

The Texas Natural Resource Conservation Commission (agency or commission) proposes new §70.4, Enforcement Action Using Information Provided by Private Individual.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The proposed new rule concerns the participation of private individuals in the agency's enforcement activities. Currently, when private individuals submit information to the agency that is intended to show a third person has violated laws that protect human health and safety and the environment, the executive director (ED) reviews the information and decides on an appropriate response. In many instances the ED sends an investigator to investigate the area or facility where the alleged violation occurred. The ED then evaluates all the information and determines whether to initiate an enforcement action against the person who allegedly violated the law. If the ED determines to initiate enforcement, the ED's case relies on the information and documentation developed by the ED's staff.

The proposed rule would implement 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"). Section 1.24 of the Sunset bill 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 ED's evaluation and use of the information. Section 18.10(a) of the Sunset bill requires the commission to adopt rules to implement the new law not 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.

When private individuals contact the commission about a possible violation, the information they submit is of varying detail. Also, the private individual may or may not wish to participate further in any agency investigation or enforcement action. The following paragraphs describe how the agency would process information from private individuals under the new rule under various scenarios.

In some instances when a private individual submits information to the agency they wish the agency to investigate and resolve the problem without the private individual's further participation. While the agency has in place procedures for accepting and processing complaints, and the agency will continue to use those procedures, the commission is taking this opportunity to review them. Currently, the Field Operations Division categorizes each complaint, and each category of complaint must be investigated within a specified amount of time. Agency staff must give reports on the status of the agency's response, and give a report on the final resolution of the complaint. The commission is considering whether to change this procedure to give earlier notice of the status of the ED's response to the complaint. The commission would note that these comments on complaint procedures apply to all types of complaints, whether the person making the complaint wishes to participate further in enforcement proceedings or not.

In other instances, when a private individual gives information to the agency they intend the agency to use that information in an enforcement action. The agency will review the information and conduct its own investigation of the violation. Depending on the value and credibility of both the information

provided by the private individual and the information gathered by agency staff, the ED may initiate an enforcement action. In some cases, the ED may initiate an enforcement action using information both from the private individual and from agency staff. The ED may also initiate enforcement based solely on the information provided by a private individual when the value and credibility of that information is very strong.

When a private individual submits information that is intended to be used in an enforcement action, its value and credibility will depend on whether the information meets the requirements of TWC, §7.0025, the requirements of the rule, and evidentiary requirements. The proposed rule tracks the statutory language in requiring that any physical or sampling data must have been collected or gathered in accordance with agency protocols. This requirement ensures that the information was gathered using established procedures for collecting reliable and accurate data. Also, 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, 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, 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.

The commission considered whether the proposed rule should give explicit direction on what are the

relevant agency protocols for gathering physical or sampling data, and for meeting evidentiary requirements. The proposed rule does not contain such information because there are numerous protocols used by agency investigators to document violations and most apply only to certain types of cases. Moreover, the Sunset bill (§1.14, adding new TWC, §5.1765) requires the commission to make available to the public in pamphlet form an explanation of the complaint policies and procedures, including information regarding and standards applicable to the collection and preservation of credible evidence of environmental problems by members of the public. This pamphlet will describe the agency's protocols. The commission is also considering publishing this information as a web page. The proposed rule does not include an explanation of evidentiary requirements because those requirements are already set forth in the rules of evidence. An attempt to summarize evidentiary requirements would likely cause confusion or be so general as to mislead the public.

The commission would note that neither HB 2912 nor the proposed rule would authorize a private individual to enter the property of another person for purposes of gathering information to document a violation. There would likely be difficulties using information as evidence when it was gathered while trespassing on another's property.

SECTION DISCUSSION

Section 70.4(a) directs that when a private individual wishes to submit information to the agency concerning an alleged violation, the private individual should submit the information to the ED rather than to the commissioners. This is because the ED is responsible for evaluating information, whether gathered by a private individual or by the ED's own staff, and initiating an enforcement case under

TWC, §5.230. The ED may initiate an administrative enforcement action or refer the case to the proper authority for initiating a civil or criminal case (e.g., TWC, Chapter 7, Subchapters C - E).

Section 70.4(b) tracks the statutory language which states that the ED has the discretion to evaluate the information provided by a private individual. The ED may evaluate whether to initiate enforcement after determining the value and credibility of the information, and the merits of an enforcement action. The subsection also provides that the ED may initiate an enforcement case based on any combination of information provided by private individuals or the ED's staff. For example, at a hearing the ED may present evidence to prove a violation that includes both information from a private individual and information from agency investigators. This latter provision in the rule is not intended to limit the ED to gathering information only from private individuals and from agency investigations. Rather, the ED may continue to gather information from all possible sources such as other governmental entities.

Section 70.4(c) sets forth the criteria the ED shall use to determine whether to use information provided by a private individual. First, the individual must be willing to sign an affidavit verifying the information gathered and verifying that any writings, recordings, or photographs he/she submits are what they purport to be. Second, the individual must agree to testify under oath in any enforcement proceedings. Third, the individual must be willing to sign an affidavit that the individual knew and used any relevant agency protocols when collecting the information.

The agency believes the requirement to sign affidavits is reasonable and necessary. Agency inspectors in the course of their work are required to sign affidavits for various purposes during the course of an

enforcement proceeding. 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 commission recognizes 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. For example, the ED may use information from private individuals to establish a violation of 30 TAC §101.4, relating to air emissions that create nuisance conditions. This violation requires that the ED show the responsible person caused air emissions that tended to be injurious to or adversely affect human health or welfare, animal life, vegetation, or property, or interfered with the normal use and enjoyment of animal life, vegetation, or property. A private individual's information showing how the emissions affected them may be used to establish the violation. Another example might include when a private individual submits information in the form of a videotape or picture showing a violation. While such information alone may not establish a violation, it may be used in conjunction with other information to establish a violation. However, when proof of a violation requires data or other analysis, that data and analysis must be collected in accordance with agency protocols.

Section 70.4(d) tracks the statutory language by stating that if the ED relies on information provided by a private individual for all or part of an enforcement case, the individual may be called to testify in the enforcement proceedings and is subject to all sanctions under law for knowingly falsifying evidence.

Section 70.4(e) provides that if the ED determines not to initiate an enforcement action based on information received from a private individual pursuant to this section, the ED will process the information received from the individual as a complaint, subject to applicable complaint investigation procedures. While information submitted by a private individual may not constitute evidence supporting initiation of an enforcement action, a complaint investigation will follow. That investigation may yield additional evidence that would support the initiation of an enforcement action.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rule is in effect there will not be significant fiscal implications for the agency or other units of state and local government as a result of administration or enforcement of the proposed rule.

The proposed rule would implement certain provisions in HB 2912 (relating to the continuation and functions of the TNRCC; providing penalties), 77th Legislature, 2001, relating to citizen collected evidence. The proposed 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 proposed rule would provide that the ED has the discretion to evaluate the information provided by a private individual and to evaluate whether to initiate enforcement action. The proposed rule would set criteria for the use of citizen collected evidence and includes the following: 1.) the individual must be willing to sign an affidavit verifying that the information gathered (including any writings, recording, and photographs submitted) is as purported; 2.) the individual must agree to testify under oath in any enforcement proceedings; and 3.) the individual must be willing to sign an affidavit that the individual knew and used relevant agency protocols when collecting information.

Agency protocol for the use of citizen collected evidence and the collection of physical or sampling data is available on the agency's website or by phone. Additional staff time may be necessary to assist with environmental investigations and to provide guidance for citizens collecting and presenting evidence. However, any additional costs associated with additional staff time are not considered significant. Adoption of the proposed rule is not anticipated to result in significant fiscal implications for any unit of state or local government as the proposed rule concerns private citizens' submission of information to the ED and the subsequent use of that information by ED.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed new section is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be

to expand the role of private individuals in compliance and enforcement proceedings. The proposed rule will also benefit the public by allowing the use of citizen collected evidence in enforcement actions prepared by the ED.

Individuals or businesses 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. The proposed rule does not require implementation by any entity.

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SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed rule. Small or micro-businesses 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. The proposed rule does not require implementation by any entity, including a small or micro-business.

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Agency protocols for the collection of physical or sampling data is available on the agency's website or by phone. The proposed rule does not require implementation by any entity, though small or micro-businesses 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.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule." 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, 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 specific primary intent of the proposed

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 proposed 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 proposed rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking. When private individuals submit information concerning a violation the ED will continue to process the information as a complaint as described above in this preamble. The proposed 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, this proposed 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 proposal does not exceed a standard set by federal law because the proposed rule does not require implementation by any entity. This proposal does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice, as well as the authorities cited in the STATUTORY AUTHORITY section of this preamble. This proposal 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. The proposed rule

does not require implementation by any entity. This proposal does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., HB 2912, §1.24 and §18.10). Finally, this rulemaking is not being proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has assessed the takings impact for the proposed rule in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the proposed new section is to implement certain provisions in HB 2912. The proposed 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 proposed 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 this 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. The proposed rule does not require implementation by any entity.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and has determined that the section is not subject to the Texas Coastal Management Program (CMP). The proposed action concerns only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or

authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC, §§281.40, *et seq.*).

ANNOUNCEMENT OF HEARINGS

Six public hearings on the proposal will be held at the following locations and times: 1.) El Paso City Council Chambers, 2nd Floor, 2 Civic Center Plaza, El Paso on **September 24, 2001**, 7:00 p.m.; 2.) University of Texas at San Antonio (Downtown Campus), Frio Street Building, Room 1.406, 501 Durango, San Antonio on **September 25, 2001**, 7:00 p.m.; 3.) TNRCC Waco Regional Office, 6801 Sanger Ave., Suite 2500, Waco on **September 27, 2001**, 7:00 p.m.; 4.) Arlington City Council Chambers, 1st Floor, 101 W. Abram St., Arlington on **October 1, 2001**, 7:00 p.m.; 5.) Texas A&M University - Corpus Christi, Natural Resources Center, Room 1003, 6300 Ocean Dr., Corpus Christi on **October 2, 2001**, 7:00 p.m.; and 6.) Houston City Hall, 2nd Floor, 901 Bagby, Houston on **October 4, 2001**, 7:00 p.m.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-029-070-AD. Comments must be received by 5:00 p.m., October 9, 2001. For further information contact Richard O'Connell at (512)-239-5528.

STATUTORY AUTHORITY

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

There are no other statutes, articles, or codes affected by this proposal.

§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; and

(3) if the ED relies on any physical or sampling data submitted by a private 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 knew and followed relevant agency protocols when collecting the data.

(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.