

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §281.21, Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary. Section 281.21 is adopted *without change* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6259) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The adopted rule implements certain requirements of Senate Bill (SB) 324, 77th Legislature, 2001. Senate Bill 324 became effective on May 26, 2001.

In accordance with SECTION 18.05(f) and (g) of House Bill (HB) 2912 (“Sunset”), 77th Legislature, 2001, former law relating to compliance history is continued in effect for underground injection control (UIC) applications for permit issuance, amendment, or renewal submitted before September 1, 2002.

Because SB 324 became effective on May 26, 2001, it is former law and applies to any UIC applications for permit issuance, amendment, or renewal pending on or submitted on or after May 26, 2001, and before September 1, 2002. For those UIC permit applications submitted on or after September 1, 2002, the compliance history requirements of HB 2912 will apply.

The purpose of the adopted rule is to implement certain requirements of SB 324. Senate Bill 324 amends Texas Water Code (TWC), §27.051(e), by requiring the commission to establish a procedure for the preparation of comprehensive summaries of an applicant’s compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant.

The commission currently has procedures for preparation of compliance summaries for UIC permit applications, and these procedures are specified in existing §281.21(d). These current procedures specify that a compliance summary shall cover at least the two-year period preceding the date on which the technical review is completed and shall include: the date(s) and descriptions of any citizen complaints received; the date(s) of all agency inspections, and for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact; the date(s) of any agency enforcement action and the applicant's response to such action; the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility contingency plan, if applicable; and the name and telephone number of a person to contact for additional compliance history. In addition to these requirements listed in the rule, compliance summary procedures specified by the commission include a current assessment of compliance and a statement indicating if a current inspection with alleged noncompliances has been resolved, a statement of whether the company is current with facility and generator fees, the date(s) and description of any pending or prior enforcement actions against the facility and the facility's response, as well as any pending or prior enforcement actions against facilities that are owned or operated by the current applicant.

Adopted §281.21(d)(7) implements SB 324 by specifying additional information for comprehensive compliance summaries prepared for injection well applications. Adopted §281.21(d)(7) specifies that the comprehensive compliance summary shall include the components in existing §281.21(d)(1) - (6) and provides information on the applicant and any entities closely related to the applicant for all media

regulated by the commission including, but not limited to, underground injection, solid waste, water, and air.

In the past, compliance summaries for injection well permits included only information relative to the site which is the subject of the current application, as well as other UIC and other solid waste facilities at other sites owned or operated by the applicant whether permitted or not. Compliance summaries for facilities with injection wells have traditionally included only inspections and reports of noncompliances related to solid waste or UIC. Adopted §281.21(d)(7) which is intended to implement the amendments to TWC, §27.051(e), significantly broadens the required elements of a compliance summary for an injection well permit application to include all compliance issues relating to a regulated entity.

Specifically, a comprehensive compliance summary would include all compliance issues for all media regulated by the commission including, but not limited to, underground injection, solid waste, water, and air.

Senate Bill 324 amendments to TWC, §27.051(e) also require the commission to prepare comprehensive summaries not only of the applicant's compliance history, but also the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. To implement this change, adopted §281.21(d)(7) requires that a compliance summary for a regulated entity applying for an injection well permit be broadened to include the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an

ownership interest of at least 20%. Perhaps the most applicable accounting standard and business practice that can be applied to the statutory reference to “closely related” is how the accounting profession determines the accounting treatment for an investment. When an investor corporation owns more than 50% of another entity it possesses a controlling interest. An investor corporation may hold an interest of less than 50% and therefore not possess legal control; however, its investment in voting stock gives it the ability to exercise significant influence over operating and financial policies of an entity. Consequently, the accounting profession established a guide for accounting for investors when 50% or less of common voting stock is held. This guide, Accounting Principles Board Opinion No. 18 (APB 18), also provides an operational definition of significant influence. To achieve a reasonable degree of uniformity in the application of “significant influence” criterion, APB 18 concludes that an investment (direct or indirect) of 20% or more of the voting stock of an entity should lead to a presumption that an investor has the ability to exercise significant influence over the entity. The commission proposes to use 20% ownership as the standard for determining whether an entity is closely related. Using 20% as the standard would establish a bright line for the commission and for an applicant in determining what entities will be included in a compliance summary. This change would result in a significant increase in the numbers and types of facilities that are reviewed during the preparation of a compliance summary for a UIC permit application.

SECTION BY SECTION DISCUSSION

Adopted §281.21(d)(7), Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary, implements the changes to TWC, §27.051(e), relating to the commission’s consideration of the compliance history of the applicant and related entities prior to the issuance of an injection well permit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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.

Although the intent of the rule is to protect the environment or reduce risks 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 rule merely requires the commission to prepare a more comprehensive compliance history for UIC applications, and requires the commission to deny permits to applicants with unacceptable compliance histories. Certain provisions of TWC, Chapter 27, were amended by SB 324 during the 77th Legislature, 2001. These amendments became effective on May 26, 2001. The adopted rule is intended to implement certain provisions of SB 324. Senate Bill 324 amends TWC, §27.051(d), and broadens its applicability. Senate Bill 324 further amends TWC, §27.051(e), by directing the commission to deny the permit in cases where the commission finds that the compliance history is unacceptable. The rule will implement these statutory changes. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because there is no comparable federal law. The adopted rule does not exceed an express requirement of state law, because

it is consistent with the express requirements of SB 324. The adopted rule does not exceed a requirement of a delegation agreement, because there is no applicable delegation agreement. The adopted rule has not been adopted solely under the general powers of the agency, but has been adopted under the express requirements of SB 324.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rule because it is reasonably taken to fulfill an obligation mandated by state law. The specific purpose of this adopted rule is to incorporate the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). Promulgation and enforcement of this adopted rule will not affect private real property which is the subject of the rule because the rule language merely incorporates the new requirements relating to the preparation of compliance summaries by the executive director and the consideration of applications by the commission, which are contained in TWC, §27.051(d) and (e). There is no burden on private real property because the adopted standards are not considered to be more stringent than existing standards. The subject adopted regulations do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this adopted rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any Coastal Natural Resource Areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rulemaking was held in Austin on September 13, 2001, at 2:00 p.m. in Building F, Room 2210 at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. No individuals presented oral statements during the public hearing. The comment period closed on September 24, 2001.

A total of seven commenters provided both general and specific comments on the proposed rulemaking that included Chapter 281, Application Processing; Chapter 305, Consolidated Permits; and Chapter 331, Underground Injection Control. The amendments to Chapters 305 and 331 are being adopted concurrently in this issue of the *Texas Register*. The following commented on the proposal: Baker Botts, L.L.P (Baker Botts); Dupont; United States Environmental Protection Agency (EPA); Fritz, Byrne & Head, L.L.P (FBH); Hance, Scarborough, Wright, Ginsberg & Brusilow (HSWGB); Jenkins & Gilchrist (J&G) on behalf of Huntsman Petrochemical Corporation; and Texas Chemical Council (TCC).

RESPONSE TO COMMENTS

Baker Botts commented that the proposed rules extend the reach of compliance history, but go beyond the statute in doing so. The statute states the compliance history must include “any corporation or business entity managed, owned, or otherwise closely related to the applicant.” Baker Botts stated that the proposed rules construe the “closely related” language extremely broadly to include “business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%.”

The commission disagrees with this comment. The commission believes that the proposed definition of “closely related” is consistent with, not broader than, the statute (SB 324). The statute does not use terms of limitation when referring to related entities. Specifically, TWC, §27.051(d) states that “the commission, in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1) of the section, shall consider, *but shall not be limited to the consideration of:* 1) compliance history of the applicant and related entities in accordance with Subsection (e) of this section ...” (emphasis added). The statute requires the preparation of comprehensive summaries of the applicant’s compliance history, including the compliance history of any corporation or business entity *managed, owned, or otherwise closely related* to the applicant (emphasis added) (TWC, §27.051(e)).

The proposed rules provide a clear standard which is consistent with the statutory language. The proposed rules would define as “closely related entities” any “business entities that share common partnership members, association members, or corporate officers with the applicant; or business

entities in which the applicant has an ownership interest of at least 20%.” Thus, entities could be closely related in one of two ways, either: 1) the applicant and the other entity share at least one person who is a partner, officer, or member in both entities; or 2) the applicant has an ownership interest of at least 20% in the entity. The commission has made no changes in response to this comment.

Baker Botts commented that the agency bases the 20% figure in the proposed rule on the 1971 guidance document by the APB 18, entitled *The Equity Method of Accounting for Investments in Common Stock*. Baker Botts commented that the applicability of the standards put forth in APB 18 to this situation is questionable. Baker Botts read the APB 18 to state that the ability to influence operating and financial policies may be indicated in many ways: board representation; participation in policy making processes or material transactions; interchange of management; or technological dependency. Baker Botts stated that, after these primary indicia, percent of ownership is described as “another important consideration” with the opinion noting that “determining the ability of an investor to exercise significant influence is not always clear and applying judgement is necessary to assess the status of each investment.” Baker Botts stated that APB 18 cautions the use of the 20% “rule” as a litmus test for determining control.

Dupont commented that by using the proposed 20% standard, one assumes that an investor has the ability to exercise significant influence, which would mean they would be technologically and managerially in control.

TCC commended the commission for looking to formal accounting principles to develop what percentage ownership constitutes the ability of an entity to control or influence the actions of a corporate affiliate. TCC commented, however, that a close reading of the APB 18 reveals that the 20% level chosen by the commission is not a “bright line” used to determine level of control, but rather is simply an indicator of possible control.

The commission partially agrees with these comments. The commission agrees that APB 18 provides indicators for determining whether investors may be able to exert significant influence over operating and financial policies of an investee. Accounting Principles Board Opinion No. 18 states that the ability to exercise significant influence may be indicated in several ways: representation on the board of directors; participation in policy making processes; material intercompany transactions; interchange of managerial personnel; or technological dependency. In APB 18, the Board also mentions as another important consideration the extent of ownership by an investor in relation to the concentration of other shareholdings. The Board then points out that substantial or majority ownership of the voting stock of an investee by one investor does not necessarily preclude the ability to exercise significant influence by another investor. The Board concludes that “{i}n order to achieve a reasonable degree of uniformity in application, . . . an investment (direct or indirect) of 20% or more of the voting stock of an investee should lead to a presumption in the absence of evidence to the contrary an investor has the ability to exercise significant influence over an investee. Conversely, an investment of less than 20% of the voting stock of an investee should lead to a presumption that an investor does not have the ability to exercise significant influence unless such ability can be demonstrated.”

The proposed rule language is consistent with APB 18. The proposed rules would define as “closely related entities” any “business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%.” This proposed rule is based upon APB 18 indicia such as “representation on the board of directors”; “participation in policy making processes”; and “interchange of managerial personnel”; as well as the 20% (direct or indirect) ownership standard.

The commission believes that a broad standard is appropriate because the purpose of SB 324 is to require the preparation of comprehensive compliance summaries which would include information related to the applicant and “the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant.” The reality of business relationships is that a “majority ownership” relationship is too narrow to capture all business relationships where two entities could be closely related. For example, two limited liability partnerships could be managed by the same general partner who may only own 1% of each of the limited liability partnerships. Thus, the general partner would be able to exert a significant influence over both companies without having a majority ownership or even a 20% ownership in either.

The commission notes that other Texas statutes provide broad criteria for considering whether an entity has the ability to influence another entity. The Texas Business and Commerce Code provides definitions for “affiliate” and “insider,” which are similar to the “closely related”

definition provided in this rulemaking. The Texas Business and Commerce Code, §24.002(1) defines an “affiliate” to include: “A) a person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding securities of the debtor. . . ; B) a corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned controlled or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . .” The Texas Business and Commerce Code, §24.002(7) defines an “insider” to include: “a relative of the debtor or general partner of the debtor”; “a director of the debtor . . . an officer of the debtor . . . or . . . a person in control of the debtor . . . or a relative of a general partner, director, officer, or person in control of the debtor”; “an affiliate, or insider of an affiliate as if the affiliate were the debtor”; and “a managing agent of the debtor.”

The Texas Government Code contains conflict of interest provisions applicable to state officers and state employees. Under Texas Government Code, §572.005, a person may have a “substantial interest” in a business entity if the person has greater than 10% of the voting interest, owns more than \$25,000 fair market value of the entity, or has a direct or indirect participating interest by shares, stock in the profits, proceeds, or capital gains of the business entity.

These statutes may lend further support for defining “closely related” broadly, by using a standard broader than a 50% majority ownership standard. The commission has made no changes in response to this comment.

Baker Botts commented that the language “common partnership members, association members, or corporate officers” is too vague and fails to provide meaningful guidance or a “bright line” test to determine which entities are included. Baker Botts commented that the rules do not specify whether one common partner, member, or officer is sufficient to bring in the compliance history of other business entities, nor do they establish any de minimis threshold. Baker Botts recommended that the rules require a majority of such individuals be present or individuals representing a majority interest and that the rules make clear that passive investors, such as limited partners, are not relevant to the analysis.

J&G commented that the meaning of the term “association members” in proposed 30 TAC §331.120(c) is unclear and needs to be clarified.

The commission partially agrees with these comments. By the term “association members,” the commission intended to include any members of an entity who could exert a significant influence over that entity. For corporations, this would include corporate officers. For partnerships, this would include partners. For other entities, this would include, but not be limited to, general partners of limited partnerships, or limited partners who participate in the control of the business; managers of limited liability companies; or sole proprietors. The term “association member” is intended to include anyone in this latter category.

With the clarification provided earlier in this preamble, the commission believes that the language “common partnership members, association members, or corporate officers” is not vague and

provides meaningful guidance or a “bright line” test to determine which entities are included.

The proposed language would include as “closely related” the applicant and any other entity with which the applicant has at least one person who is an officer, partner, or member in both the applicant and the other entity.

The commission disagrees with Baker Botts’ comment that passive investors, such as limited partners, are not relevant to the analysis. In some cases, limited partners can participate in the management, operation, or control of the business. To the extent that they participate, the commission believes that limited partners and other passive investors are relevant to the analysis.

The commission has made no change in response to this comment.

Baker Botts, DuPont, and TCC recommended that the commission adopt a 50% or greater ownership standard for determining when two entities are “closely related.”

Baker Botts suggested that the existence of a majority ownership interest is more appropriate “bright line” standard for concluding that two entities are “closely related.” Baker Botts also commented that the ownership interest threshold of 20% is too low and that instead, majority ownership should be the “bright-line test used by the agency.” In many cases, a 20% ownership interest will not give rise to an ability to control or influence the actions of a corporate affiliate.

Dupont also commented that any corporation or business entity managed, owned, or otherwise closely related to the applicant should reflect ownership of 50% or greater (bright line) as a standard for determining whether an entity is closely related.

TCC commented that a simple “majority ownership” (i.e., 50%) is a better indicator in that this is a level of control that is not in doubt and cannot be challenged.

The commission disagrees with these comments. While it is true that majority ownership would convey a controlling interest, the statutory provisions in TWC, §27.051(e), relating to “closely related” business entities are significantly broader in scope than that required by a simple majority ownership. Senate Bill 324 does not limit closely related entities to those entities in which the applicant has a 50% ownership interest. Senate Bill 324 includes not only those entities “owned” by the applicant but also those “managed” or “otherwise closely related to” the applicant. The commission believes that APB 18 provides a more accurate and meaningful approach to establishing significant influence, a standard more appropriate for judging when business entities are closely related as required by SB 324. The commission has made no changes in response to this comment.

Baker Botts commented that, at the very least, there should be an opportunity to rebut any presumption on a case-by-case basis that a 20% ownership interest gives rise to an ability to control the affiliate such that the two are “closely related.”

The commission disagrees with this comment. Senate Bill 324 requires the preparation of comprehensive summaries which are to include the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. The commission believes that the proposed definition of “closely related” will provide a “bright line” standard by which comprehensive compliance summaries can be prepared. Although APB 18 recommends that a presumption of significant influence in cases of 20% or more (direct or indirect) ownership and a presumption of no significant influence in cases of less than 20% (direct or indirect) ownership, for the purposes of preparing comprehensive compliance summaries, the commission believes that a “bright line” standard rather than a presumption would be more appropriate. The compliance summaries are intended to provide the commission with comprehensive information to assist them in determining whether the applicant’s compliance history is unacceptable. The commission will decide whether the compliance history is unacceptable on a case-by-case basis, considering the factors enumerated in new §331.120. In making a determination of whether a compliance history is unacceptable and whether an application must be denied, the commission would have the discretion to consider applicant’s arguments relating to the specifics of the relationships between the applicant and the entities with which the applicant is closely related. The commission has made no changes in response to this comment.

Baker Botts commented that proposed new §331.120(d) provides that the commission shall deny a permit application if the agency finds the applicant’s compliance history unacceptable. The decision whether an applicant’s compliance history is unacceptable will be made on a “case-by-case basis” after considering the “nature, duration, repetition, and potential impact of violations for all media.” Baker

Botts agreed that a case-by-case approach is the most appropriate way to handle determinations of “unacceptable” compliance history under SB 324, even though it provides little guidance to the permit applicant, given the interim nature of these rules. However, in taking a case-by-case approach Baker Botts commented that there is no reason nor is there statutory support for specifying “failure to permit” violations as having greater significance than other types of significant noncompliances. Baker Botts expressed the belief that the proposed regulatory considerations of “nature, duration, repetition, and potential impact” will provide the pertinent factors under which prior noncompliances may be properly weighted.

The commission disagrees with this comment. Failure to obtain a required permit is considered a particularly egregious violation of commission rules. Obtaining appropriate authorization from the commission is a fundamental requirement. Entities who engage in activities without appropriate authorization from the commission deprive the commission of the opportunity to review the entities' proposed activities and to evaluate the entities' activities against the commission requirements. Commission requirements can include facility and equipment design; processing, storage, management, and disposal techniques; monitoring; maintenance; facility closure; and emergency response. Commission evaluation is necessary to ensure that the proposed activities are protective of human health and the environment. An entities' failure or repeated failure to obtain appropriate authorization from the commission hinders the commission in its responsibility of ensuring the conservation of natural resources and the protection of human health and the environment. The commission has made no change in response to this comment.

Dupont commented that UIC compliance summaries should be prepared using EPA's *UICP Guidance Document No. 81*, which redefines significant noncompliance for Class I UIC wells.

The commission disagrees with this comment. The term “significant noncompliance (SNC)” is a term used by the EPA for its compliance rules and may not be germane to regulatory policies of the commission in all cases. However, the UIC SNC criteria do have an effect on compliance histories, although they may not be as direct an effect as the commenter suggests. Significant noncompliance criteria is used in determining when to initiate an enforcement action; this affects compliance summaries because enforcement actions are components of compliance history. However, the SNC criteria is not a limiting factor; in other words, enforcement actions may be initiated for violations which do not meet SNC criteria, and these actions would also be considered in compliance history determinations. Furthermore, although these adopted rule changes are specific to UIC applications, UIC-related compliance histories encompass all media and programs; the SNC criteria referenced by the commenter only applies to UIC and would not apply to any other programs or media. Therefore, the commission has made no change in response to this comment.

Dupont commented that more stringent Texas requirements (i.e., positive annulus pressure) should be noted in any compliance history since the federal EPA requirements are protective. DuPont stated that there are several cases where the commission regulations are more stringent than federal requirements. For example, the federal requirement is that the annulus pressure during operation must be positive, whereas, the commission has a requirement of 100 pounds per square inch (psi) annulus differential.

Dupont commented that these different requirements should be noted for the record on any compliance history because the EPA requirements are protective of human health and the environment.

The commission disagrees with this comment. The commission agrees that EPA requirements are protective of human health and the environment; however, the commission has been authorized by the EPA to conduct certain aspects of the UIC program in the State of Texas. To maintain primacy, state rules must be *at least* as stringent as federal rules. There are cases where state rules are *more stringent* than federal rules, but only where it is appropriate or necessary to do so. The commission believes that it would not be appropriate for the compliance summaries to reflect when the alleged violation is a violation of state but not federal requirements because UIC permittees in Texas are required to comply with applicable federal *and* state requirements. The commission has made no change in response to this comment.

Dupont commented that SB 324 does not require UIC applicants to have a compliance history for all media.

TCC commented that SB 324 requires “Evidence of compliance or noncompliance by an applicant for an injection well permit with environmental statutes....” This implies to TCC that SB 324 was intended to deal with those environmental statutes affecting the UIC program but not all environmental statutes. While other statutes enacted by the 77th Legislature, 2001, might specifically state that an applicant’s compliance history should cover all environmental statutes, TCC commented that SB 324 did not so

state this. TCC recommended that the rule changes implementing SB 324 should only address UIC activities, not other media.

The commission disagrees with this comment. The commission believes that the statutory changes made by SB 324 broaden TWC, §27.051(e), so that compliance summaries for UIC applicants are required to cover all media regulated by the commission. Prior to the SB 324 changes, TWC, §27.051(e) required the commission “to establish a procedure . . . for preparation of compliance summaries relating to the history of compliance . . . with rules adopted or orders or permits issued by the commission *under this chapter*” (emphasis added). Senate Bill 324 amended TWC, §27.051(e), by deleting the phrase “under this chapter.” Texas Water Code, §27.051(e) now requires the preparation of “comprehensive summaries.” In addition, prior to the SB 324 changes, evidence of compliance by an applicant with “rules adopted or orders or permits issued by the commission under this chapter” could be offered at a contested case hearing on the applicant’s application. Senate Bill 324 amended TWC, §27.051(e), deleted the phrase “under this chapter,” and now allows evidence of compliance by an applicant with “environmental statutes and rules adopted or orders or permits issued by the commission” to be offered at a contested case hearing on the applicant’s application. These SB 324 changes significantly broaden the applicability of the statute. The commission believes that the SB 324 changes now require UIC applicants’ compliance histories to include all media regulated by the commission. The commission has made no change in response to this comment.

EPA commented that the removal of the term “for the disposal of hazardous wastes” in §331.121(b), expands the following elements for the commission’s consideration to all injection well classes and is an increase in stringency.

The commission agrees with this comment. Senate Bill 324 amended TWC, §27.014(d) to require that use or installation of an injection well is in the public interest. By deleting the words “for the disposal of hazardous waste,” the public interest determination now applies to both hazardous and nonhazardous injection wells. This broader statutory requirement and its implementation in §331.121(b) does result in an increase in stringency of state rules. The commission has made no change in response to this comment.

FBH commented that proposed §331.120 is nonspecific as to the scope of consideration of compliance history. FBH stated that the investigation into an applicant’s compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant, should be restricted to facilities located in Texas. A nationwide and/or worldwide investigation into compliance histories, conducted by agency staff would be extremely burdensome and perhaps infeasible. Moreover, any attempt at a nationwide and or worldwide investigation of an applicant’s compliance history would significantly delay the processing and commission consideration of a permit application. FBH proposed that §331.21 {sic} be clarified so that an applicant’s compliance history be limited to facilities in Texas. According to FBH, such a restriction would be consistent with 30 TAC §205.1, relating to compliance history for general permits, in that the commission will not allege violations of other states’ laws as part of compliance histories.

The commission partially agrees with this comment. As a practical matter, the commission intends to include in comprehensive compliance summaries compliance data on the applicant's facilities and any related business entities in Texas. The commission intends to include in the summaries any compliance data available at the commission and any compliance data from the EPA to the extent that the data is readily available to the commission.

However, FBH's comment addresses the "scope of consideration of compliance history." The commission disagrees with FBH to the extent that the comment suggests that the commission would be limited to considering the Texas compliance history of an applicant in deciding whether to issue, amend, extend, or renew a permit. Although the proposed rules would limit compliance summary information to facilities in Texas, SB 324 provides the commission with the discretion to consider compliance history information for facilities outside of Texas. Specifically, TWC, §27.051(d) states that "the commission, in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1) of the section, shall consider, *but shall not be limited to the consideration of:* 1) compliance history of the applicant and related entities in accordance with Subsection (e) of this section . . ." (emphasis added). Moreover, TWC, §27.051(e) allows any party at hearing on the application to offer "evidence of compliance or noncompliance by an applicant . . . with environmental statutes and the rules adopted or orders or permits issued by the commission." The commission has made no change in response to this comment.

FBH commented that any consideration of compliance history under proposed §331.120 should not take into account TWC, §7.070 no-findings orders entered into by an applicant, inasmuch as the orders on their face typically state that this order shall not be considered as part of an applicant's compliance history. FBH stated that respondents negotiating §7.070 orders are entitled to rely upon the language of the order that it is not to be considered in its compliance history. Otherwise, FBH argued, an entity who agrees to settle a case under a §7.070 no-findings order might otherwise have contested the alleged violations. Moreover, FBH expressed the belief that a rule requiring consideration of §7.070 orders, where it is stated that the order is not intended to become part of a facility's compliance history, would be unconstitutional retroactive rulemaking destroying or impairing a vested right. FBH suggested that the proposed rule specifically state that §7.070 orders are not to be included in compliance summaries for purposes of §281.21(d)(7). FBH stated that this proposed modification is consistent with the definition of the term "compliance history" set forth in recently adopted §205.1(1), where it is specifically stated that compliance history "shall not include any order that is precluded by its term or by law from being part of the applicant's compliance history."

HSWGB commented that the proposed rules are silent as to the issue of whether agreed orders and notices of violations that led to agreed orders containing provisions authorized by TWC, §7.070, should be included in the compliance summaries. Senate Bill 1660 Agreed Orders (1660 orders) do not have findings of violations and contain text indicating: 1) that the entry of the agreed order is not an admission of a violation; 2) that the occurrence of a violation is in dispute; and 3) the order is not intended to become part of the compliance history. Senate Bill 324 does not amend any provision of TWC, Chapter 7 and does not change the applicability of any agreed orders containing text authorized

by TWC, §7.070. Entities who have agreed to such an order have done so in reliance on the language that the order would not become part of their compliance history. Many entities have relied on this provision of the TWC in order to expeditiously resolve disputed enforcement matters rather than engage in a protracted contested case hearing. It would be unfair to retroactively repeal the provisions that entities have relied on in making the decision to settle an enforcement matter rather than dispute it. Such entities should be able to continue to rely on that language. HSWGB suggested that the proposed rules should specify that agreed orders containing the provisions authorized by TWC, §7.070 should not be included in compliance summaries for purposes of proposed §331.121. Similarly, the proposed rules should clarify that notices of alleged violations that have been resolved with 1660 orders will not be included in compliance summaries. Such clarity will assist participants in the regulatory process in understanding exactly what will be considered in these type of permitting decisions.

The commission partially agrees with this comment. In September of 1995, the commission began to use orders crafted under the provisions of TWC, §7.070, (generally referred to as “1660 orders”). The pertinent language in TWC, §7.070(1) - (3) states that, “An agreed administrative order *may* include a reservation that: 1) the order is not an admission of a violation of a statute within the commission’s jurisdiction or of a rule adopted or an order or a permit issued under such a statute; 2) the occurrence of a violation is in dispute; *or* 3) the order is not intended to become a part of a party’s or a facility’s compliance history” (emphasis added). In September of 1995, when the commission began to use orders crafted under the provisions of TWC, §7.070, language was included stating that the occurrence of any violation is in dispute and the entry of the agreed order shall not constitute an admission by the respondent of any violation alleged in the

order, nor of any statute or rule, and further that the *order* is not intended to become a part of the respondent's compliance history.

However, the commission also continued to utilize other orders which were not crafted under §7.070, (generally referred to as "findings orders"). These orders contain findings of fact and conclusions of law, and do not contain the provision stating that they will not become a part of the respondent's compliance history. Findings orders are used in some enforcement matters, based on specific criteria.

Recently, the commission modified the language in 1660 orders being offered to respondents for settlement of applicable enforcement matters. The 1660 orders now state that if the order becomes effective prior to February 1, 2002, the order is not intended to become a part of the respondent's compliance history. The language further specifies that the order will become a part of the respondent's compliance history if it becomes effective on or after February 1, 2002. So, any 1660 orders which become effective on or after February 1, 2002, along with any findings orders regardless of effective date, will be considered part of a person's compliance history. The commission does not agree that there is a need to modify the rule to specify this.

The commission does not currently consider 1660 orders as a component of compliance history if the language included and the associated understanding between the parties is that they will not be considered for purposes of compliance history. The commission agrees with the commenter that these 1660 orders themselves cannot be included as part of the applicant's compliance history

because the terms of these orders would preclude this. The commission disagrees, however, that the rule language should explicitly state when 1660 orders will be considered as part of the applicant's compliance history and believes that this issue has been adequately addressed in this preamble. Furthermore, the components of compliance history that have to do with enforcement actions, found in existing §281.21(d)(4) have not been modified through this rulemaking. Therefore, the commission has determined that no change to the rule is warranted.

HSWGB also raised an issue regarding notices of violations (NOVs) issued and subsequently resolved by the issuance of a 1660 order containing the language stating the order is not to become part of the respondent's compliance history. The commission does not agree that NOVs ultimately resolved in this manner should not be included in compliance history reviews. As specified earlier, the applicable language in the 1660 orders only states that the *order* will not become part of the respondent's compliance history. This is consistent with the language in TWC, §7.070(3) as well. Neither the order language nor the statute states that any preceding NOV will not become part of the respondent's compliance history. Notices of violations are currently included in compliance history considerations, and the components of compliance history that have to do with NOVs, found in existing §281.21(d)(3) have not been modified through this rulemaking. The commission does not agree that any change is warranted, and no change to the rule has been made in response to this comment.

J&G commented that once the proposed revision to §331.121(b)(3) is adopted, the language in §331.121(b)(3) will be contrary to TWC, §27.051(d)(3), as it was revised by SB 324. Texas Water

Code, §27.051(d)(3) was revised by SB 324 so that it will continue to apply to hazardous waste injection wells only. Because of the proposed revision to §331.121(b) to delete the words “for the disposal of hazardous waste,” once the proposed rules are adopted, §331.121(b)(3) will apply to nonhazardous waste injection wells, which would be contrary to TWC, §27.051(d)(3). To address this problem, §331.121(b)(3) needs to be revised, adding the clause “if the injection well will be used for the disposal of hazardous waste,” to make it consistent with SB 324.

The commission agrees with this comment and will add the clause, “if the injection well will be used for the disposal of hazardous waste,” to §331.121(b)(3).

J&G commented that §331.121(b)(4) requires that the owner or operator of a hazardous waste injection well must certify that there is a program in place to reduce the volume or quantity of toxicity of the waste to be injected to the degree that is economically practicable and that the injection of the waste is the practicable method of disposal currently available that minimizes the present and future threat to human health and the environment. Once the proposed revision to §331.121(b) is adopted, §331.121(b)(4) will begin to apply to nonhazardous waste injection wells, as well as to hazardous waste injection wells. Section 331.121(b)(4) should continue to apply only to hazardous waste injection wells because there is nothing in SB 324 that specifies or even indicates that the requirement in §331.121(b)(4) should be expanded to cover nonhazardous waste injection wells, in addition to hazardous waste injection wells. Section 331.121(b)(4) should be revised to read: “that any permit issued for a Class I injection well for disposal of hazardous wastes generated on-site requires a certification....”

The commission agrees with this comment and will add the word “hazardous” to §331.121(b)(3).

TCC commented that a review of an applicant’s compliance for the two years prior to the completion of the permit technical review is appropriate.

The commission disagrees with this comment. Senate Bill 324 does not limit the time period to be covered by a comprehensive compliance summary. Current commission rules in §281.21(d) state that the summary shall cover *at least* the two-year period preceding the date on which technical review is completed (emphasis added). The adopted rule does not propose any changes to the current requirement of “at least two years.” The commission has the discretion to consider, and the executive director has the authority to prepare, comprehensive compliance summaries which cover periods of more than two years. The commission has made no change in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted 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; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and TWC, §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

SUBCHAPTER A: APPLICATIONS PROCESSING

§281.21

§281.21. Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary.

(a) The provisions of this section are applicable to applications for waste disposal activities conducted under the authority of the Texas Water Code, Chapters 26 and 27, and the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361, and the Texas Radiation Control Act, Texas Health and Safety Code, Chapter 401.

(b) The executive director shall prepare a draft permit consistent with all applicable commission rules, unless a recommendation is made not to grant an application. The draft permit will be filed with the commission to be included in the consideration of the application for permit and is subject to change during the course of the proceedings on the application. The draft permit shall be available for public review.

(c) The executive director shall prepare a technical summary which sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The executive director shall send this summary together with the draft permit to the applicant and on request, to any other person. The summary shall include the following information, where applicable:

(1) a brief description of the type of facility or activity which is the subject of the draft permit;

(2) the type and quantity of radioactive materials, wastes, fluids, or pollutants which are proposed to be or are being used, processed, stored, disposed, injected, emitted, or discharged;

(3) a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(4) reasons why any requested variances or alternatives to required standards do or do not appear justified;

(5) a description of the procedures for reaching a final decision on the draft permit, including procedures whereby the public may participate in the final decision; and

(6) the name and telephone number of any persons to contact for additional information.

(d) The executive director shall prepare a summary which describes the compliance status of persons applying for permits issued under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361; the Texas Radiation Control Act, Texas Health and Safety Code, Chapter 401; the Injection Well Act, Texas Water Code, Chapter 27; and the Water Quality Control Act, Texas Water

Code, Chapter 26. For applications filed under the Texas Solid Waste Disposal Act or the Injection Well Act, the summary shall include the applicant's compliance status with respect to rules, orders, or permits issued by the commission under the authority of both statutes. For applications filed under the Water Quality Control Act, the summary shall include the applicant's compliance status with respect to rules, orders, or permits issued by the commission under the authority of the Texas Water Code. For applications for minor amendments filed under the Texas Radiation Control Act, the executive director may determine that a compliance summary is not necessary. Upon completion of technical review and prior to issuance of public notice, the executive director shall send the compliance summary, together with the draft permit, technical summary if applicable, and environmental analysis if applicable, to the applicant and on request, to any other person. The compliance summary shall include information relative to the site which is the subject of the current application as well as other facilities owned or operated by the applicant which are under the commission's jurisdiction whether permitted or not. The summary shall cover at least the two-year period preceding the date on which technical review is completed and shall include:

- (1) the date(s) and description of any citizen complaints received;
- (2) the date(s) of all agency inspections;
- (3) for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact and, for radioactive material licenses, any impact on radiation safety;

(4) the date(s) of any agency enforcement action and the applicant's response to such action;

(5) for applicable facilities, the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility's contingency plan;

(6) the name and telephone number of a person to contact for additional information regarding compliance history; and

(7) for applications for underground injection control permits submitted or pending on or after May 26, 2001, and before September 1, 2002, a comprehensive compliance summary. The summary shall include the applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members, or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. The summary shall include the compliance history for all media regulated by the commission including, but not limited to, underground injection, solid waste, water, and air. The summary shall include the information required in paragraphs (1) - (6) of this subsection.

(e) Additional conditions for TPDES draft permits and fact sheets are as follows:

(1) TPDES draft permits shall include the information required by 40 Code of Federal Regulations (CFR) §124.6(c) - (e), as in effect on the date of TPDES program authorization, as amended, which is adopted by reference; and

(2) A fact sheet shall be prepared for a TPDES permit and shall include the information required by 40 CFR §124.56, as in effect on the date of TPDES Program authorization, as amended, which is adopted by reference.

(f) Additional conditions for radioactive material licenses are as follows.

(1) When the executive director is considering an application for a new license or license renewal to dispose of low-level radioactive waste from other persons and determines that the licensed activity may have a significant effect on the human environment, the executive director shall prepare or have prepared a written analysis of the effect on the environment.

(2) The executive director shall make the environmental analysis available to the applicant and the public. The environmental analysis shall be included as part of the record of the commission's proceedings.

