

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §60.1 *with changes* to the proposed text as published in the January 15, 2010, issue of the *Texas Register* (34 TexReg 352).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of this rulemaking is to update a cross-reference and to make non-substantive changes to update rule language to current *Texas Register* style and format requirements.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 116, Control of Air Pollution by Permits for New Construction or Modification.

SECTION DISCUSSION

The commission adopts the amendment to §60.1 to update a cross-reference to §39.402. In a concurrent rulemaking, the commission is adopting to repeal existing §39.402 and adopt new §39.402. The preamble for the changes to Chapter 39 explains the changes to the organization of new §39.402, based on comments received in response to the new section. The organization of the new section relocates the text referred in §60.1(a)(4)(H) from §39.402(a)(1) - (3) to §39.402(a)(3)(A) - (C) and (5)(A) - (C).

FINAL 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 it does not meet the definition of a "major environmental rule" as defined in that statute. A

"major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may 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 sole intent of the adopted rulemaking is to correct a cross-reference to §39.402 and make non-substantive formatting and style changes. In a concurrent rulemaking, the commission is adopting to repeal existing §39.402 and adopt new §39.402. The organization of the new section relocates the text referred to in §60.1(a)(4)(H) from §39.402(a)(1) - (3) to §39.402(a)(3)(A) - (C) and (5)(A) - (C). 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 rule merely corrects the changed cross-reference.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The following is that assessment. The specific purpose of this rulemaking is to incorporate a corrected cross-reference to §39.402. The adopted rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal

Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, this rulemaking is not subject to the Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amendment will not require any changes to outstanding federal operating permits.

PUBLIC COMMENT

The commission held a public hearing on January 25, 2010. The hearing was for concurrent rulemakings regarding Chapters 39, 55, 116, and 60, as previously discussed. At the hearing the commission received oral comments from Kelly Haragan on behalf of Citizens for Environmental Justice (CEJ); however, those comments did not refer to nor concern the cross-reference in Chapter 60. The written comments made during the comment period were regarding proposed rules in one or more of the four chapters. The comment period closed on February 16, 2010.

Written comments were received from the Association of Electric Companies of Texas, Inc., (AECT); United States Environmental Protection Agency - Region 6 (EPA); Harris County Public Health & Environmental Services, Environmental Public Health Division (HCPHES); Office of Public Interest Counsel of the TCEQ (OPIC); RPS; Texas Aggregates & Concrete Association (TACA); Texas Chemical

Council (TCC); Texas Cotton Ginners' Association (TCGA); Texas Industry Project (TIP); Texas Oil and Gas Accountability Project (TOGAP); and Zephyr Environmental Corporation (Zephyr). Comments were also received from the University of Texas School of Law Environmental Clinic on behalf of the following environmental groups (Environmental Groups I): CEJ, Texas Environmental Justice Advocacy Services, Galveston Houston Association for Smog Prevention, Environmental Defense Fund, Public Citizen's Texas Office, Sustainable Energy and Economic Development Coalition, Lone Star Chapter Sierra Club, Environmental Integrity Project, KIDS for Clean Air, Citizens Opposed to Power Plants (COPPS) for Clean Air, Multi-County Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Water, Environment and Resources (TPOWER). Written comments were also submitted on behalf of the following environmental groups (Environmental Groups II) to supplement the comments submitted by Environmental Groups I: KIDS for Clean Air; Sustainable Energy and Economic Development (SEED) Coalition; Robertson County: Our Land, Our Lives; COPPs for Clean Air; Multi-County Coalition; Texans Protecting Our Water, TPOWER. Comments were also received from over 1,000 individuals who submitted a form letter; more than 70 of whom provided additional comments.

RESPONSE TO COMMENTS

General Comments

CEJ, Environmental Groups I, and Environmental Groups II supported efforts to improve transparency and public access to permitting process. HCPHES supported the process to address public comment and participation, and supported strengthening it to allow Texas citizens to meaningfully participate in the process. TCC supported the proposed revisions to the public participation rules. An individual thanked the commission for protecting and ensuring that our great state will be enjoyed by generations to come; and that we can set an example for the rest of the nation and Washington. OPIC commented that it

supported change which will allow the public to conduct a more informed review of the commission's analysis of the application and to provide more constructive comments, and that it agreed with the concept of allowing the public to comment following the technical review of all new source review (NSR) applications, regardless of whether someone filed a contested case hearing request soon after the application was filed.

The commission appreciates the support.

Comments Regarding Chapter 60

TACA opposed the changes in Chapters 55, 60, and 116 to the extent that the changes relate to amendments in Chapter 39.

No changes were made in response to this comment. The changes in Chapter 55 public meetings and processing of public comments, were made in response to the Public Participation Notice. TACA's opposition to the changes in Chapter 39 centered on the extended opportunity for public comment and public meeting for minor NSR applications. Although for minor NSR permit applications for which no contested case hearing requests are received will be subject to a longer comment period, the commission's processing of those comments will still be subject to a 60-day regulatory deadline for filing the response to comment after the close of the comment period. As discussed elsewhere, the commission's Office of Public Assistance works diligently to schedule meetings as quickly as reasonably possible. In Chapter 116, the Plant-Wide Applicability Limit notice rule was updated, and a cross-reference in §116.114 was updated. Similarly, only a cross-reference in Chapter 60 was updated. The changes in these chapters do not directly relate to the

issue of concern for TACA.

HCPHES recommended that §39.419 be amended to specifically state that Notice of Application and Preliminary Decision (NAPD) is required to be published for permit renewal applications by applicants with a poor compliance history rating, with specific criteria included as to when the executive director will require such publication. HCPHES also noted that the commission's compliance history rules do not require that compliance histories compiled by local pollution agencies be included in the commission's compliance history. Local pollution agencies such as HCPHES have unique knowledge of the permitted entities in their jurisdictional areas and when they do not have the opportunity to participate, permit decisions are made without the benefit of crucial relevant data that would likely change the outcome of the permitting decision. Enhanced state-local coordination, together with specific procedures for incorporating local governments' compliance histories would inform and strengthen the permit review process.

No changes were made in response to this comment. The commission establishes a compliance history rating annually, and that rating is considered as part of the permit application review process. Therefore, if the rating is poor, and there is a proposed increase in allowable emissions and/or a proposed emission of an air contaminant not previously emitted, then notice via the NAPD is required. This criteria is included in amended §39.419(e)(1), as moved from subsection (e)(1)(C). In addition, as part of the application review process, local air pollution agencies, such as HCPHES, are provided opportunity to comment on the draft permit for all renewal applications, regardless of whether those applications are subject to the NAPD. The compliance history rules in Chapter 60 were not open for comment other than to update a cross-reference, and therefore, the comment

regarding composition of the components of compliance history is beyond the scope of this rulemaking.

CHAPTER 60: COMPLIANCE HISTORY

§60.1

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission general powers necessary and convenient to exercise jurisdiction authorized by the code; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission to establish and approve all general policy of the commission. The amendment is also adopted under TWC, §5.751, concerning Applicability, that provides that TWC, Chapter 5, Subchapter Q applies 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; TWC §5.752, concerning Definitions for TWC, Chapter 5, Subchapter Q; TWC, §5.753, concerning the Standard for Evaluating Compliance History, which authorizes the commission by rule to develop a uniform standard for evaluating compliance history; and TWC, §5.754, concerning Classification and Use of Compliance History, which authorizes the commission by rule to establish a set of standards for the classification of a person's compliance history, establish methods of assessing the compliance history of regulated entities and requiring the use of compliance history when reviewing permit applications. The amendment is adopted under THSC, §382.017, concerning Rules, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.011, which gives the commission general powers and duties to control the quality of the state's air; THSC, §382.0518, concerning Preconstruction Permits, which authorizes the commission to issue preconstruction permits; THSC, §382.055, concerning Review and Renewal of

Preconstruction Permit, which requires the renewal of air quality permits; THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which, among other things, provides that the commission may hold a hearing on a permit amendment, modification, or renewal if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under TWC, §5.753 and §5.754, and rules adopted and procedures developed under those sections.

The adopted amendment implements TWC, §§5.102, 5.103, 5.105, 5.751, 5.752, 5.753, and 5.754, and THSC, §§382.011, 382.017, 382.0518, 382.055, and 382.056.

§60.1. Compliance History.

(a) Applicability. The provisions of this chapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401.

(1) Specifically, the agency will utilize compliance history when making decisions regarding:

(A) the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit;

(B) enforcement;

(C) the use of announced investigations; and

(D) participation in innovative programs.

(2) For purposes of this chapter, the term "permit" means licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization.

(3) With respect to authorizations, this chapter only applies to forms of authorization, including temporary authorizations, that require some level of notification to the agency, and which, after receipt by the agency, requires the agency to make a substantive review of and approval or disapproval of the authorization required in the notification or submittal. For the purposes of this rule, "substantive review of and approval or disapproval" means action by the agency to determine, prior to issuance of the requested authorization, and based on the notification or other submittal, whether the person making the notification has satisfied statutory or regulatory criteria that are prerequisites to issuance of such authorization. The term "substantive review or response" does not include confirmation of receipt of a submittal.

(4) Notwithstanding paragraphs (2) and (3) of this subsection, this chapter does not apply to certain permit actions such as:

(A) voluntary permit revocations;

(B) minor amendments and nonsubstantive corrections to permits;

(C) Texas pollutant discharge elimination system and underground injection control minor permit modifications;

(D) Class 1 solid waste modifications, except for changes in ownership;

(E) municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice;

(F) permit alterations;

(G) administrative revisions; and

(H) air quality new source review permit amendments which meet the criteria of §39.402(a)(3)(A) - (C) and (5)(A) - (C) of this title (relating to Applicability to Air Quality Permits and Permit Amendments) and minor permit revisions under Chapter 122 of this title (relating to Federal Operating Permits Program).

(5) Further, this chapter does not apply to occupational licensing programs under the jurisdiction of the commission.

(6) Beginning February 1, 2002, the executive director shall develop compliance histories

with the components specified in this chapter.

(7) Beginning September 1, 2002, this chapter shall apply to the use of compliance history in agency decisions relating to:

(A) applications submitted on or after this date for the issuance, amendment, modification, or renewal of permits;

(B) inspections and flexible permitting;

(C) a proceeding that is initiated or an action that is brought on or after this date for the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission; and

(D) applications submitted on or after this date for other forms of authorization, or participation in an innovative program, except for flexible permitting.

(8) If a motion for reconsideration or a motion to overturn is filed under §50.39 or §50.139 of this title (relating to Motion for Reconsideration; and Motion to Overturn Executive Director's Decision) with respect to any of the actions listed in paragraph (4) of this subsection, and is set for commission agenda, a compliance history shall be prepared by the executive director and filed with the Office of the Chief Clerk no later than six days before the Motion is considered on the commission agenda.

(b) Compliance period. The compliance history period includes the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first; for purposes of determining whether an announced investigation is appropriate, the five-year period preceding an investigation; or the five years prior to the date the application for participation in an innovative program is received by the executive director. The compliance history period may be extended beyond the date the application for the permit or participation in an innovative program is received by the executive director, up through completion of review of the application.

(c) Components. The compliance history shall include multimedia compliance-related information about a person, specific to the site which is under review, as well as other sites which are owned or operated by the same person. The components are:

(1) any final enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with applicable legal requirements under the jurisdiction of the commission or the United States Environmental Protection Agency. "Applicable legal requirement" means an environmental law, regulation, permit, order, consent decree, or other requirement;

(2) notwithstanding any other provision of the TWC, orders developed under TWC, §7.070 and approved by the commission on or after February 1, 2002;

(3) to the extent readily available to the executive director, final enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states;

(4) chronic excessive emissions events. For purposes of this chapter, the term "emissions event" is the same as defined in THSC, §382.0215(a);

(5) any information required by law or any compliance-related requirement necessary to maintain federal program authorization;

(6) the dates of investigations;

(7) all written notices of violation, including written notification of a violation from a regulated person, issued on or after September 1, 1999, except for those administratively determined to be without merit and specifying each violation of a state environmental law, regulation, permit, order, consent decree, or other requirement;

(8) the date of letters notifying the executive director of an intended audit conducted and any violations disclosed under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995;

(9) the type of environmental management systems, if any, used for environmental compliance;

(10) any voluntary on-site compliance assessments conducted by the executive director under a special assistance program;

(11) participation in a voluntary pollution reduction program;

(12) a description of early compliance with or offer of a product that meets future state or federal government environmental requirements; and

(13) the name and telephone number of an agency staff person to contact for additional information regarding compliance history.

(d) Change in ownership. In addition to the requirements in subsections (b) and (c) of this section, if ownership of the site changed during the five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. Specifically, for any part of the compliance period that involves a previous owner, the compliance history will include only the site under review. For the purposes of this rule, a change in operator shall be considered a change in ownership if the operator is a co-permittee.