The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §70.10 and §70.106.

The amendments to §70.10 and §70.106 are adopted *without changes* to the proposed text as published in the August 21, 2015, issue of the *Texas Register* (40 TexReg 5250) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

Senate Bill (SB) 1267 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015, amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of contested case hearings and agency decisions, signature and timeliness of agency decisions, presumption of the date notice that an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

The changes to the APA for which TCEQ rulemaking is necessary are as follows.
First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for

filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

The commission is adopting amendments to §70.10 and §70.106 to implement SB 1267, Section 4. SB 1267, Section 4 amended Texas Government Code, §2001.142 to provide that a state agency shall notify each party to a contested case of any commission decision or order by personal delivery; email to the party or their counsel where the party agrees; or first class, certified, or registered mail. Additionally, SB 1267 amended Texas Government Code, §2001.142 by removing the presumption that a party or attorney of record receives notice of the commission's decision or order on the third day after the date on which notice of the decision or order is mailed. The adopted amendments to Chapter 70 conform to SB 1267 by changing the effective date of agreed orders and default orders, which were previously based on the presumed receipt of the commission's order, to the date that they are signed by the commission or executive

director.

Concurrently with this adoption, and published in this issue of the *Texas Register*, the commission is adopting revisions to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 80, Contested Case Hearings. SB 709, 84th Texas Legislature (2015), is implemented by rules adopted in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9, is implemented by rules adopted in Chapters 1, 50, 55, 70, and 80.

Section by Section Discussion

In addition to the adopted amendments associated with this rulemaking, various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§70.10, Agreed Orders

The amendment to §70.10(b) is adopted to establish that the effective date of an agreed order is the date that the agreed order is signed by the commission or executive director,

unless the parties agree to establish an alternative effective date and state the effective date in the agreed order. Currently, subsection (b) provides that the effective date is based on service of notice of the agreed order, under the Texas Government Code, §2001.142. SB 1267 removed the presumption that notice of commission decisions are received on the third day after mailing. Consequently, in order to create a date certain from which compliance deadlines will begin, the amendment to subsection (b) is necessary. The adopted change does not conflict with the statutory amendments in SB 1267.

While the adopted amendment establishes a date certain for the effective date of agreed orders, it does not affect the timelines for filing a motion for rehearing established by Texas Government Code, §2001.142 and §2001.146 or the agreed order's date of finality.

§70.106, Default Order

The amendment to §70.106(c) is adopted to require that notice of default orders is to be provided in accordance with Texas Government Code, §2001.142.

In addition, the amendment to §70.106(d) is adopted to establish the effective date of a default order as the date on which the default order is signed by the commission or executive director. This amendment is being adopted to make the effective dates of agreed orders and default orders consistent with one another.

While the amendment to §70.106(d) establishes a new date on which a default order becomes effective, it does not affect the timelines for filing a motion for rehearing established by Texas Government Code, §2001.142 and §2001.146, or the default order's date of finality.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and 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 adopted amendments to §70.10 and §70.106 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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. Rather, the amendments establish that the effective date of an agreed order or a default order is the date that the order is signed by

the commission or executive director, and, for agreed orders, provide that the the parties may agree to establish an alternative effective date and state the effective date in the agreed order.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general authority of the commission. The adopted amendments to §70.10 and §70.106 do not exceed an express requirement of state law or a requirement of a delegation agreement, and were not developed solely under the general powers of the agency, but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment on the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive any comments regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments to §70.10 and §70.106 establish that the effective date of an agreed order or a default order is the date that the order is signed by the commission or executive director, and, for agreed orders, provide that the parties may agree to establish an alternative effective date and state the effective date in the agreed order. The change in procedure will not burden private real property. The adopted rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The adopted rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in

Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments regarding the CMP.

Public Comment

The commission held a public hearing on September 15, 2015, at 2:00 p.m. in Austin, Texas, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on September 21, 2015. For the rulemaking project described earlier that amends six chapters of the commission's rules, the commission received comments from the United States Environmental Protection Agency (EPA); Harris County Pollution Control Services Department (HCPCSD); TCEQ Office of Public Interest Counsel (OPIC); Public Citizen; Sierra Club (individually); Sierra Club, Texas Campaign for the Environment, and Environmental Integrity Project (SC/TCE/EIP); Texas Association of Manufacturers (TAM); Texas Chemical Council (TCC); Texas Oil and Gas Association (TXOGA); Lone Star Chapter of the Solid Waste Association of North America (TXSWANA); and Water Environment Association of Texas (WEAT) and Texas

Association of Clean Water Agencies (TACWA).

Response to Comments

Comment

All commenters acknowledged that the rulemaking project was only to implement SB 709 and SB 1267 passed by the 84th Texas Legislature (2015). SC/TCE/EIP and Public Citizen stated that, in general, the proposed rules accurately reflect the legislation being implemented. TCC commends TCEQ's work on the proposed rules. TXOGA supports the implementation of SB 709 and SB 1267. Generally speaking, TAM commented the proposed rules track the legislation very closely and supports the rulemaking as proposed, with specific comments for review and consideration. TXOGA appreciates the commission's straightforward implementation of SB 1267 in the proposed revisions to the agency's rules in Chapter 70.

Response

The commission acknowledges these comments.

SUBCHAPTER A: ENFORCEMENT GENERALLY

§70.10

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, §§7.001 *et seq*, which establishes the commission's enforcement authority and provides specific requirements governing that authority. Additional relevant sections are Texas Government Code, §2001.004, concerning the Requirement to Adopt Rules of Practice and Index, Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of State Rules, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, concerning Notification of Decisions and Orders, which prescribes requirements for the notification of decisions and orders of a state agency.

The adopted amendment implements TWC, §§7.001 *et seq*; Texas Government Code, §§2001.004, 2001.142, and 201.146; and SB 1267 (84th Texas Legislature, 2015).

§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 agreed order [, for purposes of compliance with its terms and conditions, including deadlines,] shall be the date the order is signed by the commission or the executive director, unless stated otherwise in the agreed order [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.

SUBCHAPTER C: ENFORCEMENT REFERRALS TO SOAH

§70.106

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC §§7.001 *et seq*, which establishes the commission's enforcement authority and provides specific requirements governing that authority. Additional relevant sections are Texas Government Code, §2001.004, concerning the Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of State Rules, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, concerning Notification of Decisions and Orders, which prescribes requirements for the notification of decisions and orders of a state agency.

The adopted amendment implements TWC, §§7.001; Texas Government Code, §§2001.004, 2001.142, and 2001.146; and Senate Bill 1267 (84th Texas Legislature, 2015).

§70.106. Default Order.

(a) If any respondent to an executive director's preliminary report (EDPR) [EDPR] or petition initiating an enforcement action fails to timely file an answer as required by §70.105 of this title (relating to Answer), the executive director may file a motion with the chief clerk recommending that a default order be entered against the respondent. The executive director may support the motion with such documentary evidence, including affidavits, exhibits and pleadings, and oral testimony, to demonstrate that the respondent received proper notice under §70.103 or §70.104 of this title (relating to Petitions Which Initiate a Cause of Action and Notice of Executive Director's Preliminary Report [EDPR]) of the pleading initiating the cause of action; and that the respondent failed to timely file an answer under §70.105 of this title and that the respondent is liable for the violations asserted in the cause of action. The chief clerk will schedule the default order for consideration at a commission meeting under Chapter 10 of this title (relating to Commission Meetings). The executive director may also present documentary evidence and oral testimony regarding the amount of penalties that should be assessed against the respondent. In the motion for default

order, or at the hearing on the motion, the executive director may also ask for additional penalties for violations alleged in the EDPR or petition, which have continued from the time of the filing of the EDPR or petition, up to the date of the default order. If the executive director recommends additional penalties for continuing violations, he shall briefly describe, either orally or in writing, the continuing violations and the evidence, circumstantial or otherwise, that form the basis for the allegation that the violations are in fact continuing. The commission may grant the relief recommended in the EDPR or petition, or such other amount as may be justified by the evidence presented by the executive director.

(b) Even though some or all of the parties fail to appear at a contested enforcement case hearing in person or through their duly authorized representatives, the commission may consider fully and dispose of the matter pending if notice has been given in accordance with law.

(c) Upon issuance of a default order, notice of such order shall be given to the respondent in accordance with Texas Government Code, §2001.142 [according to the provisions of §70.104 of this title].

(d) The effective date of a default order shall be the date on which the order is signed by the commission or the executive director [that the order is final under §80.273 of this title (relating to Decision Final and Appealable) and APA, §2001.144].