

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners' Agenda

Date: November 2, 2011

Thru: *RHS* Richard A. Hyde, P.E., Deputy Director, Office of Compliance and Enforcement

From: *BHS* Bryan Sinclair, Director, Enforcement Division

Subject: Implementation of HB 2694 – Adoption of General Enforcement Policies

Issue Consideration of rulemaking regarding revision to 30 Texas Administrative Code Ch. 70

Background and Current Practice

HB 2694 of the 82nd Legislature requires the Commission to adopt a general enforcement policy that describes the commission's approach to enforcement. Some of the Commission's general enforcement policies currently exist in 30 Texas Administrative Code Ch. 70.

The Executive Director (ED) is before the Commission today to discuss recommendations on what to include in the rule proposal which will be presented for the Commission's approval at the March 28, 2012 agenda.

The ED received input on ten questions posed to the Commission at the July 5, 2011 Work Session and the public through a August 2, 2011 stakeholder meeting and subsequent public comment period. The ED took that input into consideration when drafting recommendations to each of the questions.

Question 1 - Should Ch. 70 be revised to include a general philosophy on why the Commission assesses administrative penalties?

Pro: Establishing a general philosophy of enforcement in rule gives the TCEQ an opportunity to clearly outline the purpose of enforcement, to reference policies and statutory requirements related to enforcement and to include key definitions of terms commonly used in enforcement documents.

Con: Since there was unanimous support for including a general philosophy from the comments that were received, the ED does not see any cons to this question.

ED Recommendation: The ED supports establishing a general philosophy of enforcement.

Question 2 – Should Ch. 70 include criteria which will describe when a Corrective Action Order (i.e., no-penalty order) is warranted and should a Corrective Action Order be included in compliance history?

Pro: Including criteria for a Corrective Action Order in rule will provide for transparency to the public and other regulatory agencies on how Corrective Action Orders are used in TCEQ enforcement actions.

Con: The TCEQ does not currently have defined criteria on issuing Corrective Action Orders, thus, the merits of the criteria will not have been proven through use. Putting the unproven criteria into rule could hinder the necessary flexibility to improve the criteria over time as needed.

ED Recommendation: The ED recommends establishing Corrective Action Order criteria in a similar method as used for Findings Orders and posting it on the external website. This provides for transparency but does not lock the criteria into a rule until it has been tested. The ED does not recommend including a Corrective Action Order in compliance history since it was not included in the Sunset legislation.

Question 3 - Should Ch. 70 include criteria which will explain when a Findings Order is warranted?

Pro: The Findings Order criteria are currently located on the external website as a stand-alone enforcement policy. Including the criteria in the General Enforcement Policy rule will be a good way to organize policies into one location to improve transparency to the public.

Con: No cons were identified for this question.

ED Recommendation: The ED recommends including the Findings Order criteria in rule to encourage transparency in agency policies.

Question 4 – Should Ch. 70 include criteria which will describe circumstances whereby violations may be referred to the Attorney General for civil penalty?

Pro: Including the criteria for referring violations to the Attorney General in the General Enforcement Policy Rule will provide a good opportunity to improve transparency in how the TCEQ determines which violations get referred to the AG and what could be subject to an AG referral. Currently, this criteria is located in internal guidance policies and is not fully accessible to the public.

Con: No cons were identified for this question.

ED Recommendation: The ED recommends including criteria for Attorney General referrals into rule to encourage transparency in agency policies.

Question 5 – Should Ch. 70 include a description of how economic benefit is considered in assessing penalties?

Pro: While not all of the commenters supported putting economic benefit into rule, many did and they believed it would add clarity to the current economic benefit guidelines found in the Penalty Policy.

Con: Including economic benefit policies in rule could create redundancy and possibly conflict between the rule and the Penalty Policy if the economic benefit policies in the Penalty Policy were to be revised.

ED Recommendation: The ED does not recommend that economic benefit policies be included in the General Enforcement Policy Rule. They are already clearly defined in

the Penalty Policy which is readily available to the public and has been subject to recent public comment and approval.

Question 6 – Should Ch. 70 include how culpability is evaluated?

Pro: While not all of the commenters supported putting culpability into rule, some did and they believed it would add clarity to the current culpability policies found in the Penalty Policy.

Con: Including culpability policies in rule could create redundancy and possibly conflict between the rule and the Penalty Policy.

ED Recommendation: The ED does not recommend that culpability policies be included in the General Enforcement Policy Rule. They are already clearly defined in the Penalty Policy which is readily available to the public and has been subject to recent public comment and approval.

Question 7 – Should Ch. 70 include how good faith efforts to comply are evaluated?

Pro: While not all of the commenters supported putting good faith efforts to comply policies into rule, some did and they believed it would add clarity to the current good faith efforts to comply policies found in the Penalty Policy.

Con: Including good faith efforts to comply policies in rule could create redundancy and possibly conflict between the rule and the Penalty Policy if the good faith efforts to comply policies in the Penalty Policy were to be revised.

ED Recommendation: The ED does not recommend that good faith efforts to comply policies be included in the General Enforcement Policy Rule. They are already clearly defined in the Penalty Policy which is readily available to the public and has been subject to recent public comment and approval.

Question 8 – Should the ED include how compliance history is used to assess a penalty?

Pro: Including the method of assessing penalties through the use of compliance history in the General Enforcement Policy rule could provide additional transparency in how compliance history is used for penalty purposes.

Con: Including compliance history in rule could create conflict between the General Enforcement Policy rule being proposed for 30 TAC ch. 70 and the Compliance History rule in 30 TAC ch. 60.

ED Recommendation: The ED does not recommend that compliance history be included in the General Enforcement Policy Rule. It is already clearly defined in the Compliance History rule which can be found in 30 TAC ch. 60. In addition, the method used to assess penalties using a respondents' compliance history is also clearly outlined in the Penalty Policy.

Question 9 – Should the ED include when a deferral is offered to a respondent?

Pro: Currently, the TCEQ's deferral process is not documented anywhere. Putting the deferral into rule is an opportunity to document the deferral process.

Con: It is inconsistent with how the TCEQ has handled other aspects of penalty assessment such as culpability, economic benefit, etc. which are all clearly laid out in the Penalty Policy.

ED Recommendation: The ED recommends that deferral policies be included the next update of the Penalty Policy. The ED prefers to put the deferral policies in the Penalty Policy since they deal with assessment of penalties. This will be more consistent with how the ED has dealt with the other components of penalty assessment such as culpability and economic benefit.

Question 10 – Should Ch. 70 include information on how Other Factors is considered in assessing penalties?

Pro: While not all of the commenters supported putting Other Factors into rule, some did and they believed it would add clarity to the current Other Factors policies found in the Penalty Policy.

Con: Including Other Factors policies in rule could create redundancy and possibly conflict between the rule and the Penalty Policy if the Other Factors policies in the Penalty Policy were to be revised.

ED Recommendation: The ED does not recommend that Other Factors policies be included in the General Enforcement Policy Rule. They are already clearly defined in the Penalty Policy which is readily available to the public and has been subject to recent public comment and approval. In addition, the fundamental purpose of the Other Factors category is to allow the ED and the Commission to exercise discretion on a case-by-case basis to adjust penalties as necessary when the unique situation may warrant it. If policy were defined in rule, it would remove most of that flexibility thus negating the effectiveness of the Other Factors option.