

The Texas Commission on Environmental Quality (commission or agency) adopts the amendments to §§70.1 and 70.9 - 70.11.

Section 70.9 is adopted *with change* to the proposed text as published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1022). Sections 70.1, 70.10, and 70.11 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2009, the 81st Legislature passed Senate Bill (SB) 1693. SB 1693, Sections 4 and 5 relate to the enforcement authority of the commission.

SB 1693, Section 4 amends Texas Water Code (TWC), §5.1175, relating to payment of administrative penalties in installments. Prior to SB 1693, TWC, §5.1175 allowed only small businesses to pay the penalty in periodic installments of up to 12 months. SB 1693 expanded TWC, §5.1175 to allow a person to apply for permission to pay the penalty in periodic installments of up to 36 months.

SB 1693, Section 5 amends TWC, §7.002, by allowing the commission to delegate to the executive director the authority to issue an administrative order. The use of the term administrative order in SB 1693 is broad and can conceivably include default orders as well as agreed orders. However, at this time the commission proposes to amend only those rules that relate to the issuance of agreed orders. Furthermore, the adopted amendments only allow for the issuance of agreed orders by the executive director upon delegation of that authority by the commission. The adopted rules do not affirmatively delegate to the executive director the authority to issue agreed orders.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 80, Contested Case Hearings.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout the rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines concerning acronym usage.

§70.1, Purpose

The commission adopts amended §70.1 to expand the applicability of the general rules governing enforcement actions to the executive director. This modification reflects the delegation granted in SB 1693 which allows the commission to delegate to the executive director the authority to issue administrative orders.

§70.9, Installment Payment of Administrative Penalty

The commission adopts amended §70.9 which modifies subsection (a) to make the rule more consistent with current commission practice by allowing installment payments upon request. Subsection (a) is also modified to allow for installment payments in an administrative penalty imposed by an executive director order. This change is necessary in case the commission delegates to the executive director authority to issue administrative orders in accordance with SB 1693. The commission adopts amended §70.9(b)(1) and (2) which delete the existing language that defines qualified small businesses to ensure consistency with TWC, §5.1175, as amended by SB 1693. Subsection (b)(3) is relettered to subsection (b) and modified to apply the requirement to specify the amount and payment schedule of monthly installments to executive

director orders. This modification is needed in the event the commission delegates to the executive director authority to issue administrative orders in accordance with SB 1693. In addition, subsection (b)(4) is relettered to subsection (c) and is amended to increase payment schedules from a 12-month period to a 36-month period to reflect the corresponding change in TWC, §5.1175, as amended by SB 1693.

§70.10, Agreed Orders

The commission adopts amended §70.10 which modifies subsection (a) to: 1) remove the limitation that agreed orders be recommended to the commission for approval; 2) broaden the scope of effective legal orders by replacing commission orders with agency orders; and 3) add the executive director as an entity who may approve and issue agreed orders. Subsection (c) is modified to provide a separate and additional mechanism for consideration of an agreed order that is issued by the executive director. The amendment clarifies that after publication of the agreed order in the *Texas Register*, agreed orders issued by the executive director will be posted on the executive director's agenda whereas agreed orders issued by the commission will continue to be scheduled during a commission meeting. In addition, subsection (c) is amended to extend the above dual mechanism of considering agreed orders to those cases that are settled at the State Office of Administrative Hearings. The modifications in subsections (a) and (c) are required if the commission grants to the executive director the authority to issue administrative orders as set out in SB 1693.

§70.11, Notice of Decisions and Orders

The commission adopts amended §70.11 which modifies subsections (a), (a)(1), and (b) to extend the notice requirements to those orders that are issued by the executive director. These changes are necessary in the event the commission delegates to the executive director the authority to issue administrative orders

as set out in SB 1693. In addition, the commission adopts amended §70.11(a) which deletes extraneous language specifying that public notice will be given either personally or by first class mail. This language is redundant because the rule already references Texas Government Code, §2001.142 which outlines the requirements for notice of decisions and orders.

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. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from 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 commission has determined that the rulemaking does not fall under the definition of a major environmental rule because the amendments are primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The amendments concern procedural requirements of the agency, such as providing for executive director authority to issue administrative orders upon commission delegation of that authority and revising installment payments of administrative penalties. These amendments allow for greater flexibility in the enforcement process while maintaining appropriate protection of human health and the environment. The amendments do not rise to the level of material, but rather are limited to incorporating modifications to the current regulatory framework based upon the implementation of the rules to date.

Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies to a major environmental rule, 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. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) 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 any state and federal program; and 4) is not adopted solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY section of this preamble.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rules and performed an assessment of whether these rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement the statutory provisions of TWC, §5.1175 and §7.002, concerning Payment of Penalty by Installment and Enforcement Authority, respectively. The rules provide for increased flexibility in payment of

administrative penalties by installment and also provide for executive director authority to issue administrative orders upon delegation of that authority by the commission.

Promulgation and enforcement of the amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the regulations do not affect a landowner's rights in real property because the clarification in the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the proposed clarification of the regulations. In other words, there are no burdens imposed on private real property under this rulemaking because they only establish a new procedural mechanism for administrative enforcement orders. Therefore, the rules do not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period and no comments were received

PUBLIC COMMENT

The commission held a public hearing on March 9, 2010 at 2:00 p.m. No comments were received at the hearing. The comment period closed on March 15, 2010. The commission received written comments from the City of Houston (the City) and Lloyd Gosselink, Attorneys at Law.

RESPONSE TO COMMENTS

The City commented that §70.9(a), does not appear to comport with the permissive intent of the legislation to allow the commission to order extended penalty payments rather than to mandate the option.

The commission respectfully disagrees that §70.9(a) mandates the penalty option. Specifically, the insertion of the word "may" makes installment payments a discretionary grant of authority. No change was made in response to this comment.

The City commented that the term "person" in §70.9(a) makes the terms "firm or business" superfluous.

The commission agrees that the term "person" makes the terms "firm or business" superfluous since 30 TAC §3.2 includes these terms within the definition of "person." In response to this comment, the commission has struck these terms from the rule.

The City suggested rule language which inserts the requirement that the person must demonstrate an ability to pay before they may request a penalty payment installment plan to make the language permissive. The City also commented that the extension of an installment payment option must rest on a finding of need for the extension. The City suggested language in §70.9(b)(3) that requires "an articulated reason for the option consistent with the inability to pay."

The City's suggested changes to the rule language go beyond the intent of the legislation which does not require that a person must demonstrate a financial inability to pay and to articulate a reason for the request in order to receive a payment plan. No changes have been made in response to these comments.

Lloyd Gosselink supported the overall revisions and implementation of the legislative intent of SB 1693 of the 81st Legislature. Lloyd Gosselink noted that the state's proposal does not address implementation in conjunction with TWC, §7.034, regarding deferral for municipally owned utilities claiming financial inability to pay. Lloyd Gosselink commented that the commission has not applied the provisions of TWC, §7.034 in a manner that truly benefits the utilities that were the intended beneficiary of this provision. Lloyd Gosselink expressed concern that if the rules were adopted without consideration of implementation in conjunction with TWC, §7.034, the ability for utilities to engage in the relief envisioned in the provision would be further diluted.

Lloyd Gosselink's suggested changes are outside the scope of the rulemaking which is to specifically address payment of the penalty by installment and delegation to the executive director the authority to issue an administrative order. With regard to Lloyd Gosselink's concerns, the commission appropriately applies the provisions of TWC, §7.034, consistently adhering to the language in the statute. No changes were made to the rules in response to this comment.

SUBCHAPTER A: ENFORCEMENT GENERALLY

§§70.1 and 70.9 - 70.11

STATUTORY AUTHORITY

The amendments are adopted under the following statutory authority: Texas Water Code (TWC), §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies 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 procedures or practice requirements of an agency; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §§7.001 *et seq.*, which establish the commission's enforcement authority and provide specific requirements governing that authority.

Additionally, the amendments are adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation. The amendments are also adopted under Senate Bill 1693, Sections 4 and 5, which require the commission to adopt rules to implement new TWC, §5.1175 and §7.002, respectively.

The adopted amendments implement TWC, §5.1175 and §7.002, which direct the commission to adopt rules to provide for increased flexibility in payment of administrative penalties by installment and provide for executive director authority to issue administrative orders upon delegation of that authority by the commission.

§70.1. Purpose.

The purpose of this chapter is to provide general rules governing enforcement actions before the commission or, upon delegation of the authority to issue an administrative order, the executive director. The commission shall delegate the authority to issue an administrative order to the executive director by resolution. Procedures for contested enforcement cases are located in Chapter 80 of this title (relating to Contested Case Hearings). If some part or parts of these rules cannot be interpreted as consistent with the Texas Water Code, the Texas Health and Safety Code, or the Administrative Procedure Act, or where applicable parts of those statutes are not specifically included in these rules, the statutes shall control.

§70.9. Installment Payment of Administrative Penalty.

(a) Any person(s) may, upon request, be allowed to make installment payments of an administrative penalty imposed in a commission or executive director order.

(b) The amount and payment schedule of monthly installments must be specified by a commission or executive director order.

(c) Payment schedules issued may not exceed a 36-month period.

§70.10. Agreed Orders.

(a) The executive director and the respondent may reach an agreement, or settlement, in an

enforcement action. In order to have legal effect as an order of the agency, and in any case in which penalties are assessed, an agreed order must be approved and issued by the commission or the executive director. In such an agreed order, the respondent may agree to:

- (1) admit to none, any, or all of the violations alleged in any Executive Director Preliminary Report or petition in the case;
- (2) assessment of a specific administrative penalty;
- (3) remedial ordering provisions;
- (4) any combination of these; and
- (5) any other lawful provisions agreed to by the executive director and the respondent.

(b) The effective date of an order, for purposes of compliance with its terms and conditions, including deadlines, shall be the date on which service of notice of the order is achieved under the Administrative Procedure Act, §2001.142.

(c) When an agreement is reached, the executive director shall publish notice of the proposed agreed order in the *Texas Register*, providing 30 days for public comment. Unless delegated to the executive director, after the public comment period, the proposed agreed order shall be scheduled for consideration by the commissioners during a commission meeting under Chapter 10 of this title (relating to

Commission Meetings). If the proposed agreed order is to be issued by the executive director, the agreed order shall be scheduled for the executive director's agenda. If the enforcement action is under the jurisdiction of the State Office of Administrative Hearings, the judge shall remand the action to the executive director who will file the agreed order with the chief clerk for commission or executive director consideration. The judge is not required to prepare a proposal for decision or memorandum regarding the settlement.

§70.11. Notice of Decisions and Orders.

(a) For rulings, orders, or decisions issued by the commission or the executive director, parties shall be given notice, in accordance with the Administrative Procedure Act, §2001.142. The notice shall include:

- (1) the commission's or the executive director's findings;
- (2) the amount of the penalty;
- (3) the right to judicial review of the commission's or the executive director's order; and
- (4) any other information required by law.

(b) In addition to the requirements of subsection (a) of this section, when the commission or the executive director issues an enforcement order in which administrative penalties have been assessed, the

chief clerk shall file notice of the commission's or the executive director's decision and order in the *Texas Register* not later than ten days after the date on which the decision is adopted.