

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §60.1.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 proposes to amend §60.1 to update a cross-reference to §39.402. In a concurrent rulemaking, the commission is proposing to repeal the existing §39.402 and propose new §39.402. 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)(2)(C) - (E).

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency. The proposed rule is not expected to have a fiscal impact on other units of state or local governments since it is administrative in nature and does not impose new requirements.

The United States Environmental Protection Agency (EPA), in its review of the proposed State Implementation Plan (SIP), expressed concerns regarding current notice and public meeting requirements found Chapter 39. EPA requested the agency provide for additional notice and opportunity for public participation regarding certain air permits. The proposed rulemaking amends Chapter 60 and is part of concurrent rulemakings for Chapters 39, 55, and 116. Fiscal impacts of rules proposed for Chapters 39, 55, and 116 can be found in separate fiscal notes for those chapters.

The proposed rulemaking amends Chapter 60 to update a cross-reference to a proposed amendment to Chapter 39. Specifically, the agency is proposing to repeal the existing §39.402 and propose new §39.402 in a separate rulemaking, and the proposed Chapter 60 rules will reference the proposed change in Chapter 39 to ensure that cross-reference is correct and there is consistency between the two chapters.

Since the proposed amendment to Chapter 60 is administrative in nature, it is not expected to have a fiscal impact on other state agencies or local governments.

#### **PUBLIC BENEFITS AND COSTS**

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be consistency in state rules regarding requirements for public notice and public hearings as well as consistency with federal requirements.

The proposed amendment to Chapter 60 is administrative in nature and updates a reference to coincide with the proposed changes to Chapter 39. Therefore, the proposed rule in Chapter 60 is not expected to

have a fiscal impact on individuals or large businesses.

#### **SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule is administrative in nature and will not have a fiscal impact on small businesses.

#### **SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS**

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule complies with federal regulations and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

#### **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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule 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 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 proposed 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 proposing to repeal the existing §39.402 and propose 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)(2)(C) - (E). 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.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### **DRAFT TAKINGS IMPACT ASSESSMENT**

The commission prepared a takings impact assessment for this proposed 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 proposed 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

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

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 25, 2010 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512)

239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-004-039-LS. The comment period closes February 16, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466 or Margaret Ligarde, Environmental Law Division, (512) 239-3426.

## CHAPTER 60: COMPLIANCE HISTORY

### §60.1

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, which gives the commission general powers necessary and convenient to exercise jurisdiction authorized by the code; 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 TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule. The amendment is also proposed under TWC, §5.751, concerning Applicability; TWC §5.752, concerning Definitions; TWC, §5.753, concerning Standard for Evaluating Compliance History; and TWC, §5.754, concerning Classification and Use of Compliance History. The amendment is proposed under Texas Health and Safety Code (THSC), §382.017, 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; and THSC, §382.0518.

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

#### **§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)(2)(C) - (E) [§39.402(a)(1) - (3)] of this title (relating to Applicability to Air Quality Permit Amendments) and minor permit revisions under Chapter 122 of this title (relating to Federal Operating Permits).

(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 [(EDPR)], 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 [EPA]. "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.