

- SUBJECT:** Revising TCEQ performance-based regulation
- COMMITTEE:** Environmental Regulation — favorable, with amendment
- VOTE:** 5 ayes — Bonnen, Kuempel, Chisum, W. Smith, West
0 nays
2 absent — Crownover, Flores
- SENATE VOTE:** On final passage, May 6 — voice vote (Zaffirini recorded nay)
- WITNESSES:** *(On companion bill, HB 1063:)*
For — Jon Fisher and Dianne Otto, Texas Chemical Council; Mary Miksa, Texas Association of Business and Chambers of Commerce

Against — Lee Carrell, Concerned Citizens of Spicewood/The Texas Hill Country; Mary Kelly, Environmental Defense

On — Ann McGinley, Texas Commission on Environmental Quality
- 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, or radiation control. Under the program, 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. The regulatory structure offers incentives based on an entity's performance classification and any voluntary measures undertaken to improve environmental quality.
- DIGEST:** SB 455, as amended, would 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 bill would specify that 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 convictions relating to violations of federal environmental laws, including the U.S. Environmental Protection Agency. TCEQ would establish a period of time for site-specific compliance history.

TCEQ could establish a set of standards for classifying compliance history at a specific site. Performance standards would have to be site specific. Performance classifications would be poor, satisfactory, and high. In classifying a person's compliance history at specific site, TCEQ would have to give consideration to the size of the site at which the violation occurred and 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 the compliance history of a regulated entity and any other relevant compliance information. TCEQ could allow a permit application for a site with a high level of compliance to undergo technical review before other applications for sites that had not demonstrated as high a level of environmental compliance.

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 the control of pollution if the applicant proposed an alternative method of control that was equally protective of the environment and public health as the method prescribed by statute or rule. 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 the 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 to enhance environmental outcomes.

The bill would repeal a requirement that the components of compliance history include notices of violations and a provision requiring TCEQ to designate a single point of contact within the agency to coordinate all innovative programs.

The bill would take effect on September 1, 2003.

**SUPPORTERS
SAY:**

SB 455, as amended, would improve performance-based regulation at TCEQ. The 77th Legislature amended the program by enacting HB 2912 by Bosse et al. Many of last session's changes were good ideas, but since then some problems have been discovered. 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 over 200,000 entities carrying out a wide range of activities, it is unrealistic to create a single uniform standard to evaluate such an array of entities. The bill would specify that TCEQ could develop standards for similar sites conducting similar activities, providing a better classification scheme, and allowing TCEQ more flexibility to prioritize ranking the most important facilities.

The bill would allow an entity to review any violation or enforcement data that would be posted on the Internet. This would be a fair measure. A company has the right to make sure that the information is accurate before the state posts it to a public forum.

Notices of violations should not be included in the compliance-history classification scheme. There is considerable misunderstanding of these notices, and they should not have been included in the compliance history in the first place. In the case of a serious violation, for example, a notice of violation is not issued, only a notice of enforcement. Because of this, an entity could receive a lower performance classification for a more severe violation than a lesser infraction.

The bill would not weaken the regulatory flexibility program. First, most regulatory statutes are federally required and cannot be waived under the

program. Second, if an entity proposed an alternative pollution-control method that was of equal or greater benefit to the environment or public health, it could be eligible for a regulatory exemption. The change would help to encourage participation in this innovative program.

**OPPONENTS
SAY:**

The bill would make the performance classification system created by HB 2912 optional. Now that the agency has invested substantial time and resources in developing the system, the bill would pull the rug from under it by not requiring the system. Moreover, of the agencies classified so far, less than 1 percent have been classified as poor performers. The bill's changes could lead to even fewer entities being classified as poor performers, undermining the classification system's credibility.

The bill would repeal a statute allowing notices of violations to be considered in an entity's compliance history. Notices of violations clearly are pertinent to an entity's history of compliance with environmental regulations. Entities have ample opportunity to challenge invalid notices of violations under current law.

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

NOTES:

The committee amendment would remove from the Senate engrossed bill requirements providing for consideration of notices of violations in an entity's compliance history and allowing a permit application for a site with a high level of environmental compliance to undergo technical review before others.

The companion bill, HB 1063 by W. Smith, was placed on the General Calendar on May 10 and was postponed.