

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §116.110 and §116.730; new §116.773 and §116.915; and the repeal of §§116.11, 116.120 - 116.123, 116.125, and 116.126. The commission adopts these revisions to Chapter 116 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 116.915 is adopted *with changes* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2945). Sections 116.11, 116.110, 116.120 - 116.123, 116.125, 116.126, 116.730, and 116.773 are adopted *without changes* and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES AND REPEALS

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 preparation of compliance summaries for new source review (NSR) permit applications for air emissions under the authority of the Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), Chapter 382, and these components are specified in

existing §116.122. These requirements are also referred to in existing §116.311 and §116.730. The associated procedures specify that a compliance summary shall cover five years and 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 facilities with sites 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.

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 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, amendments to §116.110 and §116.730, the addition of new §116.773 and §116.915, and the repeal of §§116.11, 116.120 - 116.123, 116.125, and 116.126 are adopted. Other chapters of existing regulations (30 TAC Chapters 50, 55, 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 commission 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 BY SECTION DISCUSSION

The adopted changes to this chapter will remove all references to compliance summaries and the components of compliance history as currently specified in this chapter, and will, where applicable, provide references to Chapter 60. The commission adopts these modifications because, in implementing certain requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history. In order to avoid redundancy or confusion, the commission is removing the compliance history discussion from this chapter.

The commission adopts the repeal of existing §116.11, Compliance History Definitions. The definitions in this section, which apply to NSR permit applications submitted under THSC, Chapter 382, have been superceded by the components specified in §60.1, as well as the adopted new sections to Chapter 60 regarding classification and use of compliance history included in concurrent rulemaking. Therefore, it is appropriate to repeal §116.11 because it will no longer be relevant or applicable with the (previous) adoption of §60.1, coupled with the adoption of new §60.2 and §60.3, as part of this rulemaking.

The commission adopts an amendment to §116.110, Applicability. The adopted modification will add new §116.110(c) to reflect that compliance history reviews are required under Chapter 60 for certain authorizations listed in §116.110(a) and (b), or in §116.116 (relating to Changes to Facilities). This is a new requirement that must be added in response to implementation of HB 2912, §4.01 and is consistent with §60.1(a). As a result of this addition, existing subsections (c) - (f) of this section are re-

lettered as subsections (d) - (g). No changes to the text of these subsections were proposed except for a minor formatting change in re-lettered subsection (d).

The commission adopts the repeal of all sections in Division 2, Compliance History which are: §116.120, Applicability; §116.121, Exemptions; §116.122, Contents of Compliance History; §116.123, Effective Dates; §116.125, Preservation of Existing Rights and Procedures; and §116.126, Voidance of Permit Applications. The components of compliance history as identified in these existing sections, and which apply to permit applications submitted under THSC, Chapter 382, have been superceded by the components specified in §60.1, coupled with the adopted new sections of Chapter 60 regarding classification and use of compliance history included in concurrent rulemaking.

The commission adopts an amendment to §116.730, Compliance History. The adopted modification will change the reference to compliance history requirements in §§116.120 - 116.123, 116.125, and 116.126 which are repealed through this rulemaking, to Chapter 60 in order to accurately reflect the location of applicable compliance history requirements for flexible permit applications.

The commission adopts new §116.773, Compliance History, to reflect that compliance history evaluations are required under Chapter 60 for all permit reviews conducted under Subchapter H of this chapter. This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

The commission adopts new §116.915, Compliance History, to reflect that compliance history evaluations are required under Chapter 60 for all permit reviews conducted under Subchapter I of this chapter. This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

#### 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 rules do not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of these rules is to protect the environment and reduce the risk to human health from environmental exposure, they are not "major environmental rules" because they do 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 rules 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 rules merely establish 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 rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rules do not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rules do not exceed a standard set by

federal law, because there is no comparable federal law. The adopted rules do not exceed an express requirement of state law, because they are consistent with the requirements of TWC, §5.754. The adopted rules do not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rules are not being adopted solely under the general powers of the agency, but are being adopted under the express requirements of TWC, §5.754. The commission invited public comment on the draft regulatory impact analysis determination and no comments were received.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these adopted rules in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rules 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 these adopted rules would not affect private real property which is the subject of the rules because the adopted rules set forth the standards for the classification and use of a person's compliance history, as required by TWC, §5.754. The subject adopted rules do 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 is consistent. The commission invited comment on the consistency of the proposed rulemaking with applicable CMP goals and policies and no comments were received.

#### 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 116 at the hearing. During the comment period Association of Electric Companies of Texas, Inc. (AECT); and Reliant Energy (Reliant) filed written comments opposing the proposal in part and suggested changes to the proposal as stated in the RESPONSE TO COMMENTS section of this preamble.

#### RESPONSE TO COMMENTS

AECT and Reliant commented regarding proposed §116.915. AECT and Reliant both requested that the following sentence be added to the end of proposed §116.915: "The permitting of natural gas-fired grandfathered electric generating facility permits (EGFs) under §116.911(d) shall not be subject to compliance history review under Chapter 60." AECT and Reliant asserted that this is appropriate because under proposed §116.911(d), which is being developed under separate rulemaking, "all natural gas-fired EGFs that submitted a SB 7 application under §116.911(a) will be 'considered permitted' for the emissions of all air contaminants from such EGFs." AECT and Reliant further asserted that as such, EGFs will involve substantive review and approval or disapproval by the commission, and therefore may not be subject to the compliance history requirements in Chapter 60 based on §60.1(a)(3).

**The commission agrees with this comment, and §116.915 as adopted has been revised to incorporate the suggested change. The revised language acknowledges that the initial**

**authorization of certain grandfathered natural gas-fired EGFs will not be subject to a compliance history review, but a modification, or the amendment or renewal of an EGF permit will be subject to a compliance history review under Chapter 60.**

## **SUBCHAPTER A: DEFINITIONS**

### **§116.11**

#### **STATUTORY AUTHORITY**

The repeal is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The repeal 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.

#### **§116.11. Compliance History Definitions.**

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 1: PERMIT APPLICATION**

**§116.110**

**STATUTORY AUTHORITY**

The amendment is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. 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; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

**§116.110. Applicability.**

(a) Permit to construct. Before any actual work is begun on the facility, any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall either:

(1) obtain a permit under §116.111 of this title (relating to General Application);

(2) satisfy the conditions for a standard permit under the requirements in:

- (A) Subchapter F of this chapter (relating to Standard Permits);
  
  - (B) Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);
  
  - (C) Chapter 332 of this title (relating to Composting); or
  
  - (D) Chapter 330, Subchapter N of this title (relating to Landfill Mining);
- (3) satisfy the conditions for a flexible permit under the requirements in Subchapter G of this chapter (relating to Flexible Permits);
- (4) satisfy the conditions for facilities permitted by rule under Chapter 106 of this title (relating to Permits by Rule); or
- (5) satisfy the criteria for a de minimis facility or source under §116.119 of this title (relating to De Minimis Facilities or Sources).
- (b) Modifications to existing permitted facilities. Modifications to existing permitted facilities may be handled through the amendment of an existing permit.

(c) Compliance history. For all authorizations listed in subsections (a) and (b) of this section or §116.116 of this title (relating to Changes to Facilities), compliance history reviews may be required under Chapter 60 of this title (relating to Compliance History).

(d) Exclusion. Owners or operators of affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 Code of Federal Regulations Part 63)) are not authorized to use:

(1) a permit by rule under Chapter 106 of this title;

(2) standard permits under Subchapter F of this chapter that do not meet the requirements of Subchapter C of this chapter; or

(3) §116.116(e) of this title (relating to Changes to Facilities).

(e) Change in ownership.

(1) Within 30 days after the change of ownership of a facility permitted under this chapter, the new owner shall notify the commission and certify the following:

(A) the date of the ownership change;

(B) the name, address, phone number, and contact person for the new owner;

(C) an agreement by the new owner to be bound by all permit conditions and all representations made in the permit application and any amendments and alterations;

(D) there will be no change in the type of pollutants emitted; and

(E) there will be no increase in the quantity of pollutants emitted.

(2) The new owner shall comply with all permit conditions and all representations made in the permit application and any amendments and alterations.

(f) Submittal under seal of Texas licensed professional engineer. Applications for permit or permit amendment with an estimated capital cost of the project above \$2 million, and not subject to any exemption contained in the Texas Engineering Practice Act (TEPA), shall be submitted under seal of a Texas licensed professional engineer. However, nothing in this subsection shall limit or affect any requirement which may apply to the practice of engineering under the TEPA or the actions of the Texas Board of Professional Engineers. The estimated capital cost is defined in §116.141 of this title (relating to Determination of Fees).

(g) Responsibility for permit application. The owner of the facility or the operator of the facility authorized to act for the owner is responsible for complying with this section.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 2: COMPLIANCE HISTORY**

**§§116.120 - 116.123, 116.125, 116.126**

**STATUTORY AUTHORITY**

The repeals are adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The repeals are 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; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

**§116.120. Applicability.**

**§116.121. Exemptions.**

**§116.122. Contents of Compliance History.**

**§116.123. Effective Dates.**

**§116.125. Preservation of Existing Rights and Procedures.**

**§116.126. Voidance of Permit Applications.**

## **SUBCHAPTER G: FLEXIBLE PERMITS**

### **§116.730**

#### **STATUTORY AUTHORITY**

The amendment is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. 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; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

#### **§116.730. Compliance History.**

As part of a flexible permit review, or the review of an amendment of a flexible permit, or renewal of an existing flexible permit, the provisions found in Chapter 60 of this title (relating to Compliance History) shall be applicable to the facility, group of facilities, or account being permitted, amended, or renewed.

**SUBCHAPTER H: PERMITS FOR GRANDFATHERED FACILITIES**

**§116.773**

**STATUTORY AUTHORITY**

The new section is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The new section 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; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

**§116.773. Compliance History.**

For all permit reviews under this subchapter, compliance history reviews are required under Chapter 60 of this title (relating to Compliance History).

**SUBCHAPTER I: ELECTRIC GENERATING FACILITY PERMITS**

**§116.915**

**STATUTORY AUTHORITY**

The new section is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The new section 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; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

**§116.915. Compliance History.**

For all permit reviews under this subchapter, compliance history reviews are required under Chapter 60 of this title (relating to Compliance History). However, any grandfathered natural gas-fired electric generating facility (EGF) which is considered permitted for the emissions of all air contaminants under §116.911(d) of this title (relating to Electric Generating Facility Permit Application) will be subject to a compliance history review only for a modification, or the amendment or renewal of the facility's EGF permit.

