

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §70.4, Enforcement Action Using Information Provided by Private Individual. Section 70.4 is adopted *with changes* to the proposed text as published in the September 7, 2001 issue of the *Texas Register* (26 TexReg 6841).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The rule concerns the participation of private individuals in the agency's enforcement activities, and implements new law concerning this matter. During the 77th legislative session the agency underwent the sunset review process, leading to the passage of House Bill (HB) 2912 (the "Sunset bill"). Sunset bill, §1.24 added Texas Water Code, (TWC), §7.0025 concerning the initiation of enforcement using information provided by a private individual. This section specifies that the commission may initiate enforcement using information provided by a private individual, gives certain limits on the use of such information, and authorizes the commission to adopt rules that set criteria for the TNRCC executive director's (ED's) evaluation and use of the information. Sunset bill, §18.10(a) requires the commission to adopt rules to implement the new law no later than December 1, 2001. Section 18.10(b) directs that the new law applies only to information provided by a private individual on or after January 1, 2002. This rulemaking is necessary to implement HB 2912, §1.24 and §18.10.

HEARINGS AND COMMENTERS

Six public hearings on the proposal were held in the following cities on the dates listed: 1.) El Paso on September 24, 2001; 2.) San Antonio on September 25, 2001; 3.) Waco on September 27, 2001; 4.)

Arlington on October 1, 2001; 5.) Corpus Christi on October 2, 2001; and 6.) Houston on October 4, 2001.

Written comments were submitted by the Alliance for a Clean Texas (ACT); Baker Botts L.L.P., on behalf of the Texas Industry Project (TIP); the Big Bend Regional Sierra Club; the Bayou Preservation Association (BPA); the City of Austin Water and Wastewater Utility (City of Austin Utility); Clean Air Clear Lake; the Galveston Bay Conservation and Preservation Association (Galveston Bay Association); the Galveston Bay Foundation; the Harris County Attorney's Office; the Harris County Public Health & Environmental Services Pollution Control Division (HCPCD); Hispanics for Clean Air and Safe Environments (HCASE); the Sierra Club, Houston Regional Group (Sierra Club (Houston)); Jobe Concrete Products, Inc. (Jobe); the Lone Star Chapter of the Solid Waste Association of North America (TxSWANA); Mothers for Clean Air; the Reserve Technology Institute (RTI); the Southeast Texas Bucket Brigade (STBB); Texas Cattle Feeders Association (TCFA); Texas Chemical Council (TCC); the Texas Municipal League (TML); the Texas City Attorneys Association (TCAA); the Texas Mining and Reclamation Association (TMRA); the Texas Poultry Federation (TPF); Texas Watch; and 92 individuals. Oral comments were provided during the public hearings by the office of State Representative Dora Olivo; ACT; Citizens for Environmental Justice (CEJ); Clean Water Action (CWA); Sierra Club (Houston); Quality of Life El Paso (QLEP); Jobe; Texas Watch; the Sustainable Energy and Economic Development Coalition (SEED Coalition); the SEED Coalition on behalf of the Director of STBB; the Texas Water Quality Association; the City of Waco; and 35 individuals. The comments are addressed in the SECTION DISCUSSION AND RESPONSE TO COMMENT section of this preamble.

SECTION DISCUSSION AND RESPONSE TO COMMENT

General

Almost all of the commenters generally supported the rule as a means to increase citizens' participation in the commission's enforcement activities, and to allow the commission's use of new sources of information for such activities. Several commenters favorably compared the rule to neighborhood watch programs established by local law enforcement authorities. Clean Air Clear Lake and an individual supported the proposed rule because it would allow for a new source of information to prove a violation that occurred at a particular time. In the past when they called the agency to submit a complaint an agency investigator would arrive days later to gather evidence showing the violation. But by that time the evidence of a violation had dissipated.

One individual opposed the rule, saying that under the rule the commission would impose penalties on entities based on citizen evidence that was not confirmed by agency staff.

The commission responds that it adopts the rule in order to comply with the legislative directive in HB 2912, as previously explained in this preamble. The commission would also note that evidence of a violation, whether gathered by a citizen or by agency staff, must be able to withstand scrutiny during either administrative and/or judicial proceedings. The new rule will lead to the commission's assessment of penalties only if there is competent evidence of a violation.

The public comment also proposed changes to specific provisions in the rule. The remainder of the public comment focused on the implementation of the rule once it was adopted. The commission will

first respond to comment that proposed changes to the rule itself, and then respond to comment concerning implementation of the rule.

Texas Poultry Federation recommended that throughout the rule either the term “private individual” or “individual” should be consistently used. The commenter was concerned that the rule as proposed could cause confusion, or that the commission intended some particular meaning for each of these terms that was not evident in the rule.

The commission has struck the word “private” in §70.4(c)(3) in response to this comment. The commission intends the adopted rule to apply to private individuals, as distinguished from the agency’s own staff. The rule was drafted so that in each subsection the term “private individual” is used. If a particular subsection required an additional reference to private individuals then “individual” was used. This is intended as a shortened reference to “private individual.” The commenter correctly pointed out that the drafting style was not consistently followed in §70.4(c)(3) and so the commission has made the change to make the style consistent.

Sierra Club (Houston) and one individual asserted that the proposed rule was too restrictive and was designed to intimidate citizens rather than encourage them to submit information to the commission.

The commission makes no changes in response to these comments. The commenters did not explain exactly how the rule would intimidate citizens nor did they propose alternative rule language that would address their concerns. The commission believes the commenters may be

concerned that the rule makes specific requirements on the submission and use of citizen information. Those requirements for the most part track the requirements in HB 2912, or are intended to ensure that information is sufficiently reliable so that the commission may use it in administrative or judicial proceedings. As was explained in the preamble to the proposed rule, the ED can pursue an enforcement action only if he/she knows the information he/she relies on will be admissible as evidence at the hearing. Commission enforcement actions are processed under the Texas Administrative Procedure Act (APA), Texas Government Code, Chapter 2001. An enforcement action, if contested by the alleged violator, is processed as a contested case hearing held before the State Office of Administrative Hearings (SOAH), and in the hearing the Texas Rules of Evidence apply. The purpose of the Rules of Evidence is to ensure that the truth is ascertained and that proceedings are justly determined. The ED must comply with these requirements in an enforcement action whether the violation is based on information from private individuals or from agency investigators. Of course, the Rules of Evidence apply to judicial proceedings too. The adopted rule is not intended to intimidate citizens. Rather, the rule is intended to ensure that an enforcement case based on citizen evidence may successfully withstand administrative and judicial review.

Sierra Club (Houston) and an individual requested that the commission define “enforcement action” as used in the preamble to the proposed rules.

The commission has made no changes to the adopted rule in response to these comments. The commission’s use of the term “enforcement action” means the efforts taken by the ED to enforce

the law under the commission's jurisdiction against a particular entity. The ED may pursue an enforcement action in three forums, being administrative, civil, or criminal proceedings. When agency staff decide what enforcement action to take they refer to the Field Operations Division's enforcement criteria. The criteria takes into consideration the entity's compliance history and the severity of the alleged violations. Depending on the circumstances, the enforcement criteria may direct staff to issue to the entity a notice of violation and to take no further action. But the more serious the violation the more stringent will be the ED's response. The criteria may direct staff to begin an administrative enforcement action in which the ED would seek a commission order requiring the entity to pay a penalty and to return to compliance. In a civil enforcement action the ED would refer the case to the Texas Attorney General for filing of a court petition. In a criminal enforcement action the ED would refer the case to the appropriate prosecuting authority. No matter the forum, the ED generally seeks both a penalty plus requirements that the violator return to compliance.

One individual requested that the commission make numerous changes to its rules concerning the land application of sludge. The commenter also proposed that the commission amend §1.6 of this title (relating to Inscriptions on Commission Vehicles).

The commission has made no changes to the rule in response to the comments because the proposed changes are outside the scope of the current rulemaking project.

Section 70.4. (a)

TIP commented that it supports the requirement that private individuals submit information to the ED rather than to the commission.

The commission has made no changes in response to this comment.

Section 70.4(b)

This subsection specifies that the ED may initiate an enforcement action based on information received from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. Also, the ED may initiate an enforcement action based on any combination of information provided by private individuals or by the ED's own investigations.

Galveston Bay Association and Galveston Bay Foundation commented that, to avoid confusion, the commission should define the ED's determination of the "sufficient value and credibility" of citizen evidence.

The commission has made no changes in response to this comment. The legislature directed the commission to adopt criteria for the ED to use in evaluating the value and credibility of citizen information. The legislature did not direct the commission to define exactly how the ED should exercise his/her prosecutorial discretion, and the commission believes that it is not advisable to do so on its own initiative. If the rule defined "sufficient and credible" evidence or imposed criteria

of some sort, all in an effort to manage the ED's prosecutorial discretion, the focus of an enforcement proceeding would likely be on the ED. For example, the respondent would challenge whether the ED had followed the rule. The commission believes that the focus of an enforcement proceeding based on citizen evidence should be on the alleged violations. The commission would note that the agency's Field Operations Division has promulgated and follows enforcement initiation criteria. When a citizen submits information, the ED will evaluate the value and credibility of the information, and consistent with the enforcement initiation criteria, determine whether to initiate an enforcement action.

Three individuals commented that the ED should be directed to initiate an enforcement action whenever a citizen submits information showing a violation. In contrast, TIP commented that it supports the proposed rule because it maintained the ED's discretion to initiate enforcement.

The commission makes no changes in response to these comments. As previously noted, the legislature directed the commission to establish criteria by which the ED would evaluate the sufficiency and credibility of citizen information. Using those criteria, the ED may evaluate the value and credibility of citizen information and the merits of any proposed enforcement action based on that information. The commission believes the commenters' proposal conflicts with that legislative directive. Also, practically speaking it does not make sense to require the ED to initiate enforcement whenever a citizen submits information showing an alleged violation. The ED has limited resources to pursue enforcement actions so discretion should be maintained on how best to use those resources.

QLEP and three individuals recommended that if the ED reviews certain citizen information and determines not to pursue an enforcement action based on the information, then the citizen should have a right to appeal the ED's decision. QLEP suggested a grievance procedure. One individual suggested an appeal to the commission.

The commission has made no changes in response to these comments. The commission believes an appeal process was not contemplated by the legislature, would take resources away from enforcement activities, and would be counterproductive if adopted. The legislature has directed that the ED is responsible for evaluating information, whether gathered by a private individual or by the ED's own staff, and where appropriate, initiating an enforcement case (TWC, §5.230 and TWC, Chapter 7, Subchapters C and D). In an administrative enforcement case, the ED prosecutes the case and the commission acts as the judge. In a civil enforcement case, the ED acts on behalf of the commission and refers an enforcement case to the attorney general, and the attorney general in turn prosecutes the case in court. There is nothing in the law granting citizens the right to appeal these decisions by the ED. The commission believes that such right to appeal would in effect grant to the citizen the right to prosecute a commission enforcement case. A citizen "appeal" would itself be an enforcement case in which the citizen would attempt to prove the alleged violations. Both the ED and the alleged violator would surely want to participate in such an appeal. Again, there is nothing in the law that allows for transferring the ED's responsibilities to a citizen. The commission believes that appeals of this sort could consume a substantial portion of agency resources devoted to enforcement and expend them on matters not directly related to enforcement. Finally, the commission believes that appeals of this sort would

be counterproductive. If the ED elected not to initiate enforcement based on certain citizen information, the citizen appealed the decision, and the citizen “won” the appeal, then the ED would be required to initiate enforcement. However, the alleged violator could then use the information generated during the appeal which showed that the ED argued against that very enforcement action that the ED was now pursuing.

An individual recommended the addition of “and violators’ own records” to the end of the second sentence of §70.4(b). It appears the proposed change was intended to expand the scope of possible sources of information that may be used in an enforcement action.

The commission has made no changes in response to this comment. As explained in the preamble to the proposed rule, this language does not limit the ED’s sources to private individuals and agency investigations. Rather, the ED may continue to gather information from all possible sources such as other governmental entities (or a violator’s records). The purpose of this sentence is merely to give notice that an enforcement case may be based on both information gathered by citizens and information gathered by agency staff.

Sierra Club (Houston) criticized the statement in the preamble to the proposed rule concerning when the ED may pursue an enforcement case based entirely on information provided by a private individual (and no information provided by agency staff). The preamble stated that the ED would take this action only if the information showing a violation was “very strong.” The commenter argued that this statement

would cause confusion and make citizens believe the commission intended to sabotage their participation.

The commission has made no changes in response to this comment. It is the ED's duty to carry out his/her enforcement authority in a manner that is both prudent in its use of limited enforcement resources, and that is effective in enforcing the law. When the ED pursues an enforcement case based on the information gathered by agency staff he generally can rely on one of several particular staff members to testify if needed to establish the alleged violations. But, if the ED relies on the information provided by a private individual then the ED must rely on that particular individual to participate in the entire enforcement process to prove that violation. The commission's statement that the ED would rely solely on a private individual's information only if the information were "very strong" was merely an admission that the ED must use his enforcement resources prudently. Even if a private individual has provided the information showing a violation, there remain many subsequent steps in the enforcement process. The ED must use his enforcement resources prudently to carry out the particular case plus many other cases.

Section 70.4(c)

This subsection concerns the criteria the ED shall use when evaluating the value and credibility of citizen information and determining the use of such information in an enforcement action.

Several groups which represent regulated facilities commented on the first criteria, that a citizen submitting information must be willing to submit a sworn affidavit. TMRA recommended that all citizens submitting information be required to submit an affidavit in order to facilitate sanctioning those who submit false information. The TPF recommended that the rule explicitly require affidavits from all persons in the chain of custody of citizen information. TxSWANA, TML, and TCAA all recommended that the rule require a citizen's affidavit to have attached to it a copy of the relevant agency protocol, and require the citizen to affirm that he or she complied with the protocol. In a related comment, TCC was concerned that a citizen submitting information might remain anonymous. TIP supported the criteria set out in this subsection.

The commission has made no changes in response to these comments. As explained in the preamble to the proposed rule, the ED would not require affidavits from every private individual who provides information because such practice could discourage public input. To prevent that from happening the ED would ask a private individual to sign an affidavit only when the ED has determined that an enforcement case should be initiated based on the information provided by the private individual. The requirement that a citizen sign an affidavit will ensure that the citizen understands he/she is beginning a process in which the ED will rely on the citizen's information in an adjudicatory process. The ED's preparation of the affidavit and the citizen's review and execution will help them both define and understand the exact role and purpose of the ED's use of the citizen's information. Also, the affidavit provides assurance that the information is credible. That is the commission's intent in adopting this criteria. The commission disagrees with TMRA's recommendation because the purpose of this requirement is not to facilitate sanctioning anyone.

While the commission understands the TPF's concern on chain of custody, the commission does not believe that the rule should be amended. The ED has the burden of proof in an enforcement proceeding and he/she must ensure that the case meets all requirements, including chain of custody, to prove the alleged violations. There is no need to state in this rule a requirement that already exists. For similar reasons, there is no need to require the affidavit have attached to it the relevant protocol. The commission would note that the proposed rule already required the citizen to affirm they followed the relevant protocols. Finally, in response to TCC's concern that a citizen submitting information may remain anonymous, the commission notes that if the ED elects to initiate an enforcement action based on the citizen information the citizen will be required to sign an affidavit. The affidavit (and therefore the citizen's identity) will necessarily be available for inspection.

There were numerous comments concerning the requirement that a private individual gathering physical or sampling data must do so in accordance with commission protocols. The Harris County Attorney's Office, HCPCD, and Sierra Club (Houston) recommended that the commission delete the requirement, arguing that citizens are not as expert as agency staff and so citizens should not be held to the same standards when gathering information showing a violation. One individual called the requirement "absurd." Another individual requested the word "protocol" be struck because its meaning is unclear. Another individual commented that the ED should be allowed some flexibility in deciding on the weight of the evidence submitted, and that information should not be excluded merely because it fails to meet narrowly defined criteria in specific protocols. However, Mothers for Clean Air stated that citizens must follow strict protocols.

The commission has made no changes in response to the comments by Harris County Attorney's Office, HCPCD, and Sierra Club (Houston). The legislature directed that if the commission relies on the information submitted by a private individual then any physical or sampling data must be collected and gathered in accordance with commission protocols. Commission protocols are specific practices concerning the collection of physical or sampling data. Protocols are procedures that are generally accepted by the scientific community as producing scientifically reliable and reproduceable information. The commission's protocols are intended to produce information the commission may use in enforcement cases. Some commission enforcement actions are processed under the APA, Texas Government Code, Chapter 2001. An enforcement action, if contested by the alleged violator, is processed as a contested case hearing held before the SOAH, and in the hearing the Texas Rules of Evidence apply. The purpose of the Rules of Evidence is to ensure that the truth is ascertained and that proceedings are justly determined. Of course, the Rules of Evidence would apply if the ED pursued his/her enforcement action in a judicial proceeding. The commission follows its protocols so that its information may be admitted into evidence as reliable information showing a violation. The ED must comply with these requirements in an enforcement action whether the violation is based on information from private individuals or from agency investigators. The adopted rule continues to use the word "protocols" because it is the word commonly used to describe the matters discussed in this paragraph.

The commission takes this opportunity to comment on a statement made in the preamble to the proposed rule. In that preamble the commission recognized that a private individual may wish to submit information to the ED that is not in the form of data or analysis, but is nonetheless useful

information for enforcement. For this information there is no relevant agency protocol. The commission then gave two examples but in those examples the commission mistakenly stated that there were no relevant agency protocols. The examples concerned air emissions that create a nuisance condition, and photographic information. Concerning an air nuisance violation there is a protocol and the person whose personal experience establishes the violation must follow the protocol. However, the ED may use additional information from other persons to show how the emissions adversely affected their health or welfare. Concerning photographic evidence, the commission does have a protocol for recording such information. The protocol is simple, requiring the person to record on the back of the photo the date, time, location, name of person taking the photo, brief description of the photo, and photo series (e.g. photo 1 of 5). The discussion in this paragraph concerns only when information is not in the form of data or analysis, but is nonetheless useful information for enforcement. When proof of a violation requires data or other analysis, that data and analysis must be collected in accordance with agency protocols.

ACT and an individual commented that the commission must maintain enforcement authority equal to the authority held by the United States Environmental Protection Agency (EPA). They cited EPA's "credible evidence" rules adopted on February 24, 1997 (62 FR 8313). They argued that the commission's rule must allow for citizens providing all manners of credible evidence. While they did not propose alternative rule language, they seemed to object to the requirement in the proposed rule that citizens providing data and analysis must follow commission protocols.

The commission has made no changes in response to these comments. The purpose of the EPA rules is different compared to the rule adopted by the commission. The EPA rulemaking focused on one matter: correcting the EPA's then-existing rules for its air program. Some had read EPA's rules to allow only very limited amounts of information, namely reference tests conducted by regulated entities upon initial start up and upon periodic tests, to be used as evidence of violations. The EPA amended the rules to show that the EPA could use all credible evidence of a violation. The EPA explained that with respect to this other credible evidence, "...EPA generally expects that most if not all of that data EPA would consider as potentially credible evidence of an emission violation at a unit subject to monitoring under the agency's CAM {continuous air monitoring} rule would be generated through means of appropriate, well-designed parametric or emission monitoring submitted by the source itself and approved by the permitting authority, or through other requirements in the source's permit." In other words, EPA contemplated that the credible evidence of a violation would be based on accepted, credible practices for gathering information. The commission's requirement to use protocols to gather and preserve evidence is consistent with EPA's practice. Also, the commission would note that EPA explained that its credible evidence rulemaking "creates no new rights or powers for citizen enforcers." The commission is not obligated to give new rights to citizens based on federal law when the federal law itself does not give new rights. Nor, has any other state implemented the EPA's credible evidence rules in the fashion proposed by the commenters. The commission is unaware of any other state that has a provision similar to the rule adopted by the commission.

ACT, Harris County Attorney's Office, and QLEP each recommended that the commission strike the requirement that the citizen affirm they "knew" relevant agency protocols when collecting data.

The commission agrees with these comments and has struck the requirement from the adopted rule. The commission agrees that the relevant inquiry is whether a citizen followed agency protocols when collecting data. The additional requirement that the citizen affirm they "knew" the protocol is vague, and would likely lead to disputes over a requirement that is not central to the rule's purpose.

ACT and an individual suggested that the commission adopt a rule or protocol that allows the ED on a case-by-case basis to determine whether or not physical or sampling data is of sufficient value and credibility to be used in an enforcement case. ACT and another individual suggested that the commission follow the example of the EPA in its adoption of the credible evidence rules. The commission should, like the EPA, omit any list of protocols to be used, and rather determine appropriate protocols on a case-by-case basis. Taking the opposite tack, TCFA, Galveston Bay Association, Galveston Bay Foundation, and an individual commented that the rule should give exact guidance on what are the agency protocols that a citizen must comply with when submitting information to the ED. Galveston Bay Foundation requested that the term "relevant agency protocols" be defined.

The commission has changed the adopted rule in response to these comments. The commission would first note that it must comply with the legislative directive in TWC, §7.0025(d) that any physical or sampling data must have been collected or gathered in accordance with commission

protocols. The commenters have two equally important goals. They do not want the rule to serve as a roadblock against the ED's use of reliable information. However, they do want the rule to give fairly exact notice of the methods that may be used to gather and preserve information to be used as evidence in an enforcement action. The commission, like the commenters, wants the rule to help, not hurt, the ED's efforts to review citizen information and make sound decisions on whether to initiate an enforcement action based on that information. To address these issues, the commission has changed the adopted rule to add a sentence to give further guidance concerning what are the "relevant agency protocols," and, as described in further detail in other parts of this preamble, will take certain actions in implementing the rule to make sure there is fair notice of protocols.

The commission has changed the adopted rule in §70.4(c)(3) to add a sentence that the "relevant agency protocols" are those used or determined acceptable by the ED. These are protocols deemed reliable by the ED and they may originate from sources outside the commission. Currently, the commission uses numerous protocols from a variety of sources to gather information showing violations. There is no comprehensive list of such protocols and they are subject to change. The list may expand as new technologies for data collection are developed. The list may contract because a protocol is superceded or simply because a protocol is not used any more. Some protocols were created by the commission, and the commission may be deliberate in its decisions to amend or repeal one. But some commission protocols were created by other entities such as EPA or professional associations, and adopted by the commission. When the source entity updates a protocol the commission may or may not decide to follow the updated

protocol. The commission believes its decision to not define or list the exact “relevant agency protocols” in the rule is consistent with the EPA’s adoption of its credible evidence rules discussed earlier in this preamble. In that rulemaking, the EPA proposed but declined to adopt a list of “presumptively credible evidence” because it was potentially confusing and unnecessary. The EPA recognized that both judicial and administrative tribunals routinely make determinations concerning the admissibility and weight of evidence on a case-by-case basis (62 FR 8313, 8316). Similarly, the rule would give the ED discretion to determine if the protocol used by a citizen is reliable and would have been used by the ED under similar circumstances. Under this definition of “relevant agency protocol,” the ED retains flexibility to initiate enforcement when presented with reliable physical or sampling data.

While furthering the goal of ensuring that the ED retains discretion to use reliable physical and sampling data, the ED will strive to ensure that acceptable protocols are made known and available to the public to the greatest extent practicable. As discussed later in this preamble, while it is not necessary or practical to include numerous voluminous protocols in the text of the rule, the commission will ensure that its web site provides a list of as many protocols as possible used by the ED to gather and preserve physical and sampling data.

Several commenters suggested changes to the rule to prohibit the commission’s use of information that was gathered illegally. TML, TCAA, TxSWANA, and TMRA requested such changes to the rule. TML, TCAA, and TxSWANA requested an additional provision that a private individual could not gather evidence on the premises of a regulated entity without the express permission of the regulated

entity. This provision would apply even if the private individual was not otherwise acting illegally. The TPF and Jobe requested the rule specify that the affidavit required to be signed by a private individual state that the information gathered was not the result of trespass or other illegal means. The purpose would be to put everyone on notice that the commission would not use information gathered illegally. In contrast to these arguments, one individual stated that private individuals must be allowed to enter the property of regulated entities at any time in order to gather information.

The commission has changed the adopted rule in response to some of these comments. With regard to the last comment, the commission notes that HB 2912 does not authorize a private individual to enter the property of another person. Nor does the adopted rule grant any such authorization to private individuals.

The commission has changed §70.4(c) by adding a new paragraph (4) that states the commission will not use in an enforcement case information gathered by an individual illegally. The commission believes it is best to make the adopted rule explicit on this matter to prevent any inference that the commission wishes to encourage illegal activity by private individuals. Also, the provision may well be necessary to positively exclude the illegal information from the commission's administrative and civil enforcement cases. In criminal proceedings the prosecuting authority's use of information gathered illegally is prohibited by the exclusionary rule (Texas Code Criminal Procedure Art. 38.23(a) (Vernon Supp. 2001)). The exclusionary rule applies to evidence gathered illegally both by an officer or by an "other person." However, in administrative or civil proceedings whether information gathered illegally may be used depends on

an analysis of numerous factors concerning the gathering and use of the information (*Vara v. Sharp*, 880 S.W.2d 844, 848 (Tex. App. – Austin 1994, no writ)). The commission believes that the issue of gathering information unlawfully would arise most frequently when a private individual trespasses. The public comment all discussed trespass. The commission does not want to encourage private individuals to trespass onto the property of regulated entities, even if that encouragement is only by inference. Trespassing would risk the safety of the private individual and of the employees of the regulated entity. There is no need for trespassing by private individuals when agency employees have statutory rights to enter the premises of a regulated entity (See, e.g., Texas Health and Safety Code, §361.032 and §382.015). While the comments all focused on trespass, the commission also wishes to declare that it will not use a private individual's information gathered by any other illegal means. The commission makes no changes in response to the remaining comments. The commission does not believe the rule should contain an additional restriction that a private individual must obtain authorization from the regulated entity to gather information when the individual is otherwise acting lawfully. The commission believes that the focus of enforcement proceedings should remain on the violations. The commission does not wish to create subsidiary issues for hearing or trial concerning whether a private individual obtained the proper authorization to gather information. The commission also does not believe it is necessary to add a requirement concerning the form of the affidavit because the adopted rule gives adequate notice that the commission will not use information gathered illegally.

Numerous commenters suggested that the commission protocols should be adopted as rules. This would be a more deliberate process than the commission proposed, which was to publish the protocols on the commission's web site. Two individuals wanted the rule to be very specific about how to gather and preserve information. ACT and an individual argued that the protocols are a "rule" as defined in the APA, and therefore the commission must adopt the protocols through rulemaking. Galveston Bay Foundation commented that the "relevant agency protocols" need to be defined in the rule. One individual commented that the public should participate in the development of protocols because it is their well-being that is at stake. TMRA, TML, and TCAA argued that the rulemaking process would ensure the public an opportunity to review the protocols and to educate the public. TMRA and TxSWANA argued that the commission's failure to publish the protocols as proposed rules denies the need for public input into what should be the commission protocols. Finally, Galveston Bay Foundation argued that the rule should at least list the commission web page that identifies the protocols.

The commission has made no changes in response to these comments. The purpose of commission protocols is to set the practices by which agency staff gather and preserve information showing a violation. The practices are designed so that staff gather information in a manner that produces data and analysis that is scientifically reliable, allowing its admission into evidence in an adjudicatory proceeding. The commission protocols that the ED uses to gather and preserve information are numerous. The commission has adopted a rule on protocols for water quality sampling (30 TAC §319.11). The commission rule in turn adopted by reference protocols established by EPA and by a professional association. To a great extent, commission protocols are

EPA protocols adopted by reference. For example, the commission has adopted by reference an EPA rule on characterizing hazardous waste (30 TAC §335.31). The EPA rule in turn adopts by reference protocols established by professional associations (40 CFR §260.11). However, there are many commission protocols that have not been adopted as rules. For example, commission protocols on many monitoring and analytical methods for air sampling are not rules and are not official EPA protocols.

The law does not require the commission to adopt a protocol as a rule. First and foremost, the protocols are to be used by the ED in carrying out his duties under TWC, §5.230 and TWC, Chapter 7, Subchapters C and D to enforce the laws under the commission's jurisdiction. A given protocol would be applied to a specific regulated entity only if agency staff collected data and analysis in accordance with the protocol and used it as the basis for an enforcement action. Under those circumstances the regulated entity could challenge the protocol in the adjudicatory proceeding. Agencies may use their informed discretion to choose adjudication as a means of making law and policy, rather than rulemaking, when an agency possesses both adjudicatory and rulemaking powers (*Brinkley v. Texas Lottery Commission*, 986 S.W.2d 764, 769 (Tex. App. – Austin 1999, no writ)). Adopting every protocol as a rule would mean that each of the numerous protocols would have to go through the rulemaking process. As explained earlier in the preamble, the protocols change over time. If all protocols were adopted as rules the commission's efforts to use new protocols to match new circumstances would be substantially hindered.

House Bill 2912 and the adopted rule do not change the law that it is the ED who is responsible to enforce the laws under the commission's jurisdiction. The commission acknowledges that private individuals who wish to provide data or analysis showing a violation must follow commission protocols too. But this requirement does not mean the protocols are "rules" of general applicability that affect a private individual's rights or privileges. The scope of HB 2912 is that it allows the commission to use information provided by a private individual to carry out the commission's duty to enforce the law.

The commission acknowledges that if it were to adopt all protocols as rules this would allow for greater public participation in the development of them. The commission believes that this benefit is outweighed by the administrative burden of having rulemaking proceedings for the numerous, and ever changing, protocols used by the commission. Also, the commission would note that a great many of the protocols that it uses are EPA protocols or protocols generated by professional associations. The commission generally adopts these protocols in whole or not at all, because it frequently does not make sense to adopt portions of them. Protocols are designed so that each step is crucial to the taking of reliable information. The commission generally will not adopt its own protocols when there is an established protocol set by EPA or by a professional association. To do so would require the commission to undergo a thorough review and proof that its proposed protocol was equally or more reliable. While the commission welcomes public comment on its protocols, the scope of public comment in many instances would necessarily be limited to whether the commission should adopt or not adopt a given protocol. Later in this preamble the commission discusses how it will attempt to make the protocols more user-friendly. The

commission welcomes any public comment on how that may best be done. Finally, the commission does not believe the adopted rule should contain a reference to the agency web site. To administer future changes, the commission believes it is best that information be located in the brochure (discussed later in this preamble), not in the rule.

Section 70.4(d)

Sierra Club (Houston) and an individual objected to the portion of the rule specifying that a private individual who is called to testify in an enforcement proceeding is subject to all sanctions under law for knowingly falsifying evidence. Sierra Club (Houston) stated that the commission was purposely attempting to frighten away citizens from submitting information to the commission. The individual stated that this provision should apply to regulated entities too.

The commission has made no changes in response to these comments. The adopted rule merely tracks the language in HB 2912 (codified at TWC, §7.0025(d)), and the commission believes it is appropriate to give notice in its rule that private individuals are subject to sanctions for falsifying evidence. The commission does not believe it appropriate to make this specific provision apply to regulated entities because the rule concerns the submission of information by private individuals, not by regulated entities. Other law already provides that a regulated entity is subject to all sanctions under law for knowingly falsifying evidence.

Section 70.4(e)

This subsection provides that if the ED determines not to initiate an enforcement action based on information received from a private individual, the ED will process the information received from the individual as a complaint. TMRA recommended two clarifying additions be made to the rule: 1.) that if a private individual submits information “which is not credible or reliable” it will be considered an unsubstantiated complaint; and 2.) that if a private individual makes repeated unsubstantiated complaints or repeated submissions of non credible or unreliable information, then the ED will consider this fact if the individual submits new information in the future.

The commission has made no changes in response to these comments. The commission believes that the first recommendation would mischaracterize the complaint process, and would not clarify the rule. The purpose of this subsection is to acknowledge that when the ED elects not to initiate enforcement based on the private individual’s information, the ED will initiate a complaint investigation. When the ED conducts the complaint investigation the ED may not be able to document the violation alleged by the private individual. But this fact alone does not mean the private individual has made an “unsubstantiated complaint.” It may be simply that the same conditions do not exist at the time when the agency investigator visits the site of the alleged violation. The commission also declines to adopt the second recommendation. The commission already has a policy in the Field Operation Division’s standard operating procedure concerning private individuals who repeatedly make unsubstantiated complaints. The commission does not believe that there is a need to adopt the procedure as a rule because it only concerns commission directions to agency staff. The procedure allows staff to take into consideration that a person has made repeated unsubstantiated complaints.

Other Proposed Changes to the Rule

Two individuals requested that the rule give the private individual submitting information the right to appeal a decision in the related enforcement case. The individuals argued that the private individual should have the same right to appeal as does the defendant. It was not clear, but the commission believes the commenters seek a right to appeal both administrative and judicial decisions.

The commission has made no changes in response to these comments. As previously discussed, HB 2912 authorizes the commission to use information provided by an individual in an enforcement action, but the law does not give new rights to private individuals. The commission does not believe it would be appropriate for it to adopt a rule giving a substantial new right to private individuals in the course of implementing a legislative directive that does not cover the issue.

Jobe requested that the commission add a provision to the rule requiring private individuals to maintain a record of all steps taken to gather and preserve information.

The commission has made no changes in response to this comment. The ED has the burden of proof in enforcement proceedings, so the commission believes it should leave it to the ED's discretion to determine if he/she has adequate documentation of a violation, whether gathered by a private individual or by agency staff. The ED will share with the alleged violator the documentation the ED believes shows a violation. Also, if an enforcement case leads to an adjudicatory hearing, the alleged violator will have the opportunity for formal discovery.

TxSWANA requested the commission to add a provision that a private individual's information showing a violation occurring on several days should be counted as one event for purposes of calculating a proposed penalty. The commenter was concerned that private individuals may intentionally delay their reporting information showing a violation in an effort to generate a higher penalty. The commenter also requested that a private individual be required to submit information showing a violation to the commission within 24 hours. The commenter was concerned that without this requirement a regulated entity would not have the opportunity to timely gather its own information concerning circumstances on a particular day.

The commission has made no changes in response to these comments. The commission already has in place a penalty policy that is used by agency staff to calculate a proposed penalty, which gives direction on how to calculate the number of penalty events when a violation is continuous over a period of time. While the policy does not contemplate that the person gathering information of a violation would intentionally delay producing the information, the commission does not believe there is a need to change the policy (or the adopted rule) to cover this issue. Section 70.4(b) in the adopted rule shows that the ED will use his discretion in electing whether and how to pursue an enforcement case. The commission does not believe there is a need to require private individuals to submit information to the commission within 24 hours. Currently, the agency's own investigators conduct complaint investigations without first giving notice to the regulated entity and without necessarily immediately sharing information with the regulated entity. The ED will not pursue a case when the information showing a violation has been manipulated by any person.

One individual requested that the commission add a provision to the rule which would give a general description of the rules of evidence. The commenter suggested that the rule should cover the evidentiary matters that will be most commonly at issue when the ED pursues an enforcement case that is based on information provided by a private individual. The commenter stated that he was concerned the commission's failure to have this provision in the rule would inhibit public participation in the enforcement process. ACT requested that the commission make it clear that information provided by private individuals would not be subjected to standards more stringent than the rules of evidence and the APA.

The commission has made no changes in response to these comments. As explained in the preamble to the proposed rule, the commission decided against summarizing evidentiary requirements in the rule because it would likely cause confusion or be so general as to mislead the public. The relevant law concerning admission of evidence is the Texas Rules of Evidence, and Texas Government Code, §2001.081 (for administrative hearings).

One individual requested that the commission add a provision to the rule that prohibits a regulated entity from harassing a private individual who submits information to the commission. The commenter stated that she had heard that harassment has occurred in the past and that it should be prohibited. TCC commented that there is no statutory authority for the commission to regulate retaliation by regulated entities, and that there already exist adequate civil and criminal protections.

The commission has made no changes in response to these comments. While the commission is certainly against a regulated entity harassing private individuals who submit information to the commission, the commission believes that the adopted rule is not the appropriate place to address the issue. The commission agrees that there already exist adequate civil and criminal protections.

The City of Austin Utility requested the commission add a provision to the rule that if a private individual submits information but later refuses to sign an affidavit or testify concerning the matter, then the commission shall not use that information in a subsequent enforcement proceeding. The commenter stated that this provision would protect the regulated community against frivolous allegations.

The commission has made no changes in response to this comment. If a private individual submits information to the commission but then refuses to participate in the enforcement action, the ED would not be able to use that information anyway. The ED would not have the appropriate witness to sponsor the evidence in the adjudicatory hearing. The exception, of course, would be if a private individual submitted information to the commission that could be used at hearing without a sponsor. For example, a private individual could submit public records showing a violation. The ED could offer those public records into evidence (under the hearsay exception for public records) without the testimony of the private individual. The commission does not believe the rule should prevent the use of such information merely because a private individual had brought the information to the commission's attention.

TML, TCAA, and TxSWANA requested that a regulated entity be allowed to split samples with any individual taking samples that are intended to show a violation. The regulated entity should at least be allowed to take its own sample at the same site as did the individual. The commenters argued that it is common practice for a regulated entity to split samples with an agency investigator, and this practice should apply when private individuals take samples too.

The commission has made no changes to the adopted rule in response to these comments. The commission agrees that the credibility of certain evidence is improved when all parties have the opportunity to conduct their own analyses concerning what the evidence shows. However, the commission believes the issue of how much weight to give to certain evidence is best left to the trier of fact. Currently, the ED splits samples with regulated entities but there is no rule requiring this. If the adopted rule imposed procedures of some sort the focus of an enforcement proceeding would likely be on the procedures. The commission believes that the focus of an enforcement proceeding based on citizen evidence should be on the alleged violations.

TxSWANA requested that the adopted rule allow the ED to use information gathered by a private individual showing a violation only if the ED's own investigation confirmed the violation. The commenter believed this was necessary to prevent a violation being based entirely on biased evidence that cannot be rebutted.

The commission has made no changes in response to this comment. The commission would first note that all testimonial evidence is "biased" in the sense that a particular person brings their own

experiences and outlook to their perceptions. As the commission stated earlier in this preamble, the ED would base an enforcement action solely on a private individual's information only when that information is "very strong." Not only is that because the ED must use his enforcement resources in the most prudent and effective manner possible, but also because he or she knows the trier of fact will consider the same matters of bias that concern the commenter.

Public Comment Concerning the Implementation of the Rule

Four individuals stated that the commission should have made available to the public the commission protocols during the public comment period in this rulemaking. One commenter requested the commission to extend the public comment period to allow an extra 30 days for the public to comment on the protocols.

The commission is currently gathering into one list as many of the protocols as possible, and the commission will publish this list on its web site. Many of the protocols on the list will have links to the actual protocols. The commission regrets that it could not complete this work before the end of the public comment period, but the commission did make available to several commenters sample lists of the protocols. The substantial work to put the list together does not include drafting the protocols because the protocols already exist. But never before has there been an effort to prepare a comprehensive list of the protocols. Concerning the commenter's request to extend the public comment period, the commission's general counsel issued a letter that denied that request. House Bill 2912 directed the commission to adopt rules no later than December 1, 2001, which prevents the commission from extending the comment period. As discussed earlier in

the preamble, the commission does not believe that the protocols should be adopted as rules. An additional result of that decision is that the commission may accept public comment on its protocols at any time without the formality of a public comment period.

TCFA requested the commission publish a guidance document that specified all the commission protocols. Seventy-five individuals each submitted the comment that the commission should create clear print and electronic materials letting the public know that citizen evidence may be accepted and explaining the process for submission of the information. ACT commented that an early draft of the brochure did not contain enough detailed information concerning the submission of information.

The commission is preparing a brochure that will describe both the complaint and citizen information processes. The brochure will in turn refer to a toll-free telephone number and a web page to obtain information on protocols. The commission has taken into consideration the public comment received on this matter and has revised the brochure.

Numerous commenters suggested that the commission use its web site to disseminate information on how private individuals may submit information to the commission. Galveston Bay Association suggested the web site give detailed protocols to be used. Seventy-six individuals encouraged the commission to publish clear materials concerning how to gather and preserve information. An individual and the Sierra Club (Houston) were concerned with access to such information. The individual said the commission's web site is already difficult to navigate, so the commission should ensure the information on citizen information is easy to find. Sierra Club (Houston) said the

commission should not assume everyone has access to the internet and so this information should be available in hard copy too. Sierra Club (Houston) assumed the commission would not make this information available in hard copy, and stated that this showed the commission's intent to minimize citizen input.

The commission is continuing to work on its draft web page which will be posted before January 1, 2002. The web page will explain generally the process for private individuals to submit information to the commission. It will contain a list of as many commission protocols as possible. In many instances the viewer will be able to click on a list and review the full text of a given protocol. The commission will endeavor to make sure the particular web page is as easy to find as possible. With respect to the last comment, the commission would respond that it has a free telephone number that the public may use to contact the agency 24 hours a day, 1-888-777-3186. A person may call that number and request a hard copy of a given protocol which can be faxed or mailed to the person.

HCPCD, Texas Watch, and two individuals recommended that the commission make equipment available to private individuals so that they may use it to gather information. HCPCD and Texas Watch also objected to a statement in the preamble to the proposed rules in the DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION. They disagreed with the commission's statement that the costs that private individuals may incur gathering information are not significant.

The commission does not at this time have adequate resources to loan or give equipment to private individuals. Concerning the commission's comment in the preamble to the proposed rules, the commission would note that its analysis was focused on the requirements of Texas Government Code, §2001.0225 concerning the promulgation of "major environmental rules" as defined by that statute. The statute required the commission to determine the costs the rules would impose on the public by mandate. However, the adopted rule does not require any person's compliance. It is voluntary. The commission does acknowledge, as HCPCD and Texas Watch point out, that some monitoring equipment is expensive. However, a private individual's gathering of information under the adopted rule can be in many forms, and many forms do not require the use of expensive equipment.

Numerous commenters requested that the commission train private individuals on how to gather and preserve information in accordance with commission protocols. Further, if over time private individuals are submitting information that does not comply then the commission should upgrade its training efforts. BPA suggested that the training could be made over the internet. However, Mothers for Clean Air stated that the commission's provision of information over the internet alone is not adequate training for the public. HCPCD and Galveston Bay Foundation suggested that the commission host seminars and workshops. One individual suggested that the commission prepare training videos. One individual suggested the commission work with universities and colleges to conduct training. ACT suggested that the commission contract a third party to conduct the training. Several commenters suggested the commission should pay for the training. ACT suggested that the commission have specified staff to train the public. One individual suggested that the commission's Office of Public

Interest Counsel should be responsible for training the public. Two individuals suggested that the commission should certify persons who successfully completed a training program. Some commenters spoke against the commission training the public. TCC's comment suggested the commission should not train the public because HB 2912 did not specifically authorize it, and because there are no state funds to pay for it. TCC suggested that the public may be trained by Texas Watch, which already receives commission grants. Jobe commented that the commission would better spend its funds on training agency investigators.

The commission will publish both a brochure and a web page as explained earlier in this preamble. Concerning the commission making additional efforts to train the public, TCC is correct that there is no specific funding to carry out the task. Nevertheless, the commission will conduct training, and will consider all of the proposals suggested in the comment. When a person seeks information concerning a particular protocol they should call the commission's free 24-hour telephone number, 1-888-777-3186. That number is staffed by the Field Operations Division, the staff most knowledgeable about commission protocols. The commission does not believe it should "certify" persons as having taken training concerning commission protocols. There is no funding to support a certification program. Also, if such a program existed then it would suggest the commission could not use information provided by private individuals who were not "certified" even though they otherwise gathered the information in compliance with commission protocols.

Many commenters were concerned that commission protocols are long, technical documents that the public will not understand and will not be able to comply with when gathering information showing a

violation. One commenter called them “intimidating.” One commenter suggested the commission seek the advice of a reading analyst to make sure the protocols are clear. They urged the commission to rewrite the protocols so that they are easy to understand and use. SEED commented that when the commission adopts a protocol it must balance the need for scientifically reliable information versus the need to have protocols the public can understand. Texas Watch commented that the less training available to the public the more likely the simplification of protocols would lead to private individuals gathering information that is not reliable. QLEP commented that if it becomes evident that private individuals are submitting information that cannot be used, then the commission should rewrite the protocols to make them easier to use. ACT suggested that the commission’s protocol for private well disinfection and water sampling was a good example of a protocol with a step-by-step guide. SEED suggested the commission use protocols used by STBB because they are easy to understand. The office of State Representative Dora Olivo recommended the commission prepare packages of information to give to persons when they seek information on a specific protocol. HCPCD recommended the commission conduct research into making sure the protocols are as cost-effective as possible. Mothers for Clean Air and two individuals recommended the protocols be translated into Spanish.

The commission will clarify the protocols as much as possible. The commission can begin this process with the least technical protocols, for example, the protocol for taking photographic documentation of a violation. However, as some of the commenters recognized, there is only so much simplification that can be done when at its heart a protocol is a precise methodology to gather information in a scientific and reproduceable manner. The commission explained earlier in this preamble that many of its protocols were generated by EPA or professional associations and

are adopted by the commission. The commission believes any attempt to simplify one of these adopted protocols would be a change in the commission protocol, and require the commission to undergo a thorough review and proof that its proposed protocol was equally or more reliable.

Concerning the latter comments, the commission believes that its publication of the brochure and web page, plus the availability of the 24-hour toll-free number, will provide a comprehensive source of information for the public. If a person seeks additional information they may call the toll-free number and they will be provided with the information they request. The commission does not at this time intend to translate its protocols into Spanish, although the brochure will be available in Spanish. The commission believes that the administrative burden of translating its protocols into Spanish would not be justified by the limited number of requests to see the protocols in Spanish.

One individual requested that the commission mail a copy of its brochure explaining the complaint and citizen information processes to all persons who submitted written or oral comments on the proposed rule.

The commission will mail the brochure to the persons who submitted written comment and those persons who submitted oral comment that gave the commission their mailing address.

Numerous commenters said the commission should give a written response to an individual that submits a complaint or information showing a violation. The response should explain the commission's response and why or why not the commission will pursue an enforcement action. ACT, BPA, Clean

Air Clear Lake, Galveston Bay Association, and 81 individuals made this comment. ACT recommended a response within ten days, and one individual recommended seven days. ACT recommended that the written response have attached to it a copy of the commission brochure explaining the complaint and citizen information processes. The commenters recommended the response include an explanation of what action the ED will take. One individual commented that the ED's response should be available for public inspection.

The agency's Field Operations Division has a policy to give a written response to complaints explaining what action the ED has taken. This policy will be applied to a private individual's submission of information too. The ED will explain why the ED initiated or did not initiate an enforcement action based on the information. The policy does not have a deadline to respond within a certain number of days. It takes varying amounts of time to respond to a given complaint or submitted information depending on the content and complexity of the complaint or information. The ED's response will be available for public inspection. The ED's response will not have a copy of the brochure, but the brochure will remain available to the public. The commission already must implement the requirements in Sunset bill, §1.15 concerning giving to complainants a copy of the commission's policies and procedures on complaint investigation and resolution. The commission will implement this requirement by having agency investigators give the brochure to individuals when they conduct the investigation. Accordingly, there is no need to give the brochure to the individual when the agency investigator later sends the written explanation of the ED's response.

Numerous individuals commented that the ED should take prompt enforcement action when a private individual submits information showing a violation.

The ED will process enforcement actions in as expeditious a manner as possible, whether based on information provided by private individual or by agency investigators.

An individual commented that all complaints submitted to the commission should be made available to the public.

All complaints are public records and are open for the public's review. The exception is information showing the identity of a private individual who submits a complaint. If the agency gets a request for the identity of the complainant, the standard process is to submit to the Texas Attorney General a request to keep that information confidential.

An individual requested that all complaints submitted to the commission should be published in a local newspaper and given to local governmental authorities within ten days.

The commission does not believe that the proposed procedures are necessary or a prudent use of commission resources. When a private individual submits a complaint to the commission concerning a matter within the commission's jurisdiction it is the commission's responsibility to pursue the matter. While the public and other governmental entities are welcome to review the records of the commission, there is no need for the procedures recommended by the commenter.

An individual recommended that when an agency investigator conducts an investigation in response to a complaint, the investigator should first check in with the person who submitted the complaint. Further, the investigator must conduct his/her investigation on the day the complaint is made.

The commenter did not explain the reason for having the investigator first check in with the complainant, and so the commission has made no changes in response to this comment. The Field Operations Division has written policy concerning the agency's response to a complaint, including that management first prioritizes a complaint according to the potential threat to human health and safety, and the environment. The ED prioritizes complaints because the ED does not have the resources to respond to all complaints on the day they are made.

Numerous commenters requested that the commission track the public's submission of information to the agency, including the number of submissions made, the number of submissions which information could not be used, and the number of submissions that are used to initiate an enforcement action. Some commenters requested that this information be reported on a quarterly basis. Comments were made on this subject by ACT, Clean Air Clear Lake, Galveston Bay Association, and 76 individuals.

The commission will ensure that agency staff keep records of the submission and use of information provided by private individuals. The commission will prepare reports on this matter on an as needed basis.

TCFA commented that a regulated entity will want access to the information submitted by a private individual. The commenter was concerned that the private individual may remain anonymous, and that the regulated entity would have to pursue formal discovery in an adjudicatory proceeding in order to review the information.

When the ED determines to pursue an enforcement action based on a private individual's information the affidavit signed by the private individual and the other information submitted by the private individual will be made available for review by the alleged violator.

Three individuals commented on the penalties assessed against violators that are based on information provided by a private individual. They suggested the penalties should go towards training citizens on how to comply with commission protocols.

The penalties paid to the commission as a result of an enforcement action are deposited to the state's general revenue fund. That fund is controlled by the legislature. If presented with a proposal, the commission will consider an supplemental environmental project involving environmental sampling and/or training.

Mothers for Clean Air requested that certain agency staff be designated to assist a private individual track the agency's use of their information in an enforcement action. QLEP and Texas Watch requested that there be a specific infrastructure in place including designated staff to assist persons on how to comply with commission protocols.

The ED's written response to a private individual's complaint or submission of information will list an agency staff member that may be contacted for additional information. As explained earlier in this preamble, the ED has a 24-hour toll-free number that private individuals may call to obtain information on how to submit information showing a violation.

An individual requested that the commission identify qualified laboratories that may analyze physical or sampling data. Jobe questioned whether the ED would scrutinize the laboratories used by private individuals. Jobe also questioned whether the laboratory must be certified.

The commission's web page that lists commission protocols will also list laboratories that the agency itself uses. This will not be an exclusive list of laboratories that private individuals must use. In response to the latter comments, the ED will scrutinize all information submitted by a private individual including whether the laboratory prepared reliable analyses. House Bill 2912 added a new requirement that the commission may use data from a laboratory for enforcement actions only if the laboratory is certified by the commission (§1.12 adding new TWC, §5.127). This requirement applies to information submitted by a private individual. However, the requirement will apply only when the commission has implemented this portion of HB 2912 and that has not yet occurred.

Clean Water Action requested that when a private individual submits information to the ED to show a violation, the ED should also use the information for other purposes, for example collecting information to show the status of a water body.

The commission will attempt to use particular information submitted by a private individual as appropriate.

An individual commented concerning when a private individual submits information to the ED and the ED elects not to pursue an enforcement action based on that information. The commenter noted that the individual remains free to submit the same information to his or her local governmental authority that has enforcement authority.

The commission agrees with the comment.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

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

“Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking does not meet the definition of a major environmental rule because the specific primary intent of the rule is procedural in nature, establishing procedures allowing the commission to initiate an enforcement action on a matter under its jurisdiction based on

information it receives from a private individual. The rule does not concern an existing or new regulatory program that would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking. The adopted rule does not require implementation by any entity, though individuals wishing to submit information to the agency for use in an enforcement case must use equipment and/or methods prescribed by agency protocols. In certain cases, this may result in costs for sampling, equipment, certification, or analysis, though these costs are not considered to be significant.

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law.

This adoption does not exceed an express requirement of state law because it is expressly authorized by the following state statute: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal

requirements, and is in accordance with HB 2912, §18.10, which expressly requires the commission to adopt rules implementing TWC, §7.0025 concerning the commission initiating an enforcement action based on information provided by a private individual. This adoption does not adopt a rule solely under the general powers of the agency, but rather under specific state law (i.e., HB 2912, §18.10; TWC, §7.0025; and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

The commission received several comments related to the statement in the draft regulatory impact analysis. The comments concerned the commission's description of the costs that may be incurred by citizens that wish to submit information to the commission. The commission's response to those comments are set forth in the SECTION DISCUSSION AND RESPONSE TO COMMENT portion of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed a final analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's final analysis indicates that Chapter 2007 does not apply to the adopted rule. Nevertheless, the commission further evaluated the adopted rule and performed a final analysis of whether the adopted rule constitute a takings under Chapter 2007.

The specific primary purpose of the rule is to implement certain provisions in HB 2912. The adopted rule implements provisions in HB 2912 that allow the commission to initiate an enforcement action on a

matter under its jurisdiction based on information it receives from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. The rule will substantially advance the stated purpose by providing specific criteria on how the ED will evaluate information from private individuals. Promulgation and enforcement of the rule will not affect private real property which is the subject of the rule because the proposed language consists of a new section relating to the commission's procedural rules rather than any substantive requirements. The adopted rule does not require implementation by any entity.

The commission received no comments related to the takings impact assessment analysis.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adopted rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

STATUTORY AUTHORITY

The new section is adopted under HB 2912, §1.24 and §18.10, which require the commission to adopt rules to implement new TWC, §7.0025.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the

commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

Additionally, the new section is adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

SUBCHAPTER A: ENFORCEMENT GENERALLY

§70.4

§70.4. Enforcement Action Using Information Provided by Private Individual.

(a) A private individual with information demonstrating possible violations of law within the commission's jurisdiction should notify the executive director (ED). The ED may initiate an administrative enforcement action, or he/she may refer to the appropriate prosecuting authority a civil or criminal enforcement action.

(b) The ED may initiate an enforcement action based on information received from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. The ED may initiate an enforcement action based on any combination of information provided by private individuals or by the ED's own investigations.

(c) In evaluating the value and credibility of information provided by a private individual and determining the use of such information as evidence in an enforcement action, the ED shall consider the following criteria:

(1) the individual providing the information must be willing to submit a sworn affidavit attesting to the facts that constitute the alleged violation and authenticating any writings, recordings, or photographs provided by the individual;

(2) the individual providing the information must be willing to testify in any enforcement proceedings regarding the alleged violations;

(3) if the ED relies on any physical or sampling data submitted by an individual to prove one or more elements of an enforcement case, such data must have been collected or gathered in accordance with relevant agency protocols. The individual submitting the physical or sampling data must be willing to submit a sworn affidavit demonstrating that the individual followed relevant agency protocols when collecting the data. The relevant agency protocols are those used or determined acceptable by the ED; and

(4) the commission will not use in an enforcement case information gathered by an individual illegally.

(d) A private individual who submits information on which the ED relies for all or part of an enforcement case may be called to testify in the enforcement proceedings and is subject to all sanctions under law for knowingly falsifying evidence.

(e) If the ED determines not to initiate an enforcement action based on information received from a private individual in accordance with this section, the ED will process the information received from the individual as a complaint, subject to applicable complaint investigation procedures. The ED may ultimately initiate an enforcement action that is based on information the ED develops during the complaint investigation.