

The Texas Natural Resource Conservation Commission (commission) proposes 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.

The commission has also conducted its review of the rules in Chapter 70 as required by Article IX, §167, House Bill 1, the General Appropriations Act. This action results from the commission's review of these rules. The proposed notice of review is concurrently published in the Rules Review section of this edition of the *Texas Register*.

EXPLANATION OF PROPOSED RULES

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

The proposed amendment to §70.2, concerning Definitions, changes the definition of "Contested enforcement case" to make it consistent with the APA definition of "Contested case." In addition, the definitions are now numbered to make the section conform to new *Texas Register* publication requirements.

The proposed 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 proposed 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 proposed 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 also proposes to 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 proposes to 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 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 proposed 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 would make the rule more clearly consistent with the legislative authority granted to the commission by TWC, §5.1175(a), and allow 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. A conforming change to subsection (c) is also proposed.

The proposed 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 proposed 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 all proposed administrative orders, and it ensures consistency with TWC, §7.059 and §7.075. In addition, the commission proposes to delete the reference to Texas Health and Safety Code (HSC), §382.096, which was repealed by the legislature effective September 1, 1997.

The proposed 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, and is therefore being deleted. In addition, it is proposed that 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” would be deleted, since a certificate of convenience and necessity is considered a “permit or license” for enforcement purposes.

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

The proposed amendment to §70.102, concerning Pleadings Other than the Executive Director’s Preliminary Report, would modify 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) would be modified to include language concerning adding or non-suiting additional parties in an amendment to an EDPR by the executive director. All of these proposed changes provide consistency with the rules governing civil procedure in Texas courts.

The proposed amendments to §70.104, concerning Notice of Executive Director’s Preliminary Report, would: provide additional methods of service consistent with the Texas Rules of Civil Procedure; allow

the EDPR to be served by facsimile; and reflect the process for serving the respondent by certified mail and first class mail simultaneously.

The proposed amendment to §70.105, concerning Answer, would delete 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.

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

FISCAL NOTE

Jeff Grymkoski, Director of Strategic Planning and Appropriations, has determined that for the first five-year period the sections are in effect, there will be no significant fiscal implications for state or local government as a result of administering or enforcing the sections. The purpose of this action is to clarify the commission's rules governing enforcement and to ensure compliance with the Administrative Procedure Act, Texas Water Code, Chapters 5 and 7, and the Texas Rules of Civil Procedure.

PUBLIC BENEFIT

Mr. Grymkoski also has determined that for each year of the first five years the sections are in effect,

the anticipated public benefit will be greater consistency among commission rules, the Administrative Procedure Act, the Texas Rules of Civil Procedure, and Texas Water Code, Chapters 5 and 7. In addition, it is anticipated that these sections will result in further streamlining and simplification of certain commission procedural requirements. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

SMALL BUSINESS ANALYSIS

There are no anticipated economic costs to any small businesses to comply with the proposed sections. The primary purpose of this action is to simply streamline the commission's procedural rules and make them more consistent with the Administrative Procedure Act, Texas Water Code, Chapters 5 and 7, and the Texas Rules of Civil Procedure.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government 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 proposed 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, Texas Government Code (TGC), §2001.004, requires state agencies to adopt rules of practice. Finally, the proposal 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 Texas Government 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 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 proposed rulemaking and found that the proposal is a rulemaking 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 Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules under 31 TAC §505.22, and found that the proposed rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed 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 proposed 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 proposed rules is consistent with the applicable CMP goals and policies because the proposed 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.

The commission invites public comment on the consistency of the proposed rules with the CMP.

PUBLIC HEARING

A public hearing on this proposal will be held March 1, 1999, at 10:30 a.m. in Room 2210 of Texas Natural Resource Conservation Commission Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30

minutes before the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98053-070-AD. Comments must be received by 5:00 p.m., March 1, 1999. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The amendments are proposed 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. TGC, §2001.004, which requires state agencies to adopt rules of practice, also applies to this rulemaking.

The proposed amendments implement TWC, §§5.103, 5.105, and 7.001 *et seq.* and TGC, §2001.004.

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 [, where having a right to do so, contests the issuance of the order by requesting an evidentiary 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 [Any pollution, or any discharge of waste without a permit or in violation of a permit, shall not constitute a violation under this chapter if the pollution or discharge is

the result of causes which are outside the control of the permittee or the permittee's agents and could not be avoided by the exercise of due care. Such acts include, but are not limited to,] 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.)

[(d) The executive director shall respond in writing within 30 days from receipt of the notification provided under subsection (c) of this section with a determination as to whether the event constitutes a force majeure and an affirmative defense to an enforcement action.]

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

(a) If any respondent, in response to a contested enforcement case [an EDPR or petition], 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 [an agreed] 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 [in an agreed order], subject to the following.

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

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

(4) (No change.)

§70.10. Agreed Orders.

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

(c) When an agreement is reached, the executive director shall publish the proposed agreed order in the *Texas Register* for public comment not later than the 30th day before the date on which the public comment period closes, under Texas Water Code, §7.075. Once the proposed agreed order is published, the executive director shall file the agreed order with the chief clerk so that all timely public

comments will be received by the executive director before the commission meeting on which the item is set. 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: [Notice shall also be given in accordance with Texas Health and Safety Code, §382.096, where applicable.]

(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 proposed 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. TGC, §2001.004, which requires state agencies to adopt rules of practice, also applies to this rulemaking.

The proposed amendment implements TWC, §§5.103, 5.105, and 7.001 *et seq.* and TGC, §2001.004.

§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. [A certificate of convenience and necessity is not considered to be a permit or license for the purpose of this section.]

[(1)] 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.

[(2)] Substantial noncompliance includes situations involving permit or license violations which cause or have the potential to cause a significant water quality problem in, or impairment of the uses of, a receiving stream, groundwater, or other water in the state, infringes upon the water rights of diverters or appropriators of water of the state, or results in a release or threat of release of hazardous waste to the environment, or any other set of circumstances which present a threat to public health or safety or the environment. This set of circumstances includes, but is not limited to, a failure to monitor operations or report information required by a permit or license regarding the operation of a facility without which the operator and/or the commission may be unable to adequately assess the performance of the facility and thereby assure that environmental harm or threats to public health have not occurred and may not occur. In addition, substantial noncompliance will be assessed in terms of the degree of deviation from any requirement of a permit or license independent of the harm or potential harm to the environment or to public health.]

[(3)] An emergency, for purposes of this subsection, involves an unforeseen set of circumstances which calls for immediate commission action due to an actual or potential hazard to public health and safety, or severe adverse impact on or to the uses of a receiving stream, groundwater, or other water in the state. If the emergency is of sufficient gravity, the executive director shall report the emergency to the commission together with the information relating to the noncompliance and shall

advise the commission of the necessity of seeking a temporary restraining order, temporary injunction, or any other remedy in equity or law necessary for the abatement of the condition or conditions causing or contributing to the emergency, if such remedy is authorized by statute.]

[(4) Substantial noncompliance with provisions of Texas Health and Safety Code, Chapter 382, or with rules, permits, or orders promulgated pursuant to that chapter, shall be handled pursuant to Texas Health and Safety Code, §382.082.]

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

SUBCHAPTER C : ENFORCEMENT REFERRALS TO SOAH

§§70.101, 70.102, 70.104 - 70.106

STATUTORY AUTHORITY

The amendments are proposed 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. TGC, §2001.004, which requires state agencies to adopt rules of practice, also applies to this rulemaking.

The proposed amendments implement TWC, §§5.103, 5.105, and 7.001 *et seq.* and TGC, §2001.004.

§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. [An EDPR may be superseded by a petition.]

§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 [Up to seven days prior to the] hearing, parties may file pleadings, supplemental or amended, so long as these pleadings do not operate as a [an unfair] 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 [Amendments after that time will be at the discretion of the judge and] 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 [Service by publication]. 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) [(1)] the name of the person charged;

(B) [(2)] a brief summary of the charges;

(C) [(3)] a statement of the amount of the penalty recommended, if any;

(D) [(4)] a statement that injunctive or remedial relief is sought; and

(E) [(5)] 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 a pleading with the chief clerk, which may be in the nature of a general denial as that term is used in state district courts, entitled an answer, either consenting to the imposition of the penalties and injunctive relief recommended in the EDPR, or requesting a contested enforcement case hearing. Any answer must be filed no later than 20 days [, or 30 days for irrigators and irrigation system installers,] after the date on which notice of an EDPR is received. Failure to file

the answer by the required date after the date on which notice of EDPR is received 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.