

- SUBJECT:** Revising environmental performance-based regulation
- COMMITTEE:** Environmental Regulation — favorable, without amendment
- VOTE:** 4 ayes — Bonnen, Kuempel, W. Smith, West
0 nays
3 absent — Crownover, Chisum, Flores
- WITNESSES:** No public hearing
- BACKGROUND:** Water Code, ch. 5, subch. Q authorizes performance-based regulation for certain Texas Commission on Environmental Quality (TCEQ) programs, including water quality, injection wells, solid waste disposal, air permitting, and radiation control. In performance-based regulation, TCEQ evaluates a regulated entity's compliance history and classifies the entity as a poor, average, or high performer, depending on specific criteria. TCEQ uses the performance classification in decisions regarding permitting, enforcement, inspection, or participation in innovative programs. The statute establishes regulatory disincentives for poor performers and requires TCEQ to develop a strategically directed regulatory structure to provide incentives for enhanced environmental performance. Regulatory incentives are based on an entity's performance classification and any voluntary measures undertaken to improve environmental quality.
- DIGEST:** HB 28 would amend the Water Code to make compliance history in the performance-based regulation program site-specific. TCEQ could develop standards for evaluating site-specific compliance history that were uniform for similar sites performing similar activities. The components of compliance history would not include an agreed administrative order but could include, to the extent they were readily available to TCEQ, consent decrees or criminal convictions relating to violations of federal environmental laws, including those administered by the U.S. Environmental Protection Agency. TCEQ would have to establish a time period for site-specific compliance history. Nothing would prevent TCEQ from considering any relevant compliance information, including notices of violation, in enforcement.

TCEQ could establish a set of standards for classifying compliance history at a specific site. Agency rules would have to classify site-specific compliance history so as to distinguish among poor, satisfactory, and high performance. A regulated entity would be classified as a poor performer if TCEQ judged that the entity's performance was unsatisfactory at a specific site, instead of below average. In classifying a person's compliance history at a specific site, TCEQ would have consider the size, complexity, and type of activity at the site. Criteria for classifying a repeat violator would have to limit consideration to violations of a similar nature.

In determining whether to grant an application for a permit or amendment, TCEQ would have to consider a regulated entity's compliance history and any other relevant compliance information, including notices of violation.

TCEQ's strategically directed regulatory structure would have to offer incentives based on an entity's compliance performance, instead of its compliance-history classification.

Any violation or enforcement data about a specific site that TCEQ made available to the public on the Internet would be subject to quality assurance and quality control, including an opportunity for the permitted entity to review the information before it was posted online.

TCEQ could exempt an applicant from a statutory requirement or a commission rule for pollution control if the applicant proposed an alternative method of control that was as protective of the environment and public health as the method prescribed by statute or rule, rather than more protective, as under current law. TCEQ could not exempt an applicant unless the applicant could demonstrate that the proposed project would result in environmental protection equal to or greater than existing standards.

In implementing its regulatory flexibility program, TCEQ would not have to market the program to businesses or fix and enforce environmental standards allowing businesses flexibility in meeting the standards so as to enhance environmental outcomes.

HB 28 would repeal existing Water Code provisions requiring that the components of compliance history include notices of violations, except those

determined administratively to be without merit, and that TCEQ designate a single point of contact within the agency to coordinate all innovative programs.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect November 1, 2003.

**SUPPORTERS
SAY:**

HB 28 would improve TCEQ's performance-based regulation. The 77th Legislature amended the program by enacting HB 2912 by Bosse, et al. Many of the changes were good ideas, but since then, some problems have been identified. For example, current law requires TCEQ to develop a uniform standard for evaluating a regulated entity's compliance history and assigning a performance classification. Because the agency regulates more than 200,000 entities that conduct a wide range of activities, a single uniform standard is unrealistic. HB 28 would authorize TCEQ to develop standards for similar sites conducting similar activities, providing a better classification scheme and allowing TCEQ more flexibility in regulation.

The bill would allow an entity to review any violation or enforcement data that would be posted on the Internet. A company should have the right to ensure that the information about its compliance history is accurate before the state posts it to a public forum.

The compliance history classification formula should not include notices of violation, which can be misleading in ranking an entity's performance. For example, in the case of a serious infraction, TCEQ does not issue a notice of violation but goes straight to a notice of enforcement, which is not included in the ranking system. As a result, the system can penalize an entity more for a lesser infraction than for a more serious offense. HB 28 would remedy this by removing notices of violation from the performance rankings.

The bill would not weaken the regulatory flexibility program. Most regulatory statutes are required by the federal government and cannot be waived under the program. Also, an entity could be eligible for a regulatory exemption only if the entity proposed an alternative pollution-control method that was of equal or greater benefit to the environment or public health. The change would help to encourage participation in this innovative program.

OPPONENTS
SAY:

HB 28 would make the performance classification system created by HB 2912 optional after TCEQ has invested substantial time and resources in developing the system. Fewer than 1 percent of the regulated entities classified so far have been classified as poor performers. The bill's changes could lead to even fewer entities being classified as poor performers, undermining the credibility of the classification system.

The bill would repeal a statute requiring that an entity's compliance history contain notices of violation that have merit. Such notices clearly are pertinent to a regulated entity's history of compliance with environmental regulations. Entities have ample opportunity to challenge invalid notices of violation under current law.

HB 28 would weaken the regulatory flexibility program. To be exempted from a statutory requirement or TCEQ rule, a company only would have to show that an alternative method of pollution control was equally protective of the environment or public health, rather than more protective. To enjoy the benefits of regulatory flexibility, a company should have to prove a greater environmental or public benefit.

NOTES:

Substantially similar bills were filed during the regular and first called sessions of the 78th Legislature. During the regular session, SB 455 by Armbrister, passed the Senate but died in the House. Differences between HB 28 and SB 455 include:

- SB 455, as amended in committee, would have not specified that TCEQ could consider other relevant compliance information, including notices of violation, in enforcement or determining whether to grant a permit or amendment; and
- HB 28 would require that the strategically directed regulatory structure offer incentives based on an entity's compliance performance, instead of its compliance history classification.

The companion bill to SB 455, HB 1063 by W. Smith, was placed on the General State Calendar on May 10 but was postponed and died in the House.

During the first called session, HB 112 by W. Smith, identical to SB 455, was reported favorably as substituted by the House Environmental Regulation Committee, but died in the House. Its companion, SB 55 by Armbrister, passed the Senate, but also died in the House.