

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners

**Date:** June 8, 2012

**Thru:** Bridget C. Bohac, Chief Clerk  
Zak Covar, Executive Director

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

**Docket No.:** 2011-1254-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 90, Innovative Programs  
HB 2694 (4.01, 4.06, and 4.08): 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 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 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 The references to Compliance History classification are repealed as required by HB 2694, §4.06.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.

To remove duplicative and unnecessary restrictions, the adopted 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 adopted 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 previously in the Summary of what the rulemaking does section. TWC, §5.755 and §5.758 expressly require adoption of rules.

Commissioners

Page 2

June 8, 2012

Re: Docket No. 2011-1254-RUL

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

Staff consolidated and reorganized the rules regarding these environmental incentives and innovative programs into a single subchapter, deleting duplicative requirements on applicants and the agency. The new rule also provides clarity and removes 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 adopted 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 adopted 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 adopted rules. The adopted 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 adopted 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.

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

**Stakeholder meetings:**

Commissioners

Page 3

June 8, 2012

Re: Docket No. 2011-1254-RUL

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 was being undertaken to streamline the rules and address incentives for EMSs.

No concerns were expressed with the rulemaking project.

**Public comment:**

The public comment period closed on March 12, 2012. The commission received comments from the Texas Chemical Council, the Texas Industry Project, and the Lone Star Chapter of the Sierra Club. All commenters expressed general support for the revisions.

**Significant changes from proposal:**

Sierra Club suggested that "and special nuclear" be added between "radioactive" and "materials" in §90.2 (c). In assessing the terms radioactive material and radioactive substance, the executive director notes that special nuclear material is referenced as part of the definition of radioactive substance in THSC, §401.003. Therefore, the executive director revised subsection (a) (8) to replace the term "material" with "substance." However, subsection (c) will not be revised as the term "materials" is consistent with TWC, § 5.758 (g).

TIP commented that as proposed, §90.13(g) omits the express requirement that an extension of deadlines by the executive director be in writing. The rule is revised to require that the executive director's granting of an extension should be in writing and should include a reason for the extension of a deadline.

TIP commented that proposed §90.16(a), (c), and (d) appear to be inconsistent. The rule is revised as follows. Under §90.16(a) the statement "with specific notice, comment, and hearing requirements" is removed and should have referred to subsections (b) and (c) not subsections (c) and (d).

**Potential controversial concerns and legislative interest:**

Changes in this rule package may also impact rule packages under concurrent review and proposed revisions. There has not been any legislative interest by formal comment or otherwise.

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

This rulemaking does 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?**

Commissioners

Page 4

June 8, 2012

Re: Docket No. 2011-1254-RUL

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 adoption rulemaking schedule:**

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

**Anticipated Texas Register publication date:** July 13, 2012

**Anticipated effective date:** July 19, 2012

**Six-month Texas Register filing deadline:** August 10, 2012

**Agency contacts:**

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

Amie Dutta Richardson, Staff Attorney, 239-2999

Charlotte Horn, Texas Register Coordinator, 239-0779

**Attachments**

Sections 4.01, 4.06, and 4.08 of House Bill 2694 are attached.

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