

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§70.2, 70.5, 70.7 - 70.11, 70.51, 70.101, 70.102, and 70.104 - 70.106, concerning Enforcement. This action is necessary to make the commission's rules more clearly consistent with applicable state statutes and the Texas Rules of Civil Procedure. Sections 70.5, 70.10, and 70.105 are adopted with changes to the proposed text as published in the January 29, 1999 issue of the *Texas Register* (24 TexReg 498). Sections 70.2, 70.7 - 70.9, 70.11, 70.51, 70.101, 70.102, 70.104, and 70.106 are adopted without changes and will not be republished.

The commission readopts the rules contained in Chapter 70. This action is taken to comply with the General Appropriations Act, Article IX, §167. The notice of readoption of the review is concurrently published in the Rules Review section of this edition of the *Texas Register*.

EXPLANATION OF ADOPTED RULES

Senate Bill 1876, 75th Legislature, 1997, consolidated the commission's enforcement authority under a new Chapter 7 of the Texas Water Code (TWC). The adopted rule amendments would clarify the commission's rules to make them more clearly consistent with the enforcement provisions of TWC Chapter 7 and with the commission's general authority under TWC Chapter 5, the Texas Rules of Civil Procedure, and the Texas Administrative Procedure Act (APA).

The adopted amendment to §70.2, concerning Definitions, changes the definition of "Contested enforcement case" to make it consistent with the APA definition of "Contested case."

The adopted amendment to §70.5, concerning Remedies, expands the language regarding permit revocation or suspension to also include licenses, registrations, and certificates. This change will affect entities which currently hold any type of authorization from the commission. This amendment corresponds with TWC, §7.004, which allows the commission remedies cumulative of all other remedies.

The adopted amendment to §70.7, concerning Force Majeure, deletes the requirement in subsection (d) that the executive director respond in writing within 30 days from receipt of notification as to whether an event constitutes force majeure. The amendment also clarifies the meaning of force majeure within the framework provided by TWC, §7.251. TWC, §7.251, does not require the executive director to respond within a 30-day time period. The change would give the executive director discretion to respond fully and appropriately in a timely manner, as is consistent with the statute.

The adopted amendment to §70.8, concerning Financial Inability to Pay; Amount Necessary to Obtain Compliance, deletes the phrase “that is necessary to deter future violations” in subsection (a) and makes the rule consistent with current commission policy to make a determination of financial inability to pay based on the entire penalty amount, not just the portion of the administrative penalty assessed for deterrence. The commission will remove the limitation that an assertion of an inability to pay or a challenge to the amount of a penalty can only be made in response to an executive director’s preliminary report (EDPR) or petition. The commission will allow such action simply in response to an enforcement action. This change allows the respondent an opportunity to provide documentation of financial inability to pay during the expedited enforcement process, as well as in response to an EDPR.

Both changes are necessary in order to make §70.8 more clearly consistent with how financial inability to pay claims are handled by the commission.

The adopted amendments to §70.9, concerning Installment Payment of Administrative Penalty, modify subsections (a) and (b) to provide for installment payments for any kind of enforcement order. The rule originally applied only to agreed orders. This change makes the rule more clearly consistent with the legislative authority granted to the commission by TWC, §5.1175(a), and allows qualifying entities to make installment payments for payment of administrative penalties in response to all three types of enforcement orders: agreed, default, and orders arising from a proposal for decision. It has been the policy of the commission to allow such payment plans, and these revisions will formalize that policy. The proposed preamble erroneously referenced a conforming change to subsection (c); however, there is no subsection (c) in §70.9.

The adopted amendment to §70.10, concerning Agreed Orders, modifies subsection (c) to make it consistent with the 30-day publication requirement imposed by TWC, §7.075.

The adopted amendments to §70.11, concerning Notice of Decisions and Orders, prescribe the contents of a notice of a ruling, order, or decision issued by the commission. This modification reflects that the legislature has provided the public the right to comment on most proposed administrative orders, and it ensures consistency with TWC, §7.059 and §7.075. In addition, the commission is deleting the reference to Texas Health and Safety Code (HSC), §382.096, which was repealed by the Texas Legislature effective September 1, 1997.

The adopted amendment to §70.51, concerning Mandatory Enforcement Hearings, deletes subsection (a)(2) - (4). Subsection (a)(4) references HSC, §382.082, which was repealed by the Texas Legislature effective September 1, 1997. The language in subsection (a)(2) and (3) is not required by TWC, §5.117, relating to Mandatory Enforcement Hearings, is inconsistent with the current regulatory criteria for formal enforcement, and is, therefore, being deleted. In addition, the last sentence of subsection (a), reading “a certificate of convenience and necessity is not considered to be a permit or license for purposes of this section” is deleted, because a certificate of convenience and necessity is considered a “permit or license” for enforcement purposes.

The adopted amendment to §70.101, concerning Executive Director’s Preliminary Report, deletes the provision that an EDPR can be superseded by a petition. The commission believes that this language is repetitive, because an EDPR is, in practice, also a petition. In addition, a provision is added to reflect that the EDPR must include the corrective action requested by the executive director as provided by TWC, §7.054.

The adopted amendment to §70.102, concerning Pleadings Other than the Executive Director’s Preliminary Report, modifies subsection (c) to provide that a pleading should be allowed “within seven days of the date of the hearing,” as opposed to “up to seven days prior to the hearing.” Subsection (c) is also modified to provide for pleadings filed after the seventh day. In addition, subsection (d) is modified to include language concerning adding or non-suiting additional parties in an amendment to an EDPR by the executive director. All of these changes will provide consistency with the rules governing civil procedure in Texas courts.

The adopted amendments to §70.104, concerning Notice of Executive Director's Preliminary Report, provides additional methods of service consistent with the Texas Rules of Civil Procedure, allows the EDPR to be served by facsimile, and reflects the process for serving the respondent by certified mail and first class mail simultaneously.

The adopted amendment to §70.105, concerning Answer, deletes unnecessary language concerning irrigators and irrigator pump installers. The language is no longer necessary given the repeal of TWC, §34.011, which contained this requirement. This change consistently applies the rules regarding a request for a hearing to all programs and requires all respondents to file an answer within 20 days of the date the EDPR is received. In addition, the proposed amendment modifies the text of the rule to improve readability.

The adopted amendment to §70.106, concerning Default Order, adds a new subsection (d) to provide for the effective date of a default order. This change is to ensure consistency with commission procedural rules and the APA.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that it is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because they prescribe procedural requirements for

commission enforcement actions. The adopted rule amendments do not prescribe any major new requirements on any sector of the state. The intent of this action is to make the rules more clearly consistent with TWC, Chapters 5 and 7, the APA, and the Texas Rules of Civil Procedure.

Furthermore, the rules are consistent with both state and federal mandates, and they are adopted under authority granted by TWC, Chapters 5 and 7. Additionally, the Code, §2001.004, requires state agencies to adopt rules of practice. Finally, the adoption concerns procedural amendments to existing rules and, thus, delegation agreements or contracts are not expressly implicated.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment of these rules under the Code, §2007.043. The following is a summary of that assessment. The specific purpose of this action is to make these rules more clearly consistent with TWC, Chapters 5 and 7. The rules also provide for greater consistency with the Texas Rules of Civil Procedure and the APA. Adoption of these rules will substantially advance these purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of these rules because they affect only the commission's procedural requirements for enforcement actions and clarify the rules for consistency purposes.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rule and found that the rulemaking is identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require

that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the adopted rules under 31 TAC §505.22 and found that the rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the adopted rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the administrative policies and the policies for specific activities related to construction and operation or solid waste treatment, storage, and disposal facilities and discharge of municipal and industrial wastewater to coastal areas.

Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules are only procedural in nature and continue to ensure the effective enforcement of commission rules and permits concerning these matters. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will result in effective enforcement and greater consistency with applicable state statutes, the APA, and Texas Rules of Procedure.

HEARING AND COMMENTERS

A public hearing on this proposal was held March 1, 1999 and the comment period closed on April 5, 1999. No oral comments were received at the public hearing. Written comments were received from the Texas Center for Policy Studies (TX Center); Henry, Lowerre, Johnson & Frederick (Lowerre); and an individual.

ANALYSIS OF TESTIMONY

The individual suggested that the proposed change to §70.10(c) should more clearly reflect that notice of the proposed agreed order be published, not the text of the complete proposed agreed order.

The commission agrees and proposes the following change to §70.10(c) to clarify the rule: “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. Once the notice of the proposed agreed order is published, the executive director shall*”

Lowerre contended that both the agency’s current rules and the proposed amendments are inconsistent with the United States Environmental Protection Agency’s (EPA) minimum standards for authorization of the National Pollutant Discharge Elimination System (NPDES), Underground Injection Control (UIC), and Resource Conservation and Recovery Act (RCRA) programs. Lowerre is primarily concerned with amendments to §§70.7, 70.11, and 70.51.

Lowerre’s first concern deals with the proposed amendment to §70.7(a). The commenter stated that the agency’s force majeure provision violates federal law, which requires that all violations of the law be treated as violations. Additionally, Lowerre stated that the provision prevents EPA enforcement actions and citizens’ suits for violations when such situations arise, and that the commission’s rules declare certain violations of the federal law to not be violations under state law.

The state legislature has recognized that acts of God, war, strike, riot, or other catastrophes may exist which cause violations of the state's environmental regulations and has provided a force majeure defense in the statutes in TWC, §7.251. The commission is bound by the authority given to it by the legislature. The force majeure provision was enacted during the 75th Legislature in order to provide a more consistent enforcement process across all environmental media regulated by the commission. The commission's proposed modification to §70.7(a) mirrors that language of the statute and clearly reflects legislative intent in the area of force majeure. In addition, staff believes the force majeure is consistent with federal law that applies to authorized programs or is otherwise applicable to state programs.

Lowerre also expressed concern that the proposed amendment to §70.11 highlights the fact that no guidance by the commission has been formulated as to what should be included in the notice sent to the *Texas Register* of the opportunity to comment on a proposed agreed order. The commenter stated that the commission's notice is not sufficient and that it does not contain notice of the responsible party, location of the violations, or types of acts which are subject to the order.

Apparently, the commenter has not challenged the correct proposed amendment. Section 70.11 concerns notice to the "parties" of the commission's rulings, orders, or decisions. Such notice is achieved by first class mail or personal delivery to the respondent in enforcement matters of the findings of the commission and is specifically provided for by statute in TWC, §7.059. Such notice does not involve *Texas Register* publication, nor is its perceived purpose to provide notice to the public at large. However, the notices are published in a format prescribed by the *Texas*

Register.

However, §70.10 does concern publication of notice in the *Texas Register* of proposed agreed orders for public comment. The commission's publications include information regarding: (1) the name of the entity charged with the alleged violations; (2) commission identification numbers; (3) the physical location of the facility where the alleged violations occurred; (4) the legal citations to which rules and/or statutes have been allegedly violated; (5) the amount of the penalty assessed; and (6) a central office contact and the address and telephone number of the region where the violations occurred. In addition, each notice states that a copy of each proposed agreed order is available for public inspection should a citizen want more detailed information. The commission believes that the information included in the notice is sufficiently detailed to convey the nature of the violations and apprise the public of who is responsible and where the alleged violations occurred. The purpose of the notification is to apprise the public of the general circumstances surrounding the violations, and the commission contends that the objective is fully satisfied with the information currently published in the *Texas Register* for proposed agreed orders.

Lastly, Lowerre, along with the TX Center, expressed concern about the deletion of language in §70.51(a), concerning the definition of substantial noncompliance. Lowerre suggested that the commission should adopt the EPA's definitions of noncompliance, including the substantial noncompliance definition for the NPDES program. The TX Center expressed concern that without the substantial noncompliance definition, the regulated community would be left without clear rules on what

constitutes substantial noncompliance, which the TX Center claims could lead to inconsistent application of the mandatory enforcement provisions and situations in which substantial noncompliance is not addressed through the mandatory enforcement hearing process, thereby circumventing the statutory intent.

The commission finds that §70.51(a)(4) refers to a Texas Health and Safety Code provision relating to substantial noncompliance which has been repealed. Texas Health and Safety Code, §382.082, which is incorporated by reference in the current rules, was repealed by Acts 1997, 75th Legislature, Chapter 1072, §60(b)(5), effective September 1, 1997. Thus, the reference to a repealed statute is inappropriate.

Section 70.51(a)(2) also defines substantial noncompliance and the amendment deletes that paragraph. The commission believes that the definition in the current rules limits the discretion of the commission in mandatory enforcement to only those situations defined by the rules. Currently, the commission uses more stringent, all-encompassing criteria to initiate to formal enforcement, which fully satisfies the governing statute. The commission has fully implemented TWC, §5.117, and believes that the deletion of the substantial noncompliance definition provides flexibility to pursue a more rigorous and systematic approach to enforcement matters. In addition, deletion of the substantial noncompliance definition provides flexibility across media, which is an important goal of the commission. Chapter 361 and Chapter 382 of the Texas Health and Safety Code have no comparable definition. Therefore, the TWC, Chapter 26 substantial noncompliance definition creates a separate, less-stringent standard, which is inconsistent with the

goal of creating a uniform regulatory scheme across all regulated media.

STATUTORY AUTHORITY

The amendments are adopted under the following sections of the TWC: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §§7.001 *et seq.*, which establishes the commission's enforcement authority and provides specific requirements governing that authority. The Code, §2001.004, which requires state agencies to adopt rules of practice, also applies to this rulemaking.

CHAPTER 70

ENFORCEMENT

SUBCHAPTER A : ENFORCEMENT GENERALLY

§§70.2, 70.5, 70.7 - 70.11

§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.

§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.

§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) - (c) (No change.)

§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) (No change.)

§70.9. Installment Payment of Administrative Penalty.

(a) Any person(s), firm, or business may, upon approval of the commission, be allowed to make installment payments of an administrative penalty imposed in a commission order.

(b) A qualifying small business upon written request shall be allowed to make installment payments of an administrative penalty imposed under a commission order, subject to the following.

(1) - (2) (No change.)

(3) The amount and payment schedule of monthly installments must be specified by a commission order.

(4) (No change.)

§70.10. Agreed Orders.

(a) - (b) (No change.)

(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. Once the notice of proposed agreed order is published, the executive director shall file the agreed order with the chief clerk. The chief clerk shall then schedule the agreed order for consideration during a commission meeting under Chapter 10 of this title (relating to Commission Meetings). If the enforcement action is under the jurisdiction of SOAH, the judge shall remand the action to the executive director who will file the agreed order with the chief clerk for commission consideration. The judge is not required to prepare a proposal for decision or memorandum regarding the settlement.

§70.11. Notice of Decisions and Orders.

(a) For rulings, orders, or decisions issued by the commission, parties shall be given notice, either personally or by first class mail, in accordance with the APA, §2001.142. The notice shall include:

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

(b) (No change.)

SUBCHAPTER B : MANDATORY ENFORCEMENT HEARINGS

§70.51

STATUTORY AUTHORITY

The amendment is adopted under the following sections of the TWC: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §§7.001 *et seq.*, which establishes the commission's enforcement authority and provides specific requirements governing that authority. The Code, §2001.004, which requires state agencies to adopt rules of practice, also applies to this rulemaking.

§70.51. Mandatory Enforcement Hearings.

(a) The executive director shall monitor compliance with all permits and licenses issued by the commission. If the evidence available to the executive director through the monitoring process indicates that a permittee or licensee is in substantial noncompliance for a period of four consecutive months, or for a shorter period of time if the executive director considers an emergency to exist, the executive director shall report this fact to the commission together with the information relating to the noncompliance. The executive director may consider the magnitude and frequency of noncompliances with permit or license limitations and conditions in determining the existence of substantial noncompliance.

(b) - (c) (No change.)

SUBCHAPTER C : ENFORCEMENT REFERRALS TO SOAH

§§70.101, 70.102, 70.104 - 70.106

STATUTORY AUTHORITY

The amendments are adopted under the following sections of the TWC: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §§7.001 *et seq.*, which establishes the commission's enforcement authority and provides specific requirements governing that authority. The Code, §2001.004, which requires state agencies to adopt rules of practice, also applies to this rulemaking.

§70.101. Executive Director's Preliminary Report.

(a) (No change.)

(b) An EDPR shall include a brief statement of the nature of the violation, the statute or statutes violated, the facts relied upon by the executive director in concluding that a violation has occurred, a recommendation that an administrative penalty be assessed, the amount of the recommended penalty, any corrective action to be taken by the respondent, and an analysis of the factors required in the relevant statute and rules to be considered by the commission in determining the amount of the penalty.

§70.102. Pleadings Other Than the Executive Director's Preliminary Report.

(a) - (b) (No change.)

(c) Within seven days of the date of the evidentiary hearing, parties may file pleadings, supplemental or amended, so long as these pleadings do not operate as a surprise to the opposite party. Pleadings filed after the seventh day before the evidentiary hearing shall be filed only after leave of the judge is obtained. Leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party. Late-filed amendments may constitute grounds for a continuance.

(d) The executive director may amend an EDPR by filing a petition with the chief clerk, in which the executive director may make such changes as the law allows, including, but not limited to, changes in the following: the amount of the penalty, up to the maximum allowable by statute; the violations alleged, to include any or all violations which are not precluded by law from being brought; the number of days of occurrence of previously alleged violations; and the injunctive relief (or remedial ordering provisions) sought. The right to change the violations alleged includes the right to add causes of action based on statutes within the commission's jurisdiction other than the one or ones upon which the EDPR in the case was based. In addition, the executive director may also amend to add or non-suit parties to the contested enforcement case. Petitions are pleadings and shall be served on the parties in accordance with this Chapter and Chapter 1 of this title.

(e) (No change.)

§70.104. Notice of Executive Director's Preliminary Report.

(a) - (b) (No change.)

(c) Additional methods of service. Where the executive director has been unable to deliver notice to the respondent through reasonable attempts to serve respondent by the methods described in subsection (b) of this section, notice may be effected by:

(1) publishing in a newspaper of general circulation in the county of the last known business or residential address of the respondent, for a period of seven consecutive days, the following:

(A) the name of the person charged;

(B) a brief summary of the charges;

(C) a statement of the amount of the penalty recommended, if any;

(D) a statement that injunctive or remedial relief is sought; and

(E) a statement of the right of the person charged to a hearing on the occurrence of the violation, the amount of the penalty, or both;

(2) mailing the EDPR by both certified mail, return receipt requested, and by first class mail, postage prepaid simultaneously. When the executive director gives the respondent notice of the EDPR to the respondent's last known address in the manner provided by this paragraph, timely service will be presumed if the certified mail is returned to the executive director as unclaimed by the postal service, and the first class mail is not similarly returned; or

(3) sending the EDPR by telephonic document transfer or facsimile not later than the tenth day after the date on which the EDPR is issued, at or before 5:00 p.m. local time for the respondent. Service by telephonic document transfer after 5:00 p.m. local time of the respondent shall be deemed service on the following day.

(d) (No change.)

§70.105. Answer.

(a) A respondent may file with the chief clerk a written response to the EDPR or a pleading entitled an answer which may deny the alleged violations and/or the amount of the penalty. Through the answer, the respondent may either agree to the amount of the penalties and corrective actions recommended in the EDPR or request a contested enforcement case hearing. Any answer must be filed

no later than 20 days after the date on which the respondent receives notice of an EDPR. Failure to file the answer by the 20th day after the date on which the respondent receives notice of an EDPR may result in a default order, as described in §70.106 of this title (relating to Default Order), being issued against the respondent.

(b) - (f) (No change.)

§70.106. Default Order.

(a) - (c) (No change.)

(d) The effective date of a default order shall be the date that the order is final under §80.273 of this title (relating to Decision Final and Appealable) and APA, §2001.144.