

## **BILL ANALYSIS**

Senate Research Center  
80R20957 JTS-F

C.S.H.B. 3960  
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Natural Resources  
5/19/2007  
Committee Report (Substituted)

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

In 2001, legislation based on recommendations of the Sunset Advisory Commission changed the operations of the Texas Commission on Environmental Quality (TCEQ) [Texas Natural Resource Conservation Commission]. Among those changes was a requirement that TCEQ adopt a uniform standard for evaluating compliance history and specifying the components of compliance history, requiring the agency to consolidate all innovative regulatory programs in one office, changing the requirements for eligibility for use of innovative regulatory programs and the use of regulatory flexibility. In addition, another requirement was established to require the ranking of all regulated entities based on compliance history.

However, the ranking system and standards developed to conduct the evaluation are marginally useful or practical, and require large numbers of hours to process and compile. These evaluations are highly costly and have resulted in the vast majority of entities being "Average By Default" which means they have failed to meet the standards of at least one of the three established categories. Additionally, the size and complexity of a site is not taken into consideration, which places a small rural petroleum station or local dry cleaner on the same scale as a large scale refinery or chemical manufacturer that produces countless products with high throughput multi-process systems.

C.S.H.B. 3960 discontinues the Compliance History Program as it currently exists, freeing TCEQ from the labor and financial burdens of the program. The bill changes statutory language to reflect as close as possible the conditions in place prior to the enactment of the Sunset Bill in 2001. The bill returns TCEQ to its initial starting point and allows it time to develop guidelines for a more thorough and useful program before the next legislative session.

### **RULEMAKING AUTHORITY**

Rulemaking authority previously granted to the Texas Commission on Environmental Quality is modified in SECTION 4 (Section 5.753, Water Code), SECTION 5 (Section 5.754, Water Code), of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 5.751, Water Code, to update references to include Chapter 32 of this code and Chapter 375, Health and Safety Code, among the chapters relating to programs under the jurisdiction of the Texas Commission on Environmental Quality (TCEQ) to which this subchapter applies.

SECTION 2. Amends Section 5.752(1), Water Code, to redefine "applicable legal requirement."

SECTION 3. Amends the heading to Section 5.753, Water Code, to read as follows:

Sec. 5.753. STANDARDS FOR EVALUATING AND USING COMPLIANCE HISTORY.

SECTION 4. Amends Section 5.753, Water Code, by amending Subsections (a), (b), and (d) and adding Subsection (d-1), as follows:

(a) Requires TCEQ, consistent with other law and the requirements necessary to maintain federal program authorization, by rule to develop standards, rather than a uniform standard, for evaluating and using compliance history.

(b) Sets forth the required components of compliance history.

(d) Prohibits TCEQ, for purposes of using compliance history in any escalation of penalties, from using notices of violation unless TCEQ takes subsequent action or the person is classified as a repeat violator as determined according to criteria established under Section 5.754(c). Requires the listing, if TCEQ includes a notice of violation in a compliance history, to be preceded by a certain statement. Deletes existing text requiring the set of components to include notices of violations. Prohibits a notice of violation administratively determined to be without merit from being included in a compliance history.

(d-1) Prohibits TCEQ, for purposes of listing compliance history or using compliance history in any escalation of penalties, from including as a notice of violation deviations or violations provided by a person to TCEQ, such as deviations reported in discharge monitoring reports or Title V deviation reports, unless TCEQ issues a written notice of violation. Authorizes final enforcement orders or judgments resulting from self-reported deviations or violations to be considered as compliance history components for purposes of determining compliance history.

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

(a) Requires TCEQ by rule to establish a set of standards for the classification of a person's compliance history as a means of evaluating compliance history. Authorizes TCEQ to consider the person's classification when using compliance history under Subsection (e).

(b) Requires rules adopted under Subsection (a) to provide, at a minimum, for three classifications of compliance history in a manner adequate to distinguish among unsatisfactory, rather than poor, performers, or regulated entities that in TCEQ's judgment perform below minimal acceptable performance standards established by TCEQ, rather than average, satisfactory, rather than average, performers, or regulated entities that generally comply with environmental regulations, and high performers, or regulated entities that have an above-satisfactory, rather than above-average, compliance record. Requires the rules to establish a category of unclassified performers, or regulated entities for which TCEQ does not have adequate compliance information about the site. Authorizes the rules to 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) Requires TCEQ, in classifying a person's compliance history, to establish criteria for classifying a repeat violator, giving consideration to the size, rather than the 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, rather than facilities owned or operated by the person, in addition to determining whether a violation of an applicable legal requirement is of major, moderate, or minor significance. Requires TCEQ, in classifying a person's compliance history, to consider the size and complexity of the site and the potential for a violation at the site that is attributable to the nature and complexity of the site, in addition to the significance of the violation and whether the person is a repeat violator.

(d) Authorizes TCEQ by rule to establish as necessary methods of assessing the compliance history of regulated entities for which it does not have adequate compliance information.

(e) Requires TCEQ by rule to provide for the use of compliance history, rather than classifications, in TCEQ decisions regarding certain actions.

(e-1) Prohibits the components used to determine that compliance history classification, in using a person's compliance history classification for an enforcement purpose, from being used individually for penalty enhancement or escalation.

(g) Requires rules adopted under Subsection (e) for the use of compliance history to 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 TCEQ standards, rather than in the lowest classification developed under this section.

(h) Requires TCEQ by rule, at a minimum, to prohibit a person whose compliance history is classified as unsatisfactory according to TCEQ standards from obtaining or renewing a flexible permit under the program administered by TCEQ under Chapter 382 (Clean Air Act), Health and Safety Code, or participating in the regulator flexibility program administered by TCEQ under Section 5.758. Deletes existing text requiring TCEQ by rule, at a minimum, to prohibit a person whose compliance history is classified as unsatisfactory according to TCEQ standards from receiving an announced inspection. Makes conforming changes.

SECTION 6. Amends Section 5.755(b), Water Code, to update a reference to a person's compliance history classification to refer to a person's compliance history.

SECTION 7. Amends Section 5.756, Water Code, by adding Subsection (e), as follows:

(e) Requires the information, before information about a site is authorized to be placed on the Internet under this subchapter, to 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. Amends Sections 5.758(a), (b), (d), and (h), Water Code, as follows:

(a) Authorizes TCEQ by order to exempt an applicant from a requirement of a statute or TCEQ 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 as protective, rather than more protective, of the environment and the public health as the method or standard prescribed by statute or TCEQ rule that would otherwise apply, and not inconsistent with federal law.

(b) Prohibits TCEQ from exempting an applicant under this section unless the applicant can present to TCEQ 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 TCEQ rule that would otherwise apply, rather than documented evidence of benefits to environmental quality that will result from the project the applicant proposes.

(d) Requires TCEQ's order to provide a description, rather than a specific description, of the alternative method or standard and condition the exemption on compliance with the method or standards as the order prescribes.

(h) Requires TCEQ, in implementing the program of regulatory flexibility authorized by this section, to promote, rather than market the program to businesses in the state through all available appropriate media, among other required actions.

SECTION 9. Amends Sections 361.089(a), (e), and (f), Health and Safety Code, as follows:

(a) Authorizes TCEQ, for good cause, to 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 TCEQ standards, rather than in the lowest classification, under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.

(e) Authorizes TCEQ to deny an original or renewal permit if it found, after notice and hearing, that the applicant or permit holder has a compliance history that is classified as unsatisfactory according to TCEQ standards, rather than in the lowest classification, under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections, in addition to certain findings. Makes conforming changes.

(f) Requires TCEQ to find, before denying a permit under this section, that the applicant or permit holder has a compliance history that is as unsatisfactory according to TCEQ standards, rather than in the lowest classification, under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections, in addition to the finding 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 TCEQ.

SECTION 10. Amends Section 382.0518(c), Health and Safety Code, as follow to authorize TCEQ, in considering the issuance, amendment, or renewal of a permit, to consider the applicant's compliance history in accordance with the method for using, rather than evaluating, compliance history developed by TCEQ under Section 5.754, Water Code, in addition to other considerations.

SECTION 11. Amends Section 382.056(o), Health and Safety Code, to make conforming changes.

SECTION 12. Amends Section 401.110(a), Health and Safety Code, as follows:

(a) Authorizes TCEQ, in making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a license or registration, to consider an applicant's or license holder's background that bear materially on the ability to fulfill the obligations of licensure, including technical competence, financial qualifications, and the applicant's or license holder's record in areas involving radiation. Deletes existing text relating to the applicant's compliance history in accordance with the method for evaluating compliance history developed by TCEQ under Section 5.754, Water Code.

SECTION 13. Amends Section 401.112(a), Health and Safety Code, to make conforming and nonsubstantive changes.

SECTION 14. Amends Section 26.028(d), Water Code, to make conforming changes.

SECTION 15. Amends Section 26.0281, Water Code, to make conforming changes.

SECTION 16. Amends Section 26.040(h), Water Code, to make conforming changes.

SECTION 17. Amends Section 27.051(d), Water Code, to make conforming changes.

SECTION 18. Amends Section 32.101(c), Water Code, to make conforming changes.

SECTION 19. Repealer: Section 5.757 (Coordination of Innovative Programs), Water Code.

SECTION 20. Effective date: September 1, 2007.