to current hazardous waste permit exemptions and permits-by-rule; and (3) lifting the 50-mile limit to store nonhazardous industrial solid waste without a permit. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the proposed changes revise permitting requirements and exemptions for certain nonhazardous industrial solid waste management activities and do not limit or restrict a person's rights in private real property.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the rules are subject to the Coastal Management Program and must be consistent with all applicable goals and policies of the Coastal Management Program (CMP).

The commission has prepared a consistency determination for the proposed rules pursuant to 31 TAC §505.22 and has found that the proposed rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for

specific activities related to construction and operation of solid waste treatment, storage, and disposal facilities. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the proposed rules will clarify and revise permitting requirements for nonhazardous industrial solid waste management, improve consistency of permit requirements for nonhazardous industrial solid waste relative to hazardous waste, and result in more cost-effective regulation of nonhazardous industrial solid waste and protection of human health and the environment, which will result in an overall environmental benefit across the state, including in coastal areas. In addition, the proposed rules do not violate any applicable provisions of the CMP's stated goals and policies.

The commission invites public comment on the consistency of the proposed rules.

SUBMITTAL OF COMMENTS

Written comments may be mailed to Heather Evans, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments must be received within 30 days following the date of this publication and should reference Rule Log No. 96143-335-WS. Comments received by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. For further information, please contact Jace Houston at (512) 239-4641.

STATUTORY AUTHORITY

These amendments are proposed under Texas Water Code §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the Texas Water Code or other laws of this state; and under Texas Health and Safety Code, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

These proposed amendments implement Texas Health and Safety Code Chapter 361.

