Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** March 9, 2012

Thru: Bridget C. Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Richard A. Hyde, P.E., Deputy Director
Office of Compliance and Enforcement

Docket No.: 2012-1253-RUL

Subject: Commission Approval for Proposed Rulemaking
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), §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:
Proposed §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. Proposed §70.1(c) discusses the applicability of the chapter. Proposed §70.1(d) clarifies that the commission's administrative penalty authority is not limited by the executive director (ED).

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

Proposed 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, this criteria is located in internal guidance policies and is not fully accessible to the public.

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The commission proposes to repeal current §70.11, Notices of Decision and Orders, and locate it in proposed new §70.12, to better organize the sections.

Proposed 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 rule is not required by federal regulations; however, this rule is required by state statute. HB 2694, §4.09 amended by adding Texas Water Code, §7.006. Texas Water Code, §7.006 requires that the commission to 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:
Texas Water Code, §§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 Policies rule. On September 28, 2011, ED staff presented a summary of the stakeholder comments to the commissioners at the Commission Work Session. Changes to the initial draft of the rule 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.

Potential controversial concerns and legislative interest:
None identified.

Will 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.

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 proposal rulemaking schedule:
Anticipated proposal date: March 28, 2012
Anticipated *Texas Register* publication date: April 13, 2012
Public hearing date (if any): May 8, 2012
Public comment period: April 13, 2012 – May 14, 2012
Anticipated adoption date: August 22, 2012

Agency contacts:

Re: Docket No. 2012-1253-RUL

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Attachments:
HB 2694, Section 4.09

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