

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts amendments to §90.1, Purpose; and §90.2, Applicability and Eligibility. The commission also adopts new §90.30, Definitions; §90.32, Minimum Standards for Environmental Management Systems; §90.34, Regulatory Incentives; §90.36, Evaluation of an Environmental Management System by the Executive Director; §90.38, Requests for Modification of State or Federal Regulatory Requirements; §90.40, Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System; §90.42, Termination of Regulatory Incentives under an Environmental Management System; and §90.44, Motion to Overturn. Sections 90.2, 90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, and 90.44 are adopted *with changes* to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6845). Section 90.1 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, 2001, passed House Bill (HB) 2997 which amended Texas Water Code (TWC), §5.127, Environmental Management Systems and HB 2912, §1.12, which amended TWC, §5.131 to encourage the use of environmental management systems (EMS) by the regulated community through the use of regulatory incentives. In this rulemaking, an EMS is a management system that addresses applicable environmental regulatory requirements through the use of an organizational structure, environmental planning activities, and delineation of responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement and compliance assurance.

The legislation requires that the commission adopt a comprehensive program that provides regulatory incentives to encourage the use of EMS by regulated entities, state agencies, local governments, and others. Additionally, the legislation requires that any rules adopted by the commission meet the minimum standards outlined in the bill. Further, the commission must integrate the use of EMS into its regulatory programs, develop EMS for small business and local governments, and establish environmental performance indicators to measure the program's performance. Finally, the legislation requires that the commission consider the use of an EMS in an applicant's compliance history for an applicant's facility for demonstration of compliance and potential use of an EMS to improve compliance history. The commission notes that the statutory language does not endorse any specific EMS standard over another standard to meet the minimum statutory requirements. Therefore, these rules do not specify how the EMS must be implemented, only that they must meet the minimum requirements contained in the statutory language.

While the legislation encourages the use of EMS to achieve regulatory flexibility, the commission cannot modify federally-mandated state requirements without approval from the United States Environmental Protection Agency (EPA). This will severely limit the ability of the program to offer real incentives for the adoption of EMS. It also affects the commission's ability to create a broad performance-based regulatory structure. The commission is pursuing discussion of these issues with EPA. Additionally, the adopted rules are structured to allow the approval of these types of incentives. Until the commission and the EPA come to an agreement on how to approve incentives related to federally-mandated state requirements, any request made for these incentives requires EPA approval on a case-by-case basis. The commission specifically requested comments on this issue. Discussion of and responses to these comments may be found in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS portion of this preamble.

Other factors the commission must consider in developing these rules include the type of review completed by the executive director of an EMS through the potential use of approved third-party auditors to complete the evaluations and also how members of the public should be involved in the EMS development and approval process. The commission specifically requested comments on these items.

Discussion of and responses to these comments may be found in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS portion of this preamble.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. A major environmental rule means a rule, the specific intent of which, is to protect the environment or reduce 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. As the intent of the rules is to implement HB 2997 and HB 2912, §1.12, which require the commission to adopt rules establishing a regulatory process that voluntarily encourages the use of an EMS by regulated entities, these adopted rules do not meet the definition of a major environmental rule. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, the adopted rules do not exceed a federal standard, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, the adopted rules were not developed solely under the general powers of the commission, but were specifically developed to implement HB 2997 and HB 2912, §1.12, as passed by the Texas Legislature and signed by the governor. The commission solicited and received no comments specific to the regulatory impact analysis.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed a final assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The following is a summary of that evaluation and final assessment. The specific purpose of these adopted rules is to implement HB 2997 and HB 2912, §1.12, which require the commission to adopt rules establishing a regulatory process that encourages the voluntary use of EMS by regulated entities. The adopted rules would substantially advance this stated purpose by creating an administrative process allowing regulated entities to seek regulatory incentives from the commission for the voluntary implementation of EMS. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, these rules do not affect a landowner's rights in private real property because this rulemaking does not burden; nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules provide for an administrative process which allows regulated entities to seek regulatory incentives from the commission for the voluntary implementation of EMS. There are no burdens imposed, through the implementation of a voluntary EMS program, on private real property under this rulemaking as the adopted rules neither relate to nor have any impact on the use or enjoyment of private real property, and there is no reduction in value of the property as a result of this rulemaking.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adopted rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

#### HEARING AND COMMENTERS

A public hearing was held September 27, 2001 at 10:00 a.m. in Room 131E of TNRCC Building C, located at 12100 Park 35 Circle, Austin. One individual provided oral comments at the hearing. The following provided oral comments and/or written comments during the comment period: Sierra Club-Lone Star Chapter on behalf of the Alliance for a Clean Texas (ACT); Argent Consulting Services, Inc. (Argent); Association of Electric Companies of Texas, Inc. (AECT); BP Amoco (BP); Chevron Phillips Chemical Company, LP (Chevron); ExxonMobil Refining and Supply Company (ExxonMobil); Industry Council on the Environment (ICE); Lone Star Steel Company (LSS); Office of Public Interest Counsel of the TNRCC (OPIC); Roehrig and Associates, Inc. (Roehrig); Texas Chemical Council (TCC); and Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP).

The following commenters generally supported the proposal: ACT, Argent, AECT, BP, Chevron, ExxonMobil, ICE, LSS, OPIC, Roehrig, TCC, and TIP. No commenters generally opposed the proposed rules. The following commenters suggested changes to the proposal as stated in the SECTION BY SECTION/RESPONSE TO COMMENTS portion of the preamble: ACT, Argent, AECT, BP, Chevron, ExxonMobil, ICE, LSS, OPIC, Roehrig, TCC, and TIP.

#### SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS

The commission modified the title of Chapter 90 from Regulatory Flexibility to Regulatory Flexibility and Environmental Management Systems to address the addition of the EMS regulatory incentives program to this chapter and more accurately reflect the contents of the chapter.

*General*

OPIC commented during the public hearing that the legislature intended that there be significant mechanisms for public participation in these rules and that these rules were intended to increase the accountability of participants to both the public and to the agency. OPIC further commented that the proposed rules contained no effective public accountability mechanism.

**In written comments filed on October 8, 2001, OPIC withdrew and clarified these verbal comments made at the September 27, 2001 public hearing. The commission responds to that clarification in the following comment and response.**

In written comments, OPIC stated that the rules should provide for more effective public participation and public accountability.

**The commission believes the rules establish effective public participation and public accountability. Section 90.40(b)(2) specifically requires the executive director to consider the efforts made by the person that submitted the EMS to incorporate stakeholder involvement and environmental reporting of their EMS internal and external to the organization. Additionally, §90.43(3) states, “Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval except a commission order must follow the requirements of Subchapter B of this chapter.” Subchapter B, §90.16 specifically provides, in the regulatory process, an opportunity for the public to receive reasonable notice, an opportunity to comment upon the modifications, and the ability to request a contested hearing. Any rule change that would authorize an incentive “by rule” would be governed by the Texas Administrative**

**Procedure Act (APA), Texas Government Code, Chapter 2001. The APA requires public notice, an opportunity for a public hearing, and an opportunity to make comments on the proposed rules.**

**In order to receive federal regulatory incentives, an EMS must include public participation and effective stakeholder involvement in the EMS.**

OPIC commented that regulatory incentives should be more closely linked to EMS implementation.

OPIC further commented that incentives should be media-specific and site-specific.

**The commission responds that regulatory incentives will be linked to each company's EMS implementation. The executive director will review each person's EMS and the executive director or an approved third-party auditor will conduct an on-site evaluation of each EMS before it is approved to support a regulatory incentive. Further, the executive director will conduct evaluations at least every three years to ensure that the person is still implementing an EMS at the site. Finally, the commission's existing procedures allow the executive director to terminate a person's regulatory incentive if the site has a violation that so warrants. Therefore, the granting of any incentive is directly linked to the implementation of the EMS.**

**Additionally, the legislature established this program to be voluntary and to encourage the use of EMS by offering qualifying entities regulatory incentives for the development and implementation of an EMS. The statutory language does not link regulatory incentives to specific media, therefore, it would be inappropriate for the commission to so limit this regulatory incentive program.**

**Finally, to clarify that the commission will look at an individual site rather than the company as a whole, the commission has added a definition of “site” to §90.30. The commission agrees that each site should be eligible to receive regulatory incentives if each site maintains an EMS that meets the requirements of these rules. The commission has clarified in the rule language that a single large corporation with multiple sites in Texas can seek incentives for each of its eligible Texas sites for which there is an EMS in place rather than a single statewide plan.**

OPIIC commented that the commission should recognize EMS success through a tiered approach.

**The commission responds that the intent of this rulemaking is only to encourage the use of EMS through regulatory incentives. HB 2912 requires the agency to develop a strategic structure through which regulatory incentives are offered by an entity’s place in a tiered regulatory process. That rulemaking will address the strategic structure of the commission as a whole in its environmental regulatory process, including the structuring of tiers for EMS and regulatory incentives.**

ACT commented that the legislation requires that the commission “establish environmental performance indicators to measure the program’s performance” and the rules contain no such performance measures.

ACT commented that without adequate measures, the EMS program will end up like audit privilege program: competing claims that it works or doesn’t work to improve environmental conditions, but no data to really answer the questions. ACT recommended that the commission use the model laid out in EPA’s August 2001 “Action Plan for Promoting the Use of EMS” to define performance measures for evaluating the state’s EMS program that will at a minimum assess actual emissions and compliance performance at all or some sufficient subset of facilities that have been granted incentives based on their

use of EMS and compile that information into a useful database. ACT commented that the commission's rules should spell out the performance measures that will be used to evaluate the EMS program. The EPA's August 2001 "Action Plan for Promoting the Use of EMS" provides a good model for performance evaluation.

**The commission responds that it will establish performance indicators in compliance with HB 2997. But, the commission will not include those measures in the rule language itself. The commission is currently studying many models for EMS measurement including EPA's model and anticipates submitting these measurements to the Legislative Budget Board (LBB) as required by HB 2997. The commission notes that the EPA has not yet adopted their performance indicators for EMS by rule and therefore EPA also maintains the flexibility to adjust or adapt indicators as needed. Further, the commission notes that the LBB measurements are typically adopted separately from rulemaking to allow the commission to change an indicator that may not be valid after implemented or to add an additional indicator that the commission determines is needed to measure the success of the program without additional rulemaking. The commission will make available to the public the performance indicators for the first phase of the EMS program through their public website and upon request. No change has been made in response to these comments.**

ACT commented that the EMS documentation system should be properly cross-referenced with permit and compliance information on a facility. This will improve program management and will be needed to evaluate the performance of the program, as required by HB 2912 and HB 2997.

**The commission responds that the use of a commission-approved EMS will be noted in the public compliance history database regarding a site's compliance history. This information system will**

**be developed to address the requirements of HB 2912. Therefore, public information on compliance history and permits will be linked to the use of an EMS and available in compliance with legislative requirements. Because this is already required by legislation governing the commission, no specific change has been made to the EMS rules in response to this comment.**

ACT commented that it must be acknowledged that an EMS does not in any way guarantee compliance with applicable laws, regulations, or permit terms, nor is the use of EMS intended to replace the regulatory system.

**The commission responds that the proper implementation of an EMS that is based on compliance assurance does provide better compliance assurance than other traditional mechanisms the commission uses to ensure compliance with applicable requirements. A comprehensive compliance-based EMS includes all compliance endpoints within the management system with measures to locate, correct, and prevent the reoccurrence of noncompliance; therefore, it goes above and beyond traditional compliance programs and should be more protective than traditional environmental programs that rely on inspections only to detect noncompliance. The commission notes that this voluntary EMS program is intended to allow persons to meet their compliance obligations in a more flexible or streamlined manner as a reward for establishing an EMS program that is more protective of the environment than if they did not have an EMS established. No change has been made in response to this comment.**

ACT commented that a clear recordkeeping system must be established in order for the commission to track the performance of the EMS incentive program, as required by legislation, and in order for the public to be able to evaluate the costs and benefits of this program. ACT commented that the most

straightforward approach would be to establish a separate EMS file for a site that requests incentives based on its adoption of an EMS and that file should be cross-referenced to permit and compliance files for the site. ACT also commented that it should include at a minimum the following: EMS documentation submitted to the agency; evaluation and incentive requests; evaluation results; correspondence between the agency and regulated site related to EMS, its evaluation, and the requested incentives; a record of decision or other documentation of incentives provided; and documentation of the three-year evaluation results.

**The commission does not plan to establish a separate cross-referencing procedure for the EMS program outside of what is already being created to comply with the requirements of HB 2912 for compliance history and public information. The commission responds that all data relating to an EMS collected by the commission will be available unless marked confidential by a person.**

**Additionally, the commission responds that the statutory language did not provide for funding to establish a separate file maintenance program outside of current commission practices. However, since the EMS will also be associated with the compliance history of a site in one public database, the site, its compliance history and its associated permits, would be able to be linked through existing file procedures. All of the items listed in the comment would be included in such files because they are elements of the review and approval process. No change has been made in response to these comments.**

TCC commented that it understands that the EMS must set priorities, goals, and targets for continuous improvement as per the statute. TCC further noted that there are many different ways to organize an EMS, and suggested that the commission should attempt to obtain legislative relief on this requirement in the future.

**The commission disagrees with TCC's comment that the commission should attempt to obtain legislative relief on the different ways to organize EMS. The language of the legislation is not prescriptive in how a person must develop an EMS only that the EMS must contain specific components. Priorities, goals, and targets are common components to all EMS standards and these can be defined specific to a site's operations. No change has been made in response to this comment.**

Both BP and Chevron Phillips commented that they do not agree with the TNRCC statement in the rule preamble that the cost to implement an EMS program is anticipated to range from no cost to approximately \$89,000. Chevron estimated that for a complicated chemical facility with several hundred emission points and many hundreds of applicable regulatory requirements, it could cost upwards of \$200,000 per facility to establish and quality check the database. BP commented that while some costs are proportional to the size and complexity of the site, the costs to the BP Texas City site, for example, to implement ISO 14001 have been in excess of \$500,000.

**The commission acknowledges that the cost to implement an EMS will range widely based on site-specific requirements and whether the system has received ISO 14001 certification. The costs provided in the fiscal note for the proposal related to this rule were based on data available as an average. Depending on the size of the site, the ability to use existing procedures and programs versus creating new ones, and other site-specific factors, costs could vary below or far in excess of the costs stated in the fiscal note. Given that the choice to request regulatory incentives under these rules is voluntary, no change has been made in response to this comment.**

ACT and OPIC commented that the proposed commission rules attempt to go far beyond the types of incentives that the legislature authorized.

**The commission disagrees that the proposed rules attempt to go beyond the types of incentives that the legislature authorized. Section 5.127(b) of HB 2997 states: “The incentives may include:....” While HB 2997 lists four different incentives, the commission responds that it is not limited to those four listed incentives. Specifically, Texas Government Code, §311.016(1) defines the term “may” in the Code Construction Act as creating discretionary authority or granting permission or a power. As such, the commission has the ability to expand the list of authorized incentives beyond the four listed in HB 2997. Further, the types of incentives in the rule are similar in nature to the ones in the legislation. No change has been made in response to this comment.**

AECT and ICE commented that companies may face detriments if they choose not to participate in the EMS program, which would effectively make it voluntary in name only. AECT and ICE requested that the commission include statements in the preamble to the final rules that a company with a good compliance history will not cease to receive announced agency compliance inspections solely because it chooses not to participate in the EMS program and that no other detriments will occur to companies who choose not to participate in the program. Further, AECT and ICE agreed that EMS should be voluntary, rather than mandatory. AECT and ICE expressed concern, however, that companies may face detriments (beyond the detriment of not getting to take advantage of the incentives offered by the program) if they choose not to participate in the EMS program, which would make the EMS program voluntary in name only.

**The commission responds that it is not the intent of the rulemaking to make the development and use of an EMS anything other than voluntary, regardless of a company's participation. Further, the rules as drafted do not suggest that a company will face detriments if they chose to not participate in an EMS program. However, the commission appreciates the concerns raised by ICE and AECT. The commission will clearly state in the preamble that the EMS program is a voluntary program. No change has been made in response to this comment.**

AECT and ICE expressed concern that a company with a good compliance history might cease to receive announced compliance inspections from the executive director solely because it chooses not to participate in the EMS program. AECT and ICE requested that the commission include statements in the preamble to the final rules that a company with a good compliance history will not cease to receive announced compliance inspections solely because it chooses not to participate in the EMS program, and that no other detriments will occur to companies who choose not to participate in the voluntary EMS program.

**The commission responds that HB 2912, as adopted, states that the commission by rule shall, at a minimum, prohibit a person whose compliance history is classified in the lowest classification from receiving an announced inspection. However, the determination of a site's compliance history classification and how compliance history will be used is not the subject of this rulemaking. No change has been made in response to this comment.**

ACT commented that the rules should provide that the commission will integrate the use of EMS into enforcement orders for facilities that have a consistent pattern of violations, as the EPA has now done. ACT commented that the commission should take this opportunity to make an explicit commitment to this approach.

**The commission recognizes that the use of EMS will be a positive tool for companies that have a consistent pattern of violations. The commission does not intend to make the use of EMS mandatory for these entities as that is out of the scope of this rulemaking. The proposed rules only cover a *voluntary* program to encourage the use of EMS, not the use of EMS for rehabilitation of poor performers. It is anticipated that poor performers will want to use an EMS as a method to improve their compliance history. The use of EMS in determining compliance history will be addressed in other rulemakings proposed by the commission.**

*Subchapter A: Purpose, Applicability, and Eligibility*

Section 90.1, Purpose, is adopted without changes to the proposed text. This adopted section will clarify that the purpose of this chapter is to create the EMS regulatory incentives program for regulated entities as authorized under TWC, §5.127 and §5.131.

Section 90.2, Applicability and Eligibility, is adopted with changes to the proposed text. This adopted section will outline the applicability and eligibility requirements to qualify for regulatory incentives for using an EMS and for regulatory flexibility orders (RFOs). This section will provide that any site is eligible to receive regulatory incentives, except a person that has been referred to the Texas or United States attorney general for an environmental violation and incurred a judgment against the specific site requesting the incentives is not eligible for a period of three years from the date of the judgment.

Additionally, a person is ineligible to receive regulatory incentives if that person has been convicted of willfully or knowingly committing an environmental crime regarding the site for a period of three years from the date of the conviction.

Concerning §90.2, Chevron requested that clarification be added to the rule in case the “person” is a corporation with multiple facilities to allow the separation of the corporation into manufacturing locations or business lines. OPIC also commented that the word “person” should be replaced with the word “site.”

**The commission agrees that the language of HB 2997 suggests that the rule was intended to be applied at the site or facility level. Therefore, the commission has added a definition of “site” to §90.30. A single large corporation with multiple sites in Texas may now seek incentives for each of its eligible Texas sites for which there is an EMS in place.**

Concerning §90.2, Chevron stated that a separation of a company into manufacturing locations or business lines will allow a company to maintain regulatory incentives at locations with certifiable EMS and penalize only the location with the judgment. For example, Chevron stated all of a corporation’s regulatory flexibility orders could be in jeopardy if the company acquires or purchases a plant with an environmental judgment or less than an optimal compliance record. Chevron requested that the commission clarify the definition of “person” in regard to the limitation that certain “persons” are ineligible to receive incentives from EMS implementation for three years.

**The commission agrees that each site should be eligible to receive regulatory incentives if each site maintains an EMS that meets the requirements of these rules. Therefore, if a company were to acquire a plant with an environmental judgment, the judgment would not affect other plants who were already granted regulatory incentives as long as those plants maintained their EMS and compliance history according to the eligibility requirements in these rules. Thus, to clarify that**

**the commission will look at individual sites rather than the company as a whole, the commission has added a definition of “site” to §90.30.**

Concerning §90.2, Chevron suggested an alternative option to allow a qualified company that purchases an unqualified company three years to get the unqualified company into compliance with the appropriate standards before the EMS incentives are rescinded.

**The commission agrees that a company as a whole should not be penalized for the purchase of a site which does not have a qualifying EMS in place. The commission has modified the proposed rule language in §90.30 to include a definition for “site” which separates a company into separate physical locations. Additionally, the commission has added the term “site” to clarify that these requirements apply to individual sites and not a company as a whole. If a company were to purchase an unqualified company, it would have no effect on the purchasing company’s regulatory incentives at a different site, as long as the qualifying site maintained its EMS.**

Concerning §90.2, ACT commented that the compliance performance eligibility threshold for the EMS incentive program is far too low and that the commission should require that regulated entities have a “history of sustained compliance” which is consistent with EPA’s performance track language and would be a sensible way of implementing the HB 2912 performance-based criteria for innovative programs.

**The “history of sustained compliance” language is not contained in HB 2997 or HB 2912. This is language that EPA uses to govern its policy on compliance history evaluation. The commission is required by HB 2912 to develop its own standard for evaluating compliance history. The**

**commission's rules on compliance history will comply with the requirements outlined in the statutory language. Additionally, the commission may also consider "history of sustained compliance" in a future rulemaking related to strategically directed regulatory structure.**

**Therefore, the language of the EMS rules has been crafted in a general fashion to allow for later inclusion of the compliance history or strategically directed regulatory structure language. No change has been made in response to this comment.**

Concerning §90.2, ACT requested that if the commission believes it is prohibited from changing this threshold at this time, the commission should cite the specific statutory provision that contains such a prohibition and clearly indicate in the preamble when the rules will be revised to provide a more reasonable eligibility threshold.

**House Bill 2997 and HB 2912 gave the commission deadlines to adopt specific rules to address EMS, compliance history, and a strategically-directed regulatory structure. Although the statutes adopted general requirements in each of these areas, the statutes mandated that the commission adopt rules to implement the requirements by specific dates. The compliance history rules governing the definition of compliance history and the use of compliance history are scheduled for adoption in February 2002 and September 2002, respectively. The commission will not adopt into the EMS rules compliance history requirements that may conflict with future planned rulemaking regarding compliance history that is legislatively required to be adopted by specific dates. The commission will address incorporation of the compliance history rules requirements into the EMS rules as soon as the compliance history rules are adopted by the commission. The commission has placed language in the EMS proposed rules to allow the commission to consider compliance history in the granting of incentives. The generic nature of the language contained in §90.40 of**

**the EMS rule allows compliance history to be immediately considered under the most currently adopted regulatory standard governing compliance history. The commission made no change in response to this comment.**

Concerning §90.2(c), ExxonMobil stated that a person who meets the minimum standards for the state's EMS program is only *eligible* for regulatory incentives. Exxon Mobil commented that this language should be strengthened to *provide access* to regulatory incentives, otherwise it does not provide incentive to industry as all their efforts could be denied by commission staff.

**While the commission recognizes that industry would prefer to have a stronger guarantee of regulatory incentives than currently contained in the proposed rule language, the commission notes that HB 2997 and HB 2912 require the commission to consider compliance history before granting incentives. If a site has an acceptable compliance history, the likelihood of regulatory incentives being granted greatly increases under the evaluation process. However, should a site have an unacceptable compliance history or request an incentive in a specific media for which it has compliance deficiencies, the likelihood of being granted that specific incentive is much lower. It is important to note that the process for requesting regulatory incentives is not a one-time occurrence and if a person does not receive an incentive initially, it may request that incentive or additional incentives once its EMS has been approved. In addition, for federal incentives, meeting the minimum standards for an EMS will not guarantee the award of those incentives. The EPA additionally requires that a person that is seeking incentives under the commission's EMS program must meet the National Environmental Performance Track (NEPT) standards. The commission has added clarifying language to §90.38 that states that entities must meet the requirements of the NEPT to qualify for federal incentives. Thus, for the reasons previously**

**stated, even if a site meets the minimum standards for an EMS, the commission cannot guarantee that the person will receive the specific incentives they have requested. Therefore, no change has been made in response to the comment.**

Concerning §90.2(e), ExxonMobil commented that the restriction from receiving regulatory incentives for three years after incurring a judgment under the Texas or United States attorney general referral provides an unjustifiably broad penalty for large corporations. Additionally, ExxonMobil stated that the commission's proposal under §90.2(e) would appear to prevent any of these companies from receiving regulatory incentives for implementing a complying EMS program for three years and therefore, this exclusion must be deleted.

**The commission notes that the language of HB 2997 suggests that the rule was intended to be applied at the site or facility level. Therefore, to ensure compliance with the statutory language, the commission has added a definition of "site" to §90.30. This change clarifies that eligibility for regulatory incentives will be determined on a site-specific basis. Further, the commission disagrees that it is inappropriate to have this restriction in the rule with clarifying language to specifically apply the eligibility criteria at the site level. The commission responds that it is appropriate to make those persons that have been referred to the Texas or United States attorney general and whose referral results in a final judgment to be ineligible for EMS regulatory incentives at that site until they have demonstrated the site operation has addressed those issues which incurred the judgment. These eligibility requirements parallel rules currently adopted by the commission in Chapter 90, Regulatory Flexibility. Additionally, HB 2912 requires the commission to consider the compliance history of all participants in any new or previously established incentive program.**

*Subchapter C: Regulatory Incentives for Using Environmental Management Systems*

The commission will create new Subchapter C, Regulatory Incentives for Using Environmental Management Systems, to accommodate the new rule sections that outline how a person would become eligible to request regulatory incentives for using an EMS.

New §90.30, Definitions, is adopted with changes to the proposed text. This adopted section will provide the meanings of the terms; environmental aspect; environmental impact; environmental management system; and site as they are used in Chapter 90. The definition for environmental management system is from HB 2997. The definitions for environmental impact and environmental aspect are from the International Organization of Standards (IOS) ANSI/ISO 14001 standard for "Environmental management systems - Specification with guidance for use," 1996. The definition for site is from the definition of a "person" in 30 TAC Chapter 3 with additional language added to make it site-specific instead of corporation-specific. Additionally, the commission replaced the letters with numbers and added an introductory sentence to conform with standard definition format.

Concerning §90.30, TCC commented that the definitions of environmental aspect and environmental impact are too broad in the current writing and should be revised to add flexibility and clarity. TCC recommended removing the word "any" at the beginning of each definition and starting the definitions with "elements" and "changes." Additionally TCC commented that these terms are used in §90.32 where an EMS must identify environmental aspects and impacts and that under the definition in the proposed rule, any element and any change that can interact with the environment would have to be included in the EMS. Finally, TCC stated that it is more appropriate to include "elements" and "changes" in the EMS but not all (any).

**The commission responds that the definitions of environmental aspect and environmental impact are intentionally broad to ensure that the commission is not prescriptive in the EMS development process. These definitions allow the company the latitude to customize these terms to their operations.**

**The commission notes that the inclusion of the word “any” in §90.30 in the definition of “environmental aspect” was a typographical error and the original source from which the definition was derived does not contain this term. Accordingly, the commission has deleted the word “any” from that definition.**

**In regard to impacts of a particular aspect, the commission maintains that persons should identify any positive or negative impacts associated with a particular aspect at a site. The exclusion of an impact is not acceptable because it might change the priorities that a company places on a specific aspect and thereby change what goals and targets they establish under the EMS. Therefore, no change has been made to the definition of “environmental impact” in response to this comment.**

Concerning §90.30, BP commented that since the proposed definitions for environmental aspect, environmental impact, and environmental management system are from the IOS ANSI/ISO 14001 standard for “Environmental Management Systems - Specification with Guidance for Use” as published in 1996, that facilities that are ISO 14001 certified should not be required to go through an additional evaluation under §90.36 for program acceptance.

**The commission responds that as noted in the preamble to this rule the definition for “environmental management system” was not taken from IOS’s ANSI/ISO 14001 but directly**

**from the language in HB 2997 which is different from the ISO 14001 definition for the same term.**

**The definitions for environmental aspect and environmental impact were taken from the ISO 14001 standard because they were universally understood and acknowledged definitions for those terms. The language of HB 2997 places stronger emphasis on certain aspects of an EMS than ISO 14001, specifically in the areas of continuous improvement of environmental performance and compliance assurance; therefore, the commission asserts that obtaining ISO 14001 certification may or may not meet the requirements of this standard. No change has been made in response to these comments.**

New §90.32, Minimum Standards for Environmental Management Systems, is adopted with changes to the proposed text. This adopted section will provide the minimum standards for an EMS that a site must follow in order to request regulatory incentives. The minimum standards are taken from HB 2997. The standards include: adoption of a written environment policy directed toward continuous improvement; identification and prioritization of the environmental aspects by the significance of the impacts of the site's activities; sets of priorities, goals, and targets for continuous improvement in environmental performance and for ensuring compliance with environmental laws, regulations, and permit conditions applicable to the facility; assignment of clear responsibility for implementation, training, monitoring, and corrective action to ensure compliance with environmental laws, regulations, and permit conditions applicable to the facility; documentation of procedures for and results of the use of the EMS; and routine intervals for scheduled evaluation and refinement of the EMS and demonstration of improved attainment of priorities, goals, and targets set, as well as improvement of the EMS itself.

Concerning §90.32, OPIC commented during the public hearing held on Thursday, September 27, 2001, that in listing the essential elements of an EMS, the list is incomplete.

**In written comments filed on October 8, 2001, OPIC withdrew and clarified this verbal comment that was made at the September 27, 2001 public hearing. The commission responds that the rule language contains all of the standards the legislators intended to include in the statutory language. Additionally, the specific example cited by OPIC regarding emergency preparedness and corrective action is included in the evaluation of aspects. Under the proposed rule language, if an aspect has a significant emergency response element, a person would need to indicate how the site would mitigate that existing risk. In addition, emergency preparedness and response is a regulatory requirement and since an EMS requires compliance with regulatory requirements this would also be included in the EMS under regulatory obligations. Finally, corrective action is specifically mentioned in HB 2997 under §1 which amends the language of TWC, §5.127(c)(4) as an element of the EMS.**

Concerning §90.32, ICE and ACT requested that the commission include a clear statement in the preamble to the final rules that the minimum standards in §90.32 will not be interpreted or implemented so narrowly that only certain types of EMS will be able to meet such standards and be approved under the EMS program.

**The intent of this rulemaking is not to endorse any specific EMS standard but to encourage entities to develop EMS as they see fit that meet the minimum standards contained in this rule. The commission has added a clear statement to the preamble to clarify that a person's site can**

**meet the standards for an EMS contained in these rules without using any specific standard already in existence for the development of an EMS.**

Concerning §90.32, ACT commented that two crucial elements are missing from the list of minimum standards for an EMS including: a “commitment to sharing information with external stakeholder on environmental performance against all EMS objectives and targets,” and a “commitment to pollution prevention that emphasizes source reduction.” ACT commented that adding these two criteria would provide much more complete and useful guidance for EMS and help ensure consistency with EPA’s standards for National Performance Track program. Finally, ACT stated that it could also help build public support for this approach, if justified, by providing the public with information needed to assess the usefulness of EMS in providing actual public health or environmental benefits.

**The commission acknowledges that the sharing of information with external stakeholder groups is a positive element to include in the development of an EMS. The proposed rule contains language to indicate that a person’s involvement of outside stakeholders in the site’s EMS will be considered before granting any regulatory incentive. The commission disagrees, however, that this should be mandatory for all persons. Many small businesses already have resource constraints and to add the additional requirement for outside stakeholder involvement is a disincentive to developing an EMS.**

**The commission has commenced discussions with EPA on the NEPT program requirements. For the commission to grant federal incentives, the EPA will require the EMS to meet the standards contained in the NEPT program. Therefore, the commission added clarifying rule language to §90.38 regarding the modification of federal regulatory requirements to note that modifications of**

**these requirements will only be approved if the EMS meets the NEPT program standards, but will not require this of all entities as part of the EMS regulatory incentive program.**

**In addition, the commission declines to make any changes in response to the suggestion regarding a “commitment to pollution prevention that emphasizes source reduction.” All pollution prevention efforts should be recognized as positive elements of continuous improvement whether or not they meet the definition of source reduction. Additionally, some entities, including small businesses, may not have the resources or options to prevent or reduce pollution through source reduction. The proposed rule language requires “continuous improvement in environmental performance.” The commission responds that either improvements in compliance or pollution prevention are both acceptable methods of demonstrating continuous improvement in environmental performance. The commission further notes that the legislation does not preclude a person from receiving a regulatory incentive if the site’s continuous improvement in environmental performance is not focused on source reduction.**

Concerning §90.32, LSS commented that the commission should accept an organization’s third-party certification to the ISO 14001 standard as sufficient documentation that its EMS meets the minimum standards of §90.32, and therefore, should allow the organization to receive regulatory incentives under this chapter.

**The commission responds that the ISO 14001 standard, although the most widely accepted standards for the development of an EMS, does not necessarily ensure compliance with the minimum standards of this rule for EMS. Also, ISO 14001 is not the only accepted standard for the development of an EMS. ISO 14001 is written in general terms to make it applicable to all**

**sources internationally, and does not have the very clear language of HB 2997 regarding “continuous improvement in environmental performance and for ensuring environmental compliance with environmental laws, regulations, and permit terms.” ISO 14001 has not been applied uniformly to all facilities across the United States in regard to these critical areas due to company’s and registrar’s differing interpretations of the requirements of the ISO standards. Further, the use of a third-party auditor system which allowed certain types of auditors to be “grandfathered” into the ISO 14001 program has allowed for inconsistency in the qualifications of the third-party registrars used for certification. In addition to these factors, the compliance history language contained in HB 2912 requires the commission to consider compliance history in any participation in “innovative regulatory programs.” Finally, the EPA has requested that the commission ensure that the site meets the requirements of the NEPT program in order to receive federal incentives. Certification to the ISO 14001 standard does not ensure compliance with NEPT. The commission has set up a mechanism in the rule to allow the use of an agency contractor or the company’s third-party auditor in the EMS evaluation process, to help eliminate any redundant efforts on the part of the person requesting incentives. Guidance will be developed for the use of this option. Therefore, no change has been made in response to this comment.**

Concerning §90.32, TCC commented that the EMS rule should be consistent with statutory language in HB 2997 and HB 2912 and that language not included in the legislation can change the meaning of the requirement and have significant effects, like removing flexibility. TIP commented that the commission should strive to ensure consistency between the regulations it enacts and the legislation that authorizes those regulations. TIP further stated that where the legislature uses clear and direct language, additional words and phrases not included in the underlying bill can have serious consequences and that where the legislature merely requires that a regulatory agency adopt rules, and provides limited

guidance, the agency is free to incorporate language outside of that set forth in the legislation.

However, TIP continued, where the legislature uses detailed language to describe a program, additional words and phrases added to the language can change legislative intent are clearly unauthorized.

**The commission responds that every attempt was made to ensure that deviations from the exact statutory language did not change the basic requirements of the statutes. The commission has the authority to develop rule language that implements the statutes. The language the commission used in the rule provides specific detail on how the commission will implement the statutes.**

**Therefore, no change has been made in response to this comment.**

Concerning §90.32(1), TCC requested that the commission delete the words, “governing performance improvement and compliance assurance,” from §90.32(a)(1). TIP stated that, for example, proposed §90.32(1) provides that an EMS should include a “written environmental policy governing performance improvement and compliance assurance.” TIP commented however, that the underlying legislation clearly states that the rules “must provide” that an EMS includes a “written environmental policy” and therefore the language regarding “performance improvement and compliance assurance” goes beyond the legislation, and is not authorized by the legislation. ICE and AECT recommended that the “environmental” be added to §90.32(1) between the words, “governing” and “performance” to make the language more consistent with the language in HB 2997 and HB 2912, §1.12.

**The commission responds that the definition of “environmental management system” contained in HB 2997 states that “maintaining an environmental policy directed toward continuous improvement” is an essential element of an EMS. Although the definition does not contain the language “compliance assurance,” it does imply the system will “address applicable**

**environmental regulatory requirements.” The commission has modified the language in §90.32(1) to more closely adhere to statutory language in the definition for EMS and the language is restated as “includes a written environmental policy directed towards continuous improvement.” The commission has removed the reference to compliance assurance since it is clearly detailed in the minimum standards for the EMS that an EMS must ensure regulatory compliance to meet the requirements of this rule.**

**The commission responds that the language change recommended by ICE and AECT does not add meaning or clarification to the proposed rule language. Since these rules outline the requirements for an environmental management system, and not some other type of management system, all performance improvement documented in a site’s EMS, should be related to environmental improvements. No change has been made in response to this comment.**

**Currently, both “identifies” and “prioritizes” are requirements listed in §90.32(2). The commission has separated these two requirements into two separate paragraphs and renumbered §90.32 to reflect the change. The commission made this change to clarify that a person’s EMS must identify the environmental aspects of their site *and* that a person must prioritize the previously identified environmental aspects by the significance of the impacts of aspects at the site. (Emphasis added)**

TCC requested that the word “prioritizes” be deleted from §90.32(2) and noted that an EMS does not necessarily prioritize aspects and impacts. AECT and ICE requested that the “and prioritizes” in §90.32(2) be deleted because the language is not supported by the legislation and it is not clear what

“prioritize” means in the context of proposed §90.32(2). TIP commented on §90.32(2) that HB 2997 does not require that a person prioritize the environmental aspects and impacts of its activities.

**The commission responds that the phrase “prioritizes” was added to the rule to emphasize the requirement in HB 2997, §5.127(c)(3), that a person “sets the priorities...for continuous improvement in environmental performance and for ensuring compliance with applicable laws, regulations, and permit conditions” for a site. To set meaningful goals required in the statutory language, any person implementing one of the many accepted EMS standards would prioritize the aspects identified in HB 2997, §5.127(c)(2), by the significance of the impacts. Therefore, the commission responds that adding language to prioritize the aspects based on their impacts should not be an additional burden to a person implementing an EMS. Further, this is a necessary step to establish improvement goals and compliance priorities. The commission is developing guidance to provide a more detailed explanation of the requirements contained in the rule. The commission has modified the language in §90.32(2) and (3) to clarify that aspects should be prioritized by the significance of their impacts.**

Concerning §90.32(3), LSS noted that §90.30(c) and §90.32(3) use the phrase, “continuous improvement” and that the phrase is also used in HB 2997. LSS stated that this phrase presents a conflict when an organization’s EMS program is based on the ISO 14001 standard because ISO 14001 requires “continual improvement” which it defines as “the process of enhancing the environmental management system to achieve improvements in overall environmental performance in line with the organization’s environmental policy.” LSS continued that §4.2(c) of the ISO 14001 standard also states that the organizations environmental policy include “a commitment to continual improvement.” LSS has been advised that some third-party ISO-14001 auditors will not accept the phrase “continuous

improvement” in an organization’s environmental policy. LSS requested that the commission address the conflict between the words “continuous” as stated in HB 2997 and “continual” as stated in the ISO 14001 standard.

**The commission acknowledges that there may be wording differences between the proposed rules and the requirements of ISO; however, the commission derives its authority to write rules from the legislature. In this instance, the proposed rules are based on an express delegation of authority to promulgate rules through HB 2997 and HB 2912. House Bill 2997 expressly speaks in terms of “continuous improvement.” While these rules use the language of HB 2997, the goal is the same whether one uses the word continuous or continual: that is EMS improvement over time. Therefore, a company has the flexibility and latitude on how it discusses or demonstrates “continuous improvement” in its environmental policy and associated EMS. The rule does not require that as EMS use the word “continuous” in its environmental policy to meet the requirements in §90.30(c) or §90.32(4). Further, the commission cannot address the inconsistencies in the ISO 14001 third-party auditor interpretation of “continuous” versus “continual.” Therefore, no change has been made in response to this comment.**

TCC requested that “EMS” be deleted from §90.32(5).

**The commission responds that the proposed deletion of “EMS” does not change the meaning of the requirements. Therefore, the commission will modify §90.32(6) by deleting “EMS” and substituting the original language from HB 2997, §1, under the amended language to TWC, §5.127(c)(5) and add “procedures” instead of “EMS” from §90.32(6).**

TCC requested that “written,” “on a routine schedule,” and “priorities” be deleted from §90.32(6).

TCC also noted that routine schedules may make this rule more difficult to follow for small businesses and are not included in the statute.

**An essential step in the continued improvement of an EMS “over time” is the evaluation of the EMS. This evaluation should occur at a regularly scheduled interval. In order to provide businesses that choose to seek a regulatory incentive under this rule maximum flexibility, the proposed rule language does not define what is “routine.” This will allow businesses of any size, including small businesses, seeking regulatory flexibility under this rule to work within their own resource constraints. Additionally, while the word “routine” is not in HB 2997, this statute does require an evaluation and refinement “over time” to improve attainment of environmental goals and targets and the system itself. To refine the an EMS over time, a person would need to set evaluation periods against which to measure whether it is improving or not. Further, for a person to be accountable not only within its organization but also to the public, who has an interest in whether the EMS is working, it is essential that each site that uses an EMS document whether it is reaching its goals. Without written documentation about the progress a site is making in reaching its stated goals, it would be extremely difficult to note any progress made toward each goal over any period of time. Finally, while “priorities” is not included in the statutory language for this specific requirement, it is included in HB 2997, §1 under the amended language to TWC, §5.127(c)(3). Since priorities are what are used to evaluate and refine implementation, linking the three elements together is essential for a complete evaluation process. The intent of this legislation was to not only evaluate and refine goals and targets over time, but also to reevaluate priorities to ensure they are also still relevant, which is an essential element of goal and target refinement. No change has been made in response to this comment.**

New §90.34, Regulatory Incentives, is adopted with changes to the proposed text. This adopted section will provide the range of regulatory incentives that could potentially be requested under the EMS regulatory incentive program. These incentives include, but are not limited to, on-site technical assistance, accelerated access to program information, modification of state or federal regulatory requirements that do not change emission or discharge limits, consideration of a site's implementing an EMS in scheduling and conducting compliance inspections, and inclusion of the use of an EMS in a site's compliance history and compliance summaries. While the basic language was taken from HB 2997, the adopted section was expanded to provide further clarification that state and federal regulatory incentives could be requested.

Concerning §90.34, ICE and AECT commented that the incentives in the current proposal are not adequate to motivate most companies that do not already have an EMS in place to develop and implement an EMS under the new rules. Accordingly, ICE recommended that the commission add to the proposal as many additional incentives as possible.

**The language proposed in the rule has been crafted in a general fashion to allow for the offering of many types of incentives without excluding any specific incentives until further research is done in this area by the commission. The commission has also created a stakeholder group to support incentive development and is actively working with the EPA to create specific federal incentives for entities. The overwhelming response from entities requesting a variety of regulatory incentives indicates that the proposed rule language is enough to motivate entities to develop an EMS to obtain regulatory incentives from the commission without having every incentive specifically stated in the rule. No change has been made in response to this comment.**

Concerning §90.34, AECT and ICE commented that the commission is limited in terms of what incentives it can offer because of constraints imposed by federal laws or by EPA. AECT and ICE stated that unless some of these constraints are removed or loosened so that the commission can offer more incentives to encourage companies to develop and implement an EMS, they are skeptical that the incentives will be adequate to entice companies to develop and implement an EMS. Therefore, AECT and ICE encouraged the commission to continue, and, if possible, increase its efforts to convince EPA to remove or loosen federal constraints to the commission offering incentives that likely would entice companies to develop and implement an EMS. Additionally, TCC supported the implementation of regulatory incentives available to persons with an EMS. TCC further stated, however, due to existing federal statutes, the available incentives with real benefits are limited. TCC expressed opposition to including incentives in the EMS rule that cannot be implemented due to other federal requirements. TCC supported the inclusion of these types of incentives if the commission obtains the necessary waivers from EPA prior to rule publication. TIP commented that it is critical for the commission to obtain the necessary waivers from EPA so that the benefit of EMS can be effective with respect to federal regulations. TIP encouraged the commission to involve EPA at the highest levels. ExxonMobil commented that the regulatory incentives proposed by the commission are very limited. ExxonMobil supported and endorsed the suggestions submitted by TIP and strongly encouraged the commission to include these in the regulatory language.

**The commission has commenced discussions with EPA on the NEPT program requirements. In order for the commission to grant federal incentives, EPA will require the EMS to meet the standards contained in the NEPT program. In addition EPA has submitted informal comments to the commission regarding how the EPA would like to form a partnership with the commission to facilitate the approval of federal incentives. Some suggestions from EPA include joint review of**

**EMS to facilitate workload, the establishment of a joint panel of commission and EPA stakeholders to review incentives, the creation of a memorandum of understanding between the EPA and the commission to accomplish the goal of granting federal incentives, and the creation of a formal mechanism to allow the approval of federal incentive in support of our state program.**

**No change has been made in response to these comments.**

Concerning §90.34, TIP and Chevron commented that incentives for qualifying facilities should be reviewed on a case-by-case basis.

**Until a formal incentives approval structure has been developed, the commission will review incentives requested on a case-by-case basis with specific review time periods so that a person can request incentives that may not be specifically detailed in the rulemaking and receive a response to their request in a timely fashion. No change has been made in response to this comment.**

Concerning §90.34, BP commented that the commission should expand the proposed regulatory incentives.

**The language proposed in the rule has been crafted in a general fashion to allow for the offering of many types of incentives without excluding any specific incentives until further research is done in this area by the commission. The commission has also created a stakeholder group to support incentive development and is actively working with EPA to create specific federal incentives for entities. No change has been made in response to this comment.**

Concerning §90.34, Argent commented that it is not clear what “on-site technical assistance” and “accelerated access to program information incentives” are. Argent stated that if in fact they are related to the development, review, and approval of the EMS system, then they would need to be awarded before the program is fully developed and final approval is obtained. Argent suggested that these two incentives be allowed for a preliminary system that shows developmental progress and a commitment to timely implementation. Argent further stated that a tangible reward for program development would be a tax incentive, similar to that allowed for pollution abatement equipment.

**In regard to the meanings of “on-site technical assistance” and “accelerated access to program information,” the commission will prepare guidance that will provide further clarification on the statutory language included with this rule package as well as suggestions by regulated entities on what should be included in those incentive categories. On-site technical assistance includes any free assistance offered by the agency to entities participating in the EMS regulatory program that can include specific EMS program assistance or assistance with other regulatory programs in the agency. Accelerated access to program information means participants in the EMS incentives program may request additional mechanisms to obtain program information different from current agency practices in order to expedite their information needs from the agency. The Small Business and Environmental Assistance (SBEA) Division, which is the compliance assistance area of the commission, has trained staff on the evaluation and implementation of EMS. This assistance/incentive in a variety of forms will be available to all sizes of industry and local governments that wish to develop an EMS prior to the formal evaluation process. However, the commission is unable to offer tax incentives similar to those included with other existing programs for the development of an EMS without legislative authority. Therefore, since this option was not**

**included in either HB 2997 or HB 2912, the commission cannot offer this specific incentive. No change has been made in response to this comment.**

In addition to the general comments provided about §90.34, ExxonMobil, Chevron, TCC, TIP, ICE, Argent, AECT, and BP provided specific suggestions for the types of incentives the TNRCC should offer as part of the EMS rulemaking. ExxonMobil urged the commission to include as incentives guaranteed inclusion in the highest ranked category under the compliance history programs currently under development for all person's with approved EMS programs, and dispensation to submit emission inventories every other year rather than annually, noting that any variation noticed in the off-years could be reported during the reporting years. ICE suggested the following incentives: permit extensions; expedited permitting; permit flexibility, deletion, or consolidation of redundant requirements; consolidation of recordkeeping and reporting requirements; use of consolidated permits; fee waivers, fee reductions; announced compliance inspections (for companies that are not already receiving announced inspections), and policy incentives/non-rule procedures. BP suggested the following incentives: priority processing of permit applications, a reduction in emission and permit fees; a reduction in emission inventory reporting from annually to every other year; consideration of case-by-case requests for incentives; adoption of a special notice of violation (NOV) dispensation procedure for facilities that have approved systems; defer penalty for violations corrected within a timely manner; allow pre-authorization of minor changes that result in insignificant emission increases; revision of the definition of "start of construction" to allow facilities begin some construction preparation activities; and grant a higher ranking for compliance history. Argent also suggested some regulatory incentives for final approval which could include, but are not limited to: tax benefits for the capital cost and training costs of program implementation; approval of EMS system forms and reports in place of agency forms and reports; and approval of on-line reporting systems in place of phone or fax

reports. TCC suggested the following incentives: give higher priority to permit applications; authorize all emissions associated with any activity from a permitted point source as long as the emissions are below the emission rate in the maximum allowable emission rate table (MAERT); institute a preliminary NOV dispensation procedure; allow for the option of complying with state and/or federal regulatory leak detection and repair (LDAR) program rather than the new source review (NSR) permit LDAR programs; allow more flexibility in the use of predictive emissions monitoring systems (PEMS) by reducing qualification and follow-up procedures associated with PEMS; delete multiple references to federal requirements in permits issued under 30 TAC Chapter 116; invite companies that maintain approved EMS to participate in regulatory development groups that work with the TNRCC in developing regulations affecting industry; assign the same inspector to a given facility over time; eliminate duplicative monitoring requirements; periodically publish a list of incentives granted to participating facilities; replace specific recordkeeping requirements with more general recordkeeping requirements that allow flexibility while still demonstrating compliance with applicable emission rates; reduce reporting and monitoring requirements under the discharge monitoring report (DMR) provisions of the Clean Water Act (CWA); consider maintenance of an EMS as a good faith effort to comply with state and federal requirements; allow facilities that maintain electronic records additional retrieval time; limit conditions that sources must meet to be eligible for flexible permits (state) and plant-wide applicability limits (PALs) (federal); allow pre-authorization of minor changes that result in a de minimus emissions increase; allow longer averaging periods for determining compliance with emissions limits; allow facilities the flexibility to complete tie-ins prior to receiving construction approval on a new unit; provided that any emissions increase is de minimus; allow additional construction preparation activities to be undertaken before a company is deemed to have commenced "construction"; extend the applicability period for facilities that cannot begin construction within 18 months of their best available control technology (BACT) determination; allow waste to accumulate at sites for longer periods of time

before off-site shipment; and reduce the frequency of maximum achievable control technology (MACT) reporting.

TIP requested the following incentives for having an EMS: maintenance of an EMS should show good faith effort under the penalty policy and should merit a 100% reduction in the penalty; certain standard permit conditions should be deleted or limited; the commission should look to only a two-year compliance history regarding decisions made in enforcement or permitting; a company's permit application or alternate method of control should be expedited such that it will be processed in no more than 50% of the maximum period; less frequent inspections; lower permit fees; and a single, specific point permitting contact. TIP also suggested the following incentives with a federal component: replace specific recordkeeping with general recordkeeping requirements that allow flexibility while still demonstrating compliance with applicable emission rates; reduce reporting and monitoring requirements under the DMR provisions of the CWA; consider maintenance of an EMS as a good faith effort to comply with state and federal requirements; allow facilities that maintain electronic records additional retrieval time; limit conditions that sources must meet to be eligible for flexible permit and plant-wide applicability limits; allow pre-authorization of minor changes that result in a de minimus emission increase; give high priority to permit applications by companies that maintain an EMS; allow longer averaging periods for determining compliance with emissions limits; allow facilities the flexibility to complete tie-ins prior to receiving construction approval on a new unit, provided that any emissions increase is de minimus; allow additional construction preparation activities to be undertaken before a company is deemed to have commenced "construction"; extend the applicability period for facilities that cannot begin construction within 18 months of the BACT determination; allow waste to accumulate at sites for longer periods of time before off-site shipment, without triggering resource conservation and recovery act (RCRA) permitting requirements; reduce the frequency of MACT reporting; require only

recordation of final compliance results for continuous emission monitoring system (CEMS) and continuous monitoring system (CMS); institute a special NOV dispensation procedure for facilities with an approved EMS; allow facilities the option of complying with state and federal LDAR programs in place of NSR permit programs. TIP also requested the following state-based incentives: allow more flexibility in the use of predictive emissions monitoring by reducing qualifications and follow-up procedures associated with PEMS to make them more cost effective; delete multiple references to federal requirement in permits issued under Chapter 116; eliminate specific requirements to check for hydrogen sulfide(H<sub>2</sub>S) leaks; invite companies that maintain an approved EMS to participate in regulatory development groups that work in the TNRCC in developing regulations affecting industry; assign the same inspector to a given facility over time; and eliminate duplicative monitoring requirements.

**The commission has received numerous suggestions on regulatory incentives that the commission should offer to persons that implement EMS. The commission has collected the incentives requested under this formal comment period and is considering them. Due to the short time frame provided for adoption of this rulemaking, the commission is unable to adopt specific incentives by rule because many of the requested incentives require coordination at the federal as well as the state level and may require further rulemaking to implement. Further, the language proposed in the rule has been crafted in a general fashion, similar to the statutory language, to allow for the offering of many types of incentives without excluding any specific incentives until further research is done in this area by the commission. The commission has also created a stakeholder group to support incentive development and is actively working with EPA to create specific federal incentives for entities.**

**The commission will be handling the compliance history ranking and the use of an EMS in such ranking under a separate rulemaking specifically related to compliance history use. The EMS rulemaking governing the voluntary EMS regulatory incentive program cannot include how EMS are included in compliance history as that is out of the scope of the this rulemaking and must be addressed under separate rulemaking. No change has been made in response to these comments.**

ACT has commented that the language of §90.34(3) is so broad that it fails to provide the public with reasonable notice and opportunity to comment on the rule. ACT also commented that the language as proposed could arguably be interpreted to allow the commission to waive notice and hearing requirements. ACT also commented that §90.34(3) must be eliminated from the final rules.

**The commission disagrees that the language of §90.34(3) is so broad that it fails to provide the public with reasonable notice and opportunity to comment on the rule. In addition, the commission disagrees that the rule language authorizes the commission to waive notice and hearing requirements without following the proper public participation requirements. This rule language does not change the existing mandatory procedures for authorizing significant amendments or changes to a permit which require notice. In addition, this rule language does not change existing procedures for granting modifications under the permitting or registration process. Therefore, the commission has not created any new authorization authority with this rulemaking than that which already exists at the commission.**

**Additionally, §90.34(3) must be read in conjunction with §90.38 which states: “Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval except a commission order must follow the requirements of Subchapter B of**

**this chapter” because §90.34(3) provides the ability to request the incentive while §90.38 provides the mechanism for the executive director to approve the incentive. Section 90.16 specifically provides an opportunity for the public to receive reasonable notice, an opportunity to comment upon the modifications, and the ability to request a contested hearing.**

Concerning §90.34, OPIC commented during the public hearing that where the commission lists regulatory incentives, the commission does not have the statutory authority to grant these incentives.

**In written comments filed on October 8, 2001, OPIC withdrew and clarified this verbal comment made at the September 27, 2001 public hearing. The commission responds to that clarification in the following comment and response.**

Concerning §90.34(3), OPIC commented that the commission should remove §90.34(3) because this incentive is not included in the EMS statute. The proposed §90.34(3) includes actions by the commission that the statute does not authorize. The commission is not granted statutory authority to alter the incentives included in the statute.

**The commission disagrees with OPIC’s comments that the proposed rules attempt to go beyond the types of incentives that the legislature authorized. Section 5.127(b) of HB 2997 states: “The incentives may include:....” While HB 2997 lists four different incentives, the commission believes that it is not limited to those four listed incentives. Specifically, Texas Government Code, §311.016(1) defines the term “may” in the Code Construction Act as creating discretionary authority or granting permission or a power. As such, the commission is vested with certain authority in expand the list of authorized incentives beyond the four listed in HB 2997.**

ACT commented that §90.34(4) and (5) must be revised to more closely adhere to the statutory language. ACT stated that consistency with federal requirements may limit the ability of the commission to deviate from inspection schedules or to rely on announced inspection.

**The commission responds that every attempt was made to ensure that deviations from the statutory language did not change the basic requirements of the statutes. The commission has the authority to develop rule language that implements the statutes. The language the commission used in the rule provides specific detail on how the commission will implement the statutes. Additionally, the commission notes that all of its functions must be carried out to be consistent with federal regulatory requirements. Based upon federally delegated or authorized programs the commission is bound to follow the rules and regulations unless EPA specifically authorizes a deviation from them. With regard to inspections, EPA only limits the commission's ability to schedule certain types of inspections but does not have requirements regarding announced or unannounced inspections. The new language in HB 2912, does have state requirements regarding the commission's ability to conduct announced inspections for poor performers which will be addressed in the compliance history rulemaking. Because there is no significant difference in the language proposed in §90.34(4) and the language in §1 of HB 2997 which amends TWC, §5.127(b)(3)(B), the commission will modify §90.34(4) to match the language in the statute.**

ACT commented that proposed §90.34 should include the "consistent with federal requirements" language as well as the statutory words, "information regarding" the use of an EMS. ACT stated that "information regarding" an EMS is essential to determining the relevance of a site's adoption of an EMS in the context of compliance history.

**The commission responds that its functions always must be carried out to be consistent with federal regulatory requirements. Based upon federally delegated or authorized programs the commission is bound to follow the rules and regulations unless EPA specifically authorizes a deviation from them. Therefore, since all such programs of the commission must be consistent with federal regulatory requirements, the addition of that language to this rule does not change or make more stringent the requirement that already governs the commission's functions as a whole in regard to any regulatory programs implemented that are based on federally delegated or authorized programs. The commission is already collecting information regarding an EMS as part of the evaluation process for approval of an EMS that will be considered in the context of compliance history. The addition of "information regarding" does not change the quality or quantity of information that will be collected for the commission's records under this rule and what types of information will be included in compliance history will be addressed in a separate rulemaking. No change has been made in response to these comments.**

Concerning §90.34(5), TCC suggested that §90.34(5) should reflect that the EMS is a positive element of compliance history.

**The commission responds that the actual use of an EMS as a positive component of compliance history is governed by a separate rulemaking package. The use of an EMS as a positive element will be included in that rule package. Therefore, no change has been made in response to this comment.**

New §90.36, Evaluation of an Environmental Management System by the Executive Director, is adopted with changes to the proposed text. This adopted section will provide details on how the

executive director will evaluate whether the EMS meets the standards of this chapter and what documentation must be submitted. Upon receipt of a request to evaluate an EMS, the request will be reviewed and then an on-site evaluation will be scheduled with the person. After the on-site evaluation is complete, the executive director will provide the person information on whether the EMS meets the standards of the chapter or if it does not, how it can be improved to meet the standards. After all requirements of the chapter have been met, the person will be notified that the EMS meets the standards of the chapter and that they may qualify for incentives. In addition to the initial evaluation, the executive director or an approved third-party auditor will conduct a follow-up evaluation every three years from the date of the initial evaluation. Deficiencies noted during these follow-up evaluations must be corrected in a specified time frame or incentives could be terminated in accordance with the new §90.42 adopted in this rulemaking package. Additionally, the commission added new subsection (j) which includes the criteria the executive director must consider in the approval of a third-party auditor(s).

Concerning §90.36, AECT and ICE commented that where a company discovers noncompliance as a result of developing and implementing an EMS, the commission should use its enforcement discretion and not necessarily bring enforcement against a company. AECT and ICE also commented that bringing an enforcement action against a company when implementation of its EMS results in the company identifying and correcting noncompliance will only discourage other companies from participating in the EMS program.

**The SBEA Division of the commission will be responsible for conducting the on-site evaluations.**

**The personnel of this division are compliance assistance specialists and do not have the authority to issue NOVs for noncompliance. The intent of the on-site evaluation is not to identify areas of**

**alleged noncompliance but to verify that the EMS has been implemented. If a noncompliance is witnessed, the function of the reviewer would be to determine how that noncompliance indicates a potential failure of the EMS and should be corrected. However, if the compliance assistance specialist witnesses a situation that is immediately dangerous to the environment, health, or safety of the surrounding community, the specialist is obligated to report the situation to the commission's regional office. A person who has implemented an EMS at a site should not have such a situation in existence, as the function of the EMS would be to identify, correct, and prevent the reoccurrence of such a situation. Therefore, it is not anticipated that an on-site evaluation would discourage any companies from participating in the EMS program because it is not an investigation. No change has been made in response to these comments.**

**Concerning §90.36(a), the commission added the word "written" before the word "documentation" to clarify that all documentation submitted to the executive director to request an on-site evaluation must be written. Additionally, the commission changed the word "their" to either "the person's" or "the site's" and added the language "for a specific site" in subsection(a) for clarity. Finally, the commission changed the word "should" to the word "must" to clarify that the items listed in §90.36(a)(1) - (11) are all a required part of the written documentation needed to request an on-site evaluation from the executive director.**

Concerning §90.36(a), TIP commented that the commission must develop guidance outlining acceptable EMS. ACT commented that §90.36(a) should specify what type of documentation will be required. ACT stated that the documentation must include demonstration that the EMS is in fact, being implemented. TIP also commented that such guidance should set forth the documents a company must submit during the evaluation process, as well as the methods the commission will use to determine

whether a company is improving compliance through the use of an EMS. In addition, TIP commented that commission should clarify through guidance how on-site evaluations will be carried out, if the commission maintains that requirement.

**The commission responds that guidance will be developed outlining the elements of an EMS and outline how on-site evaluations will be carried out. The commission agrees that it would be helpful to outline documentation requirements to commence an evaluation and has added language to §90.36(a) that details what information must be submitted to commence the evaluation process. Language in §90.36(a)(1), (3), and (4) clarifies that the documentation required under these paragraphs is to verify the site has created the documentation required under the minimum standards in §90.32(1) - (4). The commission wanted a person submitting documentation under §90.36 to be clear that the person could submit the same documents and not have to create new ones to satisfy §90.36(a)(1), (3), and (4). Further, the commission does not agree with including documentation demonstrating that the EMS is being implemented in the initial request for evaluation because the on-site evaluation is the appropriate mechanism for verification that the system has been implemented. The executive director or approved third-party auditor will document the results of implementation after the evaluation is complete including any deficiencies noted and corrected.**

**In addition, the commission responds that the protocols used by the commission to review EMS will be publicly available as soon as they are developed. However, the commission will not prescriptively specify how a company should determine it is improving compliance since the commission notes that the same performance measurements cannot necessarily be applied to every site. The commission would also like to clarify that the legislation required “continuous**

**improvement in environmental performance” and “ensuring compliance with environmental laws.” Therefore, compliance improvement is only one measurement for continuous improvement. If a site already maintains a high level of compliance, measuring the improvement in compliance may not be the most appropriate measurement; whereas if a site has a poor compliance history, that may be the most important measurement. No change has been made in response to this comment.**

Concerning §90.36, TIP commented that the TNRCC should have realistic expectations regarding the effectiveness of an EMS when conducting EMS conformance evaluations.

**The commission acknowledges that a facility that is attempting its first EMS will have more action items in regard to conformance with the EMS standard for compliance assurance. Depending on the nature and magnitude of the non-conformance, the site may meet the standard but may not qualify for certain incentives initially. After demonstrating improvement in meeting specific compliance assurance goals, the person could request additional incentives as its system demonstrates improvement. The commission has added §90.40(b)(4) to clarify the incentive approval process in response to this comment.**

Concerning §90.36, ICE and AECT commented that the rules should provide that EMS that are already certified under an existing recognized program (such as ISO 14001) should receive automatic approval under the EMS program, unless and until such certification lapses. BP commented that a person that is ISO 14001 certified should meet the minimum requirements for an EMS and be exempt from executive director evaluation under this section. TIP commented that the commission should allow companies that are currently certified through a recognized body to receive automatic approval and to maintain

such approval as long as the facility's certification remains current. ExxonMobil commented that the commission should provide automatic certification under the Texas EMS program for persons who have obtained certification, endorsement, or attestation of a qualifying EMS under the terms and conditions of ISO 14001 (or similar type program). TCC commented that the requirement for on-site evaluation extends beyond the intent of the legislation and should be removed as a requirement for approval of the EMS and that on-site evaluation should be voluntary. TCC suggested that submittal of documentation to the executive director is required and this should be a sufficient method for evaluation of an EMS.

**The commission responds that the ISO 14001 standard, although the most widely accepted standard for the development of an EMS, does not necessarily ensure compliance with the minimum standards of these rules for EMS. ISO 14001 is written in general terms to make it applicable to all sources internationally, and does not contain the very clear language of HB 2997 regarding “continuous improvement in environmental performance and for ensuring environmental compliance with environmental laws, regulations, and permit terms.” Also, ISO 14001 has not been applied uniformly to all facilities across the United States in regard to these critical areas due to companies’ and registrars’ differing interpretations of the requirements of the ISO standards. In addition, the IOS does not have the delegated mission to ensure the protection of human health and the environment as the commission does. The ANSI-Registration and Accreditation Board (RAB) allowed certain ISO 9000 auditors to be “grandfathered” into the ISO 14001 program. This process has allowed for inconsistency in the qualifications of the third-party registrars used for certification and differing opinions on the scope of an EMS with regard to compliance assurance. Therefore, the commission will not be able to give blanket approval of any company with ISO 14001 certification. In addition, the compliance history legislation contained in HB 2912 also requires us to consider compliance history in the awarding of incentives. Therefore,**

**automatic approval of an ISO 14001 system would not guarantee granting of a regulatory incentive if compliance history is unacceptable. Finally, EPA has requested that to receive federal incentives, the commission ensure that the site meets the requirements of the NEPT program. Certification to the ISO 14001 standard does not ensure compliance with NEPT. The commission also reiterates that this rule does not endorse one EMS standard over another. A company is free to choose which EMS standard they use to comply with the standards contained in this rule. The commission stresses that the rule allows for the use of an EMS on-site evaluation completed by a third-party auditor as long as the evaluation meets the same criteria as if the executive director completed the evaluation. Therefore, the commission is allowing for the company to make full use of work already completed on its EMS and is attempting to not add additional workload requirements to comply with this rule. The commission notes that it has not gone beyond the intent of the legislation by requiring on-site evaluations by noting that documentation is only one part of the minimum standards listed for an EMS. Other standards exist above and beyond the documentation that the executive director or an approved third-party auditor would need to verify through an on-site evaluation. No change has been made in response to these comments.**

Concerning §90.36, ICE and AECT commented that proposed §90.36 should be revised by deleting the requirement for an on-site evaluations because EMS are by definition document-based systems, and in most cases, on-site evaluations should not be necessary or appropriate for EMSs. TIP also commented that the commission should not require mandatory on-site evaluations and that on-site evaluations should be voluntary. TIP suggested that facilities should have the option of submitting appropriate documentation, consistent with the requirements articulated by the legislature, in lieu of an on-site evaluation and that any evaluation of a facility's EMS should focus on evaluating the system for non-conformance. Finally, TIP, ICE, and AECT commented that the commission needs to clarify that

when an on-site evaluation is necessary, the focus will be on evaluating documents associated with the proposed EMS and not on identifying possible areas of alleged noncompliance at the site.

**In response to the request that evaluation of EMS should not include on-site evaluations or the on-site evaluation should be voluntary, the commission strongly disagrees with this statement. In all accepted standards for EMS, document control and records are only one part of the requirements for the establishment of an EMS. A system is not solely paper or documentation. Documentation is a tool to ensure consistency in the system. Without implementation of the system through behavioral change and management support, documentation can be meaningless. The commission has reviewed the protocols of the IOS, EPA's NEPT, Ecomangement and Audit Scheme (EMAS), Coalition for Environmental Responsible Economies (CERES), EPA Code of Environmental Management Principles for Federal Facilities (CEMP), and other EMS standard review and certification bodies in regard to EMS. All of the organizations and registrars contacted stated that on-site evaluation of the EMS was a critical step in verification that the EMS was not just a document-based system but in practice at the implementing facility. None of the organizations the commission contacted suggested that an EMS could be verified solely through review of documentation. The commission would not accept the evaluation of an EMS from any third-party certifying body that did not spend a majority of its time verifying that the EMS was implemented at the facility, not just on paper. It is also the intention of the commission to complete evaluations of the EMS and identify non-conformance of the systems, through the SBEA Division, not conduct compliance investigations. Inspection and enforcement functions are the responsibility of the commission's Office of Compliance and Enforcement (OCE). Therefore, no change has been made in response to this comment.**

Concerning §90.36, TIP commented that the commission should make clear that an EMS does not necessarily have to meet the requirements of ISO 14001 to be approved, rather, ISO 14001 is merely an example of one type of EMS and that the commission will not discount other systems that meet program requirements.

**The commission reiterates these rules do not endorse one EMS standard over another. A company is free to choose which EMS standard they use to comply with the standards contained in these rules. The commission has added additional language to the preamble to clarify this fact.**

Concerning §90.36, ACT requested that the commission address how it will avoid diverting already too-scarce inspection and enforcement resources away from inspections and complaint response to EMS evaluations.

**The commission responds that the primary responsibility for the EMS regulatory incentive program will reside with the SBEA Division with assistance from OCE regarding compliance history, site data, and related issues. As the SBEA Division has no responsibilities for inspection and enforcement only compliance assistance, the commission does not anticipate a significant resource diversion from OCE which conducts inspections, responds to complaints, and initiates enforcement actions. No change has been made in response to this comment.**

Concerning §90.36, TIP suggested that where minor noncompliances are discovered during an evaluation, the commission should consider all the options available, including audit immunities, before proceeding against a company based on information discovered during an EMS evaluation.

**The commission responds that a person at any time can notify the agency of their intent to conduct an audit under the Audit Privilege Act. Since an EMS will include auditing as part of its function, if the person has claimed immunity under the Audit Privilege Act and reported any violations discovered within the time frames for an audit provided by the Audit Privilege Act, any violations discovered by the person through the process of using an EMS auditing process could be protected under the Audit Privilege Act. It would be the person's responsibility to fully comply with all requirements of the Audit Privilege Act and to claim such immunity pursuant to the terms of the Audit Privilege Act. The intent of the EMS evaluation will be to identify non-conformances of the EMS, not complete a compliance inspection. Inspections are the separate function of OCE and will continue to be their function. No change has been made in response to this comment.**

Concerning §90.36, TIP suggested that the commission create a negotiation process that allows approval steps during EMS development, as opposed to a single approval process after the EMS has been fully developed.

**The existing rule language allows the company a negotiation process to correct any deficiencies noted in the EMS system because the commission will provide the person with a list of items to correct to meet the EMS standard. If the person corrects those items, the EMS can still be approved. The on-site evaluation is not the last step in the evaluation process. In addition, the commission will offer the assistance of the SBEA staff to entities requesting assistance on an EMS at any time during their development of an EMS. If there is an area of concern or question, a person can contact this division and receive clarification or assistance on a requirement prior to receiving a formal evaluation. No change has been made in response to this comment.**

Concerning §90.36, ACT requested that the rule specifically provide that the results of either the executive director or third-party auditor on-site evaluation will be public information.

**The commission responds that all documentation summarizing the results of the evaluation will be available for public review under the Public Information Act, Texas Government Code, Chapter 553. In addition, in order for a person to use a third-party auditor, the auditor will be required to submit the same types of verification information that the commission would have gathered if the executive director completed the evaluation. Therefore, no change has been made in response to this comment.**

Concerning §90.36, Roehrig commented that a requirement to use only RAB certified ISO 14001 auditors, for example, would not be appropriate; the rule, although based extensively on ISO 14001, does not require or imply either certification or self-declaration of conformance to ISO 14001. Roehrig suggested that auditors having some formal training, e.g., American Society for Quality (ASQ) Certified Quality Auditors, who have appropriate environmental technical background and experience, including auditing experience, should be qualified. Further, Roehrig suggested that the commission provide prospective third-party auditors with appropriate program-specific training to ensure conformity and consistency with this commission program. Finally, Roehrig stated that since this is not an ISO 14001 program per se, it would probably not be appropriate to use ISO 14001 registrars as certifying bodies; the audit reports should be presented to the commission for review and program approval.

**The commission will not require that the third-party auditor be an ISO-certified auditor; however the commission will set minimum qualifications and criteria which auditors with certain types of experience will already meet through other certifications such as ISO 14001. The commission has**

**set up a mechanism in the rule to allow for the use of an agency contractor or the company's third-party auditor in the EMS evaluation process to help eliminate any redundant efforts on the part of the person requesting incentives. In addition to adding the criteria to new §90.36(j), the commission also will develop guidance on the required qualifications for third-party auditors and solicit comments from regulated entities and the public on what background and experience should be required in order to be approved. The commission also intends to provide training to entities on the evaluation and implementation of EMS through our Events Coordination and Education Section of the SBEA Division. If a registrar meets the appropriate requirements to be an approved third-party auditor, the commission does not see any issue with allowing them to evaluate EMS. It is anticipated that audit reports, in some form, will be submitted to the commission to verify the auditor followed the same standards the executive director would have used to complete the evaluation. No changes have been made in response to these comments.**

Concerning §90.36, Chevron commented that an EMS will most likely contain certain data related to production rates and processes that would be considered business confidential. Further, Chevron stated that by allowing multiple contractors to perform the audits at various companies, information pertaining to innovative features and/or lessons learned in implementing the EMS could be shared in successive audits. At the very least, a contractor whose exclusive function is to conduct these evaluations or works exclusively for the commission should be used for the audits. Chevron also commented that a serious conflict could result if various consulting companies are used, and these companies are implementing and populating database systems for one company, while auditing the systems of other companies. Finally, Chevron commented that sharing of confidential business information could be addressed through confidentiality agreements, but the sharing of the structure of databases, and EMS methodologies, and corporate procedures remains a concern.

**The commission notes that EMS documentation may be confidential. The Public Information Act, Texas Government Code, Chapter 553 governs the submittal of data that a company deems confidential. Therefore, it is the person's responsibility to note if any information provided to the agency is confidential at the time of the submission. That information would then not be shared with other entities based upon an evaluation by the Texas Attorney General. If the commission hires a contractor to complete the evaluations on behalf of the commission, the contractor will be governed by the same constraints as a commission employee. If the person requesting the evaluation chooses to use its own auditor at its own expense, the person would control and manage its auditor. The commission would not have a role in determining the scope of control that a person gives to its contractor regarding confidential information. The commission states that the use of a third-party auditor instead of a review completed by the executive director is the decision of the person. Therefore, it is the person's responsibility to ensure that its third-party auditor does not disclose confidential business information to the agency unless it is appropriately marked. No changes have been made in response to these comments.**

Concerning §90.36, TIP requested that the commission develop appropriate criteria for selection and use of third-party auditors. TIP stated that such auditors vary widely in their approaches and experience, therefore, it is appropriate for the commission to establish a list of approved third-party auditors. LSS commented that the commission needs to define the criteria necessary to be "an approved third-party auditor." LSS further commented that the commission also needs to state who will be responsible for the costs incurred for the on-site EMS evaluations performed either by the executive director or an approved third-party auditor. BP commented that the commission should develop criteria for registrars to petition for an "approval ranking" and that certifications by a TNRCC- approved ISO registrar should be accepted by the commission. BP continued that there is a need to establish a

commission list of approved or ranked ISO 14001 registrars. Finally, BP commented that to differentiate registrars, the commission should consider: 1.) the experience of the auditor in environmental systems as well as practical industry experience, the certification status, the rate of turnover or tenure with specific registrar and contracted registrars versus permanently employed by the registrar; 2.) method of audit review (proportional time spent in manual, document, records review versus field observation and personnel interviews), and 3.) number of Texas or United States sites audited versus number recommended for certification.

**The commission disagrees with the comment from TIP and BP regarding the establishment of a list of approved third-party EMS auditors. It would be inappropriate for this commission to create, monitor, and control such a list. The creation and maintenance of such a list would expose the commission to outside liability from those parties improperly excluded from the list to those parties improperly included on the list. Further, the commission may be exposed to liability to those persons seeking EMS who relied upon the list for damages occasioned by the use of an auditor from the list. The commission was not given the authority to assume such liabilities from the Texas Legislature in the enactment of the EMS statutes. The commission will be developing guidance on the qualifications and auditing protocols that will be required of any third-party auditor used as part of the evaluation process. This guidance will be coordinated through the EMS stakeholder group and will be available for review and comment prior to publication. The commission has added language to §90.36 that gives general criteria that will be used to approve third-party auditors but stresses that the application of the criteria will be detailed in guidance after the guidance has been reviewed and commented on by the regulated community and the public.**

**The commission will consider inclusion of the criteria suggested by BP in the development of the guidance document governing criteria for third-party auditors. The commission will not establish a list of approved third-party auditors because the EMS evaluation process will be completed on a site-specific not company-specific basis. The intent of approving a third-party auditor to complete the evaluation, was to recognize that a person may already be or have engaged the services of an auditor in the past that is reviewing or reviewed its EMS according to standards that meet or exceed the standards contained in these rules. This would allow the commission to recognize that review instead of starting a new evaluation process. The intent of this third-party approval option was not to give blanket authorization to any one company to complete these reviews on behalf of the commission for any site and have them accepted by the commission since the qualifications of auditors and entities can vary significantly from location to location. Therefore, no changes have been made in response to comments.**

**In response to who bears the costs incurred for the on-site EMS evaluation, the statutory language does not provide for any revenue or fee structure; therefore, the corresponding rule language also does not mention any fees required for an evaluation completed by the commission or the commission's authorized agent. If a person chooses to use their own third-party auditor, those costs would be borne by the person. No change has been made in response to these comments.**

Concerning §90.36, Argent commented that they have invested significant effort to develop an on-line compliance system and would want to ensure the system meets commission requirements before investing in further development. Argent requested that a preliminary executive director review be allowed that is not subject to the 60-day timeline. Argent expressed concern that the rule is tailored to Clean Texas businesses that already have a program in place and does not reflect the processes of

smaller companies. Argent suggested that the commission modify the rule language to allow for a preliminary review and a final review.

**The commission responds that the intent of the EMS rule is that it will be implemented and evaluated on a site-specific basis. The commission will not have the resources to review and approve any type of on-line compliance system, software, or database as meeting the standards of this rule separate from actual implementation at a site. These items, as stand-alone products, cannot demonstrate implementation of an EMS at a site. They are tools that can be used at a facility implementing an EMS, but are only one part of the EMS. The SBEA Division of the commission is available at any time prior to requesting a final evaluation of the EMS to assist persons during their EMS development and implementation process if they have questions or concerns as to whether their EMS will meet the standards in this rule. An additional review process with no timeline would more than double the commitment time of commission resources in support of an evaluation procedure. That level of resources is not available. If after the on-site evaluation, the executive director identifies deficiencies in the EMS, the person will be given the opportunity to correct the areas where it might not meet the minimum standards under the current rule language. The commission disagrees that this rule has been tailored to Clean Texas businesses because the requirements of that program are more stringent than the standards contained in §90.34. No change has been made in response to these comments.**

Concerning §90.36(b), the commission changed, throughout the paragraph, the word “their” to the word “the” for clarity.

AECT suggested the following changes for proposed §90.36(b); 1.) the term “Clean Texas Leader” needs to be defined; and 2.) the term “subsection” at the end of the last sentence should be changed to be “subchapter.” BP commented that existing item §90.36(b), concerning Clean Texas Leaders, should be revised to require that the commission or other third-party auditor assess the equivalence of the Clean Texas Leader program with all ISO 14001 or other similar EMS programs. BP stated that as with Responsible CARE, there are significant overlaps for companies who are already doing things right. Further, BP commented that the definition of a sound EMS is best compared with ISO 14001 and that other programs often are collections of requirements that contain some positive attributes. Finally, BP commented that these positive attributes may not necessarily result in a cohesive EMS driving continual improvement.

**The commission responds that Clean Texas Leader Program is an existing agency recognition program managed by the SBEA Division. Any interested person can obtain a copy of the Clean Texas Program requirements on the agency’s web site at *www.cleantexas.org* or by contacting the SBEA Division at (512) 239-3100. Therefore, the commission will not add a definition for “Clean Texas Leader” to this rule.**

**Further, under §90.36(b), a Clean Texas Leader is only exempt from providing evaluation materials to the commission prior to requesting the on-site evaluation of its EMS. Section 90.36(b) does not exempt a Clean Texas Leader from receiving the actual on-site evaluation. The Clean Texas Leader program already requires a person to submit extensive information regarding their EMS program to the commission to be approved in this program. The purpose of this exemption is to reduce the paperwork burden on Clean Texas Leaders by not having them**

**resubmit that same information already on file at the commission. Therefore, no change has been made in response to this comment.**

**Additionally, the commission responds that although ISO 14001 contains a definition for EMS, this rule is modeled after the definition contained in HB 2997. The commission acknowledges that all EMS standards are not equal, but as long as they meet the minimum standards of this rule the commission will not state that one system is better than another system for EMS development. If these other standards do not result in a cohesive EMS driving continual improvement, they would not meet the standards of this rule and would not be approved. Therefore, no change has been made in response to this comment.**

**Finally, the commission notes that the term “subsection” was used incorrectly and that the term should have been “subchapter.” The commission has deleted the term “subsection” in §90.36(b) and replaced it with the term “subchapter.”**

Concerning §90.36(b), ACT questioned the rationale for exempting Clean Texas Leaders from providing the required documentation.

**The commission responds that the Clean Texas Leader is exempt from submitting the EMS documentation because the Clean Texas Leader program already requires the Leader to submit the EMS documentation that will be required under this rule to the commission in order to be evaluated and approved for the Clean Texas Leader Program. The commission does not believe it is an effective use of a person’s resources to resubmit documentation that is already on file with**

**the commission. This existing information is available for public review at any time under the Public Information Act. No change has been made in response to this comment.**

**Concerning §90.36, the commission has added new subsection (c) to clarify that if a request for regulatory incentives is solely to request additional incentives under the EMS that has already been approved by the executive director, the person making the request is exempt from §90.36(a) and lists the alternative information a person must submit. Finally, the commission added a time frame in which the executive director must act regarding additional incentives requested under an EMS previously approved by the executive director. The commission added this subsection to more clearly outline the steps in regulatory incentive approval process.**

Concerning 90.36(c) and (d), TCC commented the 30-day periods in §90.36(c) and (d) seem brief. TCC commented that these 30- and 60-day time frames are too strict for a voluntary program. TCC suggested that the commission should change the time periods in §90.36(c) and (d) to 60 days or longer. TIP also commented that strict, short time frames will only serve to dissuade companies from participating in this voluntary program. And that the commission should endeavor to make program requirements less burdensome. TIP commented that mandatory deadlines should be extended considerably, or eliminated entirely.

**The commission recognizes that the time periods proposed may have been too short to allow an person to properly support the EMS evaluation procedure especially for a voluntary program which will require extensive resources to implement and maintain. Therefore, the commission will extend the 30-day requirements for the commission to respond back to the person in subsections (d) and (e) to 90 days. Proposed (c) and (d) have been relettered to allow for the addition of new**

**(c). The commission would not extend this time period further because the person would be notified in a timely manner, whether its information was complete and also when it could expect the executive director to conduct an on-site evaluation.**

**Concerning §90.36(f), the commission replaced the word “their” with the word “the” for clarity.**

Concerning §90.36(f), TCC commented that the timing in §90.36(f) is unclear. TCC noted that the proposal gives 30 days to respond, but no action is taken unless 60 days have passed. TCC suggested removing the 30-day time period identified in §90.36(f).

**In response to the comment, the commission has rewritten subsection (f) and relettered to subsection (g), to delete the requirement to respond within 30 days to a request for information. Subsection (g) will state that if no response is received within 90 days, the commission will place the EMS evaluation request in an “inactive” status and may require the person to submit additional information to demonstrate compliance with this subchapter.**

Concerning §90.36(g), BP commented that the commission should recognize that under the ISO 14001 standard, minimum surveillance is an annual visit by the registrar. Therefore, the commission should document in the preamble that ISO 14001 facilities exceed the three-year follow-up requirement in §90.36(g). BP stated that the annual registrar attestation of surveillance should be deemed adequate for ISO certified facilities. Finally, BP encouraged the commission to reconsider the appropriateness of allowing a non-ISO 14001 certified site to receive incentives with no review for three years. LSS requested that the commission state that it will accept proof of third-party recertification by a qualified third-party auditor of an organization’s ISO 14001 EMS program, rather than requiring the executive

director to conduct additional follow-up evaluation. LSS stated that typically, an organization that has third-party certification of its EMS has semi-annual follow-up audits by the third-party certifying body. Finally, LSS commented that an additional commission evaluation every three years is not necessary for those parties with third-party certification.

**In response to recognizing ISO 14001 as an equivalent surveillance to a commission review every three years, the commission notes that the purpose of an ISO 14001 surveillance is not the same as the ultimate mission of the commission, which is to ensure the protection of human health and the environment. The ISO 14001 level of surveillance is dependent on the registrar providing the surveillance and can vary in scope and depth and may not include all of the compliance or performance improvement goals of this rule. The commission asserts that all entities should have a review of their EMS by the executive director or an approved third-party auditor to ensure that the site is still operating to the intent of this standard and meeting their obligations. The rule language allows for a process where a person could use its third-party auditor to complete such reviews in lieu of a commission employee or contractor. Since certain incentives granted may already reduce or eliminate the normal inspection process for that site, the review proposed in this rule package is necessary to ensure that the person has abided by their commitments for its' EMS and continues to operate in an environmentally responsible manner. This review serves to verify that the EMS in place is providing compliance assurance and continuous improvement in environmental performance which are stressed strongly in the statutory language. The commission will be preparing guidance on what the three-year review will entail and anticipates that it will be an abbreviated version of the initial evaluation process and focus on achievement of environmental improvement while maintaining compliance assurance. The results of the each evaluation will be documented and submitted to the commission either by commission personnel**

**or the approved third-party auditor (which could be the same auditor providing the ISO 14001 surveillance) to verify on the public record that the EMS still meets the requirements of this rule. The commission disagrees that only an ISO 14001 site should receive regulatory incentives since the requirements of these rules do not specify ISO 14001 as the only standard that can meet the requirements to qualify for regulatory incentives. The commission will ensure that any site approved under this rule will be required to have a routine schedule for evaluation and refinement of its EMS. In addition, the intent of the statutes was not to specify that ISO 14001 is the only means to meet the requirements of these rules and receive regulatory incentives, rather, that a site's EMS must meet the standards contained in these rules. No other changes have been made to the rule language.**

Concerning §90.36(g), TIP commented that this subsection requires a follow-up evaluation at least every three years, however, no description of the process for such an evaluation is provided and that it is unclear whether the executive director will schedule such evaluation, or whether individual facilities are responsible for scheduling. The commission should clarify that it bears the responsibility for scheduling such evaluations. ExxonMobil commented the commission propose that any person who receives regulatory incentives must have a follow-up on-site evaluation every three years with the possibility of using a third-party auditor.

**The commission will prepare guidance on what the three-year review will entail and anticipates that it will be an abbreviated version of the initial evaluation process and also allow the use of a third-party auditor to complete this function. The results of each evaluation will be documented and submitted to the commission either by commission personnel or the approved third-party auditor to verify on the public record that the EMS still meets the requirements of this rule and**

**any deficiencies noted and corrected. In response to these comments, the commission has clarified in proposed §90.36(g), now relettered to §90.36(h), that it is the commission's responsibility to schedule the follow-up review and also that the EMS incentives granted will remain in place until such review is completed by the executive director and will not be rescinded without following the procedures for termination of incentives contained in this rule.**

Concerning §90.36, ExxonMobil asked if the commission will provide a list of approved third-party auditors and if approved will ISO 14001 auditors be included in that group. ExxonMobil suggested that the commission include language providing for both of these suggestions in the final rulemaking.

**The commission disagrees with this comment. It would be inappropriate for the commission to create, monitor, and control such a list. The creation and maintenance of such a list would expose the commission to outside liability from those parties alleging they were improperly excluded from the list to those parties alleging they were improperly included on the list. Further, the commission may be exposed to liability to those persons seeking EMS who relied upon the list, for damages occasioned by the use of an auditor from the list. The commission was not given the authority to assume such liabilities from the Texas Legislature in the enactment of the EMS statutes. No change has been made in response to this comment.**

Concerning §90.36, TCC commented that the wording in the proposed rule states that the executive director or a third-party auditor will conduct a follow-up evaluation on a three-year period. TCC questioned the need for a three-year follow-up audit if the evaluation is required to be completed on-site. TCC stated that the steps that must be taken by a facility after a follow-up evaluation are unclear. TCC asked that if completed by a third party, must the results be submitted to the commission.

Furthermore, TCC commented that the proposed language does not specify the status of the EMS if the executive director fails to complete the follow-up evaluation in a timely manner. TCC suggested that the three-year evaluation be based on document submittal with the option to complete an on-site audit of the EMS. TCC also commented that the language in the rule should indicate that the EMS approval is extended until the executive director completes the evaluation.

**The commission responds that one of the regulatory incentives potentially available to a person under this program is reduced inspection frequency. In order to ensure that the person is meeting its compliance obligations despite a reduction or elimination of inspections, the executive director will want to verify on site that the person is still meeting all of its obligations. In addition, the executive director is required to measure the success of the EMS regulatory incentive program and a review of progress on site will help achieve this requirement.**

**The commission will prepare guidance on what the three-year review will entail and anticipates that it will be an abbreviated version of the initial evaluation process and also allow the use of a third-party auditor to complete this function. The results of the evaluation will require some type of documentation and be submitted to the commission either by commission personnel or the approved third-party auditor to verify on the public record that the EMS still meets the requirements of this rule and any deficiencies are noted and corrected. In response to these comments, the commission has clarified in proposed §90.36(g), now relettered to §90.36(h), that it is the executive director's responsibility to schedule the follow-up review and also that the EMS incentives granted will remain in place until such review is completed by the executive director.**

New §90.38, Request for Modification of State or Federal Regulatory Requirements, is adopted with changes to the proposed text. This adopted section will address the fact that certain types of incentives may only be legally approved through the use of a commission order and in some cases, the involvement of the EPA. In addition, language has been added to clarify that to qualify for federal incentives, the EMS must meet the standards of the EPA NEPT Program. Therefore, this section provides that if a person submits a request for incentives that cannot be approved through any other process but an order, that the executive director will notify the person that he/she must follow the requirements of Subchapter B.

ACT commented that §90.34(3) and §90.38 must be eliminated from the final rules. OPIC commented that the commission goes beyond the regulatory incentives which it is statutorily authorized to implement.

**The commission disagrees with these comments that the proposed rules attempt to go beyond the types of incentives that the legislature authorized. Section 5.127(b) of HB 2997 states: “The incentives may include:....” While HB 2997 proceeds to list four different incentives, the commission believes that it is not limited to those four listed incentives. Specifically, Texas Government Code, §311.016(1) defines the term “may” in the Code Construction Act as creating discretionary authority or granting permission or a power. As such, the commission is vested with certain authority to expand the list of authorized incentives beyond the four listed in HB 2997.**

New §90.40, Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System, is adopted with changes to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6845). This adopted section will provide

persons information on when the executive director would approve regulatory incentives depending on the type of incentive requested. Regulatory incentives specifically authorized by rule may be implemented as soon as the person is notified that the person's EMS meets the requirements of the chapter. Regulatory incentives that do not require an order or are not adopted by rule, will be approved within 60 days of notification that the person's EMS meets the standards of the chapter. In addition, this section details that the executive director shall consider in the decision to allow certain regulatory incentives, the person's compliance history, the efforts made to involve internal and external stakeholders, the person's participation in voluntary programs for environmental improvement, and the steps the person has taken to develop an EMS that exceeds the minimum requirements of this chapter. Finally, the commission added new §90.40(b)(4) to clarify that if the request for regulatory incentives is specifically for additional incentives after the evaluation of the EMS has been completed and the EMS approved, or for reconsideration of granting an incentive that was previously denied, the progress made at the site toward the environmental improvement goals and compliance assurance targets listed in the site's EMS will be considered in granting further regulatory incentives.

Concerning §90.40, Roehrig commented that ISO 14001 requires communication with both internal and external parties about an organization's EMS and environmental activities. However, Roehrig commented that the development of the EMS should be the organization's responsibility, including the decision regarding the extent of involvement of external parties in the development of the EMS. Further, Roehrig continued, once the EMS has been developed, it is appropriate to share the EMS information, as well as the environmental aspect and impact information and other environmental information with external interested parties. Finally, Roehrig commented that the "quality control" mechanism to ensure adequate communication with external interested parties should be the

commission's review and approval of the EMS and that it will be important to an organization for the commission to provide information regarding its minimum requirements in this area.

**The commission acknowledges that ISO 14001 has communication aspects in the standard. The commission agrees that the development of an EMS is an organization's responsibility, including the extent of involvement with external parties. However, in order to receive federal incentives, the EMS must meet the stakeholder involvement and reporting requirements of the EPA's NEPT. Federal incentives requested under this program must have EPA approval. The commission acknowledges it is appropriate to share EMS information with external parties and that most entities completing EMS have some type of program in place to do so. The commission notes that it will not establish minimum requirements in the area of stakeholder involvement because the degree of external involvement required of the EMS will be determined by the type of incentives requested by the person (state or federal) and the site's past compliance history, as well as operational constraints. Sufficiency of the program will be determined on a case-by-case basis with consideration given to the size, resources, compliance history, environmental impact, and other operational factors specific to the site.**

**Concerning §90.40(b), the commission added "where approval by the executive director is required under this subchapter" and deleted "when considering approval of regulatory incentives" to clarify which types of incentives are being referred to in subsection (b).**

Concerning §90.40, ACT commented that the proposed rule language should be clarified because it does not clearly state what incentives will be offered nor does it specify what incentives are included in the proposed rule language. ACT also commented that §90.40(b) lists several "considerations" in the

executive director's "approval" of regulatory incentives, but fails to provide any standards for evaluating those factors. ACT stated that the standards should be spelled out in the final rule to prevent arbitrary decisions. Finally, ACT commented that proposed §90.40(b)(2) is particularly vague, unworkable, and meaningless and that without clarification, the proposed rule fails to provide the public with reasonable notice and opportunity to comment on the rules.

**The commission responds that incentives that will be offered are discussed in §90.34 of this rule, and it is not necessary to repeat those incentives in this section. This section of the rule only covers the executive director action on a requested incentive. The commission notes that for §90.4(b)(1), the standard for evaluating compliance history will be the most currently adopted regulatory standard or policy in place for evaluating compliance history. In regard to stakeholder involvement, §90.4(b)(2) rule language has been modified, and it is noted that it will rely on standards already provided by the EPA under the NEPT and other published standards for external stakeholder involvement, compliance history (as noted previously), consideration of the size, resources, environmental impact and other operational factors of the site. Section 90.38 has been expanded to provide further clarification that for federal incentives, the site must meet the requirements of the EPA's NEPT program for stakeholder involvement. In addition, a new §90.40(b)(4) has been inserted which notes that when a person is requesting additional incentives after the initial evaluation has been completed or is requesting reconsideration of granting a specific incentive that was specifically denied, the executive director will consider the person's demonstration of attainment of environmental goals and targets under the EMS. The commission disagrees that the language in §90.40(b)(2) is "vague, unworkable, and meaningless" with the clarifications to the rule language and discussed previously.**

Concerning §90.40, ExxonMobil commented that it is unclear to many in the regulated community how the commission intends to provide regulatory incentives under proscriptive mandates of the many state and federal rules and regulations under which we operate.

**The commission notes that approval authority for regulatory incentives will depend on the type of incentive requested. Incentives will be approved by several mechanisms, including: 1.) by the executive director for incentives that are not legally required to be adopted by rule, permit amendment, or order; 2.) by rulemaking; 3.) by permit amendment; 4.) by order; 5.) through federal program approval criteria (NEPT, Environmental Council of States (ECOS)/EPA agreements, etc.). Other approval mechanisms may also exist that are not specifically listed in this response to comments. No change has been made to the rule in response to this comment.**

Concerning §90.40, TCC commented that the proposed rule states that the executive director will consider steps taken to exceed the minimum EMS requirements. However, the minimum requirements for an EMS in §90.32 are so broad that it is unclear if or how a person could exceed these minimum requirements.

**The commission responds that §90.38 has been modified per previous comment discussion to clearly state that for federal regulatory incentives, the EMS must meet the additional requirements of EPA's NEPT program which exceeds the minimum standards of HB 2997. In addition, the commission will publish guidance that reviews the minimum standards for EMS as well as components which would indicate an exceedence of the minimum standards to ensure a person can evaluate the sufficiency of its EMS. In addition, the SBEA Division of the commission will be available for direct contact at (512) 239-3100 to provide guidance on this subject.**

**Concerning §90.40(d), the commission modified the first sentence to clarify that the types of incentives referred to in subsection (d) are those that require approval by the executive director under this subchapter. Additionally, for clarity, the commission changed the word “their” to the word “the.” Further, the commission added a sentence to provide that if a person requests regulatory incentives under §90.36(c), the executive director must act on that request within a certain time frame of the submission of the request. The addition of a time frame will allow requestors to know a date certain by which they can expect executive director action on the request. Finally, the commission added “or a rule change” to clarify that rule changes may take longer than 60 days.**

New §90.42, Termination of Regulatory Incentives under an Environmental Management System, is adopted with changes to the proposed text. This adopted section will provide a mechanism for the executive director to terminate regulatory incentives if a person does not maintain their EMS to the standards of the chapter. In addition, it provides a mechanism for a person to terminate incentives if they no longer wish to participate in the EMS regulatory incentive program. In addition, the executive director may specify an appropriate and reasonable transition period to allow the person to come into full compliance with all existing commission requirements, including time to apply for any necessary permits or authorizations. The person can terminate the EMS regulatory incentives by sending notice through certified mail and shall reference the order number, if applicable. The person must be in compliance with all permits, existing statutes, or commission rules at the time of termination.

Concerning §90.42, ACT commented that the language should be modified to allow an affected person, as defined by commission rules, to petition for termination of a regulatory incentive that has been granted in return for use of an EMS.

**The commission responds to the request to expand the petition for termination to include an affected person by noting that existing commission complaint procedures already allow for an affected person to file a complaint against a site with the regional office of the commission. If the complaint is substantiated or the person provides direct evidence to substantiate the claim, the regional office will initiate an investigation and possible enforcement action against the site. If the regional office identifies that the violation also indicates a failure of the EMS, then under this rulemaking, the person will be notified and given the opportunity to correct the deficiency of the EMS. If the deficiency is not corrected as required by the commission, then the commission can revoke the regulatory incentives. The commission does not believe an additional process for revoking regulatory incentives under the EMS program is necessary. Therefore, no change has been made in response to this comment.**

Concerning §90.42, TCC supported a transition time after termination of regulatory incentives to come into full compliance as specified in (b)(4). The transition time should also be reflected in §90.42(a)(2) by adding, “except as otherwise provided in this section.”

**The commission recognizes that the intent of the section is to provide a transition time for a site to come into full compliance. Therefore, the commission will add the clarifying language to §90.42(a)(2) to conform with §90.42(b)(4).**

**Concerning §90.42(b)(4), the commission added “under this section” after the word “terminated” for clarity.**

New §90.44, Motion to Overturn, is adopted without changes to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6845). This section will allow any person who has requested approval of an EMS and whose EMS was denied approval; any person who has been notified by the executive director that the approval for the person’s system has been terminated; any person who has been denied regulatory incentives under §90.40; or any person who has been notified by the executive director that a regulatory incentive has been terminated to file a motion to overturn the executive director’s decision with the Office of the Chief Clerk. Additionally, this section requires the motion to be filed within 23 days after the date the commission mails notice of the executive director’s decision to the person. Finally, this section notes that motions that are filed in a timely fashion are subject to 30 TAC §50.139(e) - (g).

**Concerning §90.44, the commission changed the word “their” to “the person’s” for clarity.**

#### STATUTORY AUTHORITY

The new and amended sections are adopted under TWC, §5.103 and §5.105, which provide the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from HB 2997, 79th Legislature, 2001 and HB 2912, §1.12, 79th Legislature, 2001, which amended TWC by adding §5.127, which requires the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities and TWC, §5.122, which delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen,

transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration, or other authorization, or approval. The adopted rules also relate to the incentives the commission will use to encourage the use of an EMS by those same regulated entities.

**SUBCHAPTER A: PURPOSE, APPLICABILITY, AND ELIGIBILITY**

**§90.1, §90.2**

**§90.1. Purpose.**

The purpose of this chapter is to implement Texas Water Code (TWC), §5.123, Regulatory Flexibility; §5.127, Environmental Management Systems; and §5.131, Environmental Management Systems.

**§90.2. Applicability and Eligibility.**

(a) Subchapter B of this chapter applies to any statute or commission rule regarding the control or abatement of pollution, except that it does not apply to requirements for storing, handling, processing, or disposing of low-level radioactive materials.

(b) Subchapter C of this chapter applies to any site that has an environmental management system (EMS) that meets the minimum standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(c) Except as provided in subsection (e) or (f) of this section, a person whose EMS for a specific site meets the minimum standards of §90.32 of this title may be eligible to receive regulatory incentives under this chapter.

(d) Except as provided in subsection (g) or (h) of this section, any person subject to any statute or commission rule regarding the control or abatement of pollution may be eligible to receive a regulatory flexibility order (RFO).

(e) A person who has been referred to the Texas or United States attorney general and has incurred a judgment against the site for which the person is requesting regulatory incentives, is ineligible to receive regulatory incentives at that site for using an EMS for a period of three years from the date the judgment was final.

(f) A person who has been convicted of willfully or knowingly committing an environmental crime regarding the site for which the person is requesting regulatory incentives is ineligible to receive regulatory incentives for using an EMS for a period of three years from the date of the conviction.

(g) A person who has been referred to the Texas or United States attorney general, and has incurred a judgment, is ineligible to receive an RFO for a period of three years from the date the judgment was final.

(h) A person who has been convicted of willfully or knowingly committing an environmental crime in this state, or any other state, is ineligible to receive an RFO for a period of three years from the date of the conviction.

**SUBCHAPTER C: REGULATORY INCENTIVES FOR USING ENVIRONMENTAL  
MANAGEMENT SYSTEMS**

**§§90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44**

**STATUTORY AUTHORITY**

The new and amended sections are adopted under TWC, §5.103 and §5.105, which provide the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from HB 2997, 79th Legislature, 2001 and HB 2912, §1.12, 79th Legislature, 2001, which amended TWC by adding §5.127, which requires the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities and TWC, §5.122, which delegates to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration, or other authorization, or approval. The adopted rules also relate to the incentives the commission will use to encourage the use of an EMS by those same regulated entities.

**§90.30. Definitions.**

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

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

(2) **Environmental impact** - Any change to the environment, whether adverse or beneficial, wholly or partially resulting from a person's activities, products, or services regarding a specific site.

(3) **Environmental management system** - A documented management system to address applicable environmental regulatory requirements that includes organizational structure, planning activities, responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement.

(4) **Site** - For purposes of this subchapter, any individual location or contiguous location of a person.

#### **§90.32. Minimum Standards for Environmental Management Systems.**

A person may be eligible to receive regulatory incentives under this chapter if the site's environmental management system (EMS), at a minimum:

- (1) includes a written environmental policy directed toward continuous improvement;
- (2) identifies the environmental aspects at the site;
- (3) prioritizes these environmental aspects by the significance of the impacts at the site;

(4) sets the priorities, goals, and targets for continuous improvement in environmental performance and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;

(5) assigns clear responsibility for implementation, training, monitoring, and taking corrective action and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;

(6) requires written documentation of the implementation procedures and the results of so doing; and

(7) requires a written evaluation, on a routine schedule, of the refinement to the EMS to demonstrate how attainment of the priorities, goals, and targets of the system has improved.

**§90.34. Regulatory Incentives.**

Regulatory incentives may include, but are not limited to:

- (1) on-site technical assistance;
- (2) accelerated access to program information;
- (3) modification of state or federal regulatory requirements that do not change emission or discharge limits;

(4) consideration of a person's implementation of an EMS regarding a specific site in scheduling and conducting compliance inspections; and

(5) inclusion of the use on an EMS in a site's compliance history and compliance summaries.

**§90.36. Evaluation of an Environmental Management System by the Executive Director.**

(a) A person must submit written documentation of the person's environmental management system (EMS) for a specific site as part of a written request for an on-site evaluation of that site's EMS to the executive director to be eligible to receive regulatory incentives under this subchapter except as described in subsection (b) of this section. The documentation must include:

(1) the environmental policy statement as required in §90.32(1) of this title (relating to Minimum Standards for Environmental Management Systems);

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

(3) the prioritized environmental aspects for the site as required in §90.32(2) and (3) of this title;

(4) environmental improvement goals and targets for continuous improvement in environmental performance as required in §90.32(4) of this title;

(5) environmental performance indicators that the person measures to demonstrate the effectiveness of the EMS at the site including continuous improvement goals and audit functions;

(6) list of any independent or third-party reviews or certifications that have been completed on the EMS;

(7) main point of contact on the EMS;

(8) date when the requestor would be ready to have the executive director conduct a formal on-site evaluation of the EMS or whether the person will be requesting approval of the person's third-party auditor(s);

(9) a description of the regulatory incentives of interest to the person regarding that site;

(10) any other information requested by the executive director during the evaluation period;

(11) signature of the requestor or the duly authorized agent, that certifies that all information is true, accurate, and complete to the best of that person's knowledge.

(b) A person who qualifies as a Clean Texas Leader is exempt from providing documentation for the EMS regarding the specific site to the executive director if the information the person submitted to qualify to become a Clean Texas Leader is still current. Clean Texas Leaders must still submit a

written request to the executive director for an on-site evaluation of the EMS to be eligible for regulatory incentives under this subchapter .

(c) If the request for regulatory incentives is solely to request additional incentives under the EMS regulatory incentive program for an EMS that has already been approved by the executive director, the person is exempt from the submittal requirements of subsection (a) of this section. The executive director will act on the request in accordance with the time frames in §90.40(d) of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System). The person must instead submit the following information:

(1) a description of the additional regulatory incentives requested for the site;

(2) main point of contact for the EMS; and

(3) any additional information requested by the executive director to evaluate the regulatory incentive request including demonstration of attainment of environmental performance improvement goals or targets.

(d) Within 90 days of submission of the request for evaluation of an EMS, the executive director shall notify the requestor in writing of whether the information provided is complete or whether additional information must be submitted to the executive director.

(e) Within 90 days of submission of the request for an on-site evaluation of an EMS, the executive director will schedule with the requestor an on-site evaluation to be performed by the

executive director or allow the use of the results from an approved third-party auditor that satisfies the evaluation criteria in subsection (j) of this section.

(f) The executive director will notify the person who submitted the request for evaluation of whether the EMS qualifies for regulatory incentives under this subchapter. If the EMS does not qualify for regulatory incentives under this subchapter, the executive director will send the person who requested an evaluation of the EMS a notice detailing where the EMS does not meet the standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(g) If the person makes no formal response within 90 days to the executive director's request regarding areas where the EMS does not meet the standard in §90.32 of this title, the EMS evaluation will be placed on inactive status and the person may be required to submit additional information to demonstrate compliance with this subchapter.

(h) If a person receives regulatory incentives under this subchapter for a specific site, the executive director will schedule a follow-up on-site evaluation by the executive director or authorize the use of an approved third-party auditor to conduct a follow-up on-site evaluation of the EMS at least every three years from the date of the initial evaluation. Regulatory incentives granted prior to the three-year evaluation will remain in effect until such time as the executive director terminates them under §90.42 of this title (relating to Termination of Regulatory Incentives under an Environmental Management System).

(i) Any areas in which the executive director or an approved third-party auditor finds the EMS does not meet the standards in §90.32 of this title during the follow-up evaluation shall be corrected in

accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives may be terminated under §90.42 of this title.

(j) In order for the executive director to approve the use of a third-party auditor(s) to complete the on-site evaluation of the EMS or to recognize the results of past evaluations completed on an EMS as equivalent to the executive director's review process, the following criteria shall be considered by the executive director:

(1) ability of the auditor's EMS review protocols to meet the same requirements as the executive director's audit protocols;

(2) ability of the auditor's documentation of the EMS evaluation process to provide comparable information to the commission that the executive director would collect if completing the same evaluation;

(3) independence of the third-party auditor completing the evaluation;

(4) demonstrated experience of the auditor in EMS programs and environmental regulatory programs and auditing;

(5) method of audit review - time allotted for review of documentation versus field observation and personnel interviews to confirm performance of EMS;

(6) educational background of auditor;

(7) certifications already granted to the auditor by other audit/standards bodies for EMS or auditing methodologies; and

(8) any other information the executive director deems necessary to verify the capability of the auditor to complete the evaluation process as the executive director would have if he completed the evaluation.

**§90.38. Requests for Modification of State or Federal Regulatory Requirements.**

(a) Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval method except a commission order must follow the requirements of Subchapter B of this chapter.

(b) Persons who request modification of federal regulatory requirements under this subchapter must also meet the standards for the EPA's National Environmental Performance Track (NEPT) Program in order to receive federal regulatory incentives.

**§90.40. Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System.**

(a) Executive director action on regulatory incentives authorized by rule is not required. Regulatory incentives authorized by rule may be implemented as soon as the person is notified that its

environmental management system (EMS) meets the requirements of §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(b) Where approval by the executive director is required under this subchapter, the executive director shall consider, among other factors:

(1) the compliance history of the person who submitted the EMS; and

(2) the efforts made by the person to include stakeholder involvement and environmental reporting of the person's EMS internal and external to the site with consideration of the size, resources, compliance history, environmental impact, and other operational factors of the specific site;

(3) the person's participation in voluntary programs for environmental improvement;  
and

(4) if the request is specifically for additional incentives after the evaluation of the EMS has been completed and approved, or for reconsideration of granting an incentive that was previously denied, the progress made at a site toward the environmental improvement goals and compliance assurance targets listed in the site's EMS will be considered in granting further regulatory incentives.

(c) When considering regulatory incentives which modify state or federal requirements, the executive director shall consider the steps the person has taken at the site to develop an EMS that exceeds the minimum requirements in §90.32 of this title.

(d) Where approval by the executive director is required under this subchapter, the executive director shall act within 60 days of notifying the person that the EMS meets the standards outlined in this subchapter. If a request for additional regulatory incentives is submitted under §90.36(c) of this title (relating to Evaluation of an Environmental Management System by the Executive Director), the executive director shall act on the request within 60 days of its submission. These time frames may be extended at the request of the person or the executive director to allow additional approval time for incentives that require approval by the EPA for implementation or adoption by rule.

**§90.42. Termination of Regulatory Incentives under an Environmental Management System.**

(a) Termination by the recipient.

(1) A person who receives regulatory incentives for a site through the use of an environmental management system (EMS) that meets the standards in this subchapter may terminate the regulatory incentives at any time by sending a notice of termination to the executive director by certified mail.

(2) Once a regulatory incentive is terminated, the site for which a person has requested incentives must be in compliance with all permits, existing statutes, or commission rules affected by the regulatory incentives granted at the time of termination except as otherwise provided in this section.

(3) If the regulatory incentives approved involve the use of an order, the person who received the regulatory incentives shall comply with the applicable provisions of §90.20 of this title (relating to Termination).

(b) Termination by the executive director.

(1) Noncompliance with the terms and conditions of the regulatory incentives, Texas Water Code, §5.127 or §5.131, or this chapter, may result in the regulatory incentives being terminated.

(2) If a person who is approved to use regulatory incentives for a specific site under this subchapter is found by the executive director or an approved third-party auditor to no longer meet the requirements of this subchapter, the executive director shall notify the person in writing of the deficiencies found.

(3) Any areas in which the executive director or an approved third-party auditor finds the EMS does not meet the standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems) during the follow-up evaluation shall be corrected in accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives will be terminated under this section.

(4) In the event regulatory incentives are terminated under this section, the executive director may specify an appropriate and reasonable transition period to allow the site previously

operating under regulatory incentives to come into full compliance with all existing commission requirements, including time to apply for any necessary permits or other authorizations.

**§90.44. Motion to Overturn.**

Any person who has requested approval of an environmental management system (EMS) and whose EMS was denied approval, any person who has been notified by the executive director that the approval for the person's system has been terminated, any person who has been denied regulatory incentives that the executive director is authorized to approve under §90.40 of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System), or who has been notified by the executive director that a regulatory incentive has been terminated, may file with the chief clerk a motion to overturn the executive director's decision. A motion must be filed within 23 days after the date the commission mails notice of the executive director's decision to the person. Timely motions are subject to §50.139(e) - (g) of this title (relating to Motion to Overturn).