

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: January 25, 2012

DATE OF REQUEST: January 6, 2012

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, (512) 239-0779

CAPTION: Docket No. 2011-1254-RUL. Consideration for publication of proposed new Sections 90.1, 90.2, 90.3, 90.10 - 90.16, 90.20 - 90.24, 90.30, and 90.31 and repealed Sections 90.1, 90.2, 90.10, 90.12, 90.14, 90.16, 90.18, 90.20, 90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44, 90.50, 90.52, 90.54, 90.56, 90.58, 90.60, 90.62, 90.64, 90.66, 90.68, 90.70, 90.72 of 30 TAC Chapter 90, Innovative Programs.

The proposed rulemaking would implement HB 2694, Articles 4.01, 4.06, and 4.08, 82nd Legislature, 2011, Regular Session, which amends the Texas Water Code (TWC), §§5.751, 5.755, and 5.758. The amendments to TWC changed the standard for TCEQ to manage its environmental incentives and innovative programs. Therefore, TCEQ proposes to consolidate and reorganize its rules regarding these environmental incentives and innovative programs into a single subchapter, deleting duplicative requirements on applicants and the agency. The proposed rulemaking would also provide clarity and remove unnecessary restrictions on the TCEQ's ability to issue Regulatory Flexibility Orders and to recognize Environmental Management Systems. (David Greer, Amie Dutta Richardson) (Rule Project No. 2011-047-090-AD)

Zak Covar

Deputy Director

Brian Christian

Division Director

Charlotte Horn

Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: January 6, 2012

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Brian Christian, Division Director
Small Business and Environmental Assistance

Docket No.: 2011-1254-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 90, Innovative Programs
Incentives
Rule Project No. 2011-047-090-AD

Background and reason(s) for the rulemaking:

Rulemaking is necessary to implement House Bill (HB) 2694, Article 4, §§4.01, 4.06, and 4.08, which amend the Texas Water Code (TWC), §§5.751, 5.755, and 5.758. HB 2694, 82nd Legislature, 2011, was authored by Representative Wayne Smith and sponsored by Senator Joan Huffman. The bill took effect September 1, 2011.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The proposed rulemaking implements HB 2694, Article 4, §§4.01, 4.06, and 4.08, which amend TWC, §§5.751, 5.755, and 5.758. The references to Compliance History classification are repealed as required by HB 2694, §4.06. HB 2694, §4.08 amends the standard of review for an alternative method or standard for control or abatement of pollution to determine whether it is as protective, rather than the former standard of review which was whether it is more protective, than the current method or standard. It is important to note that this change to the standard of review applies only to Regulatory Flexibility Orders.

To remove duplicative and unnecessary restrictions, the proposed rulemaking reorganizes and clarifies the incentive programs into a single new Subchapter A, Incentive Programs, which is derived from the consolidation of Subchapter A, Purpose, Applicability, and Eligibility; Subchapter B, General Provisions; Subchapter C, Regulatory Incentives for Using Environmental Management Systems; and Subchapter D, Strategically Directed Regulatory Structure. The proposed rulemaking would also provide clarity and remove unnecessary restrictions on the TCEQ's ability to issue Regulatory Flexibility Orders (RFOs) and to recognize Environmental Management Systems (EMSs).

B.) Scope required by federal regulations or state statutes:

There are no new federal regulations related to this rulemaking. HB 2694, §4.06, amends TWC, §5.755 and §4.08 amends TWC, §5.758 as further described in the above Summary of what the rulemaking will do. TWC, §§5.755 and 5.758 expressly require adoption of rules.

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C.) Additional staff recommendations that are not required by federal rule or state statute:

Staff proposes to consolidate and reorganize the rules regarding these environmental incentives and innovative programs into a single subchapter, deleting duplicative requirements on applicants and the agency. The proposed rulemaking would also provide clarity and remove unnecessary restrictions on the TCEQ's ability to issue RFOs and to recognize EMSs.

Statutory authority:

TWC, §§5.012, 5.103, 5.105, 5.122, 5.127, 5.751, 5.755, and 5.758
Texas Government Code, §2001.006

Effect on the:

A.) Regulated community:

Entities desiring to participate in innovative programs would be affected. As required by HB 2694, the proposed rules include subsurface area drip disposal systems and the removal of convenience switches as programs that are now eligible for consideration for the commission's innovative and alternative programs. The proposed rules also incorporate language required by HB 2694 which states that RFO alternatives must be as protective as the current method or standard rather than more protective than the current method or standard.

No fiscal implications are anticipated for industry, businesses, or individuals as a result of the implementation or administration of the proposed rules. The proposed rules do not affect current regulatory requirements on businesses or individuals. Participation in the commission's innovative and alternative programs is voluntary and therefore fiscal implications would only be anticipated for those entities who determine it is in their best interest to participate.

B.) Public:

The public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and more clear and concise requirements for the commission's innovative and alternative programs. No fiscal implications are anticipated.

C.) Agency programs:

Several agency programs would be affected by the rules. During the last ten years there have been no applications for Regulatory Flexibility submitted or processed. Statutory changes to the Regulatory Flexibility program may have the effect of increasing the number of applicants.

Proposed changes to the rules regarding applications for incentives for EMSs may increase the number of entities eligible for incentives.

Stakeholder meetings:

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Staff met with the Pollution Prevention Advisory Committee on September 7, 2011. During the meeting staff presented the changes that are required and discussed the desire to reorganize and consolidate the rules. In addition, the current Clean Texas members were notified that the rulemaking is being undertaken to streamline the rules and address incentives for EMSs.

No concerns were expressed with the rulemaking project.

Potential controversial concerns and legislative interest:

There are no controversial concerns anticipated.

Will this rulemaking affect any current policies or require development of new policies?

This rulemaking would not affect current policy or require the development of new policy.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

TWC, §5.758 (regarding Regulatory Flexibility) requires the commission by rule to specify the procedure for obtaining an exemption. If the rulemaking does not go forward, the newly amended statute and rule would be in conflict regarding allowing alternatives to be as protective rather than more protective. Staff recommends proceeding with rulemaking.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: January 25, 2012

Anticipated *Texas Register* publication date: February 10, 2012

Public hearing date (if any): None

Public comment period: February 10, 2012 - March 12, 2012

Anticipated adoption date: June 13, 2012

Agency contacts:

David Greer, Rule Project Manager, 239-5344, Small Business and Environmental Assistance

Amie Dutta Richardson, Staff Attorney, 239-2999

Charlotte Horn, Texas Register Coordinator, 239-0779

Commissioners
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Re: Docket No. 2011-1254-RUL

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
David Greer
Charlotte Horn

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the repeal of §§90.1, 90.2, 90.10, 90.12, 90.14, 90.16, 90.18, 90.20, 90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44, 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; and proposes new §§90.1 - 90.3, 90.10 - 90.16, 90.20 - 90.24, 90.30, and 90.31.

Background and Summary of the Factual Basis for the Proposed Rules

As required by House Bill (HB) 2694, Article 4, §§4.01, 4.06, and 4.08, 82nd Legislature, 2011 the proposed rules are offered to implement incentive based programs under a statutory Strategically Directed Regulatory Structure, including Regulatory Flexibility Orders (RFOs), and Environmental Management Systems (EMS) requiring the repeal, reorganization, and amendments to the existing rules under Chapter 90.

The proposed rulemaking implements HB 2694, Article 4, §§4.01, 4.06, and 4.08, which amend Texas Water Code (TWC), §§5.751, 5.755, and 5.758. The amendments to the TWC changed the standard for TCEQ to manage its environmental incentives and innovative programs. Therefore, TCEQ proposes to consolidate and reorganize the rules regarding these environmental incentives and innovative programs into a single subchapter, deleting duplicative requirements on applicants and the agency. Additional amendments to the rule are proposed to provide clarity and remove unnecessary restrictions on the TCEQ's ability to issue RFOs and to recognize EMS.

Section by Section Discussion

In order to remove duplicative and unnecessary restrictions, the proposed rulemaking reorganizes and clarifies the incentive programs into single new Subchapter A, Incentive Programs, which is derived from the consolidation of Subchapter A, Purpose, Applicability, and Eligibility; Subchapter B, General Provisions; Subchapter C, Regulatory Incentives for Using Environmental Management Systems; and Subchapter D, Strategically Directed Regulatory Structure. The references to classification are deleted as required by HB 2694, §4.06.

§90.1, Purpose

Proposed new §90.1 establishes that the purpose of the chapter is to implement TWC, §§5.755, 5.758, 5.127. New §90.1 consolidates the purpose statements from repealed §90.1 and §90.50.

§90.2, Applicability

Proposed new §90.2 consolidates the applicability from repealed Subchapters A and D. In addition to other statutory chapters listed, TWC, Chapter 32 and Texas Health and Safety Code (THSC), Chapter 375 were added in accordance with changes to TWC, §5.751. New §90.2 lists regulatory activities from applicable statutory chapters that create the incentive program rules offered in proposed Chapter 90. Specifically,

subsurface area drip disposal systems under TWC, Chapter 32 and removal of convenience switches under THSC, Chapter 375 will now be eligible for consideration under these programs.

§90.3, Definitions

Proposed new §90.3 consolidates the definition sections from repealed §90.30 and §90.58. Definitions are proposed to provide meaning to the terms: applicable legal requirement, certified, enhanced environmental performance, environmental aspect, environmental impact, environmental management system, independent assessor, innovative program, maximum environmental benefit, permit, public participation, region, site, strategically directed regulatory structure, and voluntary measure.

Definitions for applicable legal requirement, environmental management system, innovative program, permit, region, and strategically directed regulatory structure are derived from statute.

§90.10, Strategically Directed Regulatory Structure

Proposed new §90.10 clarifies that the Strategically Directed Regulatory Structure is a statutorily required structure to provide incentives for enhanced environmental performance as required by TWC, §5.755. Proposed new §90.10 creates a regulatory framework for innovative programs that provide incentives for enhanced environmental performance.

§90.11, Eligibility

Proposed new §90.11 specifies the eligibility requirements for participation in innovative programs under the Strategically Directed Regulatory Structure.

§90.12, Incentives

Proposed new §90.12 specifies the criteria that the executive director will use when determining whether to provide an incentive for participation in innovative programs.

§90.13, Application for Incentives

Proposed new §90.13 outlines the requirements a person must follow to apply for a regulatory incentive. It allows incentives to be requested through participation in one of the listed programs and outlines the minimum information and demonstrations required by the application.

§90.14, Review by Executive Director Required

Proposed new §90.14 specifies that a person receiving incentives must submit a progress report to the executive director every two years and lists the requirements of the progress report. It requires that incentive be terminated for failure to provide enhanced environmental performance. It requires a person to give the executive director notice if the person terminates use of the incentives.

*§90.15, Termination of Regulatory Incentives Under the Strategically Directed
Regulatory Structure*

Proposed new §90.15 offers procedures allowing either the recipient of the incentives or the executive director to terminate the incentives or to require a new permit, permit amendment, or other authorization necessary to achieve regulatory compliance. It also provides timelines for achieving compliance with requirements for which incentives were provided.

§90.16, Public Notice, Comment, and Hearing

Proposed new §90.16 consolidates the Public Notice, Comment, and Hearing sections from repealed §90.16 and §90.70. It requires public participation in the form of public notice, comment, and hearings as a threshold requirement for applicants to receive regulatory incentives. It provides minimum requirements for exemptions from regulations that do not require public notice, public comment, and public hearing. For example, incentives provided under an approved EMS are exempt from requirements of this section. If no exemption applies, the applicant must use the process required by the regulations from which the applicant is seeking exemption.

§90.20, Regulatory Flexibility

Proposed new §90.20 clarifies that a regulatory flexibility order may exempt an applicant from a requirement or rule by applying an alternative method or standard. It also clarifies violations of an order is equivalent to a violation of the exempted rule or requirement.

§90.21, Application for a Regulatory Flexibility Order

Proposed new §90.21 details the necessary components of an application for an RFO. HB 2694, §4.08 states that alternatives will now be as protective rather than more protective than the current method or standard. The provisions allowing for a cost recovery agreement moved from repealed §90.12 to new §90.21(b)(7) and no longer rely on the rates established in Chapter 333, Voluntary Cleanup Programs.

§90.22, Commission Action on an Application

Proposed new §90.22 describes that commission action should comply with application and other authorizations processing rules found at 30 TAC Chapter 50, Subchapter B and clarifies the additional components the commission can consider in making a decision as well as provisions to be included in an order.

§90.23, Amendment/Renewal

Proposed new §90.23 details the requirements for submitting an amendment or renewal request for a RFO and the effect of an existing RFO while it is undergoing timely renewal.

§90.24, Termination

Proposed new §90.24 details the procedures for terminating an RFO by the recipient or the commission, including an opportunity for a show cause hearing.

§90.30, Minimum Standards for Environmental Management Systems

Proposed new §90.30 details the minimum requirements of an EMS implementation of which may allow for eligibility for incentives. It proposes a new requirement that the EMS be certified by an independent third party.

§90.31, Review of Incentive Applications for Environmental Management Systems

Proposed new §90.31 outlines the process for review by the executive director. It clarifies that public notice, comment, and hearing are not required for incentives provided for EMS and that the executive director will maintain a list of incentives available.

Fiscal Note: Costs To State And Local Government

Jeffrey Horvath, Analyst in the Strategic Planning and Assessment Section, has

determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the commission or for other units of state or local government as a result of the administration or enforcement of the proposed rules. The proposed rulemaking implements certain provisions of HB 2694 which amended the commission's authority to establish a regulatory process that encourages the use of a variety of innovative and alternative programs. Participation in these innovative and alternative programs is voluntary and therefore fiscal implications would only be anticipated for those entities who determine it is in their best interest to participate.

The rulemaking proposes to make changes related to TCEQ's environmental incentives and innovative programs as required by HB 2694. The proposed rules also intend to consolidate and reorganize provisions regarding environmental incentives and innovative programs and to provide clarity and remove unnecessary restrictions on the TCEQ's ability to issue regulatory flexibility orders and to recognize EMS. As required by HB 2694, the proposed rules include subsurface area drip disposal systems and the removal of convenience switches as programs that are now eligible for consideration for the commission's innovative and alternative programs. The proposed rules also incorporate language required by HB 2694 which states that RFO alternatives must be as protective as the current method or standard rather than more protective than the current method or standard. Under current rules, a \$250 application fee is required for RFO applications. The current rules also allow the executive director to execute a cost

recovery agreement with entities who apply for an RFO if the executive director determines that the application is significant and complex enough to warrant cost recovery. The cost recovery agreement would allow the commission to recover costs incurred for administrative review, technical review, and hearings associated with the application. The proposed rules do not change application fee requirements or the ability of the executive director to execute a cost recovery agreement. The commission has processed few, if any applications for Regulatory Flexibility Orders over the last ten years. The proposed rulemaking may increase the number of applications, but any increase is not expected to be significant.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and more clear and concise requirements for the commission's innovative and alternative programs.

No fiscal implications are anticipated for industry, businesses, or individuals as a result of the implementation or administration of the proposed rules. The proposed rules do not affect current regulatory requirements on businesses or individuals. Participation in the commission's innovative and alternative programs is voluntary and therefore fiscal implications would only be anticipated for those entities who determine it is in their best

interest to participate.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the implementation of the proposed rules. The proposed rules do not increase or decrease regulatory requirements for small or micro-businesses.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the rules do not adversely affect small or micro-businesses and are proposed in order to comply with the legislative requirements of HB 2694.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory analysis

requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Although these rules are proposed to protect the environment and reduce the risk to human health from environmental exposure, they would not be a major environmental rule because they would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, the proposed rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The rules would not exceed a standard set by federal law because standards in the proposed rules are in accordance with the corresponding federal regulations, and they do not exceed an express requirement of state law. The proposed rules do not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The rulemaking proposes rules under specific state law (TWC, §§5.127, 5.131, 5.755, and 5.758). Finally, this rulemaking is not being proposed on an emergency basis either to protect the environment or to reduce risks to human health from environmental exposure.

Takings Impact Assessment

In accordance with Texas Government Code, §2007.043, the commission has prepared a takings impact assessment for the proposed rules. The following is a summary of that assessment. The specific purpose of the proposed rules is to streamline the TCEQ's EMS program and other incentives relating to RFOs. Promulgation and enforcement of the proposed rules would not affect private property mainly because it would not require anyone to do anything; everything it proposes is strictly voluntary. The proposed standards are not more stringent than existing standards as the 2011 legislation requires that the program be as protective of the environment and the public health as the method or standard prescribed by the statute or commission rule that would otherwise apply; and not inconsistent with federal law. For these reasons, the proposed rules would not be a burden to private real property and would not constitute a taking under Texas Government Code, Chapter 2007. The proposed rules would not affect a landowner's rights in private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with

Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the proposed rules include 31 TAC §§501.19, 501.21, 501.22, 501.23, 501.25 and 501.32. These policies govern permit conditions for which regulatory flexibility could be sought from the commission. However, the proposed amendments to the Regulatory Flexibility Program would still require that alternative methods proposed be as protective of the environment as the method or standard prescribed.

These rules implement programs designed in most cases to encourage enhanced benefits to the environment. The rules provide incentives to applicants in exchange for benefits to the environment. The Strategically Directed Regulatory Structure and EMS programs encourage entities to go beyond compliance in managing environmental concerns. The Regulatory Flexibility Program will be used to identify alternative methods of compliance that provide a clear benefit to the environment and may not be inconsistent with federal law.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and because the proposed rules are voluntary, encourage innovative approaches to environmental compliance and alternative methods must be as protective of the environment as the prescribed method or standard.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-047-090-AD. The comment period closes March 12, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information,
please contact David Greer, Pollution Prevention and Education Unit, (512) 239-5344.

**[SUBCHAPTER A: PURPOSE, APPLICABILITY, AND ELIGIBILITY]
[§90.1, §90.2]**

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The proposed repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement

legislation.

The proposed repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs, including amendments to TWC, §§5.751, 5.755, and 5.758.

[§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.]

[§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.]

SUBCHAPTER A: INCENTIVE PROGRAMS
§§90.1 - 90.3, 90.10 - 90.16, 90.20 - 90.24, 90.30, 90.31

Statutory Authority

The new rules are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these proposed new rules is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The proposed new rules also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these new rules are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement

legislation.

The proposed new rules are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs, including amendments to TWC, §§5.751, 5.755, and 5.758.

§90.1. Purpose.

The purpose of this chapter is to establish rules provided for in Texas Water Code (TWC), §5.755, relating to incentives for enhanced environmental performance under a Strategically Directed Regulatory Structure; TWC, §5.758, relating to commission issuance of Regulatory Flexibility Orders for an exemption for an applicant who proposes an alternative method or alternative standard to control or abate pollution; and TWC, §5.127, relating to Environmental Management Systems.

§90.2. Applicability.

(a) The provisions of this subchapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26, 27, and 32; and Texas Health and Safety Code (THSC), Chapters 361, 375, 382, and 401. The applicable regulatory activities include, but are not limited to:

(1) discharges to surface water and groundwater regulated under TWC,

Chapter 26;

(2) petroleum storage tanks regulated under TWC, Chapter 26;

(3) disposal of waste by underground injection regulated under TWC,

Chapter 27;

(4) systems for subsurface area drip disposal regulated under TWC,

Chapter 32;

(5) management and disposal of industrial solid waste, hazardous waste, or municipal solid waste (including composting, sewage sludge, and water treatment sludge) regulated under THSC, Chapter 361;

(6) removal of convenience switches and the convenience switch recovery program under THSC, Chapter 375;

(7) emission sources of air contaminants regulated under THSC, Chapter 382; and

(8) 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.

(c) Regulatory Flexibility Orders shall not authorize exemptions to statutes or regulations for storing, handling, processing, or disposing of low-level radioactive materials.

§90.3. 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--A state or federal environmental law, regulation, permit, order, consent decree, or other requirement.

(2) Certified--For purposes of this chapter, a documented third party decision that the environmental management system meets the minimum standards of a recognized environmental management system standard.

(3) 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.

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

(5) 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.

(6) 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.

(7) 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.

(8) Innovative program--

(A) a program developed by the commission under Texas Water Code (TWC), Chapter 5, Subchapter Q, Performance Based Regulation; TWC, Chapter 26 or 27; or Texas Health and Safety Code (THSC), Chapters 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 described in §90.20 of this title (relating to Regulatory Flexibility);

(D) the Environmental Management Systems program described in §90.30 of this title (relating to Minimum Standards for Environmental Management Systems); or

(E) a program established under THSC, §382.401, and defined in Chapter 101, Subchapter C of this title (relating to Voluntary Supplemental Leak Detection Program), to encourage the use of alternative technology for detecting leaks or emissions of air contaminants.

(F) other voluntary programs administered by the agency's Small Business and Environmental Assistance Division or that division's successor designated as innovative by the executive director.

(9) 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.

(10) 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.

(11) 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.

(12) Region--A region of the agency's Field Operations Division or that division's successor.

(13) 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.

(14) Strategically directed regulatory structure--A program that is designed to use innovative programs to provide maximum environmental benefit and to reward compliance performance.

(15) Voluntary measure--A program with specific performance measures undertaken by a person to improve environmental quality that is not required by rule or law.

§90.10. Strategically Directed Regulatory Structure.

The Strategically Directed Regulatory Structure establishes a framework for innovative programs to provide for enhanced environmental performance and to reward compliance performance.

§90.11. 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 §90.13 of this title (relating to Application for Incentives) 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 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 §90.20 of this title (relating to Regulatory Flexibility);

(2) incentives for using an environmental management system under §90.30 of this title (relating to Minimum Standards for 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 provided under one innovative program do not guarantee the providing of incentives offered under another innovative program, except where those incentives are equivalent.

§90.12. 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; and

(2) a person's voluntary measures, including participation in innovative programs, to improve environmental quality. The executive director may give favorable consideration to voluntary measures that are related to the specific media for which a person is requesting incentives or participation in an innovative program.

(b) In providing 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 regulatory requirements that do not increase existing emission or discharge limits or decrease public involvement;

(5) flexibility in regulatory processes;

(6) public recognition; and

(7) inclusion of the use of an Environmental Management System in a site's compliance history and compliance summaries.

(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.

§90.13. Application for Incentives.

(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 30 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 returned 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 30 days after the date of the request, the application will be returned without further action by the executive director.

(3) If an application is returned under paragraph (1) or (2) of this subsection, the person may file a new application at any time.

(4) The person may request in writing 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.

(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 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 improvement 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 to show 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 may be extended by the executive director.

§90.14. 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 improvements;

(3) documentation of any public participation component; and

(4) how the results achieved compare to the results projected in the application.

(b) 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 §90.15 of this title (relating to Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure).

(c) If a person suspends or terminates voluntary environmental measures

associated with incentives provided by the executive director, that person must notify the executive director within ten calendar days after the occurrence.

§90.15. 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 provided 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 offered under the Strategically Directed Regulatory Structure, a Regulatory Flexibility Order, an environmental management system, 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.

(3) If the executive director determines that a person who is provided 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 provided 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 30 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.

§90.16. Public Notice, Comment, and Hearing.

(a) Applicants for participation in innovative programs with specific notice, comment, and hearing requirements shall follow the requirements under subsections (c) and (d) of this section, unless the applicant is only requesting additional incentives under this chapter.

(b) If an applicant for incentives under this chapter 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) or regulatory flexibility requested;

(3) the name and address of the applicant and, if different, the location of the facility for which incentives or regulatory flexibility under this chapter 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) a brief description of the public comment procedures and the time and place of any public meeting or public hearing; and

(7) the date by which comments or requests for hearing must be received by the executive director.

§90.20. Regulatory Flexibility.

(a) The commission by issuance of a Regulatory Flexibility Order may exempt an applicant from a requirement of a statute or commission rule regarding the control or

abatement of pollution if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard.

(b) A violation of an order issued under this section is punishable as if it were a violation of the statute or rule from which the order provides an exemption.

§90.21. 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 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) as protective of the environment and the public health as the method or standard prescribed by the statute or commission rule that would otherwise apply; and

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

(3) evidence that the alternative the applicant proposes is as protective of the environment and the public health as the method or standard prescribed by the statute or commission rule that would otherwise apply;

(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. The executive director may determine that the application for an RFO constitutes a significant and complex application for which the recovery of all reasonable costs for review and approval by the commission is appropriate. Upon notice to the applicant of such finding, the applicant shall execute a cost recovery agreement in a form approved by the executive director. Recoverable costs include costs incurred by the commission for administrative review, technical review, and hearings associated with the application; 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 accurate and complete.

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

(e) The applicant shall comply with public notice, comment, and hearing requirements in §90.16 of this title (relating to Public Notice, Comment, and Hearing).

§90.22. Commission Action on an Application.

(a) Commission action on an application under this chapter shall comply 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.

(c) The commission's order must provide a description of the alternative method or standard and condition the exemption on compliance with the method or standard as the order prescribes.

§90.23. Amendment/Renewal.

(a) An application for amendment or renewal of an 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 timely application for renewal is final.

§90.24. Termination.

(a) By the recipient.

(1) A recipient of an 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 applicable statutes or commission rules at the time of termination.

(b) By the executive director.

(1) Noncompliance with the terms and conditions of an RFO, or any provision of this chapter, may result in the executive director's termination of an RFO after the executive director provides written notice of the noncompliance to the recipient and the recipient is given an opportunity of not less than 30 days from the date the notice was mailed to show cause why the RFO should not be terminated. Procedures for

requesting a show cause hearing before the commission shall be included in the executive director's written notice.

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

§90.30. 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):

(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;

(7) requires evaluation and refinement of the EMS to demonstrate improved attainment of the priorities, goals, and targets of the system; and

(8) has been certified to a recognized environmental management system standard by an independent third party.

§90.31. Review of Incentive Applications for Environmental Management Systems.

(a) A person must submit written documentation of the 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 chapter. The documentation must include:

(1) the environmental policy statement as required in §90.30(1) of this title (relating to Minimum Standards for Environmental Management Systems);

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

(3) the prioritized environmental aspects for the site as required in §90.30(2) and (3) of this title;

(4) environmental improvement goals and targets for continuous improvement in environmental performance as required in §90.30(4) of this title;

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

(6) main point of contact on the EMS;

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

(8) signature of the requestor or the duly authorized agent, that certifies that all information is accurate, and complete.

(b) Requests for incentives under this section do not require public notice, comment, and hearing under §90.16 of this title (relating to Public Notice, Comment, and Hearing).

(c) The executive director will notify the person who submitted the request for review of whether the EMS qualifies for regulatory incentives under this chapter. If the EMS does not qualify for regulatory incentives under this chapter, 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 §90.30 of this title.

(d) If a person receives regulatory incentives under this section 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.

(e) The executive director will maintain a list of incentives available to a person whose EMS is eligible to receive regulatory incentives under this chapter.

(f) Regulatory incentives provided under this section may not be claimed or utilized without approval from the executive director.

**[SUBCHAPTER B: GENERAL PROVISIONS]
[§§90.10, 90.12, 90.14, 90.16, 90.18, 90.20]**

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The proposed repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement

legislation.

The proposed repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs including amendments to TWC, §§5.751, 5.755, and 5.758.

[\$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.]

[\$90.12. Additional Fees; Cost Recovery.]

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

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

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

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

[\$90.14. Commission Action on Application.]

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

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

[\$90.16. Public Notice, Comment, and Hearing.]

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

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

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

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

[(c) Alternative public notice.]

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

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

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

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

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

[(3) the name and address of the commission;]

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

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

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

[\$90.18. Amendment/Renewal.]

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

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

[§90.20. Termination.]

[(a) By the recipient.]

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

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

[(b) By the commission.]

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

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

**[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]**

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The proposed repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement

legislation.

The proposed repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs including amendments to TWC, §§5.751, 5.755, and 5.758.

[\$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.]

[\$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.]

[\$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.]

[\$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.]

[\$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.]

[\$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.]

[\$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.]

[§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).]

**[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]**

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103 and §5.105, which provide the commission with authority to adopt rules; and specific statutory authorization for these repeals is derived from TWC, §5.127, and amended TWC, §§5.751, 5.755, and 5.758, which together require the commission to promulgate rules that establish a regulatory process that encourages the use of a variety of innovative and alternative programs, such as environmental management systems; and includes regulatory flexibility orders and other incentives for regulated entities. The proposed repeals also relate to the incentives the commission will use to encourage the use of strategically directed regulatory structure to provide incentives and regulatory flexibility to issue exemption orders for those same regulated entities. TWC, §5.122, delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration or other authorization, or approval. Finally, these repeals are also proposed under Texas Government Code, §2001.006, which provides state agencies the authority to adopt rules or take other administrative action that the agency deems necessary to implement

legislation.

The proposed repeals are offered to implement House Bill 2694, 82nd Legislature, 2011, Article 4, §§4.01, 4.06, and 4.08, which created the revisions to compliance and enforcement programs including amendments to TWC, §§5.751, 5.755, and 5.758.

[\$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.]

[\$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.]

[§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.]

[§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.]

[\$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.]

[\$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.]

[\$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.]

[\$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.]

[§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) a brief description of the public comment procedures; and]

[(7) the date by which comments must be received by the executive director.]

[\$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.]

office.

SECTION 3.04. Subchapter G, Chapter 5, Water Code, is amended by adding Section 5.276 to read as follows:

Sec. 5.276. FACTORS FOR PUBLIC INTEREST REPRESENTATION. (a)

The commission by rule, after consideration of recommendations from the office of public interest counsel, shall establish factors the public interest counsel must consider before the public interest counsel decides to represent the public interest as a party to a commission proceeding.

(b) Rules adopted under this section must include:

(1) factors to determine the nature and extent of the public interest; and

(2) factors to consider in prioritizing the workload of the office of public interest counsel.

ARTICLE 4. COMPLIANCE AND ENFORCEMENT

SECTION 4.01. Section 5.751, Water Code, is amended to read as follows:

Sec. 5.751. APPLICABILITY. This subchapter applies to programs under the jurisdiction of the commission under Chapters 26, ~~and~~ 27, and 32 of this code and Chapters 361, 375, 382, and 401, Health and Safety Code. It does not apply to occupational licensing programs under the jurisdiction of the commission.

SECTION 4.02. Section 5.752(1), Water Code, is amended to

read as follows:

(1) "Applicable legal requirement" means an environmental law, regulation, permit, order, consent~~[7]~~ decree, or other requirement.

SECTION 4.03. The heading to Section 5.753, Water Code, is amended to read as follows:

Sec. 5.753. STANDARDS [~~STANDARD~~] FOR EVALUATING AND USING COMPLIANCE HISTORY.

SECTION 4.04. Section 5.753, Water Code, is amended by amending Subsections (a), (b), and (d) and adding Subsection (d-1) to read as follows:

(a) Consistent with other law and the requirements necessary to maintain federal program authorization, the commission by rule shall develop standards [~~a uniform standard~~] for evaluating and using compliance history that ensure consistency. In developing the standards, the commission may account for differences among regulated entities.

(b) The components of compliance history must include:

(1) enforcement orders, court judgments, [~~consent decrees,~~7] and criminal convictions of this state [~~and the federal government~~] relating to compliance with applicable legal requirements under the jurisdiction of the commission [~~or the United States Environmental Protection Agency~~];

(2) notwithstanding any other provision of this code, orders issued under Section 7.070;

(3) to the extent readily available to the commission, enforcement orders, court judgments, consent decrees, and criminal convictions relating to violations of environmental rules [~~laws~~] of the United States Environmental Protection Agency [~~other states~~]; and

(4) changes in ownership.

(d) Except as provided by this subsection, notices of violation must be included as a component of compliance history for a period not to exceed one year from the date of issuance of each notice of violation. The listing of a notice of violation must be preceded by the following statement prominently displayed: "A notice of violation represents a written allegation of a violation of a specific regulatory requirement from the commission to a regulated entity. A notice of violation is not a final enforcement action nor proof that a violation has actually occurred." [~~The set of components shall include notices of violations.~~] A notice of violation administratively determined to be without merit may [~~shall~~] not be included in a compliance history. A notice of violation that is included in a compliance history shall be removed from the compliance history if the commission subsequently determines the notice of violation to be without merit.

(d-1) For purposes of listing compliance history, the commission may not include as a notice of violation information received by the commission as required by Title V of the federal Clean Air Act (42 U.S.C. Section 7661 et seq.) unless the commission issues a written notice of violation. Final enforcement orders or judgments resulting from self-reported Title V deviations or violations may be considered as compliance history components for purposes of determining compliance history.

SECTION 4.05. Section 5.754, Water Code, is amended by amending Subsections (a), (b), (c), (d), (e), (g), and (h) and adding Subsection (e-1) to read as follows:

(a) The commission by rule shall establish a set of standards for the classification of a person's compliance history as a means of evaluating compliance history. The commission may consider the person's classification when using compliance history under Subsection (e).

(b) Rules adopted under Subsection (a):

(1) [this section] must, at a minimum, provide for three classifications of compliance history in a manner adequate to distinguish among:

(A) unsatisfactory [(1) poor] performers, or regulated entities that in the commission's judgment perform below minimal acceptable performance standards established by the

commission [average];

(B) satisfactory [(2) average] performers, or regulated entities that generally comply with environmental regulations; and

(C) [(3)] high performers, or regulated entities that have an above-satisfactory [above-average] compliance record;

(2) may establish a category of unclassified performers, or regulated entities for which the commission does not have adequate compliance information about the site; and

(3) must take into account both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the federal Clean Air Act (42 U.S.C. Section 7661 et seq.).

(c) In classifying a person's compliance history, the commission shall:

(1) determine whether a violation of an applicable legal requirement is of major, moderate, or minor significance;

(2) establish criteria for classifying a repeat violator, giving consideration to the size [number] and complexity of the site at which the violations occurred, and limiting consideration to violations of the same nature and the same environmental media that occurred in the preceding five years [facilities owned or operated by the person]; and

(3) consider:

(A) the significance of the violation and whether the person is a repeat violator;

(B) the size and complexity of the site, including whether the site is subject to Title V of the federal Clean Air Act (42 U.S.C. Section 7661 et seq.); and

(C) the potential for a violation at the site that is attributable to the nature and complexity of the site.

(d) The commission by rule may require [~~shall establish methods of assessing the compliance history of regulated entities for which it does not have adequate compliance information. The methods may include requiring~~] a compliance inspection to determine an entity's eligibility for participation in a program that requires a high level of compliance.

(e) The commission by rule shall provide for the use of compliance history [~~classifications~~] in commission decisions regarding:

(1) the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit;

(2) enforcement;

(3) the use of announced inspections; and

(4) participation in innovative programs.

(e-1) The amount of the penalty enhancement or escalation

attributed to compliance history may not exceed 100 percent of the base penalty for an individual violation as determined by the commission's penalty policy.

(g) Rules adopted under Subsection (e) for the use of compliance history shall provide for additional oversight of, and review of applications regarding, facilities owned or operated by a person whose compliance performance is classified as unsatisfactory according to commission standards [~~in the lowest classification developed under this section~~].

(h) The commission by rule shall, at a minimum, prohibit a person whose compliance history is classified as unsatisfactory according to commission standards [~~in the lowest classification developed under this section~~] from[+]

[~~(1) receiving an announced inspection; and~~

[~~(2)~~] obtaining or renewing a flexible permit under the program administered by the commission under Chapter 382, Health and Safety Code, or participating in the regulatory flexibility program administered by the commission under Section 5.758.

SECTION 4.06. Section 5.755(b), Water Code, is amended to read as follows:

(b) The strategically directed regulatory structure shall offer incentives based on:

(1) a person's compliance history [~~classification~~]; and

(2) any voluntary measures undertaken by the person to improve environmental quality.

SECTION 4.07. Section 5.756, Water Code, is amended by adding Subsection (e) to read as follows:

(e) Before compliance performance information about a site may be placed on the Internet under this subchapter, the information must be evaluated through a quality assurance and control procedure, including a 30-day period for the owner or operator of the site to review and comment on the information.

SECTION 4.08. Sections 5.758(a), (b), (d), and (h), Water Code, are amended to read as follows:

(a) The commission by order may exempt an applicant from a requirement of a statute or commission rule regarding the control or abatement of pollution if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard that is:

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

(2) not inconsistent with federal law.

(b) The commission may not exempt an applicant under this section unless the applicant can present to the commission [~~documented~~] evidence that the alternative the applicant proposes

is as protective of the environment and the public health as the method or standard prescribed by the statute or commission rule that would otherwise apply [~~of benefits to environmental quality that will result from the project the applicant proposes~~].

(d) The commission's order must provide a [~~specific~~] description of the alternative method or standard and condition the exemption on compliance with the method or standard as the order prescribes.

(h) In implementing the program of regulatory flexibility authorized by this section, the commission shall:

(1) promote [~~market~~] the program to businesses in the state through all available appropriate media;

(2) endorse alternative methods that will clearly benefit the environment and impose the least onerous restrictions on business;

(3) fix and enforce environmental standards, allowing businesses flexibility in meeting the standards in a manner that clearly enhances environmental outcomes; and

(4) work to achieve consistent and predictable results for the regulated community and shorter waits for permit issuance.

SECTION 4.09. Subchapter A, Chapter 7, Water Code, is amended by adding Section 7.006 to read as follows:

Sec. 7.006. ENFORCEMENT POLICIES. (a) The commission by