

# Texas Commission on Environmental Quality

## INTEROFFICE MEMORANDUM

**To:** Commissioners' Work Session                      **Date:** August 25, 2011

**Thru:** Stephanie Bergeron Perdue, Deputy Director, Office of Legal Services *SPB*

**From:** Kathleen Decker, Director, Litigation Division *KCD*

**Subject:** Executive Director Delegation to Issue Administrative Orders

### **Background and Current Practices**

Delegation of the authority to issue administrative orders from the Commission to the Executive Director (ED) was granted during the 81<sup>st</sup> legislative session and codified in Tex. Water Code § 7.002. The statute provides: "[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...."

Pursuant to Tex. Water Code § 7.002, the ED requests the Commission delegate to the ED the authority to issue administrative enforcement orders under certain conditions. In addition to seeking authority to issue enforcement orders as provided by Tex. Water Code § 7.002, the ED separately requests delegated authority to approve all Field Citations.

### **Pros:**

1. The administrative order process is expedited, resulting in prompt enforcement.
2. With the expedited process for finalizing administrative orders, there is the potential for the corrective actions to be implemented earlier, resulting in more timely compliance.
3. Less administrative review time.

### **Cons:**

1. Commissioners will not review and consider all enforcement orders.
2. Public would not have opportunity to appear before commission to comment on order.

Please note that the draft resolution delegating authority to the ED to issue enforcement orders provides that the ED in his discretion may forward any agreed enforcement order to the Commission for approval, including those orders which require the interpretation or establishment of Commission policy. In addition, agreed enforcement orders are required to be published in the Texas Register for a minimum 30 day comment period as provided for in state law and agency rule. One of the proposed criteria for delegation

precludes the ED from issuing an enforcement order if adverse comment was received after the order was published in the Texas Register.

**Question 1:** Does the Commission wish to delegate the authority to issue administrative orders to the ED as allowed by Tex. Water Code § 7.002?

Because Tex. Water Code § 7.002 merely states that the Commission may delegate to the ED the authority to issue an administrative order, the type of order to be delegated should be chosen. The term “administrative order” is very broad and can include 1660 Agreed Orders, Findings Orders, Default Orders and even orders issued after a contested case hearing. However, because the ED is a party to a contested case hearing, the ED is not seeking authority to issue either a Default Order or one that would be issued after a contested case hearing.

**Question 2:** If authority to issue orders is delegated, what type of order should the ED be authorized to issue?

**Option 1:** only 1660 Agreed Orders

**Option 2:** both 1660 Agreed Orders and Findings Orders

**Question 3:** Does the Commission wish to set a penalty ceiling amount for the administrative orders that can be issued by the ED?

**Option 1:** \$5,000 or less in total penalty

**Option 2:** \$7,500 or less in total penalty

**Option 3:** \$10,000 or less in total penalty

**Question 4:** Does the Commission wish to delegate Field Citation approval to the ED?

During the December 2005 work session to present the concept of a field citation program to the Commissioners, the issue of delegation to the ED was not discussed, but it was mentioned that citations would be sent to the Commissioners for their approval on either a monthly or quarterly basis while the program was evolving into its final form. For compliance history purposes staff proposed the citations as an enhancement component equivalent to a Findings Order. However, the Commissioners were more comfortable in using the citation as a component equal to the enhancement for a 1660 Agreed Order which is what was ultimately adopted and currently in use today. Attached is a chart illustrating the types of violations eligible for the issuance of a field citation.

## **Attachments**

Draft Resolution

Field Citation Chart

## RESOLUTION

Delegating to the Executive Director the Authority to Issue Administrative Enforcement Orders and Authorizing the Executive Director's Sub-delegation of Authority Relating to Administrative Enforcement Orders as provided by this Resolution, Docket \_\_\_\_\_

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; and

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

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; and

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; and

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

WHEREAS, the formality of final approval before the full Commission frequently necessitates the representatives of the parties to travel long distances and expend valuable time and financial resources to attend the meeting in the unlikely event that a circumstance might arise where their input might be needed; and

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

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

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; and

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; and

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 the Executive Director may elect to delegate his authority to review, issue, approve and act on such administrative enforcement orders 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 to the Commission for approval as appropriate, including those orders which require the interpretation or establishment of Commission policy; and

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; and

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:

1. The Executive Director or his designee may approve and sign agreed administrative enforcement orders that meet the following criteria:

- a. The administrative penalty assessed is less than \$\_\_\_\_\_ and
- b. The agreed administrative enforcement order meets all statutory and administrative criteria; and

- c. No new issues affecting Commission policy or involving unprecedented interpretations of existing policy are presented in the agreed administrative enforcement order; and
- d. No objection is raised by the Office of Public Interest Counsel; and
- e. No adverse public comment was received after the order 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 must be published in the Texas Register and provide a minimum of 30 days for public comment.

3. For orders issued by the Executive Director or his designee, parties shall be given notice of the approved order, 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 order in the Texas Register not later than ten days after the date on which the order is approved.

4. The order will become effective on the date of hand-delivery of the Order to the party or three days after the date on which the Commission mails notice of the Order to the party, whichever is earlier.

5. The Executive Director will provide regular reports to each Commissioner and the Office of General Counsel describing the administrative enforcement orders 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 administrative enforcement orders as soon as practicable.

Issue date:

TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY

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Bryan W. Shaw, Ph.D., Chairman

## Violations Contained Within the Current Field Citation Program

| VIOLATION  | MEDIA  |
|--|--|
| Failure to obtain release detection  | Petroleum Storage Tank (PST)                         |
| Failure to provide corrosion protection  | PST  |
| Failure to implement inventory control procedures  | PST  |
| Failure to provide spill and overfill  | PST  |
| Failure to possess delivery certificate prior to receiving fuel                                      | PST  |
| Failure to have Stage I equipment  | PST  |
| Failure to have Stage II equipment   | PST  |
| Failure to submit initial/renewal UST registration and self-cert.                                    | PST  |
| Failure to maintain Financial Assurance  | PST  |
| Failure to obtain required occupational license  | PST  |
| Failure, by installer, to ensure On-Site Sewage Facility (OSSF) authorization to construct is issued | OSSF   |
| Purchasing perc. with a non-perc. registration   | Industrial Hazardous Waste (IHW)<br>Dry Cleaner (DC) |
| Distributing or selling perc. w/o registration   | IHW / DC   |
| Failure to obtain valid, current DCL registration  | IHW / DC   |
| Impounding, diverting, using state water w/o permit  | Water Rights (WR)                                    |
| Failure to obtain Construction General Permit  | Storm Water General Permit                           |
| Failure to obtain Multi-Sector General Permit (MSGP)   | Storm Water MSGP                                     |
| Failure to obtain required occupational license  | OSSF Installer License                               |
| Failure to obtain required occupational license  | Public Water Supply (PWS) Operator License           |
| Failure to obtain required occupational license  | Municipal Solid Waste Operator License               |
| Failure to obtain required occupational license  | PWS Backflow Prevention Tester                       |
| Failure to obtain required occupational license  | PWS Customer Service Inspector                       |
| Failure to obtain required occupational license  | Wastewater Operator License                          |