

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §55.211, Commission Action on Requests for Reconsideration and Contested Case Hearing. The commission adopts these revisions to Chapter 55, 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 55.211 is adopted *without change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2927) 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 requests for reconsideration and contested case hearings in Chapter 55. Specifically, in §55.211, there is a discussion under subsection (d) regarding when the commission may refer an application to the State Office of Administrative Hearings (SOAH). Subsection (d)(3) states that the commission may refer an application to SOAH if the commission determines that the application is for renewal of a hazardous waste permit and the applicant’s compliance history for the preceding five years raises an issue regarding the applicant’s ability to

comply with a material term of its permit. Subsection (d)(4) states that the commission may refer an application to SOAH if the application is for renewal of a wastewater discharge permit and the applicant's compliance history for the preceding five years raises an issue 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* (26 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 §55.211 is adopted. Other chapters of existing regulations (30 TAC Chapters 50, 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 §55.211 will remove the references 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 THSC, §361.088(f) and TWC, §26.028(d)(4) through HB 2912, as

§55.211(d)(3) reflects the statutory language in THSC, §361.088(f), and §55.211(d)(4) reflects the statutory language in TWC, §26.028(d)(4).

No changes to §55.211(a) - (c), (d)(1) or (2), or (e) or (f) were proposed.

The commission adopts modification to §55.211(d)(3) by deleting “for the preceding five years” from the text, 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 adopts an added reference to Chapter 60 in the text.

This adoption reflects the modification to THSC, §361.088(f), as found in HB 2912, §16.11, in which a similar change to the statutory language was made. Specifically, the phrase “for the preceding five years” was deleted and replaced with “under the method for evaluating compliance history developed by the commission under Section 5.754, Water Code.” THSC, §361.088(f) now reads, “Notwithstanding Subsection (e), 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, Water Code, raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing.”

The commission also adopts modification to §55.211(d)(4) by deleting “for the preceding five years” from the text, and adding in its place “as determined under Chapter 60 of this title.” These modifications are 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 adopts an added reference to Chapter 60 in 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 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.”

The commission adopts an administrative change to §55.211(g) by deleting “(relating to Judges)” to avoid repetition.

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 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 55 at the hearing.

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR
CONTESTED CASE HEARING**

§55.211

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.

§55.211. Commission Action on Requests for Reconsideration and Contested Case Hearing.

- (a) Commission consideration of the following items is not itself a contested case subject to the

APA:

- (1) public comment;
- (2) executive director's response to comment;
- (3) request for reconsideration; or
- (4) request for contested case hearing.

(b) The commission will evaluate public comment, executive director's response to comment, requests for reconsideration, and requests for contested case hearing and may:

- (1) grant or deny the request for reconsideration;
- (2) determine that a hearing request does not meet the requirements of this subchapter, and act on the application; or
- (3) determine that a hearing request meets the requirements of this subchapter and:

(A) if the request raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter in writing by filing a

withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and that are relevant and material to the commission's decision on the application:

(i) specify the number and scope of the specific factual issues to be referred to SOAH;

(ii) specify the maximum expected duration of the hearing; and

(iii) direct the chief clerk to refer the issues to SOAH for a hearing; or

(B) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or

(4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the requestor is an affected person. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA. If the commission determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the application if either the commission has specified, or the parties have agreed to, the number and scope of the issues and maximum expected duration of the hearing.

(c) A request for a contested case hearing shall be granted if the request is:

(1) made by the applicant or the executive director;

(2) made by an affected person if the request:

(A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

(B) is timely filed with the chief clerk;

(C) is pursuant to a right to hearing authorized by law; and

(D) complies with the requirements of §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing).

(d) Notwithstanding any other commission rules, the commission may refer an application to SOAH if the commission determines that:

(1) a hearing would be in the public interest; or

(2) the application is for an amendment, modification, or renewal of an air permit under Texas Health and Safety Code, §382.0518 or §382.055 that involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(3) the application is for renewal of a hazardous waste permit, subject to §305.65(a)(8) of this title (relating to Renewal) and the applicant's compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises an issue regarding the applicant's ability to comply with a material term of its permit.

(4) the application is for renewal or amendment of a wastewater discharge permit and the applicant's compliance history as determined under Chapter 60 of this title raises an issue regarding the applicant's ability to comply with a material term of its permit.

(e) If a request for a contested case hearing is granted, a decision on a request for reconsideration or contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A judge may consider additional issues beyond the list referred by the commission as provided by §80.4(c)(16) of this title (relating to Judges). A person whose request for reconsideration or contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on

an application. Failure to seek party status shall be deemed a withdrawal of a person's request for reconsideration or hearing request.

(f) If all requests for reconsideration or contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed no more than 20 days after the date the person or attorney of record is notified of the commission's final decision or order. A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail. If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §361.321 or §382.032, or under the APA.

(g) If all hearing requestors whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before issuance of the notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under §80.4(c)(16) of this title.