

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §281.21, Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary. The commission proposes these revisions to Chapter 281, Applications Processing; Subchapter A, Application Processing, 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 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 30 TAC §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 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 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, amendment to §281.21 is proposed. Other chapters of existing regulations (30 TAC Chapters 50, 55, 116, and 122) are being proposed 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 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 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 proposed changes to §281.21 would remove all references to compliance summaries and the components of 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. In order to avoid redundancy or confusion, the commission proposes to remove 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 proposes to modify 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 proposes to make 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) are proposed.

The commission proposes to modify §281.21(d) by deleting all but one sentence from this subsection. Additionally, the remaining sentence would be modified to reflect that change in terminology from “compliance summary” to “compliance history” and to reference, with regard to compliance history, Chapter 60. This modification is proposed 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, proposed §281.21(d) would 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 proposes to make 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) are proposed.

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 application processing 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 remove all references to compliance summaries and the components of compliance history

from Chapter 281, because the commission has created a new chapter (Chapter 60) which contains all regulations pertaining to compliance history.

This proposed rulemaking is intended to facilitate the consolidation of the commission's compliance history requirements into Chapter 60. The proposed amendment is procedural in nature and is not anticipated to result in significant fiscal implications for units of state and local government.

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 application processing 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 remove all references to compliance summaries and the components of compliance history from Chapter 281, because the commission has created a new chapter (Chapter 60) which contains all regulations pertaining to compliance history.

The proposed rulemaking is intended to facilitate the consolidation of the commission's compliance history requirements into Chapter 60. The proposed amendment is procedural in nature and are not anticipated to result in significant fiscal implications for individuals or businesses.

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 application processing 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 remove all references to compliance summaries and the components of compliance history from Chapter 281, because the commission has created a new chapter (Chapter 60) which contains all regulations pertaining to compliance history.

The proposed rulemaking is intended to facilitate the consolidation of the commission's compliance history requirements into Chapter 60. The proposed amendment is procedural in nature and is not anticipated to result in significant fiscal implications for small or micro-businesses.

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 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 subject to 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 a 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 A: APPLICATIONS PROCESSING

§281.21

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; 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.

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

(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, [and] the TSWDA [Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361], and the TRCA [Texas Radiation Control Act, Texas Health and Safety Code, Chapter 401].

(b) - (c) (No change.)

(d) [The executive director shall prepare a summary which describes the compliance status of persons applying for permits issued under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361; the Texas Radiation Control Act, Texas Health and Safety Code, Chapter 401; the Injection Well Act, Texas Water Code, Chapter 27; and the Water Quality Control Act, Texas Water Code, Chapter 26. For applications filed under the Texas Solid Waste Disposal Act or the Injection Well Act, the summary shall include the applicant's compliance status with respect to rules, orders, or permits issued by the commission under the authority of both statutes. For applications filed under the Water Quality Control Act, the summary shall include the applicant's compliance status with respect to rules, orders, or permits issued by the commission under the authority of the Texas Water Code. For applications for minor amendments filed under the Texas Radiation Control Act, the executive director may determine that a compliance summary is not necessary.] 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 [summary], 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 compliance summary shall include information relative to the site which is the subject of the current application as well as other facilities owned or operated by the applicant which are under the commission's jurisdiction whether permitted or not. The summary shall cover at least the two-year period preceding the date on which technical review is completed and shall include:]

[(1) the date(s) and description of any citizen complaints received;]

[(2) the date(s) of all agency inspections;]

[(3) for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact and, for radioactive material licenses, any impact on radiation safety;]

[(4) the date(s) of any agency enforcement action and the applicant's response to such action;]

[(5) for applicable facilities, the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility's contingency plan;]

[(6) the name and telephone number of a person to contact for additional information regarding compliance history; and]

[(7) for applications for underground injection control permits submitted or pending on or after May 26, 2001, and before September 1, 2002, a comprehensive compliance summary. The summary shall include the applicant's compliance history, including the compliance history of any corporation or business entity managed, owned, or otherwise closely related to the applicant. Closely related entities include business entities that share common partnership members, association members,

or corporate officers with the applicant; or business entities in which the applicant has an ownership interest of at least 20%. The summary shall include the compliance history for all media regulated by the commission including, but not limited to, underground injection, solid waste, water, and air. The summary shall include the information required in paragraphs (1) - (6) of this subsection.]

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

(1) (No change.)

(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 [Program] authorization, as amended, which is adopted by reference.

(f) (No change.)