

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §281.21, Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary. The commission adopts these revisions to Chapter 281, Subchapter A, 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 281.21 is adopted *without change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2959).

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 preparation of compliance summaries for permit applications for waste disposal activities conducted under the authority of TWC, Chapters 26 and 27; the Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361; and the Texas Radiation Control Act, THSC, Chapter 401, which are specified in existing §281.21(d). These current procedures specify that a compliance summary shall cover at least the two-year period preceding the date on which the technical review is completed and shall include: 1) the date(s) and

descriptions of any citizen complaints received; 2) the date(s) of all agency inspections, and for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact; 3) the date(s) of any agency enforcement action and the applicant's response to such action; 4) the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility contingency plan, if applicable; and 5) the name and telephone number of a person to contact for additional 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, the amendment to §281.21 is adopted. Other chapters of existing regulations (30 TAC Chapters

50, 55, 116, and 122) are being adopted concurrently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasons.

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 for 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 §281.21 will remove all references to compliance summaries and the components of 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. In order to avoid redundancy or confusion, the commission is removing the compliance history discussion from §281.21, leaving only a reference to the fact that, upon completion of technical review and prior to issuance of public notice, the executive director shall send the compliance history prepared under Chapter 60, together with the draft permit, technical summary if applicable, and environmental analysis if applicable, to the applicant and on request, to any other person.

The commission adopts modification of the title of §281.21 from “Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary” to “Draft Permit, Technical Summary, Fact Sheet, and Compliance History” to reflect the change in terminology from “compliance summary” to “compliance history” to comport with Chapter 60.

The commission adopts minor administrative changes to §281.21(a) to use the acronyms for the Texas Solid Waste Disposal Act and the Texas Radiation Control Act because they are spelled out in 30 TAC Chapter 3, Definitions. No changes to §281.21(b) - (c) were proposed.

The commission adopts modification to §281.21(d) by deleting all but one sentence from this subsection. Additionally, the remaining sentence is modified to reflect the change in terminology from “compliance summary” to “compliance history” and to reference, with regard to compliance history, Chapter 60. This modification is adopted because the components of compliance history identified in this subsection which apply to permit applications submitted under TWC, Chapters 26 and 27, and

THSC, Chapters 361 and 401, have been superceded by the components specified in §60.1.

Specifically, adopted §281.21(d) will read, “Upon completion of technical review and prior to issuance of public notice, the executive director shall send the compliance history prepared under Chapter 60 of this title (relating to Compliance History), together with the draft permit, technical summary if applicable, and environmental analysis if applicable, to the applicant and on request, to any other person.”

The commission adopts minor administrative changes to §281.21(e) to spell out Texas Pollutant Discharge Elimination Systems, and in subsection (e)(2) to lower case the word “program” for consistency. No changes to §281.21(f) were proposed.

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 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 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 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 public 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 281 at the hearing.

SUBCHAPTER A: APPLICATIONS PROCESSING

§281.21

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; 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.

§281.21. Draft Permit, Technical Summary, Fact Sheet, and Compliance History.

(a) The provisions of this section are applicable to applications for waste disposal activities conducted under the authority of the Texas Water Code, Chapters 26 and 27, the TSWDA, and the TRCA.

(b) The executive director shall prepare a draft permit consistent with all applicable commission rules, unless a recommendation is made not to grant an application. The draft permit will be filed with the commission to be included in the consideration of the application for permit and is subject to change during the course of the proceedings on the application. The draft permit shall be available for public review.

(c) The executive director shall prepare a technical summary which sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The executive director shall send this summary together with the draft permit to the applicant and on request, to any other person. The summary shall include the following information, where applicable:

(1) a brief description of the type of facility or activity which is the subject of the draft permit;

(2) the type and quantity of radioactive materials, wastes, fluids, or pollutants which are proposed to be or are being used, processed, stored, disposed, injected, emitted, or discharged;

(3) a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(4) reasons why any requested variances or alternatives to required standards do or do not appear justified;

(5) a description of the procedures for reaching a final decision on the draft permit, including procedures whereby the public may participate in the final decision; and

(6) the name and telephone number of any persons to contact for additional information.

(d) Upon completion of technical review and prior to issuance of public notice, the executive director shall send the compliance history prepared under Chapter 60 of this title (relating to Compliance History), together with the draft permit, technical summary if applicable, and environmental analysis if applicable, to the applicant and on request, to any other person.

(e) Additional conditions for Texas Pollutant Discharge Elimination System (TPDES) draft permits and fact sheets are as follows.

(1) TPDES draft permits shall include the information required by 40 Code of Federal Regulations (CFR) §124.6(c) - (e), as in effect on the date of TPDES program authorization, as amended, which is adopted by reference; and

(2) A fact sheet shall be prepared for a TPDES permit and shall include the information required by 40 CFR §124.56, as in effect on the date of TPDES program authorization, as amended, which is adopted by reference.

(f) Additional conditions for radioactive material licenses are as follows.

(1) When the executive director is considering an application for a new license or license renewal to dispose of low-level radioactive waste from other persons and determines that the licensed activity may have a significant effect on the human environment, the executive director shall prepare or have prepared a written analysis of the effect on the environment.

(2) The executive director shall make the environmental analysis available to the applicant and the public. The environmental analysis shall be included as part of the record of the commission's proceedings.

