

- SUBJECT:** Discontinuance of TCEQ's compliance history program
- COMMITTEE:** Environmental Regulation — favorable, without amendment
- VOTE:** 6 ayes — Bonnen, Hancock, Lucio, T. King, Kuempel, West
0 nays
1 absent — Driver
- WITNESSES:** For — (*Registered, but did not testify:* Andy Barrett, Aqua Texas, Inc.; Doug DuBois, Texas Petroleum Marketers and Convenience Store Association; Debbie Hastings, Texas Oil and Gas Association)

Against — Beth O'Brien, Public Citizen; Cyrus Reed, Lone Star Chapter of the Sierra Club; Robin Schneider, Texas Campaign for the Environment
- BACKGROUND:** In 2001, the 77th Legislature enacted HB 2912 by Bosse to continue the Texas Commission of Environmental Quality (TCEQ) and modify its operations. Among the changes made by that bill is a requirement for TCEQ to employ compliance history standards and use those standards in its decision-making processes.
- Water Code, sec. 5.753 requires TCEQ to develop uniform standards for evaluating the compliance history of regulated facilities. Components of compliance history include:
- legal orders issued by the state and federal government pertaining to compliance with requirements set forth by the U.S. Environmental Protection Agency;
 - administrative orders regarding an alleged violation of a statute or rule adopted by TCEQ;
 - legal orders regarding violations of environmental laws in other states;
 - changes in ownership;
 - requirements to maintain federal program authorization; and
 - violation notices.
- HB 2912 also added sec. 5.754, which requires TCEQ to set standards for the classification of an individual's compliance history. TCEQ rules

distinguish between poor performers, average performers, and high performers. In classifying a facility's compliance history, the commission considers each violation and determines its significance. Also, TCEQ develops criteria for classifying repeat violations, with consideration of the number and complexity of facilities owned by the violator. For regulated entities that lack adequate compliance information, TCEQ establishes new methods to evaluate compliance history.

TCEQ uses compliance history information in decisions regarding:

- a permit's issuance, renewal, amendment, modification, denial, suspension, or revocation;
- enforcement;
- use of announced inspections; and
- participation in innovative programs.

Sec. 5.754 also specifies circumstances in which a repeat violator's permit can be revoked and administrative penalties can be imposed, according to a facility's compliance history. A facility with a compliance history in the lowest classification receives additional oversight by TCEQ. Also, the commission does not allow such facilities to receive an announced inspection or obtain certain permits. TCEQ also can use compliance history to grant regulated entities a permit for activities under the commission's jurisdiction.

Under sec. 5.755, TCEQ develops a strategic regulatory structure to provide incentives for enhanced environmental performance. The structure offers incentives based on compliance history classifications and voluntary measures undertaken to improve environmental quality. Under this structure, innovative programs are consistent with requirements necessary to maintain federal program authorization.

Health and Safety Code, sec. 375.101(a) allows TCEQ to distribute incentives for recycling convenience switches in vehicles. These switches contain mercury, a hazard to human health. Incentives include compliance history classification adjustments.

DIGEST:

HB 3960 would discontinue TCEQ's compliance history program. In various sections of the Health and Safety Code and the Water Code, the bill would eliminate requirements that TCEQ use compliance history standards set forth in Water Code, sec. 5.754.

Solid Waste Disposal Act. A facility's compliance history within the previous five years would be considered when evaluating applications for a solid waste management facility permit. Additionally, compliance history for the past five years would be considered when determining an applicant's ability to comply with permit terms.

TCEQ would not deny or amend a permit for applicants falling under the lowest classification of compliance. Instead, TCEQ would consider:

- violations to the Solid Waste Disposal Act or other laws pertaining to solid waste management;
- an applicant or permit holder's record of violations in the previous five years; and
- significant violations that the permit holder or applicant had not made a substantial attempt to correct;

TCEQ would deny or suspend a discharge permit if the discharger's compliance history contained violations demonstrating consistent disregard for the regulatory process. The discharger's ranking in the lowest classification of the compliance history standards no longer would be considered in permit evaluations. The bill also would eliminate the requirement that TCEQ review permits for solid waste disposal every five years in order to assess compliance history.

Clean Air Act. When issuing, amending, or renewing a permit under the Clean Air Act, the commission would consider an applicant's compliance with state and federal laws over the previous five years from the date of the application's submission. In the renewal of pre-construction permits, TCEQ would consider compliance with the Clean Air Act and the terms of the existing permit. TCEQ would hold a hearing on a permit amendment, modification, or renewal if the facility had unresolved violations that demonstrated a consistent disregard for the regulatory process.

Regulatory flexibility. The bill would eliminate standards on performance-based regulation in the Water Code. Current rules on regulatory flexibility would remain in place, with a few modifications.

Exemption from rules regarding pollution control or abatement would be permitted if an applicant proposed an alternative method at least as protective of the environment and public health as the current method. The

requirement that an alternative method of pollution control or abatement be more than protective than the current method would be repealed.

HB 3960 also would eliminate the requirement that applicants present evidence of benefits to environmental quality in order to qualify for exemption from pollution control or abatement rules. Additionally, the bill would eliminate requirements that alternative methods clearly benefit the environment. Regional economic impacts would be considered in evaluating exemption from rules regarding pollution control or abatement.

Radioactive materials. When determining whether to grant, amend, deny, renew, revoke, suspend, or restrict a license or registration for a facility that handles radioactive material, TCEQ would consider an applicant or license holder's record in circumstances involving radiation. The commission would consider past operating practices when issuing licenses for the disposal of low-level radioactive waste.

Water quality. In considering whether to renew or amend a permit pertaining to water quality, the applicant's compliance history for the preceding five years would be evaluated. TCEQ would examine an applicant's past performance and compliance with state laws governing waste discharge, waste treatment, or waste disposal facilities when considering a permit to discharge effluent composed primarily of sewage or renewal waste.

Injection wells. The bill would eliminate certain rules applying to permits for injection wells for hazardous waste deposits. TCEQ's ability to develop and employ compliance history standards for injection wells, as stipulated under Water Code, sec. 5.754, would be repealed.

Incentives for enhanced environmental performance. The bill no longer would require the pollution prevention advisory committee to advise TCEQ on the strategic regulatory structure that provides incentives for enhanced environmental performance, under Water Code, sec. 5.755. Recycling facilities that remove convenience switches from vehicles no longer would receive incentives for enhanced environmental performance.

The bill would take effect on September 1, 2007, and would apply to permits filed with TCEQ on or after that date.

**SUPPORTERS
SAY:**

HB 3960 would eliminate TCEQ's compliance history standards, giving policymakers an opportunity to develop guidelines for a more useful compliance history program by the next legislative session. TCEQ considered a facility's compliance history when issuing and renewing permits prior to 2001. The enactment of HB 2912 represented an effort to formalize this process. Now, TCEQ's compliance history rating process is a farcical system that easily can be manipulated. Instead of modifying its many flaws, the system needs a complete overhaul.

Enacting a meaningful and equitable compliance history program for a large state agency can be difficult, as TCEQ's experience demonstrates. The commission regulates a large quantity of facilities under its formalized compliance history program. This system utilizes only three classification rankings, and the size and complexity of a facility is not considered. TCEQ uses a basic approach in examining an enormous set of implications that should be evaluated and addressed individually. As a result, the information generated often is meaningless.

The current compliance history program is expensive and requires many employees to gather and process the information. The stringent data keeping and indexing requirements do not produce useful results. Given the difficulty and cost of evaluating all regulated entities, the vast majority of facilities are "average by default," as they do not fall into any of these categories. Only low performers are evaluated in surprise inspections. By eliminating the compliance history requirements, TCEQ employees could assist the commission in its other endeavors. This modification serves to benefit TCEQ, as the agency currently is grossly understaffed.

Small businesses are subject to the same requirements and classification system as large-scale facilities. This lack of distinction places small regulated facilities at a disadvantage under TCEQ's compliance history program. For instance, a local dry cleaner is subject to the same method of evaluation as a chemical manufacturer producing numerous products in multi-process systems. As such, a compliance violation at a small facility matters more than a violation at large plant with various components to monitor. Also, small facilities have fewer resources to monitor and ensure compliance than large-scale facilities.

**OPPONENTS
SAY:**

TCEQ's compliance history system may need certain modifications, but it should not be eliminated entirely. Already, TCEQ rarely uses its powers to address issues of public and environmental health. HB 3960 would

eliminate yet another tool that TCEQ can employ to regulate environmental quality. This bill would erode yet another improvement gained when TCEQ was renewed and reformed in the Sunset process in 2001.

HB 3960 would not require the Legislature to study the successes and failures of TCEQ's compliance history program and propose a new means of evaluation by the next legislative session. This requirement should be included in the bill if the Legislature truly is committed to protecting the state's environmental quality through TCEQ.

**OTHER
OPPONENTS
SAY:**

TCEQ implemented the provisions stipulated in HB 2912 in a meaningless, surface-level manner. With the implementation of certain changes, the compliance history program could serve as a better tool for yielding more valuable information and outcomes. For instance, ratings should be conducted in a manner that cannot be manipulated by facilities. The classification system should not be all-encompassing. Instead, the system needs to be more in-depth to reflect the various types of facilities regulated by TCEQ. Further, surprise inspections should occur at all facilities.