

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

§90.50. Purpose.

The purpose of this subchapter is to implement Texas Water Code, §5.755, Strategically Directed Regulatory Structure, to establish a framework for innovative programs to provide for enhanced environmental performance and to reward compliance performance.

Adopted July 23, 2003

Effective August 14, 2003

§90.52. Applicability.

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

- (1) management and disposal of industrial solid waste, hazardous waste, or municipal solid waste (including composting, sewage sludge, and water treatment sludge) regulated under the Texas Solid Waste Disposal Act, THSC, Chapter 361;
- (2) discharges to surface water and groundwater regulated under TWC, Chapter 26;
- (3) petroleum storage tanks regulated under TWC, Chapter 26;
- (4) disposal of waste by underground injection regulated under TWC, Chapter 27;
- (5) emission sources of air contaminants regulated under THSC, Chapter 382; and
- (6) management and disposal of radioactive material waste regulated under THSC, Chapter 401.

(b) This subchapter does not apply to occupational licensing programs or other programs specifically exempted by statute.

Adopted July 23, 2003

Effective August 14, 2003

§90.54. Single Point of Contact.

The executive director or the executive director's designee shall serve as the single point of contact within the agency to coordinate all innovative programs. The executive director, or the executive director's designee, acting as the coordinator, shall:

- (1) inventory, coordinate, and market and evaluate all innovative programs;
- (2) provide information and technical assistance to persons participating in or interested in participating in those programs; and
- (3) work with the Pollution Prevention Advisory Committee or its successor(s) to assist the commission in integrating the innovative programs into the agency's operations, including:
 - (A) program administration;
 - (B) strategic planning; and
 - (C) staff training.

Adopted July 23, 2003

Effective August 14, 2003

§90.56. Eligibility.

(a) Except as provided in subsection (b) or (c) of this section, a person whose application to participate in an innovative program or whose application for an incentive meets the minimum standards of §90.62 of this title (relating to Application) shall be eligible to receive regulatory incentives under this chapter.

(b) A person who has incurred a judgment in a suit brought by the Texas or United States attorney general against the site for which the person is requesting regulatory incentives, is ineligible to participate in an innovative program or to receive regulatory incentives at that site for a period of five years after the date the judgment was final.

(c) A person who has been convicted of willfully or knowingly committing an environmental crime regarding the site for which the person is requesting to participate in an innovative program or requesting regulatory incentives is ineligible to receive regulatory incentives through participation in an innovative program under this chapter for a period of three years after the date of the conviction.

(d) A person shall be accepted into a strategically directed regulatory structure by meeting the criteria and standards for the following:

- (1) regulatory flexibility under Subchapter B of this chapter (relating to General Provisions);
- (2) incentives for using an environmental management system under Subchapter C of this chapter (relating to Regulatory Incentives for Using Environmental Management Systems);
- (3) programs authorized as innovative by the executive director;

(4) flexible permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or

(5) other programs set forth under this subchapter.

(e) Incentives granted under one innovative program do not guarantee incentives offered under another innovative program, except where those incentives are equivalent.

Adopted July 23, 2003

Effective August 14, 2003

§90.58. Definitions.

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

(1) **Applicable legal requirement** - An environmental law, regulation, permit, order, consent, decree, or other requirement.

(2) **Enhanced environmental performance** - An activity by a person, including any measurable voluntary action undertaken by a person to improve environmental quality, which:

(A) reduces or eliminates discharges or emissions of pollutants to an extent that is greater than required by applicable legal requirements;

(B) provides an overall reduction of discharges or emissions of pollutants from a site to an extent that is greater than required by applicable legal requirements;

(C) reduces a negative impact on air, water, land, natural resources, or human health to an extent that is greater than required by applicable legal requirements; or

(D) is otherwise determined by the executive director to improve environmental quality to an extent greater than required by applicable legal requirements.

(3) **Environmental outcome** - A measurable or discernable improvement in the quality of air, water, land, or natural resources or in the protection of the environment as determined by the executive director.

(4) **Innovative program** -

(A) a program developed by the commission under Texas Water Code (TWC), Subchapter Q, Performance Based Regulation, TWC, Chapter 26 or 27; or Texas Health and Safety Code (THSC), Chapter 361, 382, or 401; that provides incentives to a person in return for benefits to the environment that exceed benefits that would result from compliance with applicable legal requirements;

(B) the flexible permit program administered by the agency under THSC, Chapter 382, and defined in Chapter 116, Subchapter G of this title (relating to Flexible Permits);

(C) the regulatory flexibility program defined in Subchapter B of this chapter (relating to General Provisions);

(D) the environmental management systems program defined in Subchapter C of this chapter (relating to Regulatory Incentives for Using Environmental Management Systems); or

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

(5) **Maximum environmental benefit** - The overall long-term goal of the agency for environmental improvement which is accomplished by enhanced environmental performance over time from individual reductions in discharges or emissions of pollutants by persons who reduce the negative impacts on water, air, land, natural resources, or human health to an extent that is greater than required by applicable legal requirements.

(6) **Permit** - A license, certificate, registration, approval, permit by rule, standard permit, or other form of authorization issued by the agency under the Texas Water Code or Texas Health and Safety Code.

(7) **Public participation** - Activities by a person under this subchapter intended to enhance public input that are not otherwise required by law or by commission rules.

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

(9) **Site** - Except with regard to portable units, all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A site for a portable regulated unit or facility is any location where the unit or facility is or has operated.

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

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

§90.60. Incentives.

(a) In providing incentives for enhanced environmental performance, the executive director shall offer incentives based on:

(1) a person's and/or site's compliance history classification under §60.2 of this title (relating to Classification); and

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

(b) In granting incentives, the executive director may also consider any other factor that the executive director finds relevant that leads to enhanced environmental performance.

(c) The incentives the executive director may offer for participation in innovative programs include, but are not limited to:

(1) one point of contact for coordinating innovative programs;

(2) technical assistance provided by the agency;

(3) accelerated access to agency information;

(4) modification of state or federal regulatory requirements that do not increase existing emission or discharge limits or decrease public involvement;

(5) flexibility in regulatory processes; and

(6) public recognition.

(d) An innovative program offered as part of the strategically directed regulatory structure must be consistent with other law and any requirement necessary to maintain federal program authorization, including the provisions of any agreements between the agency and the federal government.

Adopted July 23, 2003

Effective August 14, 2003

§90.62. Application.

(a) A person who applies to the executive director for a regulatory flexibility project or to use an environmental management system under this chapter, or for a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or

another program designated as innovative under Texas Water Code (TWC), §5.752(2), does not need to submit another application under this section's requirements, unless the person requests an additional incentive not available to the person in the program in which the person is already participating or applying to participate. Compliance with this requirement does not relieve the person from complying with all other applicable legal requirements.

(b) If a person seeks incentives under this section that are not available under specific innovative programs designated in this chapter, Chapter 116 of this title, or other programs designated as innovative under TWC, §5.752(2), the person must submit an application to the executive director to receive incentives available under this section. Within 30 days after receipt of an application under this section, the executive director shall mail written notification informing the person that the application is administratively complete or that it is deficient.

(1) If the application is deficient, the notification shall specify the deficiencies, and allow the person 33 days from the date of the notice to provide the requested information. If the person does not submit an adequate response within the allotted time, the application will be sent back to the person without further action by the executive director.

(2) Additional technical information may be requested within 60 days after issuance of an administrative completeness letter. If the person does not provide the requested technical information within 33 days after the date of the request, the application will be sent back to the person without further action by the executive director.

(3) If an application is sent back to the person under paragraph (1) or (2) of this subsection, the person may refile the application at any time.

(4) The person may request that the executive director allow additional time for a person to submit information regarding the person's application to use an innovative program or to request an incentive.

(c) In making a determination of eligibility, the executive director shall review the application submitted under this section, as well as the person's and site's compliance history classification as determined by Chapter 60 of this title (relating to Compliance History).

(d) An application for participation in the strategically directed regulatory structure must, at a minimum, include:

(1) a narrative summary of the proposal or project, including the specific statutes or commission rules under which participation is being sought;

(2) a specific reference to the appropriate permit provision or citation to a regulation if the person's request is to modify an existing state or federal regulatory requirement;

(3) a detailed explanation, including a demonstration as appropriate, that the proposal or project is:

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

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

(4) a description of any public participation component associated with the proposal or project;

(5) where appropriate, a project monitoring schedule which includes a proposal for monitoring, recordkeeping, and/or reporting of environmental performance and compliance;

(6) any documented results from the project or estimates of future project outcomes demonstrating that the project produces a measurable environmental outcome that enhances environmental performance;

(7) an explanation of how the project will be consistent with the needed outcome/regional plan if the applicant chooses a project that will address a regional environmental issue identified in the agency's strategic plan, as amended; and

(8) any necessary additional information as determined by the executive director.

(e) The application must be signed and must certify that all information is true, accurate, and complete to the best of the signatory's knowledge.

(f) An original and two copies of the signed application shall be submitted to the executive director for review, and one additional copy shall be submitted to the appropriate regional office for the region in which the site is located.

(g) A person whose application is approved by the executive director must maintain records and other supporting information which shows that voluntary environmental measures associated with incentives approved by the executive director are being carried out and are resulting in enhanced environmental performance. All records and data shall be retained at the site and/or shall be readily available for review by an agency representative or any local air pollution control program with jurisdiction for a period of three years after the date of any record or sample, measurement, report, application, or certification. This period shall be extended at the written direction of the executive director.

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

(a) Persons who request a modification of a state or federal regulatory requirement which requires approval by commission order must follow the requirements of §90.62 of this title (relating to Application).

(b) Persons who request modification of federal regulatory requirements under this subchapter must also meet the requirements of agreements between the EPA and the agency in order to receive federal regulatory incentives.

(c) Persons who request modification of federal regulatory requirements under this chapter must include a public participation component in the project proposal.

Adopted July 23, 2003

Effective August 14, 2003

§90.66. Review by Executive Director Required.

(a) Any person who is receiving incentives under this subchapter shall submit a progress report to the executive director every two years from the date of initial written approval from the executive director for the incentives, documenting the enhanced environmental performance of the project, including:

(1) a demonstration that the results are more protective of the environment than the method or standard prescribed by the statute or commission rule that would otherwise apply;

(2) specific measurable results of the project and how these contribute toward environmental outcomes;

(3) documentation of any public participation component; and

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

(b) At least once every two years from the date of initial written approval for the incentives from the executive director, the executive director shall review the latest compliance history classification available for the person and the site receiving incentives under this chapter, as determined under §60.2 of this title (relating to Classification). The executive director shall also review the latest progress reports required to be submitted under this chapter and any voluntary measures by the person and the site receiving an incentive under this chapter to enhance environmental performance undertaken since any previous biennial review.

(c) If the biennial review indicates that a person's or site's compliance history classification has declined to a lower classification than the person or site held at the time the incentives were approved, the executive director shall begin termination proceedings under §90.68 of this title (relating to Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure) for

any incentives granted that were only available to the person and/or site under the previous compliance classification.

(d) If the executive director finds that a person's voluntary environmental measures no longer provide for enhanced environmental performance, the executive director shall begin termination proceedings under §90.68 of this title.

(e) If a person suspends or terminates voluntary environmental measures associated with incentives granted by the executive director, that person must notify the executive director within ten calendar days after the occurrence.

Adopted July 23, 2003

Effective August 14, 2003

§90.68. Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure.

(a) Termination by the recipient.

(1) A person who receives regulatory incentives for a site under this subchapter may terminate the regulatory incentives at any time by sending a notice of termination to the executive director by certified mail.

(2) If the incentives received by the person or site included exemptions from state or federal requirements, the person or site must be in full compliance with all requirements for which exemptions were granted within 30 days after notice of termination is mailed to the executive director. If a new permit, permit amendment, or other authorization is necessary in order for the person to achieve compliance, an administratively complete application for such authorization shall be submitted to the executive director within 30 days after notice of termination is mailed to the executive director.

(b) Termination by the executive director.

(1) Noncompliance with the terms and conditions of regulatory incentives, an environmental management system approved under Chapter 90, Subchapter B of this title (relating to General Provisions), or this chapter, may result in termination of the regulatory incentives.

(2) The executive director may also terminate incentives under this chapter if the executive director finds that the person or site receiving incentives is not complying with other applicable legal requirements, even if the site's or person's compliance history classification has not changed.

(3) If the executive director determines that a person who is granted regulatory incentives under this subchapter no longer meets the requirements of this subchapter, the executive director shall notify the person in writing within 90 days after the deficiencies are documented.

(4) If the noted deficiencies are not corrected and supporting documentation submitted within 90 days after receipt of the notification, regulatory incentives shall be terminated.

(5) If the incentives received by the person or site included exemptions from state or federal requirements, the person or site must be in full compliance with all requirements for which exemptions were granted within 30 days after termination by the executive director. If a new permit, permit amendment, or other authorization is necessary in order for the person to achieve compliance, an administratively complete application for such permit or authorization shall be submitted within 33 days after termination by the executive director. Upon written request, the executive director may allow an additional amount of time not to exceed 90 days from the date the incentive is terminated for a person to achieve compliance with applicable legal requirements or apply for proper authorization.

Adopted July 23, 2003

Effective August 14, 2003

§90.70. Public Notice and Comment.

(a) Applicants for participation in innovative programs with specific notice, comment, and hearing requirements shall follow the requirements under those programs notwithstanding the requirements of this subchapter, unless the applicant is requesting additional incentives under this subchapter.

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

(c) If the specific innovative program or statute or commission rule for which an applicant is seeking an exemption does not require public notice or an opportunity for comment, the following requirements shall apply.

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

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

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

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

- (2) a brief description of the incentive(s) requested;
- (3) the name and address of the applicant and, if different, the location of the facility for which incentives under this subchapter are sought;
- (4) the name and address of the agency;
- (5) the name, address, and telephone number of an agency contact person from whom interested persons may obtain further information;
- (6) the name of the applicant or applicant's designated representative;
- (7) a brief description of the public comment procedures; and
- (8) the date by which comments must be received by the executive director.

Adopted July 23, 2003

Effective August 14, 2003

§90.72. Notice of Proposed Final Action.

(a) After the public comment period, the executive director shall send notice of the proposed final action on the application by first-class mail to any person who commented during the public comment period and to the applicant.

(b) The notice shall include the executive director's decision on the application, the response to any comments submitted during the public comment period, and a statement that any person may file a motion to overturn the executive director's decision under subsection (c) of this section.

(c) The applicant, the executive director, the public interest counsel, or any other person may file with the chief clerk a motion to overturn the executive director's decision to grant, deny, or terminate incentives. A motion must be filed within 23 days after the date the agency mails notice of the executive director's decision to the applicant and persons who submitted timely comment. Timely motions are subject to §50.139(e) - (g) of this title (relating to Motion to Overturn Executive Director's Decision). If a person who received a final notice from the executive director terminating incentives received under this section files a motion to overturn the executive director's decision, the person will continue to receive the incentives pending final disposition of the motion to overturn under the procedures in §50.139(e) - (g) of this title. If the motion to overturn is denied or overruled by operation of law, the provisions of §90.68(b)(5) of this title (relating to Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure) apply on the date the motion is denied or overruled by operation of law.

Adopted July 23, 2003

Effective August 14, 2003