

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 proposed amendments only allow for the issuance of agreed orders by the executive director upon delegation of that authority by the commission. The proposed rules do not affirmatively delegate to the executive director the authority to issue agreed orders.

SECTION BY SECTION DISCUSSION

The commission proposes 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 proposes to amend §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 proposes to amend §70.9 by modifying subsection (a) to make the rule more consistent with current commission practice by allowing installment payments upon request. Subsection (a) is also proposed to be 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 proposes to amend §70.9(b)(1) and (2) by deleting the existing language that defines qualified small businesses to ensure consistency with TWC, §5.1175, as amended by SB 1693. Subsection (b)(3) is proposed to be 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 proposed to be relettered to subsection (c) and is proposed to be 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 proposes to amend §70.10 by modifying 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 proposed to be modified to provide a separate and additional mechanism for consideration of an agreed order that is issued by the executive director. The proposed 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 proposed to be 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 proposes to amend §70.11 by modifying 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 proposes to amend §70.11(a) by deleting 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Unit, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or any other unit of state or local government as a result of administration or enforcement of the proposed rules. Local governments that own or operate facilities subject to regulation by the commission who are assessed an administrative penalty may benefit from being able to pay penalties in installments of up to 36 months.

The proposed rules implement SB 1693, Sections 4 and 5. SB 1693, Section 4 relates to payment of administrative penalties in installments. Prior to SB 1693, only small businesses were allowed to pay penalties in periodic installments of up to 12 months. The proposed rules allow a person, firm, or business to request to pay a penalty in periodic installments of up to 36 months. Furthermore, the proposed rules allow the commission to delegate to the executive director the authority to issue an administrative order. The proposed amendments only allow for the issuance of agreed orders by the executive director upon delegation of that authority by the commission.

The proposed change to allow entities other than small businesses to pay penalties in installments of up to 36 months is not expected to result in significant fiscal implications. The majority of fee penalties (over 99%) collected by the agency are deposited to the state's General Revenue Fund 001. Some penalty fee revenue is statutorily deposited to the Dry Cleaning Facility Release Account 5093, but these funds make up a small portion of the penalty fee revenue collected. None of the penalty fees collected by the agency are available for expenditure unless appropriated by the legislature.

The proposed changes are anticipated to allow persons, units of government, or businesses additional

flexibility to pay an administrative penalty, particularly if there are costs of corrective action to be paid.

This fiscal note assumes that the agency would only offer an installment option in cases of economic hardship and that these cases would represent a small fraction of the penalties assessed. The extension of time from 12 months to 36 months is not expected to significantly affect fee penalty revenue collections. Any cash flow implications for the state due to the lower amount for penalty fees collected each year is not expected to be significant; therefore, no significant fiscal implications are anticipated for the agency or any other unit of state government.

The proposed rules also allow the commission to delegate to the executive director the authority to issue an agreed order. This change could streamline the existing enforcement process and may result in a decrease in time necessary to issue administrative orders. No significant fiscal implications are anticipated for the agency resulting from these proposed changes.

PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and more efficient enforcement procedures.

No fiscal implications are anticipated for businesses or individuals as a result of the administration or enforcement of the proposed rules. Some businesses or individuals who have been assessed administrative penalties and are experiencing economic hardships may benefit through the additional flexibility provided by the proposed rules to pay the penalty, particularly if there are costs of corrective action to be paid. This fiscal note assumes that businesses and individuals are in compliance with agency

rules and regulations.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the implementation of the proposed rules. Small and micro-businesses will still be allowed to make installment payments of an administrative penalty, and the time they will have to make these payments will be increased from 12 months to 36 months. The proposed rules would expand the number of businesses and individuals allowed to make installment payments beyond just small and micro-businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary to comply with state law and are not expected to adversely affect small or micro-businesses for the first five years the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 proposed 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 proposed rulemaking does not fall under the definition of a major environmental rule because the proposed amendments are primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The proposed 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 proposed 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 proposed 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 proposed solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY section of this preamble.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an assessment of whether these proposed 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 proposed 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 proposed amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed 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 proposed 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 proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 9, 2010, at 2:00 p.m. in Building E, Room 201S, 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 prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-045-070-CE. The comment period closes March 15, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Melinda Johnston, Office of Compliance and Enforcement at (512) 239-5832.

SUBCHAPTER A: ENFORCEMENT GENERALLY

§§70.1 and 70.9 - 70.11

STATUTORY AUTHORITY

The amended rules are proposed 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 proposed 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 amended rules are also proposed 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 proposed 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 [APA], 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), firm, or business may, upon request [approval of the commission], be allowed to make installment payments of an administrative penalty imposed in a commission or executive director order.

[(b) A qualifying small business upon written request shall be allowed to make installment payments of an administrative penalty imposed under a commission order, subject to the following.]

[(1) For purposes of this provision, a small business shall be defined as any person, firm, or business which employs, by direct payroll and/or through contract, fewer than 100 full-time employees and with net annual receipts of less than \$3 million. For the purposes of this provision, net annual receipts

is defined as annual gross receipts less returns, discounts, and adjustments. The period used to determine net annual receipts under this section shall be the preceding 12-month accounting year and can be either a calendar or fiscal-based period.]

[(2) A business that is a wholly-owned subsidiary of a corporation shall not qualify as a small business under this section if the parent organization does not qualify as a small business under this section.]

(b) [(3)] The amount and payment schedule of monthly installments must be specified by a commission or executive director order.

(c) [(4)] Payment schedules issued may not exceed a 36 [12]-month period.

§70.10. Agreed Orders.

(a) The executive director and the respondent may reach an agreement, or settlement, in an enforcement action, [such that an agreed order is recommended to the commission for approval and issuance.] In order to have legal effect as an order of the agency [commission], 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 [EDPR] 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 [APA], §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 [Once the notice of proposed agreed order is published, the executive director shall file the agreed order with the chief clerk. The chief clerk shall then schedule the agreed order] 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 [SOAH], 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, [either personally or by first class mail,] in accordance with the Administrative Procedure Act [APA], §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.