SUBJECT: Standards for compliance histories of TCEQ-regulated entities

COMMITTEE: Environmental Regulation — favorable, as amended

VOTE: 7 ayes — Bonnen, Howard, T. King, Driver, Homer, Kuempel, W. Smith

0 nays

WITNESSES: For — Carol Batterton, Water Environment Association of Texas; Jon Fisher, Texas Chemical Council; Mary Miksa, Texas Association of Business; Cindy Morphew, Texas Oil and Gas Association.

Against — Beth O'Brien, Public Citizen; Cyrus Reed, Lone Star Chapter, Sierra Club; Cathy Sisk, Harris County Public Health and Environmental Services and Harris County Attorney.

BACKGROUND: Pursuant to recommendations by the Sunset Advisory Commission in 2001, the Texas Commission on Environmental Quality (TCEQ, then known as TNRCC) was required to adopt a clearly defined and common definition of compliance history for regulated entities. Compliance histories are used to show a facility's record of environmental performance and compliance with the law over the past five years.

TCEQ's current system of classifying entities according to their compliance history uses a complex mathematical formula commonly applied to all regulated industries. Regulated entities are placed in categories of "high", "average" and "poor" compliance based on a rating derived from the formula. Compliance histories are stored in an online database that is accessible from the agency's website.

TCEQ considers compliance history in a number of regulatory decisions, including the renewal of existing permits, the issuance of new permits, the severity of enforcement penalties, participation in innovative agency programs and eligibility for announced inspections. Facilities with a compliancy history classification of "poor" are not eligible for announced inspections and are barred from participation in innovative programs such as the Regulatory Flexibility Program.

DIGEST:

HB 86, as amended, would repeal the classification system implemented in 2001 that ranked entities according to their compliance histories based on a formula. TCEQ no longer would be required to place entities into the distinct categories of "high", "average" and "poor" based on their compliance histories. In addition, TCEQ no longer would be required to use a uniform standard to evaluate a facility's compliance history. TCEQ could consider the compliance histories of entities using varying criteria based on the particular characteristics of the entity.

The bill would change criteria for classifying an entity as a "repeat violator" to include only entities that committed violations of the same nature and in the same environmental media, rather than including entities that commit more than one serious violation of any type.

HB 86 would require that EPA enforcement orders, court judgments, consent decrees, and criminal convictions be used as components of compliance history only when readily available to the agency.

TCEQ no longer would be required to include notices of violations as components of compliance history for the purpose of escalation of penalties unless an enforcement order were issued or the facility were determined to be a "repeat violator." Violators would have an opportunity to correct any violation after receiving a notice of violation but before being issued an enforcement order. "Repeat violators" would not have an opportunity to correct their violation after receiving a notice of violation.

The bill would eliminate the restriction that TCEQ not be allowed to perform announced inspections on entities with unfavorable compliance histories. The agency would have the option of providing advance notice to an entity with an inadequate record of compliance before performing an inspection.

Regulated entities would be able to use alternative pollution control or abatement methods that are as protective, rather than more protective, of the environment and public health as the standard prescribed by law. Also, facilities no longer would be required to provide documentation of the effects of alternative pollution control or abatement methods on the environment and public health.

TCEQ would have to notify regulated entities before information regarding their compliance histories was posted on the Internet. A

representative from the regulated entity could review and dispute any false information before it is placed on TCEQ's online compliance history database.

TCEQ no longer would be able to include self-reported violations in a facility's compliance history without first issuing a written notice of violation. HB 86 would allow TCEQ to decide whether or not to issue notices of violation in cases involving self-reported violations.

HB 86 would require TCEQ to explain in writing that a notice of violation was merely an allegation and not proof of a violation and to display such information in the entity's compliance history when notices of violation were included.

The bill would take effect September 1, 2005.

SUPPORTERS SAY:

HB 86 would implement a more workable system for using compliance histories. TCEQ's current system of evaluating regulated entities' compliance histories does not allow the agency adequate flexibility. The current system is unnecessarily restrictive and prevents the agency from offering input in determining the compliance history of regulated entities.

The current formula does not take into account an entity's size. Gigantic industries are ranked using the same formula that is applied to small businesses. This classification system cannot consider an entity's resources or the magnitude of the environmental impact of its violation. The use of a uniform standard for all regulated entities presents a bias against small business as they do not have the same resources nor do they cause as much environmental damage as large industries.

The definition of "repeat violator" currently used is overly broad and does not target only entities that commit the same violation on more than one occasion. A "repeat violator" should be an entity that repeats an identical violation in the same environmental medium rather than any entity that has more than one serious violation. For example, an entity that failed to obtain an air permit and later failed to obtain a water permit should not be considered a repeat violator because the violations involved different environmental media.

The ability to perform announced inspections on facilities with

unacceptable records of compliance could benefit both the agency and the regulated entity. Announced inspections would give a facility adequate time to assemble the information necessary for TCEQ to perform its inspection.

Once information is displayed on the Internet, it cannot easily be retracted In the past, TCEQ has posted incorrect information about an entity's compliance history on the Internet without first notifying the entity. By requiring TCEQ to notify an entity before posting information, HB 86 would give regulated entities the right to dispute any potential inaccuracies before they are displayed online.

OPPONENTS SAY:

Notices of violation are an important component of compliance history and should not be eliminated. Including them in compliance history allows permit reviewers and inspectors to recognize patterns of repeat notices of violation. Notices of violation also are useful to ordinary citizens who may wish to contest the renewal or issuance of a permit for a particular entity.

HB 86 would allow the use of alternative pollution control or abatement methods not proven to have a better impact on the environment and public health than the standard prescribed by law. If a regulated facility is to be granted exception from standards required by law, the alternative methods should have to be more protective of the environment and public health. Further, under HB 86, facilities using alternative methods would not be required to submit documented evidence showing the effect of these alternative methods. Removing the requirement that entities be able to provide documentation of the reliability of their alternative pollution control or abatement methods would allow polluters to use questionable methods for pollution control.

Compliance histories should be used to guide the decision on whether or not to perform unannounced or announced inspections on a regulated facility. Facilities that have been shown to break environmental laws should not have the privilege of announced inspections. Unannounced inspections are more useful when trying to regulate an entity with a history of disregard for the law.

Eliminating enforcement orders, court judgments, consent decrees, and criminal convictions from the federal government and compliance histories from other states as mandatory components would impede the

agency's ability accurately to portray an entity's compliance history. Information about an entity's environmental record from the federal government and other states could predict their compliance record in Texas. TCEQ could more closely evaluate an entity with a poor compliance history with the federal government or another state when issuing a new permit.

HB 86 would allow entities that repeatedly violate the agency's rules to avoid classification as "repeat violators." A single entity that commits serious violations across different environmental media should be considered a "repeat violator" for purposes of compliance history and penalty enhancement.

OTHER OPPONENTS SAY:

The bill should require TCEQ to consider the compliance histories of the violators with the largest impact on the environment and public health more closely than the compliance histories of small businesses. For example, a few companies are responsible for the vast majority of air pollution in some areas.

A timeline should be specified to limit how long an entity could spend reviewing compliance information before it was posted on the Internet. As the bill stands, entities could spend as long as they wished reviewing their compliance histories before they were placed in the agency's online database.

NOTES:

The companion bill, SB 519 by Armbrister, has been left pending in the Senate Natural Resources Committee.