

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §50.113, Applicability and Action on Application. The commission adopts these revisions to Chapter 50, Subchapter F, to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history. Section 50.113 is adopted *without change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2922) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

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

The commission currently has procedures for actions on applications and other authorization in Chapter 50. Specifically, in §50.113, there is a discussion under subsection (d) regarding what the commission may act on without holding a contested case hearing. Subsection (d)(4) states that the commission may act on an application for a wastewater discharge permit renewal or amendment under TWC, §26.028(d) without holding a contested case hearing, unless the commission determines that an applicant’s

compliance history for the preceding five years raises issues regarding the applicant's ability to comply with a material term of its permit.

30 TAC Chapter 60, Compliance History, §60.1, was adopted December 19, 2001 and published in the January 4, 2002 issue of the *Texas Register* (27 TexReg 191). Section 60.1 specifies the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization requiring agency approval, to implement the requirement of HB 2912, §4.01 to "develop a uniform standard for evaluating compliance history." New sections to Chapter 60 are being adopted concurrently in this issue of the *Texas Register* as part of this rulemaking to implement further requirements of HB 2912, §4.01 to establish rules for the classification and use of compliance history. HB 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401. Chapter 60 will be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters, and compliance history specifics currently provided for elsewhere in commission rules are being deleted. For this reason, the amendment to §50.113 is adopted. Other chapters of existing regulations (30 TAC Chapters 55, 116, 122, and 281) are being adopted concurrently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasoning.

The commission adopted a compliance period of five years in §60.1. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director.

According to HB 2912, §18.05, the agency must begin using the new components of compliance history for actions taken by the agency on or after February 1, 2002. Additionally, §18.05 specifies that classification and use rules, which are currently being adopted in Chapter 60, will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION DISCUSSION

The adopted changes to §50.113 will remove the reference to the length of time of the compliance history, and will instead reference Chapter 60, Compliance History. The commission adopts these modifications because, in implementing the requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history. Further, the commission adopts these changes to reflect the changes made to TWC, §26.028(d)(4) through HB 2912, as TWC, §26.028(d) is referenced in §50.113(d)(4), and §50.113(d)(4) reflects the statutory language.

No changes to §§50.113(a) and (b), 50.113(c)(1) - (3), or to 50.113(d)(1) - (3) were proposed. The commission adopts a minor administrative change to §50.113(c)(4) to conform with *Texas Register* style requirements.

The commission adopts modification to existing §50.113(d)(4) by deleting “for the preceding five years,” and adding in its place “as determined under Chapter 60 of this title (relating to Compliance History).” This modification is adopted because compliance history is addressed in Chapter 60. The new sections to Chapter 60 which are being adopted in concurrent rulemaking will address the classification and use of compliance history. Section 60.1 already defines the components of compliance history as well as the length of time a compliance history encompasses. Therefore, the commission is adding a reference to Chapter 60 to the text.

This adoption reflects the modification to TWC, §26.028(d)(4), as found in HB 2912, §16.05, in which a similar change to the statutory language was made. Specifically, the phrase “for the preceding five years” was deleted, and was replaced with “under the method for evaluating compliance history developed by the commission under Section 5.754.” TWC, §26.028(d)(4) now reads, “Notwithstanding any other provision of this chapter, the commission, at a regular meeting without the necessity of holding a public hearing, may approve an application to renew or amend a permit if: ... the commission determines that an applicant's compliance history under the method for evaluating compliance history developed by the commission under Section 5.754 raises no issues regarding the applicant's ability to comply with a material term of its permit.”

No changes to §50.113(d)(5) were proposed.

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 determined that the rulemaking is not subject to §2001.0225 because the adopted rule does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of this rule is to protect the environment and reduce the risk to human health from environmental exposure, it is not a "major environmental rule" because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rule merely establishes the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted 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 adopted rule 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 requirements of TWC, §5.754. The adopted rule does not exceed the requirements of a delegation agreement because there is no applicable

delegation agreement. The rule is not being adopted solely under the general powers of the agency, but is being adopted under the express requirements of TWC, §5.754. The commission invited public comment on the draft regulatory impact analysis determination and received no comments in response.

TAKINGS IMPACT ASSESSMENT

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

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this 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. The commission invited public comment on the CMP determination and received no comments in response.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. No individuals provided oral comments related to Chapter 50 at the hearing.

SUBCHAPTER F: ACTION BY THE COMMISSION

§50.113

STATUTORY AUTHORITY

The amendment is adopted 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 amendment 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; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

§50.113. Applicability and Action on Application.

(a) **Applicability.** This subchapter applies to applications that are declared administratively complete on or after September 1, 1999. Applications that are declared administratively complete before September 1, 1999 are subject to Subchapter B of this chapter (relating to Action by the Commission).

(b) This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.

(c) After the deadline for filing a request for reconsideration or contested case hearing under §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing), the commission may act on an application without holding a contested case hearing or acting on a request for reconsideration, if:

(1) no timely request for reconsideration or hearing has been received;

(2) all timely requests for reconsideration or hearing have been withdrawn, or have been denied by the commission;

(3) a judge has remanded the application because of settlement; or

(4) for applications under Texas Water Code, Chapters 26 and 27 and Texas Health and Safety Code, Chapters 361 and 382, the commission finds that there are no issues that:

(A) involve a disputed question of fact;

(B) were raised during the public comment period; and

(C) are relevant and material to the decision on the application.

(d) Without holding a contested case hearing, the commission may act on:

(1) an application for any air permit amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted;

(2) an application for any initial issuance of an air permit for a voluntary emission reduction or electric generating facility;

(3) an application for a hazardous waste permit renewal under §305.631(a)(8) of this title (relating to Renewal);

(4) an application for a wastewater discharge permit renewal or amendment under Texas Water Code, §26.028(d), unless the commission determines that an applicant's compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises issues regarding the applicant's ability to comply with a material term of its permit; and

(5) other types of applications where a contested case hearing request has been filed but no opportunity for hearing is provided by law.