

SUBCHAPTER A: ENFORCEMENT GENERALLY

§§70.1 - 70.12

Effective December 31, 2015

§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 non-compliance with the commission's rules and to recover any economic benefit resulting from the non-compliance as the commission determines is appropriate. 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.

Adopted August 8, 2012

Effective August 30, 2012

§70.2. Definitions.

Unless specifically defined in this chapter, all terms used in these rules bear the

same definitions ascribed by the Texas Water Code, the Texas Health and Safety Code, the APA, and commission rules. The terms specifically defined for the purposes of this chapter are as follows.

(1) Contested enforcement case - An action in which the executive director seeks an enforcement order and the respondent has an opportunity for an adjudicative hearing.

(2) Executive director's preliminary report (EDPR) - A pleading filed by the executive director which, when issued and served under this title, seeks an enforcement order against a respondent. EDPR is further defined in Subchapter C of this chapter (relating to Enforcement Referrals to SOAH).

(3) Petition - The instrument by which the executive director states a cause of action for an enforcement order against a respondent. When an EDPR is filed and issued under this chapter the EDPR and notice constitute a petition, as do amended EDPRs and amended or supplemental petitions.

(4) Respondent - A person against whom the executive director is seeking an enforcement order.

Adopted June 16, 1999

Effective July 7, 1999

§70.3. Specific Enforcement Policies.

The executive director may use specific enforcement policies 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 do not establish rules which the public is required to obey or with which it is to avoid conflict. These specific enforcement policies do not convey any rights or impose any obligations on members of the public. These specific enforcement policies 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.

Adopted August 8, 2012

Effective August 30, 2012

§70.4. Enforcement Action Using Information Provided by Private Individual.

(a) A private individual with information demonstrating possible violations of law within the commission's jurisdiction should notify the executive director (ED). The ED may initiate an administrative enforcement action, or he/she may refer to the appropriate prosecuting authority a civil or criminal enforcement action.

(b) The ED may initiate an enforcement action based on information received from a private individual if that information, in the ED's judgment, is of sufficient value and credibility to warrant the initiation of an enforcement action. The ED may initiate an enforcement action based on any combination of information provided by private individuals or by the ED's own investigations.

(c) In evaluating the value and credibility of information provided by a private individual and determining the use of such information as evidence in an enforcement action, the ED shall consider the following criteria:

(1) the individual providing the information must be willing to submit a sworn affidavit attesting to the facts that constitute the alleged violation and authenticating any writings, recordings, or photographs provided by the individual;

(2) the individual providing the information must be willing to testify in any enforcement proceedings regarding the alleged violations;

(3) if the ED relies on any physical or sampling data submitted by an individual to prove one or more elements of an enforcement case, such data must have been collected or gathered in accordance with relevant agency protocols. The individual submitting the physical or sampling data must be willing to submit a sworn affidavit demonstrating that the individual followed relevant agency protocols when collecting the data. The relevant agency protocols are those used or determined acceptable by the ED; and

(4) the commission will not use in an enforcement case information gathered by an individual illegally.

(d) A private individual who submits information on which the ED relies for all or part of an enforcement case may be called to testify in the enforcement proceedings and is subject to all sanctions under law for knowingly falsifying evidence.

(e) If the ED determines not to initiate an enforcement action based on information received from a private individual in accordance with this section, the ED will process the information received from the individual as a complaint, subject to applicable complaint investigation procedures. The ED may ultimately initiate an enforcement action that is based on information the ED develops during the complaint investigation.

Adopted November 20, 2001

Effective December 11, 2001

§70.5. Remedies.

Remedies available to the commission in enforcement actions include all those found in the Texas Water Code, the Texas Health and Safety Code, and the APA. These include, but are not limited to, issuance of administrative orders with or without penalties; referrals to the Texas Attorney General's Office for civil judicial action; referrals to the Environmental Protection Agency for civil judicial or administrative action; referrals for criminal action; or permit, license, registration, or certificate revocation or suspension. Nothing herein shall be construed to preclude the executive director from seeking any remedy in law or equity not specifically mentioned in these rules. In addition, an enforcement matter may be resolved informally without a contested case proceeding in appropriate circumstances.

Adopted June 16, 1999

Effective July 7, 1999

§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 indispensable party in an action brought by a local government under TWC, §7.351 and §7.353.

Adopted August 8, 2012

Effective August 30, 2012

§70.7. Force Majeure.

(a) If a person can establish that an event that would otherwise be a violation of a statute, rule, order, or permit was caused solely by an act of God, war, strike, riot, or other catastrophe, the event is not a violation of that statute, rule, order, or permit.

(b) The owner or operator of the affected facility shall have the burden of proof to demonstrate that any pollution or discharge is not a violation as provided by subsection (a) of this section.

(c) If force majeure is claimed as an affirmative defense to an action brought under this chapter, the permittee must submit notice to the executive director as provided by §305.125(9) of this title (relating to Standard Permit Conditions).

Adopted June 16, 1999

Effective July 7, 1999

§70.8. Financial Inability to Pay; Amount Necessary to Obtain Compliance.

(a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

(b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

Adopted June 16, 1999

Effective July 7, 1999

§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.

Adopted June 30, 2010

Effective July 22, 2010

§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 shall be the date the order is signed by the commission or the executive director, unless stated otherwise in the agreed order.

(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.

Adopted December 9, 2015

Effective December 31, 2015

§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, as set out in §101.222(a) of this title (relating to Demonstrations);

(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.

Adopted August 8, 2012

Effective August 30 2012

§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.

Adopted August 8, 2012

Effective August 30 2012

Derivation Table
Rule Log No. 95123-263-AD
Procedural Rules
Adopted May 8, 1996
Effective June 6, 1996

Chapter 70 - Enforcement
Subchapter A: Enforcement Generally

This table tracks sections during and after rule revisions. The column on the left lists the current sections prior to the revision. The column on the right lists where the section is proposed to end up in the final adoption.

New Section	Old Section
§70.1	§337.1
§70.2	§337.3
§70.3	§337.9
§70.4 (repeal effective 3/26/98)	§337.10
§70.5	§337.22
§70.6	§337.6
§70.7	New
§70.8	§337.50
§70.9	§337.11
§70.10	§337.30
§70.11	§337.57