

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** July 20, 2012

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: Ramiro Garcia, Jr., Deputy Director
Office of Compliance and Enforcement

Docket No.: 2011-1253-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 70, Enforcement
HB 2694 (4.09): Enforcement Policy
Rule Project No. 2011-034-070-CE

Background and reason(s) for the rulemaking:

House Bill (HB) 2694, §4.09 (TCEQ Sunset Bill), 82nd Legislature, 2011, directs the TCEQ to adopt a general enforcement policy that describes the commission's approach to enforcement. The effective date of the legislation was September 1, 2011.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

Section 70.1(b), expands on the original rule language by referencing factors in assessing an administrative penalty and explaining the purpose of an administrative penalty. It includes cross-references to other state statutes which explain what factors are considered in assessing an administrative penalty. Section 70.1(c) discusses the applicability of the chapter. Section 70.1(d) clarifies that the commission's administrative penalty authority is not limited by the executive director (ED).

Amended §70.3, adds clarification that specific enforcement policies, including the TCEQ Penalty Policy, are available on the Internet. This amendment also replaces the term "enforcement guidelines" with "specific enforcement policies." This amendment was made pursuant to Texas Water Code (TWC), §7.006(c). These specific enforcement policies are not rules. The commission also changed the title of §70.3 from "Enforcement Guidelines" to "Specific Enforcement Policies."

Amended §70.6, adds criteria for when violations may be referred to the Office of the Attorney General (OAG) for civil prosecution. Including the criteria for referring violations to the OAG will improve transparency in how the TCEQ determines which violations get referred to the OAG and what could be subject to an OAG referral. Currently, these criteria are located in internal guidance policies and are not fully accessible to the public.

The commission repealed current §70.11, Notices of Decision and Orders, and located it in new §70.12, to better organize the sections.

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New §70.11 adds criteria to explain when an agreed order may be drafted as a findings order. The findings order criteria are currently located on the external Web site as a stand-alone enforcement policy. Default Orders and Commission Orders based on consideration of Proposals for Decision are not covered by this rule.

B.) Scope required by federal regulations or state statutes: This rulemaking is not required by federal regulations; however, this rulemaking is required by state statute. HB 2694, §4.09 amended the statute by adding TWC, §7.006. TWC, §7.006 requires that the commission adopt a general enforcement policy describing the commission's approach to enforcement. Therefore, the scope of this rulemaking is required by HB 2694, §4.09.

C.) Additional staff recommendations that are not required by federal rule or state statute: N/A

Statutory authority:

TWC, §§5.103, 5.105, and 7.001, *et seq.*

Texas Government Code, §2001.004 and §2001.006

Effect on the:

A.) Regulated community: A general enforcement policy in rule will increase transparency for the regulated community.

B.) Public: A general enforcement policy in rule will increase transparency for the public.

C.) Agency programs: There are no anticipated impacts to agency programs.

Stakeholder meetings:

The first meeting was held August 2, 2011. ED staff took questions and comments during the meeting and an email was set up to take comments from remote participants. There were approximately 35 persons in attendance representing industry, trade associations, small business, local government, consulting firms, law firms, and environmental advocacy groups. The ED received 14 comment letters during the public comment period from members of the public, trade associations, and environmental advocacy groups. The majority of the comments were in response to the questions TCEQ staff posed to the commission at the July 5, 2011 Work Session. Those who provided comments supported the concept of putting a general enforcement philosophy into rule but there were differences of opinion on how much detail should be included beyond this general philosophy. There was no unanimous support for including the tools of enforcement such as corrective action orders, findings orders, referral to the OAG, economic benefit, culpability, compliance history, good faith efforts to comply, and other factors with the exception of deferrals. There were many comments regarding revisions to the Penalty Policy specifically, which are outside the scope of the General Enforcement Policy rules. On September 28, 2011, ED staff presented a summary of the stakeholder comments to the

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commissioners at the Commission Work Session. Changes to the initial draft of the rules were made to the Findings Order Criteria as a result of the comments received.

As directed by the commission at the November 2, 2011, Work Session, a second stakeholder meeting was held on December 6, 2011. ED staff took questions and comments during the meeting and an email was set up to take comments from remote participants. There were nine people in attendance representing trade associations, law firms, and consulting firms. The ED received two comment letters during the public comment period. On the issue of deferrals, which was the one item that the commissioners specifically requested input from the public, one comment letter supported putting the deferral criteria into rule. The reasoning was that there is currently nothing in writing that explains the criteria and allows the public to understand what qualifies for a deferral. The ED's recommendation is to put the criteria in the Penalty Policy which should satisfy the commenter's concern. The other commenter supported adding the deferral criteria to the Penalty Policy.

Public comment:

The proposal was published in the April 13, 2012, issue of the *Texas Register* (37 TexReg 2518). The commission held a public hearing on May 8, 2012. The comment period closed on May 14, 2012. The commission received comments from the Association of Electric Companies of Texas, Inc. (AECT); Alliance for a Clean Texas (ACT); Hilco H2O; Lloyd Gosselink Rochelle & Townsend, P.C. (Lloyd Gosselink); Lone Star Chapter of the Sierra Club (Sierra Club); Public Citizen; Sustainable Energy and Economic Development Coalition (SEED Coalition); Texas Association of Clean Water Agencies (TACWA); Texas Chemical Council (TCC); Texas Industry Project (TIP); Texas Pipeline Association (TPA); Texas Oil & Gas Association (TxOGA); Water Environment Association of Texas (WEAT); and two individuals. Significant comments and concerns are discussed further.

The commission received several comments regarding the enforcement Penalty Policy. ACT, Public Citizen, SEED Coalition, Sierra Club, and TPA commented that the rules should directly incorporate the agency's Penalty Policy and other enforcement-related policies, stating that the general reference to the commission's Internet Web site was an improvement, but not stringent enough. No changes were made to the proposed rules in response to these comments. The commission reasoned that the statute does not require the commission to adopt all enforcement-related policies into rule, and that the methodology for initiating enforcement actions and the criteria that apply to those actions should remain in policy to allow the commission flexibility to assess and update the policies as needed. Additionally, the commission stated that the Penalty Policy has been enforced by courts and the State Office of Administrative Hearings. For these reasons, it is important that the specific details of the enforcement-related policies not be incorporated into rule.

The commission received several comments regarding the OAG referral criteria. TCC, TIP, TPA, and TxOGA commented that several of the criteria should either be removed from the

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rules or specific terms further defined. No changes were made to the proposed rules in response to these comments. The section containing OAG referral criteria was specifically included in the rules to provide better transparency and clarity as to when an enforcement action may be referred to the OAG. Due to the commission's broad jurisdiction and the need for flexibility, it is not appropriate to further define or limit the commission's ability to refer an enforcement case to the OAG.

The commission received several comments regarding the findings order criteria. Lloyd Gosselink, TACWA, TCC, TIP, TPA, TxOGA, and WEAT commented that many of the terms and conditions of the findings order criteria should either be removed from the rules or specific terms further defined. One change, as discussed in the section below, was made to the proposed rules in response to these comments. The commission included the findings order criteria in the proposed rules in order to provide better transparency and clarity as to when a findings order may be issued during an enforcement action, thus the commission did not remove this criteria from the rules. With regard to further defining specific terms in the rules, the commission believes it addressed the commenters' concerns by providing explanation in the responses on how the findings order criteria has historically been interpreted and applied. The commission reasoned that to further define the terms in rules would unnecessarily limit the flexibility of the commission.

Significant changes from proposal:

In response to AECT's comment that the phrase "to recover any economic benefit resulting from the non-compliance" should be reworded, since economic benefits may not always be recovered under the current Penalty Policy, the commission changed §70.1(b) by adding "as the commission determines is appropriate" to the end of this sentence.

In response comments received by TCC, the commission changed §70.11(b)(3)(D) to include the phrase "as determined by the executive director under §101.222(a)" to the findings order criteria for unauthorized emissions which are excessive emissions events.

Potential controversial concerns and legislative interest:

As outlined above, the commission received comments from several organizations expressing concerns about this rulemaking. Although the adopted rules provide responses to these comments and reasoned justifications for the commission's decisions, it is likely that the exclusion of specific components that are currently outlined in various enforcement policies (such as the Penalty Policy) from the rulemaking will continue to be an item of interest, as well as the OAG referral criteria and findings order criteria.

Does this rulemaking affect any current policies or require development of new policies? As a result of this rulemaking, changes have been made to the findings order criteria. New policies will be drafted for corrective action order criteria and deferral criteria.

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What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking? If this rulemaking does not go forward the TCEQ will not be compliant with HB 2694, §4.09. There are no known alternatives to rulemaking.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: April 13, 2012

Anticipated Texas Register publication date: August 24, 2012

Anticipated effective date: August 30, 2012

Six-month Texas Register filing deadline: October 12, 2012

Agency contacts:

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Attachments

HB 2694, Section 4.09

cc: Chief Clerk, 2 copies
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