

SUBCHAPTER A: INCENTIVE PROGRAMS
§§90.1 - 90.3, 90.10 - 90.16, 90.20 - 90.24, 90.30, 90.31
Effective July 19, 2012

§90.1. Purpose.

The purpose of this chapter is to establish rules provided for in Texas Water Code (TWC), §5.755, relating to incentives for enhanced environmental performance under a Strategically Directed Regulatory Structure; TWC, §5.758, relating to commission issuance of Regulatory Flexibility Orders for an exemption for an applicant who proposes an alternative method or alternative standard to control or abate pollution; and TWC, §5.127, relating to Environmental Management Systems.

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§90.2. Applicability.

(a) The provisions of this subchapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26, 27, and 32; and Texas Health and Safety Code (THSC), Chapters 361, 375, 382, and 401. The applicable regulatory activities include, but are not limited to:

(1) discharges to surface water and groundwater regulated under TWC, Chapter 26;

(2) petroleum storage tanks regulated under TWC, Chapter 26;

(3) disposal of waste by underground injection regulated under TWC, Chapter 27;

(4) systems for subsurface area drip disposal regulated under TWC, Chapter 32;

(5) management and disposal of industrial solid waste, hazardous waste, or municipal solid waste (including composting, sewage sludge, and water treatment sludge) regulated under THSC, Chapter 361;

(6) removal of convenience switches and the convenience switch recovery program under THSC, Chapter 375;

(7) emission sources of air contaminants regulated under THSC, Chapter 382; and

(8) management and disposal of radioactive substances regulated under THSC, Chapter 401.

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

(c) Regulatory Flexibility Orders shall not authorize exemptions to statutes or regulations for storing, handling, processing, or disposing of low-level radioactive materials.

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§90.3. Definitions.

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

(1) Applicable legal requirement--A state or federal environmental law, regulation, permit, order, consent decree, or other requirement.

(2) Certified--For purposes of this chapter, a documented third party decision that the environmental management system meets the minimum standards of a recognized environmental management system standard.

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

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

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

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

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

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

(5) 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.

(6) 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.

(7) Independent assessor--A person or team of people, at least one of whom has appropriate professional credentials and experience to review an environmental management system. The assessor(s) must not have contributed to the development of the system being assessed.

(8) Innovative program--

(A) a program developed by the commission under Texas Water Code (TWC), Chapter 5, Subchapter Q, Performance Based Regulation; TWC, Chapter 26 or 27; or Texas Health and Safety Code (THSC), Chapters 361, 382, or 401; that provides incentives to a person in return for benefits to the environment that exceed benefits that would result from compliance with applicable legal requirements;

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

(C) the regulatory flexibility program described in §90.20 of this title (relating to Regulatory Flexibility);

(D) the Environmental Management Systems program described in §90.30 of this title (relating to Minimum Standards for Environmental Management Systems);

(E) a program established under THSC, §382.401, and defined in Chapter 101, Subchapter C of this title (relating to Voluntary Supplemental Leak Detection Program), to encourage the use of alternative technology for detecting leaks or emissions of air contaminants; or

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

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

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

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

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

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

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

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

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§90.10. Strategically Directed Regulatory Structure.

The Strategically Directed Regulatory Structure establishes a framework for innovative programs to provide for enhanced environmental performance and to reward compliance performance.

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§90.11. Eligibility.

(a) Except as provided in subsection (b) or (c) of this section, a person whose application to participate in an innovative program or whose application for an incentive meets the minimum standards of §90.13 of this title (relating to Application for Incentives) shall be eligible to receive regulatory incentives under this chapter.

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

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

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

(1) regulatory flexibility under §90.20 of this title (relating to Regulatory Flexibility);

(2) incentives for using an environmental management system under §90.30 of this title (relating to Minimum Standards for Environmental Management Systems);

(3) programs authorized as innovative by the executive director;

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

(5) other programs set forth under this subchapter.

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

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§90.12. Incentives.

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

(1) a person's and/or site's compliance history; and

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

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

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

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

(2) technical assistance provided by the agency;

(3) accelerated access to agency information;

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

(5) flexibility in regulatory processes;

(6) public recognition; and

(7) inclusion of the use of an Environmental Management System in a site's compliance history and compliance summaries.

(d) An innovative program offered as part of the strategically directed regulatory structure must be consistent with other law and any requirement necessary to maintain

federal program authorization, including the provisions of any agreements between the agency and the federal government.

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§90.13. Application for Incentives.

(a) A person who applies to the executive director for a regulatory flexibility project or to use an environmental management system under this chapter, or for a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or another program designated as innovative under Texas Water Code (TWC), §5.752(2), does not need to submit another application under this section's requirements, unless the person requests an additional incentive not available to the person in the program in which the person is already participating or applying to participate. Compliance with this requirement does not relieve the person from complying with all other applicable legal requirements.

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

(1) If the application is deficient, the notification shall specify the deficiencies, and allow the person 30 days from the date of the notice to provide the requested information. If the person does not submit an adequate response within the allotted time, the application will be returned without further action by the executive director.

(2) Additional technical information may be requested within 60 days after issuance of an administrative completeness letter. If the person does not provide the requested technical information within 30 days after the date of the request, the application will be returned without further action by the executive director.

(3) If an application is returned under paragraph (1) or (2) of this subsection, the person may file a new application at any time.

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

(c) In making a determination of eligibility, the executive director shall review the application submitted under this section, as well as the person's and site's compliance history.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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§90.14. Review by Executive Director Required.

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

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

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

(3) documentation of any public participation component; and

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

(b) If the executive director finds that a person's voluntary environmental measures no longer provide for enhanced environmental performance, the executive director shall begin termination proceedings under §90.15 of this title (relating to Termination of Regulatory Incentives Under the Strategically Directed Regulatory Structure).

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

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

(a) Termination by the recipient.

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

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

(b) Termination by the executive director.

(1) Noncompliance with the terms and conditions of regulatory incentives offered under the Strategically Directed Regulatory Structure, a Regulatory Flexibility Order, an environmental management system, or this chapter, may result in termination of the regulatory incentives.

(2) The executive director may also terminate incentives under this chapter if the executive director finds that the person or site receiving incentives is not complying with other applicable legal requirements.

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

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

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

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§90.16. Public Notice, Comment, and Hearing.

(a) Applicants for participation in innovative programs shall follow the requirements under subsections (b) and (c) of this section, unless the applicant is only requesting additional incentives under this chapter.

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

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

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

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

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

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

(2) a brief description of the incentive(s) or regulatory flexibility requested;

(3) the name and address of the applicant and, if different, the location of the facility for which incentives or regulatory flexibility under this chapter are sought;

(4) the name and address of the agency;

(5) the name, address, and telephone number of an agency contact person from whom interested persons may obtain further information;

(6) a brief description of the public comment procedures and the time and place of any public meeting or public hearing; and

(7) the date by which comments or requests for hearing must be received by the executive director.

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§90.20. Regulatory Flexibility.

(a) The commission by issuance of a Regulatory Flexibility Order may exempt an applicant from a requirement of a statute or commission rule regarding the control or abatement of pollution if the applicant proposes to control or abate pollution by an alternative method or by applying an alternative standard.

(b) A violation of an order issued under this section is punishable as if it were a violation of the statute or rule from which the order provides an exemption.

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§90.21. Application for a Regulatory Flexibility Order.

(a) An application for a Regulatory Flexibility Order (RFO) must be submitted to the executive director.

(b) The application must include:

(1) a narrative summary of the proposal, including the specific statutes or commission rules for which an exemption is being sought;

(2) a detailed explanation, including a demonstration as appropriate, that the proposed alternative is:

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

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

(3) evidence that the alternative the applicant proposes is as protective of the environment and the public health as the method or standard prescribed by the statute or commission rule that would otherwise apply;

(4) an implementation schedule which includes a proposal for monitoring, recordkeeping, and/or reporting, where appropriate, of environmental performance and compliance under the RFO;

(5) an identification, if applicable, of any proposed transfers of pollutants between media;

(6) a description of efforts made or proposed to involve the local community and to achieve local community support;

(7) an application fee of \$250. The executive director may determine that the application for an RFO constitutes a significant and complex application for which the recovery of all reasonable costs for review and approval by the commission is appropriate. Upon notice to the applicant of such finding, the applicant shall execute a cost recovery agreement in a form approved by the executive director. Recoverable costs include costs incurred by the commission for administrative review, technical review, and hearings associated with the application; and

(8) any other information requested from the applicant by the executive director during the application review period.

(c) The application must be signed by the applicant or its duly authorized agent and must certify that all information is accurate and complete.

(d) The applicant shall submit an original and two copies of the signed application to the executive director for review, and shall send one additional copy to the commission's regional office for the region in which the facility is located.

(e) The applicant shall comply with public notice, comment, and hearing requirements in §90.16 of this title (relating to Public Notice, Comment, and Hearing).

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§90.22. Commission Action on an Application.

(a) Commission action on an application under this chapter shall comply with the provisions set forth in Chapter 50, Subchapter B of this title (relating to Action by the Commission), as applicable.

(b) The commission may consider in its decision, among other factors, the applicant's compliance history and efforts made to involve the local community and achieve local community support.

(c) The commission's order must provide a description of the alternative method or standard and condition the exemption on compliance with the method or standard as the order prescribes.

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§90.23. Amendment/Renewal.

(a) An application for amendment or renewal of an Regulatory Flexibility Order (RFO) may be filed in the same manner as an original application under this subchapter.

(b) If renewal procedures have been initiated at least 180 days prior to the RFO expiration date, the existing RFO will remain in effect, and will not expire until commission action on the timely application for renewal is final.

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§90.24. Termination.

(a) By the recipient.

(1) A recipient of an Regulatory Flexibility Order (RFO) may terminate the RFO at any time by sending a notice of termination to the executive director by certified mail.

(2) The recipient must be in compliance with all applicable statutes or commission rules at the time of termination.

(b) By the executive director.

(1) Noncompliance with the terms and conditions of an RFO, or any provision of this chapter, may result in the executive director's termination of an RFO after the executive director provides written notice of the noncompliance to the recipient and the recipient is given an opportunity of not less than 30 days from the date the notice was mailed to show cause why the RFO should not be terminated. Procedures for requesting a show cause hearing before the commission shall be included in the executive director's written notice.

(2) In the event an RFO is terminated, the executive director may specify an appropriate and reasonable transition period to allow the recipient to come into full compliance with all applicable commission requirements, including time to apply for any necessary agency permits or other authorizations.

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§90.30. 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):

(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;

(7) requires evaluation and refinement of the EMS to demonstrate improved attainment of the priorities, goals, and targets of the system; and

(8) has been certified to a recognized environmental management system standard by an independent third party.

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§90.31. Review of Incentive Applications for Environmental Management Systems.

(a) A person must submit written documentation of the Environmental Management System (EMS) for a specific site as part of a written request for approval of the site's EMS to the executive director to be eligible to receive regulatory incentives under this chapter. The documentation must include:

(1) the environmental policy statement as required in §90.30(1) of this title (relating to Minimum Standards for Environmental Management Systems);

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

(3) the prioritized environmental aspects for the site as required in §90.30(2) and (3) of this title;

(4) environmental improvement goals and targets for continuous improvement in environmental performance as required in §90.30(4) of this title;

(5) list of any independent certifications that have been completed on the EMS;

(6) main point of contact on the EMS;

(7) any other information requested by the executive director during the review period; and

(8) signature of the requestor or the duly authorized agent, that certifies that all information is accurate, and complete.

(b) Requests for incentives under this section do not require public notice, comment, and hearing under §90.16 of this title (relating to Public Notice, Comment, and Hearing).

(c) The executive director will notify the person who submitted the request for review of whether the EMS qualifies for regulatory incentives under this chapter. If the EMS does not qualify for regulatory incentives under this chapter, the executive director will send the person who requested a review of the EMS a notice detailing where the EMS does not meet the standards in §90.30 of this title.

(d) If a person receives regulatory incentives under this section for a specific site, the executive director will require an additional independent reassessment of the EMS at least every three years from the date of the initial assessment. Results of this reassessment must be provided to the executive director.

(e) The executive director will maintain a list of incentives available to a person whose EMS is eligible to receive regulatory incentives under this chapter.

(f) Regulatory incentives provided under this section may not be claimed or utilized without approval from the executive director.

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