

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners' Work Session **Date:** July 5, 2011

Thru: John Sadlier, Deputy Director, Office of Compliance and Enforcement

From: *BKS* 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 (E.D.) is seeking direction from the Commission regarding which general enforcement policies should be included in Ch. 70 and how to proceed with rulemaking as that effort relates to stakeholder involvement.

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

Possible Language Options:

Purpose and Applicability

(a) This chapter delineates what factors are considered and how statutory requirements are applied in determining the amount of an administrative penalty. The purpose of an administrative penalty is to deter noncompliance with the commission's rules and to recover any economic benefit resulting from the non-compliance. The commission may also establish policies to further delineate the specific procedures for calculating administrative penalties. Specific statutory requirements are located in Texas Water Code (TWC), Chapters 5, 7, 11, 12, 13, and 16; and the Texas Health and Safety Code, Chapters 341, 366, 369, 371, and 401.

(b) This chapter does not define what is or is not a violation.

(c) This chapter applies to all persons, as defined in §3.2 of this title (relating to Definitions), under the jurisdiction of the commission.

(d) This chapter applies to administrative penalties in an enforcement action, as defined in §3.2 of this title (relating to Definitions), initiated after the effective date of this subchapter.

(e) Nothing in this chapter shall constrain the commission from issuing an enforcement order pursuant to TWC §7.051 that assesses an administrative penalty that is different from a penalty proposed by the executive director based on fact-specific circumstances.

Definitions

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

(1) Base penalty--The penalty calculated for each violation beginning at the daily statutory maximum and adjusted by taking into consideration the duration, nature, circumstances, extent, gravity and impact of the violation.

(2) Recommended penalty--The penalty calculated to deter future violations for violation(s) of the TWC or Texas Health and Safety Code (THSC) beginning at the base penalty and adjusted by taking into account culpability, demonstrated good faith efforts to comply, compliance history, economic benefit, and other factors as justice may require.

(3) Respondent--A person against whom the executive director is seeking an enforcement order as defined by §70.2 of this title (relating to Definitions).

(4) Statutory maximum--The maximum administrative penalty that can be assessed by the commission for a violation of a statute or regulation.

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?

Possible Language Options:

Corrective Action Orders

A Corrective Action Order may be used when any of the following criteria are met:

1. A respondent is participating in a Sanitary Sewer Overflow initiative;
2. To address noncompliance with disinfection by-products rules by a purchase water system;
3. To address naturally occurring contaminants in drinking water where technically or financially feasible treatment options are not available;

4. The respondent is a new owner acquiring a facility in non-compliance; and/or
5. At the discretion of the Executive Director in situations where the Executive Director determines that an administrative penalty will not be an effective mechanism to gaining compliance.

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

Possible Language Options:

Findings Orders

A "Findings" order may be used when any of the following four criteria are satisfied:

1. The violation is a gross deviation from a standard of conduct common in a given industry defined as:
 - (a) indifference to legal duty;
 - (b) a manifestly smaller amount of watchfulness than the circumstance(s) require of an entity or individual acting with ordinary prudence; or
 - (c) absence of management practices designed to ensure compliance;
2. The violation involves an emission or discharge of contaminants to the environment or other actions meeting the following criteria:
 - (a) People have been exposed to pollutants which exceed levels that are protective;
 - (b) Environmental receptors have been exposed to pollutants which exceed levels that are protective;
 - (c) Unauthorized diversion, taking, or storage of state water or an unauthorized change in flood elevation of a stream which deprives others of water, severely affects aquatic life, or results in a safety hazard, property damage, or economic loss; or
 - (d) Unauthorized emissions which are excessive emissions events.
3. The respondent has been the subject of any of the following patterns of repeated enforcement actions (Notice of Violation, Compliance Agreement, order, judgment) over the prior five year period.
 - (a) Two repeated enforcement actions for the same violation;
 - (b) Three repeated enforcement actions for the same violations or substantial history of the same violation by the same individual who is required to be registered, certified, or licensed by TCEQ prior to performing certain activities;
 - (c) Two prior enforcement orders/judgments having the same general cause for nuisance violations.
4. Regardless of specific violations, a respondent has demonstrated a pattern of non-

compliance with environmental laws. This is a judgment to be made by the enforcement coordinator, investigator, legal staff and appropriate managers.

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

Possible Language Options:

Referral to the Attorney General

The agency may refer cases to the Office of the Attorney General (AG) who will, in turn, file a lawsuit against the respondent on behalf of the State of Texas

The criteria for TCEQ referral of a case to the AG include but are not limited to the following:

- Need for immediate action (temporary restraining order or injunction, receivership, Superfund) to protect public health, safety, or the environment.
- Need for a judgment to enforce compliance with an existing administrative enforcement order where there is a significant impact to the environment or to agency policy.
- Egregious violations where the availability of civil penalties is necessary to adequately address the violations should be considered.
- TCEQ has been named as a necessary and indispensable party in an action brought by a local government under TEX. WATER CODE §§7.351 and 7.353.
- When required by law under TEX. WATER CODE § 7.105, unless under TEX. WATER CODE § 7.106, the AG and the E.D. agree to resolve the violation(s) through an administrative order.

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

Possible Language Options:

Economic Benefit

(a) Economic benefit is a monetary gain derived from a failure to comply with any regulation or statute. Economic benefit may include any or all of the following:

(1) the return a respondent may earn by delaying the capital costs of purchasing and installing pollution control equipment;

(2) the return a respondent may earn by delaying a one-time expenditure; or

(3) the return a respondent may earn by avoiding the costs of compliance.

(b) When applied, an adjustment for economic benefit shall increase the penalty.

(c) When adjusting a penalty for economic benefit, the executive director shall consider

if the respondent gained an economic benefit from avoided or delayed costs including delayed capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained.

(d) When adjusting a penalty for economic benefit, the executive director may consider whether a respondent is a governmental entity or nonprofit organization as defined by the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq.*

(e) If it is demonstrated that an inadvertent or unintentional monetary loss has occurred as a result of a violation, the executive director may recommend that the amount of the loss be subtracted when adjusting a penalty for economic benefit.

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

Possible Language Options:

Culpability

(a) Culpability shall be assessed for the five year period prior to the date of initiating an enforcement action with an initial settlement offer or the filing of an EDPRP, whichever occurs first, documenting the current violations and applied on either:

(1) a site specific basis; or

(2) on a multi-site basis, for mobile units and individuals who are required to be registered, certified, or licensed by the agency prior to performing certain regulated activities for which violations have been alleged.

(b) When applied, an adjustment for culpability shall increase the penalty.

(c) When adjusting a penalty for culpability, the executive director shall consider whether the alleged violation was attributable to mechanical or electrical failures and could have been reasonably anticipated and avoided.

(d) The executive director shall determine whether documentation indicating culpability exists (*e.g.*, contractor notes; agency letters describing the same violation at the same unit; respondent notes; investigations not associated to the current enforcement action).

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

Possible Language Options:

Good Faith Efforts to Comply

(a) When applied, an adjustment for good faith efforts shall decrease the penalty.

(b) When adjusting a penalty for good faith, the executive director shall consider actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons.

(c) An adjustment for good faith may not be included in a proposed default order.

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

Possible Language Options:

Compliance History

(a) When applied, an adjustment for compliance history may increase or decrease the penalty.

(b) When adjusting a penalty for compliance history, the executive director shall consider:

(1) the classification as assigned under 60.2(f) of a respondent and whether the respondent has been designated a repeat violator under 60.2(d) of this title; and

(2) the number of administrative or court orders and environmentally related criminal convictions issued for activities at the site, as defined in §60.2 (a) of this title in the five-year period preceding the date of initiating an enforcement action with an initial settlement offer or the filing date of an EDPRP, whichever occurs first.

(c) An adjustment for compliance history which results in a reduction of recommended penalty may not be included in a proposed default order.

Question 9 – Should the E.D. include when a deferral is offered to a respondent?

Possible Language Options:

Installment Payments and Deferral of Administrative Penalty

(a) The executive director may recommend that all or a portion of the penalty be deferred.

(b) Circumstances in which the executive director may recommend deferral of a penalty include:

(1) expedited settlement of an enforcement action;

(2) an enforcement action relating to certain utility or district facilities as defined in TWC §7.034;

(3) an enforcement action in which a respondent demonstrates that a lesser penalty is justified under §70.8 of this title (relating to Financial Inability to Pay; Amount Necessary to Obtain Compliance); or

(4) an enforcement action in which a respondent performs all required corrective action.

(c) The executive director may recommend deferral of all or part of a full penalty when the respondent is a certain utility or district as defined in TWC §7.034 and that entity complies with all provisions for corrective action to address the violation.

(d) The executive director may not recommend deferral of a penalty if:

(1) the order includes findings of fact and conclusions of law;

(2) the type of order being issued is a default order, as described in §70.106 of this title (relating to Default Order);

(3) the respondent has been deemed culpable, as described in §70.204 of this title (relating to Culpability);

(4) the respondent's compliance history is unsatisfactory and/or repeat violator as defined in §60.2 of this title (relating to Classification); or

(5) the executive director determines that a deferral is not warranted.

(e) If a respondent fails to comply with any term or condition of an order, a respondent shall be required to pay at minimum that portion of the deferred penalty for which corrective

action has not been performed.

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

Possible Language Options:

Other Factors as Justice May Require

(a) When applied, this adjustment may increase or decrease the penalty.

(b) When adjusting a penalty based on other factors as justice may require, the executive director shall consider:

(1) whether a respondent has used a verified environmental management system for environmental compliance, as defined in Chapter 90 of this title (relating to Innovative Programs) in place for one year or more;

(2) whether a respondent has participated in the Environmental Monitoring and Response System or a voluntary site assessment with subsequent certification;

(3) the nature, circumstances, extent, duration, and gravity of the violation;

(4) the regionalization efforts of a respondent;

(5) whether a respondent voluntarily notified the executive director of the violation(s) including notifications sent to the executive director pursuant to the Texas Environmental, Health and Safety Audit Privilege Act, *Tex Rev. Civ. Stat. Ann. Art 4447cc(Vernon's)*; and

(6) whether a respondent is a small government or nonprofit organization as defined by the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq.*

(c) The executive director may increase the recommended penalty by an amount necessary to deter future violations.

AN ACT

relating to the continuation and functions of the Texas Commission on Environmental Quality and abolishing the On-site Wastewater Treatment Research Council.

SECTION 4.05. Section 5.754, Water Code, is amended by amending Subsections (a), (b), (c), (d), (e), (g), and (h) and adding Subsection (e-1) to read as follows:

(e-1) The amount of the penalty enhancement or escalation attributed to compliance history may not exceed 100 percent of the base penalty for an individual violation as determined by the commission's penalty policy.

SECTION 4.09. Subchapter A, Chapter 7, Water Code, is amended by adding Section 7.006 to read as follows:

Sec. 7.006. ENFORCEMENT POLICIES. (a) The commission by rule shall adopt a general enforcement policy that describes the commission's approach to enforcement.

(b) The commission shall assess, update, and publicly adopt specific enforcement policies regularly, including policies regarding the calculation of penalties and deterrence to prevent the economic benefit of noncompliance.

(c) The commission shall make the policies available to the public, including by posting the policies on the commission's Internet website.

SECTION 4.10. Sections 7.052(a) and (c), Water Code, are amended to read as follows:

(a) The amount of the penalty for a violation of Chapter 37 of this code, Chapter 366, 371, or 372, Health and Safety Code, or Chapter 1903, Occupations Code, may not exceed \$5,000 [~~\$2,500~~] a day for each violation.

(c) The amount of the penalty for all other violations within the jurisdiction of the commission to enforce may not exceed \$25,000 [~~\$10,000~~] a day for each violation.

SECTION 4.12. Section 13.4151(a), Water Code, is amended to read as follows:

(a) If a person, affiliated interest, or entity subject to the jurisdiction of the commission violates this chapter or a rule or order adopted under this chapter, the commission may assess a penalty against that person, affiliated interest, or entity as provided by this section. The penalty may be in an amount not to exceed \$5,000 [~~\$500~~] a day. Each day a violation continues may be considered a separate violation.

SECTION 4.31. (a) Not later than September 1, 2012, the Texas Commission on Environmental Quality by rule shall establish the method for evaluating compliance history as

required by Section 5.753(a), Water Code, as amended by this article. Until the commission adopts that method, the commission shall continue in effect its current standard for evaluating compliance history.

(b) The changes in law made by Sections 7.052 and 13.4151, Water Code, as amended by this article, apply only to a violation that occurs on or after the effective date of this Act. For purposes of this section, a violation occurs before the effective date of this Act if any element of the violation occurs before that date. A violation that occurs before the effective date of this Act is covered by the law in effect on the date the violation occurred, and the former law is continued in effect for that purpose.

ARTICLE 11. EFFECTIVE DATE

SECTION 11.01. This Act takes effect September 1, 2011.

SUBCHAPTER A: ENFORCEMENT GENERALLY
§§70.1 - 70.11
Effective July 22, 2010

§70.1. Purpose.

The purpose of this chapter is to provide general rules governing enforcement actions before the commission or, upon delegation of the authority to issue an administrative order, the executive director. The commission shall delegate the authority to issue an administrative order to the executive director by resolution. Procedures for contested enforcement cases are located in Chapter 80 of this title (relating to Contested Case Hearings). If some part or parts of these rules cannot be interpreted as consistent with the Texas Water Code, the Texas Health and Safety Code, or the Administrative Procedure Act, or where applicable parts of those statutes are not specifically included in these rules, the statutes shall control.

Adopted June 30, 2010

Effective July 22, 2010

§70.2. Definitions.

Unless specifically defined in this chapter, all terms used in these rules bear the same definitions ascribed by the Texas Water Code, the Texas Health and Safety Code, the APA, and commission rules. The terms specifically defined for the purposes of this chapter are as follows.

(1) **Contested enforcement case** - An action in which the executive director seeks an enforcement order and the respondent has an opportunity for an adjudicative hearing.

(2) **Executive director's preliminary report (EDPR)** - A pleading filed by the executive director which, when issued and served under this title, seeks an enforcement order against a respondent. EDPR is further defined in Subchapter C of this chapter (relating to Enforcement Referrals to SOAH).

(3) **Petition** - The instrument by which the executive director states a cause of action for an enforcement order against a respondent. When an EDPR is filed and issued under this chapter the EDPR and notice constitute a petition, as do amended EDPRs and amended or supplemental petitions.

(4) **Respondent** - A person against whom the executive director is seeking an enforcement order.

Adopted June 16, 1999

Effective July 7, 1999

§70.3. Enforcement Guidelines.

The executive director may use enforcement guidelines that are neither rules nor precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings. These guidelines do not establish rules which the public is

required to obey or with which it is to avoid conflict. These guidelines do not convey any rights or impose any obligations on members of the public. These guidelines are available to the public under the terms of the Public Information Act, Texas Government Code, Chapter 552.

Adopted May 8, 1996

Effective June 6, 1996

§70.4. Enforcement Action Using Information Provided by Private Individual.

(a) A private individual with information demonstrating possible violations of law within the commission's jurisdiction should notify the executive director (ED). The ED may initiate an administrative enforcement action, or he/she may refer to the appropriate prosecuting authority a civil or criminal enforcement action.

(b) The ED may initiate an enforcement action based on information received from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. The ED may initiate an enforcement action based on any combination of information provided by private individuals or by the ED's own investigations.

(c) In evaluating the value and credibility of information provided by a private individual and determining the use of such information as evidence in an enforcement action, the ED shall consider the following criteria:

(1) the individual providing the information must be willing to submit a sworn affidavit attesting to the facts that constitute the alleged violation and authenticating any writings, recordings, or photographs provided by the individual;

(2) the individual providing the information must be willing to testify in any enforcement proceedings regarding the alleged violations;

(3) if the ED relies on any physical or sampling data submitted by an individual to prove one or more elements of an enforcement case, such data must have been collected or gathered in accordance with relevant agency protocols. The individual submitting the physical or sampling data must be willing to submit a sworn affidavit demonstrating that the individual followed relevant agency protocols when collecting the data. The relevant agency protocols are those used or determined acceptable by the ED; and

(4) the commission will not use in an enforcement case information gathered by an individual illegally.

(d) A private individual who submits information on which the ED relies for all or part of an enforcement case may be called to testify in the enforcement proceedings and is subject to all sanctions under law for knowingly falsifying evidence.

(e) If the ED determines not to initiate an enforcement action based on information received from a private individual in accordance with this section, the ED will process the information received from the individual as a complaint, subject to applicable complaint

investigation procedures. The ED may ultimately initiate an enforcement action that is based on information the ED develops during the complaint investigation.

Adopted November 20, 2001

Effective December 11, 2001

§70.5. Remedies.

Remedies available to the commission in enforcement actions include all those found in the Texas Water Code, the Texas Health and Safety Code, and the APA. These include, but are not limited to, issuance of administrative orders with or without penalties; referrals to the Texas Attorney General's Office for civil judicial action; referrals to the Environmental Protection Agency for civil judicial or administrative action; referrals for criminal action; or permit, license, registration, or certificate revocation or suspension. Nothing herein shall be construed to preclude the executive director from seeking any remedy in law or equity not specifically mentioned in these rules. In addition, an enforcement matter may be resolved informally without a contested case proceeding in appropriate circumstances.

Adopted June 16, 1999

Effective July 7, 1999

§70.6. Judicial Civil Enforcement.

The executive director is authorized to cause to be instituted, in courts of competent jurisdiction, legal proceedings to enforce and compel compliance with any provisions, whether of statutes, rules, regulations, permits or licenses, or orders, that the commission is entitled or required by law to enforce or with which the commission is entitled or required by law to compel compliance. Such legal proceedings may be initiated at any time by the executive director by a letter from the executive director or an authorized representative referring the matter to the Texas Attorney General's Office and requesting that the attorney general take action on behalf of the commission.

Adopted May 8, 1996

Effective June 6, 1996

§70.7. Force Majeure.

(a) If a person can establish that an event that would otherwise be a violation of a statute, rule, order, or permit was caused solely by an act of God, war, strike, riot, or other catastrophe, the event is not a violation of that statute, rule, order, or permit.

(b) The owner or operator of the affected facility shall have the burden of proof to demonstrate that any pollution or discharge is not a violation as provided by subsection (a) of this section.

(c) If force majeure is claimed as an affirmative defense to an action brought under this chapter, the permittee must submit notice to the executive director as provided by §305.125(9) of this title (relating to Standard Permit Conditions).

Adopted June 16, 1999

Effective July 7, 1999

§70.8. Financial Inability to Pay; Amount Necessary to Obtain Compliance.

(a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

(b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

Adopted June 16, 1999

Effective July 7, 1999

§70.9. Installment Payment of Administrative Penalty.

(a) Any person(s) may, upon request, be allowed to make installment payments of an administrative penalty imposed in a commission or executive director order.

(b) The amount and payment schedule of monthly installments must be specified by a commission or executive director order.

(c) Payment schedules issued may not exceed a 36-month period.

Adopted June 30, 2010

Effective July 22, 2010

§70.10. Agreed Orders.

(a) The executive director and the respondent may reach an agreement, or settlement, in an enforcement action. In order to have legal effect as an order of the agency, and in any case in which penalties are assessed, an agreed order must be approved and issued by the commission or the executive director. In such an agreed order, the respondent may agree to:

(1) admit to none, any, or all of the violations alleged in any Executive Director Preliminary Report or petition in the case;

(2) assessment of a specific administrative penalty;

(3) remedial ordering provisions;

(4) any combination of these; and

(5) any other lawful provisions agreed to by the executive director and the respondent.

(b) The effective date of an order, for purposes of compliance with its terms and conditions, including deadlines, shall be the date on which service of notice of the order is achieved under the Administrative Procedure Act, §2001.142.

(c) When an agreement is reached, the executive director shall publish notice of the proposed agreed order in the *Texas Register*, providing 30 days for public comment. Unless delegated to the executive director, after the public comment period, the proposed agreed order shall be scheduled for consideration by the commissioners during a commission meeting under Chapter 10 of this title (relating to Commission Meetings). If the proposed agreed order is to be issued by the executive director, the agreed order shall be scheduled for the executive director's agenda. If the enforcement action is under the jurisdiction of the State Office of Administrative Hearings, the judge shall remand the action to the executive director who will file the agreed order with the chief clerk for commission or executive director consideration. The judge is not required to prepare a proposal for decision or memorandum regarding the settlement.

Adopted June 30, 2010

Effective July 22, 2010

§70.11. Notice of Decisions and Orders.

(a) For rulings, orders, or decisions issued by the commission or the executive director, parties shall be given notice, in accordance with the Administrative Procedure Act, §2001.142. The notice shall include:

- (1) the commission's or the executive director's findings;
- (2) the amount of the penalty;
- (3) the right to judicial review of the commission's or the executive director's order; and
- (4) any other information required by law.

(b) In addition to the requirements of subsection (a) of this section, when the commission or the executive director issues an enforcement order in which administrative penalties have been assessed, the chief clerk shall file notice of the commission's or the executive director's decision and order in the *Texas Register* not later than ten days after the date on which the decision is adopted.

Adopted June 30, 2010

Effective July 22, 2010

Derivation Table
Rule Log No. 95123-263-AD
Procedural Rules
Adopted May 8, 1996
Effective June 6, 1996

Chapter 70 - Enforcement
Subchapter A : Enforcement Generally

This table tracks sections during and after rule revisions. The column on the left lists the current sections prior to the revision. The column on the right lists where the section is proposed to end up in the final adoption.

New Section	Old Section
70.1	337.1
70.2	337.3
70.3	337.9
70.4 (repeal effective 3/26/98)	337.10
70.5	337.22
70.6	337.6
70.7	New
70.8	337.50
70.9	337.11
70.10	337.30
70.11	337.57