

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §50.113, Applicability and Action on Application. The commission proposes these revisions to Chapter 50, Action on Applications and Other Authorizations; Subchapter F, Action by the Commission, to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

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

The commission 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. Paragraph (4) of subsection (d) 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 proposed 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. The commission proposes that Chapter 60 would be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters, and further that compliance history specifics currently provided for elsewhere in commission rules be deleted. For this reason, the amendment to §50.113 is proposed. Other chapters of existing regulations (30 TAC Chapters 55, 116, 122, and 281) are being proposed 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 proposed in Chapter 60, will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION DISCUSSION

The proposed changes to §50.113 would remove the reference to the length of time of the compliance history, and would instead reference Chapter 60, Compliance History. The commission proposes 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 proposes 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), or to §50.113(d)(1) - (3) are proposed. The commission proposes to make a minor administrative change to §50.113(c)(4) to conform with *Texas Register* style requirements.

The commission proposes to modify 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 proposed because compliance history is addressed in Chapter 60. The new sections to Chapter 60 which are being proposed 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 proposes to add a reference to Chapter 60 to the text. A minor administrative change is also proposed to §50.113(c)(4) to conform with *Texas Register* style requirements.

This proposal 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) are proposed.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed amendment is in effect, significant fiscal implications are not anticipated for units of state and local government due to implementation of the proposed amendment.

The proposed rulemaking is intended to make changes to the commission's procedures for actions on applications and other authorizations in order to implement certain provisions of HB 2912. The bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. In a concurrent rulemaking, the commission is proposing to establish the classification and use of the components of compliance history under Chapter 60. In existing Chapter 50 rules, an application for a wastewater discharge permit renewal can be approved without 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 the permit requirements. This rulemaking is intended to update existing language in Chapter 50 to refer to the compliance history requirements proposed in the concurrent Chapter 60 rulemaking.

The commission already reviews compliance history for wastewater discharge permits; therefore, the commission does not anticipate significant fiscal implications for units of state or local government that

apply to renew or amend a wastewater discharge permit. The proposed amendment is intended to consolidate compliance history requirements into Chapter 60.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined for each of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of implementing the proposed amendment will be compliance with legislative requirements to establish a set of standards to classify a person's compliance history.

The proposed rulemaking is intended to make changes to the commission's procedures for actions on applications and other authorizations in order to implement certain provisions of HB 2912. The bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. In a concurrent rulemaking, the commission is proposing to establish the classification and use of the components of compliance history under Chapter 60. This rulemaking is intended to update existing language in Chapter 50 to refer to the compliance history requirements proposed in the concurrent Chapter 60 rulemaking.

The commission already reviews compliance history for wastewater discharge permits; therefore, the commission does not anticipate significant fiscal implications for individuals and businesses that apply to renew or amend a wastewater discharge permit. The proposed amendment is intended to consolidate compliance history requirements into Chapter 60.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendment, which is intended to make changes to the commission's procedures for actions on applications and other authorizations in order to implement certain provisions of HB 2912. The bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. In a concurrent rulemaking, the commission is proposing to establish the classification and use of the components of compliance history under Chapter 60. This rulemaking is intended to update existing language in Chapter 50 to refer to the compliance history requirements proposed in the concurrent Chapter 60 rulemaking.

The commission already reviews compliance history for wastewater discharge permits; therefore, the commission does not anticipate significant fiscal implications for small or micro-businesses that apply to renew or amend a wastewater discharge permit. The proposed amendment is intended to consolidate compliance history requirements into Chapter 60.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed amendment does not adversely affect a local economy in a material way for the first five years that the proposed amendment is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

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

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

TAKINGS IMPACT ASSESSMENT

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

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission 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. This proposed rulemaking, which is administrative, does not relax any existing standards. Rather, the intent of the proposed rulemaking is to increase compliance with existing standards and rule requirements.

The commission seeks public comment on the consistency of the proposed amendment with applicable CMP goals and policies.

ANNOUNCEMENT OF HEARING

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

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

SUBMITTAL OF COMMENTS

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

SUBCHAPTER F: ACTION BY THE COMMISSION

§50.113

STATUTORY AUTHORITY

The amendment is proposed under THSC, §361.017 and §361.024, which provide 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; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

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

§50.113. Applicability and Action on Application.

(a) - (b) (No change.)

(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) - (3) (No change.)

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

(A) - (C) (No change.)

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

(1) - (3) (No change.)

(4) an application for a wastewater discharge permit renewal or amendment under [§26.028(d) of the] 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) [for the preceding five years] raises issues regarding the applicant's ability to comply with a material term of its permit; and

(5) (No change.)