

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §55.211, Commission Action on Requests for Reconsideration and Contested Case Hearing. The commission proposes these revisions to Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Subchapter F, Requests for Reconsideration or Contested Case Hearing, 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 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).

Paragraph (3) of subsection (d) 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. Paragraph (4) of subsection (d) 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 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 §281.21 is proposed. Other chapters of existing regulations (30 TAC Chapters 50, 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 §55.211 would remove the references 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 THSC, §361.088(f) and TWC, §26.028(d)(4) through HB 2912,

as §55.2113(d)(3) reflects the statutory language in THSC, §361.088(f), and §55.2113(d)(4) reflects the statutory language in TWC, §26.028(d)(4).

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

The commission proposes to modify §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 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.

This proposal 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 was 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 proposes to modify §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 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.

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 §55.211(e) - (f) are proposed. The commission proposes to make an administrative change to §55.21(g) by deleting “(relating to Judges)” to avoid repetition.

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 requests for reconsideration and contested case hearings 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 55 rules, the commission can refer an application for renewal of a hazardous waste or wastewater discharge permit to SOAH for a contested case hearing if 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 55 to refer to the compliance history requirements proposed in the concurrent Chapter 60 rulemaking.

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

local government that apply to renew either of these permits. 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 requests for reconsideration and contested case hearings 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 55 to refer to the compliance history requirements proposed in the concurrent Chapter 60 rulemaking.

The commission already reviews compliance history for hazardous waste and wastewater discharge permits; therefore, the commission does not anticipate significant fiscal implications for individuals or businesses that apply to renew either of these permits. 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 requests for reconsideration and contested case hearings 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 55 to refer to the compliance history requirements proposed in the concurrent Chapter 60 rulemaking.

The commission already reviews compliance history for hazardous waste and wastewater discharge permits; therefore, the commission does not anticipate significant fiscal implications for small or micro-businesses that apply to renew either of these permits. 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 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, §5.754.

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: REQUESTS FOR RECONSIDERATION OR
CONTESTED CASE HEARING**

§55.211

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.

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

(a) - (c) (No change.)

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

(1) - (2) (No change.)

(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) [for the preceding five years] 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 [for the preceding five years] raises an issue regarding the applicant's ability to comply with a material term of its permit.

(e) - (f) (No change.)

(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 [(relating to Judges)].