

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 The references to Compliance History classification are repealed as required by HB 2694, §4.06.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:

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