

The Texas Commission on Environmental Quality (commission or TCEQ) adopts new §§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. Sections 90.52, 90.54, 90.56, 90.58, 90.60, 90.62, 90.64, 90.66, 90.68, 90.70, and 90.72 are adopted *with changes* to the proposed text as published in the March 7, 2003 issue of the *Texas Register* (28 TexReg 2023). Section 90.50 is adopted *without change* to the proposed text and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 77th Legislature re-authorized the commission following an extensive review by the Sunset Advisory Commission. The legislature re-authorized the commission in House Bill 2912, 77th Legislature, 2001, and in Texas Water Code (TWC), §5.755, Strategically Directed Regulatory Structure, directed the commission to develop an initial rule for a strategically directed regulatory structure that will provide incentives for enhanced environmental performance. The legislature further directed the commission to develop the strategically directed regulatory structure based on a person's compliance history classification and voluntary measures undertaken by the person to improve environmental quality. House Bill 2912 also requires that these initial rules be adopted by September 1, 2003 and the final rules be adopted by September 2005.

This initial rulemaking is intended to establish a system whereby persons interested in participating in the commission's innovative programs may also apply for incentives in recognition of their participation in these programs. While the initial system will involve a case-by-case review and approval methodology, it is the commission's intention to eventually develop a more streamlined system, in which persons meeting certain eligibility requirements will be able to receive a variety of appropriate

incentives from an established menu of options that will include federal, as well as state incentives. In developing this system, the commission will make every effort to work with the United States Environmental Protection Agency (EPA) to develop consistent and meaningful incentives for participation in innovative programs. Initial steps have already been made in this direction through the development of a memorandum of agreement between the commission and EPA on harmonizing application requirements for certain environmental leadership programs.

TWC, §5.752, Definitions, defines strategically directed regulatory structure as a program that is designed to use innovative programs to provide maximum environmental benefit and to reward compliance performance. This section defines innovative program as a program developed by the commission under this subchapter, TWC, Chapter 26 or 27, or Texas Health and Safety Code, Chapter 361, 382, or 401 that provides incentives to a person in return for benefits to the environment that exceed benefits that would result from compliance with applicable legal requirements under the commission's jurisdiction. TWC, §5.755, requires that 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. Section 5.755 also defines the commission's flexible permit program and regulatory flexibility program as innovative programs.

In the Sunset Advisory Commission Staff Report, 2000, Management Action, 3.5, the Sunset Advisory Commission recommended that the commission "expand opportunities for public participation within innovative regulatory programs." The Sunset Advisory Commission stated that this recommendation, ". . . would encourage TNRCC {now TCEQ} to find more ways for the public to participate in its

innovative regulatory programs. Since these programs offer an alternative to traditional regulatory processes, greater public participation is a key to ensuring accountability.” (Sunset Advisory Commission Staff Report, Texas Natural Resource Conservation Commission, 2000, page 38.)

To meet these legislative mandates and the Sunset Advisory Commission recommendation, the commission solicited comments from a formal advisory group. The executive director’s staff worked with the Pollution Prevention Advisory Committee in developing the process, structural elements, and appropriate incentives for these rules. The legislature designated the committee, created by House Bill 2912 from the Waste Reduction Advisory Committee, to advise the commission during this rulemaking process under Texas Health and Safety Code, §361.0215. Accordingly, agency staff made a series of presentations to the committee during the development of this proposal to solicit feedback, and will continue to do so throughout the rulemaking process.

Additionally, the agency staff reviewed rules from other state environmental agencies regarding innovative programs and identified several common elements. These elements include using a person’s compliance history classification as a basis for tracking and/or admission to innovative regulatory programs; using a tiered regulatory approach, in which the conventional compliance system is used as the base-level tier and “beyond compliance” schemes are used for higher tiers; providing technical assistance that is explicitly linked to compliance and enforcement strategies; using environmental management systems as compliance tools and requirements for participation in upper tier programs; and encouraging participation in upper tier programs through incentives. Some of the incentives used to move entities into higher tiers include recognition for superior performance, regulatory flexibility,

“single point of contact” management through the regulatory process, and additional technical assistance for meeting goals. Finally, several programs that the executive director’s staff reviewed contain strong public participation components, like active stakeholder involvement in decision-making about project goals or in managing projects either through a contract or a charter.

The purpose of these adopted rules is to establish a systematic approach for using innovative programs to achieve maximum environmental benefit and to reward compliance performance. As allowed by TWC, §5.755, one of the factors the executive director must use to determine whether a person is eligible for an incentive under an innovative program is that person’s compliance history classification. In December 2001, the commission adopted the definition of compliance history and in August 2002 amended 30 TAC Chapter 60, Compliance History, to include the process the commission uses in determining a person’s compliance history classification. These adopted rules reference the commission’s existing compliance history requirements and do not create a new evaluation process to assess a person’s compliance history classification. These adopted rules reward good compliance and actions which exceed regulatory requirements by providing meaningful incentives. Examples of categories of innovative programs and incentives include alternative methods of compliance, burden reduction, and recognition.

Additional incentives adopted in these rules include on-site technical assistance, accelerated access to program information, and modification of state or federal regulatory requirements that do not change emission or discharge limits. These classes of incentives were identified in a related piece of legislation, House Bill 2997, dealing with the establishment of an environmental management system,

and in a set of incentives proposed for the EPA's National Environmental Performance Track Program and the EPA's Innovation Policy. These classes of incentives were included in these adopted rules because they were broad enough to cover most incentives available to the commission, because they are similar to the list of incentives related to compliance history, and finally because they have a firm legislative mandate under the terms of House Bill 2997.

Also to evaluate a person's eligibility, the adopted rules provide that the executive director may consider whether the proposal will address regional environmental concerns. Potential environmental needs include, but are not limited to, reducing ozone and ozone precursors in air quality nonattainment and near nonattainment areas; reducing water pollution in impaired waters and waters of concern; taking corrective action or remediation of contaminated sites; addressing potential cumulative impacts from air emissions or wastewater discharges; and providing needed ambient monitoring to enhance current efforts.

#### SECTION BY SECTION DISCUSSION

The commission has changed the name of Chapter 90 from Regulatory Flexibility and Environmental Management Systems to Innovative Programs to better reflect the contents of the chapter.

*Subchapter D: Strategically Directed Regulatory Structure*

The commission has created a new Subchapter D, Strategically Directed Regulatory Structure, to accommodate the new rule sections that outline how a person would become eligible to request regulatory incentives through the commission's strategically directed regulatory structure.

Adopted new §90.50, Purpose, explains that the purpose of Subchapter D is to implement TWC, §5.755, to establish a framework for innovative programs to provide for enhanced environmental performance and to reward compliance performance.

Adopted new §90.52, Applicability, specifies the activities to which Subchapter D applies.

Adopted new §90.52(a) specifies that the provisions of Subchapter D apply to all persons subject to the requirements of TWC, Chapters 26 and 27, and Texas Health and Safety Code, Chapters 361, 382, and 401. Activities that are regulated under these chapters include, but are not limited to, the 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, Texas Health and Safety Code, Chapter 361; discharges to surface water and groundwater regulated under TWC, Chapter 26; petroleum storage tanks regulated under TWC, Chapter 26; disposal of waste by underground injection regulated under TWC, Chapter 27; emission sources of air contaminants regulated under Texas Health and Safety Code, Chapter 382; and management and disposal of radioactive material regulated under Texas Health and Safety Code, Chapter 401. This subsection implements TWC, §5.751, Applicability, which specifies that programs under the jurisdiction of the

commission under TWC, Chapters 26 and 27 and Texas Health and Safety Code, Chapters 361, 382, and 401 are eligible to participate in performance-based regulation. The commission added the words “but not limited to” to specify that the list of applicable regulatory activities is not an exhaustive list.

Adopted new §90.52(b) specifies that this subchapter does not apply to occupational licensing programs or other programs specifically exempted by statute. This subsection implements TWC, §5.751.

Adopted new §90.54, Single Point of Contact, specifies that the executive director or the executive director’s designee will serve as the single point of contact within the agency to coordinate all innovative programs. This provision is included to implement TWC, §5.757, which was added to the TWC by House Bill 2912.

Adopted new §90.54 requires that the executive director, or the executive director’s designee, acting as the coordinator must inventory, coordinate, and market and evaluate all innovative programs; provide information and technical assistance to persons participating in or interested in participating in those programs; and 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 program administration, strategic planning, and staff training. The commission adopted this requirement to implement TWC, §5.757. In §90.54(3) the commission added “or its successors” to clarify that even if the name of the Pollution Prevention Advisory Committee changes, the commission will still work with this group in integrating innovative programs into the agency’s operations and changed the word “commission” to “agency” to meet current agency rule writing standards.

Adopted new §90.56, Eligibility, specifies the eligibility requirements for Subchapter D.

Adopted new §90.56(a) provides that 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 is eligible to receive regulatory incentives under this chapter.

The commission changed the word “title” to “chapter” to more clearly define the location of Subchapter B. The commission adopted this subsection to avoid making a person apply twice for the same incentives when that person’s eligibility has already been established.

Adopted new §90.56(b) explains that 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. The commission adopted this subsection for consistency with the requirements in Chapter 60.

Adopted new §90.56(c) explains that 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 for using an environmental management system for a period of three years after the date of the conviction. The commission adopted this subsection for consistency with the requirements in Chapter 90, Subchapter C.

Adopted new §90.56(d) provides that a person will be accepted into a strategically directed regulatory structure by meeting the criteria and standards for regulatory flexibility under Subchapter B; the criteria and standards to receive incentives for using an environmental management system under Subchapter C; the criteria and standards of programs authorized as innovative by the executive director; the criteria and standards for flexible permits under 30 TAC Chapter 116; or the criteria and standards set forth under this subchapter. The commission adopted this subsection to conform with the rules for innovative programs and to avoid a person having to submit multiple applications for the same incentives.

Adopted new §90.56(e) specifies that incentives granted under one innovative program do not guarantee incentives offered under another innovative program, except where those incentives are equivalent.

This provision is adapted from Chapter 90, Subchapter B.

Adopted new §90.58, Definitions, defines the terms used in Subchapter D.

Applicable legal requirement is defined as an environmental law, regulation, permit, order, consent decree, or other requirement. This definition is taken from TWC, §5.752.

Enhanced environmental performance is defined as an activity by a person, including any measurable voluntary action undertaken by a person to improve environmental quality, which reduces or eliminates discharges or emissions of pollutants to an extent that is greater than required by applicable legal requirements; 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; 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 other activity determined by the executive director to be greater than required by applicable legal requirements. The commission developed this definition from the regulatory flexibility rules in Chapter 90, Subchapter B; and from TWC, §5.755(c).

Environmental outcome is defined as 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. This definition is based on agency practices for measurement of environmental trends as used by the commission in its strategic plan and the Small Business and Environmental Assistance Division's definition of environmental outcomes for innovative programs.

Innovative program is defined as a program developed by the commission under TWC, Subchapter Q, Performance-Based Regulations, TWC, Chapter 26 or 27, or Texas Health and Safety Code, Chapter 361, 382, or 401, that provides incentives to a person in return for benefits to the environment that exceed benefits that would result from compliance with applicable legal requirements; the flexible permit program administered by the agency under Texas Health and Safety Code, Chapter 382, and defined in Chapter 116; or the regulatory flexibility program defined in Chapter 90, Subchapter B. The environmental management system program and voluntary programs designated as innovative by the executive director administered by the Small Business and Environmental Assistance Division or that division's successor are also included as innovative programs. This definition is taken from TWC, §5.752, and has been modified for clarity. For readability, the commission deleted "under the commission's jurisdiction" in §90.58(4)(a); changed the word "commission" to "agency" in

§90.58(4)(B); and deleted the word “commission” in §90.58(4)(E) to meet current agency rule writing standards. The commission added “designated as innovative by the executive director” to specify that it is the executive director who determines if a program is innovative.

Maximum environmental benefit is defined as 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. TWC, §5.752(5), defines strategically directed regulatory structure as “. . . a program that is designed to use innovative programs to provide maximum environmental benefit and to reward compliance performance.” The commission developed this definition to provide notice to persons seeking incentives through the strategically directed regulatory structure program about how the goal of the strategically directed regulatory structure program will be assessed. The commission changed the word “commission” to “agency” to meet current agency rule writing standards.

Permit is defined as a license, certificate, registration, approval, permit by rule, standard permit, or other form of authorization issued by the commission under the TWC or Texas Health and Safety Code. This definition is taken from TWC, §5.752, as amended by House Bill 2912. The commission adopted this definition of permit for consistency with the strategically directed regulatory structure framework set forth in House Bill 2912 and with Chapter 60.

Public participation is defined as activities by a person under this subchapter intended to enhance public input that are not otherwise required by law or by commission rules. This definition is based on a recommendation from the Sunset Advisory Commission Staff Report, Texas Natural Resource Conservation Commission, 2000, Issue 3.

Region is defined as a region of the Field Operations Division or that division's successor. This definition is taken from TWC, §5.752. The commission deleted the word “commission” to meet current agency rule writing standards.

Site is defined as, 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. This definition is taken from §60.2(a).

Strategically directed regulatory structure is defined as a program that is designed to use innovative programs to provide enhanced environmental performance and to reward compliance performance. This definition is taken from TWC, §5.752.

Voluntary measure is defined as any program with specific performance measures undertaken by a person to improve environmental quality that is not required by rule or law. The commission developed this based on its experience developing and implementing voluntary compliance and

voluntary pollution reduction programs, including the Clean Texas Program, Clean Industries, Clean Cities, and Clean Texas Star.

Adopted new §90.60, Incentives, specifies the criteria that the executive director will use when determining whether to grant an incentive.

Adopted new §90.60(a) specifies that a person's compliance history classification will be used in determining eligibility for incentives. This subsection also specifies that the executive director must consider a person's voluntary measures undertaken 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. This section implements TWC, §5.755(b)(1) and (2), which requires the commission to base incentives offered under a strategically directed regulatory structure on a person's compliance history classification and voluntary measures undertaken by a person to improve environmental quality.

Adopted new §90.60(b) allows the executive director to consider any other factor that provides enhanced environmental performance that the executive director finds relevant.

The executive director may also consider whether a person voluntarily engages in restoring, enhancing, or preserving natural resources, or whether a person mentors and/or helps other individuals and entities to comply with environmental requirements, limits discharges or emissions of pollutants, or in some other way minimizes the negative effects on air, water, land, natural resources, or human health.

Moreover, the executive director may consider efforts by a person to address environmental issues beyond their own operations; efforts made by the person to include stakeholder involvement and environmental reporting of the person's environmental program with consideration to the size and resources of the specific site; or whether a person undertakes community-based initiatives that improve environmental quality or reduce environmental impacts.

Moreover, the executive director may also take into consideration the voluntary measures a person has undertaken that contribute towards goals set in the commission's strategic plan; that address environmental issues of local or community concern; or that address environmental initiatives developed by the regulated community. This section provides criteria that assist in implementing TWC, §5.755(a) and (b), which directs the commission to develop a strategically directed regulatory structure that offers incentives based on compliance history classification and voluntary measures undertaken to improve environmental quality.

Adopted new §90.60(c) specifies that the incentives the executive director may offer for participation in innovative programs include, but are not limited to, one point of contact for coordinating innovative programs; technical assistance provided by the agency; accelerated access to agency information; modification of state or federal regulatory requirements that do not increase existing emission or discharge limits; flexibility in regulatory processes; and public recognition. For consistency, the commission has taken these incentives primarily from Chapter 90, Subchapter C. The commission changed the word "commission" to "agency" to meet current agency rule writing standards and deleted "that do not require modification of regulatory requirements" for readability.

Adopted new §90.60(d) requires that an innovative program offered as part of the strategically directed regulatory structure must be consistent with other laws and any requirement necessary to maintain federal program authorization, including the provisions of any agreements between the agency and the federal government. This section implements TWC, §5.755(c), which requires that any innovative programs offered as part of the strategically directed regulatory structure be consistent with other laws and requirements necessary to maintain federal program authorization. The commission changed the word “commission” to “agency” to meet current agency rule writing standards.

Adopted new §90.62, Application, explains the requirements a person must follow to apply for a regulatory incentive.

Adopted new §90.62(a) explains that a person who applies to the executive director for a regulatory flexibility project or to use an environmental management system under Chapter 90, or for a flexible permit under Chapter 116 or another program that is designated as innovative under TWC, §5.752(2)(a), does not need to submit another application under this subchapter. A person would, however, need to submit another application under this subchapter if the person requests incentives different from those incentives provided in another innovative program under Subchapter D in which the person is already participating or applying. Further, this subsection specifies that compliance with this provision does not relieve the person from complying with all other applicable legal requirements. For consistency, the provisions in this section are drawn from the regulatory flexibility requirements in Chapter 90, Subchapter B, and the requirements for using an environmental management system in

Chapter 90, Subchapter C. This section implements the requirements for providing incentives for participation in innovative programs under TWC, §5.755.

Adopted new §90.62(b) specifies that within 30 days after receipt of an application, the executive director must mail written notification informing the person that the application is administratively complete or that it is deficient. This subsection also allows the person who submitted the application 33 days to correct any deficiencies. Furthermore, the executive director may request additional technical information within 60 days after issuing an administrative completeness letter. If the person does not provide the requested technical information within 33 days, the application will be sent back to the person without further action by the executive director. This section also allows a person to refile the application if the executive director sends the application back based on reasons specified in this subsection. Upon request, the executive director may provide additional time for a person to submit information regarding the person's application to use an innovative program or to request an incentive. The commission developed this subsection by adapting similar provisions in Chapter 90, Subchapter B, and the requirements for using an environmental management system in Chapter 90, Subchapter C. The commission deleted "to use an innovative program or to request an incentive under this section" from the rule language because the phrase is not necessary and to meet current agency rule writing standards. The commission changed "30 days from the date of receipt of the notice" to "33 days from the date of the notice" for consistency throughout this rule and to be consistent with other agency rules. The commission also changed the word "from" to the word "after" to make clear that the person must provide the technical information within 33 days after the date of the request. Additionally, the commission changed the word "applicant" to "person" for consistency of terms throughout the rule.

Adopted new §90.62(c) requires the executive director to review the person's application as well as the person's and site's compliance history classification. This subsection implements TWC, §5.755(b)(1), which requires the commission to base incentives offered under strategically directed regulatory structure on compliance history classification. The commission added "submitted under this section" to the rule language to specify that the applications the executive director is going to review are the applications submitted under this section. Additionally, the commission modified the rule language by deleting "defined by" and adding "determined under" to make clear that it is Chapter 60 that will be used to determine a person's and site's compliance history classification.

Adopted new §90.62(d) lists the items an application must, at a minimum, include for participation in the strategically directed regulatory structure. These items include a narrative summary of the proposal or project, including the specific statutes or commission rules under which participation is being sought; reference to the specific permit provision or regulation the person requests to modify; and a detailed explanation, including a demonstration as appropriate, that the proposal or project is 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 that the proposal or project is not inconsistent with federal law, including any requirement for a federally approved or authorized program. Additional application requirements include a description of any public participation component associated with the proposed project; where appropriate, a project monitoring schedule which includes a proposal for monitoring, recordkeeping, and/or reporting of environmental performance and compliance; any documented results from the project demonstrating that the project produces a measurable environmental outcome that enhances environmental performance; an explanation of how the project

will be consistent with the needed environmental 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 any information requested from the person by the executive director. The commission developed this subsection by adapting similar provisions in Chapter 90, Subchapters B and C. The commission changed the word "commission" to "agency" to meet current agency rule writing standards.

Adopted new §90.62(e) requires the application to be signed, certifying that all information is true, accurate, and complete to the best of the signatory's knowledge. The commission developed this subsection by adapting similar provisions in Chapter 90, Subchapters B and C.

Adopted new §90.62(f) requires the person to submit an original and two copies of the signed application to the executive director for review, and to send one additional copy to the regional office for the region in which the site is located. A list of the regional offices can be found at <http://www.tceq.state.tx.us/admin/directory/region/reglist.html>. The commission developed this subsection by adapting similar provisions in Chapter 90, Subchapters B and C.

Adopted new §90.62(g) requires a person whose application is approved by the executive director to 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. Access to the site and all records and data must be retained at the site and/or must be readily available for review by an agency representative for a period of three

years after the date of any record or sample, measurement, report, application, or certification. This period must be extended at the written request of the executive director. The commission adapted this section from similar provisions regarding environmental management systems in Chapter 90, Subchapter C. The commission changed the word “commission” to “agency” to meet current agency rule writing standards.

Adopted new §90.64, Requests for Modification of State or Federal Regulatory Requirements, outlines the requirements a person must meet when requesting modifications of state or federal regulatory requirements.

Adopted new §90.64(a) requires persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval method except a commission order to follow the requirements of §90.62. The commission adapted this section from similar provisions regarding regulatory flexibility in Chapter 90, Subchapter B.

Adopted §90.64(b) requires persons who request modification of federal regulatory requirements under this subchapter to also meet the requirements of agreements between the EPA and the agency to receive federal regulatory incentives. This section implements TWC, §5.755(c), which requires that any innovative programs offered as part of the strategically directed regulatory structure be consistent with other laws and requirements necessary to maintain federal program authorization. The commission changed the word “commission” to “agency” to meet current agency rule writing standards.

Adopted new §90.64(c) requires persons who request modification of federal regulatory requirements under this chapter to include a public participation component in the project proposal. This section implements Management Action, 3.5, Sunset Commission Staff Report, 2000, to expand opportunities for public participation within innovative regulatory programs.

Adopted new §90.66, Review by Executive Director Required, specifies that the incentives the executive director grants must be terminated if a person's or site's compliance history classification has declined to a lower classification than the person or site had assigned at the time the incentives were approved.

Adopted new §90.66(a) requires any person who receives incentives under this subchapter to submit a progress report to the executive director every two years documenting the enhanced environmental performance of the project and specifies what the report must include. The commission adapted this section from similar provisions in Chapter 90, Subchapters B and C. The commission added "to the executive director" to the rule language to specify that it is the executive director who should receive the progress report. The commission also added the word "initial" to the rule language to specify that the progress report should be submitted every two years from the date of initial written approval. Additionally, the commission added "for the incentives" to the rule language to specify that the initial written approval is for the incentives.

Adopted new §90.66(b) specifies that at least once every two years, the executive director must review the latest compliance history classification available for the person and the site receiving incentives

under this chapter, as determined under §60.2. This subsection also requires the executive director to review the latest progress reports required to be submitted under this chapter and any voluntary measures undertaken by the person and site receiving incentives under this chapter to enhance environmental performance since any previous biennial review. The commission adapted this section from similar provisions in Chapter 90, Subchapters B and C. The commission added the word “initial” to the rule language to specify that the two-year time period for the executive director to review the latest compliance history classification begins from the date of initial written approval. Additionally, the commission added “for the incentives” to the rule language to specify that the executive director’s written approval is for the incentives.

Adopted new §90.66(c) requires the executive director to begin termination proceedings under §90.68 if the biennial review indicates that a person’s or site’s compliance history classification has declined to a lower classification, and the incentives were only available for the previous classification. The commission adapted this section from similar provisions in Chapter 90, Subchapters B and C.

Adopted new §90.66(d) requires the executive director to begin termination proceedings under §90.68 if the executive director finds that a person’s voluntary environmental measures no longer provide enhanced environmental performance. The commission adapted this section from similar provisions in Chapter 90, Subchapters B and C; and TWC, §5.755.

Adopted new §90.66(e) specifies that a person who suspends or terminates voluntary environmental measures associated with incentives granted by the executive director must notify the executive director

within ten calendar days after the occurrence. The commission adopts this subsection to specify that it is the person's responsibility to inform the commission when the person has ceased the voluntary activity that was used to determine eligibility for incentives and to be consistent with the reporting requirements for participants in other innovative and voluntary programs of the agency.

Adopted new §90.68, Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure, allows either the recipient of the incentives or the executive director to terminate the incentives.

Adopted new §90.68(a) outlines the requirements for termination of incentives by the recipient. This subsection allows a person who receives regulatory incentives for a site under this subchapter to terminate the regulatory incentives at any time by sending a notice of termination to the executive director by certified mail, and requires the site for which a person received incentives to be in compliance with all applicable legal requirements affected by the regulatory incentives granted within 30 days after the date the incentive is terminated. The commission adapted this section from similar provisions in Chapter 90, Subchapters B and C. This subsection implements TWC, §5.755. The commission changed the word "commission" to "executive director" in §90.68(a)(2) to meet current agency rule writing standards.

Adopted new §90.68(b) outlines the requirements for termination of incentives by the executive director. This subsection specifies that the executive director may 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 though the site's or person's compliance history classification has not changed. This subsection also specifies that noncompliance with the terms and conditions of regulatory incentives, an environmental management system approved under Chapter 90, or this subchapter, may result in the regulatory incentives being terminated. Additionally, this subsection specifies that if the executive director finds a person who is approved to use regulatory incentives for a specific site under this subchapter is no longer meeting the requirements of this subchapter, the executive director must notify the person in writing within 90 days after the deficiencies are found and allow the person 90 days to correct the deficiencies. If the person does not correct the deficiencies within 90 days, the executive director will terminate the regulatory incentives. Paragraph (5) of this subsection specifies that if the incentives received by the person or site included exemptions from state or federal requirements, the executive director will allow 30 days for the person or site to be in full compliance with all requirements for which exemptions were granted. If a permit or other authorization is required from the commission in order for the person to be in compliance, an administratively complete application for the permit or authorization must be submitted within 33 days after termination by the executive director. Further, a person may request, in writing, an additional amount of time not to exceed 90 days after the date the incentives are terminated to achieve compliance with applicable legal requirements or apply for proper authorization. The commission changed the word "shall" to "may" to allow the executive director discretion in the executive director's decision to terminate. The commission changed the word "chapter" to "title" to more clearly define the location of Subchapter B. The commission adapted this section from similar provisions in Chapter 90, Subchapters B and C; and TWC, §5.755.

Adopted new §90.70, Public Notice and Comment, specifies the requirements for public notice, comment, and hearing. The commission proposes these provisions to address the Sunset Advisory Commission's recommendation that the commission "expand opportunities for public participation within innovative regulatory programs." (Sunset Advisory Commission Staff Report, Texas Natural Resource Conservation Commission, 2000, page 38.) The commission adopted this section to implement the Sunset Commission's Management Recommendation.

Adopted new §90.70(a) requires that applicants for participation in innovative programs with specific notice, comment, and hearing requirements must follow the requirements under those programs notwithstanding the requirements of this subchapter, unless the applicant is requesting additional incentives under this subchapter. The commission adopted this subsection to be consistent with TWC, §5.112, Public Testimony Policy; and existing statutory provisions regarding public notice.

Adopted new §90.70(b) specifies that if an applicant for incentives under this subchapter requests an exemption from a statute or commission rule, the applicant must 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. The commission adopted this subsection to be consistent with TWC, §5.112, and with the Sunset Commission's Management Recommendation regarding public participation in innovative programs, and existing statutory provisions regarding public participation.

Adopted new §90.70(c) requires that 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 applicant must follow the requirements in §90.70(c)(1) and (2). The commission adopted this subsection to be consistent with TWC, §5.112, the Sunset Commission Management Recommendation regarding public participation in innovative programs, and existing statutory provisions regarding public notice.

Adopted new §90.70(c)(1) requires the applicant to publish notice 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 must be published within 30 days after submittal of the application and not be smaller in font size than that normally used in the newspaper's classified advertising section. The commission adopted this paragraph to be consistent with TWC, §5.112, and the Sunset Commission Management Recommendation regarding public participation in innovative programs.

Adopted new §90.70(c)(2) requires that the executive director accept public comment for 30 days after the last publication of the notice of application. The commission adopted this paragraph to be consistent with TWC, §5.112, and the Sunset Commission Management Recommendation regarding public participation in innovative programs. The commission changed the word “commission” to “executive director” to meet current agency rule writing standards.

Adopted new §90.70(d) lists the items that must be in the notice, including a brief description of the proposal and of the business conducted at the facility or activity described in the application; a brief

description of the incentive(s) requested; the name and address of the applicant and, if different, the location of the facility for which incentives under this subchapter are sought; the name and address of the agency; the name, address, and telephone number of an agency contact person from whom interested persons may obtain further information; the name of the applicant or applicant's designated representative; a brief description of the public comment procedures; and the date by which comments must be received by the executive director. The commission adopted this paragraph to be consistent with TWC, §5.112, and the Sunset Commission Management Recommendation regarding public participation in innovative programs. The commission changed the word "commission" to "agency" to meet current agency rule writing standards. Additionally, the commission added the words "the name of" to §90.70(d)(6) to specify that it is the name of the applicant or applicant's designated representative that must appear in the notice.

Adopted new §90.72, Notice of Proposed Final Action, specifies the actions the executive director will follow if comments are received and describes the requirements for a motion to overturn.

Adopted new §90.72(a) requires that after the public comment period, the executive director must send notice by first-class mail of the proposed final action on the application to any person who commented during the public comment period and to the applicant. The commission moved "of the proposed final action on the application" between the word "notice" and the word "by" from the end of the sentence for readability. The commission adopted this subsection to be consistent with TWC, §5.112, and with the Sunset Commission's Management Recommendation regarding public participation in innovative programs.

Adopted new §90.72(b) specifies that the notice must 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. The commission adopted this subsection to be consistent with TWC, §5.112, and with the Sunset Commission's Management Recommendation regarding public participation in innovative programs.

Adopted new §90.72(c) specifies that 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 or deny 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 30 TAC §50.139(e) - (g). The provision specifies that a person whose incentives have been terminated by the executive director may continue to receive those incentives pending final disposition of any motion to overturn the executive director's decision filed by the person. The commission adapted this section from similar provisions in Chapter 90, Subchapters B and C; Chapter 60; and TWC, §5.755. The commission added "or terminate" to the first sentence to specify that an applicant who has had incentives terminated may file a motion to overturn. The commission also changed the word "commission" to "agency" in §90.72(c) to meet current agency rule writing standards.

**FINAL REGULATORY IMPACT ANALYSIS DETERMINATION**

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to that section because it does not meet the definition of a “major environmental rule.” “Major environmental rule” means a rule developed with the specific intent of protecting the environment or reducing risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of these rules is to implement TWC, §5.755 and §5.757, which require the commission to adopt rules to develop a strategically directed regulatory structure to provide incentives for enhanced regulatory performance, and to adopt rules to designate a single point of contact within the commission to coordinate all innovative programs. Although the intent of the strategically directed regulatory structure rules is to encourage additional protection of the environment and human health resulting from environmental exposure, participation in the program is voluntary and therefore should 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. Since eligibility for participation in the program depends on verifiable environmental enhancements, the environment and the public health and safety of the state should be improved with implementation of the rules.

In addition, the specific intent of this rulemaking does not meet the applicability criteria for a major environmental rule found in Texas Government Code, §2001.0225(a). That section defines a major environmental rule as one that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically

required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a “major environmental rule.” The adopted rules do not require regulated entities to meet a standard that exceeds a federal standard, an express requirement of state law, or a requirement contained in a delegation agreement. The adopted rules were not developed solely under the commission’s general powers, but rather were developed to implement the specific requirements of House Bill 2912, §4.01, which added TWC, §5.755 and §5.757.

#### TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action. The specific purpose of this rulemaking is to implement House Bill 2912, §4.01, which added TWC, §5.755 and §5.757. These sections require the commission to develop a strategically directed regulatory structure to provide incentives for enhanced environmental performance, and to promulgate rules designating a single point of contact within the commission to coordinate all innovative programs. Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking because they do not adversely affect private real property. Private property will not be adversely affected because participation in the program is voluntary, and participation will not prohibit activities that would otherwise be allowed on private property. The rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a

governmental action. Therefore, these rules do not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

This rulemaking is subject to the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.* and the Texas Coastal Management Program (CMP) and, therefore, must be consistent with CMP goals and policies. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking establishes procedural processes and will have no substantive effect on commission actions subject to the CMP and is therefore consistent with CMP goals and policies.

#### PUBLIC COMMENT

A public hearing on these rules was held in Austin on March 27, 2003, and the public comment period closed on April 7, 2003. The agency did not receive any oral or written comments regarding these rules.

## **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 new rules are adopted under TWC, §5.103 and §5.105, which provide the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; and TWC, §5.112, which requires the commission to develop and implement policies that will provide the public with a reasonable opportunity to appear before the commission and speak on any issue under the jurisdiction of the commission. Specific statutory authorization derives from House Bill 2912, which amended the TWC by adding §5.755. This section requires the commission to promulgate rules to develop a strategically directed regulatory structure to provide incentives for enhanced regulatory performance. Further specific statutory authorization derives from House Bill 2912, which amended the TWC by adding §5.757. This section requires the commission to promulgate rules designating a single point of contact within the commission to coordinate all innovative programs.

### **§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) the name of the applicant or applicant's designated representative;

(7) a brief description of the public comment procedures; and

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

**§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.