

The Texas Natural Resource Conservation Commission proposes amendments to §90.1, Purpose; and §90.2, Applicability and Eligibility. The commission also proposes 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.

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

The 77th Legislature, 2001, passed House Bill (HB) 2997 which amended Texas Water Code (TWC), §5.127, Environmental Management Systems, to be read in conjunction with HB 2912, §1.12, which amended TWC, §5.131 to encourage the use of environmental management systems (EMS) by the regulated community. This legislation is based on the E\*Texas Report from the Comptroller's Office, December 2000, which suggested that the use of an EMS would result in enhanced compliance and continuous improvement in environmental performance for entities implementing these systems. In addition, industry organizations supported the legislation that created the requirement for the commission to develop regulatory incentives to encourage the use of EMS. 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.

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 will pursue discussion of these issues with EPA. Additionally, the proposed 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 require EPA approval on a case-by-case basis. The commission is specifically requesting comments on this issue.

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 affected public should be involved in the EMS

development and approval process. The commission is specifically requesting comments on these items.

The legislation requires that the commission have these rules adopted by December 1, 2001.

#### SECTION BY SECTION DISCUSSION

The commission proposes to change 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.

##### *Subchapter A: Purpose, Applicability, and Eligibility*

Section 90.1, Purpose, clarifies 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, outlines the applicability and eligibility requirements to qualify for regulatory incentives for using an EMS and for regulatory flexibility orders (RFOs). This section provides that any person is eligible to receive regulatory incentives, except a person who has been referred to the Texas or United States attorney general for an environmental violation and incurred a judgment is not eligible for a period of three years from the date of the judgement. Additionally, a person is ineligible to receive regulatory incentives if that person has been convicted of willfully or knowingly committing an environmental crime in this or any other state for a period of three years from the date of the conviction.

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

The commission proposes to create a 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 proposed to provide the meanings of the terms, environmental aspect, environmental impact, and environmental management system 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 for Standardization's ANSI/ISO 14001 standard for "Environmental management systems - Specification with guidance for use," 1996.

New §90.32, Minimum Standards for Environmental Management Systems, is proposed to provide the minimum standards for an EMS that a person must follow in order to request regulatory incentives. The minimum standards are taken from HB 2997 without any additions or deletions. The standards include: adoption of a written environment policy governing performance improvement and compliance assurance; identification and prioritization of the environmental aspects and impacts of the person'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/targets set as well as improvement of the EMS itself.

New §90.34, Regulatory Incentives, is proposed to 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, adjustment to the methods or frequency for scheduling and conducting compliance inspections, and inclusion of the use of an EMS in a person's compliance history and compliance summaries. While the basic language was taken from HB 2997, the proposed section was expanded to provide further clarification on what types of incentives could be requested.

New §90.36, Evaluation of an Environmental Management System by the Executive Director, is proposed to provide details on how the executive director will evaluate whether the EMS meets the standards of this chapter. 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 proposed in this rulemaking package.

New §90.38, Request for Modification of State or Federal Regulatory Requirements, is proposed to address the fact that certain types of incentives may only be legally approved through the use of the commission's order process and in some cases, the involvement of the EPA. 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 they must follow the requirements of Subchapter B.

New §90.40, Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System, will be proposed to 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 their 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 the local community and achieve local support, 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.

New §90.42, Termination of Regulatory Incentives under an Environmental Management System, is proposed to 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.

New §90.44, Motion to Overturn, proposes to 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 his 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).

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined for the first five-year period the proposed rules are in effect, there will be fiscal implications, which may be significant, for units of state and local government that voluntarily decide to participate in the provisions of this rulemaking. There will be no fiscal implications to other units of state and local government who chose not to participate in the program established by this proposed rulemaking. The cost to implement an EMS program is anticipated to range from no cost to approximately \$89,000,

depending on business practices and procedures of the organization implementing the new program.

The proposed rulemaking is intended to implement certain provisions of both HB 2912 (an act relating to the continuation and functions of the commission; providing penalties) and HB 2997 (an act relating to the implementation by the commission of a program to encourage the use of an EMS, 77th Legislature, 2001). These bills require the commission to develop and implement a program that provides regulatory incentives to encourage the use of an EMS by regulated entities, including state agencies and local governments. The bill requires the commission to integrate the use of an EMS into its regulatory programs, help develop EMS programs for small business and local governments, and establish environmental performance indicators to measure the effectiveness of the program's performance. Additionally, the bills require that the commission consider the use of EMS in an applicant's compliance history.

An EMS is a documented management system that contains all 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.

This rulemaking does not require units of state and local government to adopt the use of an EMS; therefore, there will be no additional costs to comply with these proposed rules unless a unit of state or local government voluntarily decide to participate in the EMS program. The cost to implement an EMS varies widely and is site specific. According to a report published by NSF International titled, "*Environmental Management System Demonstration Project*," 1996, the cost to implement an EMS

program at one large business referenced in the report was approximately \$89,000 per site. The major cost of implementing an EMS was listed as staff salaries. If an organization chooses to have an outside consultant perform a large portion of the work, consulting fees might increase this cost estimate.

Implementation costs will vary significantly depending on the facility/site and the amount of internal personnel allocated to implement the program. Other businesses listed in the report did not report additional costs, because implementation of an EMS program was considered part of doing business.

#### PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with this rulemaking will be a potential increase in environmental regulatory compliance.

The proposed rulemaking is intended to implement certain provisions of HB 2912 and HB 2997, which require the commission to implement a program that provides regulatory incentives to encourage the use of an EMS by regulated entities, state agencies, and local governments.

An EMS is a documented management system that addresses 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 and compliance assurance.

This rulemaking does not require individuals and businesses to adopt the use of an EMS; therefore,

there will be no additional costs to comply with these proposed rules unless an affected person voluntarily decides to participate in the EMS program. The cost to implement an EMS varies widely and is site specific. According to a report published by NSF International titled, "*Environmental Management System Demonstration Project*," 1996, the cost to implement an EMS program at one large business referenced in the report was approximately \$89,000 per site. The major cost of implementing an EMS was listed as staff salaries. If an organization chooses to have an outside consultant perform a large portion of the work, consulting fees might increase this cost estimate. Implementation costs will vary significantly depending on the facility/site and the amount of internal personnel allocated to implement the program. Other businesses listed in the report did not report additional costs, because implementation of an EMS program was considered part of doing business.

#### SMALL AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts to any small or micro-business as a result of the proposed rules, unless an affected person decides to implement the voluntary provisions of this rulemaking. The proposed rules are intended to implement certain provisions of HB 2912 and HB 2997, which require the commission to implement a program that provides regulatory incentives to encourage the use of an EMS by regulated entities, state agencies, and local governments.

An EMS is a documented management system that addresses 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.

This rulemaking does not require small or micro-businesses to adopt the use of an EMS; therefore, there will be no additional costs to comply with these proposed rules unless an affected person voluntarily decides to participate in the EMS program. The cost to implement an EMS varies widely and is site specific. According to a report published by NSF International titled, "*Environmental Management System Demonstration Project*," 1996, the cost to implement an EMS program at one large business referenced in the report was approximately \$89,000 per site. The major cost of implementing an EMS was listed as staff salaries. If an organization chooses to have an outside consultant perform a large portion of the work, consulting fees might increase this cost estimate. Implementation costs will vary significantly depending on the facility/site and the amount of internal personnel allocated to implement the program. Other businesses listed in the report did not report additional costs, because implementation of an EMS program was considered part of doing business.

The following is an analysis of the potential cost savings per employee for small or micro-businesses affected by the proposed rules. Small and micro-business are defined as having fewer than 100 or 20 employees respectively. A small business that decides to implement an EMS program would incur costs up to approximately \$89,000 per site or \$890 per employee. A micro-business that decides to implement an EMS program would incur costs of approximately \$89,000 per site or \$4,450 per employee. The costs used in this example were for a large business. Actual implementation costs for small or micro-businesses are anticipated to be less than the \$89,000 used in this cost per employee analysis. The overall costs to implement an EMS would vary widely between businesses and would depend largely on the amount of internal resources available to implement the program.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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.

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 rule is to implement HB 2997 and HB 2912, §1.12, which require the commission to adopt procedural rules establishing a regulatory process that encourage the use of an EMS by regulated entities, these proposed 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 proposed rules do not exceed a federal standard, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, the proposed 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 invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether they constitute a takings under Texas Government Code, Chapter 2007. The following is a summary of that evaluation and preliminary assessment. The commission’s preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rules because this is an action

that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). Furthermore, the purpose of this rulemaking is to implement HB 2997 and HB 2912, §1.12, which require the commission to adopt procedural rules establishing a regulatory process that encourages the use of EMS by regulated entities. Promulgation and enforcement of these proposed rules will constitute neither a statutory nor a constitutional taking of private real property. There are no burdens imposed on private real property under this rulemaking as the proposed 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 proposed rulemaking and found that the proposed 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 proposed rules are not subject to the Texas Coastal Management Program.

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held September 27, 2001, at 10:00 a.m. in Room 131E of TNRCC Building C, located at 12100 Park 35 Circle, Austin. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-040-090-AD. Comments must be received by 5:00 p.m., October 8, 2001. For further information, please contact Kathy Ramirez, Regulation Development Section, at (512) 239-6757.

#### STATUTORY AUTHORITY

The amendments are proposed 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 TWC and other laws of this state. Specific statutory authorization is derived from HB 2997 and HB 2912, §1.12, 77th Legislature, 2001, which amended TWC by adding §5.127, Environmental Management Systems, and §5.131, Environmental Management Systems, which require the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities.

The proposed amendments implement TWC, §5.127, Environmental Management Systems, and §5.131, Environmental Management Systems.

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

### **§90.1, §90.2**

#### **§90.1. Purpose.**

The purpose of this chapter is to implement [the commission's authority under] Texas Water Code (TWC), §5.123, Regulatory Flexibility; §5.127, Environmental Management Systems; and §5.131, Environmental Management Systems. [to provide regulatory flexibility to an applicant who proposes an alternative method or alternative standard to control or abate pollution.]

#### **§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 person whose environmental management system (EMS) 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 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 (e) or (f) 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 judgement, is ineligible to receive regulatory incentives for using an EMS or an RFO for a period of three years from the date the judgement was final.

(f) 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 regulatory incentives for using an EMS or for an RFO for a period of three years from the date of the conviction.

[(a) 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) 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, except that:]

[(1) a person who has been referred to the Texas or United States attorney general, and has incurred a judgment, is ineligible for a period of three years from the date the judgment was final;]

[(2) a person who has been convicted of willfully or knowingly committing an environmental crime in this state or any other state is ineligible 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 sections are proposed 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 TWC and other laws of this state. Specific statutory authorization is derived from HB 2997 and HB 2912, §1.12, 77th Legislature, 2001, which amended TWC by adding §5.127, Environmental Management Systems, and §5.131, Environmental Management Systems, which require the commission to promulgate rules that establish a regulatory process that encourages the use of an EMS by regulated entities.

The proposed new sections implement TWC, §5.127, Environmental Management Systems, and §5.131, Environmental Management Systems.

**§90.30. Definitions.**

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

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

(c) **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.

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

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

(1) includes a written environmental policy governing performance improvement and compliance assurance;

(2) identifies and prioritizes the environmental aspects and impacts of the person's activities;

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

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

permit conditions;

(5) requires written documentation of the implementation of the EMS and the results of so doing; and

(6) 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) adjustment to the methods or frequency for scheduling and conducting compliance inspections; and

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

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

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

(b) A person who qualifies as a Clean Texas Leader is exempt from providing documentation for their EMS 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 their EMS to be eligible for regulatory incentives under this subsection.

(c) Within 30 days of submission of the request for evaluation of an EMS, the executive director shall notify in writing the person who submitted the request of whether the information provided is complete or that additional information must be submitted to the executive director.

(d) Within 30 days of submission of the request for an on-site evaluation of the EMS, the executive director will schedule with the person who has submitted the request an on-site evaluation to be performed by the executive director or an approved third-party auditor.

(e) 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 their 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).

(f) The person has 30 days from the date the executive director mailed the notice to provide in writing the additional information the executive director has requested. If the person does not respond to the executive director's request in 60 days, the EMS is considered withdrawn from consideration.

(g) If a person receives regulatory incentives under this subchapter, the executive director or an approved third-party auditor will conduct a follow-up on-site evaluation of the EMS at least every three years from the date of the initial evaluation.

(h) 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 (relating to Termination of Regulatory Incentives under an Environmental Management System).

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

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.

**§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) When considering approval of regulatory incentives, the executive director shall consider, among other factors:

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

(2) the efforts made by the person who submitted the EMS to involve the person's community and achieve community support; and

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

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

(d) The executive director shall act on regulatory incentives not included in subsection (a) of this section or subject to §90.38 of this title (relating to Requests for Modification of State or Federal Regulatory Requirements) within 60 days of notifying the person that their EMS meets the standards outlined in this subchapter. This time frame 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.

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

(a) Termination by the recipient.

(1) A person who receives regulatory incentives 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 person who received the regulatory incentives must be in compliance with all permits, existing statutes, or commission rules affected by the

regulatory incentives granted at the time of termination.

(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 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, the executive director may specify an appropriate and reasonable transition period to allow the person 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 their 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).