

The Texas Commission on Environmental Quality (commission) proposes new §§70.201 - 70.206.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement Senate Bill 1265, 78th Legislature, 2003. Senate Bill 1265 amends Texas Water Code (TWC), §7.203, Criminal Enforcement Review. Senate Bill 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 for an 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 executive director. Senate Bill 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 proposes to create 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.

Proposed new §70.201, Scope and Purpose, sets forth the purpose of proposed 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.

Proposed 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 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 an activity for which the permit was issued by the commission or ED.

Proposed new §70.203, Definitions, adds the definitions of related to and activity for which a permit was issued. Related to is defined as having an established relationship or connection. Activity for which a permit was issued is defined as a specific 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.

Proposed 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 and an explanation as to the reason criminal enforcement of the violation is the

most appropriate action, rather than administrative or civil enforcement. The report may include any other information that the requesting officer determines to be relevant.

Proposed 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, determine whether an alleged environmental violation exists, 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 a criminal enforcement review determination is made, 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. 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.

Proposed 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 executive director 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, proposed §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.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst, Strategic Planning and Appropriations Section, determined that, for the first five-year period the proposed rules are 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 rules.

The proposed rules implement Senate Bill 1265. The specific purpose of the proposed rules is to establish procedures for Texas peace officers to use when referring alleged environmental violations for criminal enforcement review.

The proposed rules set forth criteria for submitting a request to the ED for review of an alleged criminal environmental violation. The request is to be submitted to the ED prior to referring to a prosecuting attorney. The request and report must include a description of 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 and an explanation as to the reason criminal enforcement of the violation is the most appropriate action, rather than administrative or civil enforcement. The report may include any other information that the requesting officer determines to be relevant. The proposed rules also set forth factors that the ED shall consider in the process of conducting a criminal enforcement review. The ED is required to notify the peace officer in writing, setting forth the reasons why administrative or civil remedies are inadequate or inappropriate and recommending criminal prosecution; or that the alleged environmental violation is to be resolved through administrative or civil means by the appropriate authorities. This determination must be issued within 45 days after receiving the request.

Fiscal implications for the agency to implement the procedure for criminal enforcement reviews are not expected to be significant. Local law enforcement officials may be affected by the additional staff hours needed to compile the needed information and submit the request for review to the ED. However, according to agency staff, the information local officials would have to compile would not differ significantly from the information that would need to be developed to prosecute a case. In addition, local law enforcement officials may also have access to the ED staff's technical expertise to assist in an investigation, if it is determined that the case is appropriate for criminal prosecution. Therefore, no significant fiscal implications are anticipated for local governments.

Though not a part of this rulemaking, Senate Bill 1265 also requires that any fine, penalty, or settlement recovered through a prosecution by a local law enforcement authority be apportioned 70% to

the state and 30% to any local government significantly involved in prosecuting the case. Because of the cost associated with prosecuting these types of cases, such as the need for lab analysis and expert witnesses, the split provided could result in a local unit of government not being able to recover the total cost of the prosecution.

#### PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the enforcement of and compliance with the proposed rules will be compliance with state law and the establishment of a uniform statewide procedure to evaluate whether alleged environmental violations exist and whether administrative or civil remedies would adequately and appropriately redress the alleged violation.

Fiscal implications are not anticipated for businesses or individuals as a result of the implementation or enforcement of the proposed rules.

Individuals or businesses that have permits issued by the commission or ED will have an additional level of review by the ED prior to local law enforcement presenting alleged criminal violations of permit conditions to local prosecutors. This is expected to provide statewide consistency in the criminal enforcement of environmental violations related to an activity for which the permit was issued.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated as a result of implementation of the proposed rules for small or micro-businesses. Small or micro-businesses that have permits issued by the commission or ED will have an additional level of review by the ED prior to local law enforcement presenting alleged criminal violations of permit conditions to local prosecutors. This is expected to provide statewide consistency in the criminal enforcement of environmental violations related to an activity for which the permit was issued.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### DRAFT 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 proposed rulemaking does not meet any of the four applicability requirements listed in §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 proposed rules do not satisfy the definition of a major environmental rule. This rulemaking proposes to establish agency procedures in conformance with the Senate Bill 1265. The proposed rules provide a procedure for Texas peace officers to follow, prior to referring an alleged criminal environmental violation to a prosecuting attorney. These procedures would 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 would 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 an activity for which the permit was issued by the commission or ED. The proposed 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 proposed rulemaking did meet the definition of a major environmental rule, the proposed 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). Section 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 proposed addition of Subchapter D to Chapter 70 does not meet any of these requirements. First, there are no federal standards that these proposed rules would exceed. Second, the proposed rules do not exceed an express requirement of state law. Third, there is no delegation agreement that would be exceeded by these proposed rules. Fourth, the commission proposes these rules to establish procedures for conducting a criminal enforcement review in conformance with Senate Bill 1265. Therefore, the commission does not propose the adoption of these rules solely under the commission's general powers.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific intent of the proposed rules is to establish agency procedures in conformance with Senate Bill 1265 and to help ensure statewide consistency in the criminal enforcement of environmental violations based on a violation related to an activity for which the permit was issued by the commission or ED. The proposed rules provide a procedure for Texas peace officers to follow prior to referring an alleged criminal environmental violation to a prosecuting attorney. These procedures would 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 would 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 an activity for which the permit was issued by the commission or ED.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed rulemaking. These proposed 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 proposed 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 proposed rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed these proposed 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 proposed 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.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 11, 2004 at 2:00 p.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., March 15, 2004, and should reference Rule Project Number 2003-061-070-AD. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

**SUBCHAPTER D: CRIMINAL ENFORCEMENT REVIEW**

**§§70.201 - 70.206**

STATUTORY AUTHORITY

The new sections are proposed under the authority granted to the commission by the Texas Legislature in TWC, Chapter 7. The new sections are also proposed 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 Senate Bill 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.

The proposed new sections implement TWC, §§5.103, 5.105, and 7.203.

**§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 an 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 must 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 and 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 an activity for which the permit was issued by the commission or executive director.

(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) criminal offenses that will be prosecuted only as a Class C misdemeanor.

**§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 a permit was issued** - A specific 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 must include the legal name of the alleged violator and a report describing the facts and circumstances of the alleged criminal environmental violation and an explanation as to the reason criminal enforcement of the violation is the most appropriate action, rather than administrative or civil enforcement.

(b) 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, in accordance with §70.206 of this title (relating to Factors Considered in the Criminal Enforcement Review Process).

(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 violation 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, as to whether a criminal violation exists and whether civil or administrative remedies are adequate to address the alleged environmental violation.

(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.