

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** September 30, 2016

Thru: Caroline M. Sweeney, Deputy Director, Office of Legal Services

From: Kathleen Decker, Director, Litigation Division

Subject: TCEQ Docket No. 2016-1593-RES reauthorizing the Executive Director or his designee to approve and sign agreed administrative orders and field citations

Background

Delegation of the authority to issue enforcement orders from the Commission to the Executive Director (ED) was granted during the 81st legislative session and codified in TEX. WATER CODE § 7.002. The statute states, “The commission may delegate to the executive director the authority to issue an administrative order, including an administrative order that assesses penalties or orders corrective measures, to ensure compliance with the provisions of this code and the Health and Safety Code within the commission’s jurisdiction....”

On August 25, 2011, the Commission issued TCEQ Docket No. 2011-1506-RES to authorize the Executive Director or his designee to approve and sign administrative enforcement orders and field citations pursuant to certain criteria. Four years later Senate Bill 1267 passed by the 84th Legislature, 2015 Regular Session, amended the Texas Administrative Procedure Act codified in Chapter 2001 of the Government Code and it became effective September 1, 2015. Senate Bill 1267 specifically amended § 2001.142 of the Government Code by removing the presumption that a party or attorney of record receives notice of the Commission’s decision or order on the third day after the date on which notice of the decision or order is mailed. In order to implement the changes required by Senate Bill 1267, the Commission amended 30 Texas Administrative Code § 70.10(b) to provide that the effective date of an agreed order is the date that the agreed order is signed by the Commission or Executive Director, unless stated otherwise in the agreed order. The rule amendment became effective on December 31, 2015.

Action Requested

Staff respectfully recommend that the Commissioners adopt the resolution which incorporates the requirements of SB 1267 and 30 Texas Administrative Code § 70.10(b) into the procedures to be used for expediting approval of agreed administrative orders and field citations issued by the Executive Director or his designee, specifically that the order or field citation will become effective on the date of signature.

The resolution would supersede and replace Resolution No. 2011-1506-RES issued by the Commission on August 25, 2011.

Attachments

Draft Resolution

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



A RESOLUTION

reauthorizing the Executive Director to issue certain administrative enforcement orders and field citations and reauthorizing the Executive Director's sub-delegation of authority relating to administrative enforcement orders and field citations, TCEQ Docket No. **2016-1593-RES**

WHEREAS, the Executive Director is authorized by Section 7.002 of the Texas Water Code, to issue an administrative enforcement order, including an administrative order that assesses penalties or orders corrective measures, upon delegation by the Commission;

WHEREAS, there are a substantial number of administrative enforcement orders and field citations requiring Commission action;

WHEREAS, the Commission strives to improve efficiency and effectiveness in its service to the public in fulfilling its mission to protect human health and the environment;

WHEREAS, businesses, individuals, municipalities, and organizations who are a party to an administrative enforcement order would be well served by the timely issuance of those orders;

WHEREAS, the Commission has an equally strong desire to increase the timeliness and effectiveness of the enforcement process while providing the public with a reasonable opportunity to address the Commission;

WHEREAS, the Commission desires to enhance its time management of agenda meetings;

WHEREAS, many of the administrative enforcement orders and field citations which are presented to the Commission for approval are considered to be "agreed" because the parties have reached settlement of the enforcement matter;

WHEREAS, the term "Administrative Enforcement Order" means any Commission order enforcing or directing compliance with any provisions; whether of statutes, regulations, permits or licenses, or orders; which the Commission is entitled by law to enforce or with which the Commission is entitled by law to compel compliance;

WHEREAS, the term “Agreed Order” is defined as an administrative enforcement order where the parties have reached settlement of the enforcement matter, which the Office of Public Interest Counsel has had an opportunity for review, and which has been noticed to the general public in accordance with the provisions of the Texas Administrative Procedures and Texas Register Act and applicable substantive law;

WHEREAS, the Executive Director is authorized to delegate to his staff any authority or duty assigned to him unless the statute, rule or order, assigning the authority or duty specifies otherwise pursuant to Section 5.222 of the Texas Water Code; and

WHEREAS, 30 TAC § 3.2 defines Executive Director as the Executive Director of the Commission, or any authorized individual designated to act for the Executive Director; and

WHEREAS, to streamline the processing of administrative enforcement orders and field citations the Executive Director may elect to delegate his authority to review, issue, approve and act on such administrative enforcement orders or field citations to the Deputy Director with responsibility for the particular program involved with certain exceptions; and

WHEREAS, notwithstanding this delegation of authority, the Executive Director in his discretion may forward any agreed administrative enforcement order or field citation to the Commission for approval as appropriate, including those orders or citations which require the interpretation or establishment of Commission policy;

WHEREAS, the Commission does not intend by the issuance of this resolution to repeal or change any duty or authority delegated to the Executive Director by Commission rule;

WHEREAS, on August 25, 2011, the Commission issued TCEQ Docket No. 2011-1506-RES to authorize the Executive Director or his designee to approve and sign administrative enforcement orders and field citations under certain criteria;

WHEREAS, SB 1267 passed by the 84th Legislature (2015) amending the Texas Administrative Procedure Act (APA) codified in Chapter 2001 of the Government Code became effective September 1, 2015;

WHEREAS SB 1267 specifically amended § 2001.142 of the Government Code by removing the presumption that a party or attorney of record receives notice of the Commission’s decision or order on the third day after the date on which notice of the decision or order is mailed;

WHEREAS in order to comply with SB 1267, 30 Texas Administrative Code § 70.10(b) (Agreed Orders) was amended (effective December 31, 2015) to provide that the effective date of an agreed order is the date that the agreed order is signed by the Commission or Executive Director, unless stated otherwise in the agreed order.

WHEREAS this resolution changes the effective date of agreed orders and field citations approved and signed by the Executive Director or his designee to conform to the provisions of SB 1267 and 30 Texas Administrative Code § 70.10(b).

NOW, THEREFORE, BE IT RESOLVED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that the Commission hereby adopts the following procedures for expediting approval of agreed administrative enforcement orders and field citations:

1. The Executive Director or his designee may approve and sign field citations and agreed administrative enforcement orders that meet the following criteria:
 - a. The agreed administrative enforcement order is not a findings order;
 - b. The administrative penalty assessed is \$ 7,500 or less;
 - c. The agreed administrative enforcement order or field citation meets all statutory and administrative criteria;
 - d. No new issues affecting Commission policy or involving unprecedented interpretations of existing policy are presented in the agreed administrative enforcement order or field citation;
 - e. No objection is raised by the Office of Public Interest Counsel; and
 - f. No adverse public comment was received after the agreed administrative order or field citation was published in the Texas Register.
2. Notice of the date after which the Executive Director or his designee will act to approve the agreed administrative enforcement order or field citation must be published in the Texas Register and provide a minimum of 30 days for public comment.
3. For agreed administrative orders or field citations issued by the Executive Director or his designee, parties shall be given notice of the approved order or field citation, either personally or by first class mail, in accordance with APA §2001.142. In addition, the chief clerk shall file notice of the Executive Director's agreed administrative order or field citation in the Texas Register not later than ten days after the date on which the order or field citation is approved.
4. The agreed administrative order or field citation will become effective on the date it is signed by the Executive Director or his designee.

5. The Executive Director will provide regular reports to each Commissioner and the Office of General Counsel describing the administrative enforcement orders and field citations that have been approved as well as any changes that may occur to his sub-delegation of authority.

IT IS FURTHER RESOLVED that the Commission hereby directs the Executive Director to implement and administer this procedure for approving agreed administrative enforcement orders and field citations as soon as practicable.

THIS RESOLUTION, upon becoming effective, supersedes and replaces Resolution No. 2011-1506-RES issued by the Commission on August 25, 2011.

Issue date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman