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TCEQ State Innovations Grant Final Report

Attachment 1: Strategically Directed Regulatory Structure Performance Report – A Report to the 79th Texas Legislature



SFR-077/04
December 2004

Strategically Directed Regulatory Structure Performance Report

A Report to the 79th Texas Legislature

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A Report to the 79th Texas Legislature

Prepared by
Small Business and Environmental Assistance Division

SFR-077/04 (Revised)
December 2004



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Executive Summary

On August 23, 2003, the Texas Commission on Environmental Quality (TCEQ) adopted rules to implement the Strategically Directed Regulatory Structure (SDRS) mandated by the Texas Legislature under Chapter 5, Subchapter Q, of the Texas Water Code, entitled "Performance-Based Regulation."

These rules provide the foundation to build a performance-based regulatory structure to enhance the existing compliance-based regulatory system. Under the current compliance-based regulatory system, the performance of a facility is measured only against minimum regulatory standards. While this system helps to ensure minimum thresholds are maintained, it does nothing to encourage further innovations to achieve greater environmental performance beyond the minimum standards. The Strategically Directed Regulatory Structure (SDRS) provides a new framework for advancing environmental and public health protection and innovation in Texas.

As it is implemented, the TCEQ is using SDRS as an umbrella for existing and future innovative programs for members of the regulated community who demonstrate maximum environmental benefit and compliance performance.

Implementing SDRS at the TCEQ

Over the last biennium, the TCEQ has been working to implement regulatory incentives established by the Legislature under Sections 5.131(b), 5.757(a), and 5.758(a) of the Water Code. These incentives include: providing a single point of contact on innovative programs; offering technical assistance; offering accelerated access to agency information and modifications to state or federal regulatory requirements; allowing for flexibility in the regulatory process; and providing public recognition.

Throughout the implementation process, the TCEQ has continued to work with the public, the regulated community, the Pollution Prevention Advisory Committee (PPAC), and other stakeholders to implement SDRS.

Specifically, the TCEQ continues to work with the PPAC as mandated under Section 361.0215 of the Texas Health and Safety Code. Following the PPAC's initial review of the TCEQ plans for implementing performance-based regulations in 2002, the PPAC created a consensus "vision statement" for a future performance-based regulatory structure.

This vision, the entire text of which can be found in Appendix A of this report, consisted of several key elements, including the following:

- The TCEQ should clearly define who qualifies for performance-based regulations, as well as the benefits of participating in the performance-based regulatory structure.
- The TCEQ should develop a performance-based regulatory structure as an alternative to the current compliance-based regulatory structure.
- Performance-based regulations should replace compliance-based regulations for sites that qualify.
- As the performance-based regulatory structure allows, the TCEQ should work to better allocate resources to maximize environmental results.
- In implementing a performance-based regulatory structure, the TCEQ should continue to encourage innovations.
- In implementing a performance-based regulatory structure, efforts should be made to educate the public about the change from a compliance-based structure to a performance-based regulatory structure to allow for a high level of public participation in order to enhance accountability of the regulated entity and foster public trust.

These elements are helping guide the TCEQ in the development and implementation of a performance-based regulatory structure and SDRS. Several of these elements have been integrated into SDRS already, while others will help guide future initiatives to support the performance-based framework.

The TCEQ continues to promote existing innovative programs, and has increased efforts to market SDRS and performance-based regulations to the regulated community. Programs such as CLEAN TEXAS, CLEANER WORLD, the Flexible Permits Program, the Regulatory Flexibility Program, and the Compliance Commitment (C2) Partnership are innovative programs designed to provide incentives for demonstrated performance.

While no significant changes to federal environmental statutes have been made during the last biennium, the U.S. Environmental Protection Agency (EPA) did issue several new rules that provide regulatory incentives for those entities participating in the National Environmental Performance Track Program. The TCEQ is working in partnership with the EPA to align both state and federal incentives to provide the regulated community a coordinated and integrated approach.

During the next biennium, the TCEQ will continue to implement SDRS and offer additional incentives for demonstrated environmental and compliance performance by the regulated community. Overall, the SDRS

serves as the agency's umbrella for performance-based regulatory programs, including:

- use of compliance history classification as a basis for authorization to participate in innovative regulatory programs;
- a tiered regulatory structure that offers applicable incentives for demonstrated environmental performance;
- core technical assistance linked to compliance and enforcement strategies;
- performance-based environmental management systems;
- integration of environmental management systems into TCEQ permitting, enforcement, and compliance assistance activities; and
- alignment of state and federal incentives.

Recommendations

The TCEQ is committed to future implementation efforts, including:

1. providing regulatory guidance, case studies, and technical assistance on SDRS specific projects, using existing agency resources;
2. educating and training the regulated community, agency staff, and the public on SDRS using existing agency resources;
3. publically reporting performance measures to the public, and the Legislature of the environmental results and achievements resulting from SDRS implementation;
4. coordinating future SDRS implementation with the Pollution Prevention Advisory Committee; and
5. not later than September 1, 2005, completing all rules necessary for the SDRS, as required by Section 5.755 of the Texas Water Code.

The Pollution Prevention Advisory Committee (PPAC) is also providing several consensus-based recommendations regarding SDRS:

1. The TCEQ should implement a long-term effort to implement the SDRS to transition from a compliance-based regulatory structure to a performance-based regulatory structure by 2015.
2. As the SDRS offers greater opportunities for participation by the regulated community, the TCEQ should balance agency resources toward performance-based regulation.
3. The TCEQ should increase awareness and better market SDRS to the regulated community.
4. The reimbursement of expenses for PPAC committee members is critical to continued dialogue regarding the implementation of SDRS and performance-based regulation.

Performance-Based Regulation

In 2001, the 77th Texas Legislature offered a new vision for environmental protection with the creation of performance-based regulation under Section 5.755 of the Texas Water Code, including creating the Strategically Directed Regulatory Structure (SDRS) as an umbrella program to enhance environmental and public health protection in Texas.

This new approach builds on the current regulatory system using incentives to drive better environmental and compliance performance. Performance-based regulation is designed to recognize and reward entities for demonstrated performance beyond what is required under existing law.

Performance-based regulation includes statutory provisions related to compliance history standards and use; strategically directed regulatory structure; collection and analysis of compliance performance information; coordination of innovative programs; and regulatory flexibility.

Specifically, the legislation directed the TCEQ to implement a rule to establish the "Strategically Directed Regulatory Structure" which provides incentives to entities for enhanced environmental performance. The Legislature further directed the TCEQ to develop the rule based on a person's compliance history classification and any voluntary measures undertaken by the person to improve environmental quality.

The Strategically Directed Regulatory Structure is designed to use innovative programs to provide maximum environmental benefit and to reward compliance performance. Through the SDRS, the TCEQ has established the mechanism to implement performance-based programs that provide both flexibility and accountability.

An "innovative program" is defined in Subchapter Q as:

"a program developed by the commission under this subchapter, Texas Water Code Chapter 26 or 27, or Texas Health and Safety Code Chapter 361, 382, or 401 that provides incentives to a person in return for benefits to the environment that exceed benefits that would result from compliance with applicable legal requirements under the commission's jurisdiction."

Section 5.755(c) of the Texas Water Code requires that "an innovative program offered as part of the [SDRS] must be consistent with other law and any requirement necessary to maintain federal program authorization." The commission's Flexible Permit Program and Regulatory Flexibility Program are also defined as innovative programs in the statute.

In addition to the authorizing legislation, the Sunset Advisory Commission recommended the commission "expand opportunities for public participation within innovative regulatory programs" and encouraged the TCEQ to find more ways to include the public in its innovative regulatory programs. Since these programs offer an alternative to traditional regulatory processes, appropriate public participation throughout the process is a key to allowing for accountability and transparency.

To comply with these legislative mandates and the Sunset Advisory Commission recommendations, the commission has worked to actively solicit input in the development of SDRS. The TCEQ actively engaged those entities already participating in voluntary programs, the regulated community, environmental and public interest organizations, the Pollution Prevention Advisory Committee (PPAC), the EPA, agencies in other states, and the public.

At the core of the SDRS rule is the formal definition for "maximum environmental benefit." Maximum environmental benefit has been defined in the rule as:

"the overall long-term goal of the agency for environmental improvement which is accomplished from reductions in discharges or emissions of pollutants by a person, including any measurable voluntary action undertaken to improve environmental quality to an extent that is greater than required by applicable legal requirements."

Other key elements of the SDRS rule, include:

- creating a formal regulatory structure that integrates SDRS with existing innovative programs;
- establishing a SDRS application process, technical review, and reporting mechanism to assure accountability;
- providing a mechanism for termination of SDRS regulatory incentives;
- requiring SDRS public notice, comment, and final action notice; and
- creating a process to file a motion to overturn the Executive Director's decision to grant, deny or terminate incentives.

Strategically Directed Regulatory Structure

The Strategically Directed Regulatory Structure accomplishes three basic functions for demonstrated compliance and environmental performance:

- a system for approving incentives to authorized members of existing innovative programs like CLEAN TEXAS, CLEANER WORLD;
- a new process for authorized entities to request incentives not currently provided by existing programs; and
- a framework for future innovative programs.

The TCEQ performance-based regulatory framework is illustrated in Figure 1. The figure demonstrates how the SDRS integrates with existing and future innovative programs to ultimately provide flexibility and public accountability.

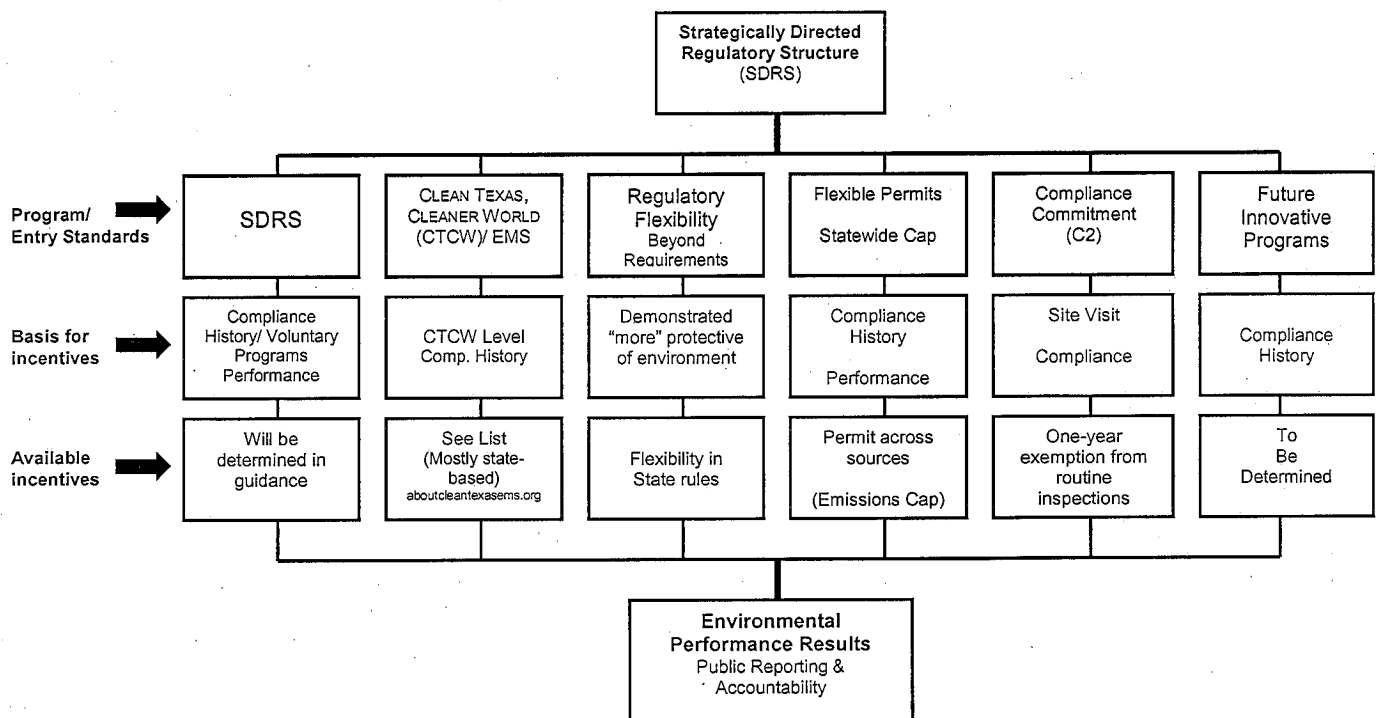


Figure 1: Performance-Based Regulatory Framework

Incentives may be granted in recognition of performance in innovative and/or voluntary projects based on compliance classification. Incentives for compliance classification are intended to be on a graduated scale, with the greatest variety of incentives and flexibility for those persons with the highest classification.

The TCEQ has primarily focused implementation of incentives through the CLEAN TEXAS, CLEANER WORLD Program to harmonize state and federal regulatory programs. This is critical to the overall success of the program, since many of the regulatory incentives are linked to federal statutes. This is accomplished by working in partnership with the U.S. EPA's National Environmental Performance Track through an existing Memorandum of Agreement to collaborate and align state and federal programs.

Overall, the major challenge to SDRS today is creating more awareness and incentives for the regulated community to increase participation. Although the SDRS rule was approved in August 2003, there have not been any direct requests for its use via the application process.

The most active programs include the CLEAN TEXAS, CLEANER WORLD Program, the Flexible Permits Program, and the Small Business Compliance Commitment (C2) Partnership Program.

Program Participation

During the past biennium, the TCEQ has increased efforts to educate, promote, and implement the SDRS through several key programs: CLEAN TEXAS, CLEANER WORLD, Flexible Permitting, and the Compliance Commitment (C2) Partnership.

Several other promising initiatives are also under way, including the Environmental Monitoring and Response System and the Permit Processing Prioritization Pilot. These efforts are being used to pilot innovative approaches to improving environmental performance.

In implementing these programs, the TCEQ regularly seeks input from stakeholders, including the Pollution Prevention Advisory Committee (PPAC) and the TCEQ Environmental Performance Partnership Advisory Group. The PPAC, a legislatively mandated advisory committee, is comprised of members from both the regulated community and environmental or public interest groups, as well as *ex officio* members from a variety of stakeholder groups. The Environmental Performance Partnership is a group of stakeholders that brought together the members of both the EMS Stakeholders Group and the Clean Texas Team. These groups both meet at least quarterly to review and discuss, among other topics, incentives and program development.

At the same time, the TCEQ continues to work closely with the EPA to coordinate the requirements and provisions of the National Environmental Performance Track Program. As new incentives are made available through federal rulemaking, the TCEQ will work to incorporate these new provisions into existing state regulations.

Because of this state-federal partnership, participants in many of these programs are able to participate at both the state and federal level with a single point of contact at the TCEQ.

The following is a brief summary of several of the innovative programs currently available at the TCEQ.

CLEAN TEXAS, CLEANER WORLD

CLEAN TEXAS, CLEANER WORLD is Texas' premier environmental leadership program. The overall goal is to produce measurable environmental results, such as reducing air emissions, improving water quality, minimizing waste, and preventing pollution beyond what is required by law.

CLEAN TEXAS, CLEANER WORLD offers four levels of participation: Advocate, Partner, Lone Star Leader, and National Leader. The program

provides opportunities for all types of organizations – industries, businesses, military installations, schools, universities, local governments, community groups, and trade associations – to join. As an incentive for their commitment, members receive recognition, networking opportunities, and technical assistance. In addition, members at the Leader levels are eligible to receive regulatory benefits.

Individual members at the various levels commit to activities such as:

- implementing performance-based EMS;
- setting "beyond compliance" environmental performance goals;
- initiating stakeholder involvement activities;
- committing to community environmental projects; and
- promoting CLEAN TEXAS, CLEANER WORLD to their community, supply chain and customers.

The TCEQ was the first of the nation's state environmental agencies to enter into a Memorandum of Agreement with the EPA to align the state and federal environmental leadership programs. The landmark agreement between CLEAN TEXAS, CLEANER WORLD and National Environmental Performance Track provides greater benefits to participating members and creates a platform to share resources and experiences between the two environmental agencies.

As of December 2004, the CLEAN TEXAS, CLEANER WORLD program had 223 members, with 70 members at the Advocate level, and 153 at the Partner level. Seventy-four facilities have submitted an Environmental Management System "Declaration of Commitment" to participate in CLEAN TEXAS, CLEANER WORLD as a Lone Star Leader or National Leader. An environmental management system is defined in Chapter 90 of the Texas Administrative Code as:

"A documented management system to address applicable environmental regulatory requirements that includes organizational structure, planning activities, responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement."

The TCEQ has conditionally approved two facilities at the Leader level with five currently pending final determination.

Flexible Permits Program

The Flexible Permits Program was created to authorize a new category of air permit that allows a site operator more flexibility in managing their operation by establishing a facility emissions cap.

Under this alternative, certain physical or operational changes made under the rules may not require prior agency notification. The flexible permitting program is an incentive for well-controlled facilities with a strong performance history. Industry benefits from increased flexibility and prior authorization to make process changes in response to new market opportunities. The state of Texas and its citizens benefit from the increased number of facilities permitted with lower overall emission rates and improved controls.

While flexible permitting has been in place in Texas since 2001, it was not until 2003 that the EPA proposed a formal rule for flexible air permitting as an additional incentive for Performance Track sites. This rule has not been formally adopted, but as the EPA develops this rule, the TCEQ will work to ensure that its own flexible permitting incentives remain in line with those implemented at the federal level. During the last biennium, the TCEQ issued 14 flexible permits.

Compliance Commitment (C2) Partnership

The Compliance Commitment (C2) Partnership program provides small businesses and small local governments with a one-year exemption from routine investigations for committing to free and confidential compliance site visits.

The program requires participation in two compliance site visits conducted by an environmental professional on contract with the TCEQ. During the initial site visit, all of the site's environmental compliance issues are reviewed, followed by a written report describing all of the compliance findings.

Upon self-correction of all compliance deficiencies, the TCEQ contractor will conduct a second site visit to verify compliance. If successful, the TCEQ will authorize a C2 Partnership certificate to the site.

To be eligible for a C2 Partnership, a site must:

- employ 100 or fewer employees in the entire company or be operated by a small local government (county of 100,000 or city of 50,000);
- participate in a minimum of two site visits; and
- correct all compliance deficiencies found during the initial site visits within a reasonable period of time.

Finally, in the event of an imminent threat or danger to human health or the environment, a catastrophe, formal complaints, or to follow up on previously cited violations or agreements for corrective action, the exemption from routine inspections provided under the C2 Partnership will be voided.

During FY 2004, the C2 Partnership authorized 70 entities for demonstrated compliance. This designation provides the entity with a one-year exemption from scheduled inspections by the TCEQ, the EPA, and local government programs in Houston, Galveston, Pasadena, Dallas, Fort Worth, and El Paso.

Status of Incentives

The TCEQ is working through the CLEAN TEXAS, CLEANER WORLD Program to design, test, and implement incentives, including federal incentives authorized under the National Environmental Performance Track.

The development of incentives at the TCEQ goes through several steps. The first step is the initial conceptualization of the incentive suggested by nongovernmental organizations, state agencies, the public, advisory groups, or regulated entities. The second step is a review of the incentive by a cross-agency team using the following criteria from Chapter 90 of the Texas Administrative Code:

1. The incentive must not be less protective of the environment or result in increased emissions or pollution to the environment.
2. The incentive must not reduce efforts to promote public involvement.
3. The incentive cannot conflict with any statutes or rules.
4. Additional criteria, such as the following, are also considered: the logistical or cost impact to the agency; the extent to which the TCEQ has authority and can influence the offering of the incentive; and whether the incentive conflicts with a major agency initiative.

Incentives that meet the agency criteria are recommended to agency executive management for formal consideration by the commissioners. Upon approval by the commissioners, program staff can then begin implementing incentives through a variety of mechanisms, including rulemaking.

Implementation may involve simply putting a new practice in place (such as agency discounts on training), implementing a new agency policy (such as reduced inspection frequency), or proposal and adoption of a new rule (such as exemption from the Waste Reduction Policy Act or credit under the Compliance History rules).

A summary of the incentives that have been approved by the commission are provided in Tables 1, 2, and 3.

Status of CLEAN TEXAS, CLEANER WORLD Incentives

Table 1: Incentives Approved and Implemented					
Incentive	Advocate*	Partner*	Lone Star Leader*	National Leader*	National Leader w/ High CH**
Reduced fees for TCEQ training	x	x	x	x	x
Technical and program assistance	x	x	x	x	x
Networking and partnerships	x	x	x	x	x
Use of logo and annual recognition	x	x	x	x	x
Custom market materials: custom marketing including on-site recognition			x	x	x
Credit under compliance history: 10% credit under Texas Administrative Code, Chapter 60			x	x	x
Exemption from Source Reduction and Waste Minimization Planning: Exemption from 30 TAC Chapter 335 Subchapter Q planning requirements			x	x	x
Single point of contact for innovative activities: Assistance with multi-media innovations and related issues			x	x	x
Stringency evaluation: Stringency evaluations under air programs so that sites held to two similar standards (federal and state) only be held to one				x	x
Low inspection priority for EPA inspections: does not include complaints or sector initiatives				x	x
Reduced state inspection frequency: case-by-case reduction in inspection frequency					x

Incentive	Advocate*	Partner*	Lone Star Leader*	National Leader*	National Leader w/ High CH**
<p>* Advocate membership is for nonregulated entities; Partner membership requires performance that exceeds compliance requirements, and community outreach; and Lone Star Leader and National Leader are the TCEQ APPROVED environmental management system levels.</p> <p>** Compliance History</p>					

Table 2: Incentives Approved and Implementation in Progress				
Incentive	Partner*	Lone Star Leader*	National Leader*	National Leader w/ High CH**
Extended hazardous waste storage time: this was adopted by EPA in April 2004 and will need state rule adoption.			x	x
Reduced Maximum Achievable Control Technology (MACT) reporting: this was adopted by EPA in April 2004 and will need state rule adoption.			x	x
Additional notice for inspections: to be developed.				x
<p>* Advocate membership is for nonregulated entities; Partner membership requires performance that exceeds compliance requirements and community outreach; and Lone Star Leader and National Leader are the TCEQ APPROVED environmental management system levels.</p> <p>** Compliance History</p>				

Table 3: Incentives Approved and Implementation Is Planned

Incentive	Partner*	Lone Star Leader*	National Leader*	National Leader w/ High CH**
Reduced Discharge Monitoring Reporting (DMR): reduced reporting and monitoring under the DMR provisions of the Clean Water Act. This incentive will need federal approval to implement.			X	X
Alternative compliance options under Title V: allow for alternative compliance options under Title V (if allowed by rule) without requiring the option to be identified up front. The equipment and/or operation would need to be authorized under the New Source Review (NSR) permit. This incentive will need federal approval to implement.			X	X
<p>* Advocate membership is for nonregulated entities; Partner membership requires performance that exceeds compliance requirements, and community outreach; and Lone Star Leader and National Leader are the TCEQ APPROVED environmental management system levels.</p> <p>** Compliance History</p>				

Federal Changes Affecting Implementation

No significant changes have been made to major federal environmental statutes related to strategically directed regulatory programs during the past biennium. Further progress has been made through administrative means to provide for more flexible approaches to environmental protection by the U.S. EPA and state governments.

The following "innovation tools" are currently implemented at the federal level.

National Environmental Performance Partnership System: provides states greater flexibility in setting their environmental priorities and aligning use of federal funds.

States Agreement to Pursue Regulatory Innovation: EPA signed an agreement with the Environmental Council of the States to experiment with new approaches to environmental protection.

National Environmental Performance Track: EPA's national environmental leadership program provides incentives and public recognition for improved environmental performance.

In April 2004, the EPA issued its two National Environmental Performance Track rules for Performance Track facilities. One simplifies the reporting requirements for National Environmental Performance Track (NEPT) facilities governed by the Maximum Achievable Control Technology (MACT) provisions of the Clean Air Act. The second revises Resource Conservation and Recovery Act (RCRA) regulations to allow hazardous waste generators who are National Environmental Performance Track members to accumulate their hazardous waste for 180 days (270 days in certain cases) without a RCRA permit, provided these generators meet certain conditions.

The TCEQ will be working to authorize these rules through the CLEAN TEXAS CLEANER, WORLD PROGRAM for those entities approved at the National Leader level.

The EPA has also proposed several other rules concerning incentives for NEPT members. For those governed by the MACT standards, the EPA is proposing three air incentives for qualifying facilities:

- flexible permits, which would typically include provisions that provide advance approval for process changes that would otherwise require a major permit modification;

- a designated contact at EPA headquarters to provide technical support to TCEQ permit staff handling applications from National Environmental Performance Track members; and
- quicker agency turnaround time for facility applications for alternative compliance, meaning National Environmental Performance Track facilities will receive action in 30 days instead of 45.

Proposed waste incentives for qualifying generators of hazardous waste include:

- less frequent self-inspections for NEPT facilities, reducing self-inspections from 52 per year to as few as 12; and
- greater flexibility in RCRA Generator Standards.

Finally, the EPA is discussing possible incentives for NEPT members to expedite the renewal of water permits and reduce related monitoring, and incentives that would be tied to the effluent guidelines planning process and state revolving fund program.

EPA National Center for Environmental Innovation: The National Center for Environmental Innovation's main objective is to find innovative approaches to improve environmental results by working with other EPA programs, states, businesses, and communities to solve challenging environmental problems through new ideas, creative partnerships, and sound analysis.

To foster creative environmental problem solving, the National Center for Environmental Innovation:

- provides a testing ground for innovative ideas that advance environmental protection;
- assists EPA's national programs and regions in adopting innovative policies and programs; and
- supports improved environmental performance in business, communities, and state, tribal and local governments.

By working to develop and implement performance-based regulations, the Center is working to develop a system that: focuses more on results and less on process; emphasizes environmental protection, not just pollution control; and takes a comprehensive rather than piecemeal approach to problem-solving.

Future Implementation of SDRS

The TCEQ has not experienced any significant statutory barriers to implementation at the state level. At the federal level, it would be useful for Congress to take actions similar to those taken by the Texas Legislature to promote performance-based regulations that complement the existing compliance-based regulatory structure.

Without new legislative action from Congress to authorize EPA's efforts to embrace a more performance-based approach to existing federal statutes and regulations, it is not likely that significant federal regulatory incentives will materialize, except on a case-by-case basis.

While the lack of further action from Congress is the primary impediment to expanding the scope of performance-based regulation in the U.S., other realities are affecting implementation at the state-level. Throughout the transition from compliance-based regulation to performance-based regulation, the limitations of stretching existing resources at the TCEQ to implement SDRS will need to be balanced with the overall mission of the agency to protect human health and the environment.

As the TCEQ continues to work toward a more performance-based regulatory structure, the agency should continue efforts to integrate performance-based regulation into permitting, enforcement, and compliance assistance by training more agency staff on SDRS. In addition, the TCEQ should work to promote greater awareness of the SDRS program and encourage the regulated community to pilot additional innovative projects or programs.

Strategically Directly Regulatory Structure Performance Report

The following table provides a summary of the performance of the Strategically Directly Regulatory Structure for the period 2003-2004.

The table shows the number of cases filed, the number of cases resolved, and the number of cases pending at the end of the period. The data is presented for the entire period and for each of the four quarters.

The table also shows the number of cases resolved by each of the four quarters. The data is presented for the entire period and for each of the four quarters.

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Benefits to the Environment

Even though performance-based regulation is in the early stages, the impact of these programs and their benefits has started to produce environmental results. The TCEQ has established an Environmental Performance Report for participating entities to report environmental improvement results.

This reporting has been aligned with the EPA's National Environmental Performance Track Program to coordinate on program reporting. Benefits to the environment can already be seen by those facilities which have reported air, water, and waste reductions. In addition, these facilities are also reporting on water conservation and energy efficiency.

The reported financial savings are often an indicator of avoided waste disposal and other environmental costs. The resulting savings can be used by the entity to operate more competitively, to reinvest savings in new innovative technologies, and to help reduce overall liabilities and risk.

Each year, the benefits generated by CLEAN TEXAS, CLEANER WORLD members are calculated from savings reported by members in their annual Environmental Performance Reports and surveys submitted by members. The pollution reductions and savings achieved during FY 2004 through the CLEAN TEXAS, CLEANER WORLD program are detailed in Table 4.

Table 4: 2004 CLEAN TEXAS, CLEANER WORLD Results			
Environmental Improvement	Quantity Reduced	Unit	Savings
Brownfield use increased	0.90	acres	
Discharges of toxics to water reduced	7.65	tons	
Emissions of carbon monoxide (CO) reduced	14.77	tons	
Emissions of NOx reduced	235.80	tons	
Emissions of ozone-depleting gases (ODG) reduced	10.05	tons	
Emissions of particulate matter (PM) reduced	8.60	tons	
Emissions of sulfur dioxide (SO2) reduced	101.46	tons	
Emissions of VOCs reduced	215.48	tons	\$43,900.00
Energy conserved	36,819,461.64	kWh	\$2,015,571.00
Habitat restoration increased	40.30	acres	\$157,500.00
Hazardous waste reduced	3,542.73	tons	\$777,829.97
Materials composted	8,041.37	tons	\$11,165.20
Materials conserved	15,469.19	tons	\$190,735.00
Nonhazardous materials Recycled/Reused	13,303.54	tons	\$864,954.31
Nonhazardous waste reduced	2,745.42	tons	\$17,930.00
Recycled/Reused materials used	4,019.80	tons	\$1,933,750.00
Water conserved	663,912,404.69	gallons	\$855,033.00
Total Dollars Saved			\$6,868,368.48
Total Emissions Reduced			47,715.85 tons

Recommendations

The following are separate sets of recommendations proposed by TCEQ staff and the Pollution Prevention Advisory Committee respectively.

Staff Recommendations

Based upon the current SDRS implementation, the TCEQ will commit to several actions to support future implementation, including:

1. With existing agency resources, the TCEQ will provide guidance, case studies, and training on developing SDRS specific projects. Similar guidance documents typically should include questions that encourage critical thinking and assessment of successes, obstacles, and lessons learned. The following are six examples of modules that are currently being tested by the EPA as a means of analyzing innovative projects:
 - background information on the innovation,
 - environmental outcomes,
 - costs and cost effectiveness,
 - compliance assistance,
 - transferability, and
 - public involvement.
2. The TCEQ will promote, market, and provide training on SDRS to the regulated community, agency staff, and the public. At the present time, one of the barriers to expanding the role of SDRS and performance-based regulation is obtaining increased participation in existing programs and new innovative approaches. Increasing awareness of these programs would help increase participation and contribute to the development of further innovations.
3. The TCEQ will communicate performance measures, environmental results, and achievements resulting from the implementation of SDRS to the public and Legislature. As a result, it is important that the TCEQ continue to document the benefits of SDRS for the regulated community to encourage further participation in, and innovations from, the performance-based regulatory structure. In addition, the TCEQ should work to maximize public transparency throughout the implementation process and in regulatory practice in order to foster public trust.
4. The TCEQ will continue to coordinate future SDRS implementation with the Pollution Prevention Advisory Committee (PPAC). The PPAC provides an important opportunity for dialogue and feedback regarding SDRS from both the regulated and environmental communities. The committee has provided input throughout the implementation process, and it is important that the TCEQ maintains

this dialogue to ensure that the state can maximize the benefits of SDRS.

5. Not later than September 1, 2005, the TCEQ will complete all rules necessary for the SDRS, as required by Section 5.755 of the Texas Water Code.

Pollution Prevention Advisory Committee Recommendations

In Section 5.757 (b)(3) of the Texas Water Code, the Legislature mandates that the TCEQ "work with the [PPAC] to assist the commission in integrating the innovative programs into the commission's operations." Early in the implementation process, the PPAC provided a consensus "vision" for performance-based regulation. The entire text of their vision is included as Appendix A to this report.

As a part of this mandate, and as a part of its ongoing involvement in the implementation of a performance-based regulatory structure, the PPAC has provided the following recommendations regarding the current status of the SDRS implementation process:

1. The TCEQ has successfully implemented the initial component of SDRS. Over the long term, the TCEQ should implement a long-range effort to implement the SDRS to transition from a compliance-based regulatory structure to a performance-based regulatory structure over the next 10 years by the year 2015.

To ensure that this progress continues, the TCEQ should annually review the transition from a compliance-based regulatory structure to SDRS and a performance-based regulatory structure. This review should establish benchmarks for the transition, based on regional and/or statewide goals for achieving maximum environmental performance.

2. It is important that the successful implementation of SDRS, and the innovative approaches it entails, is not inhibited by a lack of available resources. The TCEQ should provide adequate financial resources for SDRS balanced with the overall mission of the agency. Throughout the transition, as performance-based regulation in general, and SDRS specifically, generate participation by the regulated community, the demand for resources in other compliance-based regulatory areas will diminish, allowing for the reallocation of resources to areas with higher demands.
3. One of the keys to the success of SDRS is the participation of members of the regulated community. The TCEQ should promote SDRS, and the regulated community should test new approaches in the

future that are aligned with objectives set by the agency's strategic plan.

4. Throughout the implementation process, the PPAC has provided an important platform for a dialogue between the regulated and environmental communities. Because PPAC representatives come from communities across the state of Texas, face-to-face meetings, while more productive, are often difficult to achieve. Reimbursement of expenses for advisory committee members in the PPAC is important to allow for the continuing dialogue between diverse groups of stakeholders regarding the implementation of SDRS and performance-based regulation.

Appendix A

The Pollution Prevention Advisory Committee Vision of Performance-Based Regulation

The Pollution Prevention Advisory Committee (PPAC) considers the application of the innovative rules under the SDRS to be a good interim step in a much broader and much needed change toward a more comprehensive and encompassing plan for performance-based regulations. To this end, and in conjunction with the mandates of Section 5.757 (b)(3) of the Texas Water Code, the PPAC offers its vision of performance-based regulation—a vision that was carefully crafted and adopted following an extensive dialogue among representatives on the advisory committee.

This vision for performance-based regulation, prepared independent of the TCEQ, appears here as it was submitted to the Commission by the PPAC.

Background

The SDRS subteam [of the PPAC] met on Wednesday, November 13th [2002] to draft comments to the SDRS regulatory agency draft. During the course of the discussions, it was clear that a need existed for a vision of performance-based rules to clearly identify the longer-term requirements of performance-based regulations. These are to be used as TCEQ guidance from the PPAC. We consider the SDRS proposal an interim step and subset of the larger more encompassing plan for performance-based regulations.

A Vision of Performance-Based Regulations

- *Define who qualifies for performance-based regulations.* A definition would need to be created that clearly differentiates between entities that through their environmental performance, qualify for a performance-based regulatory structure and those entities that would remain in the existing compliance-based regulatory structure.
- *Develop a new regulatory structure.* New rules would need to be developed to accommodate a performance-based structure that would encourage innovation. The rules would need to be a completely separate alternative to the existing compliance-based regulations.
- *Performance-based regulations would replace compliance-based regulations for those that qualify.* Our current regulatory scheme is a compliance-based regulation that drives improvements for entities that requires regimented guidance and control through enforced compliance. While this is necessary for many, entities that qualify for performance-based regulation perceive compliance-based regulations as a

barrier to innovative environmental improvement. As proof of performance-based regulation success proliferates, performance-based regulation will become the obvious preference. Gradually, regulatory applicability will shift from compliance-based regulations to performance-based regulations.

- *Better allocation of commission resources to maximize environmental results.* The performance-based regulation structure should allow the agency to direct resources freed up by the performance-based regulation system toward strategies to improve the performance of facilities with poor and average compliance classifications.
- *Environmental performance instead of a compliance-based method.* A process would need to be identified by which an entity would be held accountable for their environmental performance rather than conformance to use of required control technology.
- *Encourage innovations.* A performance based structure would be open to the influence of new ideas and approaches to improved environmental performance generated from government entities such as TCEQ, industry or community involvement.
- *Publicly transparent.* Performance-based regulation should allow for a high level of public participation. The environmental performance of facilities under the performance-based regulation system should be readily accessible to enhance accountability and foster public trust.
- *Program benefits need to be clearly defined as part of regulations.* Establishing demonstration criteria for participants will create the ability of quantifying program value for all stakeholders as well as providing metrics and means to determine success.

Appendix B

Texas Administrative Code, Chapter 90 (30 TAC 90): Regulatory Flexibility

Chapter 90 of the Texas Administrative Code contains several subchapters. Due to the size of this chapter, only Subchapter D, which deals specifically with the Strategically Directed Regulatory Structure, is included here in its entirety. The titles of the remaining subchapters, Subchapters A through C, are listed here for reference.

- Subchapter A: Purpose, Applicability, and Eligibility (Sections 90.1 and 90.2)
- Subchapter B: General Provisions (Sections 90.10, 90.12, 90.14, 90.16, 90.18, and 90.20)
- Subchapter C: Regulatory Incentives for Using Environmental Management Systems (Sections 90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, and 90.44)

Subchapter D: Strategically Directed Regulatory Structure

(Sections 90.50, 90.52, 90.54, 90.56, 90.58, 90.60, 90.62, 90.64, 90.66, 90.68, 90.70, and 90.72)

§90.50. Purpose

The purpose of this subchapter is to implement Texas Water Code, §5.755, Strategically Directed Regulatory Structure, to establish a framework for innovative programs to provide for enhanced environmental performance and to reward compliance performance.

Adopted July 23, 2003, Effective August 14, 2003

§90.52. Applicability

- (a) The provisions of this subchapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401. The applicable regulatory activities include, but are not limited to:
- (1) management and disposal of industrial solid waste, hazardous waste, or municipal solid waste (including composting, sewage sludge, and water treatment sludge) regulated under the Texas Solid Waste Disposal Act, THSC, Chapter 361;
 - (2) discharges to surface water and groundwater regulated under TWC, Chapter 26;
 - (3) petroleum storage tanks regulated under TWC, Chapter 26;

- (4) disposal of waste by underground injection regulated under TWC, Chapter 27;
 - (5) emission sources of air contaminants regulated under THSC, Chapter 382; and
 - (6) management and disposal of radioactive material waste regulated under THSC, Chapter 401.
- (b) This subchapter does not apply to occupational licensing programs or other programs specifically exempted by statute.

Adopted July 23, 2003 Effective August 14, 2003

§90.54. Single Point of Contact.

The executive director or the executive director's designee shall serve as the single point of contact within the agency to coordinate all innovative programs. The executive director, or the executive director's designee, acting as the coordinator, shall:

- (1) inventory, coordinate, and market and evaluate all innovative programs;
- (2) provide information and technical assistance to persons participating in or interested in participating in those programs; and
- (3) work with the Pollution Prevention Advisory Committee or its successor(s) to assist the commission in integrating the innovative programs into the agency's operations, including:
 - (A) program administration;
 - (B) strategic planning; and
 - (C) staff training.

Adopted July 23, 2003 Effective August 14, 2003

§90.56. Eligibility

- (a) Except as provided in subsection (b) or (c) of this section, a person whose application to participate in an innovative program or whose application for an incentive meets the minimum standards of §90.62 of this title (relating to Application) shall be eligible to receive regulatory incentives under this chapter.
- (b) A person who has incurred a judgment in a suit brought by the Texas or United States attorney general against the site for which the person is requesting regulatory incentives, is ineligible to participate in an innovative program or to receive regulatory incentives at that site for a period of five years after the date the judgment was final.

- (c) A person who has been convicted of willfully or knowingly committing an environmental crime regarding the site for which the person is requesting to participate in an innovative program or requesting regulatory incentives is ineligible to receive regulatory incentives through participation in an innovative program under this chapter for a period of three years after the date of the conviction.
- (d) A person shall be accepted into a strategically directed regulatory structure by meeting the criteria and standards for the following:
 - (1) regulatory flexibility under Subchapter B of this chapter (relating to General Provisions);
 - (2) incentives for using an environmental management system under Subchapter C of this chapter (relating to Regulatory Incentives for Using Environmental Management Systems);
 - (3) programs authorized as innovative by the executive director;
 - (4) flexible permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or
 - (5) other programs set forth under this subchapter.
- (e) Incentives granted under one innovative program do not guarantee incentives offered under another innovative program, except where those incentives are equivalent.

Adopted July 23, 2003 Effective August 14, 2003

§90.58. Definitions

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

- (1) Applicable legal requirement - An environmental law, regulation, permit, order, consent, decree, or other requirement.
- (2) Enhanced environmental performance - An activity by a person, including any measurable voluntary action undertaken by a person to improve environmental quality, which:
 - (A) reduces or eliminates discharges or emissions of pollutants to an extent that is greater than required by applicable legal requirements;
 - (B) provides an overall reduction of discharges or emissions of pollutants from a site to an extent that is greater than required by applicable legal requirements;
 - (C) reduces a negative impact on air, water, land, natural resources, or human health to an extent that is greater than required by applicable legal requirements; or

- (D) is otherwise determined by the executive director to improve environmental quality to an extent greater than required by applicable legal requirements.
- (3) Environmental outcome - A measurable or discernable improvement in the quality of air, water, land, or natural resources or in the protection of the environment as determined by the executive director.
- (4) Innovative program
 - (A) a program developed by the commission under Texas Water Code (TWC), Subchapter Q, Performance Based Regulation, TWC, Chapter 26 or 27; or Texas Health and Safety Code (THSC), Chapter 361, 382, or 401; that provides incentives to a person in return for benefits to the environment that exceed benefits that would result from compliance with applicable legal requirements;
 - (B) the flexible permit program administered by the agency under THSC, Chapter 382, and defined in Chapter 116, Subchapter G of this title (relating to Flexible Permits);
 - (C) the regulatory flexibility program defined in Subchapter B of this chapter (relating to General Provisions);
 - (D) the environmental management systems program defined in Subchapter C of this chapter (relating to Regulatory Incentives for Using Environmental Management Systems); or
 - (E) other voluntary programs administered by the Small Business and Environmental Assistance Division or that division's successor designated as innovative by the executive director.
- (5) Maximum environmental benefit - The overall long-term goal of the agency for environmental improvement which is accomplished by enhanced environmental performance over time from individual reductions in discharges or emissions of pollutants by persons who reduce the negative impacts on water, air, land, natural resources, or human health to an extent that is greater than required by applicable legal requirements.
- (6) Permit - A license, certificate, registration, approval, permit by rule, standard permit, or other form of authorization issued by the agency under the Texas Water Code or Texas Health and Safety Code.
- (7) Public participation - Activities by a person under this subchapter intended to enhance public input that are not otherwise required by law or by commission rules.

- (8) Region - A region of the Field Operations Division or that division's successor.
- (9) Site - Except with regard to portable units, all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A site for a portable regulated unit or facility is any location where the unit or facility is or has operated.
- (10) Strategically directed regulatory structure - A program that is designed to use innovative programs to provide maximum environmental benefit and to reward compliance performance.
- (11) Voluntary measure - A program with specific performance measures undertaken by a person to improve environmental quality that is not required by rule or law.

Adopted July 23, 2003 Effective August 14, 2003

§90.60. Incentives

- (a) In providing incentives for enhanced environmental performance, the executive director shall offer incentives based on:
 - (1) a person's and/or site's compliance history classification under §60.2 of this title (relating to Classification); and
 - (2) a person's voluntary measures, including participation in innovative programs, to improve environmental quality. The executive director may weigh more favorably voluntary measures that are related to the specific media for which a person is requesting incentives or participation in an innovative program.
- (b) In granting incentives, the executive director may also consider any other factor that the executive director finds relevant that leads to enhanced environmental performance.
- (c) The incentives the executive director may offer for participation in innovative programs include, but are not limited to:
 - (1) one point of contact for coordinating innovative programs;
 - (2) technical assistance provided by the agency;
 - (3) accelerated access to agency information;
 - (4) modification of state or federal regulatory requirements that do not increase existing emission or discharge limits or decrease public involvement;

- (5) flexibility in regulatory processes; and
- (6) public recognition.

- (d) An innovative program offered as part of the strategically directed regulatory structure must be consistent with other law and any requirement necessary to maintain federal program authorization, including the provisions of any agreements between the agency and the federal government.

Adopted July 23, 2003 Effective August 14, 2003

§90.62. Application

- (a) A person who applies to the executive director for a regulatory flexibility project or to use an environmental management system under this chapter, or for a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or another program designated as innovative under Texas Water Code (TWC), §5.752(2), does not need to submit another application under this section's requirements, unless the person requests an additional incentive not available to the person in the program in which the person is already participating or applying to participate. Compliance with this requirement does not relieve the person from complying with all other applicable legal requirements.
- (b) If a person seeks incentives under this section that are not available under specific innovative programs designated in this chapter, Chapter 116 of this title, or other programs designated as innovative under TWC, §5.752(2), the person must submit an application to the executive director to receive incentives available under this section. Within 30 days after receipt of an application under this section, the executive director shall mail written notification informing the person that the application is administratively complete or that it is deficient.
 - (1) If the application is deficient, the notification shall specify the deficiencies, and allow the person 33 days from the date of the notice to provide the requested information. If the person does not submit an adequate response within the allotted time, the application will be sent back to the person without further action by the executive director.
 - (2) Additional technical information may be requested within 60 days after issuance of an administrative completeness letter. If the person does not provide the requested technical information within 33 days after the date of the request, the application will be sent back to the person without further action by the executive director.
 - (3) If an application is sent back to the person under paragraph (1) or (2) of this subsection, the person may refile the application at any time.

- (4) The person may request that the executive director allow additional time for a person to submit information regarding the person's application to use an innovative program or to request an incentive.
- (c) In making a determination of eligibility, the executive director shall review the application submitted under this section, as well as the person's and site's compliance history classification as determined by Chapter 60 of this title (relating to Compliance History).
- (d) An application for participation in the strategically directed regulatory structure must, at a minimum, include:
 - (1) a narrative summary of the proposal or project, including the specific statutes or commission rules under which participation is being sought;
 - (2) a specific reference to the appropriate permit provision or citation to a regulation if the person's request is to modify an existing state or federal regulatory requirement;
 - (3) a detailed explanation, including a demonstration as appropriate, that the proposal or project is:
 - (A) more protective of the environment and the public health than the method or standard prescribed by the statute or commission rules that would otherwise apply; and
 - (B) not inconsistent with federal law, including any requirement for a federally approved or authorized program;
 - (4) a description of any public participation component associated with the proposal or project;
 - (5) where appropriate, a project monitoring schedule which includes a proposal for monitoring, recordkeeping, and/or reporting of environmental performance and compliance;
 - (6) any documented results from the project or estimates of future project outcomes demonstrating that the project produces a measurable environmental outcome that enhances environmental performance;
 - (7) an explanation of how the project will be consistent with the needed outcome/regional plan if the applicant chooses a project that will address a regional environmental issue identified in the agency's strategic plan, as amended; and
 - (8) any necessary additional information as determined by the executive director.
- (e) The application must be signed and must certify that all information is true, accurate, and complete to the best of the signatory's knowledge.

- (f) An original and two copies of the signed application shall be submitted to the executive director for review, and one additional copy shall be submitted to the appropriate regional office for the region in which the site is located.
- (g) A person whose application is approved by the executive director must maintain records and other supporting information which shows that voluntary environmental measures associated with incentives approved by the executive director are being carried out and are resulting in enhanced environmental performance. All records and data shall be retained at the site and/or shall be readily available for review by an agency representative or any local air pollution control program with jurisdiction for a period of three years after the date of any record or sample, measurement, report, application, or certification. This period shall be extended at the written direction of the executive director.

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§90.64. Requests for Modification of State or Federal Regulatory Requirements

- (a) Persons who request a modification of a state or federal regulatory requirement which requires approval by commission order must follow the requirements of §90.62 of this title (relating to Application).
- (b) Persons who request modification of federal regulatory requirements under this subchapter must also meet the requirements of agreements between the EPA and the agency in order to receive federal regulatory incentives.
- (c) Persons who request modification of federal regulatory requirements under this chapter must include a public participation component in the project proposal.

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§90.66. Review by Executive Director Required

- (a) Any person who is receiving incentives under this subchapter shall submit a progress report to the executive director every two years from the date of initial written approval from the executive director for the incentives, documenting the enhanced environmental performance of the project, including:

- (1) a demonstration that the results are more protective of the environment than the method or standard prescribed by the statute or commission rule that would otherwise apply;
 - (2) specific measurable results of the project and how these contribute toward environmental outcomes;
 - (3) documentation of any public participation component; and
 - (4) how the results achieved compare to the results projected in the application.
- (b) At least once every two years from the date of initial written approval for the incentives from the executive director, the executive director shall review the latest compliance history classification available for the person and the site receiving incentives under this chapter, as determined under §60.2 of this title (relating to Classification). The executive director shall also review the latest progress reports required to be submitted under this chapter and any voluntary measures by the person and the site receiving an incentive under this chapter to enhance environmental performance undertaken since any previous biennial review.
- (c) If the biennial review indicates that a person's or site's compliance history classification has declined to a lower classification than the person or site held at the time the incentives were approved, the executive director shall begin termination proceedings under §90.68 of this title (relating to Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure) for any incentives granted that were only available to the person and/or site under the previous compliance classification.
- (d) If the executive director finds that a person's voluntary environmental measures no longer provide for enhanced environmental performance, the executive director shall begin termination proceedings under §90.68 of this title.
- (e) If a person suspends or terminates voluntary environmental measures associated with incentives granted by the executive director, that person must notify the executive director within ten calendar days after the occurrence.

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§90.68. Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure

- (a) Termination by the recipient.
- (1) A person who receives regulatory incentives for a site under this subchapter may terminate the regulatory incentives at any time by

sending a notice of termination to the executive director by certified mail.

- (2) If the incentives received by the person or site included exemptions from state or federal requirements, the person or site must be in full compliance with all requirements for which exemptions were granted within 30 days after notice of termination is mailed to the executive director. If a new permit, permit amendment, or other authorization is necessary in order for the person to achieve compliance, an administratively complete application for such authorization shall be submitted to the executive director within 30 days after notice of termination is mailed to the executive director.

(b) Termination by the executive director.

- (1) Noncompliance with the terms and conditions of regulatory incentives, an environmental management system approved under Chapter 90, Subchapter B of this title (relating to General Provisions), or this chapter, may result in termination of the regulatory incentives.
- (2) The executive director may also terminate incentives under this chapter if the executive director finds that the person or site receiving incentives is not complying with other applicable legal requirements, even if the site's or person's compliance history classification has not changed.
- (3) If the executive director determines that a person who is granted regulatory incentives under this subchapter no longer meets the requirements of this subchapter, the executive director shall notify the person in writing within 90 days after the deficiencies are documented.
- (4) If the noted deficiencies are not corrected and supporting documentation submitted within 90 days after receipt of the notification, regulatory incentives shall be terminated.
- (5) If the incentives received by the person or site included exemptions from state or federal requirements, the person or site must be in full compliance with all requirements for which exemptions were granted within 30 days after termination by the executive director. If a new permit, permit amendment, or other authorization is necessary in order for the person to achieve compliance, an administratively complete application for such permit or authorization shall be submitted within 33 days after termination by the executive director. Upon written request, the executive director may allow an additional amount of time not to exceed 90 days from the date the incentive is terminated for a person to achieve compliance with applicable legal requirements or apply for proper authorization.

Adopted July 23, 2003 Effective August 14, 2003

§90.70. Public Notice and Comment

- (a) Applicants for participation in innovative programs with specific notice, comment, and hearing requirements shall follow the requirements under those programs notwithstanding the requirements of this subchapter, unless the applicant is requesting additional incentives under this subchapter.
- (b) If an applicant for incentives under this subchapter requests an exemption from a statute or commission rule, 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 (c) of this section.
- (c) If the specific innovative program or statute or commission rule for which an applicant is seeking an exemption does not require public notice or an opportunity for comment, the following requirements shall apply.
 - (1) The applicant shall publish notice of the application at least once in a newspaper of general circulation in the county where the facility or site requesting incentives is located or proposed to be located. The notice shall be published within 30 days after the application is determined to be administratively complete. Notice under this section shall not be published in a font size smaller than that normally used in the newspaper's classified advertising section.
 - (2) The executive director shall accept public comment for 30 days after the last publication of the notice of application.
- (d) Notice under this section shall include, at a minimum:
 - (1) a brief description of the proposal and of the business conducted at the facility or activity described in the application;
 - (2) a brief description of the incentive(s) requested;
 - (3) the name and address of the applicant and, if different, the location of the facility for which incentives under this subchapter are sought;
 - (4) the name and address of the agency;
 - (5) the name, address, and telephone number of an agency contact person from whom interested persons may obtain further information;
 - (6) the name of the applicant or applicant's designated representative;
 - (7) a brief description of the public comment procedures; and

- (8) the date by which comments must be received by the executive director.

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§90.72. Notice of Proposed Final Action

- (a) After the public comment period, the executive director shall send notice of the proposed final action on the application by first-class mail to any person who commented during the public comment period and to the applicant.
- (b) The notice shall include the executive director's decision on the application, the response to any comments submitted during the public comment period, and a statement that any person may file a motion to overturn the executive director's decision under subsection (c) of this section.
- (c) The applicant, the executive director, the public interest counsel, or any other person may file with the chief clerk a motion to overturn the executive director's decision to grant, deny, or terminate incentives. A motion must be filed within 23 days after the date the agency mails notice of the executive director's decision to the applicant and persons who submitted timely comment. Timely motions are subject to §50.139(e) - (g) of this title (relating to Motion to Overturn Executive Director's Decision). If a person who received a final notice from the executive director terminating incentives received under this section files a motion to overturn the executive director's decision, the person will continue to receive the incentives pending final disposition of the motion to overturn under the procedures in §50.139(e) - (g) of this title. If the motion to overturn is denied or overruled by operation of law, the provisions of §90.68(b)(5) of this title (relating to Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure) apply on the date the motion is denied or overruled by operation of law.

Adopted July 23, 2003 Effective August 14, 2003

Sources

- House Bill 2912, 77th Texas Legislature, Article 4, Section 4.01 et seq. Subchapter Q, Performance Based Regulation, Texas Water Code, Chapter 5, September 2001.
- *Conceptual Framework for HB 2912 Implementation*, Internal Agency Report, Texas Natural Resource Conservation Commission*, November 2001.
- Rule Log No. 2001-072-090-AD. Chapter 90– Regulatory Flexibility and Environmental Management Systems, Subchapter D: Strategically Directed Regulatory Structure Initial Rule, Texas Natural Resource Conservation Commission, August 5, 2002.
- *Sunset Advisory Commission Staff Report*, Texas Natural Resource Conservation Commission, 2000..
- U.S. Environmental Protection Agency (EPA), National Environmental Performance Track, Program Criteria, www.epa.gov/performancectrack/faq.htm.
- *Building on the Foundation*, National Environmental Performance Track, Second Annual Progress Report, EPA, Office of Policy, Economics, and Innovation, April 2004.
- National Center for Environmental Innovation (NCEI), Program Information, EPA, www.epa.gov/innovation/aboutncei.htm.
- *Environmental Protection: Overcoming Obstacles to Innovative State Regulatory Programs*, Report to Congressional Requesters, U.S. General Accounting Office, Report No. GAO-02-268, January 2002.
- *Innovating for Better Environmental Results: A Strategy To Guide The Next Generation of Innovation at EPA*, U.S. Environmental Protection Agency (EPA), April 2002.

* now Texas Commission on Environmental Quality

