

By: Smith of Harris

H.B. No. 2318

A BILL TO BE ENTITLED

1 AN ACT

2 relating to compliance histories for and incentives to reward  
3 compliance performance by entities regulated by the Texas  
4 Commission on Environmental Quality.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Section 5.751, Water Code, is amended to read as  
7 follows:

8 Sec. 5.751. APPLICABILITY. This subchapter applies to  
9 programs under the jurisdiction of the commission under Chapters  
10 26, ~~and~~ 27, and 32 of this code and Chapters 361, 375, 382, and  
11 401, Health and Safety Code. It does not apply to occupational  
12 licensing programs under the jurisdiction of the commission.

13 SECTION 2. Section 5.752(1), Water Code, is amended to read  
14 as follows:

15 (1) "Applicable legal requirement" means an  
16 environmental law, regulation, permit, order, consent~~[r]~~ decree,  
17 or other requirement.

18 SECTION 3. The heading to Section 5.753, Water Code, is  
19 amended to read as follows:

20 Sec. 5.753. STANDARDS ~~[STANDARD]~~ FOR EVALUATING AND USING  
21 COMPLIANCE HISTORY.

22 SECTION 4. Section 5.753, Water Code, is amended by  
23 amending Subsections (a), (b), and (d) and adding Subsection (d-1)  
24 to read as follows:

1 (a) Consistent with other law and the requirements  
2 necessary to maintain federal program authorization, the  
3 commission by rule shall develop standards [~~a uniform standard~~] for  
4 evaluating and using compliance history.

5 (b) The components of compliance history must include:

6 (1) enforcement orders, court judgments, [~~consent~~  
7 ~~decrees,~~] and criminal convictions of this state [~~and the federal~~  
8 ~~government~~] relating to compliance with applicable legal  
9 requirements under the jurisdiction of the commission [~~or the~~  
10 ~~United States Environmental Protection Agency~~];

11 (2) notwithstanding any other provision of this code,  
12 orders issued under Section 7.070;

13 (3) to the extent readily available to the commission,  
14 enforcement orders, court judgments, consent decrees, and criminal  
15 convictions relating to violations of environmental rules [~~laws~~] of  
16 the United States Environmental Protection Agency [~~other states~~];  
17 and

18 (4) changes in ownership.

19 (d) For purposes of using compliance history in any  
20 escalation of penalties, the commission may not use notices of  
21 violation unless the commission takes subsequent action or the  
22 person is classified as a repeat violator as determined according  
23 to criteria established under Section 5.754(c). If the commission  
24 includes a notice of violation in a compliance history, the listing  
25 must be preceded by the following statement prominently displayed:  
26 "A notice of violation represents a written allegation of a  
27 violation of a specific regulatory requirement from the commission

1 to a regulated entity. A notice of violation is not a final  
2 enforcement action nor proof that a violation has actually  
3 occurred." [~~The set of components shall include notices of~~  
4 ~~violations.~~] A notice of violation administratively determined to  
5 be without merit may [~~shall~~] not be included in a compliance  
6 history. A notice of violation that is included in a compliance  
7 history shall be removed from the compliance history if the  
8 commission subsequently determines the notice of violation to be  
9 without merit.

10 (d-1) For purposes of listing compliance history or using  
11 compliance history in any escalation of penalties, the commission  
12 may not include as a notice of violation deviations or violations  
13 provided by a person to the commission, such as deviations reported  
14 in discharge monitoring reports or Title V deviation reports,  
15 unless the commission issues a written notice of violation. Final  
16 enforcement orders or judgments resulting from self-reported  
17 deviations or violations may be considered as compliance history  
18 components for purposes of determining compliance history.

19 SECTION 5. Section 5.754, Water Code, is amended by  
20 amending Subsections (a) through (e), (g), and (h) and adding  
21 Subsection (e-1) to read as follows:

22 (a) The commission by rule shall establish a set of  
23 standards for the classification of a person's compliance history  
24 as a means of evaluating compliance history. The commission may  
25 consider the person's classification when using compliance history  
26 under Subsection (e).

27 (b) Rules adopted under Subsection (a):

1           (1) [~~this section~~] must, at a minimum, provide for three  
2 classifications of compliance history in a manner adequate to  
3 distinguish among:

4           (A) unsatisfactory [~~(1) poor~~] performers, or  
5 regulated entities that in the commission's judgment perform below  
6 minimal acceptable performance standards established by the  
7 commission [~~average~~];

8           (B) satisfactory [~~(2) average~~] performers, or  
9 regulated entities that generally comply with environmental  
10 regulations; and

11           (C) [(3)] high performers, or regulated entities  
12 that have an above-satisfactory [~~above-average~~] compliance record;

13           (2) must establish a category of unclassified  
14 performers, or regulated entities for which the commission does not  
15 have adequate compliance information about the site; and

16           (3) may provide for using a formula-based approach to  
17 evaluate compliance history, provided the formula takes into  
18 account both positive and negative factors related to the  
19 operation, size, and complexity of the site.

20           (c) In classifying a person's compliance history, the  
21 commission shall:

22           (1) determine whether a violation of an applicable  
23 legal requirement is of major, moderate, or minor significance;

24           (2) establish criteria for classifying a repeat  
25 violator, giving consideration to the size [~~number~~] and complexity  
26 of the site at which the violations occurred, and limiting  
27 consideration to violations of the same nature and the same

1 environmental media that occurred in the preceding five years  
2 ~~[facilities owned or operated by the person]~~; and

3 (3) consider:

4 (A) the significance of the violation and whether  
5 the person is a repeat violator;

6 (B) the size and complexity of the site; and

7 (C) the potential for a violation at the site  
8 that is attributable to the nature and complexity of the site.

9 (d) The commission by rule may ~~shall~~ establish as  
10 necessary methods of assessing the compliance history of regulated  
11 entities for which it does not have adequate compliance  
12 information. The methods may include requiring a compliance  
13 inspection to determine an entity's eligibility for participation  
14 in a program that requires a high level of compliance.

15 (e) The commission by rule shall provide for the use of  
16 compliance history ~~[classifications]~~ in commission decisions  
17 regarding:

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

20 (2) enforcement;

21 (3) the use of announced inspections; and

22 (4) participation in innovative programs.

23 (e-1) In using a person's compliance history classification  
24 for an enforcement purpose, the components used to determine that  
25 compliance history classification may not be used individually for  
26 penalty enhancement or escalation.

27 (g) Rules adopted under Subsection (e) for the use of

1 compliance history shall provide for additional oversight of, and  
2 review of applications regarding, facilities owned or operated by a  
3 person whose compliance performance is classified as  
4 unsatisfactory according to commission standards [~~in the lowest~~  
5 ~~classification developed under this section~~].

6 (h) The commission by rule shall, at a minimum, prohibit a  
7 person whose compliance history is classified as unsatisfactory  
8 according to commission standards [~~in the lowest classification~~  
9 ~~developed under this section~~] from[+]

10 [(1) ~~receiving an announced inspection; and~~  
11 [(2)] obtaining or renewing a flexible permit under  
12 the program administered by the commission under Chapter 382,  
13 Health and Safety Code, or participating in the regulatory  
14 flexibility program administered by the commission under Section  
15 5.758.

16 SECTION 6. Section 5.755(b), Water Code, is amended to read  
17 as follows:

18 (b) The strategically directed regulatory structure shall  
19 offer incentives based on:

20 (1) a person's compliance history [~~classification~~];  
21 and

22 (2) any voluntary measures undertaken by the person to  
23 improve environmental quality.

24 SECTION 7. Section 5.756, Water Code, is amended by adding  
25 Subsection (e) to read as follows:

26 (e) Before information about a site may be placed on the  
27 Internet under this subchapter, the information must be evaluated

1 through a quality assurance and control procedure, including a  
2 30-day period for the owner or operator of the site to review and  
3 comment on the information.

4 SECTION 8. Sections 5.758(a), (b), (d), and (h), Water  
5 Code, are amended to read as follows:

6 (a) The commission by order may exempt an applicant from a  
7 requirement of a statute or commission rule regarding the control  
8 or abatement of pollution if the applicant proposes to control or  
9 abate pollution by an alternative method or by applying an  
10 alternative standard that is:

11 (1) as ~~[more]~~ protective of the environment and the  
12 public health as ~~[than]~~ the method or standard prescribed by the  
13 statute or commission rule that would otherwise apply; and

14 (2) not inconsistent with federal law.

15 (b) The commission may not exempt an applicant under this  
16 section unless the applicant can present to the commission  
17 ~~[documented]~~ evidence that the alternative the applicant proposes  
18 is as protective of the environment and the public health as the  
19 method or standard prescribed by the statute or commission rule  
20 that would otherwise apply ~~[of benefits to environmental quality~~  
21 ~~that will result from the project the applicant proposes]~~.

22 (d) The commission's order must provide a ~~[specific]~~  
23 description of the alternative method or standard and condition the  
24 exemption on compliance with the method or standard as the order  
25 prescribes.

26 (h) In implementing the program of regulatory flexibility  
27 authorized by this section, the commission shall:

1           (1) promote [~~market~~] the program to businesses in the  
2 state through all available appropriate media;

3           (2) endorse alternative methods that will clearly  
4 benefit the environment and impose the least onerous restrictions  
5 on business;

6           (3) fix and enforce environmental standards, allowing  
7 businesses flexibility in meeting the standards in a manner that  
8 clearly enhances environmental outcomes; and

9           (4) work to achieve consistent and predictable results  
10 for the regulated community and shorter waits for permit issuance.

11           SECTION 9. Sections 361.089(a), (e), and (f), Health and  
12 Safety Code, are amended to read as follows:

13           (a) The commission may, for good cause, deny or amend a  
14 permit it issues or has authority to issue for reasons pertaining to  
15 public health, air or water pollution, or land use, or for having a  
16 compliance history that is classified as unsatisfactory according  
17 to commission standards [~~in the lowest classification~~] under  
18 Sections 5.753 and 5.754, Water Code, and rules adopted and  
19 procedures developed under those sections.

20           (e) The commission may deny an original or renewal permit if  
21 it is found, after notice and hearing, that:

22           (1) the applicant or permit holder has a compliance  
23 history that is classified as unsatisfactory according to  
24 commission standards [~~in the lowest classification~~] under Sections  
25 5.753 and 5.754, Water Code, and rules adopted and procedures  
26 developed under those sections;

27           (2) the permit holder or applicant made a false or



1 misleading statement in connection with an original or renewal  
2 application, either in the formal application or in any other  
3 written instrument relating to the application submitted to the  
4 commission, its officers, or its employees;

5 (3) the permit holder or applicant is indebted to the  
6 state for fees, payment of penalties, or taxes imposed by this title  
7 or by a rule of the commission; or

8 (4) the permit holder or applicant is unable to ensure  
9 that the management of the hazardous waste management facility  
10 conforms or will conform to this title and the rules of the  
11 commission.

12 (f) Before denying a permit under this section, the  
13 commission must find:

14 (1) that the applicant or permit holder has a  
15 compliance history that is classified as unsatisfactory according  
16 to commission standards [~~in the lowest classification~~] under  
17 Sections 5.753 and 5.754, Water Code, and rules adopted and  
18 procedures developed under those sections; or

19 (2) that the permit holder or applicant is indebted to  
20 the state for fees, payment of penalties, or taxes imposed by this  
21 title or by a rule of the commission.

22 SECTION 10. Section 382.0518(c), Health and Safety Code, is  
23 amended to read as follows:

24 (c) In considering the issuance, amendment, or renewal of a  
25 permit, the commission may consider the applicant's compliance  
26 history in accordance with the method for using [~~evaluating~~]  
27 compliance history developed by the commission under Section 5.754,

1 Water Code. In considering an applicant's compliance history under  
2 this subsection, the commission shall consider as evidence of  
3 compliance information regarding the applicant's implementation of  
4 an environmental management system at the facility for which the  
5 permit, permit amendment, or permit renewal is sought. In this  
6 subsection, "environmental management system" has the meaning  
7 assigned by Section 5.127, Water Code.

8 SECTION 11. Section 382.056(o), Health and Safety Code, is  
9 amended to read as follows:

10 (o) Notwithstanding other provisions of this chapter, the  
11 commission may hold a hearing on a permit amendment, modification,  
12 or renewal if the commission determines that the application  
13 involves a facility for which the applicant's compliance history is  
14 classified as unsatisfactory according to commission standards [~~in~~  
15 ~~the lowest classification~~] under Sections 5.753 and 5.754, Water  
16 Code, and rules adopted and procedures developed under those  
17 sections.

18 SECTION 12. Section 401.110(a), Health and Safety Code, is  
19 amended to read as follows:

20 (a) In making a determination whether to grant, deny, amend,  
21 renew, revoke, suspend, or restrict a license or registration, the  
22 commission may consider an applicant's or license holder's  
23 technical competence, financial qualifications, and compliance  
24 history under the method for using [~~evaluation of~~] compliance  
25 history developed by the commission under Section 5.754, Water  
26 Code.

27 SECTION 13. Section 401.112(a), Health and Safety Code, is

1 amended to read as follows:

2 (a) The department or commission, within its jurisdiction,  
3 in making a licensing decision on a specific license application to  
4 process or dispose of low-level radioactive waste from other  
5 persons, shall consider:

6 (1) site suitability, geological, hydrological, and  
7 meteorological factors, and natural [~~naturals~~] hazards;

8 (2) compatibility with present uses of land near the  
9 site;

10 (3) socioeconomic effects on surrounding communities  
11 of operation of the licensed activity and of associated  
12 transportation of low-level radioactive waste;

13 (4) the need for and alternatives to the proposed  
14 activity, including an alternative siting analysis prepared by the  
15 applicant;

16 (5) the applicant's qualifications, including  
17 financial and technical qualifications and compliance history  
18 under the method for using [~~evaluation of~~] compliance history  
19 developed by the commission under Section 5.754, Water Code, for an  
20 application to the commission or the requirements of Section  
21 401.110(b) for an application to the department;

22 (6) background monitoring plans for the proposed site;

23 (7) suitability of facilities associated with the  
24 proposed activities;

25 (8) chemical, radiological, and biological  
26 characteristics of the low-level radioactive waste and waste  
27 classification under Section 401.053;

1           (9) adequate insurance of the applicant to cover  
2 potential injury to any property or person, including potential  
3 injury from risks relating to transportation;

4           (10) training programs for the applicant's employees;

5           (11) a monitoring, record-keeping, and reporting  
6 program;

7           (12) spill detection and cleanup plans for the  
8 licensed site and related to associated transportation of low-level  
9 radioactive waste;

10          (13) decommissioning and postclosure care plans;

11          (14) security plans;

12          (15) worker monitoring and protection plans;

13          (16) emergency plans; and

14          (17) a monitoring program for applicants that includes  
15 prelicense and postlicense monitoring of background radioactive  
16 and chemical characteristics of the soils, groundwater, and  
17 vegetation.

18          SECTION 14. Section 26.028(d), Water Code, is amended to  
19 read as follows:

20          (d) Notwithstanding any other provision of this chapter,  
21 the commission, at a regular meeting without the necessity of  
22 holding a public hearing, may approve an application to renew or  
23 amend a permit if:

24           (1) the applicant is not applying to:

25                   (A) increase significantly the quantity of waste  
26 authorized to be discharged; or

27                   (B) change materially the pattern or place of

1 discharge;

2 (2) the activities to be authorized by the renewed or  
3 amended permit will maintain or improve the quality of waste  
4 authorized to be discharged;

5 (3) for NPDES permits, notice and the opportunity to  
6 request a public meeting shall be given in compliance with NPDES  
7 program requirements, and the commission shall consider and respond  
8 to all timely received and significant public comment; and

9 (4) the commission determines that an applicant's  
10 compliance history under the method for using ~~[evaluating]~~  
11 compliance history developed by the commission under Section 5.754  
12 raises no issues regarding the applicant's ability to comply with a  
13 material term of its permit.

14 SECTION 15. Section 26.0281, Water Code, is amended to read  
15 as follows:

16 Sec. 26.0281. CONSIDERATION OF COMPLIANCE HISTORY. In  
17 considering the issuance, amendment, or renewal of a permit to  
18 discharge effluent comprised primarily of sewage or municipal  
19 waste, the commission shall consider the compliance history of the  
20 applicant and its operator under the method for using ~~[evaluating]~~  
21 compliance history developed by the commission under Section 5.754.  
22 In considering an applicant's compliance history under this  
23 subsection, the commission shall consider as evidence of compliance  
24 information regarding the applicant's implementation of an  
25 environmental management system at the facility for which the  
26 permit, permit amendment, or permit renewal is sought. In this  
27 section, "environmental management system" has the meaning

1 assigned by Section 5.127.

2 SECTION 16. Section 26.040(h), Water Code, is amended to  
3 read as follows:

4 (h) Notwithstanding other provisions of this chapter, the  
5 commission, after hearing, shall deny or suspend a discharger's  
6 authority to discharge under a general permit if the commission  
7 determines that the discharger's compliance history is classified  
8 as unsatisfactory according to commission standards [~~in the lowest~~  
9 ~~classification~~] under Sections 5.753 and 5.754 and rules adopted  
10 and procedures developed under those sections. A hearing under this  
11 subsection is not subject to Chapter 2001, Government Code.

12 SECTION 17. Section 27.051(d), Water Code, is amended to  
13 read as follows:

14 (d) The commission, in determining if the use or  
15 installation of an injection well is in the public interest under  
16 Subsection (a)(1), shall consider, but shall not be limited to the  
17 consideration of:

18 (1) compliance history of the applicant and related  
19 entities under the method for using [~~evaluating~~] compliance history  
20 developed by the commission under Section 5.754 and in accordance  
21 with the provisions of Subsection (e);

22 (2) whether there is a practical, economic, and  
23 feasible alternative to an injection well reasonably available; and

24 (3) if the injection well will be used for the disposal  
25 of hazardous waste, whether the applicant will maintain sufficient  
26 public liability insurance for bodily injury and property damage to  
27 third parties that is caused by sudden and non-sudden accidents or

1 will otherwise demonstrate financial responsibility in a manner  
2 adopted by the commission in lieu of public liability insurance. A  
3 liability insurance policy which satisfies the policy limits  
4 required by the hazardous waste management regulations of the  
5 commission for the applicant's proposed pre-injection facilities  
6 shall be deemed "sufficient" under this subdivision if the policy:

7 (A) covers the injection well; and

8 (B) is issued by a company that is authorized to  
9 do business and to write that kind of insurance in this state and is  
10 solvent and not currently under supervision or in conservatorship  
11 or receivership in this state or any other state.

12 SECTION 18. Section 32.101(c), Water Code, is amended to  
13 read as follows:

14 (c) The commission, in determining if the use or  
15 installation of a subsurface area drip dispersal system is in the  
16 public interest under Subsection (a)(1), shall consider:

17 (1) compliance history of the applicant and related  
18 entities under the method for using ~~evaluating~~ compliance history  
19 developed by the commission under Section 5.754 and in accordance  
20 with the provisions of Subsection (d) of this section;

21 (2) whether there is a practical, economic, and  
22 feasible alternative to a subsurface area drip dispersal system  
23 reasonably available; and

24 (3) any other factor the commission considers  
25 relevant.

26 SECTION 19. Section 5.757, Water Code, is repealed.

27 SECTION 20. This Act takes effect September 1, 2007.