

1-1 By: Smith of Harris (Senate Sponsor - Jackson) H.B. No. 3960
1-2 (In the Senate - Received from the House May 7, 2007;
1-3 May 8, 2007, read first time and referred to Committee on Natural
1-4 Resources; May 21, 2007, reported adversely, with favorable
1-5 Committee Substitute by the following vote: Yeas 9, Nays 0;
1-6 May 21, 2007, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR H.B. No. 3960 By: Jackson

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to compliance histories for and incentives to reward
1-11 compliance performance by entities regulated by the Texas
1-12 Commission on Environmental Quality.

1-13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-14 SECTION 1. Section 5.751, Water Code, is amended to read as
1-15 follows:

1-16 Sec. 5.751. APPLICABILITY. This subchapter applies to
1-17 programs under the jurisdiction of the commission under Chapters
1-18 26, ~~and~~ 27, and 32 of this code and Chapters 361, 375, 382, and
1-19 401, Health and Safety Code. It does not apply to occupational
1-20 licensing programs under the jurisdiction of the commission.

1-21 SECTION 2. Section 5.752(1), Water Code, is amended to read
1-22 as follows:

1-23 (1) "Applicable legal requirement" means an
1-24 environmental law, regulation, permit, order, consent~~[-]~~ decree,
1-25 or other requirement.

1-26 SECTION 3. The heading to Section 5.753, Water Code, is
1-27 amended to read as follows:

1-28 Sec. 5.753. STANDARDS ~~[STANDARD]~~ FOR EVALUATING AND USING
1-29 COMPLIANCE HISTORY.

1-30 SECTION 4. Section 5.753, Water Code, is amended by
1-31 amending Subsections (a), (b), and (d) and adding Subsection (d-1)
1-32 to read as follows:

1-33 (a) Consistent with other law and the requirements
1-34 necessary to maintain federal program authorization, the
1-35 commission by rule shall develop standards ~~[a uniform standard]~~ for
1-36 evaluating and using compliance history.

1-37 (b) The components of compliance history must include:

1-38 (1) enforcement orders, court judgments, ~~[consent~~
1-39 ~~decrees,~~ and criminal convictions of this state ~~[and the federal~~
1-40 ~~government]~~ relating to compliance with applicable legal
1-41 requirements under the jurisdiction of the commission ~~[or the~~
1-42 ~~United States Environmental Protection Agency]~~;

1-43 (2) notwithstanding any other provision of this code,
1-44 orders issued under Section 7.070;

1-45 (3) to the extent readily available to the commission,
1-46 enforcement orders, court judgments, consent decrees, and criminal
1-47 convictions relating to violations of environmental rules ~~[laws]~~ of
1-48 the United States Environmental Protection Agency ~~[other states]~~;
1-49 and

1-50 (4) changes in ownership.

1-51 (d) For purposes of using compliance history in any
1-52 escalation of penalties, the commission may not use notices of
1-53 violation unless the commission takes subsequent action or the
1-54 person is classified as a repeat violator as determined according
1-55 to criteria established under Section 5.754(c). If the commission
1-56 includes a notice of violation in a compliance history, the listing
1-57 must be preceded by the following statement prominently displayed:
1-58 "A notice of violation represents a written allegation of a
1-59 violation of a specific regulatory requirement from the commission
1-60 to a regulated entity. A notice of violation is not a final
1-61 enforcement action nor proof that a violation has actually
1-62 occurred." ~~[The set of components shall include notices of~~
1-63 ~~violations.]~~ A notice of violation administratively determined to

be without merit may ~~[shall]~~ not be included in a compliance history. A notice of violation that is included in a compliance history shall be removed from the compliance history if the commission subsequently determines the notice of violation to be without merit.

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

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

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

(b) Rules adopted under Subsection (a):

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

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

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

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

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

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

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

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

(2) establish criteria for classifying a repeat violator, giving consideration to the size ~~[number]~~ and complexity of the site at which the violations occurred, and limiting consideration to violations of the same nature and the same environmental media that occurred in the preceding five years ~~[facilities owned or operated by the person]~~; and

(3) consider:

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

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

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

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

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

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

- (2) enforcement;
- (3) the use of announced inspections; and
- (4) participation in innovative programs.

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

(g) Rules adopted under Subsection (e) for the use of compliance history shall provide for additional oversight of, and review of applications regarding, facilities owned or operated by a person whose compliance performance is classified as unsatisfactory according to commission standards ~~[in the lowest classification developed under this section]~~.

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

~~[(1) receiving an announced inspection; and~~

~~[(2)]~~ obtaining or renewing a flexible permit under the program administered by the commission under Chapter 382, Health and Safety Code, or participating in the regulatory flexibility program administered by the commission under Section 5.758.

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

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

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

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

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

(e) Before information about a site may be placed on the Internet under this subchapter, the information must be evaluated through a quality assurance and control procedure, including a 30-day period for the owner or operator of the site to review and comment on the information.

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

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

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

(2) not inconsistent with federal law.

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

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

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

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

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

(3) fix and enforce environmental standards, allowing businesses flexibility in meeting the standards in a manner that

clearly enhances environmental outcomes; and

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

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

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

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

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

(2) the permit holder or applicant made a false or misleading statement in connection with an original or renewal application, either in the formal application or in any other written instrument relating to the application submitted to the commission, its officers, or its employees;

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

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

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

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

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

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

(c) In considering the issuance, amendment, or renewal of a permit, the commission may consider the applicant's compliance history in accordance with the method for using [evaluating] compliance history developed by the commission under Section 5.754, Water Code. In considering an applicant's compliance history under this subsection, the commission shall consider as evidence of compliance information regarding the applicant's implementation of an environmental management system at the facility for which the permit, permit amendment, or permit renewal is sought. In this subsection, "environmental management system" has the meaning assigned by Section 5.127, Water Code.

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

(o) Notwithstanding other provisions of this chapter, 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 classified as unsatisfactory according to commission standards [in the lowest classification] under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.

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

(a) In making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a license or registration, the commission may consider an applicant's or license holder's

technical competence, financial qualifications, and compliance history under the method for using ~~[evaluation of]~~ compliance history developed by the commission under Section 5.754, Water Code.

SECTION 13. Section 401.112(a), Health and Safety Code, is amended to read as follows:

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

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

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

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

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

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

(6) background monitoring plans for the proposed site;

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

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

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

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

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

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

(13) decommissioning and postclosure care plans;

(14) security plans;

(15) worker monitoring and protection plans;

(16) emergency plans; and

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

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

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

(1) the applicant is not applying to:

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

(B) change materially the pattern or place of discharge;

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

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

(4) the commission determines that an applicant's compliance history under the method for using ~~[evaluating]~~

compliance history developed by the commission under Section 5.754 raises no issues regarding the applicant's ability to comply with a material term of its permit.

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

Sec. 26.0281. CONSIDERATION OF COMPLIANCE HISTORY. In considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste, the commission shall consider the compliance history of the applicant and its operator under the method for using ~~[evaluating]~~ compliance history developed by the commission under Section 5.754. In considering an applicant's compliance history under this subsection, the commission shall consider as evidence of compliance information regarding the applicant's implementation of an environmental management system at the facility for which the permit, permit amendment, or permit renewal is sought. In this section, "environmental management system" has the meaning assigned by Section 5.127.

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

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

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

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

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

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

(3) if the injection well will be used for the disposal of hazardous waste, whether the applicant will maintain sufficient public liability insurance for bodily injury and property damage to third parties that is caused by sudden and non-sudden accidents or will otherwise demonstrate financial responsibility in a manner adopted by the commission in lieu of public liability insurance. A liability insurance policy which satisfies the policy limits required by the hazardous waste management regulations of the commission for the applicant's proposed pre-injection facilities shall be deemed "sufficient" under this subdivision if the policy:

(A) covers the injection well; and

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

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

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

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

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

(3) any other factor the commission considers relevant.

7-1 SECTION 19. Section 5.757, Water Code, is repealed.
7-2 SECTION 20. This Act takes effect September 1, 2007.

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