TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Proposed Rulemaking

AGENDA REQUESTED: January 25, 2012

DATE OF REQUEST: January 6, 2012

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Michael Parrish, (512) 239-2548

CAPTION: Docket No. 2011-1251-RUL. Consideration for publication of, and hearing on, proposed amendments to Sections 60.1, 60.2, and 60.3 of 30 TAC Chapter 60, Compliance History.

The proposed rulemaking would implement House Bill 2694, Articles 4.01 - 4.05 and 4.07, 82nd Legislature, 2011, Regular Session, which amends Texas Water Code (TWC), Sections 5.751 - 5.754 and 5.756. The amendments to TWC require the TCEQ to make changes to the compliance history rule. This proposed rulemaking would revise Chapter 60. The purpose of this proposed rulemaking is to allow the commission to use new standards instead of the existing uniform standard for evaluating and using compliance history. In addition, the proposed rulemaking modifies the components and formula of compliance history in order to provide a more accurate measure of regulated entities' performance and make compliance history a more effective regulatory tool.
(David Van Soest, Anna Treadwell) (Rule Project No. 2011-032-060-CE)

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Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** January 6, 2012

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Richard A. Hyde, P.E., Deputy Director
Office of Compliance and Enforcement

Docket No.: 2011-1251-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 60, Compliance History
HB 2694 (4.01 and Article 4): Compliance History
Rule Project No. 2011-032-060-CE

Background and reason(s) for the rulemaking:
Rulemaking is necessary to implement House Bill (HB) 2694, Article 4, §§4.01 - 4.05 and 4.07, 82nd Legislature, 2011, which amend Texas Water Code (TWC), §§5.751 - 5.756. HB 2694 was authored by Representative Wayne Smith and sponsored by Senator Joan Huffman. The bill took effect September 1, 2011.

Scope of the rulemaking:
A.) Summary of what the rulemaking will do:
The proposed rulemaking implements HB 2694, Article 4, §§4.01 - 4.05 and 4.07, which amend TWC, §§5.751 - 5.754 and 5.756. This proposed rulemaking would revise Chapter 60. The purpose of this proposed rulemaking is to allow the commission to use new standards instead of the existing uniform standard for evaluating and using compliance history. In addition, the proposed rulemaking modifies the components and formula of compliance history in order to provide a more accurate measure of regulated entities' performance and make compliance history a more effective regulatory tool.

B.) Scope required by federal regulations or state statutes:
There are no new federal regulations related to this rulemaking. HB 2694, §4.01, amends TWC, §5.751; §4.03 amends TWC, §5.753; §4.04 amends TWC, §5.753; §4.05 amends TWC, §5.754 and §5.755; and §4.07 amends TWC, §5.756. TWC, §5.754 expressly requires adoption of rules.

C.) Additional staff recommendations that are not required by federal rule or state statute:
None.

Statutory authority:
TWC, §§5.012, 5.103, 5.105, 5.122, 5.127, 5.751, 5.753. 5.754, 5.755, and 5.756
Texas Government Code, §2001.006

Re: Docket No. 2011-1251-RUL

Effect on the:
A.) Regulated community:
As required by HB 2694, the compliance history rule is now applicable to TWC, Chapter 32, Subsurface Area Drip Dispersal Systems and Texas Health and Safety Code, Chapter 375, Removal of Convenience Switches. These programs are now included in the proposed rulemaking.

No fiscal implications are anticipated for industry, businesses, or individuals as a result of the implementation or administration of the proposed rules. The proposed rules do not affect current regulatory requirements on businesses or individuals.

B.) Public:
The public benefit anticipated from the changes seen in the proposed rules will be a more transparent and effective means of reviewing and comparing regulated entity's compliance histories. No fiscal implications are anticipated.

C.) Agency programs:
The agency will be required to modify its Consolidated Compliance and Enforcement Data System (CCEDs), Central Registry, and compliance history application in order to accommodate changes to the compliance history formula resulting from this rulemaking. The agency website will need to be updated to reflect changes. A process will need to be developed to allow the agency to perform a quality assurance and control procedure of compliance history data, including allowing the owner or operator of a site 30 days to review any information or data before it is placed on the Internet.

Stakeholder meetings:
Staff held a stakeholder meeting open to the general public on September 22, 2011. During the meeting staff presented the changes that are required and discussed the desire to improve effectiveness of the rules. No concerns were expressed in proceeding with the rulemaking project.

Potential controversial concerns and legislative interest:
It is expected that there will be interest in the compliance history formula, classification, and grouping.

Will this rulemaking affect any current policies or require development of new policies?
This rulemaking would not affect current policy or require the development of new policy.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?
TWC, §5.753 (regarding Compliance History) requires the commission, by rule, to establish a set of standards for the classification of a person's compliance history as a means of

evaluating compliance history. If the rulemaking does not go forward, the newly amended statute and rulemaking would be in conflict regarding evaluation and use of compliance history. Staff recommends proceeding with rulemaking.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: January 25, 2012
Anticipated *Texas Register* publication date: February 10, 2012
Public hearing date (if any): March 6, 2012
Public comment period: February 10, 2012 - March 12, 2012
Anticipated adoption date: June 27, 2012

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The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §§60.1 - 60.3.

Background and Summary of the Factual Basis for the Proposed Rules

The commission proposes revisions to Chapter 60 to implement certain requirements of House Bill (HB) 2694, regarding compliance history. HB 2694, 82nd Legislature, 2011, §§4.01 - 4.05 and 4.07, amended Texas Water Code (TWC), Chapter 5, Subchapter Q, requiring the commission to make changes to the compliance history rule. The purpose of this proposed rulemaking is to allow the commission to use new standards instead of the existing uniform standard for evaluating and using compliance history. In addition, the proposed rulemaking modifies the components and formula of compliance history in order to provide a more accurate measure of regulated entities' performance and make compliance history a more effective regulatory tool.

HB 2912, 77th Legislature, 2001, §4.01, amended TWC, Chapter 5, by adding Subchapter Q, TWC, §5.753, that required the commission to "develop a uniform standard for evaluating compliance history." At the time, the process for measuring or comparing compliance history across the commission's programs for air, water, and waste was inconsistent. In addition to the traditional use of compliance history in permitting and enforcement decisions, this new performance-based regulation allowed the commission to use compliance history when determining eligibility for voluntary incentive programs.

The idea behind these programs was to use compliance history to provide incentives for regulated entities to do more to protect the environment than law requires by making available benefits, such as regulatory flexibility and exemptions from some inspections. In late 2001 and early 2002, TCEQ held stakeholder meetings to develop this new system of compliance history. TCEQ interpreted the uniform standard to mean using an identical objective formula for all entities across all program areas. The compliance history system has remained unchanged since implementation.

In calculating compliance history, TCEQ currently assigns points for different components that when computed in an equation produce a numerical score for each regulated entity. Generally, the lower the score, the better the classification. For instance, noncompliance issues, such as enforcement actions taken against a facility, adds points and proactive approaches towards compliance, such as participating in voluntary programs, subtracts points.

The commission currently recalculates compliance history scores annually based on information from the previous five years, and classifies regulated entities as poor, average, or high performers. HB 2912 also required the commission to assess the compliance history of entities for which it does not have compliance information. The commission classifies these entities as average by default.

Section 4.01 of HB 2694 amends TWC, §5.751 to add TWC, Chapter 32, and Texas Health and Safety Code (THSC), Chapter 375, regarding applicability. Persons and entities covered by those chapters will now be subject to the compliance history rule.

Section 4.04 of HB 2694 amends TWC, §5.753(a) to remove the requirement for a uniform standard for evaluating compliance history, and replaces the uniform standard with a standard that ensures consistency and may account for differences among regulated entities.

Section 4.04 of HB 2694 amends TWC, §5.753(b) to remove enforcement actions from other states and the federal government, except actions by the United States Environmental Protection Agency (EPA), as mandatory components of compliance history and to clarify that enforcement actions from the EPA are mandatory components to the extent readily available to the commission.

Section 4.04 of HB 2694 amends TWC, §5.753(d) to limit the inclusion of notices of violation (NOV) as a mandatory component of compliance history to NOVs one-year-old or less. In addition, the commission must include a prominently displayed statement emphasizing the NOV is only an allegation and not proof of an actual violation.

Section 4.04 of HB 2694 adds TWC, §5.753(d-1) to prohibit the commission from

including a self-reported violation under Title V of the Federal Clean Air Act as an NOV for compliance history purposes, unless the commission issues a written NOV or the self-reported violation results in a final enforcement order or judgment.

Section 4.05 of HB 2694 amends TWC, §5.754(a) and (e) to clarify that the commission may, but is not required to, consider compliance history classifications when using compliance history in commission decisions regarding permitting, enforcement, announced inspections, and participation in innovative programs.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(1) to rename the compliance history classifications from poor, average, and high performers to unsatisfactory, satisfactory, and high performers. The amendment clarifies that unsatisfactory performers perform below minimal acceptable performance standards established by the commission and that high performers have an above-satisfactory compliance record.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(2) and (d) to allow the commission to establish a category of unclassified performers for which the commission does not have adequate compliance information about the site and to allow the commission to require a compliance inspection to determine an entity's eligibility for participation in a program that requires a high level of compliance.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(3) to require the commission to consider both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act.

Section 4.05 of HB 2694 amends TWC, §5.754(c)(2) to modify the classification of repeat violators. The commission must consider the size and complexity of the site at which the violations occurred, and limit consideration to violations of the same nature and same environmental media that occurred in the previous five years. The number of sites is no longer included as a criterion for repeat violator classification.

Section 4.05 of HB 2694 amends TWC, §5.754(c)(3) to require that compliance history classifications consider the size and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act, and the potential for a violation at the site that is attributable to the nature and complexity of the site.

Section 4.05 of HB 2694 adds TWC, §5.754(e-1) to prohibit the amount of penalty enhancement or escalation attributed to compliance history from exceeding 100% of the base penalty for an individual violation as determined by the commission's penalty policy.

Section 4.05 of HB 2694 amends TWC, §5.754(h) to state that persons classified as

unsatisfactory performers are no longer prohibited from receiving announced investigations.

Section 4.07 of HB 2694 adds TWC, §5.756(e) to require 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, before compliance performance information about a site may be placed on the Internet.

Section by Section Discussion

§60.1, Compliance History

The proposal amends §60.1(a) by adding TWC, Chapter 32, and THSC, Chapter 375, as required by HB 2694.

The commission proposes revisions to §60.1(a)(6) and (7) to address compliance histories calculated under the existing rule and the proposed rule. HB 2694, §4.31, has a savings clause for the commission to continue to use its current standard. The commission will continue to use the version of the rule in effect at the time the compliance history classification was calculated in accordance with §60.1(b). For example, if an application for a permit is received by the executive director, then the version of Chapter 60 in effect at the time the application is received will be the version used for compliance history purposes. Therefore, the compliance history rating

generated under the existing version of this chapter will remain in effect for any actions applicable under that chapter. The commission may consider new compliance history information as it deems necessary.

In the existing rule, the compliance period for NOVs is five years. The proposal amends §60.1(b) to change the compliance period for NOVs to one year except as used in proposed §60.2(f) for determination of repeat violator. In evaluating repeat violators, the commission will review a five-year period for NOVs. The compliance period remains unchanged for all other compliance history components.

The proposal amends §60.1(c)(1), (3), (7), (9) and (13) to change the components of compliance history.

Section §60.1(c)(1) is being revised because HB 2694 no longer requires the commission to include consent decrees or criminal convictions of the federal government unless they are readily available.

The proposal amends §60.1(c)(3) to reflect the changes the legislature made to TWC, §5.754 regarding the readily available components to be considered in compliance history. The commission shall now consider enforcement orders, court judgments, consent decrees, and criminal convictions relating to environmental rules of the EPA

that are readily available to the commission as a component of compliance history. This section has also been revised to remove from consideration enforcement orders, court judgments, and criminal convictions of other states as a component of compliance history in accordance with HB 2694.

The proposal amends §60.1(c)(7) regarding NOVs. Under the proposal, the components would include all written NOVs for a period of one year from the date of issuance for each NOV. NOVs will be considered for a five-year compliance period for determination of the repeat violator status. In the Compliance History Report, NOVs will be preceded with the statement, "A notice of violation represents a written allegation of a violation of a specific regulatory requirement from the commission to a regulated entity. A notice of violation is not a final enforcement action nor proof that a violation has actually occurred," as required by HB 2694. Information received by the commission as required by Title V of the Federal Clean Air Act (42 United States Code (USC), §7661 *et seq*.) may not be included as an NOV component of compliance history unless the executive director issues a written NOV. The executive director has historically evaluated deviation reports during an investigation prior to making a compliance determination. An NOV would only be issued for deviations if the executive director's staff documented a violation. This is the current practice of the executive director.

The proposal amends §60.1(c)(9) relating to environmental management systems

(EMS) to specify that the commission will consider an EMS approved under Chapter 90 as a positive component of compliance history.

The proposal amends §60.1(c)(13) to remove the name and address of the staff person as a compliance history component from the rule language. While this information will continue to be on the Compliance History Report, it is not a compliance-related component of the compliance history.

Section 60.1(d) has remained unchanged. Change of ownership remains a component of compliance history and any change of ownership will be shown on the compliance history. Any previous NOVs or orders will be assessed against new owners for the applicable compliance period, which is consistent with how it has been applied by the commission in the past.

§60.2, Classification

The proposal amends §60.2(a)(1) - (a)(3) to change the classification nomenclature from high, average, and poor performers to high, satisfactory, and unsatisfactory performers. Under the proposal, a high performer has an above-satisfactory compliance record. A satisfactory performer generally complies with environmental regulations. An unsatisfactory performer performs below minimal acceptable performance standards established by the commission. The change in nomenclature is present in

§60.2(g)(2)(B) and (C), (3), (3)(A), (3)(A)(iii), (3)(B), (3)(B)(i), and (ii), and §60.3.(a)(2), (3), (3)(A) - (C), (6), (b), (c)(1), (d), (d)(3), and (e). This change has been applied throughout this section as applicable.

The legislature has revised the statute to allow the commission to establish a category of unclassified performers, or regulated entities for which the commission does not have adequate compliance information about the site. The proposal amends §60.2(b) to change the current category from "average performer by default" to "unclassified." The executive director considers any site that does not have compliance history points attributable to violation points, chronic excessive emissions points, repeat violator points, or self-audit points to be unclassified. Unclassified performers will include sites where the executive director may not have investigated the site in the last five years. The nomenclature change removes the implication that a regulated entity with no compliance information generally complies with environmental regulations.

The commission proposes adding §60.2(c). HB 2694 eliminates the commission's uniform standard for evaluating compliance history and allows the commission to account for differences among regulated entities. HB 2694 directs the commission to account for operation, complexity, and size of a site when determining compliance history. In order to more effectively compare regulated entities against those similarly situated, the proposal adds groupings based on the North American Industry

Classifications System (NAICS). The executive director selected NAICS because it is a nationally recognized standard applicable to all industries and is currently information readily available to the commission. The executive director initially proposes to organize regulated entities by the following groups: 1) NAICS codes 44711 and 44719, Gas Stations with Convenience Stores and other Gas Stations; 2) NAICS code 32411, Oil and Petroleum Refineries; 3) NAICS code 211, Oil and Gas Extraction; 4) NAICS code 212, Mining; 5) NAICS code 325, Chemical Manufacturing; 6) NAICS code 2211, Electric Power Generation; 7) NAICS code 562212, Solid Waste Landfills; 8) NAICS code 22132, Sewage Treatment Facilities; 9) NAICS code 23, Construction; 10) NAICS code 3273, Cement and Concrete Product Manufacturing; 11) NAICS codes 5621,56221, 562213, 562219, Waste Management (exclude landfills); 12) NAICS code 11, Agriculture, Forestry, Fishing, and Hunting; and 13) All Other Regulated Entities. For reporting purposes, the sites would be grouped according to their reported primary NAICS group which reflects their primary business. The executive director recognizes that the use of NAICS codes is not an exact means to determine the complexity of a site, but that similar businesses may have similar levels of complexity. The executive director also recognizes that the current NAICS codes for some regulated entities are incorrect as reported to the commission. Therefore, other readily available information, such as complexity points gathered under proposed §60.2(e), may also be used for reporting purposes to group similarly complex entities.

The commission reletters existing §60.2(c) as proposed §60.2(d) due to the inclusion of proposed §60.2(c).

The commission proposes §60.2(e), concerning complexity points, to address the requirements of TWC, §5.754(b)(3), which states that the commission, in classifying a person's compliance history, must take into account both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act (USC, §7661 *et seq*.). HB 2694 directs the commission to account for complexity and size for sites when determining compliance history. In addition, HB 2694 removed the number of facilities owned or operated by a person as a consideration for establishing criteria for classifying a repeat violator. The proposed rule removes existing §60.2(d)(3) relating to the number of sites in Texas owned or operated by a person. The commission recognizes that the compliance history of widely varying types of sites requires various means to determine overall complexity. In this proposed rule, the commission has broadened the scope of data used to determine a site's complexity. Data available to the commission has improved significantly since the existing rule was written. The points assigned under proposed §60.2(e) are based upon criteria points found in existing §60.2(d). The rulemaking proposes to utilize complexity points for all sites. The term "complexity points" includes program participation, size, and nonattainment points. Under the existing rule, complexity points refer to those points assigned based upon the types of permits at the

site, which is now known as "program participation" points.

In proposed §60.2(e)(1), the commission would assign every site "program participation" points ranging from factors of four, three, two, or one, based generally upon the site's program authorizations. A site will receive points for each of its program authorizations. As required by HB 2694, Title V Federal Operating Permits have been added to §60.2(e)(1)(C)(i). This is not included under the existing compliance history rule. Other program authorizations and registrations, that are not included in the existing rule, such as Edwards Aquifer authorizations, Enclosed Structures constructed over a closed Municipal Solid Waste (MSW) landfill permits and registrations, Industrial Hazardous Waste registrations, Medical Waste permits, Radioactive Waste storage or processing license; Petroleum Storage Tanks registrations, Stage II Vapor Recovery registrations, Sludge permits or registrations, Stormwater permits, and Uranium licenses are proposed to be added in proposed §60.2(e)(1)(D).

Sites with permits and/or authorizations in the following program areas including: Radioactive Waste Disposal; Hazardous or Industrial Non-Hazardous Storage Processing or Disposal; MSW Type I; Prevention of Significant Deterioration; Phase I Municipal Separate Storm Sewer System; and Texas Pollutant Discharge Elimination Discharge System (TPDES) or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major, will receive four points for each permit type

issued to a person at a site. Sites with permits and/or authorizations in the following program areas including: Underground Injection Control Class I/III; MSW Type I Arid Exempt; MSW Type IV, V, or VI; MSW Tire Registration; and TPDES or NPDES Industrial or Municipal Minor, will receive three points for each permit type issued to a person at the site. Sites with permits and/or authorizations in the following program areas including: Title V Federal Operating Permits; New Source Review individual permit; and any other individual site-specific water quality permit not referenced previously or any water quality general permit, will receive two points. Other registrations and authorizations readily available to the executive director that are applicable to the compliance history rule including: Edwards Aquifer; Enclosed Structures constructed over a closed MSW landfill; Industrial Hazardous Waste; Medical Waste; Radioactive Waste; Petroleum Storage Tanks; Stage II Vapor Recovery; Sludge; Stormwater; permit by rule requiring submission of a PI-7 under Chapter 106; and Uranium will receive one point.

Under proposed §60.2(e)(2), the commission proposes to assign points based upon the size of the site. Under the existing rule, size points are addressed under §60.2(d)(4). The commission recognizes that the point structure for size under the existing rule is limiting and does not account for a meaningful range of size for very complex sites. Under the existing rule, the points assigned to size for each media ranged from one to four points which did not allow enough degree of separation between large sites and

small sites. Under the proposed rule, the executive director has changed the points assigned to each media for size. One measure of size is the number of points of emission, discharge, or potential release to the environment at the site. Generally, each of these points or facilities requires authorization which adds additional regulatory oversight and increased complexity. The commission currently has information on size through Facility Identification Numbers (FINs), Water Quality external outfalls, and Active Hazardous Waste Management Units (AHWMU). The commission is currently reviewing additional readily available data sets for all media that may be used to more accurately represent the size of a site.

Under the proposal, the points assigned to the size factor for FINs will be calculated by multiplying the total number of FINs at a site by 0.01 and rounded up to nearest whole number. The size factor for Water Quality external outfalls and AHWMUs will be based on the number of external outfalls and number of AHWMUs. A site with ten or more external outfalls or 50 or more AHWMUs will receive ten points. A site with at least five but fewer than ten external outfalls or at least 20 but fewer than 50 AHWMUs will receive five points. A site with at least two, but fewer than five external outfalls or at least ten but fewer than 20 AHWMUs will receive three points. A site with at least one external outfall or at least one, but fewer than ten AHWMUs will receive one point.

The commission proposes §60.2(e)(2)(D) to assign points to small entities. Small

entities are proposed to be assigned three points to account for the complexity that arises from being a small entity. A small entity is defined as: a city with a population of less than 5,000; a county with a population of less than 25,000; or a small business. A small business is defined as any person, firm, or business which employs, by direct payroll and/or through contract, fewer than 100 full-time employees. A business that is a wholly owned subsidiary of a corporation shall not qualify as a small business if the parent organization does not qualify as a small business. The definition of small entity comes from the TCEQ's Enforcement Standard Operating Procedures. The commission recognizes that size alone cannot account for the complexity that a small entity faces, and therefore proposes to add a separate provision of size points for those entities.

Proposed §60.2(e)(3) addresses points for sites located in nonattainment areas. Points for sites located in nonattainment areas are in §60.2(d)(5) under the existing rule and no changes are recommended. The commission would continue to assign every site located in a nonattainment area one point.

HB 2694 requires changes to the way in which the commission evaluates repeat violators. Previously, in determining whether or not an entity was a repeat violator, the commission evaluated all major violations that occurred during the five-year compliance period. Under the proposed rule, in accordance with HB 2694, the commission will limit consideration to only those violations that are of the same nature and the same

environmental media that occurred in the preceding five years. The commission analyzed different methods to define "same nature." The commission proposes to define same nature as violations that have the same root citation at the subsection level. For example, all rules under §334.50 (e.g. §334.50(a) or (b)(2)) would be considered same nature. If a person is determined to be a repeat violator, the impact to the compliance history calculation remains the same as in the existing rule and 500 points will be added to the compliance history calculation. If the person is not a repeat violator, then zero points will be added to the calculation.

The proposal replaces the term "criteria points" with "complexity points" throughout §60.2(f).

The commission proposes §60.2(f)(1)(A) - (C), replacing existing §60.2(d)(1)(A) - (C). Proposed §60.2(f)(1)(A) - (C) removes the range of complexity points used to determine if a person is a repeat violator, simplifying the language. Under the proposal, a person is a repeat violator when: the site has had a major violation(s) documented on at least two occasions and has less than a total of nine complexity points; the site has had a major violation(s) documented on at least three occasions and has less than a total of 25 complexity points; or the site has had a major violation(s) documented on at least four occasions.

The proposal moves "Repeat Violator Exemption" from existing §60.2(d)(6) to proposed §60.2(f)(2).

The proposal moves "Formula" from existing §60.2(e) to proposed §60.2(g).

The current formula used for calculating compliance history is:

Figure 1: 30 TAC Chapter 60 - Preamble

Existing Formula for Site Ratings

$$\left[\frac{\text{(Violation Points)} + \text{(Chronic Excessive Emissions Events Points)} + \text{(Repeat Violator Points)} - \text{(Self-Audit Points)}}{\text{(Investigations} + 1)}\right] \times \text{(0.9 for Environmental Management System)}$$

The commission proposes the following revised formula:

Figure 2: 30 TAC Chapter 60 - Preamble

Proposed Formula for Site Ratings

$$\left[\frac{\text{(Violation Points)} + \text{(Chronic Excessive Emissions Events Points)} + \text{(Repeat Violator Points)} - \text{(Self-Audit Points)}}{\text{(No. of Investigations x 0.1)} + \text{(Complexity Points)}}\right] \times \text{(Voluntary Program Points)}$$

The commission proposes §60.2(g)(1)(D) to incorporate a positive factor in the site's compliance history rating regarding compliance with orders. The site will receive the full amount of violation points attributable to an order for the first two years. Two years after the effective date of the order, if the entity is compliant with all ordering provisions and has resolved all violations, the points attributable to that order will be reduced. The reduction will be 25% for year three, 50% for year four, and 75% for year five. The commission proposes this new reduction to encourage compliance and encourage maintaining compliance.

Proposed §60.2(g)(1)(E) and (F) amend the multipliers used to calculate points assigned to violations contained in NOVs. Under the proposal, major violations shall be multiplied by ten (currently five in the existing rule) and moderate violations shall be multiplied by four (currently three in the existing rule). The commission is proposing this change to ensure the weight of the violations is more appropriate.

Proposed §60.2(g)(1)(L) amends the multipliers used to calculate points assigned to violations disclosed as a result of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended, and the site was granted immunity from an administrative or civil penalty for that violation(s) by the agency. Under the proposal, major violations shall be multiplied by ten (currently five

in the existing rule) and moderate violations shall be multiplied by four (currently three in the existing rule). The commission is proposing this change to ensure the weight of the violations is more appropriate.

The commission proposes to revise existing §60.2(e)(1)(L) to proposed §60.2(g)(1)(M) to reflect that only investigations which do not result in a documented violation will be considered. The number of investigations conducted during the compliance period that do not document any violations will be multiplied by 0.1 and added to the number of complexity points in §60.2(e). Investigations that do not document any violations will be the only investigations considered in the compliance history formula. The number of investigations that do not document any violations multiplied by 0.1 shall be rounded up to the nearest whole number. The executive director reviewed the investigations applicable to compliance history and determined that approximately 91% of all investigations do not result in documented violations. The executive director proposes this change to further encourage incentives for compliance. Investigations that do not result in documented violations more accurately reflect a positive component of compliance history. The commission will continue its current practice and will not include investigations that are the result of a complaint regardless of whether or not violations are documented.

The commission proposes to revise existing §60.2(e)(1)(M) to proposed §60.2(g)(1)(N)

to incorporate the changes made to TWC, §5.755(b). An EMS is a way for sites to receive a reduction to their compliance history rating. The amount of reduction for implementing an EMS has not changed and remains at 10%. The commission proposes to add incentives for entities that participate in other commission supported voluntary pollution reduction or early compliance programs. The commission proposes a reduction of 5% for each of the voluntary pollution reduction or early compliance programs applicable to a site. The total amount of reduction available to an entity implementing an EMS (10%) and participating in other commission supported voluntary reduction or early compliance programs (5% each) is 25%. The commission currently supports three programs: 1) Pollution Prevention Site Assistance; 2) Clean Texas Voluntary Pollution Reduction; and 3) Compliance Commitment.

Proposed §60.2(g)(2) changes the site rating ranges for each classification based on the proposed formula. A high performer is defined as having fewer than 0.10 points. A satisfactory performer is defined as having 0.10 points to 55 points. An unsatisfactory performer is defined as having more than 55 points.

The proposal amends existing §60.2(e)(3) to proposed §60.2(g)(3)(A) and (B)(i) and (ii) to correspond to the new point ranges in §60.2(g)(2). Proposed §60.2(g)(3)(A) states that the executive director may reclassify a site with 55 points based on the listed mitigating factors. Proposed §60.2(g)(3)(B)(i) and (ii) states that reclassification of a

site under these clauses shall be applicable to a satisfactory performer with 55 points.

The proposal moves §60.2(f) in the existing rule to §60.2(h). Under the existing rule a person classification is assigned by averaging the site ratings of all the sites owned and/or operated by that person in the State of Texas. Under the proposed rule, the executive director would assign a classification to a person by adding the complexity weighted site ratings of all the sites owned and/or operated by that person in the State of Texas. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site multiplied by the percentage of complexity points that site represents of the person's total complexity points for all sites. This is depicted in the formula below.

Figure 3: 30 TAC Chapter 60 - Preamble

$$\text{Site \#1 Compliance History Rating} \times \frac{\text{Complexity Points for Site \#1}}{\text{Sum of all complexity points for all sites associated to the person}}$$

Each of these calculated amounts will be added together to determine the person's compliance history rating.

The proposal moves existing §60.2(g), to §60.2(i). The proposal revises the notice of

classification to incorporate changes to TWC, §5.756. Every September 1, the executive director calculates new person and site classification ratings for compliance history. The compliance history ratings are published on the commission's Web site 30 days after the completion of a quality assurance, quality control (QAQC) review period conducted by executive director's staff. The commission regulates over 220,000 sites, some of which have more than one owner or operator. The executive director will only conduct a QAQC review of compliance history calculations where the person or site has a rating above zero. A QAQC review will not be conducted on persons or sites who rank unclassified or have a rating of zero. TWC, §5.756 included a 30-day period for the owner or operator of the site to review and comment on the information. During the QAQC review, owners or operations who wish to review and comment on the compliance history information must submit a Compliance History Review Form. The Compliance History Review Form must be submitted by August 15 of each year and must be submitted annually to the commission. The executive director will publish a press release on the commission's Web site on or about July 15 to remind the regulated community of the compliance history QAQC review period. A person may file an appeal of the classification in accordance with proposed §60.3(e). The commission will post on the commission's Web site the compliance history rating for a person and site on or about November 1 of each year. The commission will still allow for an owner or operator of the regulated entity to submit a correction request, in accordance with proposed §60.3(f) at any time for review by executive director's staff.

§60.3, Use of Compliance History

This section describes activities the commission may take if a site is classified as an unsatisfactory performer. Language in §60.3(b)(3) is revised to reflect changes in HB 2694 which provides flexibility to the commission in conducting investigations announced or unannounced.

The proposal amends §60.3(e) and (e)(4). Section 60.3(e) is amended to state that a person or site classification may be appealed only if the person or site is classified as either an unsatisfactory performer or a satisfactory performer with 45 points or more. The existing rule states that 30 points or more are needed to appeal. The change is necessary based on the proposed changes to the compliance history formula. Section 60.3(e)(4) is amended to state that any replies to an appeal must be filed no later than 15 days after the filing of the appeal to provide the commission with a more reasonable amount of time to reply. The existing rule provides ten days.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Strategic Planning and Assessment section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are anticipated for other units of state or local government as a result of administration

or enforcement of the proposed rules.

The proposed rulemaking implements certain sections of HB 2694 and relates to the use of standards for evaluating and using compliance history for entities regulated by the commission. The proposed rules replace the uniform standard for evaluating compliance history with a standard that ensures consistency and may account for differences among regulated entities.

The proposed rules would clarify that enforcement actions from the EPA are mandatory components to the extent that they are readily available to the commission. The proposed rules would limit the inclusion of NOVs as a mandatory component of compliance history to those that are one-year-old or less and would prohibit the commission from including a self-reported violation under Title V of the Federal Clean Air Act as an NOV for compliance history purposes, unless the commission issues a written NOV or the self-reported violation results in a final enforcement order or judgment. The proposed rules include subsurface area drip disposal systems and the removal of convenience switches as programs that are now subject to the compliance history rule.

The proposed rules would clarify that the commission may, but is not required, to consider compliance history classifications when using compliance history in

commission decisions regarding permitting, enforcement, announced inspections, and participation in innovative programs. The proposed rules would rename the compliance history classifications from poor, average, and high performers to unsatisfactory, satisfactory, and high performers. The proposed rules would allow the commission to establish a category of unclassified performers for which the commission does not have adequate compliance information and would allow the commission to require a compliance inspection to determine an entity's eligibility for participation in a program that requires a high level of compliance.

The proposed rules would require the commission to consider both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act. The commission must consider the size and complexity of the site at which the violations occurred, and limit consideration to violations of the same nature and same environmental media that occurred in the previous five years. The number of sites is no longer included as a criterion for repeat violator classification.

The proposed rules would prohibit the amount of penalty enhancement or escalation attributed to compliance history from exceeding 100% of the base penalty for an individual violation as determined by the commission's penalty policy.

In order to implement the proposed rules, the agency will need to modify the Consolidated Compliance and Enforcement Data System (CCEDs), the Central Registry system, and the compliance history application in order to accommodate changes to the compliance history formula resulting from this rulemaking. The agency Web site will need to be updated to reflect the proposed changes. HB 2694 requires the agency to implement 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, before compliance performance information about a site may be placed on the Internet. All of the aforementioned changes are anticipated to cost the agency between $90,000 and $150,000 in fiscal year 2012 with the majority of the funds allocated to database updates for CCEDS and Central Registry. No additional funding was appropriated to the agency to implement the changes so the agency will use available resources. Agency costs after fiscal year 2012 are expected to be minimal.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law through the implementation of a more effective and transparent compliance history evaluation and classification system.

The proposed rulemaking is not expected to have fiscal implications for any individuals

or businesses. Although all regulated entities for which compliance history is currently applicable will fall into the new classification and rating system, no components are being added to the current formula which would result in negative consequences and the overall impact is anticipated to be minor with no adverse fiscal impacts. The proposed rules do not impose new regulatory requirements or fees.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules do not add new regulatory requirements or fees. Even though regulated entities for which compliance history is currently applicable will fall into a new classification and rating system, no components are being added to the current formula which would result in negative consequences for small or micro-business.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the rulemaking merely adds the new requirements relating to the components of compliance history. The commission has determined that the proposed rulemaking does not fall under the definition of a "major environmental rule" because the proposed amendments are primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The primary purpose of the proposed rulemaking is to implement HB 2694, 82nd Legislature, 2011, §§4.01 - 4.05 and 4.07, which amended TWC, Chapter 5, Subchapter Q, requiring changes to the compliance history rule. The proposed

rulemaking revises the standards for use and evaluation of compliance history.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the Statutory Authority section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rules and performed an assessment of whether

these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement the statutory provisions of TWC, §§5.751 - 5.754 and 5.756. The proposed rules provide for standards for evaluating and using compliance history.

Promulgation and enforcement of the proposed amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulations do not affect a landowner's rights in real property because the clarification in the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the proposed clarification of the regulations. In other words, there are no burdens imposed on private real property under this rulemaking because they only establish a new procedural mechanism for compliance history. Therefore, the proposed rules do not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission

conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rule include: 31 TAC §501.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 31 TAC §501.12(2), to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; 31 TAC §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; 31 TAC §501.12(5), to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; 31 TAC §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 31 TAC §501.12(7), to make agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and 31 TAC §501.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by

developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed these rules for consistency with applicable goals of the CMP and determined that the rules are consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the proposed rules include: 31 TAC §501.19, Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; 31 TAC §501.20, Prevention, Response, and Remediation of Oil Spills; 31 TAC §501.21, Discharge of Municipal and Industrial Wastewater to Coastal Waters; 31 TAC §501.22, Nonpoint Source (NPS) Water Pollution; 31 TAC §501.23, Development in Critical Areas; 31 TAC §501.25, Dredging and Dredged Material Disposal and Placement; 31 TAC §501.28, Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and 31 TAC §501.32, Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Texas Department of Health regarding wastewater discharges that could significantly

adversely affect oyster reefs. This rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable: to areas with the potential to develop agricultural or silvicultural NPS water quality problems; to on-site disposal systems; to underground storage tanks; or to Texas Pollutant Discharge Elimination System permits for storm water discharges. This rulemaking does not relax the standards related to dredging, the discharge of dredge material, compensatory mitigation, and authorization of development in critical areas or to dredging, the discharge, disposal, and placement of dredged material, compensatory mitigation, and the authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements. This rulemaking has been conducted consistent with the THSC, Chapter 382. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be

consistent with the applicable goals and policies of the CMP. The commission reviewed the rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of CNRAs (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking is the policy (31 TAC §501.32) that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (31 TAC §501.32).

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on March 6, 2012 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes

prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-032-060-CE. The comment period closes March 12, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact David Van Soest, Office of Compliance and Enforcement at (512) 239-0468.

§§60.1 - 60.3

Statutory Authority

House Bill 2694 granted rulemaking authority to the commission under Texas Water Code (TWC), §5.754 to establish a set of standards for the classification and use of compliance history. The amendments are proposed under Texas Health and Safety Code (THSC), §361.017 and §361.024, which provide the commission with authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The amendments are also authorized under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

The proposed amendments implement TWC, §§5.751 - 5.754, and 5.756, relating to the standard for evaluating compliance history.

§60.1. Compliance History.

(a) Applicability. The provisions of this chapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26, [and] 27, and 32 and Texas Health and Safety Code (THSC), Chapters 361, 375, 382, and 401.

(1) Specifically, the agency will utilize compliance history when making decisions regarding:

(A) the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit;

(B) enforcement;

(C) the use of announced investigations; and

(D) participation in innovative programs.

(2) For purposes of this chapter, the term "permit" means licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization.

(3) With respect to authorizations, this chapter only applies to forms of authorization, including temporary authorizations, that require some level of notification to the agency, and which, after receipt by the agency, requires the agency to make a substantive review of and approval or disapproval of the authorization required in the notification or submittal. For the purposes of this rule, "substantive review of and approval or disapproval" means action by the agency to determine, prior to issuance of the requested authorization, and based on the notification or other submittal, whether the person making the notification has satisfied statutory or regulatory criteria that are prerequisites to issuance of such authorization. The term "substantive review or response" does not include confirmation of receipt of a submittal.

(4) Notwithstanding paragraphs (2) and (3) of this subsection, this chapter does not apply to certain permit actions such as:

(A) voluntary permit revocations;

(B) minor amendments and nonsubstantive corrections to permits;

(C) Texas pollutant discharge elimination system and underground injection control minor permit modifications;

(D) Class 1 solid waste modifications, except for changes in ownership;

(E) municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice;

(F) permit alterations;

(G) administrative revisions; and

(H) air quality new source review permit amendments which meet the criteria of §39.402(a)(3)(A) - (C) and (5)(A) - (C) of this title (relating to Applicability to Air Quality Permits and Permit Amendments) and minor permit revisions under Chapter 122 of this title (relating to Federal Operating Permits Program).

(5) Further, this chapter does not apply to occupational licensing programs under the jurisdiction of the commission.

(6) Not later than September 1, 2012 [Beginning February 1, 2002], the executive director shall develop compliance histories with the components specified in this chapter. Until the commission adopts that method, the executive director shall continue in effect the standards and use of compliance history for any action (permitting, enforcement, or otherwise) that were in effect before September 1, 2012.

(7) Beginning September 1, 2012 [2002], this chapter shall apply to the use of compliance history in agency decisions relating to:

(A) applications submitted on or after this date for the issuance, amendment, modification, or renewal of permits;

(B) inspections and flexible permitting;

(C) a proceeding that is initiated or an action that is brought on or after this date for the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission; and

(D) applications submitted on or after this date for other forms of authorization, or participation in an innovative program, except for flexible permitting.

(8) If a motion for reconsideration or a motion to overturn is filed under §50.39 or §50.139 of this title (relating to Motion for Reconsideration; and Motion to Overturn Executive Director's Decision) with respect to any of the actions listed in paragraph (4) of this subsection, and is set for commission agenda, a compliance history shall be prepared by the executive director and filed with the Office of the Chief Clerk no later than six days before the Motion is considered on the commission agenda.

(b) Compliance period. The compliance history period includes the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first; for purposes of determining whether an announced investigation is appropriate, the five-year period preceding an investigation; or the five years prior to the date the application for participation in an innovative program is received by the executive director. The compliance history period may be extended beyond the date the application for the permit or participation in an innovative program is received by the executive director, up through completion of review of the application. <u>Except as used in §60.2(f) of this title (relating to Classification) for determination of repeat violator, notices of violation may only be used as a component of compliance history for a period not to exceed one year from the date of issuance.</u>

(c) Components. The compliance history shall include multimedia compliance-related information about a person, specific to the site which is under review, as well as other sites which are owned or operated by the same person. The components are:

(1) [any final] enforcement orders, court judgments, [consent decrees,] and criminal convictions of this state [and the federal government] relating to compliance with applicable legal requirements under the jurisdiction of the commission [or the United States Environmental Protection Agency]. "Applicable legal requirement" means an environmental law, regulation, permit, order, consent decree, or other requirement;

(2) notwithstanding any other provision of the TWC, orders developed under TWC, §7.070 and approved by the commission on or after February 1, 2002;

(3) to the extent readily available to the executive director, [final] enforcement orders, court judgments, consent decrees, and criminal convictions relating to violations of environmental rules [laws] of the United States Environmental Protection Agency [other states];

(4) chronic excessive emissions events. For purposes of this chapter, the term "emissions event" is the same as defined in THSC, §382.0215(a);

(5) any information required by law or any compliance-related requirement necessary to maintain federal program authorization;

(6) the dates of investigations;

(7) all written notices of violation for a period not to exceed one year from the date of issuance of each notice of violation, including written notification of a violation from a regulated person, issued on or after September 1, 1999, except for those administratively determined to be without merit [and specifying each violation of a state environmental law, regulation, permit, order, consent decree, or other requirement];

(8) the date of letters notifying the executive director of an intended audit conducted and any violations disclosed under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995;

(9) an [the type of] environmental management system [systems] under Chapter 90 of this title (relating to Innovative Programs), if any, used for environmental compliance;

(10) any voluntary on-site compliance assessments conducted by the executive director under a special assistance program;

(11) participation in a voluntary pollution reduction program; and

(12) a description of early compliance with or offer of a product that meets future state or federal government environmental requirements.[; and]

[(13) the name and telephone number of an agency staff person to contact for additional information regarding compliance history.]

(d) Change in ownership. In addition to the requirements in subsections (b) and (c) of this section, if ownership of the site changed during the five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. Specifically, for any part of the compliance period that involves a previous owner, the compliance history will include only the site under review. For the purposes of this rule, a change in operator shall be considered a change in ownership if the operator is a co-permittee.

§60.2. Classification.

(a) Classifications. Beginning September 1, 2002, the executive director shall evaluate the compliance history of each site and classify each site and person as needed for the actions listed in §60.1(a)(1) of this title (relating to Compliance History). On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify each site and person. For the purposes of classification in this chapter, and except with regard to portable units, "site" means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. Each site and person shall be classified as:

(1) a high performer, which has an above-<u>satisfactory</u> [average] compliance record;

(2) <u>a satisfactory</u> [an average] performer, which generally complies with environmental regulations; or

(3) <u>an unsatisfactory</u> [a poor] performer, which performs below <u>minimal acceptable performance standards established by the commission</u> [average].

(b) Inadequate information. For purposes of this rule, "inadequate information" shall be defined as no compliance information. If there is no compliance information about the site at the time the executive director develops the compliance history classification, then the classification shall be designated as "unclassified." ["average performer by default."] The executive director may conduct an investigation to develop a compliance history.

(c) Groupings. Sites will be divided into groupings based on North American Industry Classifications Systems (NAICS) codes or other information available to the executive director.

(d) [(c)] Major, moderate, and minor violations. In classifying a site's compliance history, the executive director shall determine whether a documented violation of an applicable legal requirement is of major, moderate, or minor significance.

(1) Major violations are:

(A) a violation of a commission enforcement order, court order, or consent decree;

(B) operating without required authorization or using a facility that does not possess required authorization;

(C) an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment;

(D) falsification of data, documents, or reports; and

(E) any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

(2) Moderate violations are:

(A) complete or substantial failure to monitor, analyze, or test a release, emission, or discharge, as required by a commission rule or permit;

(B) complete or substantial failure to submit or maintain records, as required by a commission rule or permit;

(C) not having an operator whose level of license, certification, or other authorization is adequate to meet applicable rule requirements;

(D) any unauthorized release, emission, or discharge of pollutants that is not classified as a major violation;

(E) complete or substantial failure to conduct a unit or facility inspection, as required by a commission rule or permit;

(F) any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction; and

(G) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.

(3) Minor violations are:

(A) performing most, but not all, of a monitoring or testing requirement, including required unit or facility inspections;

(B) performing most, but not all, of an analysis or waste characterization requirement;

(C) performing most, but not all, of a requirement addressing the submittal or maintenance of required data, documents, notifications, plans, or reports; and

(D) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate.

(e) Complexity Points. All sites classified shall have complexity points as follows:

(1) Program Participation Points. A site shall be assigned Program Participation Points based upon its types of authorizations, as follows:

(A) four points for each permit type listed in clauses (i) - (vi) of this subparagraph issued to a person at a site:

(i) Radioactive Waste Disposal;

(ii) Hazardous or Industrial Non-Hazardous Storage Processing or Disposal;

(iii) Municipal Solid Waste Type I;

(iv) Prevention of Significant Deterioration;

(v) Phase I--Municipal Separate Storm Sewer System; and

(vi) Texas Pollutant Discharge Elimination System (TPDES) or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major;

(B) three points for each type of authorization listed in clauses (i) - (v) of this subparagraph issued to a person at a site:

(i) Underground Injection Control Class I/III;

(ii) Municipal Solid Waste Type I AE;

(iii) Municipal Solid Waste Type IV, V, or VI;

(iv) Municipal Solid Waste Tire Registration; and

(v) TPDES or NPDES Industrial or Municipal Minor;

(C) two points for each permit type listed in clauses (i) and (iii) of this subparagraph issued to a person at a site or utilized by a person at a site:

(i) Title V Federal Operating Permit;

(ii) New Source Review individual permit; and

(iii) any other individual site-specific water quality permit not referenced in subparagraph (A) or (B) of this paragraph or any water quality general permit;

(D) one point for each type of authorization listed in clauses (i) - (xii) of this subparagraph issued to a person at a site or utilized by a person at a site:

(i) Edwards Aquifer registration;

(ii) Enclosed Structure permit or registration relating to the use of land over a closed Municipal Solid Waste landfill;

(iii) Industrial Hazardous Waste registration;

(iv) Medical Waste permit;

(v) Other types of Municipal Solid Waste permits or registrations not listed in subparagraphs (A) - (C) of this paragraph;

(vi) Petroleum Storage Tank registration;

(vii) Radioactive Waste Storage or Processing license;

(viii) Sludge registration or permit;

(ix) Stage II Vapor Recovery registration;

(x) Stormwater permit;

(xi) Permit by Rule requiring submission of a PI-7 under Chapter 106 of this title (relating to Permits by Rule); and

(xii) Uranium license.

(2) Size. Every site shall be assigned points based upon size as determined by the following:

(A) Facility Identification Numbers (FINs): The total number of FINS at a site will be multiplied by 0.01 and rounded up to the nearest whole number.

(B) Water Quality external outfalls:

(i) 10 points for a site with ten or more external outfalls;

(ii) 5 points for a site with at least five, but fewer than ten, external outfalls;

(iii) 3 points for sites with at least two, but fewer than five, external outfalls; and

(iv) 1 point for sites with one external outfall;

(C) Active Hazardous Waste Management Units (AHWMUs):

(i) 10 points for sites with 50 or more AHWMUs;

(ii) 5 points for sites with at least 20, but fewer than 50, AHWMUs;

(iii) 3 points for sites with at least ten, but fewer than 20, AHWMUs; and

(iv) 1 point for sites with at least one but fewer than ten AHWMUs.

(D) Small Entities shall receive 3 points. A small entity is defined as: a city with a population of less than 5,000; a county with a population of less than 25,000; or a small business. A small business is defined as any person, firm, or business which employs, by direct payroll and/or through contract, fewer than 100 full-time employees. A business that is a wholly owned subsidiary of a corporation shall not

qualify as a small business if the parent organization does not qualify as a small business.

(3) Nonattainment area points. Every site located in a nonattainment area shall be assigned 1 point.

(4) The subtotals from subparagraphs (1) - (3) of this paragraph shall be summed.

(f) [(d)] Repeat violator.

(1) Repeat violator criteria. A person may be classified as a repeat violator at a site when, on multiple, separate occasions, [a] major violations [violations(s)] of the same nature and the same environmental media occurs during the preceding five-year compliance period as provided in subparagraphs (A) - (C) of this paragraph. Same nature is defined as violations that have the same root citation at the subsection level. For example, all rules under §334.50 of this title (relating to Release Detection) (e.g. §334.50(a) or (b)(2) of this title) would be considered same nature. The total complexity [criteria] points for a site equals the sum of points assigned to a specific site in subsection [paragraphs] (e) [(2) - (5)] of this section [subsection]. A person is a repeat violator at a site when:

(A) the site has had a major violation(s) documented on at least two occasions and has less than a total of 9 complexity [criteria] points ranging from 0 to 8;

(B) the site has had a major violation(s) documented on at least three occasions and has less than a total of 25 complexity [criteria] points ranging from 9 to 24; or

(C) the site has had a major violation(s) documented on at least four occasions [and has total criteria points greater than 24].

[(2) Complexity points. A site shall be assigned complexity points based upon its types of permits, as follows:]

[(A) four points for each permit type listed in clauses (i) - (vi) of this subparagraph issued to a person at a site:]

[(i) Radioactive Waste Disposal;]

[(ii) Hazardous or Industrial Non-Hazardous Storage Processing or Disposal;]

[(iii) Municipal Solid Waste Type I;]

[(iv) Prevention of Significant Deterioration;]

[(v) Phase I--Municipal Separate Storm Sewer System; and]

[(vi) Texas Pollutant Discharge Elimination System (TPDES) or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major;]

[(B) three points for each permit type listed in clauses (i) - (v) of this subparagraph issued to a person at a site:]

[(i) Underground Injection Control Class I/III;]

[(ii) Municipal Solid Waste Type I AE;]

[(iii) Municipal Solid Waste Type IV, V, or VI;]

[(iv) Municipal Solid Waste Tire Registration; and]

[(v) TPDES or NPDES Industrial or Municipal Minor;]

[(C) two points for each permit type listed in clauses (i) and (ii) of this subparagraph issued to a person at a site or utilized by a person at a site:]

[(i) New Source Review individual permit or permit by rule requiring submission of a PI-7 under Chapter 106 of this title (relating to Permits by Rule); and]

[(ii) any other individual site-specific water quality permit not referenced in subparagraph (A) or (B) of this paragraph or any water quality general permit.]

[(3) Number of sites points. The following point values are assigned based on the number of sites in Texas owned or operated by a person:]

[(A) 1 point when a person owns or operates one site only;]

[(B) 2 points when a person owns or operates two sites only;]

[(C) 3 points when a person owns or operates three sites only;]

[(D) 4 points when a person owns or operates four sites only;]

[(E) 5 points when a person owns or operates five sites only;]

[(F) 6 points when a person owns or operates six to ten sites;]

[(G) 7 points when a person owns or operates 11 to 100 sites; and]

[(H) 8 points when a person owns or operates more than 100 sites.]

[(4) Size. Every site shall be assigned points based upon size as determined by the following:]

[(A) Facility Identification Numbers (FINs):]

[(i) 4 points for sites with 600 or more FINs;]

[(ii) 3 points for sites with at least 110, but fewer than 600, FINs;]

[(iii) 2 points for sites with at least 44, but fewer than 110, FINs; and]

[(iv) 1 point for sites with at least one but fewer than 44 FINs;]

[(B) Water Quality external outfalls:]

[(i) 4 points for a site with ten or more external outfalls;]

[(ii) 3 points for a site with at least five, but fewer than ten, external outfalls;]

[(iii) 2 points for sites with at least two, but fewer than five, external outfalls; and]

[(iv) 1 point for sites with one external outfall;]

[(C) Active Hazardous Waste Management Units (AHWMUs):]

[(i) 4 points for sites with 50 or more AHWMUs;]

[(ii) 3 points for sites with at least 20, but fewer than 50, AHWMUs;]

[(iii) 2 points for sites with at least ten, but fewer than 20, AHWMUs; and]

[(iv) 1 point for sites with at least one but fewer than ten AHWMUs.]

[(5) Nonattainment area points. Every site located in a nonattainment area shall be assigned 1 point.]

(2) [(6)] Repeat violator exemption. The executive director shall designate a person as a repeat violator as provided in this subsection, unless the executive director determines the nature of the violations and the conditions leading to the violations do not warrant the designation.

(g) [(e)] Formula. The executive director shall determine a site rating based upon the following method.

(1) Site rating. For the time period reviewed, the following calculations shall be performed based upon the compliance history at the site.

(A) The number of major violations contained in:

(i) any adjudicated final court judgments and default judgments, shall be multiplied by 160;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 140;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 120;

(iv) any final prohibitory emergency orders issued by the commission shall be multiplied by 120;

(v) any agreed final enforcement orders without a denial of liability shall be multiplied by 100; and

(vi) any agreed final enforcement orders containing a denial of liability shall be multiplied by 80.

(B) The number of moderate violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 115;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 95;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 75;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 60; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 45.

(C) The number of minor violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 45;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 35;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 25;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 20; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 15.

<u>(D) The total number of points assigned for all resolved violations in subparagraphs (A) - (C) of this paragraph will be reduced based on achievement of compliance with all ordering provisions. For the first two years after the effective date of</u>

the enforcement order(s), court judgment(s), consent decree(s), and criminal conviction(s), the site will receive the total number of points assigned for violations in subparagraphs (A) - (C) of this paragraph. If all violations in subparagraphs (A) - (C) of this paragraph are resolved and compliance with all ordering provisions is achieved, for each enforcement order(s), court judgment(s), consent decree(s), and criminal conviction(s) over:

(i) two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.75;

(ii) three years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.50; and

(iii) four years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.25.

(E) [(D)] The number of major violations contained in any notices of violation shall be multiplied by 10 [5].

(F) [(E)] The number of moderate violations contained in any notices of violation shall be multiplied by 4 [3].

(G) [(F)] The number of minor violations contained in any notices of violation shall be multiplied by 1.

(H) [(G)] The number of counts in all criminal convictions:

(i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and

(ii) under TWC, §§7.147 - 7.151, 7.154, 7.157, 7.159, 7.160, 7.162(a)(6) - (8), 7.163(a)(4), 7.165 - 7.167, 7.171, 7.177 - 7.181, and all misdemeanor convictions under the Texas Penal Code, TWC, THSC, or the USC shall be multiplied by 250.

(I) [(H)] The number of chronic excessive emissions events shall be multiplied by 100.

(J) [(I)] The subtotals from subparagraphs (A) - (I) [(H)] of this paragraph shall be summed.

(K) [(J)] If the person is a repeat violator as determined under subsection (f) [(d)] of this section, then 500 points shall be added to the total in subparagraph (J) [(I)] of this paragraph. If the person is not a repeat violator as determined under subsection (f) [(d)] of this section, then zero points shall be added to the total in subparagraph (J) [(I)] of this paragraph.

(L) [(K)] If the total in subparagraph (K) [(J)] of this paragraph is greater than zero, then:

(i) subtract 1 point from the total in subparagraph (K) [(J)] of this paragraph for each notice of an intended audit submitted to the agency during the compliance period; or

(ii) if a violation(s) was disclosed as a result of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended, and the site was granted immunity from an administrative or civil penalty for that violation(s) by the agency, then the following number(s) shall be subtracted from the total in subparagraph (K) [(J)] of this paragraph:

(I) the number of major violations multiplied by 10 [5];

(II) the number of moderate violations multiplied by 4 [3]; and

(III) the number of minor violations multiplied by 1.

(M) [(L)] The result of the calculations in subparagraphs (J) - (L) [(I) - (K)] of this paragraph shall be divided by the number of investigations conducted during the compliance period multiplied by 0.1 plus [one] the number of complexity points in subsection (e) of this section. Investigations that do not document any violations will be the only ones counted in the compliance history formula. The number of investigations multiplied by 0.1 shall be rounded up to the nearest whole number. If the value is less than zero, then the site rating shall be assigned a value of zero. For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation, for the purposes of this chapter, may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. [All sites with a classification of "average performer by default" are assigned 3.01 points.]

(N) [(M)] If the person receives certification of an environmental management system (EMS) under Chapter 90 of this title (relating to Innovative Programs [Regulatory Flexibility and Environmental Management System]) and has implemented the EMS at the site for more than one year, then multiply the result in subparagraph (M) [(L)] of this paragraph by 0.9. If the person receives credit for a voluntary pollution reduction program or for early compliance, then multiply the result in subparagraph (M) of this paragraph by 0.95 for each commission supported voluntary program. The maximum reduction that a site's compliance history may be reduced through voluntary programs in this subparagraph is 0.75

(2) Point ranges. The executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification:

(A) fewer than 0.10 points--high performer;

(B) 0.10 points to 55 [45] points--satisfactory [average] performer; and

(C) more than 55 [45] points--unsatisfactory [poor] performer.

(3) Mitigating factors. The executive director shall evaluate mitigating factors for a site classified as an unsatisfactory [a poor] performer.

(A) The executive director may reclassify the site from unsatisfactory [poor performer] to satisfactory [average] performer with 55 [45] points based upon the following mitigating factors:

(i) other compliance history components included in §60.1(c)(10) - (12) of this title;

(ii) implementation of an EMS not certified under Chapter 90 of this title at a site for more than one year;

(iii) a person, all of whose other sites have a high or satisfactory [average] performer classification, purchased a site with an unsatisfactory [a poor] performer classification or became permitted to operate a site with an unsatisfactory [a poor] performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule; and

(iv) voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, or that is reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency.

(B) When a person, all of whose other sites have a high or satisfactory [average] performer classification, purchased a site with an unsatisfactory [a poor] performer classification or became permitted to operate a site with an unsatisfactory [a poor] performer classification and the person contemporaneously entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance, the executive director:

(i) shall reclassify the site from unsatisfactory [poor] performer to satisfactory [average] performer with 55 [45] points until such time as the next annual compliance history classification is performed; and

(ii) may, at the time of subsequent compliance history classifications, reclassify the site from unsatisfactory [poor] performer to satisfactory

[average] performer with 55 [45] points based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement.

(h) [(f)] Person classification. The executive director shall assign a classification to a person by adding [averaging] the complexity weighted site ratings of all the sites owned and/or operated by that person in the State of Texas. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site multiplied by the percentage of complexity points that site represents of the person's total complexity points for all sites. Each of these calculated amounts will be added together to determine the person's compliance history rating.

(i) [(g)] Notice of classifications. Notice of person and site classifications shall be posted on the commission's website after [within] 30 days from [after] the completion of the classification. The notice of classification shall undergo a quality assurance, quality control review period. An owner or operator of a site may review the pending compliance history rating upon request by submitting a Compliance History Review Form to the commission by August 15 each year.

§60.3. Use of Compliance History.

(a) Permitting.

(1) Permit actions subject to compliance history review. For permit actions subject to compliance history review identified in §60.1(a) of this title (relating to Compliance History), the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit by evaluating the person's:

(A) site-specific compliance history and classification; and

(B) aggregate compliance history and classification, especially considering patterns of environmental compliance.

(2) Review of permit application. In the review of any application for a new, amended, modified, or renewed permit, the executive director or commission may require permit conditions or provisions to address an applicant's compliance history. Unsatisfactory [Poor] performers are subject to any additional oversight necessary to improve environmental compliance.

(3) Unsatisfactory [Poor] performers and repeat violators.

(A) If a site is classified as an unsatisfactory [a poor] performer, the agency shall:

(i) deny or suspend a person's authority relating to that site to discharge under a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges); and

(ii) deny a permit relating to that site for, or renewal of, a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(B) If a site is classified as <u>an unsatisfactory</u> [a poor] performer, upon application for a permit, permit renewal, modification, or amendment relating to that site, the agency may take the following actions, including:

(i) deny or amend a solid waste management facility permit;

(ii) deny an original or renewal solid waste management facility permit; or

(iii) hold a hearing on an air permit amendment, modification, or renewal, and, as a result of the hearing, deny, amend, or modify the permit.

(C) If a site is classified as an unsatisfactory [a poor] performer or repeat violator and the agency determines that a person's compliance history raises an issue regarding the person's ability to comply with a material term of its hazardous waste management facility permit, then the agency shall provide an opportunity to request a contested case hearing for applications meeting the criteria in §305.65(8) of this title (relating to Renewal).

(D) Upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.

(E) The commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This includes violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

(4) Additional use of compliance history.

(A) The commission may consider compliance history when:

(i) evaluating an application to renew or amend a permit under Texas Water Code (TWC), Chapter 26;

(ii) considering the issuance, amendment, or renewal of a preconstruction permit, under Texas Health and Safety Code (THSC), Chapter 382; and

(iii) making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under THSC, Chapter 401.

(B) The commission shall consider compliance history when:

(i) considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste;

(ii) considering if the use or installation of an injection well for the disposal of hazardous waste is in the public interest under TWC, Chapter 27;

(iii) determining whether and under which conditions a preconstruction permit should be renewed; and

(iv) making a licensing decision on an application to process or dispose of low-level radioactive waste from other persons.

(5) Revocation or suspension of a permit. Compliance history classifications shall be used in commission decisions relating to the revocation or suspension of a permit.

(6) Repeat violator permit revocation. In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as <u>an unsatisfactory</u> [a poor] performer, or for cause, including:

(A) a criminal conviction classified as major under §60.2(c)(1)(E) of this title (relating to Classification);

(B) an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(c)(1)(C) of this title;

(C) repeatedly operating without required authorization; or

(D) documented falsification.

(b) Investigations. If a site is classified as an unsatisfactory [a poor] performer, then the agency:

(1) may provide technical assistance to the person to improve the person's compliance with applicable legal requirements;

(2) may increase the number of investigations performed at the site; and

(3) may [shall] perform any investigations unannounced.

(c) Enforcement. For enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements.

(1) Unsatisfactory [Poor] performers are subject to any additional oversight necessary to improve environmental compliance.

(2) The commission shall consider compliance history classification when assessing an administrative penalty.

(3) The commission shall enhance an administrative penalty assessed on a repeat violator.

(d) Participation in innovative programs. If the site is classified as an unsatisfactory [a poor] performer, then the agency:

(1) may recommend technical assistance; or

(2) may provide assistance or oversight in development of an environmental management system (EMS) and require specific environmental reporting to the agency as part of the EMS; and

(3) shall prohibit that person from participating in the regulatory flexibility program at that site. In addition, an unsatisfactory [a poor] performer is prohibited from receiving additional regulatory incentives under its EMS until its compliance history classification has improved to at least a satisfactory [an average] performer.

(e) Appeal of classification. A person or site classification may be appealed only if the person or site is classified as either an unsatisfactory [a poor] performer or a satisfactory [average] performer with 45 [30] points or more. An appeal under this subsection shall be subject to the following procedures.

(1) An appeal shall be filed with the executive director no later than 45 days after notice of the classification is posted on the commission's website.

(2) An appeal shall state the grounds for the appeal and the specific relief sought. The appeal must demonstrate that if the specific relief sought is granted, a change in site or person classification will result. The appeal must also include all documentation and argument in support of the appeal.

(3) Upon filing, the appellant shall serve a copy of the appeal including all supporting documentation by certified mail, return receipt requested, as provided in subparagraphs (A) and (B) of this paragraph.

(A) If an appeal of a person's classification is filed by a person other than the person classified, a copy shall be served on the person classified.

(B) If an appeal of a site classification is filed by a person other than the permit holder(s) or the owner of the classified site, a copy shall be served on the owner and permit holder (if different) of the classified site.

(4) Any replies to an appeal must be filed no later than 15 [ten] days after the filing of the appeal.

(5) In response to a timely filed appeal and any replies, the executive director may affirm or modify the classification.

(6) The executive director shall mail notice of his decision to affirm or modify the classification to the appellant, any person filing a reply, and the persons identified in paragraph (3)(A) and (B) of this subsection no later than 60 days after the filing of the appeal. An appeal is automatically denied on the 61st day after the filing of the appeal unless the executive director mails notice of his decision before that day.

(7) The executive director's decision is effective and for purposes of judicial review, constitutes final and appealable commission action on the date the executive director mails notice of his decision or the date the appeal is automatically denied.

(8) During the pendency of an appeal to the executive director or judicial review of the executive director's decision under this subsection, the agency shall not, for the person or site for which the classification is under appeal or judicial review:

(A) conduct an announced investigation;

(B) grant or renew a flexible permit under THSC, Chapter 382;

(C) allow participation in the regulatory flexibility program under TWC, §5.758; or

(D) grant authority to discharge under a general permit under TWC, §26.040(h).

(f) Corrections of classifications. The executive director, on his own motion or the request of any person, at any time may correct any clerical errors in person or site classifications. If a person classification is corrected, the executive director shall notify the person whose classification has been corrected. If a site classification is corrected, the executive director shall notify the site owner and permit holder (if different). If the correction results in a change to a classification that is subject to appeal under subsection (e) of this section, then an appeal may be filed no later than 45 days after

posting of the correction on the commission's website. Clerical errors under this section include typographical errors and mathematical errors.

(g) Compliance history evidence. Any party in a contested case hearing may submit information pertaining to a person's compliance history, including the underlying components of classifications, subject to the requirements of §80.127 of this title (relating to Evidence). A person or site classification itself shall not be a contested issue in a permitting or enforcement hearing.

office.

SECTION 3.04. Subchapter G, Chapter 5, Water Code, is amended by adding Section 5.276 to read as follows:

Sec. 5.276. FACTORS FOR PUBLIC INTEREST REPRESENTATION. (a) The commission by rule, after consideration of recommendations from the office of public interest counsel, shall establish factors the public interest counsel must consider before the public interest counsel decides to represent the public interest as a party to a commission proceeding.

(b) Rules adopted under this section must include:

(1) factors to determine the nature and extent of the public interest; and

(2) factors to consider in prioritizing the workload of the office of public interest counsel.

ARTICLE 4. COMPLIANCE AND ENFORCEMENT

SECTION 4.01. Section 5.751, Water Code, is amended to read as follows:

Sec. 5.751. APPLICABILITY. This subchapter applies to programs under the jurisdiction of the commission under Chapters 26, [~~and~~] 27, and 32 of this code and Chapters 361, 375, 382, and 401, Health and Safety Code. It does not apply to occupational licensing programs under the jurisdiction of the commission.

SECTION 4.02. Section 5.752(1), Water Code, is amended to

read as follows:

(1) "Applicable legal requirement" means an environmental law, regulation, permit, order, consent[~~,~~] decree, or other requirement.

SECTION 4.03. The heading to Section 5.753, Water Code, is amended to read as follows:

Sec. 5.753. STANDARDS [~~STANDARD~~] FOR EVALUATING AND USING COMPLIANCE HISTORY.

SECTION 4.04. Section 5.753, Water Code, is amended by amending Subsections (a), (b), and (d) and adding Subsection (d-1) to read as follows:

(a) Consistent with other law and the requirements necessary to maintain federal program authorization, the commission by rule shall develop standards [~~a uniform standard~~] for evaluating and using compliance history that ensure consistency. In developing the standards, the commission may account for differences among regulated entities.

(b) The components of compliance history must include:

(1) enforcement orders, court judgments, [~~consent decrees,~~] and criminal convictions of this state [~~and the federal government~~] relating to compliance with applicable legal requirements under the jurisdiction of the commission [~~or the United States Environmental Protection Agency~~];

(2) notwithstanding any other provision of this code, orders issued under Section 7.070;

(3) to the extent readily available to the commission, enforcement orders, court judgments, consent decrees, and criminal convictions relating to violations of environmental rules [~~laws~~] of the United States Environmental Protection Agency [~~other states~~]; and

(4) changes in ownership.

(d) Except as provided by this subsection, notices of violation must be included as a component of compliance history for a period not to exceed one year from the date of issuance of each notice of violation. The listing of a notice of violation must be preceded by the following statement prominently displayed: "A notice of violation represents a written allegation of a violation of a specific regulatory requirement from the commission to a regulated entity. A notice of violation is not a final enforcement action nor proof that a violation has actually occurred." [~~The set of components shall include notices of violations.~~] A notice of violation administratively determined to be without merit may [~~shall~~] not be included in a compliance history. A notice of violation that is included in a compliance history shall be removed from the compliance history if the commission subsequently determines the notice of violation to be without merit.

(d-1) For purposes of listing compliance history, the commission may not include as a notice of violation information received by the commission as required by Title V of the federal Clean Air Act (42 U.S.C. Section 7661 et seq.) unless the commission issues a written notice of violation. Final enforcement orders or judgments resulting from self-reported Title V deviations or violations may be considered as compliance history components for purposes of determining compliance history.

SECTION 4.05. Section 5.754, Water Code, is amended by amending Subsections (a), (b), (c), (d), (e), (g), and (h) and adding Subsection (e-1) to read as follows:

(a) The commission by rule shall establish a set of standards for the classification of a person's compliance history as a means of evaluating compliance history. The commission may consider the person's classification when using compliance history under Subsection (e).

(b) Rules adopted under Subsection (a):

(1) [~~this section~~] must, at a minimum, provide for three classifications of compliance history in a manner adequate to distinguish among:

(A) unsatisfactory [~~(1) poor~~] performers, or regulated entities that in the commission's judgment perform below minimal acceptable performance standards established by the

commission [~~average~~];

(B) satisfactory [~~(2) average~~] performers, or regulated entities that generally comply with environmental regulations; and

(C) [~~(3)~~] high performers, or regulated entities that have an above-satisfactory [~~above-average~~] compliance record;

(2) may establish a category of unclassified performers, or regulated entities for which the commission does not have adequate compliance information about the site; and

(3) must take into account both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the federal Clean Air Act (42 U.S.C. Section 7661 et seq.).

(c) In classifying a person's compliance history, the commission shall:

(1) determine whether a violation of an applicable legal requirement is of major, moderate, or minor significance;

(2) establish criteria for classifying a repeat violator, giving consideration to the size [~~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 [~~facilities owned or operated by the person~~]; and

(3) consider:

(A) the significance of the violation and whether the person is a repeat violator;

(B) the size and complexity of the site, including whether the site is subject to Title V of the federal Clean Air Act (42 U.S.C. Section 7661 et seq.); and

(C) the potential for a violation at the site that is attributable to the nature and complexity of the site.

(d) The commission by rule may require [~~shall establish methods of assessing the compliance history of regulated entities for which it does not have adequate compliance information. The methods may include requiring~~] a compliance inspection to determine an entity's eligibility for participation in a program that requires a high level of compliance.

(e) The commission by rule shall provide for the use of compliance history [~~classifications~~] in commission decisions regarding:

(1) the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit;

(2) enforcement;

(3) the use of announced inspections; and

(4) participation in innovative programs.

(e-1) The amount of the penalty enhancement or escalation

attributed to compliance history may not exceed 100 percent of the base penalty for an individual violation as determined by the commission's penalty policy.

(g) Rules adopted under Subsection (e) for the use of compliance history shall 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 commission standards [~~in the lowest classification developed under this section~~].

(h) The commission by rule shall, at a minimum, prohibit a person whose compliance history is classified as unsatisfactory according to commission standards [~~in the lowest classification developed under this section~~] from[~~:~~

[~~(1) receiving an announced inspection; and~~

[~~(2)~~] obtaining or renewing a flexible permit under the program administered by the commission under Chapter 382, Health and Safety Code, or participating in the regulatory flexibility program administered by the commission under Section 5.758.

SECTION 4.06. Section 5.755(b), Water Code, is amended to read as follows:

(b) The strategically directed regulatory structure shall offer incentives based on:

(1) a person's compliance history [~~classification~~]; and

(2) any voluntary measures undertaken by the person to improve environmental quality.

SECTION 4.07. Section 5.756, Water Code, is amended by adding Subsection (e) to read as follows:

(e) Before compliance performance information about a site may be placed on the Internet under this subchapter, the information must 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 4.08. Sections 5.758(a), (b), (d), and (h), Water Code, are amended to read as follows:

(a) The commission by order may exempt an applicant from a requirement of a statute or commission 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:

(1) as [~~more~~] protective of the environment and the public health as [~~than~~] the method or standard prescribed by the statute or commission rule that would otherwise apply; and

(2) not inconsistent with federal law.

(b) The commission may not exempt an applicant under this section unless the applicant can present to the commission [~~documented~~] 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 commission rule that would otherwise apply [~~of benefits to environmental quality that will result from the project the applicant proposes~~].

(d) The commission's order must provide a [~~specific~~] description of the alternative method or standard and condition the exemption on compliance with the method or standard as the order prescribes.

(h) In implementing the program of regulatory flexibility authorized by this section, the commission shall:

(1) promote [~~market~~] the program to businesses in the state through all available appropriate media;

(2) endorse alternative methods that will clearly benefit the environment and impose the least onerous restrictions on business;

(3) fix and enforce environmental standards, allowing businesses flexibility in meeting the standards in a manner that clearly enhances environmental outcomes; and

(4) work to achieve consistent and predictable results for the regulated community and shorter waits for permit issuance.

SECTION 4.09. Subchapter A, Chapter 7, Water Code, is amended by adding Section 7.006 to read as follows:

Sec. 7.006. ENFORCEMENT POLICIES. (a) The commission by

rule shall adopt a general enforcement policy that describes the commission's approach to enforcement.

(b) The commission shall assess, update, and publicly adopt specific enforcement policies regularly, including policies regarding the calculation of penalties and deterrence to prevent the economic benefit of noncompliance.

(c) The commission shall make the policies available to the public, including by posting the policies on the commission's Internet website.

SECTION 4.10. Sections 7.052(a) and (c), Water Code, are amended to read as follows:

(a) The amount of the penalty for a violation of Chapter 37 of this code, Chapter 366, 371, or 372, Health and Safety Code, or Chapter 1903, Occupations Code, may not exceed $5,000 [~~$2,500~~] a day for each violation.

(c) The amount of the penalty for all other violations within the jurisdiction of the commission to enforce may not exceed $25,000 [~~$10,000~~] a day for each violation.

SECTION 4.11. Section 7.067, Water Code, is amended to read as follows:

Sec. 7.067. SUPPLEMENTAL ENVIRONMENTAL PROJECTS. (a) The commission may compromise, modify, or remit, with or without conditions, an administrative penalty imposed under this

subchapter. In determining the appropriate amount of a penalty for settlement of an administrative enforcement matter, the commission may consider a respondent's willingness to contribute to supplemental environmental projects that are approved by the commission, giving preference to projects that benefit the community in which the alleged violation occurred. The commission may encourage the cleanup of contaminated property through the use of supplemental environmental projects. The commission may approve a supplemental environmental project with activities in territory of the United Mexican States if the project substantially benefits territory in this state in a manner described by Subsection (b). Except as provided by Subsection (a-1), the [~~The~~] commission may not approve a project that is necessary to bring a respondent into compliance with environmental laws, that is necessary to remediate environmental harm caused by the respondent's alleged violation, or that the respondent has already agreed to perform under a preexisting agreement with a governmental agency.

(a-1) The commission may approve a supplemental environmental project that is necessary to bring a respondent into compliance with environmental laws or that is necessary to remediate environmental harm caused by the respondent's alleged violation if the respondent is a local government.

(a-2) The commission shall develop a policy to prevent

regulated entities from systematically avoiding compliance through the use of supplemental environmental projects under Subsection (a-1), including a requirement for an assessment of:

(1) the respondent's financial ability to pay administrative penalties;

(2) the ability of the respondent to remediate the harm or come into compliance; and

(3) the need for corrective action.

(b) In this section:

(1) "Local government" means a school district, county, municipality, junior college district, river authority, water district or other special district, or other political subdivision created under the constitution or a statute of this state.

(2) "Supplemental [~~, "supplemental~~] environmental project" means a project that prevents pollution, reduces the amount of pollutants reaching the environment, enhances the quality of the environment, or contributes to public awareness of environmental matters.

SECTION 4.12. Section 13.4151(a), Water Code, is amended to read as follows:

(a) If a person, affiliated interest, or entity subject to the jurisdiction of the commission violates this chapter or a rule or order adopted under this chapter, the commission may assess a

penalty against that person, affiliated interest, or entity as provided by this section. The penalty may be in an amount not to exceed $5,000 [~~$500~~] a day. Each day a violation continues may be considered a separate violation.

SECTION 4.13. Section 26.028(d), Water Code, is amended to read as follows:

(d) Notwithstanding any other provision of this chapter, the commission, at a regular meeting without the necessity of holding a public hearing, may approve an application to renew or amend a permit if:

(1) the applicant is not applying to:

(A) increase significantly the quantity of waste authorized to be discharged; or

(B) change materially the pattern or place of discharge;

(2) the activities to be authorized by the renewed or amended permit will maintain or improve the quality of waste authorized to be discharged;

(3) for NPDES permits, notice and the opportunity to request a public meeting shall be given in compliance with NPDES program requirements, and the commission shall consider and respond to all timely received and significant public comment; and

(4) the commission determines that an applicant's

compliance history under the method for using [~~evaluating~~] compliance history developed by the commission under Section 5.754 raises no issues regarding the applicant's ability to comply with a material term of its permit.

SECTION 4.14. Section 26.0281, Water Code, is amended to read as follows:

Sec. 26.0281. CONSIDERATION OF COMPLIANCE HISTORY. In considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste, the commission shall consider the compliance history of the applicant and its operator under the method for using [~~evaluating~~] compliance history developed by the commission under Section 5.754. In considering an applicant's compliance history under this subsection, the commission shall consider as evidence of compliance information regarding the applicant's implementation of an environmental management system at the facility for which the permit, permit amendment, or permit renewal is sought. In this section, "environmental management system" has the meaning assigned by Section 5.127.

SECTION 4.15. Section 26.040(h), Water Code, is amended to read as follows:

(h) Notwithstanding other provisions of this chapter, the commission, after hearing, shall deny or suspend a discharger's

authority to discharge under a general permit if the commission determines that the discharger's compliance history is classified as unsatisfactory according to commission standards [~~in the lowest classification~~] under Sections 5.753 and 5.754 and rules adopted and procedures developed under those sections. A hearing under this subsection is not subject to Chapter 2001, Government Code.

SECTION 4.16. Section 26.3467, Water Code, is amended by adding Subsections (d) and (e) to read as follows:

(d) A person may not deliver any regulated substance into an underground storage tank regulated under this chapter unless the underground storage tank has been issued a valid, current underground storage tank registration and certificate of compliance under Section 26.346. The commission may impose an administrative penalty against a person who violates this subsection. The commission shall adopt rules as necessary to enforce this subsection.

(e) It is an affirmative defense to the imposition of an administrative penalty for a violation of Subsection (d) that the person delivering a regulated substance into an underground storage tank relied on:

(1) a valid paper delivery certificate presented by the owner or operator of the underground storage tank or displayed at the facility associated with the underground storage tank;

(2) a temporary delivery authorization presented by the owner or operator of the underground storage tank or displayed at the facility associated with the underground storage tank; or

(3) registration and self-certification information for the underground storage tank obtained from the commission's Internet website not more than 30 days before the date of delivery.

SECTION 4.17. Section 26.351, Water Code, is amended by adding Subsections (c-1) and (c-2) to read as follows:

(c-1) The commission may undertake corrective action to remove an underground or aboveground storage tank that:

(1) is not in compliance with the requirements of this chapter;

(2) is out of service;

(3) presents a contamination risk; and

(4) is owned or operated by a person who is financially unable to remove the tank.

(c-2) The commission shall adopt rules to implement Subsection (c-1), including rules regarding:

(1) the determination of the financial ability of the tank owner or operator to remove the tank; and

(2) the assessment of the potential risk of contamination from the site.

SECTION 4.18. Section 26.3573(d), Water Code, is amended to

read as follows:

(d) The commission may use the money in the petroleum storage tank remediation account to pay:

(1) necessary expenses associated with the administration of the petroleum storage tank remediation account and the groundwater protection cleanup program;

(2) expenses associated with investigation, cleanup, or corrective action measures performed in response to a release or threatened release from a petroleum storage tank, whether those expenses are incurred by the commission or pursuant to a contract between a contractor and an eligible owner or operator as authorized by this subchapter;

(3) subject to the conditions of Subsection (f), expenses associated with investigation, cleanup, or corrective action measures performed in response to a release or threatened release of hydraulic fluid or spent oil from hydraulic lift systems or tanks located at a vehicle service and fueling facility and used as part of the operations of that facility; [~~and~~]

(4) expenses associated with assuring compliance with the commission's applicable underground or aboveground storage tank administrative and technical requirements, including technical assistance and support, inspections, enforcement, and the provision of matching funds for grants; and

(5) expenses associated with investigation, cleanup, or corrective action measures performed under Section 26.351(c-1).

SECTION 4.19. Section 26.3574, Water Code, is amended by amending Subsection (b) and adding Subsection (b-1) to read as follows:

(b) A fee is imposed on the delivery of a petroleum product on withdrawal from bulk of that product as provided by this subsection. Each operator of a bulk facility on withdrawal from bulk of a petroleum product shall collect from the person who orders the withdrawal a fee in an amount determined as follows:

(1) not more than $3.75 for each delivery into a cargo tank having a capacity of less than 2,500 gallons [~~for the state fiscal year beginning September 1, 2007, through the state fiscal year ending August 31, 2011~~];

(2) not more than $7.50 for each delivery into a cargo tank having a capacity of 2,500 gallons or more but less than 5,000 gallons [~~for the state fiscal year beginning September 1, 2007, through the state fiscal year ending August 31, 2011~~];

(3) not more than $11.75 for each delivery into a cargo tank having a capacity of 5,000 gallons or more but less than 8,000 gallons [~~for the state fiscal year beginning September 1, 2007, through the state fiscal year ending August 31, 2011~~];

(4) not more than $15.00 for each delivery into a cargo

tank having a capacity of 8,000 gallons or more but less than 10,000 gallons [~~for the state fiscal year beginning September 1, 2007, through the state fiscal year ending August 31, 2011~~]; and

(5) not more than $7.50 for each increment of 5,000 gallons or any part thereof delivered into a cargo tank having a capacity of 10,000 gallons or more [~~for the state fiscal year beginning September 1, 2007, through the state fiscal year ending August 31, 2011~~].

(b-1) The commission by rule shall set the amount of the fee in Subsection (b) in an amount not to exceed the amount necessary to cover the agency's costs of administering this subchapter, as indicated by the amount appropriated by the legislature from the petroleum storage tank remediation account for that purpose.

SECTION 4.20. Section 27.025(g), Water Code, is amended to read as follows:

(g) Notwithstanding the other provisions of this chapter, the commission, after hearing, shall deny or suspend authorization for the use of an injection well under a general permit if the commission determines that the owner's compliance history is classified as unsatisfactory according to commission standards [~~in the lowest classification~~] under Sections 5.753 and 5.754 and rules adopted and procedures developed under those sections. A hearing under this subsection is not subject to the requirements relating

to a contested case hearing under Chapter 2001, Government Code.

SECTION 4.21. Section 27.051(d), Water Code, is amended to read as follows:

(d) The commission, in determining if the use or installation of an injection well is in the public interest under Subsection (a)(1), shall consider, but shall not be limited to the consideration of:

(1) compliance history of the applicant and related entities under the method for using [~~evaluating~~] compliance history developed by the commission under Section 5.754 and in accordance with the provisions of Subsection (e);

(2) whether there is a practical, economic, and feasible alternative to an injection well reasonably available; and

(3) if the injection well will be used for the disposal of hazardous waste, whether the applicant will maintain sufficient public liability insurance for bodily injury and property damage to third parties that is caused by sudden and non-sudden accidents or will otherwise demonstrate financial responsibility in a manner adopted by the commission in lieu of public liability insurance. A liability insurance policy which satisfies the policy limits required by the hazardous waste management regulations of the commission for the applicant's proposed pre-injection facilities shall be deemed "sufficient" under this subdivision if the policy:

(A) covers the injection well; and

(B) is issued by a company that is authorized to do business and to write that kind of insurance in this state and is solvent and not currently under supervision or in conservatorship or receivership in this state or any other state.

SECTION 4.22. Section 32.101(c), Water Code, is amended to read as follows:

(c) The commission, in determining if the use or installation of a subsurface area drip dispersal system is in the public interest under Subsection (a)(1), shall consider:

(1) compliance history of the applicant and related entities under the method for using [~~evaluating~~] compliance history developed by the commission under Section 5.754 and in accordance with the provisions of Subsection (d) of this section;

(2) whether there is a practical, economic, and feasible alternative to a subsurface area drip dispersal system reasonably available; and

(3) any other factor the commission considers relevant.

SECTION 4.23. Section 49.198(a), Water Code, is amended to read as follows:

(a) A district may elect to file annual financial reports with the executive director in lieu of the district's compliance with Section 49.191 provided:

(1) the district had no bonds or other long-term (more than one year) liabilities outstanding during the fiscal period;

(2) the district did not have gross receipts from operations, loans, taxes, or contributions in excess of $250,000 [~~$100,000~~] during the fiscal period; and

(3) the district's cash and temporary investments were not in excess of $100,000 at any time during the fiscal period.

SECTION 4.24. Sections 361.089(a), (e), and (f), Health and Safety Code, are amended to read as follows:

(a) The commission may, for good cause, 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 commission standards [~~in the lowest classification~~] under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.

(e) The commission may deny an original or renewal permit if it is found, after notice and hearing, that:

(1) the applicant or permit holder has a compliance history that is classified as unsatisfactory according to commission standards [~~in the lowest classification~~] under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections;

(2) the permit holder or applicant made a false or misleading statement in connection with an original or renewal application, either in the formal application or in any other written instrument relating to the application submitted to the commission, its officers, or its employees;

(3) 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 the commission; or

(4) the permit holder or applicant is unable to ensure that the management of the hazardous waste management facility conforms or will conform to this title and the rules of the commission.

(f) Before denying a permit under this section, the commission must find:

(1) that the applicant or permit holder has a compliance history that is classified as unsatisfactory according to commission standards [~~in the lowest classification~~] under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections; or

(2) 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 the commission.

SECTION 4.25. Section 382.0518(c), Health and Safety Code, is

amended to read as follows:

(c) In considering the issuance, amendment, or renewal of a permit, the commission may consider the applicant's compliance history in accordance with the method for using [~~evaluating~~] compliance history developed by the commission under Section 5.754, Water Code. In considering an applicant's compliance history under this subsection, the commission shall consider as evidence of compliance information regarding the applicant's implementation of an environmental management system at the facility for which the permit, permit amendment, or permit renewal is sought. In this subsection, "environmental management system" has the meaning assigned by Section 5.127, Water Code.

SECTION 4.26. Section 382.056(o), Health and Safety Code, is amended to read as follows:

(o) Notwithstanding other provisions of this chapter, the commission may hold a hearing on a permit amendment, modification, or renewal if the commission determines that the application involves a facility for which the applicant's compliance history is classified as unsatisfactory according to commission standards [~~in the lowest classification~~] under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.

SECTION 4.27. Subchapter C, Chapter 382, Health and Safety

Code, is amended by adding Section 382.059 to read as follows:

Sec. 382.059. HEARING AND DECISION ON PERMIT AMENDMENT APPLICATION OF CERTAIN ELECTRIC GENERATING FACILITIES. (a) This section applies to a permit amendment application submitted solely to allow an electric generating facility to reduce emissions and comply with a requirement imposed by Section 112 of the federal Clean Air Act (42 U.S.C. Section 7412) to use applicable maximum achievable control technology. A permit amendment application shall include a condition that the applicant is required to complete the actions needed for compliance by the time allowed under Section 112 of the federal Clean Air Act (42 U.S.C. Section 7412).

(b) The commission shall provide an opportunity for a public hearing and the submission of public comment on the application in the manner provided by Section 382.0561.

(c) Not later than the 45th day after the date the application is received, the executive director shall issue a draft permit.

(d) Not later than the 30th day after the date of issuance of the draft permit under Subsection (c), parties may submit to the commission any legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is the maximum achievable control technology required under Section 112 of

the federal Clean Air Act (42 U.S.C. Section 7412) and may request a contested case hearing before the commission. If a party requests a contested case hearing under this subsection, the commission shall conduct a contested case hearing and issue a final order issuing or denying the permit amendment not later than the 120th day after the date of issuance of the draft permit under Subsection (c).

(e) The commission shall send notice of a decision on an application for a permit amendment under this section in the manner provided by Section 382.0562.

(f) A person affected by a decision of the commission to issue or deny a permit amendment may move for rehearing and is entitled to judicial review under Section 382.032.

(g) This section expires on the sixth anniversary of the date the administrator adopts standards for existing electric generating facilities under Section 112 of the federal Clean Air Act (42 U.S.C. Section 7412), unless a stay of the rules is granted.

(h) The commission shall adopt rules to implement this section.

SECTION 4.28. Section 401.110(a), Health and Safety Code, is amended to read as follows:

(a) In making a determination whether to grant, deny, amend, renew, revoke, suspend, or restrict a license or registration, the

commission may consider an applicant's or license holder's technical competence, financial qualifications, and compliance history under the method for using [~~evaluation of~~] compliance history developed by the commission under Section 5.754, Water Code.

SECTION 4.29. Section 401.112(a), Health and Safety Code, is amended to read as follows:

(a) The commission, in making a licensing decision on a specific license application to process or dispose of low-level radioactive waste from other persons, shall consider:

(1) site suitability, geological, hydrological, and meteorological factors, and natural hazards;

(2) compatibility with present uses of land near the site;

(3) socioeconomic effects on surrounding communities of operation of the licensed activity and of associated transportation of low-level radioactive waste;

(4) the need for and alternatives to the proposed activity, including an alternative siting analysis prepared by the applicant;

(5) the applicant's qualifications, including:

(A) financial and technical qualifications and compliance history under the method for using [~~evaluation of~~]

compliance history developed by the commission under Section 5.754, Water Code, for an application to the commission; and

(B) the demonstration of financial qualifications under Section 401.108;

(6) background monitoring plans for the proposed site;

(7) suitability of facilities associated with the proposed activities;

(8) chemical, radiological, and biological characteristics of the low-level radioactive waste and waste classification under Section 401.053;

(9) adequate insurance of the applicant to cover potential injury to any property or person, including potential injury from risks relating to transportation;

(10) training programs for the applicant's employees;

(11) a monitoring, record-keeping, and reporting program;

(12) spill detection and cleanup plans for the licensed site and related to associated transportation of low-level radioactive waste;

(13) decommissioning and postclosure care plans;

(14) security plans;

(15) worker monitoring and protection plans;

(16) emergency plans; and

(17) a monitoring program for applicants that includes prelicense and postlicense monitoring of background radioactive and chemical characteristics of the soils, groundwater, and vegetation.

SECTION 4.30. Not later than the 180th day after the effective date of this Act, the Texas Commission on Environmental Quality shall adopt rules to implement Section 382.059, Health and Safety Code, as added by this article.

SECTION 4.31. (a) Not later than September 1, 2012, the Texas Commission on Environmental Quality by rule shall establish the method for evaluating compliance history as required by Section 5.753(a), Water Code, as amended by this article. Until the commission adopts that method, the commission shall continue in effect its current standard for evaluating compliance history.

(b) The changes in law made by Sections 7.052 and 13.4151, Water Code, as amended by this article, apply only to a violation that occurs on or after the effective date of this Act. For purposes of this section, a violation occurs before the effective date of this Act if any element of the violation occurs before that date. A violation that occurs before the effective date of this Act is covered by the law in effect on the date the violation occurred, and the former law is continued in effect for that purpose.

(c) The change in law made by Section 26.3467(d), Water Code, as added by this article, applies only to a delivery of a regulated

substance to an underground storage tank made on or after the effective date of this Act.

(d) The fee applicable to a delivery in Section 26.3574(b), Water Code, as that subsection existed immediately before the effective date of this Act, remains in effect until the Texas Commission on Environmental Quality adopts and implements a fee applicable to that delivery under Section 26.3574(b-1), Water Code, as added by this article.

SECTION 4.32. Section 49.198(a), Water Code, as amended by this article, applies to a district that files its annual financial report on or after the effective date of this Act. A district that files its annual financial report before the effective date of this Act is governed by the law in effect on the date the report is filed, and that law is continued in effect for that purpose.

ARTICLE 5. WATER RIGHTS

SECTION 5.01. Section 11.002(12), Water Code, is amended to read as follows:

(12) "Agriculture" means any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture,