

The Texas Natural Resource Conservation Commission (commission) proposes new §122.162, Compliance History Requirements. The commission proposes this new section to Chapter 122, Federal Operating Permits; Subchapter B, Permit Requirements; Division 5, Miscellaneous, to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

HB 2912, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to “develop a uniform standard for evaluating compliance history.” Section 5.754, Classification and Use of Compliance History, goes on to require the commission to “establish a set of standards for the classification of a person’s compliance history.”

The commission does not have procedures for evaluation of compliance histories for federal operating permit applications for air emissions.

30 TAC Chapter 60, Compliance History, §60.1, was adopted December 19, 2001 and published in the January 4, 2002 issue of the *Texas Register* (27 TexReg 191). Section 60.1 specifies the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard

permits, or other forms of authorization requiring agency approval, to implement the requirement of HB 2912, §4.01 to “develop a uniform standard for evaluating compliance history.” New sections to Chapter 60 are being proposed concurrently in this issue of the *Texas Register* to implement further requirements of HB 2912, §4.01 to establish rules for the classification and use of compliance history. HB 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401. The commission proposes that Chapter 60 would be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters. For this reason, new §122.162 is proposed to ensure operating permit applicants understand and are aware of these new evaluation criteria. Other chapters of existing regulations (30 TAC Chapters 50, 55, 116, and 281) are being proposed currently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasoning.

The commission adopted a compliance period of five years in §60.1. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director. According to HB 2912, §18.05, the agency must begin using the new components of compliance history for actions taken by the agency on or after February 1, 2002. Additionally, §18.05 specifies that classification and use rules, which are currently being proposed in Chapter 60, will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for

actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION DISCUSSION

The proposed new section would specify the new requirements of compliance history evaluation and use. The commission proposes this addition because, in implementing the requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history.

The commission proposes new §122.162, Compliance History Requirements. The proposed new section would specify the federal operating permit applications for air emissions which will require the evaluation of compliance histories in decisions pertaining to issuance, significant revisions, reopenings, and renewals of such permits, as a result of implementation of HB 2912.

Proposed new §122.162(a) states, “The executive director will conduct compliance history reviews under Chapter 60 of this title (relating to Compliance History) for the following actions:” and then lists the specific actions in paragraphs (1) - (9). This subsection is proposed to reflect that one of the conditions which must be met prior to decisions regarding the listed actions being taken is the

completion of a compliance history review, as required by Chapter 60. This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

The specific actions included in proposed new paragraphs (1) - (9) include: initial permit issuances under §122.201, Initial Permit Issuance; significant permit revisions under §122.221, Procedures for Significant Permit Revisions; permit reopenings under §122.231(a) or (b), Permit Reopenings; permit renewals under Subchapter C, Division 4, Permit Renewals; initial acid rain permit issuances under §122.410, Operating Permit Interface; acid rain permit revisions for fast-track modifications under §122.414(a)(2), Acid Rain Permit Revisions; acid rain permit modifications under §122.414(a)(3); acid rain permit reopenings under §122.231(a) or (b); and renewals of authorizations to operate under a general operating permit under §122.505, Renewal of the Authorization to Operate Under a General Operating Permit.

The commission proposes new §122.162(b), which states that, prior to the granting of an authorization to operate under a general operating permit, a compliance history review may be required under Chapter 60, to reflect that prior to a decision regarding the granting of an authorization to operate under §122.502, Authorization to Operate, a compliance history review may be required under Chapter 60.

This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rule is in effect, there may be significant fiscal implications to units of state and local government that renew or apply for federal operating permits due to implementation of the proposed rule. The proposed rule requires the commission to factor compliance history into decisions concerning the issuance, renewal, and modification of federal operating permits. Only those units of government that own or operate an affected site that receives a compliance history classification of poor, or sites that violate commission regulations on multiple occasions during the compliance history period, would potentially be fiscally impacted by the provisions in this rulemaking. Fiscal implications are not anticipated for all other units of state and local government due to implementation of the proposed rule.

The proposed rulemaking is intended to make changes to the commission's federal operating permit program in order to implement certain provisions of HB 2912. The bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. In a concurrent rulemaking, the commission is proposing to establish the classification and use of the components of compliance history. This rulemaking is intended to reference the new compliance history requirements in the commission's federal operating permit program procedures.

The proposed rule will affect all new or existing sites operating under a federal operating permit in Texas, which the commission estimates at approximately 1,750. Approximately 10% (175) of the affected sites are owned and operated by units of state and local government. Owners and operators of one or more of the following are required to obtain a federal operating permit: 1) any site that is a major source; 2) any site with an affected unit subject to the requirements of the Acid Rain Program; 3) any solid waste incineration unit required to obtain a permit; or 4) any site that is a nonmajor source which the United States Environmental Protection Agency (EPA), through rulemaking, has designated as no longer exempt from the obligation to obtain a permit. Examples of state and local government sites that could be affected by the proposed rule include: electric generating facilities, landfills, boilers, and power plants.

A previous rulemaking established that the time period analyzed for compliance will be the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first; for purposes of determining whether an announced investigation is appropriate, the five-year period preceding an investigation; or the five years prior to the date the application for participation in an innovative program is received by the executive director. The compliance history period may be extended beyond the date the application for the permit or participation in an innovative program is received by the executive director, up through completion of review of the application.

The proposed rule would require the commission to use the compliance history classification in commission decisions concerning federal operating permits, including: permit issuance; significant permit revisions; permit renewals; issuance of an acid rain permit; and an acid rain permit modification. Only those sites classified as poor would be potentially fiscally impacted by the proposed rule. The overall effect on sites classified as poor performers is anticipated to vary widely, depending on the site and the overall compliance with commission regulations.

The commission anticipates that the number of units of state and local government that will be impacted economically due to implementation of the proposed rule will be very small, if any. The commission estimates that out of the approximately 1,750 affected sites currently regulated by the commission, only a very small number are anticipated to be classified as poor performers. Of these, very few, if any, will be units of state and local government. For those units of government with sites classified as poor, the overall costs resulting from implementation of the proposed rule are expected to vary for each site, depending on additional permit provisions required by the commission.

The following costs are only provided as examples, because there are so many variables which could affect the costs, including: the type of site and the statutes and regulations it is regulated under; the size of the site; whether more stringent permit provisions are specified or the permit is denied, suspended, or revoked; and what costs may be reduced at the same time other costs are incurred as a result of modifications to, or denial, suspension, or revocation of permits. For units of government that are required to convene a permit hearing, the commission estimates that the cost to affected units of government would be approximately \$30,000 per permit. If the commission requires a site to renew its

permit every two years instead of every five years, the affected site would have to pay an extra \$10,000 in permit renewal fees. If the commission decides to revoke a permit, the revocation proceeding will cost the affected site approximately \$50,000 for each revoked permit. If the commission decides to require additional monitoring systems for a large combustion source for sulfur dioxide (SO₂), nitrogen oxides (NO_x), and oxygen (O₂), the cost is estimated to range between \$100,000 to \$150,000. If the commission denies approval of a permit application, the applicant may have to resubmit the permit with additional information. All of these examples are worst-case scenarios. The commission intends to work closely with each site rated as a poor performer to try to raise the classification of the site utilizing options intended to minimize compliance costs.

In addition to permit-related costs, the proposed rule may result in increased costs from enforcement penalties for sites with multiple regulatory violations during the compliance period. The proposed rule would double the administrative penalty enhancement based on compliance history for a repeat violator, although the statutory maximums, which range from \$2,500 to \$10,000 per day per violation, would not be exceeded.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined for each of the first five years the proposed rule is in effect, the public benefit anticipated as a result of implementing the proposed rule will be potentially increased environmental protection by linking a site's historical environmental performance with future authorizations provided by the commission.

The proposed rulemaking is intended to make changes to the commission's federal operating permit program in order to implement certain provisions of HB 2912. The bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. In a concurrent rulemaking, the commission is proposing to establish the classification and use of the components of compliance history. This rulemaking is intended to reference the new compliance history requirements in the commission's federal operating permit program procedures.

The commission estimates there are 1,575 existing facilities, privately-owned and operated by individuals and businesses in Texas, that will be affected by the proposed rule. Examples of sites affected by the proposed rule include: electric generating facilities; landfills; boilers and power plants; oil and gas operations; fiberglass and chemical manufacturers; cotton seed oil mills; furniture manufacturers; concrete and asphalt batch plant operators; and manufacturers with coating operations (metal parts, aircraft parts, and auto parts).

The proposed rule would require the commission to use the compliance history classification in commission decisions concerning federal operating permits, including: permit issuance; significant permit revisions; permit renewals; issuance of an acid rain permit; and an acid rain permit modification. Only those sites classified as poor would be potentially fiscally impacted by the proposed rule. The overall effect on sites classified as poor performers is anticipated to vary widely, depending on the site and the overall compliance with commission regulations.

The commission anticipates that the number of individuals and businesses that will be impacted economically due to implementation of the proposed rule will be very small. The commission estimates that out of the approximately 1,575 affected privately-owned sites currently regulated by the commission, only a very small number are anticipated to be classified as poor performers. For those businesses with sites classified as poor, the overall costs resulting from implementation of the proposed rule are expected to vary for each site, depending on additional permit provisions required by the commission.

The following costs are only provided as examples, because there are so many variables which could affect the costs, including: the type of site and the statutes and regulations it is regulated under; the size of the site; whether more stringent permit provisions are specified or the permit is denied, suspended, or revoked; and what costs may be reduced at the same time other costs are incurred as a result of modifications to, or denial, suspension, or revocation of permits. For businesses that are required to convene a permit hearing, the commission estimates that the cost to affected units of government would be approximately \$30,000 per permit. If the commission requires a site to renew its permit every two years instead of every five years, the affected site would have to pay an extra \$10,000 in permit renewal fees. If the commission decides to revoke a permit, the revocation proceeding will cost the affected site approximately \$50,000 for each revoked permit. If the commission decides to require additional monitoring systems for a large combustion source for SO₂, NO_x, and O₂, the cost is estimated to range between \$100,000 to \$150,000. If the commission denies approval of a permit application, the applicant may have to resubmit the permit with additional information. All of these examples are

worst-case scenarios. The commission intends to work closely with each site rated as a poor performer to try to raise the classification of the site utilizing options intended to minimize compliance costs.

In addition to permit-related costs, the proposed rule may result in increased costs from enforcement penalties for sites with multiple regulatory violations during the compliance period. The proposed rule would double the administrative penalty enhancement based on compliance history for a repeat violator, although the statutory maximums, which range from \$2,500 to \$10,000 per day per violation, would not be exceeded.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications, which could be significant, for small or micro-businesses due to implementation of the proposed rule, which is intended to make changes to the commission's federal operating permit program in order to implement certain provisions of HB 2912. The bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. In a concurrent rulemaking, the commission is proposing to establish the classification and use of the components of compliance history. This rulemaking is intended to reference the new compliance history requirements in the commission's federal operating permit program procedures.

The commission estimates that approximately 1,575 existing privately-owned facilities, some of which are small and micro-businesses, will be affected by the proposed rule. Examples of small and micro-

businesses that could be affected by the proposed rule include: small oil and gas operations; fiberglass manufacturers; cotton seed oil mills; landfills; furniture manufacturing; small chemical manufacturers; small concrete or asphalt batch plant operators; and small manufacturers with coatings operations (metal parts, aircraft parts, and auto parts).

The proposed rule would require the commission to use the compliance history classification in commission decisions concerning federal operating permits, including: permit issuance; significant permit revisions; permit renewals; issuance of an acid rain permit; and an acid rain permit modification. Only those sites classified as poor would be potentially fiscally impacted by the proposed rule. The overall effect on sites classified as poor performers is anticipated to vary widely, depending on the site and the overall compliance with commission regulations.

The commission anticipates that the number of small or micro-businesses that will be impacted economically due to implementation of the proposed rule will be very small. The commission estimates that out of the approximately 1,575 affected privately-owned sites currently regulated by the commission, only a very small number are anticipated to be classified as poor performers. For those businesses with sites classified as poor, the overall costs resulting from implementation of the proposed rule are expected to vary for each site, depending on additional permit provisions required by the commission.

The following costs are only provided as examples, because there are so many variables which could affect the costs, including: the type of site and the statutes and regulations it is regulated under; the size

of the site; whether more stringent permit provisions are specified or the permit is denied, suspended, or revoked; and what costs may be reduced at the same time other costs are incurred as a result of modifications to, or denial, suspension, or revocation of permits. For businesses that are required to convene a permit hearing, the commission estimates that the cost to affected units of government would be approximately \$30,000 per permit. If the commission requires a site to renew its permit every two years instead of every five years, the affected site would have to pay an extra \$10,000 in permit renewal fees. If the commission decides to revoke a permit, the revocation proceeding will cost the affected site approximately \$50,000 for each revoked permit. If the commission decides to require additional monitoring systems for a large combustion source for SO₂, NO_x, and O₂, the cost is estimated to range between \$100,000 to \$150,000. If the commission denies approval of a permit application, the applicant may have to resubmit the permit with additional information. All of these examples are worst-case scenarios. The commission intends to work closely with each site rated as a poor performer to try to raise the classification of the site utilizing options intended to minimize compliance costs.

In addition to permit-related costs, the proposed rule may result in increased costs from enforcement penalties for sites with multiple regulatory violations during the compliance period. The proposed rule would double the administrative penalty enhancement based on compliance history for a repeat violator, although the statutory maximums, which range from \$2,500 to \$10,000 per day per violation, would not be exceeded.

The following is an analysis of the costs per employee for small and micro-businesses that are required to install additional monitoring systems at a large combustion source to comply with the proposed rule.

Small and micro-businesses are defined as having fewer than 100 or 20 employees respectively. A small business that is required by the commission to install additional monitoring systems would have to pay up to an additional \$1,500 per employee to comply with the proposed rule. A micro-business that is required by the commission to install additional monitoring systems would have to pay up to an additional \$7,500 per employee to comply with the proposed rule. Since the proposed rule could result in a number of different potential costs for affected small and micro-businesses, this example was chosen because it is one of the most costly.

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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has 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 the proposed rule does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of this rule is to protect the environment and reduce the risk to human health from environmental exposure, it is not a "major environmental rule" because it does not 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 rule will not 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 because the proposed rule merely establishes the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the proposed rule is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the proposed rule does not meet any of the four applicability requirements listed in §2001.0225(a). The proposed rule does not exceed a standard set by federal law, because there is no comparable federal law. The proposed rule does not exceed an express requirement of state law, because it is consistent with the requirements of TWC, §5.754. The proposed rule does not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rule is not proposed to be adopted solely under the general powers of the agency, but will be adopted under the express requirements of TWC, §5.754.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposed rule in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rule is to establish a set of standards for the classification and use of a person's compliance history, as required by TWC, §5.754. Promulgation and enforcement of this proposed rule would not affect private real property which is the subject of the rule because the proposed rule sets forth the standards for the classification and use of a

person's compliance history, as required by TWC, §5.754. The subject proposed rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this proposed rulemaking is identified in, or will affect an action/authorization identified in, the Coastal Coordination Act Implementation Rules, 31 TAC §505.11 and will, therefore, require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission prepared a preliminary consistency determination for the proposed rule under 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the proposed rulemaking is §501.12(1), the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants will be authorized and the proposed rulemaking will maintain the same level of emissions control as the existing rules. The CMP policy applicable to this rulemaking action is §501.14(q), the policy that commission rules comply with regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas. This rulemaking action has been conducted consistent with THSC, Chapter 382.

The commission solicits comment on the consistency of the proposed rulemaking with applicable CMP goals and policies.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on May 1, 2002, at 2:00 p.m. at the commission's central office, Building E, Room 201S, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., May 2, 2002, and should reference Rule Log Number 2001-071-060-AD. For further information, please contact Debra Barber, Policy and Regulations Division, at (512) 239-0412.

SUBCHAPTER B: PERMIT REQUIREMENTS

DIVISION 5: MISCELLANEOUS

§122.162

STATUTORY AUTHORITY

The new section is proposed under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new section is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

The proposed new section implements TWC, §5.753, relating to the standard for evaluating compliance history; and TWC, §5.754, relating to the classification and use of compliance history.

§122.162. Compliance History Requirements.

(a) The executive director will conduct compliance history reviews under Chapter 60 of this title (relating to Compliance History) for the following actions:

(1) initial permit issuances under §122.201 of this title (relating to Initial Permit Issuance);

(2) significant permit revisions under §122.221 of this title (relating to Procedures for Significant Permit Revisions);

(3) permit reopenings under §122.231(a) or (b) of this title (relating to Permit Reopenings);

(4) permit renewals under Subchapter C, Division 4 of this chapter (relating to Permit Renewals);

(5) initial acid rain permit issuances under §122.410 of this title (relating to Operating Permit Interface);

(6) acid rain permit revisions for fast-track modifications under §122.414(a)(2) of this title (relating to Acid Rain Permit Revisions);

(7) acid rain permit modifications under §122.414(a)(3) of this title;

(8) acid rain permit reopenings under §122.231(a) or (b) of this title; and

(9) renewals of authorizations to operate under a general operating permit under §122.505 of this title (relating to Renewal of the Authorization to Operate Under a General Operating Permit).

(b) Prior to the granting of an authorization to operate under a general operating permit under §122.502 of this title (relating to Authorization to Operate), a compliance history review may be required under Chapter 60 of this title.