

The Texas Natural Resource Conservation Commission (commission) adopts new §122.162, Compliance History Requirements. The commission adopts this new section to Chapter 122, Subchapter B, Division 5, 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 122.162 is adopted *with change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2952).

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.”

Prior to adoption of this rule, the commission did not have procedures for evaluation of compliance histories for federal operating permit applications for air emissions.

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* 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 be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters. For this reason, new §122.162 is adopted to ensure operating permit applicants understand and are aware of these new evaluation criteria. Other chapters of existing regulations (30 TAC Chapters 50, 55, 116, and 281) are being adopted currently 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. 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 new section will specify the new requirements of compliance history evaluation and use.

The commission adopts this addition because, in implementing the requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history.

The commission adopts new §122.162, Compliance History Requirements. The adopted new section will specify the federal operating permit applications for air emissions which will require the evaluation of compliance histories in decisions pertaining to issuance, significant revisions, reopenings, and renewals of such permits, as a result of implementation of HB 2912.

Adopted new §122.162 states, “The executive director shall conduct compliance history reviews under Chapter 60 of this title (relating to Compliance History) for the following actions:” and then lists the specific actions in paragraphs (1) - (10). This subsection is adopted to reflect that one of the conditions which must be met prior to decisions regarding the listed actions being taken is the completion of a compliance history review, as required by Chapter 60. This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

The specific actions included in adopted new paragraphs (1) - (10) include: initial permit issuances under §122.201, Initial Permit Issuance; significant permit revisions under §122.221, Procedures for Significant Permit Revisions; permit reopenings under §122.231(a) or (b), Permit Reopenings; permit renewals under Subchapter C, Division 4, Permit Renewals; initial acid rain permit issuances under §122.410, Operating Permit Interface; acid rain permit revisions for fast-track modifications under

§122.414(a)(2), Acid Rain Permit Revisions; acid rain permit modifications under §122.414(a)(3); acid rain permit reopenings under §122.231(a) or (b); initial authorizations to operate under a general operating permit under §122.502, Authorization to Operate; and renewals of authorizations to operate under a general operating permit under §122.505, Renewal of the Authorization to Operate Under a General Operating Permit.

The commission has modified the rule from proposal as follows: changed the word “will” to “shall” in the first sentence for clarity and consistency with modifications made to other chapters in this rulemaking; moved proposed subsection (b) to adopted subsection (a)(9) because it was erroneously separated out in the proposal as a form of authorization not always requiring preparation and consideration of a compliance history priority to issuance; reworded the text of proposed subsection (b) as adopted in subsection (a)(9) for grammatical correctness as a result of moving it; renumbered the paragraph proposed as (a)(9) to (a)(10) as a result of inserting the paragraph before it; and, as a result of deleting proposed subparagraph (b), the “(a)” has been deleted in front of the adopted rule language, as it is now an “implied (a).”

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 no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007. 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 this 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 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 122 at the hearing. During the comment period Public Citizen (PC) 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

PC commented regarding proposed §122.162(a)(8), stating that it believed that compliance histories should be considered not just for those operating permit reopenings considered under §122.231(a) and (b), but also for all other operating permit reopenings. PC went on to say that it "sees no explanation in

the rule preamble for exempting reopenings under §122.231(c) from the compliance history rules and believes that such exemption should be eliminated."

The commission responds that §60.1(a)(3) states that the compliance history chapter only applies to forms of authorization that require the agency to make a substantive review prior to approval of the authorization. Reopenings to incorporate requirements under 30 TAC Chapter 106, Subchapter A or Chapter 116 or any term or condition of any preconstruction permit do not receive a "substantive review" as that term is defined in §60.1(a)(3). Therefore, Chapter 60 compliance history review requirements do not apply to reopenings under §122.231(c). No changes have been made in response to this comment.

SUBCHAPTER B: PERMIT REQUIREMENTS

DIVISION 5: MISCELLANEOUS

§122.162

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.

§122.162. Compliance History Requirements.

The executive director shall conduct compliance history reviews under Chapter 60 of this title (relating to Compliance History) for the following actions:

- (1) initial permit issuances under §122.201 of this title (relating to Initial Permit Issuance);

(2) significant permit revisions under §122.221 of this title (relating to Procedures for Significant Permit Revisions);

(3) permit reopenings under §122.231(a) or (b) of this title (relating to Permit Reopenings);

(4) permit renewals under Subchapter C, Division 4 of this chapter (relating to Permit Renewals);

(5) initial acid rain permit issuances under §122.410 of this title (relating to Operating Permit Interface);

(6) acid rain permit revisions for fast-track modifications under §122.414(a)(2) of this title (relating to Acid Rain Permit Revisions);

(7) acid rain permit modifications under §122.414(a)(3) of this title;

(8) acid rain permit reopenings under §122.231(a) or (b) of this title;

(9) authorizations to operate under a general operating permit under §122.502 of this title (relating to Authorization to Operate); and

(10) renewals of authorizations to operate under a general operating permit under §122.505 of this title (relating to Renewal of the Authorization to Operate Under a General Operating Permit).