

US EPA ARCHIVE DOCUMENT

TCEQ State Innovations Grant Final Report

Attachment 4: Texas Administrative Code Chapter 90 EMS Rule

SUBCHAPTER A: PURPOSE, APPLICABILITY, AND ELIGIBILITY

§90.1, §90.2

Effective February 15, 2007

§90.1. Purpose.

The purpose of this chapter is to implement the commission's authority under Texas Water Code, §5.758, to provide regulatory flexibility to an applicant who proposes an alternative method or alternative standard to control or abate pollution; §5.127, relating to Environmental Management Systems; and §5.131, relating to Environmental Management Systems.

Adopted July 10, 2002

Effective July 31, 2002

§90.2. Applicability and Eligibility.

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

(b) Subchapter C of this chapter applies to any site that has an environmental management system (EMS) that meets the minimum standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(c) Except as provided in subsection (e) or (f) of this section, a person whose EMS for a specific site meets the minimum standards of §90.32 of this title may be eligible to receive regulatory incentives under this chapter.

(d) Except as provided in subsection (g) or (h) of this section, any person subject to any statute or commission rule regarding the control or abatement of pollution may be eligible to receive a regulatory flexibility order (RFO).

(e) A person who has been referred to the Texas or United States attorney general and has incurred a judgment against the site for which the person is requesting regulatory incentives, is ineligible to receive regulatory incentives at that site for using an EMS for a period of two or three years from the date the judgment was final, depending on the level of the program for which the person is applying.

(f) A person who has been convicted of willfully or knowingly committing an environmental crime regarding the site for which the person is requesting regulatory incentives is ineligible to receive regulatory incentives for using an EMS for a period of five years from the date of the conviction.

(g) A person who has been referred to the Texas or United States attorney general, and has incurred a judgment, is ineligible to receive an RFO for a period of three years from the date the judgment was final.

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

Adopted January 24, 2007

Effective February 15, 2007

SUBCHAPTER B: GENERAL PROVISIONS
§§90.10, 90.12, 90.14, 90.16, 90.18, 90.20
Effective July 31, 2002

§90.10. Application for a Regulatory Flexibility Order.

(a) An application for a Regulatory Flexibility Order (RFO) must be submitted to the executive director.

(b) The application must, at a minimum, include:

(1) a narrative summary of the proposal, including the specific statutes or commission rules for which an exemption is being sought;

(2) a detailed explanation, including a demonstration as appropriate, that the proposed alternative is:

(A) more protective of the environment and the public health than the method or standard prescribed by the statute or commission rule that would otherwise apply; and

(B) not inconsistent with federal law, including any requirement for a federally approved or authorized program;

(3) documented evidence of the benefits to environmental quality that will result from the proposal;

(4) an implementation schedule which includes a proposal for monitoring, recordkeeping, and/or reporting, where appropriate, of environmental performance and compliance under the RFO;

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

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

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

(8) any other information requested from the applicant by the executive director during the application review period.

(c) The application must be signed by the applicant or its duly authorized agent and must certify that all information is true, accurate, and complete to the best of that person's knowledge.

(d) The applicant shall submit an original and two copies of the signed application to the executive director for review, and shall send one additional copy to the commission's regional office for the region in which the facility is located.

Adopted July 10, 2002

Effective July 31, 2002

§90.12. Additional Fees; Cost Recovery.

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

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

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

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

Adopted August 26, 1998

Effective September 20, 1998

§90.14. Commission Action on Application.

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

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

Adopted August 26, 1998

Effective September 20, 1998

§90.16. Public Notice, Comment, and Hearing.

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

(b) If the statute or commission rule for which an applicant is seeking flexibility does not require

public notice, or an opportunity for comment or hearing, the following requirements shall apply.

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

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

(c) Alternative public notice.

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

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

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

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

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

(3) the name and address of the commission;

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

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

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

§90.18. Amendment/Renewal.

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

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

Adopted August 26, 1998

Effective September 20, 1998

§90.20. Termination.

(a) By the recipient.

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

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

(b) By the commission.

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

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

Adopted August 26, 1998

Effective September 20, 1998

**SUBCHAPTER C: REGULATORY INCENTIVES FOR USING ENVIRONMENTAL
MANAGEMENT SYSTEMS**

§§90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44

Effective February 15, 2007

§90.30. Definitions.

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

(1) **Assessment**--On-site review of the environmental management system by an independent assessor.

(2) **Certified**--For purposes of this subchapter, a documented decision that the environmental management system meets either the minimum standards of this subchapter or another recognized environmental management system standard which is substantively equivalent to the minimum standards.

(3) **Environmental aspect**--Element of a person's activities, products, or services that can interact with the environment.

(4) **Environmental impact**--Any change to the environment, whether adverse or beneficial, wholly or partially resulting from a person's activities, products, or services regarding a specific site.

(5) **Environmental management system**--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.

(6) **Independent assessor**--A person or team of people, at least one of whom has appropriate professional credentials and experience to review an environmental management system. The assessor(s) must not have contributed to the development of the system being assessed.

(7) **Site**--For purposes of this subchapter, any individual location or contiguous location of a person.

Adopted January 24, 2007

Effective February 15, 2007

§90.32. Minimum Standards for Environmental Management Systems.

A person may be eligible to receive regulatory incentives under this chapter if the site's environmental management system (EMS), at a minimum:

- (1) includes a written environmental policy directed toward continuous improvement;
- (2) identifies the environmental aspects at the site;
- (3) prioritizes these environmental aspects by the significance of the impacts at the site;
- (4) sets the priorities, goals, and targets for continuous improvement in environmental performance and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;
- (5) assigns clear responsibility for implementation, training, monitoring, and taking corrective action and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;
- (6) requires written documentation of the implementation procedures and the results of so doing; and
- (7) requires a written evaluation, on a routine schedule, of the refinement to the EMS to demonstrate how attainment of the priorities, goals, and targets of the system has improved.

Adopted November 20, 2001

Effective December 16, 2001

§90.34. Regulatory Incentives.

Regulatory incentives may include, but are not limited to:

- (1) on-site technical assistance;
- (2) accelerated access to program information;
- (3) modification of state or federal regulatory requirements that do not change emission or discharge limits;
- (4) consideration of a person's implementation of an EMS regarding a specific site in scheduling and conducting compliance inspections; and
- (5) inclusion of the use on an EMS in a site's compliance history and compliance summaries.

Adopted November 20, 2001

Effective December 16, 2001

§90.36. Review of an Environmental Management System by the Executive Director.

(a) A person must submit written documentation of the person's environmental management system (EMS) for a specific site as part of a written request for approval of the site's EMS to the executive director to be eligible to receive regulatory incentives under this subchapter. The documentation must include:

(1) the environmental policy statement as required in §90.32(1) of this title (relating to Minimum Standards for Environmental Management Systems);

(2) scope of the EMS (programmatic, geographic area, sites, facilities, or units included in the EMS);

(3) the prioritized environmental aspects for the site as required in §90.32(2) and (3) of this title;

(4) environmental improvement goals and targets for continuous improvement in environmental performance as required in §90.32(4) of this title;

(5) environmental performance indicators that the person measures to demonstrate the effectiveness of the EMS at the site including continuous improvement goals and audit functions;

(6) list of any independent certifications that have been completed on the EMS;

(7) main point of contact on the EMS;

(8) a description of the regulatory incentives of interest to the person regarding that site;

(9) any other information requested by the executive director during the review period; and

(10) signature of the requestor or the duly authorized agent, that certifies that all information is true, accurate, and complete to the best of that person's knowledge.

(b) The executive director will determine, based on risk, if an on-site verification visit shall be conducted by the executive director to assure that all requirements have been met.

(c) If the request for regulatory incentives is solely to request additional incentives under the EMS regulatory incentive program for an EMS that has already been approved by the executive director, the person is exempt from the submittal requirements of subsection (a) of this section. The executive director will act on the request in accordance with the time frames in §90.40(d) of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System). The person must instead submit the following information:

- (1) a description of the additional regulatory incentives requested for the site;
- (2) main point of contact for the EMS; and
- (3) any additional information requested by the executive director to evaluate the regulatory incentive request including demonstration of reasonable progress toward attainment of environmental performance improvement goals or targets.

(d) Within 90 days of submission of the request for review of an EMS, the executive director shall notify the requestor in writing of whether the information provided is complete or whether additional information must be submitted to the executive director.

(e) The executive director will notify the person who submitted the request for review of whether the EMS qualifies for regulatory incentives under this subchapter. If the EMS does not qualify for regulatory incentives under this subchapter, the executive director will send the person who requested a review of the EMS a notice detailing where the EMS does not meet the standards in §90.32 of this title.

(f) If the person makes no formal response within 90 days to the executive director's request regarding areas where the EMS does not meet the standard in §90.32 of this title, the EMS review will be placed on inactive status and the person may be required to submit additional information to demonstrate compliance with this subchapter.

(g) If a person receives regulatory incentives under this subchapter for a specific site, the executive director will require an additional independent reassessment of the EMS at least every three years from the date of the initial assessment. Results of this reassessment must be provided to the executive director. Regulatory incentives granted prior to the three-year reassessment will remain in effect until such time as the executive director terminates them under §90.42 of this title (relating to Termination of Regulatory Incentives under an Environmental Management System).

(h) Any areas in which an independent assessor finds the EMS does not meet the standards in §90.32 of this title during the reassessment shall be corrected in accordance with the schedule required by the independent assessor. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives may be terminated under §90.42 of this title.

(i) In order for the executive director to approve the use of an independent assessor, the following criteria shall be considered by the executive director:

- (1) independence of the assessor from the implementation of the EMS;
- (2) credentials of the independent assessor;

- (3) method of assessment to confirm performance of the EMS; and
- (4) any other information the executive director deems necessary to verify the capability of the assessor to complete the assessment process.

Adopted January 24, 2007

Effective February 15, 2007

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

(a) Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval method except a commission order must follow the requirements of Subchapter B of this chapter.

(b) Persons who request modification of federal regulatory requirements under this subchapter must also meet the standards for the EPA's National Environmental Performance Track (NEPT) Program in order to receive federal regulatory incentives.

Adopted November 20, 2001

Effective December 16, 2001

§90.40. Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System.

(a) Executive director action on regulatory incentives authorized by rule is not required. Regulatory incentives authorized by rule may be implemented as soon as the person is notified that its environmental management system (EMS) meets the requirements of §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(b) Where approval by the executive director is required under this subchapter, the executive director shall consider, among other factors:

- (1) the compliance history of the person who submitted the EMS;
 - (2) the efforts made by the person to include stakeholder involvement and environmental reporting of the person's EMS internal and external to the site with consideration of the size, resources, compliance history, environmental impact, and other operational factors of the specific site;
 - (3) the person's participation in voluntary programs for environmental improvement;
- and
- (4) if the request is specifically for additional incentives after the review of the EMS has been completed and approved, or for reconsideration of granting an incentive that was previously denied, the progress made at a site toward the environmental improvement goals and compliance assurance targets listed in the site's EMS will be considered in granting further regulatory incentives.

(c) When considering regulatory incentives which modify state or federal requirements, the executive director shall consider the steps the person has taken at the site to establish and make progress toward environmental performance improvement goals beyond or outside of regulatory requirements.

(d) Where approval by the executive director is required under this subchapter, the executive director shall act within 60 days of notifying the person that the EMS meets the standards outlined in this subchapter. If a request for additional regulatory incentives is submitted under §90.36(c) of this title (relating to Review of an Environmental Management System by the Executive Director), the executive director shall act on the request within 60 days of its submission. These time frames may be extended at the request of the person or the executive director to allow additional approval time for incentives that require approval by the EPA for implementation or adoption by rule.

Adopted January 24, 2007 Effective February 15, 2007

§90.42. Termination of Regulatory Incentives under an Environmental Management System.

(a) Termination by the recipient.

(1) A person who receives regulatory incentives for a site through the use of an environmental management system (EMS) that meets the standards in this subchapter may terminate the regulatory incentives at any time by sending a notice of termination to the executive director by certified mail.

(2) Once a regulatory incentive is terminated, the site for which a person has requested incentives must be in compliance with all permits, existing statutes, or commission rules affected by the regulatory incentives granted at the time of termination except as otherwise provided in this section.

(3) If the regulatory incentives approved involve the use of an order, the person who received the regulatory incentives shall comply with the applicable provisions of §90.20 of this title (relating to Termination).

(b) Termination by the executive director.

(1) Noncompliance with the terms and conditions of the regulatory incentives, Texas Water Code, §5.127 or §5.131, or this chapter, may result in the regulatory incentives being terminated.

(2) If a person who is approved to use regulatory incentives for a specific site under this subchapter is found by the executive director or an independent assessor to no longer meet the requirements of this subchapter, the executive director shall notify the person in writing of the deficiencies found.

(3) Any areas in which the executive director or an independent assessor finds the EMS does not meet the standards in §90.32 of this title (relating to Minimum Standards for Environmental

Management Systems) based on a reassessment shall be corrected in accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives will be terminated under this section.

(4) In the event regulatory incentives are terminated under this section, the executive director may specify an appropriate and reasonable transition period to allow the site previously operating under regulatory incentives to come into full compliance with all existing commission requirements, including time to apply for any necessary permits or other authorizations.

Adopted January 24, 2007

Effective February 15, 2007

§90.44. Motion to Overturn.

Any person who has requested approval of an environmental management system (EMS) and whose EMS was denied approval, any person who has been notified by the executive director that the approval for the person's system has been terminated, any person who has been denied regulatory incentives that the executive director is authorized to approve under §90.40 of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System), any person who has been notified by the executive director that a regulatory incentive has been terminated, or any other person may file with the chief clerk a motion to overturn the executive director's decision. A motion must be filed within 23 days after the date the commission mails notice of the executive director's decision to the person. Timely motions are subject to §50.139(e) - (g) of this title (relating to Motion to Overturn Executive Director's Decision).

Adopted January 24, 2007

Effective February 15, 2007

The first of these is the fact that the human race is not a homogeneous mass, but is divided into many distinct groups, each with its own characteristics and customs. These groups are known as races, and they are the result of a long process of evolution and adaptation to their environment.

The second fact is that the human race is not stationary, but is constantly changing. This is due to the fact that the environment is constantly changing, and the human race must adapt to these changes in order to survive.

The third fact is that the human race is not isolated, but is in constant contact with other races. This contact leads to the exchange of ideas and customs, and to the development of new races.

The fourth fact is that the human race is not perfect, but is constantly improving. This is due to the fact that the human race is capable of learning and of making progress.

The fifth fact is that the human race is not immortal, but is mortal. This is due to the fact that the human race is subject to the same laws of nature as all other living beings. The human race is born, it grows, it reproduces, and it dies. This is the natural cycle of life, and it is the same for all races.

The sixth fact is that the human race is not divine, but is human. This is due to the fact that the human race is made of the same material as all other living beings, and it is subject to the same weaknesses and limitations.

SUBCHAPTER D: STRATEGICALLY DIRECTED REGULATORY STRUCTURE
§§90.50, 90.52, 90.54, 90.56, 90.58, 90.60, 90.62, 90.64, 90.66, 90.68, 90.70, 90.72
Effective August 14, 2003

§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.

§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.

§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.

Adopted July 23, 2003

Effective August 14, 2003

§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.

Adopted July 23, 2003

Effective August 14, 2003

§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.

Adopted July 23, 2003

Effective August 14, 2003

§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

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