The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§70.1, 70.3, and 70.6; the repeal of §70.11; and new §70.11 and §70.12.

Background and Summary of the Factual Basis for the Proposed Rules

Section 4.09 of House Bill (HB) 2694 (TCEQ Sunset Bill), 82nd Legislature, 2011, directs the TCEQ to adopt a general enforcement policy that describes the commission's approach to enforcement. The effective date of the legislation was September 1, 2011.

The commission held two stakeholder meetings to solicit public comment on what should be included in the rule. The first meeting was held August 2, 2011. Executive Director's (ED) staff took questions and comments during the meeting and an email was set up to take comments from remote participants. There were approximately 35 persons in attendance representing industry, trade associations, small business, local government, consulting firms, law firms and environmental advocacy groups.
On November 2, 2011, the ED's staff presented draft language for the General Enforcement Policy rule to the commissioners at the Commission Agenda for review and discussion. The commissioners requested that the ED's staff hold a second stakeholder meeting and solicit public comment specifically on whether the ED's policy on penalty deferrals should be included in the rule. The commissioners were supportive of including a general philosophy of enforcement, findings order criteria and attorney general referral criteria in the rule and maintaining the remaining items (corrective

action order criteria, economic benefit, culpability, good faith efforts, compliance history, penalty deferral and other factors) as policy to be included in the penalty policy specifically.

A second stakeholder meeting was held on December 6, 2011. ED staff took questions and comments during the meeting and an email was set up to take comments from remote participants. There were nine people in attendance representing trade associations, law firms, and consulting firms.

Section by Section Discussion

§70.1, Purpose

Proposed §70.1(b), expands on the original rule language by referencing factors in assessing an administrative penalty and explaining the purpose of an administrative penalty. It includes cross-references to other state statutes which explain what factors are considered in assessing an administrative penalty. Proposed §70.1(c) discusses the applicability of the chapter. Proposed §70.1(d) clarifies that the commission's administrative penalty authority is not limited by the ED.

§70.3, Specific Enforcement Policies

Proposed amended §70.3, adds clarification that specific enforcement policies, including the TCEQ Penalty Policy, are available on the Internet. This proposed amendment also

replaces the term "enforcement guidelines" with "specific enforcement policies." This amendment was made pursuant to Texas Water Code, §7.006(c). These specific enforcement policies are not rules. The commission also proposes to change the title of §70.3 from "Enforcement Guidelines" to "Specific Enforcement Policies."

§70.6, Judicial Civil Enforcement

Proposed amended §70.6, adds criteria for when violations may be referred to the Office of the Attorney General (OAG) for civil prosecution in enforcement cases. Including the criteria for referring violations to the OAG will improve transparency in how the TCEQ determines which violations get referred to the OAG and what could be subject to an OAG referral. Currently, this criteria is located in internal guidance policies and is not fully accessible to the public.

§70.11, Notice of Decisions and Orders

The commission proposes to repeal current §70.11.

§70.11, Findings Agreed Orders

Proposed new §70.11 adds criteria to explain when an agreed order may be drafted as a findings order. The findings order criteria are currently located on the external Web site as a stand-alone enforcement policy. Default Orders and Commission Orders based on consideration of Proposals for Decision are not covered by this rule.

§70.12, Notice of Decisions and Orders

The requirements of repealed §70.11, are proposed to be located in new §70.12, to better organize the sections.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, 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 other units of state or local government as a result of administration or enforcement of the proposed rules.

HB 2694, 82nd Legislature, 2011, required the agency to adopt a general enforcement policy describing the agency's approach to enforcement into rule. The proposed rules would adopt currently applied policies and practices, and the agency does not expect that any regulated entity, including governmental entities, will experience any significant fiscal impact as a result of the proposed rules.

Public Benefits and Costs

Nina Chamness 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.

The proposed rules would adopt current enforcement policy, and regulated individuals and large businesses will not experience any significant fiscal impact as a result of the proposed rules.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would adopt current compliance policy, and regulated individuals and large businesses will not experience any significant changes to revenue or costs.

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 required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that 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 rulemaking is primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The proposed rulemaking concerns procedural requirements of the agency and clarify the commission's approach to enforcement. The rulemaking codifies the commission's existing general enforcement policy while maintaining appropriate protection of human health and the environment. The proposed rulemaking does not rise to the level of material, but rather is 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 takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement the statutory provisions of Texas Water Code, §7.006(a) and (c), concerning Enforcement Policies. The proposed rules set out the commission's existing general enforcement policy that describes the commission's current approach to enforcement and states that specific enforcement policies are available on the internet.

Promulgation and enforcement of the proposed rules 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 affect only the commission's procedural requirements for enforcement actions by codifying the commission's existing general enforcement policy. 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 rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) and (4) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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 May 8, 2012, at 10:00 a.m. in Room 201S, Building E, 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 Sandy Wong, Office of Legal Services at (512) 239-1802. 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.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-034-070-CE. The comment period closes May 14, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact David Van Soest, Office of Compliance and Enforcement at (512) 239-0468.

SUBCHAPTER A: ENFORCEMENT GENERALLY

§§70.1, 70.3, 70.6, 70.11, AND 70.12

Statutory Authority

The amendments and new 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 establishes the commission's enforcement authority and provides specific requirements governing that authority. Additionally, the new and amended sections 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 amendments and new rules implement House Bill 2694, §4.09, TWC, §7.006(a) and (c).

§70.1. Purpose.

(a) 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.

(b) This chapter delineates what factors are considered and how statutory requirements are applied in determining the amount of an administrative penalty. The purpose of an administrative penalty is to penalize and deter noncompliance with the commission's rules and to recover any economic benefit resulting from the non-compliance. The commission may also establish policies to further delineate the specific procedures for calculating administrative penalties. Specific statutory requirements are located in Texas Water Code, Chapters 5, 7, 11 - 13, and 16; and the Texas Health and Safety Code, Chapters 341, 366, 369, 371, 374, and 401.

(c) This chapter applies to all persons, as defined in §3.2 of this title (relating to Definitions), under the jurisdiction of the commission.

(d) Nothing in this chapter shall constrain the commission from issuing an enforcement order pursuant to Texas Water Code, §7.051 that assesses an administrative penalty that is different from a penalty proposed by the executive director.

(e) Procedures for contested enforcement cases are located in Chapter 80 of this title (relating to Contested Case Hearings).

(f) 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.

§70.3. Specific Enforcement Policies [Enforcement Guidelines].

The executive director may use specific enforcement policies [guidelines] that are neither rules nor precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings. These specific enforcement policies [guidelines] do not establish rules which the public is required to obey or with which it is to avoid conflict. These specific enforcement policies [guidelines] do not convey any rights or impose any obligations on members of the public. These specific

enforcement policies [guidelines] are available to the public under the terms of the Public Information Act, Texas Government Code, Chapter 552 and the specific enforcement policies are posted on the commission's Internet Web site.

§70.6. Judicial Civil Enforcement.

(a) The executive director is authorized to cause to be instituted, in courts of competent jurisdiction, legal proceedings to enforce and compel compliance with any provisions, whether of statutes, rules, regulations, permits or licenses, or orders, that the commission is entitled or required by law to enforce or with which the commission is entitled or required by law to compel compliance. Such legal proceedings may be initiated at any time by the executive director by a letter from the executive director or an authorized representative referring the matter to the Texas Attorney General's Office (OAG) and requesting that the attorney general take action on behalf of the commission.

(b) The criteria for the commission or the executive director to refer an enforcement case to the OAG include but are not limited to the following:

(1) need for immediate action to protect public health, safety, or the environment;

(2) need for a judgment to enforce compliance with an existing administrative enforcement order where there is a significant impact to the environment or to agency policy;

(3) egregious violations where the availability of civil penalties is necessary to adequately address the violations;

(4) when required by law under Texas Water Code (TWC), §7.105, unless under TWC, §7.106, the OAG and the executive director agree to resolve the violation(s) through an administrative order; or

(5) when the TCEQ has been named as a necessary and indispensible party in an action brought by a local government under TWC, §7.351 and §7.353.

§70.11. Findings Agreed Orders.

(a) A findings agreed order is an enforcement order that is drafted with findings of fact and conclusions of law.

(b) An agreed order may be drafted as a findings order when any of the following six criteria are satisfied:

(1) absence of management practices designed to ensure compliance;

(2) a violation of a commission issued enforcement order or court order;

(3) a violation contained in the agreed order involves an emission or discharge of contaminants to the environment or other actions meeting one or more of the following criteria:

(A) people have been exposed to pollutants which exceed levels that are protective;

(B) environmental receptors have been exposed to pollutants which exceed levels that are protective;

(C) unauthorized diversion, taking, or storage of state water or an unauthorized change in flood elevation of a stream which deprives others of water, severely affects aquatic life, or results in a safety hazard, property damage, or economic loss; or

(D) unauthorized emissions which are excessive emissions events;

(4) the respondent has been the subject of any of the following repeated enforcement actions (Notice of Violation, enforcement order, judgment) over the prior five-year period from the Notice of Enforcement date:

(A) three repeated enforcement actions for the same violation as contained in the current agreed order or a substantial history of the same violation entity-wide;

(B) three repeated enforcement actions for the same violations or substantial history of the same violation as contained in the current agreed order by the same respondent who is required to be registered, certified, or licensed by TCEQ prior to performing certain activities;

(C) two prior enforcement orders having the same general cause for nuisance violations;

(5) regardless of specific violations, a respondent has demonstrated a pattern of non-compliance with environmental laws; or

(6) indifference to legal duty.

§70.12. 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 Texas Government Code, §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.

SUBCHAPTER A: ENFORCEMENT GENERALLY

[§70.11]

Statutory Authority

The repealed rule is 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 establishes the commission's enforcement authority and provides specific requirements governing that authority. Additionally, the repealed rule is 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 repealed rule implements TWC, §§7.057, 7.058, 7.059, 7.060, and 7.064.

[§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.]