

The Texas Natural Resource Conservation Commission (commission) proposes new §60.1, Compliance History. The commission proposes new Chapter 60 to implement certain requirements of House Bill (HB) 2912, 77th Legislature, 2001, regarding compliance history.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

House Bill 2912, 77th Legislature, 2001, §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.” The purpose of this proposed rule is to define the components of compliance history.

The commission currently has procedures for preparation of compliance summaries for permit applications for waste disposal activities conducted under the authority of TWC, Chapters 26 and 27, and the Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361, and the Texas Radiation Control Act, THSC, Chapter 401, and these procedures are specified in existing 30 TAC §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: 1) the date(s) and descriptions of any citizen complaints received; 2) 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; 3) the date(s) of any agency enforcement action and the applicant’s response to such action; 4) 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 5) the name and telephone number of a person to contact for additional compliance history.

The commission currently has procedures for preparation of compliance summaries for permit applications for air emissions under the authority of the Texas Clean Air Act, THSC, Chapter 382, and these components are specified in existing 30 TAC §116.122. The associated procedures specify that a compliance summary shall cover five years and shall include the following compliance events and associated information involving the Texas facility that is the subject of the permit application: criminal convictions known to the commission and civil orders, judgments, and decrees; administrative enforcement orders; and compliance proceedings. For United States facilities outside the State of Texas, the compliance summary shall include criminal convictions and civil judgments, administrative enforcement orders, and notices of violation issued by the United States Environmental Protection Agency (EPA). Furthermore, §116.122 specifies that violations of fugitive emission monitoring and recordkeeping requirements meeting certain criteria shall not be included in the compliance history.

The commission is also required by TWC, §7.053 to consider compliance history (as one of several factors) for purposes of assessing administrative penalties in commission enforcement actions. As reflected in the commission's penalty policy (first revision, effective January 1, 1999), when assessing compliance history for enforcement purposes, a five-year history of the violator is examined in all programs of all media under the jurisdiction of the commission for the specific site under enforcement. Additionally, in evaluating the violator, the histories of all of its locations in the state are considered for the medium or media of concern in the enforcement action. For example, this includes multiple water or wastewater plants owned by a city; parent, sister, or daughter companies in a corporate entity; and companies owned by each partner in a partnership. Furthermore, if the site of the violation has undergone a change in ownership, both the five-year histories of the site itself and of the new owner are examined. The components of compliance history considered for enforcement purposes are previous

commission or federal enforcement orders that include findings of fact and conclusions of law, district court orders, federal court orders, or criminal convictions related to environmental laws.

The commission currently uses compliance history as a criterion for participation in the voluntary Clean Texas Program. Any facility that has been issued a findings order by the commission three years prior to the application date is ineligible to participate. Any facility that has been the subject of a state or federal district court judgment for up to three years prior to the application is also ineligible to participate. Lastly, any facility with a criminal conviction or whose employees have a criminal conviction for infraction of environmental laws is ineligible to participate.

Proposed new Chapter 60 would implement the requirement of HB 2912, §4.01 to “develop a uniform standard for evaluating compliance history” by specifying 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. As specified in TWC, §5.751, the compliance history requirements of HB 2912 do not apply to occupational licensing programs under the jurisdiction of the commission. The commission proposes that this rule only applies to forms of authorization, including temporary authorizations, that require some level of notification to the agency, review, and approval or response. This rule would not apply to permit actions such as voluntary permit revocations; minor amendments and nonsubstantive corrections to permits; Texas pollutant discharge elimination system (TPDES) and underground injection control minor permit modifications; Class 1 solid waste modifications, except for changes in ownership; municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications

requiring public notice; permit alterations; and administrative revisions, unless a motion for reconsideration or a motion to overturn is filed under 30 TAC §50.39 or §50.139 with respect to the listed permit actions. The bill further states that compliance history must be utilized in agency decisions regarding enforcement, the use of announced inspections, and participation in innovative programs. House Bill 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401.

New Chapter 60 proposes a compliance period of at least five years. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director; the five-year period preceding the date of the inspection that initiates an enforcement action; for purposes of determining whether an announced inspection is appropriate, the five-year period preceding an inspection; or the five-year period preceding the date the application for participation in an innovative program is received by the executive director, as applicable. 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 this proposed new chapter 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 proposed new §60.1.

The components of compliance history specified in new Chapter 60 include enforcement orders; court judgments; consent decrees; criminal convictions of this state and the federal government relating to compliance with an environmental law, regulation, permit, order, consent decree, or other requirement under the jurisdiction of the commission or the EPA; orders issued under TWC, §7.070; to the extent readily available, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states; chronic excessive emissions events; any information required by other law or any requirements necessary to maintain federal program authorization; dates of investigations; notices of violations; any notices of audits conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995; the type of environmental management systems used for environmental compliance; any voluntary on-site compliance assessments conducted by the executive director under a special assistance program; participation in a voluntary pollution reduction program; and the name and telephone number of an agency staff person to contact for additional information regarding compliance history. Additionally, compliance histories would now cover all media, including air, water, and waste. Changes in ownership would also be reflected.

Proposed §60.1 would only implement the first phase of HB 2912, §4.01, as it relates to the definition, or components of, compliance history. The next phase of the implementation of HB 2912, §4.01,

relating to the use of compliance history, will be accomplished through additional rulemaking. House Bill 2912, §18.05(a), specifies that, not later than September 1, 2002, the commission by rule shall establish the standards for the classification and use of compliance history, as required by TWC, §5.754. This additional rulemaking will include modifications to Chapter 60, as well as to other applicable chapters of commission rules for the purpose of implementing the compliance history requirements of HB 2912, §4.01.

The commission solicits additional comments regarding applicability and appropriate components for use in defining a person's compliance history.

SECTION DISCUSSION

Proposed new §60.1, Compliance History, would implement the requirements of TWC, §5.753. Specifically, the proposed language would establish the components of compliance history the agency must consider prior to certain decisions. In this phase of rulemaking associated with the implementation of HB 2912, §4.01 regarding compliance history, the way the agency will use compliance history in certain decisions is not addressed; rather, this proposed language would only address the applicability and components of compliance history.

The commission proposes new §60.1(a), Applicability. The proposed subsection states that the chapter would be applicable to persons subject to the requirements of TWC, Chapters 26 and 27 and THSC, Chapters 361, 382, and 401. The proposed subsection would mirror HB 2912, §4.01, as it creates new TWC, §5.754(e) by specifying that the agency will utilize compliance history when making decisions regarding the issuance, renewal, amendment, modification, denial, suspension, or revocation of a

permit; enforcement; the use of announced inspections; and participation in innovative programs. This proposed subsection would also specify that, for purposes of this proposed new chapter, “permit” means licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization. This is to reflect the definition of “permit” included in TWC, §5.751. Additionally, the term “person” is the same as found in 30 TAC Chapter 3.

The types of permits, licenses, certificates, registrations, approvals, permits by rule, and standard permits over which the commission has jurisdiction can be categorized into two groups. The first group can be referred to as a “no decision” process. This term refers to a situation in which a person informs the agency, as required by rule, that it is engaging in a certain regulated activity for which there is no specific authorization required. This includes, for example, changes to qualified facilities under 30 TAC §116.117 and §116.118. Additionally, the “no decision” process includes activities that are authorized by rule for which notification may or may not be required, but no agency response is required for the site to be authorized. The following are examples of required notifications that do not require response by the agency: the on-site management of nonhazardous waste for which a notification is required by 30 TAC §335.6; underground or aboveground storage tanks registered under 30 TAC §334.7 or §334.127; emissions authorized by 30 TAC Chapter 106, where no written site approval is required; emissions authorized by Chapter 116, Subchapter F of this title (relating to Standard Permits), where no written site approval is required; and waste discharge notices of intent under 30 TAC Chapter 205, where no written approval is required.

Other types of permits can be referred to as a “decision” process. This group includes authorizations which require notification or application, an agency review, and site-specific agency approval or response. Examples of this category include municipal solid waste transfer stations as required by 30 TAC §330.65, and tire processing facilities as required by 30 TAC §328.63. This category also includes the more traditional permit decisions, such as authorization for an air permit under 30 TAC §116.111, and authorization for a Class I underground injection control well under 30 TAC §331.7. Proposed new §60.1 would only be applied to those permits or other forms of authorization, including temporary authorizations, requiring the “decision” process.

The commission considered whether the actions under Chapter 101, Subchapter H of this title, relating to Emissions Banking and Trading, are subject to the compliance history review requirements. The commission determined that these actions are not subject to the compliance history review requirements because they are not a form of authorization. The actions under Subchapter H are compliance methods for achieving the emissions reductions required under the state implementation plan as required by 30 TAC Chapter 117, and providing flexibility for compliance with 30 TAC Chapters 115 and 117.

The commission considered whether executive director actions regarding the remediation of spills or other contamination are subject to the compliance history review requirements. These actions are required under commission rules and the executive director reviews the actions taken during remediation to determine compliance with the rules and gives approval to implement the next requirement. The executive director is not authorizing any new activity and thus the commission determined that these actions are not subject to the compliance history review requirements.

The commission also considered whether there are specific kinds of permit actions which do not extend new authorizations. The commission suggests that permit actions such as voluntary permit revocations; minor amendments and nonsubstantive corrections to permits; TPDES and underground injection control minor permit modifications; Class 1 solid waste modifications, except for changes in ownership; municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice; permit alterations; and administrative revisions, do not change the current authorizations, but add clarity, correct typographical errors, update contact information, or make other minor changes where the minor changes are equally protective of human health and the environment. Therefore, the commission proposes that this rule would not be applicable to these types of permit actions, unless a motion for reconsideration or a motion to overturn is filed under 30 TAC §50.39 or §50.139 with respect to the listed permit actions.

The proposal would reflect that Chapter 60 does not apply to occupational licensing programs under the jurisdiction of the commission, which is stated in TWC, §5.751.

With regard to required implementation dates, as specified in HB 2912, §18.05, the proposed subsection reflects that new Chapter 60 applies as follows: 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. Additionally, the commission proposes that the compliance history requirements apply to decisions by the executive director relating to other forms of authorization and innovative programs to begin September 1, 2002.

The commission proposes new §60.1(b), Components, to specify the components of compliance history that the agency must consider under applicable circumstances. The components of compliance history as specified in proposed Chapter 60 shall apply to an action taken by the agency on or after February 1, 2002, as specified in HB 2912, §18.05. The proposed new subsection states that compliance history shall include multimedia compliance-related information about a person, specific to the site which is under review as well as other sites which are under the commission's jurisdiction and owned or operated by the same person. The proposed language would further require that compliance history cover at least a five-year period. This would include at least the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of the inspection that initiates enforcement; with regard to the use of announced inspections, the five-year period preceding an inspection; or the five-year period preceding the date the application for participation in an innovative program is received by the executive director. This is reflected in the proposed language to establish by rule “a period for compliance history” as required by TWC, §5.753(e). The agency may develop a compliance history for a longer period based upon case-by-case considerations. For example, the agency may develop a five-year compliance history based upon the receipt date of an application, and then supplement the history for the time period needed to process a permit application. The proposed minimum five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in

evaluating compliance history for purposes of commission enforcement actions. The commission believes that a minimum five-year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance.

With regard to the actual components of compliance history, the commission first proposes new §60.1(b)(1), which mirrors TWC, §5.753(b)(1). This paragraph provides that one component of compliance history must include any enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with an environmental law, regulation, permit, order, consent, decree, or other requirement under the jurisdiction of the commission or the EPA.

The commission proposes new §60.1(b)(2), to comply with the requirement of TWC, §5.753(b)(2), which provides that, notwithstanding any other provision of the TWC, orders issued under TWC, §7.070 must be included in the agency's consideration of compliance history. The proposed language would further specify use of orders issued under TWC, §7.070 on or after February 1, 2002. This is because currently, commission orders issued under TWC, §7.070 include language specifically stating that the order is not intended to become a part of the respondent's compliance history. As of the effective date of TWC, §5.753(b)(2), which is February 1, 2002, the compliance history portion of TWC, §7.070 is superceded, and orders issued under this section of the statute will be considered in compliance history. In the interim, the commission will also modify the existing language in applicable proposed enforcement orders to reflect the February 1, 2002 change to these types of orders.

The commission proposes new §60.1(b)(3), which would require that, to the extent readily available to the executive director, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states must be considered as a component of compliance history. This component is required by TWC, §5.753(b)(3). The commission intends to utilize the EPA Integrated Compliance Information System and its retrieval component, Online Tracking Information System or any subsequent equivalent system(s) to retrieve the administrative and civil enforcement information which is extracted from the program-specific EPA data bases. Commission decisions regarding compliance history that are based upon information contained on the EPA Integrated Compliance Information System shall not be voided by the subsequent discovery of enforcement orders and court judgments relating to violations of environmental laws of other states that were not noted in the EPA Integrated Compliance Information System.

The commission proposes new §60.1(b)(4), which would require that chronic excessive emissions events be included as a component of compliance history. This implements HB 2912, §4.01, which adds chronic excessive emissions events as a statutory requirement in new THSC, §382.0216(j). The proposed paragraph would further state that, for purposes of new Chapter 60, the term “emissions event” is the same as defined in THSC, §382.0215(a).

The commission proposes new §60.1(b)(5), mirroring the language in TWC, §5.753(c), which states that any information required by other law or any requirement necessary to maintain federal program authorization must be included as a compliance history component.

The commission proposes new §60.1(b)(6), which would require that the dates of investigations conducted by the executive director or his contractors be included as a component of compliance history. This information would reflect how many investigations have taken place during the five-year compliance period, allowing for a better perspective with regard to the other components of compliance history, especially those in proposed paragraphs (1) - (5), and (7). For example, it would be important to know whether the facility had been inspected during the compliance period, and how many times, when there are no notices of violations or orders present during the compliance period.

The commission proposes new §60.1(b)(7) which states that all written notices of violation issued on or after February 1, 2002 must be included as a component of compliance history, specifying each violation of an environmental law, regulation, permit, order, consent decree, or other requirement.

This requirement implements TWC, §5.753(d), which further states that a notice of violation administratively determined to be without merit will not be included in a compliance history.

Additionally, a notice of violation that is included in a compliance history will be removed from the compliance history if the commission subsequently determines that the notice of violation was without merit. The commission is proposing the use of written notices of violation issued on or after February 1, 2002 to allow the agency to complete a more efficient tracking system and to develop specific procedures to re-evaluate complex violations as needed.

The commission suggests that there are other components of compliance history that it should consider to fully evaluate a person's commitment to environmental excellence. Therefore, the commission proposes new §60.1(b)(8), which would require, as applicable, the date of letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety

Audit Privilege Act, 74th Legislature, 1995, to be included as a component of compliance history.

These voluntary compliance audits can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations.

The commission also proposes new §60.1(b)(9), which would require the type of environmental management systems (EMSs), if any, used for environmental compliance to be included as a component of compliance history. Environmental management systems are another voluntary tool that the regulated community may use to evaluate their own environmental management practices, confirm compliance with environmental rules and regulations, and emphasize management oversight of regulated activities.

The commission recognizes that small entities are very concerned about environmental compliance but may not have the resources needed to conduct detailed assessments of their regulated activities.

Therefore, the commission proposes new §60.1(b)(10), which would require any voluntary on-site compliance assessments conducted by the executive director under a special assistance program, such as assessments conducted by Small Business Environmental Assistance Division under the site visit program to be included as a component of compliance history. These voluntary assessments are conducted upon request.

The commission also recognizes that voluntary pollution reduction program is an important tool in addressing environmental concerns in the state beyond regulatory requirements, and reflects a person's commitment to environmental excellence. Therefore, the commission proposes new §60.1(b)(11),

which would require participation in a voluntary pollution reduction program to be included as a component of compliance history.

The commission proposes new §60.1(b)(12), which would require, as a part of compliance history, a description of early compliance with or offer of a product that meets future state or federal government environmental requirements. Accelerating the implementation of new requirements that are intended to benefit the environment is a choice that a person may make. This voluntary early compliance is also a reflection of a person's commitment to environmental excellence.

Finally, with regard to the components of compliance history, the commission proposes new §60.1(b)(13), which requires that the name and telephone number of an agency staff person to contact for additional information regarding compliance history be included.

It should be noted that in proposed new Chapter 60, the commission does not include existing 30 TAC §281.21(d)(1) and (3) pertaining to the date(s) and description of any citizen complaints received; and for each inspection, whether a condition of noncompliance was alleged by the investigator and a brief description of the resulting environmental impact and, for radioactive material licenses, any impact on radiation safety. These items are not specifically included in TWC, §5.753 as required components of compliance history, and further, other components included in this proposal would, in effect, include pertinent aspects of this same information. For instance, a citizen may file a complaint regarding an environmental incident. The executive director will investigate, and if a violation is documented, then the executive director will issue a notice of violation or initiate enforcement, as appropriate. Thus, the

complaint would be part of the compliance history via the notice of violation or commission order. The commission notes that during the legislative process citizen complaints were not included in HB 2912.

Additionally, it should be noted that, in proposed new Chapter 60, the commission does not include the existing requirement, 30 TAC §281.21(d)(5), which states that, for applicable facilities, the date(s) and description of any incident the applicant reported to the executive director which required implementation of the facility's contingency plan is to be included as a component of compliance history. It is not a statutory requirement that this information be included as a component of compliance history, nor is it a requirement that is necessary to maintain federal authorization.

Additionally, the implementation of HB 2912, §4.01, is intended to develop a uniform standard for the agency to use in evaluating compliance history, and existing 30 TAC §281.21(d)(5) only applies to a limited portion of the permits issued by the commission; therefore, the commission suggests that this item not be included in new Chapter 60.

In proposed new Chapter 60, the commission does not include notices of violations issued by the EPA, which are currently a component of air permit compliance histories, required in 30 TAC §116.122.

The commission suggests that EPA notices of violations not be considered because it does not have the opportunity to evaluate the merit of those notices of violations.

The commission proposes new §60.1(c), Change in Ownership, which would state that if ownership of the site changed during the minimum five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. Specifically, the proposed language states that for any part of the compliance period that involves a different, previous owner, the

compliance history would be assessed for only the site under review. The distinction for previous owners is that proposed §60.1(b) would require that for the current owner of the site, the compliance history would look at the site under review as well as other sites which are under the commission's jurisdiction and owned or operated by the same person.

The commission has determined that for purposes of developing compliance histories, "ownership" would only include the entity filing the permit application, under enforcement, being inspected, or applying for participation in an innovative program, as defined by its legal name. For example, any parent, sister, or daughter corporations related to the legal entity would not be included. This would change current agency practice.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for units of state and local government as a result of administration and enforcement of the proposed rule, which is intended to implement certain provisions of HB 2912, 77th Legislature, 2001. The proposed rule is procedural in nature and is not anticipated to result in additional costs for units of state and local government.

The commission currently has procedures for preparation of compliance summaries for waste disposal and air emission permit applications, enforcement actions, and participation in the voluntary Clean Texas Program; however, these procedures are not standardized. House Bill 2912 requires the commission to standardize procedures and broaden the use of compliance histories to cover more

applications before the commission, including licenses, certificates, registrations, approvals, permits by rule, standard permits, and other forms of authorizations issued by the agency. In order to comply with the compliance history provision of HB 2912, the commission proposes two rulemaking phases. This rulemaking is phase I and consists of defining the applicability and components of compliance history. Phase II, to be proposed in a separate rulemaking, is the actual implementation phase and will detail how compliance histories will be used in applicable decisions made by the agency, including decisions regarding permit issuance, renewal, amendment, modification, denial, suspension, or revocation; enforcement; the use of unannounced inspections; and participation in innovative programs.

The proposed rule in phase I is intended to implement uniform standards for evaluating compliance histories by defining the components to be included in all evaluations. The compliance history reviews will cover all media, including air, water and waste, and will include the following components: enforcement orders; court judgments; consent decrees; criminal convictions of this state and the federal government relating to compliance with an environmental law; regulation, permit, order, consent decree, or other requirements under the jurisdiction of the commission or the EPA; and orders issued regarding findings of fact. The reviews, to the extent readily available, will also consist of enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states; chronic excessive emissions events; any information required by other law or any requirements necessary to maintain federal program authorization; dates of investigations; notices of violations; any notices of audits conducted under the Texas Environmental, Health, and Safety Audit Privilege Act; and the type of EMSs used for environmental compliance; and a description of early compliance with or offer of a product that meets future state or federal government requirements. Additionally, the following components will be included in the reviews: any voluntary onsite compliance assessments

conducted by the executive director under a special assistance program; participation in a voluntary pollution reduction program; and the name and telephone number of an agency staff person to contact for additional information regarding compliance history. Changes in ownership would also be reflected.

This rulemaking is procedural in nature and does not propose additional regulatory requirements for units of state and local government; therefore, the commission anticipates no additional costs due to implementation of the proposed rule. Additionally, since this rulemaking only defines the components to be used in compliance history summaries, the commission anticipates no additional costs to the agency due to implementation of this rulemaking phase.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with this rulemaking will be standardized procedures to be used by the commission during compliance history reviews to ensure regulated entities are adhering to applicable regulations.

The commission currently has procedures for preparation of compliance summaries for waste disposal and air emission permit applications, enforcement actions, and participation in the voluntary Clean Texas Program; however, these procedures are not standardized. House Bill 2912 requires the commission to standardize procedures and broaden the use of compliance histories to cover more applications before the commission, including licenses, certificates, registrations, approvals, permits by rule, standard permits, and other forms of authorizations issued by the commission. House Bill 2912

further requires compliance histories to be used in applicable decisions made by the agency, including decisions regarding permit issuance, renewal, amendment, modification, denial, suspension, or revocation; enforcement; the use of unannounced inspections; and participation in innovative programs.

The proposed rule is intended to implement uniform standards for evaluating compliance histories by defining the components to be included in all evaluations. This rulemaking is procedural in nature and does not propose additional regulatory requirements; therefore, the commission does not anticipate fiscal implications for individuals and businesses to comply with the proposed rule.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts to any small or micro-business as a result of the proposed rule, which is intended to implement certain provisions of HB 2912. The commission currently has procedures for preparation of compliance summaries for waste disposal and air emission permit applications, enforcement actions, and participation in the voluntary Clean Texas Program; however, these procedures are not standardized. House Bill 2912 requires the commission to standardize procedures and broaden the use of compliance histories to cover more applications before the commission, including licenses, certificates, registrations, approvals, permits by rule, standard permits, and other forms of authorizations issued by the commission. House Bill 2912 further requires compliance histories to be used in applicable decisions made by the agency, including decisions regarding permit issuance, renewal, amendment, modification, denial, suspension, or revocation; enforcement; the use of unannounced inspections; and participation in innovative programs.

The proposed rule is intended to implement uniform standards for evaluating compliance histories by defining the components to be included in all evaluations. This rulemaking is procedural in nature and does not propose additional regulatory requirements; therefore, the commission does not anticipate fiscal implications for small or micro-businesses to comply with the proposed rule.

LOCAL EMPLOYMENT IMPACT

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 affect.

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 it 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, this 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 adds the new requirements relating to the components of compliance history. These requirements are contained in TWC, §5.753. 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 this

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, §5.753. The proposed rule does not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The proposed 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, §5.753. 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 following is a summary of that assessment. Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this proposed rule since it is reasonably taken to fulfill an obligation mandated by state law. The specific purpose of this proposed rule is to incorporate the new requirements relating to the components of compliance history, which are contained in TWC, §5.753. Promulgation and enforcement of this proposed rule would not affect private real property which is the subject of the rule because the proposed rule language merely incorporates the new requirements relating to the components of compliance history, which are contained in TWC, §5.753. The subject proposed rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the Coastal Management Program.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on November 12, 2001, at 10:00 a.m. at the commission's central office, Building F, Room 2210, 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.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, 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., November 12, 2001, and should reference Rule Log Number 2001-070-060-AD. For further information, please contact Debra Barber, Policy and Regulations Division, at (512) 239-0412.

STATUTORY AUTHORITY

The new section is proposed under THSC, §361.017 and §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; 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; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The new rule 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 rule implements TWC, §5.753, relating to the standard for evaluating compliance history.

CHAPTER 60: COMPLIANCE HISTORY

§60.1

§60.1 Compliance History.

(a) Applicability. The provisions of this chapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401. Specifically, the agency will utilize compliance history when making decisions regarding the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit; enforcement; the use of announced inspections; and participation in innovative programs. For purposes of this chapter, the term “permit” means licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization. This rule only applies to forms of authorization, including temporary authorizations, that require some level of notification to the agency; review; and approval or response. In addition, this rule does not apply to permit actions such as voluntary permit revocations; minor amendments and nonsubstantive corrections to permits; Texas pollutant discharge elimination system and underground injection control minor permit modifications; Class 1 solid waste modifications, except for changes in ownership; municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice; permit alterations; and administrative revisions, unless a motion for reconsideration or a motion to overturn is filed under 30 TAC §50.39 or §50.139 of this title (relating to Motion for Reconsideration; and Motion to Overturn Executive Director’s Decision; respectively) with respect to the listed permit actions. Further, this chapter does not apply to occupational licensing programs under the jurisdiction of the commission. This chapter applies:

(1) in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits, only to applications submitted on or after September 1, 2002;

(2) in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002;

(3) 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; and

(4) with respect to compliance history, for an action taken by the executive director on other forms of authorization, or participation in an innovative program, except for flexible permitting, effective September 1, 2002.

(b) Components. The components of compliance history as specified in this chapter shall apply to an action taken by the agency on or after February 1, 2002. The compliance history shall include multimedia compliance-related information about a person, specific to the site which is under review, as well as other sites which are under the commission's jurisdiction and owned or operated by the same person. The compliance history shall cover at least a five-year period. The compliance period includes at least the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of the inspection that initiates enforcement; for purposes of

determining whether an announced inspection is appropriate, the five-year period preceding an inspection; or the five-years prior to the date the application for participation in an innovative program is received by the executive director. The components are:

(1) any enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with an environmental law, regulation, permit, order, consent decree, or other requirement under the jurisdiction of the commission or the EPA;

(2) notwithstanding any other provision of the TWC, orders issued under TWC, §7.070 on or after February 1, 2002;

(3) to the extent readily available to the executive director, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states;

(4) chronic excessive emissions events. For purposes of this chapter, the term “emissions event” is the same as defined in THSC, §382.0215(a);

(5) any information required by law or any compliance-related requirement necessary to maintain federal program authorization;

(6) the dates of investigations;

(7) all written notices of violation issued on or after February 1, 2002, except for those administratively determined to be without merit, specifying each violation of an environmental law, regulation, permit, order, consent decree, or other requirement;

(8) the date of letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995;

(9) the type of environmental management systems, if any, used for environmental compliance;

(10) any voluntary on-site compliance assessments conducted by the executive director under a special assistance program;

(11) participation in a voluntary pollution reduction program;

(12) a description of early compliance with or offer of a product that meets future state or federal government environment requirements; and

(13) the name and telephone number of an agency staff person to contact for additional information regarding compliance history.

(c) Change in ownership. In addition to the requirements in subsection (b) of this section, if ownership of the site changed during the five-year compliance period, a distinction of compliance

history of the site under each owner during that five-year period shall be made. Specifically, for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review.

