

The Texas Commission on Environmental Quality (commission or TCEQ) adopts new §§70.201 - 70.206. Sections 70.201 - 70.705 are adopted *with changes* to the proposed text as published in the February 13, 2004, issue of the *Texas Register* (29 TexReg 1297). Section 70.206 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the adopted rules is to implement Senate Bill 1265, 78th Legislature, 2003. Senate Bill (SB) 1265 amends Texas Water Code (TWC), §7.203, Criminal Enforcement Review. SB 1265 applies to criminal prosecution of alleged environmental violations committed by a person holding a permit or a person employed by a person holding such a permit, and the alleged criminal violation is related to the activity for which the permit was issued by the commission or executive director (ED). A permit includes a license, certificate, registration, approval, or any other form of authorization granted by the commission or ED. SB 1265 requires the agency to establish procedures for Texas peace officers to use when referring alleged environmental violations for criminal enforcement review.

SECTION BY SECTION DISCUSSION

The commission created a new Subchapter D, Criminal Enforcement Review, to establish procedures for Texas peace officers to use when referring alleged environmental violations for criminal enforcement review.

Adopted new §70.201, Scope and Purpose, sets forth the purpose of new Subchapter D by establishing the procedure and mechanism for Texas peace officers to submit to the ED a request for criminal enforcement review of alleged criminal environmental violations, as required under TWC, §7.203.

Adopted new §70.202, Applicability, sets forth the criteria for submitting a formal request for review of an alleged criminal environmental violation to be submitted to the ED prior to referring the case to a prosecuting attorney for criminal prosecution. The individual submitting the request must be a peace officer; the alleged criminal offense must be a violation of the TWC or the Texas Health and Safety Code; the person alleged of committing the criminal violation must be the holder of a permit issued by the commission or ED or an employee of a person holding such a permit; and the alleged criminal environmental violation is related to the activity for which the permit was issued by the commission or ED.

Adopted new §70.203, Definitions, adds the definitions of related to and activity for which the permit was issued. Related to is defined as having an established relationship or connection. Activity for which the permit was issued is defined as the activity authorized by the commission or ED, under any provision, prohibition, or requirement of a permit, license, certificate, registration, approval, or other form of authorization granted by the commission or ED.

Adopted new §70.204, Procedure of Requesting Criminal Enforcement Review, sets forth the procedures for requesting a criminal enforcement review. The peace officer requesting criminal enforcement review must submit to the ED a written request for review with a report that is marked

“For Law Enforcement Use Only,” and describes the facts and circumstances of the alleged criminal environmental violation. The report must also include the legal name(s) of the person(s) alleged to have committed the offense. The report may include any other information that the requesting officer determines to be relevant and an explanation as to the reason criminal enforcement of the violation is the most appropriate action, rather than administrative or civil enforcement. Any documentation submitted for review under this section will remain the property of the submitting law enforcement agency and the documentation will be returned upon completion of the criminal enforcement review.

Adopted new §70.205, Criminal Enforcement Review Schedule, sets forth the schedule for criminal enforcement reviews. The ED shall, within 45 days of receiving a criminal enforcement review request, determine whether an alleged environmental violation exists, and whether administrative or civil remedies would adequately address the alleged violation or whether the alleged violations would be more appropriately addressed by criminal enforcement. Within 45 days after receiving a request for criminal enforcement review, the ED shall notify the referring peace officer in writing. The notification must include the reasons why civil and administrative remedies are or are not adequate to address the alleged environmental violation and whether the ED recommends criminal prosecution. If the ED does not make a determination within 45 days of receiving the request, an appropriate prosecuting attorney may bring an action for criminal prosecution, and the state is not entitled to receive any part of the amount recovered through a prosecution brought by that prosecuting attorney.

Adopted new §70.206, Factors Considered in the Criminal Enforcement Review Process, sets forth the factors the ED shall consider in the process of conducting a criminal enforcement review. The ED

shall consider: the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public; the result of the violation on air quality in the region; a receiving stream or underground water reservoir; instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or affected persons. With respect to the alleged violator, the ED shall consider: the history and extent of previous violations; the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided; the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; economic benefit gained through the violation; the necessity to deter future violations; and any other matters that justice may require. Additionally, §70.206(b) states that the criminal environmental enforcement review team will be comprised of representatives with expertise in criminal investigations, civil and administrative enforcement, and any other relevant specialists.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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. The adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

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. These adopted rules do not satisfy the definition of a major environmental rule. This rulemaking establishes agency procedures in conformance with the SB 1265. The adopted rules provide a procedure for Texas peace officers to follow, prior to referring an alleged criminal environmental violation to a prosecuting attorney for prosecution. These procedures require the ED to conduct a criminal enforcement review to determine whether the alleged environmental violation exists and whether administrative or civil remedies would adequately address the alleged violation. These procedures apply only if the person alleged of committing the violation is a holder of a permit or an employee of a person holding such a permit, and the alleged violation is related to the activity for which the permit was issued by the commission or ED. The adopted rules are not a major environmental rule because they are not expected to 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. This rulemaking does not qualify as a major environmental rule because it does not have as its specific intent the protection of the environment or the reduction of risk to human health from environmental exposure.

Furthermore, even if the adopted rulemaking did meet the definition of a major environmental rule, the adopted rules are not subject to Texas Government Code, §2001.0225, because they do not accomplish any of the four results specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless

the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) 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; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. In this case, the addition of Subchapter D to Chapter 70 does not meet any of these requirements. First, there are no federal standards that these adopted rules exceed. Second, the adopted rules do not exceed an express requirement of state law. Third, there is no delegation agreement that is exceeded by these adopted rules. Fourth, the commission adopts these rules to establish procedures for conducting a criminal enforcement review in conformance with SB 1265. Therefore, the commission does not adopt these rules solely under the commission's general powers.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific intent of the adopted rules is to establish agency procedures in conformance with SB 1265 and to help ensure statewide consistency in the criminal enforcement of environmental violations based on a violation related to the activity for which the permit was issued by the commission or ED. The adopted rules provide a procedure for Texas peace officers to follow prior to referring an alleged criminal environmental violation to a prosecuting attorney. These procedures require the ED to conduct a criminal enforcement review to determine whether the alleged environmental violation exists and whether administrative or civil remedies would adequately and appropriately address the alleged violation. These procedures apply only if the person alleged of committing the violation is a holder of a

permit issued by the commission or ED or an employee of a person holding such a permit, and the alleged violation is related to the activity for which the permit was issued by the commission or ED.

Promulgation and enforcement of these adopted rules is neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rules do not affect a landowner's rights in private real property by burdening private real property, nor restricting or limiting a landowner's right to property, or reducing the value of property by 25% or more beyond that which would otherwise exist in the absence of the adopted rulemaking. These adopted rules simply provide an additional level of review by the ED of an alleged criminal environmental violation, prior to the alleged violation being referred by a prosecuting attorney. These adopted rules do not affect any private real property.

There are no burdens imposed on private real property, and a benefit to society results from ensuring statewide consistency in the criminal enforcement of environmental violations based on a violation of a permit issued by the commission or ED. Therefore, the adopted rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed these adopted rules for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that these adopted rules will not have direct or significant adverse effect on any coastal natural resources areas, nor will they have a substantive effect on commission actions subject to the CMP.

PUBLIC COMMENT

A public hearing on this proposal was held in Austin on March 11, 2004 and an oral comment was received. The public comment period ended at 5:00 p.m. on March 15, 2004. Comments were submitted by: Benthul & Woodruff, LLP on behalf of the Associated Builders and Contractors of Texas (ABC); Brown McCarroll L.L.P. (Brown McCarroll); City of Houston; Harris County District Attorney's Office (Harris County); Kaufman County Solid Waste Management Cooperative, Inc.; North Texas Corporate Recycling Association; and Travis County Attorney's Office (Travis County).

The commenters generally supported the proposed rules and provided specific comments on the rules.

RESPONSE TO COMMENTS

Harris County commented on the FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT section of the preamble. Harris County commented that the sentence, "The request is to be submitted to the ED prior to referring to a prosecuting attorney," should be changed to "The request is to be submitted to the ED prior to referring to a prosecuting attorney for the filing of criminal charges."

The commission agrees with the comment that the fiscal note language does not fully mirror the statutory language. The inadvertent exclusion of the phrase "for the filing of criminal charges" from the fiscal note does not impact the contents of the fiscal note. Since the Texas Administrative Procedure Act does not require republication of fiscal notes, there is not an opportunity to correct this oversight. No change has been made in response to this comment.

Travis County commented on §70.202(a)(4) and stated that TWC, §7.203(a) clearly states that the criminal violation should be “related to *the* activity for which the permit was issued . . .” and that proposed §70.202(a)(4) states that the criminal violation should be “related to *an* activity for which the permit was issued . . .”

The commission agrees with the comment and the rule language has been changed to match the statute.

Brown McCarroll commented that the proposed rules would not require TCEQ to review an alleged violation of a local government’s own rule, code, ordinance, etc., and felt that is appropriate when the violation is within local government’s jurisdiction and not within the jurisdiction of the TCEQ. Brown McCarroll urged the commission to delete the last phrase in §70.202(c)(1), which reads, “or to enforcement of the local government’s own codes, ordinances, rules, orders, permits or other decisions” to ensure that rules that have been adopted by local governments are only exempt from review if those rules are not covered by commission rules, or the issue is solely within the local government’s jurisdiction.

The commission disagrees with this comment. The statute states that it governs prosecution of state environmental requirements and does not give authority to the commission to require review of violations of local ordinances. No change has been made in response to this comment.

Brown McCarroll commented that the proposed rules would completely exempt Class C misdemeanor criminal offenses from the review process and does not think it's an appropriate revision for the agency to make of its own volition. Rather than a complete exemption for any Class C misdemeanor, Brown McCarroll urged instead that a streamlined review process be used for all alleged criminal violations, thereby avoiding a burdensome review process and ensuring a timely response to local enforcement officials.

The commission disagrees with this comment. TWC, §7.203(b) does not prohibit a peace officer from issuing a citation or making an arrest. Violations involving a Class C misdemeanor are usually initiated by an officer filing a citation or complaint directly with the appropriate court. Prosecutors are not usually involved in the disposition of a Class C misdemeanor unless it is contested by the person who is charged with the offense. Class C misdemeanors are punishable by fine only and Texas Penal Code, §12.03 states that a conviction of a Class C misdemeanor does not impose any legal disability or disadvantage. Since TWC, §7.203 requires a peace officer to submit a case for review prior to bringing the case to a prosecutor for prosecution and Class C misdemeanors are initiated without the need for a prosecutor's involvement, the commission has determined that it is appropriate to exempt most Class C misdemeanors from the review process. However, the commission has modified the proposed rule in response to the comment to provide that this subchapter does not apply to Class C misdemeanors that are initiated by a peace officer without first referring the case to a prosecuting attorney.

The City of Houston commented on proposed §70.202(c) and supported the addition of language clarifying that the rules will not apply to a local government's enforcement of its own ordinances and regulations. Further, the City of Houston supported the language stating that the rules do not apply to criminal offenses prosecuted as Class C misdemeanors.

The commission appreciates the City of Houston's support of the proposed rule language. No change has been made in response to this comment.

ABC commented on §70.202(a)(2) and stated that the proposed rule inappropriately leaves out the applicability language from the statute that reads, “. . . or any other rule, statute, permit or other decision of the commission's jurisdiction.” ABC commented that this omission seriously and inappropriately limits the scope of proposed referrals that should receive TCEQ review.

The commission disagrees with this comment. TWC, §7.203 requires the commission to conduct a criminal enforcement review of alleged environmental criminal violations. The TWC and the Texas Health and Safety Code contain all of the criminal provisions for the violation of statutes, rules, orders, permits, or other decision of the commission within the commission's jurisdiction. No change has been made in response to this comment.

Travis County commented on §70.202(a) and stated that the operative term should be “shall be submitted” instead of “must be submitted.” Travis County also stated the agency should keep the rules consistent with the language of the statute in TWC, §7.203(b), which specifically uses the word “shall”

in its directory language and that this also maintains the consistency with §7.203(a) and (b), where the words “shall” and “may” are used.

The commission agrees with this comment and §70.202(a) has been changed.

ABC commented that the proposed language in §70.202(c)(2) inappropriately excludes Class C misdemeanors within the exclusion from applicability.

The commission disagrees with this comment. TWC, §7.203(b) states that it does not prohibit a peace officer from issuing a citation or making an arrest. Violations involving a Class C misdemeanor are usually initiated by an officer filing a citation or complaint directly with the appropriate court. Prosecutors are not usually involved in the disposition of a Class C misdemeanor unless it is contested by the person who is charged with the offense. Class C misdemeanors are punishable by fine only and Texas Penal Code, §12.03 states that a conviction of a Class C misdemeanor does not impose any legal disability or disadvantage. Since TWC, §7.203 requires a peace officer to submit a case for review prior to bringing the case to a prosecutor for prosecution and Class C misdemeanors are initiated without the need for a prosecutor’s involvement, the commission has determined that the intent of TWC, §7.203(b) is to exempt most Class C misdemeanors from the review process. However, the commission has modified the proposed rule in response to the comment to provide that this subchapter does not apply to Class C misdemeanors that are initiated by a peace officer without first referring the case to a prosecuting attorney.

Brown McCarroll commented that the definitions of the terms “related to” and “activity for which a permit was issued” should be deleted and changed, respectively. The definition for the term “related to” is sufficiently clear and does not need to be defined and should be deleted. The term “specific activity” in the proposed definition for “activity for which a permit was issued” could be interpreted to be too limited in scope. Brown McCarroll further commented that many day-to-day activities that aren’t specifically written out in a permit could be determined to be outside the bounds of the review, if the review was limited to violations of those “specific activities” authorized by the commission. Brown McCarroll suggested that the term “the activities for which the permit was issued” be defined to mean “the purpose and intended activity which necessitated the state authorization, and includes those actions that are reasonably incident to conducting that authorized activity. Activities that are included within a permit application submitted by the permit holder in order to receive the authorization are considered to be included within this definition.”

The commission agrees that the term “related to” is clear. However, the commission disagrees that the definition of the term “related to” should be deleted from the rules. The commission has determined that having this definition in the rules will reduce the uncertainty and lessen the burden to local law enforcement by describing the applicability of the rules. The commission also defined the term “activity for which the permit was issued” to reduce uncertainty and lessen the burden to local law enforcement. The definition for “activity for which the permit was issued” in §70.203(2) tracks the statutory language of TWC, §7.203 with the addition of incorporating the definition of a permit as it is defined in TWC, §7.001(2). The definition suggested by the commenter for the term “activity for which the permit was issued” could lead to confusion on

when the statute applies. Since the meaning of the term related “activity for which the permit was issue” is clear under the statute and the proposed definition more closely tracks the statutory language, the commission has not adopted the definition suggested by the commenter. However, the commission does agree with the commenter that the phrase “specific activity” in the proposed definition of “activity for which a permit was issued” could be interpreted to be too limited in scope. The commission has deleted the words “a specific activity” and replaced them with “the activity” to mirror the statutory language.

Brown McCarroll commented that the criminal environmental enforcement review team should specifically include representatives of the regulatory and permitting sections of the TCEQ, in addition to “other relevant specialists.”

The commission disagrees with this comment. The rules provide a mechanism to include relevant specialists (e.g., a permit engineer) on a case-by-case basis. By including the relevant specialists only as needed, the commission can ensure the best use of its resources and facilitate the commission meeting the 45-day time frame set forth in TWC, §7.203. No change has been made in response to this comment.

Travis County commented on §70.203(1) and (2) and stated that the term “Activity for which the permit was issued” should be given an extremely narrow interpretation by the TCEQ and that legislative intent clearly dictates such interpretation.

The commission believes that the definition in §70.203 sufficiently describes the scope of the phrase “activity for which the permit was issued.” The commission agrees that the review process should only be applied to cases that fall within the statute. No change has been made in response to this comment.

The City of Houston commented on §70.203(2) and supported the proposed definition of “Activity for which a permit was issued.”

The commission appreciates the City of Houston’s support of the proposed rule language. No change has been made in response to this comment.

The City of Houston commented on §70.204 and supported the changes from the earlier public draft regarding the amount of documentation the peace officer must provide to TCEQ and the language stating that TCEQ will not permanently hold the documentation.

The commission appreciates the City of Houston’s support of the proposed rule language. No change has been made in response to this comment.

Both ABC and Harris County commented on the §70.204(a) requirement that the requesting officer provide an explanation as to the reason why criminal enforcement of the violation is the most appropriate action. ABC commented that §70.204(a) should be expanded to include as an element of the referral report, identification of those features of the case and the underlying evidence that makes it

an appropriate subject for criminal prosecution and which distinguish it from other civil cases involving similar conduct. Harris County objected to the §70.204(a) requirement that the requesting officer provide an explanation as to the reason criminal enforcement of the violation is the most appropriate action rather than administrative or civil enforcement. Harris County stated that since most police officers around the state aren't that familiar with administrative law and procedures, requiring them to be able to tell the commission why the violation couldn't be handled administratively would place an undue burden on local law enforcement.

The commission agrees with the comment that requiring the requesting officer to provide an explanation why the violation couldn't be handled administratively would place an undue burden on local law enforcement. The purpose of TWC, §7.203 is to place the responsibility on the TCEQ to make that determination. Section 70.204 has been changed to allow a requesting officer to submit this type of information but it is no longer a requirement under the rules.

Harris County commented on §70.204(b) that states, "The requesting officer may also include any additional information that the requesting officer determines is relevant to the request for conducting the criminal enforcement review . . ." Harris County raised a concern that there may be a significant amount of relevant information that would be presented to a local prosecuting attorney that the requesting officer could not legally submit for review by the TCEQ, for example criminal histories, evidence gathered by a grand jury, sealed evidence, and other types of privileged information.

The commission agrees with commenter that there may be situations in which the TCEQ is not provided all relevant information for review due to legal constraints prohibiting disclosure of that information. This is an additional reason for making the submission of relevant information permissive, rather than mandatory. No change has been made based on this comment.

The City of Houston commented on §70.205 and supported the addition of language clarifying that the ED decision will be “based on the information provided by the requesting peace officer.” The City of Houston suggested that TCEQ add the word “alleged” before “criminal violation” to reinforce that fact that TCEQ has not decided the substance of the allegation in paragraph (1)(C).

The commission agrees with this comment and the rule has been changed to include this language.

The City of Houston commented on TWC, §7.203(d) and suggested adding language stating that the written notification it provides in these instances will include the required recommendation.

The commission agrees with this comment and §70.205 has been changed to include this language.

ABC supported the detection, prosecution, and punishment of criminal conduct, however, commented that the most careful scrutiny of a proposed referral for criminal prosecution is warranted to ensure: 1) the best allocation of enforcement resources; and 2) that the conduct under evaluation receives a careful review that considers the potentially adverse consequences that mere accusation of criminal conduct carries with it.

The commission agrees with the comment. No change has been made in response to this comment.

ABC commented that criminal enforcement of these environmental laws should take into account the existence of an already comprehensive enforcement scheme available to civil regulators with primary responsibility for ensuring compliance with environmental laws. ABC further commented that proposed criminal cases should be evaluated in the context of where they fit in the existing and pervasive regulatory scheme, if they fit at all, to ensure consistent and appropriate response to alleged violations.

The commission agrees with the comment. No change has been made in response to this comment.

ABC commented that proposed referrals involving TWC, §7.147 should be examined to ascertain what aspects of the referral separate it from other similar cases that would routinely be prosecuted as civil penalty cases also involving strict liability civil penalties. ABC also commented that in reviewing proposed felony cases, the TCEQ should, in considering whether to retain a case for civil relief or to allow it to go forward as a criminal matter, closely examine the referral to ensure that all elements, including the appropriate mental state and supporting evidence, are present.

The commission appreciates ABC's comments on the proposed rule language. TWC, §7.203 requires the commission to determine whether an alleged environmental violation exists and

whether administrative or civil remedies would adequately address the alleged violation. TWC, §7.203(c) requires the commission to consider the factors prescribed in TWC, §7.053 in making its determination. One of those factors addresses degree of culpability. Under TWC, §7.203, the commission does not step into the role of the prosecuting attorney whose duty it is to determine whether the evidence supports the criminal violations alleged. No change has been made in response to this comment.

ABC commented that §70.205(3) is inappropriate and should be deleted. ABC stated that the TCEQ, either in the person of the ED or the commission, should respond in writing to ensure appropriate consideration of each referral according to SB 1265 and the rules.

The commission disagrees with this comment. Section 70.205(3) is a restatement of TWC, §7.203(c). No change has been made in response to this comment.

North Texas Corporate Recycling Association commented that it would be against transferring enforcement power to a single individual on the state level. North Texas Corporate Recycling Association stated that it is very important that local authorities retain the right to prosecute those who damage their air and water by breaking environmental laws and any proposed changes should ensure continued local involvement and/or control.

The commission appreciates the comments on the proposed rules. SB 1265 was enacted and became effective September 1, 2003. The proposed rules are required by TWC, §7.203 to

establish the procedure for peace officers to refer an alleged criminal environmental violation to the commission for criminal enforcement review. TWC, §7.203 requires the commission to determine whether an alleged environmental violation exists and whether administrative or civil remedies would adequately address the alleged violation. However, the right and duty to prosecute criminal violations of the environmental statutes remain with the local prosecutor. Under TWC, §7.203, the commission does not step into the role of the prosecuting attorney, whose duties include the determination of whether the evidence supports the criminal violations alleged. No change has been made in response to this comment.

Kaufman County Solid Waste Management Cooperative, Inc. commented that if TCEQ implements SB 1265, there will be so much red tape for the prosecutors to go through to get a TCEQ ED permission before an environmental crime can be prosecuted and expressed the fear that environmental crimes will be put at the lowest level of priority. Kaufman County Solid Waste Management Cooperative, Inc. requested that the TCEQ consider all the work that is being implemented to create awareness of environmental crimes and keep the process simple for the legal system, and that these crimes should be tried and punishments should be given. Kaufman County Solid Waste Management Cooperative, Inc. stated that it does not feel implementing SB 1265 would enhance that procedure.

The commission appreciates the comments on the proposed rules. SB 1265 was enacted and became effective September 1, 2003. The proposed rules are required by TWC, §7.203 to establish the procedure for peace officers to refer an alleged criminal environmental violation to the commission for criminal enforcement review. To avoid placing any undue burden on local law

enforcement, the commission has made the procedures as simple and flexible as possible. Section 70.204(a) limits the required information that the requesting officer must provide to the legal name of the alleged violator and a report describing the facts and circumstances of the alleged violation. Section 70.204(b) allows the requesting officer to include any additional information that the requesting officer determines is relevant to the criminal enforcement review request. No change has been made in response to this comment.

Harris County commented that §7.205(1)(A) needs to be changed so that it reads, “to determine whether there is probable cause to believe that an alleged environmental violation exists” so that it’s clear that the TCEQ’s function is not to determine whether or not someone’s guilty or whether or not there is a violation that clearly exists. Harris County also commented that the TCEQ is only going to hear one side of the argument at the time of the review; therefore, the TCEQ is just reviewing the police report to determine whether or not there is sufficient evidence or probable cause to believe there is an alleged environmental violation.

The commission agrees that under TWC, §7.203, the commission does not step into the role of the prosecuting attorney, whose duty it is to determine whether the evidence supports the criminal violations alleged. However, TWC, §7.203 does require the commission to determine whether an alleged environmental violation exists and whether administrative or civil remedies would adequately address the alleged violation. No change has been made based on this comment.

SUBCHAPTER D: CRIMINAL ENFORCEMENT REVIEW

§§70.201 - 70.206

STATUTORY AUTHORITY

The new sections are adopted under the authority granted to the commission by the Texas Legislature in TWC, Chapter 7. The new sections are also adopted under the general authority granted in TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(14)(b); §7.002, which authorizes the commission to enforce provisions of the TWC; and SB 1265, 78th Texas Legislature, 2003, which authorizes the commission to adopt rules to establish procedures for Texas peace officers to follow when referring alleged environmental violations for criminal enforcement review.

§70.201. Scope and Purpose.

The purpose of this subchapter is to establish the procedure and mechanism for Texas peace officers to submit to the executive director a request for criminal enforcement review of an alleged criminal environmental violation related to the activity for which a permit was issued by the commission or executive director, as required under Texas Water Code, §7.203. A permit, as defined under Texas Water Code, §7.001, includes a license, certificate, registration, approval, or any other form of authorization granted by the commission or executive director.

§70.202. Applicability.

(a) As required under Texas Water Code, §7.203, a written request for review of an alleged criminal environmental violation shall be submitted to the executive director prior to referring to a prosecuting attorney for criminal prosecution if all the following criteria are met:

(1) the individual submitting the request is a peace officer, as that term is defined in Texas Water Code, §7.193 or Texas Code of Criminal Procedure, Chapter 2;

(2) the alleged criminal offense is a violation of the Texas Water Code or the Texas Health and Safety Code;

(3) the person alleged to have committed the criminal violation is the holder of a permit issued by the commission or executive director or an employee of a person holding such a permit; and

(4) the alleged criminal violation is related to the activity for which the permit was issued.

(b) A written request for review is not required to be submitted to the executive director under Texas Water Code, §7.203, if the alleged violation constitutes imminent danger of death or bodily injury under an endangerment offense specified in Texas Water Code, §7.252.

(c) This subchapter does not apply to:

(1) enforcement by a local government of statutory provisions within the jurisdiction of the local government, and not within the jurisdiction of the commission, or to enforcement of the local government's own codes, ordinances, rules, orders, permits, or other decisions; and

(2) Class C misdemeanors that are initiated by a peace officer filing a complaint or citation with an appropriate court without first referring the case to a prosecuting attorney.

§70.203. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Related to** - Having an established relationship or connection.

(2) **Activity for which the permit was issued** - The activity authorized by the commission or executive director under any provision, prohibition, or requirement of a permit, license, certificate, registration, approval, or other form of authorization granted by the commission or executive director.

§70.204. Procedure for Requesting Criminal Enforcement Review.

(a) The peace officer requesting criminal enforcement review under this section shall submit to the executive director a written request for review that is clearly marked “For Law Enforcement Use Only.” The request shall include the legal name of the alleged violator and a report describing the facts and circumstances of the alleged criminal environmental violation.

(b) The requesting officer may also include any additional information that the requesting officer determines is relevant to the criminal enforcement review request, in accordance with §70.206 of this title (relating to Factors Considered in the Criminal Enforcement Review Process), and an explanation as to the reason criminal enforcement of the violation is the most appropriate action, rather than administrative or civil enforcement.

(c) Any criminal enforcement review documentation that is submitted under this section will remain the property of the submitting law enforcement agency and the records will be returned upon completion of the criminal enforcement review.

§70.205. Criminal Enforcement Review Schedule.

Following submission of the information required by §70.204 of this title (relating to Procedure for Requesting Criminal Enforcement Review), the executive director shall determine whether the request contains the required information necessary to conduct a criminal enforcement review.

(1) If the executive director determines that the request is administratively complete by meeting the requirements in §70.204 of this title, the executive director shall, based on the information provided by the requesting peace officer, within 45 days of receiving the request:

(A) determine whether an alleged environmental violation exists;

(B) determine whether administrative or civil remedies would adequately and appropriately address the alleged violation or whether the alleged violation would be more appropriately addressed by criminal enforcement; and

(C) notify the referring peace officer in writing, of the determination as to whether an alleged criminal violation exists and whether civil or administrative remedies are adequate to address the alleged environmental violation or recommend criminal prosecution.

(2) If the executive director determines that the criminal enforcement review request is not administratively complete, the executive director shall notify the requesting peace officer in writing within ten days of receipt of the request. The notification will specify the deficiencies and identify the information necessary for the executive director to make the required determination.

(3) If the executive director does not make a determination within 45 days of receiving the request, an appropriate prosecuting attorney may bring an action for criminal prosecution, and the

state is not entitled to receive any part of the amount recovered through a prosecution brought by that prosecuting attorney.

§70.206. Factors Considered in the Criminal Enforcement Review Process.

(a) The executive director shall consider the following factors in the process of conducting a criminal enforcement review:

(1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;

(2) the result of the violation on:

(A) air quality in the region;

(B) a receiving stream or underground water reservoir;

(C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or

(D) affected persons;

(3) with respect to the alleged violator:

(A) the history and extent of previous violations;

(B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;

(C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;

(D) economic benefit gained through the violation; and

(E) the necessity to deter future violations; and

(4) any other matters that justice may require.

(b) The criminal environmental enforcement review team will be comprised of representatives with expertise in criminal investigations, civil and administrative enforcement, and any other relevant specialists.