

# Texas Commission on Environmental Quality

## INTEROFFICE MEMORANDUM

**To:** Commissioners' Work Session                      **Date:** May 9, 2008

**Thru:**  John Sadlier, Deputy Director, Office of Compliance and Enforcement

**From:**  Matthew R. Baker, P.E., Director, Enforcement Division

**Subject:** Commission Approval for Proposed Rulemaking; Chapter 60, Compliance History, Rule Project 2006-001-060-CE

**Issue** Publication of, and hearing on, proposed amendments to 30 Texas Administrative Code Chapter 60, Compliance History, Sections 60.1 through 60.3

### **Background and Current Practice**

The TCEQ has implemented approximately 61% of the Enforcement Process Review (EPR) recommendations. The remaining 39% relate to changes to the compliance history rule or the penalty policy. The Executive Director is seeking direction from the Commission on the outstanding issues in order to complete implementation of the EPR recommendations.

**Compliance History** issues were presented before the Commission at the August 12, 2005, September 16, 2005, and March 10, 2006 Commission Work Sessions. At the direction of the Commission, informal discussions with interested parties were held. At the March 10, 2006 Commission Work Session, the Commission provided the Executive Director with direction on the issues and instructions to proceed with formal rulemaking. A draft rule package was scheduled for consideration in August of 2006; however, given the pending legislative session, the Commission directed the Executive Director to hold the package until further notice.

Following direction received after the September 7, 2007 Commission Work Session, the compliance history draft rule package was scheduled for consideration at the January 16, 2008 Commission Agenda. At the direction of the Commission, an informal discussion with interested parties was held on March 19, 2008. A summary of comments made during that discussion and all written comments received regarding this rulemaking project are attached for your review. The draft rule changes are summarized below and a copy of the draft rule is also attached.

### **Issues for Consideration:**

The Executive Director is recommending that the following changes be made to the current rule:

- **Site rating formula:** exclude violations cited in federal orders from the numerator, exclude self-reported violations from the numerator and denominator until addressed in an enforcement order, add complexity to the denominator of the formula, and include

positive components such as early compliance with a rule or participation in an agency-supported voluntary pollution reduction program.

- **Repeat Violator:** redefine repeat violator as having more than one of the "same" major violation.
- **Nomenclature of classification:** change "Average by Default" to "Unclassified".
- **Change of ownership:** add requirement that, as part of a due diligence performed, compliance history information is disclosed by the seller to the buyer prior to a change of ownership.
- **Review of data:** add language that allows a regulated entity access to its compliance history information prior to publication on the agency's Web site.
- **Appeal of classification:** revise the appeal of classification language to allow all average performers the opportunity to appeal.

The Executive Director is seeking concurrence from the Commission to go forward with a draft rule package to address these issues.

Attachment 1: Summary of Comments  
March 19, 2008  
Compliance History Informal Meeting

Texas Commission on Environmental Quality  
**Compliance History Meeting Summary**  
March 19, 2008

Meeting Attendees:

J. Woodard - Dow Chemical  
S. Kilpatrick - Dow Chemical  
M. McMullen - Texas Chemical Council  
M. Miksa - Texas Association of Business  
Terri Seales - Saitas & Seales  
Angela Moorman - Birch, Becker & Moorman, LLP  
Julie Morelli - Westward Environmental  
Matt Paulson - Baker Botts  
Parker Wilson - Valero  
Debbie Hastings - TXOGA  
Cyrus Reed - Sierra Club

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**Revising the compliance history formula:**

- This approach attempts to revamp the current compliance history formula by focusing on potential points of noncompliance, as opposed to the number of permits, to determine a site's complexity. To provide any realistic and meaningful rating or evaluation of an entity's compliance performance, the process must include a consideration of the opportunities for noncompliance or the size of the compliance obligations.

This new calculation could be conducted by counting the number of compliance points (CPs), required by rules, permits, orders, etc, for all applicable programs. Then multiply each CP by the number of times it is required to be analyzed or monitored (continuous monitoring may only count once per day depending on how many violations TCEQ may charge during a single day) and by the number of parameters checked each time. The product of these numbers is developed by the site operator and is subject to TCEQ review. The magnitude of this number will reflect the number of regulatory programs (complexity) and the size of the site. This will be the denominator in the new formula.

After the compliance point exceedances are added up, the number of individual violations noted and adjudicated, by the TCEQ are included. An "impact" (or magnitude) to each exceedance is assigned (as in the current process). The compliance point violations are then multiplied by their impact factor, the sum of which becomes the numerator in the new formula.

With this system, we understand that there may be too much of a span between a large industrial complex and a small business like a printing shop, in the number of compliance points. In order to make a fair showing of rankings, and in order to keep with the statute's

“uniform standard”, after each ranking is given, the results can be posted with entities classified within their own industry. For example, print shops’ rankings can be compared to that of other print shops, to decide on performance levels rather than being compared to a large industrial park’s ranking.

The uniform standard is kept because all entities are subject to the formula’s points of compliance calculation, but the classification groupings by industry afterwards, will show a more honest interpretation of each site’s actual performance. (see written comments submitted by TAB/TCC/TXOGA)

- Removing self-reported violations and investigations is not entirely clear in proposed rule. Net result for large facilities from taking away this information could have unintended consequences. Removing the investigations associated with self-reported data and adding criteria points into the denominator, would always result in a worse overall score.
- TIP includes both downstream and upstream facilities. While not a distinction of small and large businesses, it looks that way in the rule. You’ll have an upstream operator with a gas plant with a hundred if not thousands of compressor stations and those facilities can easily become poor under current rule with just a few incidents. It’s much easier to become poor if you don’t have DMRs or other things that can count as investigations, especially if you don’t interface with the agency as much.
- Removing self-reported violations and investigations is not entirely clear in proposed rule. Net result for large facilities from taking away this information could have unintended consequences. Removing the investigations associated with self-reported data and adding criteria points into the denominator, would always result in a worse overall score.
- In section, 60.2(d)(2) on complexity points, we feel the list of permit types is lacking. While we don’t think just looking at permits is an appropriate way to measure compliance, we think that the list in the current proposed rules does not accurately reflect the breadth of permits some of our facilities are operating under.

We think that the list of permits should also include, non-attainment permits, minor new source review permits, and Title V permits.

Again to accurately reflect the range of requirements some of our companies operate under, we think to this section should be added a list of regulatory programs, at a minimum to cover “applicable requirements” under Title V, though an argument could be made for other rule programs as well. (see written comments submitted by TAB/TCC/TXOGA)

- TCEQ is encouraged to think about impacts for small and large businesses; try to find middle ground in regards to self-reported data. DMRs are sometimes one of the only components that small operators have.

### **Adding positives to the formula**

- Proposed rule recognizes Clean Texas members at the Gold and Platinum level. Considering the difficulty to get into the program at any level, it would be nice to recognize Bronze and other membership levels, maybe proportionate to level of membership.

### **Redefine repeat violator as having more than one or more of the “same” major violation**

- Repeat violator definition of same, you need so many major violations to be a repeat. Proposed to add defining same as a same violation of statute, chapter, subsection. In regards to air violation, all violations will be the same because the THSC §382.0805(b) is cited every time. We need to clarify this.
- We agree conceptually that “repeat violator” should be defined as only covering more than one of the “same” violations at the same chapter, section, and subsection.”

However we believe that the provision needs to further clarify that the agency cannot subvert this language by simply using Health & Safety Code section 382.085(b) (“[a] person may not cause, suffer, allow, or permit” a violation).

To be considered a “repeat violator,” violations of the same underlying substantive program (or cause) must have occurred.

We suggest that the agency add the following language to the definition of “repeat violator,” which is consistent with current statutory language (Water Code §7.00251):

*The same major violation is defined as a violation at a site due to the same root cause from two consecutive investigations within the most recent five-year period.* (see written comments from TAB/TCC/TXOGA)

- Under the THSC and TWC any violation would considered a same violation. You never see a landfill violation or WWTP violation that doesn’t cite §26.121 and they get inspected every year. All air violations include a citation for §382.085. Under this definition, they would always be the same.

### **Definition of Major violation**

- Definition of major violation - suggested language for §60.2(c)(1) to be similar to what is in the current Penalty Policy. (see written comments from TAB/TCC/TXOGA)
- Major violations - Adjust definition to consider impact of violation rather than failure to submit permit application or notification or registration. The cost of a compliance audit and getting permits can cost \$10-15K and lots of times this is on the heels of an enforcement action with a \$35-75K penalty. The company’s compliance history is in the toilet and it’s really hard to dig your way out. These kinds of operators shouldn’t be excluded from General Permit program for ignorance of permit violation.

- Because the definition of major violation is so critical to compliance history, we think that the agency needs to distinguish more clearly the difference between major violations and other types of violations; and

Because CH is so closely tied to the penalty policy, we also think the agency needs to use some of the same language that we think is going to be used in the penalty policy (we're thinking but not knowing since we haven't seen the staff penalty policy proposal).

We suggest the following definition: *major violations are a significant and unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on which exceed levels that are protective of human health, safety, or the environment.* (see written comments from TAB/TCC/TXOGA)

### **Requirement for change of ownership**

- Biggest concern with the change of ownership section is that the only result is going to be litigation associated with what is disclosed. The agency should not get into the business of putting burdens on the transfer of real property. (see written comments submitted by TIP)
- Concern about including a change of ownership requirement. It's not in current ASTM standard requirements, which is the basis for Phase I assessments. Conveying an additional statutory requirement that's going to cost money to these small businesses will cause backlash.
- Would like to see the compliance history "cleaned" when a property is acquired by a new company, not to follow the facility.

### **Allowing a regulated entity access to its compliance history information prior to publication**

- Is there a specific timeline in the rule to ask for compliance history information prior to publication on the agency's web site?

### **Revision to appeal language**

- Do you have to prove that a change of classification will result from an appeal. It would be useful if person's who are challenging average classification do not have to prove up front that a change of classification will occur. Precludes a lot of appeals, and places a high burden on a person.

### **Other comments**

- We may want to wait until the legislature meets before going forward.
- On proposed rule, look at the 5-year compliance period timeline to consider in certain cases and permits, 10 years might be an appropriate timeframe.

- Asked if a copy of the draft Penalty Policy could be made available for review as it would be helpful and useful to comment on both at the same time.
- Changes in this proposed rule are an improvement over earlier versions.
- At past work sessions, there has been much discussion about the need to cease using CH components twice, once to determine compliance history and again as part of the penalty enhancement.
- Double-dipping was the primary concern expressed by stakeholders during both the TCEQ discussions on creation of the original compliance history formula and the agency's recent extensive Enforcement Review.

At the Sept. 7, 2007 work session, it was discussed that although NOV's should not be counted twice, the agency nevertheless should continue using the same final orders to both determine compliance history and to enhance penalties.

We strongly disagree with this proposal because it violates the legislature's intent in Water Code § 5.754(e) that the "compliance history classification" be considered in determining enforcement—not the classification of all elements plus one or more of those elements again.

The statute does not allow such double counting.

To address this issue, we suggest that §60.3(C) in the proposed rule be amended by adding the following language: In using a person's compliance history classification for an enforcement purpose, the components used to determine that the compliance history classification may not be used individually for penalty enhancement or escalation. (see written comments from TAB/TCC/TXOGA)

- One thing the commission could consider is waiting for the legislature to take up compliance history assuming they will take up compliance history again next year.
- Hoping to see incentive for small and big businesses to do the right thing; to come into compliance; to self-report violations; to disclose information during property transfers and not for it to become so burdensome and onerous and litigation bound that nobody wants to have anything to do with it and starts seeing bad business behavior out there in the real world.
- Go forward with this rulemaking, would like to see some adjustments in the compliance history rule now. And then see what the legislature does.
- This issue is not addressed in this rulemaking but is in regards to the application of compliance history. For any formula to work, the information that goes into the formula has to be accurate and consistent on how the agency applies it and how programs define investigations and put that information into that formula. Historically, there's been a problem at the agency in that different programs define different types of actions as investigations,

specifically when it comes to the review of required information submitted by a permittee. This has led to drastically different results when the formula is applied. One landfill will have lots of different reports identified as investigations and another will have very few. It's becoming ad hoc practice at the agency to determine what types of those reports actually count as an investigation and you have permittees going back and pulling out letters from 2 and 3 years and different Executive Directors and different staff saying "for your compliance history this is an investigation" and you have attorneys every year filing the same appeal or request for correction asking for corrections to get their client's compliance history back down and have those reports added again. And until investigation has some sort of consistent meaning among the divisions here, there's never going to be a consistent meaning to those numbers. And you'll always have people complaining about what they are. These rules don't do a particularly good job of explaining what an investigation is going to be.

Attachment 2: Written Comments  
Compliance History

## Key Compliance History Comments

Mark Shelton – CAP Chairman

10/28/05

- 1) *Simplifying the compliance history classification formula*  
Clearly define what an investigation is. Violations and orders should not count in compliance history unless there is a corresponding investigation captured in the rating.
- 2) *Adding a true measure of complexity to the denominator of the classification formula instead of (or in addition to), the “number of investigations”*  
The base of the divisor in the rating calculation should be increased to 2. This will address the fact that small businesses and local governments have fewer scheduled investigations and thus are treated inequitably in the current formula.
- 3) *Consideration of the use of self-reported data as a component of compliance history;*  
Self-reported violations should not be included in the compliance history calculation.
- 4) *Inclusion of factors related to “good performance and/or the implementation of innovative compliance methodologies” into the classification formula;*  
Businesses that have been classified “Average By Default” and earned a Compliance Commitment C2 Partnership certificate (and are exempted from TCEQ investigations for one year) should be given the opportunity to be rated as a high performer.
- 5) *Consideration of alternate nomenclature related to person classification (i.e., Superior, High, Average, Unclassified, Poor, etc. versus High, Average, and Poor);*  
Use a preferred range of classifications such as: Superior, High, Satisfactory, Poor, Unclassified, by changing average to satisfactory and adding a category for unclassified based on the fact that there has not been a recent inspection.
- 6) *Simplifying the repeat violator definition.*  
“Repeat Violator” in relation to Compliance History should be redefined so that a site will be designated a repeat violator if the same major violation occurred at the site more than once.

**CALPINE**

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October 9, 2006

Ms. Lola Brown  
Texas Commission on Environmental Quality  
Office of Legal Services

VIA FACSIMILE (512) 239-4808

Re: **Comments on Proposed Amendments to 30 TAC 60.1-60.3  
Compliance History Rule  
Calpine Corporation  
REFERENCE NO. 2006-001-060-CE**

Dear Ms. Brown:

Calpine Corporation ("Calpine") respectfully submits these comments in response to TCEQ's proposed amendments to the Compliance History Rule (30 TAC 60.1-60.3). Calpine either owns or operates 12 power plants in Texas with a total net generation of approximately 7,500 MW.

Calpine appreciates the TCEQ's focus on improving the Compliance History Rule and its requested input from the public and the regulated community. Calpine has reviewed the proposed rules, and has selected some issues for discussion and comment.

**30 TAC 60.1(d) – Change in Ownership**

The proposed language under 60.1(d) does not clearly spell out the obligations of the buyer and seller of a site as they pertain to compliance history. The proposed rule states that the seller "shall fully disclose the compliance history record of the site" to the buyer. The rule does not clarify how in-depth the compliance history record that is produced for the buyer must be, and does not include a definition of "fully disclose." This lack of clarification may lead to conflict between a buyer and seller if the two parties have differing opinions on what full disclosure entails. For example, if a seller does not believe that a minor aspect of compliance history needs to be disclosed, and if a buyer discovers that aspect in the course of performing due diligence, a complaint or legal action may be initiated against the seller. Furthermore, if the TCEQ compliance history record is not up to date at the time of the transaction, some component of the compliance history that is missing from the record at the time the due diligence is performed may be discovered at a later time. This could lead to a legal dispute between the buyer and seller as to whether the record was "fully disclosed."

Furthermore, the rule states that the buyer "shall exercise due diligence to seek out compliance history information from the current owner, the commission's online compliance history database, through a records review, or request for information." This statement implies that almost any effort to review the compliance history of the site is adequate to meet this requirement, including a brief check of the TCEQ online database.

Calpine suggests that TCEQ reconsider this proposed revision to the Change in Ownership language of the Compliance History rule. Imposing due diligence and disclosure requirements on the buyers and sellers of affected properties that are vague and open to interpretation is problematic and could lead to legal disputes between both parties, potentially involving TCEQ staff.

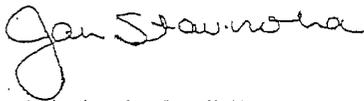
30 TAC 60.2(d) – "Repeat Violator" Criteria

In the proposed rule, "repeat violator" criteria consist of more than one major violation of "the same chapter, section, and subsection of a commission rule or statute." The criteria do not address emission sources, emission points, or causes of emission events. Therefore, a site can experience two or more emission events that violate any subsection of a rule or statute, no matter how general, from different emission sources due to different causes, and be classified as a "repeat violator."

The revised rule should indicate that a person is a "repeat violator" if a particular activity results in one or more major violation of the same chapter, section, and subsection of a commission rule or statute due to the same cause.

Calpine appreciates the opportunity to submit these comments on the Compliance History Rule, and anticipates that TCEQ will implement positive changes to the rule as a result of stakeholder participation.

Sincerely,  
Calpine Corporation



Jan Stavinoha, P.E.  
Environmental Manager – Texas Power Region



Westward Environmental, Inc.

P.O. Box 2205  
BOERNE, TEXAS  
78006

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October 2, 2007

Buddy Garcia, Chairman  
Larty R. Soward, Commissioner  
Office of the Commissioners, MC 100  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

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OCT 05 2007  
Texas Commission on Environmental Quality  
Commissioners' Offices

DUE DATE: 10-26-07

Re: Proposed Changes to the Compliance History Rule

On behalf of Westward Environmental, Inc. (WEI), I am pleased to share our comments with respect to Title 30 of the Texas Administrative Code (TAC) Chapter 60 (relating to Compliance History). WEI is an environmental engineering and consulting company that supports businesses of all sizes in Texas.

Background

Since 2004, WEI has been engaged in the evaluation of 30 TAC §60 on the regulated business community. We have participated in multiple internal discussions and meetings, viewed TCEQ presentations, and attended TCEQ Commissioner's work sessions.

Current Rule

TCEQ presently utilizes a system, described in 30 TAC §60, which places the components of a regulated entity's compliance history into a specified site rating formula to generate a compliance history rating and classification. As you are aware, this compliance history record is then utilized to make decisions for permit authorizations, additional monitoring conditions, penalty decisions, agency fees, etc. The current system is not only a complex process for the public to understand but the information is also not used efficiently or representatively in the permitting and enforcement activities of the agency. We appreciate the fact the TCEQ recognizes that the present classification system should be improved, and supports this being achieved with targeted, meaningful changes to the present compliance history components and formula through new rulemaking to make compliance history more equitable and effective.

Proposed Rule Changes

WEI believes that there is a need for new legislation; however, as this opportunity has passed, WEI supports new rulemaking (as opposed to or in addition to adoption of TCEQ policy). We recommend the October 2006 Compliance History proposed rule, Rule Project No. 2006-001-060-CE, or a similar project, be used as a starting point for the improving the compliance history process and its associated uses.

WEI supports the following proposed changes to the current Compliance History Rule:

1. The compliance history period should be reduced from five (5) years to three (3) years. A three year period is consistent with other environmental programs, and more accurately reflects the current compliance status of a site under current ownership – both positive or negative.
2. Consider self-reported violations as a component of compliance history only when they are included in an issued order or judgment.
3. Consider adding a "superior" performer classification, which has an exceptional compliance record and includes actions that go above and beyond compliance.
4. Consider changing the "Average by Default" classification to "Unclassified"
5. The violations termed as "Major" within 60.2(c)(1) should be changed to reflect those violations that harm human health, the environment, or that demonstrate disregard for environmental regulations. This change would include 60.2(c)(1)(B)

Westward Environmental, Inc.  
10/2/2007

- "operating without required authorization or using a facility that does not possess required authorization". Such violations can create a "repeat violator" scenario because a facility may need two or more permits (i.e., air and storm water). In many cases, obtaining the permit(s) does not change the environmental impact of the business. "Operating without a required authorization" is particularly an issue for businesses that have not been aware of the need to obtain authorizations from the TCEQ. Businesses should be given the opportunity to comply before being penalized.
6. Consider redefining repeat violator as having more than one of the "same" major violation(s).
  7. Compliance history information should apply only to the individual site and owner. Compliance history components associated with a parent corporation do not necessarily apply to all facilities associated with the corporation.
  8. TCEQ should notify all performers prior to putting the classification on the internet. This allows businesses the opportunity to review their data for accuracy before it is released. In addition, appeal eligibility for compliance history classification should not be limited by the compliance history rating. The requirement that an entity must be either a poor performer or average performer with 30 points or more should be removed.
  9. Quicker updates should be made to the TCEQ data system regarding a changed compliance history classification. Corrections reflected in the data system within 30 days will prevent delays to permits due to an incorrect rating.
  10. Consider adding positive factors to the compliance history site rating formula for participation in innovative programs, C2 certification, Environmental Excellence Awards, and other positive elements.

#### Conclusion

WEI does not disagree with the intent of the Compliance History rule and the proposed uses of a business compliance record to make agency decisions. However, the components and calculations used to create a regulated entity's Compliance History must first be representative of true environmental risk and must be equitable to all businesses. Unless changes are made to this effect, the impacts on business will be further exacerbated, ultimately damaging to the Texas economy. Should a permit be unreasonably withheld or delayed due to compliance history, the business impact can be detrimental.

WEI believes that the change we propose will result in a clearer and less burdensome method of calculating both compliance classifications and compliance ratings. All businesses, and especially small businesses, will be better able to properly manage their compliance history.

WEI sincerely appreciates your consideration of our input and recommendations regarding this issue, which is a concern of the manufacturing community due to the economic effect of this rule.

Sincerely,



Juliana Morelli  
Compliance Specialist  
Westward Environmental, Inc.

## TEXAS INDUSTRY PROJECT

### SUPPLEMENT TO OCTOBER 6, 2006 COMMENTS ON DRAFT COMPLIANCE HISTORY RULES AND RELATED PENALTY POLICY CHANGES

OCTOBER 22, 2007

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#### I. Supplemental Comments on Draft Rule

##### A. Penalty Policy Compliance History Enhancements

###### 1. TIP Supports Removing NOV's from the Penalty Enhancements

As discussed in our 2006 Comments, the executive summary prepared in association with last year's draft compliance rules proposed to eliminate the compliance history component enhancements from the Penalty Policy. At the September 7, 2007 Work Session, the Commissioners discussed the possibility of removing notices of violation from the enhancements. TIP supports this approach. NOV's are merely allegations, and should not be used to increase future penalties. However, while this potential change is positive, it does not go far enough to implement the Commission-approved recommendation to eliminate the compliance history enhancements entirely.

###### 2. 1660 Orders, Like NOV's, Should Not be Used to Enhance Penalties

At the September 7, 2007 Work Session, the Commissioners also discussed the percentage that should be assigned to orders, and whether 1660 orders should receive a different percentage than findings orders. While TIP opposes any component-based enhancement (consistent with staff's Enforcement Process Review recommendation to eliminate the enhancements and the Commissioners approval of the recommendation), 1660 orders should not be used to enhance compliance history for the same reasons that NOV's should not: they are non-adjudicated. Specifically, 1660 orders include a denial of liability, and do not contain findings of fact or conclusions of law. A 1660 order, by its very definition, is a non-adjudicated order, and as a result, it should not be used to increase a penalty based on compliance history. In fact, the underlying legislation even addresses compliance history directly, noting that a 1660 order may include a reservation that "the order is not intended to become a part of a party's or a facility's compliance history." Tex. Water Code § 7.070.

###### 3. Too Much Weight is Placed on a Single Statutory Factor

The Commissioners also directed staff to propose a percentage to assign orders for compliance history enhancement purposes. The portion of a penalty attributable to the compliance history enhancement has risen dramatically in the last five years. The use of compliance history in enforcement actions generally stems from a statutory mandate to consider certain factors in determining a penalty. Specifically, the Texas Water Code requires consideration of: (1) the nature, circumstances, extent, duration, and gravity of violation; (2) the

impact of the violation on air quality, surface water and groundwater, instream uses or affected persons; (3) compliance history; (4) culpability; (5) good faith; (6) economic benefit; (7) the amount necessary to deter future violations; and (8) other facts as justice may require. By placing such a significant emphasis on only one of the factors—compliance history—the other statutory factors are necessarily being given much less consideration in a manner inconsistent with the legislative directive to consider all of the factors when assessing penalties.

Accordingly, in the event the compliance history enhancements are not withdrawn in their entirety, and taking into account the Commissioners' direction not to put a ceiling on the number of orders that can be used to enhance a penalty, TIP proposes assigning 5 percent to findings orders. If 1660 orders are also used to enhance compliance history, TIP proposes assigning 2 percent to each 1660 order.

#### **B. Consideration of Size and Complexity in Compliance History Enhancements**

Although size and complexity are considered, to a certain degree, in both the repeat violator determination and the compliance history formula, they are completely ignored when applying the compliance history enhancements. This is fundamentally unfair, and wholly inconsistent with the compliance history rule. A large, complex site has literally thousands if not tens of thousands of opportunities for noncompliance on a daily basis. As a result, larger, more complex sites tend to have more noncompliances than smaller, less complex sites. TIP urges staff to consider adding a size and complexity component to the compliance history enhancements. This could be accomplished fairly easily. For example, different percentages could be assigned to orders based on the complexity factors currently used in the repeat violator determination. Another alternative would be to use a size and complexity factor as a denominator to the potential enhancement from compliance history components.

#### **C. Economic Benefit of Noncompliance**

At the September 7, 2007 Work Session, the Commissioners proposed reducing the economic benefit threshold from \$15,000 to \$7,500, and increasing the base penalty by the alleged economic benefit, rather than by a specified percentage. TIP opposes any decrease in the economic benefit threshold. The threshold was initially established to prevent wasting agency resources on determination and recovery of "economic benefits" that were less than the cost of recovery. Determining an alleged economic "benefit" is a very inexact process that does not take into account the very real losses of product and profits that most alleged noncompliances cause. For example, a flaring event caused by a mechanical failure has absolutely no true economic benefit for a company. Correcting the failure may require significant expenditures and the flaring event itself represents lost profit as otherwise marketable product is lost. Any proposal to determine and recover economic benefit from non-compliance should only consider economic information directly related to the alleged noncompliance.

TIP also strongly opposes the proposal to increase the base penalty by the entire alleged economic benefit, as opposed to a set percentage where the threshold is exceeded. This change could increase penalties dramatically, likely elevating the economic benefit factor above the compliance history enhancements in terms of the overall impact on the penalty. This

concern, coupled with the fact that determining an alleged economic benefit is such an inexact process, supports maintaining the percentage-based enhancement approach.

#### D. Culpability

At the recent Work Session, the Commissioners also discussed the culpability factor. Although the consensus seemed to be that it should be left as is, there was some discussion regarding whether NOV's would be considered when applying the culpability factor in the event they are removed from the compliance history enhancements. Such an approach, however, would be completely inconsistent with the Commissioners' direction that NOV's should not be used as part of the compliance history enhancements due to the fact that they are non-adjudicated. In fact, using NOV's to determine culpability would be even more of a concern because of their non-adjudicated nature. Culpability suggests that an entity has been *found* liable, as opposed to merely accused. For these obvious reasons, NOV's should not be used in the culpability determination.

#### E. Repeat Violator Definition

TIP supports the proposal to require the "major" violations to be the same before they will be counted toward the repeat violator determination. However, the proposed definition of "same" would completely eviscerate the change. As noted in TIP's 2006 Comments, defining "same" to include violations of the same statutory provision will result in literally *any* violation of the Texas Clean Air Act, any rule, or any order being the same as any other violation of the Act, any rule or any order. This is because Section 382.085(b) of the Act provides that a person may not "cause, suffer, allow or permit . . . the performance of any activity in violation of this chapter or of any commission rule or order." This "catchall" provision is routinely added to alleged violations. By defining "same" so broadly, literally every violation will be the same as every other violation, and this change will be pointless.

Instead of focusing on the violation of statutes or rules, staff should propose a definition of "same" that is based on the underlying cause of the alleged noncompliance. This is simply the most logical approach. If "repeat" suggests that a regulated entity did the same thing more than once, which staff appears to agree with based on the proposed changes reflected in the draft rule, then the underlying cause should be the same. No one would suggest that a recordkeeping violation at one unit is the same as an emissions event at another unit. However, under the broad definition of "same" proposed in the draft rule, those violations would clearly be the same. Accordingly, TIP strongly urges staff to propose a new definition that focuses on the underlying cause of the alleged noncompliance.

## II. Concepts Supporting Alternative Approaches to Compliance History

As set forth in TIP's 2006 Comments, a formula-based approach to compliance history is not required by statute, and is not supported in *any* way by *any* stakeholder group. However, in the event TCEQ decides to maintain the current formula-based approach, TIP suggests the following concepts, which would result in a more equitable application of the formula to the regulated community.

## A. One Size Does Not Fit All

The current formula attempts to apply a standard, rigid approach to all industry sectors, from the simplest site to the largest, most complex industrial facilities in the state. This rigid approach creates ridiculous outcomes in many instances. No where is this better seen than in the recent "poor" performer list, which includes literally hundreds if not thousands of service stations and other smaller sites, such as pipeline compressor stations, that are not regularly, if ever, inspected by the agency. As a result, a single, minor violation results in a "poor" performer classification. On the other hand, without the investigation component of the formula, every large, complex industrial facility in the state would be a "poor" performer.

This is just one of many examples supporting the obvious problem with applying the same formula to vastly different facilities and sectors of the state's energy economy. As a result, TIP would like to propose a new approach that applies different formulas, or different variations of the same formula, to different industry sectors. For example, the number of service stations of a particular brand in a particular region of the state could be factored into the denominator of the formula for that specific sector, and the number of compressor stations in the state could be factored into the formula for pipeline operators.

Larger, more complex sites, on the other hand, cannot have their compliance history classification determined by the same formula as smaller sites. For example, if the investigation component was removed from the denominator (or dramatically diminished by the removal of DMRs and Title V deviation report reviews from the denominator) many large complex sites would be "poor" performers. This is based on the simple fact that these sites have thousands of opportunities for noncompliance on a daily basis, and as a result, they have more compliance history components than smaller, less complex facilities.

Accordingly, TIP urges staff to consider a one-size-does-not-fit-all approach to compliance history classification that uses different variations on the formula for different types of sites.

## B. The Definition of "Site"

Along the same lines, certain "sites" are rated and classified under the compliance history rule, even though they have no interface with the agency from an investigation standpoint. These sites are not regulated on a day-to-day basis by the agency, do not require any agency authorization to operate, and are not inspected by the agency. An example of such a "site" is a residential gas line. While applying a different formula may work for certain smaller facilities, certain "sites" should simply not be classified at all.

Fortunately, a very simple change to the rule could address these sites. Specifically, Section 60.2(a) of the current rule could be revised as follows:

For the purposes of classification in this chapter . . . "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 and that are required to obtain a permit or registration from the commission.

This simple change would promote fairness in the classification of compliance history and get TCEQ out of the business of classifying "sites" that have no interface with the agency under a rule that is heavily weighted toward sites that are regulated by the agency on a much more frequent basis.

**C. Clarify Investigations Counted in the Rating**

TIP encourages the agency to consider a different approach to the compliance history rating process that clarifies the investigations that are counted. Under a simplified formula that looks at reports submitted, rather than records reviewed, regulated entities could evaluate their own compliance history. Self-reported information that is required to be submitted should be presumed to have the same potential for determination of non-compliance. Of course, under the current formula it is impossible to determine one's own compliance history because there is so much uncertainty regarding what constitutes an "investigation" and when it counts for compliance history purposes. Simplifying the process by listing out the specific reports that would count toward the number of investigations would allow regulated entities to estimate their own ratings, without the agency giving up any oversight authority.

**TEXAS INDUSTRY PROJECT**  
**COMMENTS ON TCEQ'S PENDING PROPOSAL**  
**DRAFT COMPLIANCE HISTORY RULE**  
**OCTOBER 6, 2006**

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The Texas Industry Project ("TIP") submits the following comments on the Texas Commission on Environmental Quality's ("TCEQ's") Pending Proposal Draft Compliance History Rule ("Draft Rule"). TIP is comprised of 63 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, and transportation industries with operations in Texas. A list of TIP member companies is attached.

**I. Summary**

TIP supports the TCEQ's efforts to implement the compliance history recommendations to come out of the Enforcement Process Review ("EPR"). The Draft Rule incorporates a number of TIP's specific recommendations and comments made during the EPR process. However, while TIP believes that some progress has been made, all stakeholders—industry, small business, government, and environmental advocate groups—agreed that a formula-based approach to compliance history should be abandoned. Despite this consistent feedback, the Draft Rule proposes to retain the formula-based approach, while making several small revisions to the current formula. Although agency staff believe, based on comments in the preamble, that these changes will positively affect all regulated entities; in fact, they have the potential to negatively affect most larger sites. These consequences are described below in TIP's comments.

**II. Comments on the Draft Rule**

**A. Positive Developments**

**1. *Revision to the Penalty Policy***

Although the Draft Rule does not revise the Penalty Policy directly, staff's August 4, 2006 letter, presenting the Draft Rule, recommended that a change be made to the Penalty Policy to use only the overall compliance history classification in assessing penalties. TIP strongly supports this proposed policy change, which would address TIP's comment that the current use of both classifications and component enhancements in penalty calculations constitutes double-counting and should be eliminated.

**2. *Exclude Self-Reported Violations***

TIP supports the removal of self-reported violations from the numerator of the site rating formula. However, this exclusion also includes the removal of the investigation "corresponding" to the violation. Excluding investigations as proposed is problematic because it reduces the denominator by a much greater degree than the benefit provided by the removal of

self-reported violations from the numerator. The interaction of these two components is described in more detail below.

### 3. *Exclude EPA Orders*

It is a positive step for the TCEQ to limit the compliance history formula to state orders and violations. However, the proposed limitation is unclear because while the Draft Rule excludes EPA orders from the site rating, it includes EPA orders as a component of compliance history. TIP recommends that the TCEQ clarify what role non-state orders and violations will play in the compliance history determination. Compliance history is a state compliance and enforcement tool, and should be restricted to state orders and findings, both within and outside of the compliance history formula.

### 4. *Include Points for Early Compliance and Voluntary Programs*

TIP supports proposed new section 60.2(e)(1)(N), which provides a multiplier for companies that comply early with a regulation or enter into a voluntary program. It provides an incentive to companies to closely consider voluntary programs and strive beyond compliance without penalizing those companies that are unable to implement such programs.

### 5. *Pre-Review of Data to Be Posted to the Web*

The Draft Rule includes recommendations, previously submitted by TIP, to add a process whereby companies are able to review compliance history data for accuracy prior to posting on the Web. While TIP supports this very positive development, the Draft Rule remains vague regarding the review mechanism and the process used to notify entities when information is posted and ready for review.

Proposed Section 60.2(a) provides that the TCEQ will conduct an annual recalculation in September for each regulated entity. That provision directly conflicts with Section 60.1(b), which ties the compliance history period to the period five years prior to the date of the permit application. This inconsistency affects the review process by the regulated entity because the review process is tied to the annual recalculation in September and not the permit application.

The review process described in the Draft Rule is silent regarding the review mechanisms; *i.e.*, notification to the entity of the recalculation and the process to appeal the recalculation. Entities are allowed to appeal a site rating recalculation, but the appeal must be filed prior to 30 days after the recalculation is completed. Therefore, the Draft Rule would require an entity to request site rating information from the TCEQ prior to September 1 each year, leaving less than 30 days to appeal the rating.

Entities should be notified of annual recalculations and given at least 30 days to evaluate the recalculation and appeal it before posting. The current process for recalculation and review will likely increase the number of appeals after a rating is posted because there is a high probability that an entity will miss the small window for review provided in Section 60.2(g). Additionally, to require companies to continuously monitor the Web site for posted information

would take much needed resources away from compliance. Instead, regulated entities should be notified whenever information is ready for pre-review.

The TCEQ should consider implementing portions of the process employed by EPA in its Enforcement and Compliance History Online ("ECHO") program. For example, in that program, EPA designates a single point of contact for issues relating to the information posted on ECHO.

6. *Allow Average Performers to Appeal Site-Ratings*

The inclusion of a provision that allows any average performer to appeal a classification is a positive development. However, the Draft Rule still requires a change of classification as a result of the appeal. The average performer range spans from 0.11 points to 45 points and an appeal to change the rating from the 30's to the single digits would be significant. Entities with an average performer classification are not likely to request an appeal to change a rating by a few points, thus there is no danger that a large number of companies will appeal a change of just a few points.

B. **Concerns**

1. *TCEQ Should Not Remove Investigations from Denominator that "Correspond" to Self-Reported Violations*

The exclusion of self-reported violations, upon initial review, appears to generally benefit regulated entities. The addition of complexity points to the denominator, in and of itself, will improve compliance history scores. However, upon closer analysis, large facilities will be negatively impacted. As discussed above, making small changes to the delicate balance of the current formula, rather than abandoning the formula-based approach altogether, will result in unintended consequences. When "corresponding" investigations are removed, the denominator is reduced to such a degree that the addition of complexity points does not offset that reduction. The result is a significantly worse site rating for many large facilities.

As the preamble to the original compliance history rule makes clear, the purpose of including investigations in the site rating formula is to consider *all* opportunities for non-compliance. Specifically, the preamble to the original rule clearly provides that "[a]n investigation is an *evaluation* of compliance that is significant because that is when the assessment of compliance occurs." 27 *Tex Reg.* 7,824, 7,872, August 23, 2002 (emphasis in original). Associating self-reported violations with the record review the agency conducts after-the-fact is entirely inconsistent with this admonition. For example, although exceedances may be noted in a discharge monitoring report ("DMR"), the assessment of compliance, and the agency's exercise of its discretion, has not happened until the DMR is reviewed. Associating an exceedance in a DMR with the underlying assessment of compliance by excluding the agency's review of the DMR from the denominator of the formula, ignores the original reason for including investigations in the denominator.

It is true that the addition of complexity points to the denominator, when viewed in isolation, is an improvement to the formula and initially appears to have a positive effect for larger entities. However, the removal of investigations negates any benefit provided by the

addition of complexity points. The interaction between the exclusion of certain investigations and the inclusion of complexity points illustrates how “tweaking” the formula can have negative, unintended consequences. Nowhere is this unintended consequence more clearly illustrated than in the agency’s review of monthly DMRs. Again, the preamble to the Draft Rule provides that the addition of complexity points to the denominator will have a positive affect on regulated entities. However, when the removal of DMRs from the denominator is considered, the overall negative effect on large sites will be significant. A reasonable number of complexity points for a large site is 15 to 20. However, most large sites (that submit DMRs) have 60 points in the denominator corresponding to five years of monthly record reviews. The overall result will be 45 to 40 fewer points in the denominator, and a resulting significant increase in the site rating. This clearly negative result is both at odds with the intent of the original rule, and directly contrary to the intent of the current rule—*i.e.*, to “positively affect *all* regulated entities.” (Emphasis added.)

## 2. *Change of Ownership*

The additions to the Change of Ownership section of the Draft Rule are vague, unenforceable, and problematic. The Draft Rule fails to clearly define “fully disclose” and “compliance history.” These vague terms will likely lead to problems in real estate transactions. Leaving “compliance history” undefined opens the door to complaints against sellers that some aspect of compliance history was not disclosed. In addition, describing due diligence as “to seek out compliance history information from the current owner, the commission’s online compliance history database, through a records review, or request for information,” makes a buyer’s obligations unclear. The “or” implies that merely checking the TCEQ online database will constitute due diligence.

The complexity of the compliance rating calculation and the ever-changing components of the formula prohibit regulated entities from knowing their rating at any given time. Because companies do not know, at any given time, what records TCEQ has reviewed, sellers may be accused of not fully disclosing compliance history.

More importantly, however, the TCEQ should not be in the business of imposing complex and confusing requirements on the transfer of real property. In fact, the agency may even find itself drawn into disputes between buyers and sellers over the meaning of this proposed requirement. As a result, TIP recommends that the TCEQ reconsider any changes that place a burden on the transfer of real property.

## 3. *Repeat Violator Definition*

The definition of “same violation” provided in the Draft Rule is also problematic. It describes “same” in the context of statute, chapter, and section. A violation of the same section of a statute may involve different units within a facility, different circumstances, different components, and different root causes. For example, subsection (b) of section 382.085 of the Texas Health and Safety Code provides:

A person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.

TEXAS HEALTH AND SAFETY CODE § 382.085(b) (West 2004). This provision is cited very frequently in support of alleged emission violations. Depending on how "major" is defined, if any alleged violation of § 382.085(b) is the "same" as any other violation of that section, then all large sites in Texas will be "repeat violators." Moreover, labeling these incidents as the "same" ignores the underlying root cause. Under the Draft Rule's definition, all emissions, regardless of facility, unit, or cause would be the "same." Finally, the definition of "same" used in the Draft Rule is not consistent with the definition of "same" used in the TCEQ's Findings Order Criteria or in the Penalty Policy.

#### 4. *Unclassified Entities*

The Draft Rule proposes to replace "average by default" with "unclassified" for those entities with no compliance information. This change in terminology is a positive development; however, "unclassified" entities are still average performers because the Draft Rule assigns "unclassified" entities 3.01 points. "Unclassified" entities should not be assigned points. The very term "unclassified" suggests that the entity does not fall into a particular category or classification. Assigning 3.01 points elevates an "unclassified" entity into the average performer classification without sufficient information to complete the site rating formula. An entity with a site rating must earn every point in its classification, whereas an "unclassified" entity is given, by default, enough points to obtain an average performer classification.

Proposed new section 60.2(e)(1)(O) amplifies the problem of assigning points to "unclassified" entities. It provides a multiplier to "unclassified" entities and allows them to achieve high performer status through employing a management system, complying early with a regulation, or entering into a voluntary program. This section in combination with the assignment of 3.01 points seems to favor those entities with insufficient compliance information. An "unclassified" entity could be, in reality, a poor performer and be assigned average or high performer status based on nothing other than a lack of compliance information.

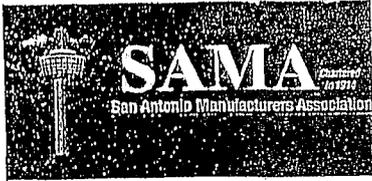
#### 5. *Compliance History Classification Levels*

The revisions to the rating formula in the Draft Rule necessitate a reevaluation of the break points in the classification levels. Each revision to an element of the site rating formula modifies the final rating and classification of an entity. The current break points of 0.11 (between Average and High Performer) and 45 (between Average and Poor Performer) were originally tested to confirm that they were the appropriate break points for the formula. Several modifications to the formula have been made since that testing, potentially making the current break points no longer be appropriate. The break points need to be reassessed and adjusted in light of any changes to the formula. The alternative is a completely arbitrary classification system.

TIP appreciates the opportunity to discuss the Draft Rule and to be part of the ongoing stakeholder process. If you have any questions regarding TIP's concerns, please contact Matt Paulson at 512.322.2582.

TEXAS INDUSTRY PROJECT  
(2006 Member Companies)

- 
1. Advanced Micro Devices, Inc.
  2. Albemarle Corporation
  3. Arkema
  4. Basell USA, Inc.
  5. BASF Corporation
  6. BP
  7. Celanese Chemicals, Ltd.
  8. CenterPoint Energy Houston Electric, LLC
  9. Chevron Corporation
  10. Chevron Phillips Chemical Company LP
  11. CITGO Petroleum Corporation
  12. ConocoPhillips
  13. Degussa Engineered Carbons, LP
  14. Delek Refining Ltd.
  15. Dixie Chemical Company, Inc.
  16. Dow Chemical Company, The
  17. Duke Energy Field Services, LP
  18. Dynegy Inc.
  19. Eastman Chemical Company
  20. E. I. Du Pont de Nemours & Company
  21. Entergy Texas
  22. Enterprise Products Operating L.P.
  23. Exelon Power Texas
  24. ExxonMobil Chemical Company
  25. Firestone Polymers, LLC
  26. GB Biosciences Corporation
  27. Goodyear Tire & Rubber Company, The
  28. Hexion Specialty Chemicals, Inc.
  29. Huntsman Corporation
  30. INEOS Olefins & Polymers, USA
  31. Intercontinental Terminals Company
  32. International Paper Company
  33. Kinder Morgan Liquids Terminals, LLC
  34. LANXESS Corporation
  35. LBC Houston, LP
  36. Lockheed Martin Aeronautics Company
  37. Lyondell Chemical Company
  38. LYONDELL-CITGO Refining LP
  39. Marathon Ashland Petroleum LLC
  40. MeadWestvaco Corporation
  41. Merisol USA, L.L.C.
  42. NOVA Chemicals Corporation
  43. NRG Texas LP
  44. Occidental Chemical Corporation
  45. Odfjell Terminals (Houston) LP
  46. Oiltanking Houston LP
  47. Praxair, Inc.
  48. Reliant Energy, Inc.
  49. Rohm and Haas Texas, Incorporated
  50. Shell Chemical Company
  51. Solutia Inc.
  52. ST Services
  53. Sterling Chemicals, Inc.
  54. Stewart & Stevenson Services, Inc.
  55. Stolthaven Houston Inc.
  56. Suez Energy North America
  57. TARGA
  58. Temple-Inland, Inc.
  59. Texas Instruments Incorporated
  60. Union Pacific Railroad Company
  61. Valero Energy Corporation
  62. Vopak Logistics North America, Inc.
  63. Western Refining Co., L.P.



**San Antonio Manufacturers Association**

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OCT 15 2007

Texas Commission on Environmental Quality  
Commissioners' Offices

October 12, 2007

Mr. Buddy Garcia, Chairman  
Office of the Commissioners, MC 100  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Dear Chairman Garcia:

Re: Proposed Changes to the Compliance History Rule

On behalf of the San Antonio Manufacturers Association (SAMA), which serves as a TCEQ Small Business Advisory Committee (SBAC) for the San Antonio region, and as a participant of the Small Business Compliance Advisory Panel (CAP), I am pleased to share our comments with respect to Title 30 of the Texas Administrative Code (TAC) Chapter 60 (relating to Compliance History). SAMA is a non-profit trade organization and recognized voice and advocate of approximately 450 manufacturers and support businesses of all sizes in the greater San Antonio Area.

Through SAMA's participation in TCEQ CAP/SBAC meetings and our Environmental Committee, we keep our members advised of new rules and regulations that affect them. The comments contained herein are the result of thoughtful discussion and consideration by the SAMA membership.

Background

Since 2004, SAMA members have been engaged in the evaluation of 30 TAC §60 on the regulated business community. Our membership participated in multiple internal discussions and meetings, viewed TCEQ presentations, and attended TCEQ Commissioner's work sessions. In addition, SAMA sent comments to the Agency on March 31, 2004, in reference to the TCEQ website Online Questionnaire relating to the enforcement process, and again on September 23, 2004, in reference to the TCEQ Executive Director's recommendations presented in the Enforcement Process Review Draft Final Report. In 2006, SAMA began preparing a rulemaking petition regarding Compliance History issues that was suspended prior to the legislative session in anticipation of new legislation which might address the same issues. Although our members were disappointed that the session brought no change in status, we are pleased to note that the Commission is again working on this important component of the Agency's enforcement process. During SAMA's July and August Environmental Committee meetings, our members resolved to ensure the Commission is aware of the impact of the current Compliance History Rule on the regulated community.

Current Rule

TCEQ presently utilizes a system, described in 30 TAC §60, which places the components of a regulated entity's compliance history into a specified site rating formula to generate a compliance history rating and classification. As you are aware, this compliance history record is then utilized to make decisions for permit authorizations, additional monitoring conditions, penalty decisions, agency fees, etc. The current system is not

"What San Antonio makes...makes San Antonio!"

only a complex process for the public to understand, but the information is also not used efficiently or representatively in the permitting and enforcement activities of the agency. SAMA appreciates the fact the TCEQ recognizes that the present classification system should be improved, and supports this being achieved with targeted, meaningful changes to the present compliance history components and formula through new rulemaking to make compliance history more equitable and effective.

#### Proposed Rule Changes

SAMA believes that there is a need for new legislation; however, as this opportunity has passed, SAMA supports new rulemaking (as opposed to or in addition to adoption of TCEQ policy). We recommend the October 2006 Compliance History proposed rule, Rule Project No. 2006-001-060-CE, or a similar project, be used as a starting point for the improving the compliance history process and it's associated uses.

SAMA supports the following proposed changes to the current Compliance History Rule:

1. The compliance history period should be reduced from five (5) years to three (3) years. A three year period is consistent with other environmental programs, and more accurately reflects the current compliance status of a site under current ownership – both positive or negative.
2. Consider self-reported violations as a component of compliance history only when they are included in an issued order or judgment.
3. Consider adding a “superior” performer classification, which has an exceptional compliance record and includes actions that go above and beyond compliance.
4. Consider changing the “Average by Default” classification to “Unclassified”
5. The violations termed as “Major” within 60.2(c)(1) should be changed to reflect those violations that harm human health, the environment, or that demonstrate disregard for environmental regulations. This change would include 60.2(c)(1)(B) “operating without required authorization or using a facility that does not possess required authorization”. Such violations can create a “repeat violator” scenario because a facility may need two or more permits (i.e., air and storm water). In many cases, obtaining the permit(s) does not change the environmental impact of the business. “Operating without a required authorization” is particularly an issue for businesses that have not been aware of the need to obtain authorizations from the TCEQ. Businesses should be given the opportunity to comply before being penalized.
6. Consider redefining repeat violator as having more than one of the “same” major violation(s).
7. ~~Compliance history information should apply only to the individual site and owner. Compliance history components associated with a parent corporation do not necessarily apply to all facilities associated with the corporation.~~
8. TCEQ should notify all performers prior to putting the classification on the internet. This allows businesses the opportunity to review their data for accuracy before it is released. In addition, appeal eligibility for compliance history classification should not be limited by the compliance history rating. The requirement that an entity must be either a poor performer or average performer with 30 points or more should be removed. Finally, quicker updates should be made to the TCEQ data system regarding a

changed compliance history classification. Corrections reflected in the data system within 30 days will prevent delays to permits due to an incorrect rating.

9. Consider adding positive factors to the compliance history site rating formula for participation in innovative programs, C2 certification, Environmental Excellence Awards, and other positive elements.

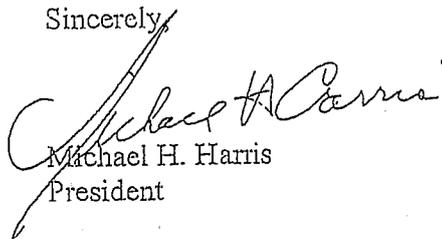
Conclusion

SAMA does not disagree with the intent of the Compliance History rule and the proposed uses of a business compliance record to make agency decisions. However, the components and calculations used to create a regulated entity's Compliance History must first be representative of true environmental risk and must be equitable to all businesses. Unless changes are made to this effect, the impacts on business will be further exacerbated, ultimately damaging to the Texas economy. Should a permit be unreasonably withheld or delayed due to compliance history, the business impact can be detrimental.

SAMA believes that the change we propose will result in a clearer and less burdensome method of calculating both compliance classifications and compliance ratings. All businesses, and especially small businesses, will be better able to properly manage their compliance history.

SAMA sincerely appreciates your consideration of our input and recommendations regarding this issue, which is a concern of the manufacturing community due to the economic effect of this rule. I also offer SAMA's continued support to the agency, particularly with respect to small business representation.

Sincerely,



Michael H. Harris  
President

cc: Commissioner Larry R. Soward

Draft; 1/14/08

D R A F T

March 3, 2008

Mr. John Gaete  
MC 205  
Office of Legal Services  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Comments on Rule Project No. 2006-002-060-CE  
*Submitted electronically to <http://www5.tceq.state.tx.us/rules/ecomments/>*

Dear Mr. Gaete:

On behalf of the Texas Chemical Council, the Texas Association of Business, and the Texas Oil and Gas Association, we are pleased to submit these comments on TCEQ's draft proposed compliance history rulemaking changes.

As we discuss below, on the whole these changes may offer some improvement to the compliance history rating rules and in some ways, make it more consistent with the agency's penalty policy. However, the changes still do not tackle the current rule's most important problem: using the convoluted formula now in place (but not required by statute) instead of a criteria-based characterization of compliance history. We also continue to have concerns with the agency's use of compliance history in enforcement actions and the insufficient focus on using a risk-based approach to enforcement, but we understand that the agency will be addressing those issues separately in its penalty policy review.

Section 60.1(c)(7): We agree that notices of violation (NOVs) based on self-reported violations, such as in discharge monitoring reports and Title V deviation reports, should not be included as a component of compliance history until cited in an issued final enforcement order. The inclusion of information in a self-report should not be considered on the same par as an alleged violation that is finally determined by the agency to have merit after using its full, appropriate processes.

Section 60.1(c)(10): We appreciate the agency's continued support for the addition of positive elements of compliance history. We believe the changes here, however, unnecessarily limit and discourage the regulated community's volunteering for on-site compliance assessments by the agency under special assistance programs. Specifically, a person or site's compliance history should note both the fact of a voluntary on-site compliance assessment and any successful responses to observations the agency notes. If compliance history is limited solely to successful responses, then those entities that are still in the process of completing any responses would not be recognized for their efforts at all under this proposal.

Section 60.1(c)(11): We agree that participation in voluntary pollution reduction programs should be included as a component of compliance history. However, we disagree that compliance history should recognize only the highest levels of participation, such as through

Clean Texas Gold and Platinum. Although this would serve as an encouragement to some entities to achieve such lofty status, the vast majority of entities would be further discouraged from participating at the other levels. The message this proposal would send is that TCEQ is no longer interested in entities doing more than is required but only seeks to work with a handful of entities at the very top of their sector. Participation at any level of such programs – all of which have thresholds for participation – should be recognized, and participation at the highest levels should be recognized even more. Credit should also be given for having an environmental management system that meets criteria set out by the agency or another recognized organization (such as an ISO 14000), or that can be shown to be driving improved environmental performance.

Section 60.1(d): This section veers from the statutory mandate that TCEQ include “changes in ownership” as a compliance history component (Water Code § 5.753(b)(4)) and is not appropriately included in this rule. The issue of what and how an entity’s information should be disclosed in a transaction should not be addressed in a provision outlining the components of compliance history.

Section 60.2(b): We agree that the “average by default” designation should be changed to “unclassified” and that points should no longer be assigned to such an entity.

Section 60.2(c)(1)(C): In order to make the definition of “major” violation consistent with the penalty policy, we propose the following amendment to Section 60.2(c)(1)(C):

(1) Major violations are:

(C) a significant and unauthorized release, emission, or discharge of pollutants ~~that caused, or occurred at levels or volumes sufficient to cause, adverse effects on~~ which exceed levels that are protective of human health, safety, or the environment;

Section 60.2(d)(1): We agree conceptually that “repeat violator” should be defined as only covering more than one of the “same” major violations at the same site on multiple, separate occasions within the compliance period “of the same chapter, section, and subsection.” However, we believe that the provision needs to further clarify that the agency cannot subvert this language by simply using Health & Safety Code section 382.085(b) (“[a] person may not cause, suffer, allow, or permit” a violation). To be considered a “repeat violator,” violations of the same underlying substantive program (or cause) must have occurred. Accordingly, we suggest that the agency adopt the following definition of “repeat violator,” which is consistent with current statutory language (see Water Code § 7.00251):

(1) Repeat violator criteria. A person may be classified as a repeat violator at a site when, on multiple, separate occasions, the same [a] major violation(s) occurs during the compliance period as provided in subparagraphs (A) – (C) of this paragraph. The same major violation is defined as a violation at a site due to the same root cause from two consecutive investigations within the most recent five-year period.

Draft; 1/14/08

Section 60.2(d)(2): In determining a site's compliance history, consideration should be given to both the size and complexity of the site's operations. Complexity cannot be adequately determined based solely on the number of permits a site has from the agency. Rather, complexity should also be determined based on the number of regulations under which a site must comply (i.e., Title V). This would be a more accurate determination of a site's opportunities for noncompliance, which is directly tied to complexity.

Section 60.2(e)(1)(A)-(C) and (G): We agree that violations cited in federal Environmental Protection orders should not be included in the calculation of a site rating.

Section 60.2(e)(1)(L): We agree that size and complexity points for the site should be included in the denominator. We also agree that the denominator should exclude from the scope of "investigations" not only investigations initiated by citizen complaints but also self-reported data, where the agency has not yet undertaken a review or evaluation of that information.

Section 60.2(e)(1)(N): We wholeheartedly agree that the other positive compliance history components (in addition to environmental management systems, already addressed in (M)) should also be included in the site rating. Where, as we have proposed here, a range of positive compliance history is included in a compliance history report (e.g., not just participation at the highest levels of a voluntary program but also at the lower levels), such a range also should be included in the site's compliance history. For example, participation in Clean Texas at the Bronze level could merit a 10% reduction.

Section 60.2(e)(1)(O): We agree that entities categorized as "average by default" or "unclassified" and that also have positive compliance history elements (in 60.1(c)(9)-(12)) should be classified as a "high performer" with a 0.00 site rating.

Section 60.2(e)(2): If the agency changes any basis or components of the compliance history formula, it will be necessary to recalibrate the break points for point ranges which determine an entity's classification.

Section 60.2(g): We agree that a regulated entity should be able to review its rating, classification, and compliance history components before the agency posts them on its website. We believe, however, that the better process would be for the agency to send the regulated entity the proposed rating, classification, and compliance history report, rather than for regulated entities to have to request this. If the agency nevertheless retains its proposed language and the regulated entity has to request the proposal, we urge the addition of a provision here requiring the agency to notify the entity that the proposal is ready, thereby providing notice and a clear trigger for the 30-day review period. It should also be noted that the biggest unknown for most entities is the "number of investigations" cited. In the past, the agency has not given an entity a detailed accounting of how this number was derived, and the number can vary greatly depending on how a site is investigated. It is our position that each field investigations and all required regulatory reviews and reports should be counted as an investigation.

Section 60.3(c): At past work sessions, there has been much discussion about the need to cease using components twice, once to determine compliance history and again as penalty

enhancements. At the September 7, 2007 work session, it was discussed that NOV's should not be counted twice, but that the agency should continue using final orders for purposes of both determining compliance history and for use as penalty enhancements. We strongly disagree with this proposal as it violates the Legislature's intent in Water Code Section 5.754(e) that a "compliance history classification" be considered in determining enforcement -- not the collective classification of all the elements plus some of those elements again. To allow such double counting would require legislation. Accordingly, we suggest the following change to Section 60.3(c):

(c) Enforcement. For enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements. In using a person's compliance history classification for an enforcement purpose, the components used to determine that compliance history classification may not be used individually for penalty enhancement or escalation.

Section 60.3(e): We agree that the regulated entity should be able to appeal all average and poor performer classifications, even if the rating is less than 30 points.

Thank you for the opportunity to comment on this proposed rulemaking.

Sincerely,

John L. Howard, Jr.

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**Comments by the Texas Association of Business, the Texas Chemical  
Council and the Texas Oil Gas Association on  
Compliance History**

Mar. 19, 2008

My name is Mary Miksa, and I am with the Texas Association of Business. The following comments are jointly from the Texas Association of Business, the Texas Chemical Council and the Texas Oil and Gas Association (the Associations).

We appreciate all the work that has been undertaken by staff thus far on the compliance history rules and we also appreciate the opportunity to discuss our concerns in a stakeholder meeting.

The first desire of the Associations is for TCEQ to eliminate the compliance history formula completely in favor of a criteria-based process. Failing that, the Associations favor a compliance history where complexity and size would be based on compliance—the number of opportunities a regulated entity has to be in compliance or to be out of compliance with applicable rules and regulations, rather than one based on the number of permits, as is the current system. The Associations also include comments on the current draft compliance history rules.

There are three parts to our comments:

- 1) The relationship of compliance history to the draft penalty policy and draft penalty policy rules.
- 2) The Associations' proposal for addressing complexity and size as well as addressing the issue of uniformity.
- 2) The Associations' suggestions for changes in the current compliance history rule package.

**Remarks by Debbie Hastings (TXOGA) on the Relationship of Compliance History to Penalty Policy**

I appreciate TCEQ calling a stakeholders' meeting to discuss the proposed Compliance History rules and I appreciate all the work that has already been done to bring forth the current rule package.

We also know that you have been busily working on the Penalty Policy. We recognize that these are separate packages that you are developing for the enforcement process. However, we agree with Commissioner Shaw's statements at the January 16<sup>th</sup> agenda where he stated that he would prefer to consider the Compliance History rule with the Penalty Policy.

Although we will be offering some suggestions to improving the compliance history rules, it is difficult to offer meaningful comments to the Compliance History rule proposal without first being able to consider the Penalty Policy. We believe these documents should be reviewed concurrently.

At this point, we can only guess how compliance history will be weighed into the penalty policy and we urge staff to give all stakeholders the opportunity for input prior to proposal.

Again, I thank you for offering the stakeholders the opportunity to work with TCEQ on this rule package and I would ask that you do the same for the Penalty Policy. Thank you.

#### Remarks by Mike McMullen (TCC) on a New Compliance History Proposal

This approach attempts to revamp the current compliance history formula by focusing on potential points of noncompliance, as opposed to the number of permits, to determine a site's complexity. To provide any realistic and meaningful rating or evaluation of an entity's compliance performance, the process must include a consideration of the opportunities for noncompliance or the size of the compliance obligations.

This new calculation could be conducted by counting the number of compliance points (CPs), required by rules, permits, orders, etc, for all applicable programs. Then multiply each CP by the number of times it is required to be analyzed or monitored (continuous monitoring may only count once per day depending on how many violations TCEQ may charge during a single day) and by the number of parameters checked each time. The product of these numbers is developed by the site operator and is subject to TCEQ review. The magnitude of this number will reflect the number of regulatory programs (complexity) and the size of the site. This will be the denominator in the new formula.

After the compliance point exceedances are added up, the number of individual violations noted and adjudicated, by the TCEQ are included. An "impact" (or magnitude) to each exceedance is assigned (as in the current process). The compliance point violations are then multiplied by their impact factor, the sum of which becomes the numerator in the new formula.

With this system, we understand that there may be too much of a span between a large industrial complex and a small business like a printing shop, in the number of compliance points. In order to make a fair showing of rankings, and in order to keep with the statute's "uniform standard", after each ranking is given, the results can be posted with entities classified within their own industry. For example, print shops' rankings can be compared to that of other print shops, to decide on performance levels rather than being compared to a large industrial park's ranking.

The uniform standard is kept because all entities are subject to the formula's points of compliance calculation, but the classification groupings by industry afterwards, will show a more honest interpretation of each site's actual performance.

#### **Remarks by Mary Miksa (TAB) on the current draft compliance history rules**

We have four significant comments on current rule package concerning: complexity and size, double-dipping, definition of major violation, and definition of repeat violator.

##### **Complexity and size. Sec. 60.2(d)(2).**

In section, 60.2(d)(2) on complexity points, we feel the list of permit types is lacking. While we don't think just looking at permits is an appropriate way to measure compliance (and Mike has just indicated what we think would be a better tool)-- we think that the list in the current proposed rules does not accurately reflect the breadth of permits some of our facilities are operating under.

We think that the list of permits should also include, non-attainment permits, minor new source review permits, and Title V permits.

Lastly, again to accurately reflect the range of requirements some of our companies operate under, we think to this section should be added a list of regulatory programs, at a minimum to cover "applicable requirements" under Title V, though an argument could be made for other rule programs as well.

##### **Double-dipping of components. Sec. 60.3(C).**

At past work sessions, there has been much discussion about the need to cease using CH components twice, once to determine compliance history and again as part of the penalty enhancement.

Double-dipping was the primary concern expressed by stakeholders during both the TCEQ discussions on creation of the original compliance history formula and the agency's recent extensive Enforcement Review.

At the Sept. 7, 2007 work session, it was discussed that although NOVs should not be counted twice, the agency nevertheless should continue using the same final orders to both determine compliance history and to enhance penalties.

We strongly disagree with this proposal because it violates the legislature's intent in Water Code § 5.754(e) that the "compliance history classification" be considered in determining enforcement—not the classification of all elements plus one or more of those elements again.

The statute does not allow such double counting.

To address this issue, we suggest that §60.3(C) in the proposed rule be amended by adding the following language: In using a person's compliance history classification for an enforcement purpose, the components used to determine that the compliance history classification may not be used individually for penalty enhancement or escalation.

#### Definition of major violation, Sec. 60.2(c)(1)(C).

Because the definition of major violation is so critical to compliance history, we think that the agency needs to distinguish more clearly the difference between major violations and other types of violations; and

Because CH is so closely tied to the penalty policy, we also think the agency needs to use some of the same language that we think is going to be used in the penalty policy (we're thinking but not knowing since we haven't seen the staff penalty policy proposal).

We suggest the following definition: *major violations are a significant and unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on which exceed levels that are protective of human health, safety, or the environment.*

#### Definition of repeat violator, Sec. 60.2(d)(1).

We agree conceptually that "repeat violator" should be defined as only covering more than one of the "same" violations at the same chapter, section, and subsection."

However we believe that the provision needs to further clarify that the agency cannot subvert this language by simply using Health & Safety Code section 382.085(b) (“[a] person may not cause, suffer, allow, or permit” a violation).

To be considered a “repeat violator,” violations of the same underlying substantive program (or cause) must have occurred.

We suggest that the agency add the following language to the definition of “repeat violator,” which is consistent with current statutory language (Water Code §7.00251):

*The same major violation is defined as a violation at a site due to the same root cause from two consecutive investigations within the most recent five-year period.*

From: "Julie Morelli" <jmorelli@westwardenv.com>  
To: <mwallin@tceq.state.tx.us>  
Date: 3/20/2008 2:54:52 PM  
Subject: Comments on Proposed Chapter 60 - Compliance History

Dear Ms. Wallin:

In response to the Agency request for additional comments on proposed rule 30 TAC Chapter 60, I submit the following:

1. We propose that the rule contain a conditional waiver for small businesses and/or facilities that purchase a "poor performer" to be granted permission to obtain a general permit (i.e., general permits under TPDES). Perhaps this could be a tentative authorization to reviewed after two years to ensure that the facility is operating in good faith with the applicable rules.

Small businesses, especially, are adversely affected by the inability to obtain general permits for water discharges. As has been discussed, small businesses also easily fall into the poor performer category because they have fewer inspections, points of interaction with the agency, etc.

2. Further, we would like to re-iterate that we disagree with the inclusion of a regulatory requirement to disclose compliance history during a property transaction. Property transactions are often between a lender and the regulated community. ASTM standards for Phase I Environmental Site Assessments, often driven by property transactions, do not require a review of facility compliance. Not all Lenders even require a Phase I.

It is our contention that including a requirement to disclose compliance history in Chapter 60 is going to become a litigation issue for several reasons:

1) Compliance history only documents those instances of non-compliance observed by the TCEQ leaving room open for a buyer to sue a seller for not disclosing information that TCEQ had not discovered.

2) Compliance history is not a true reflection of current operations, corrective actions performed, etc.; The purpose of the Phase I and Phase II is to determine impacts to the environment from regulated operations. We contend that this, combined with the requirements to amend, terminate, or re-authorize applicable permits, is sufficient to convey pertinent environmental information to a prospective buyer.

3) We contend that the current compliance history calculation is not equitable between small business and big business and is, therefore, not an accurate evaluation of the facility's compliance.

4) We contend that the definition of major violation drops some facilities into the poor performer category for violations that had little or no impact to the environment. This information is not pertinent to all property transactions, since the property may be purchased for a different end use.

5) We contend that inclusion of the compliance history as a requirement of regulation provides an additional opportunity to penalize the regulated community for infractions that have no real impact to the environment.

6) We contend that compliance history can become a disincentive for acquiring industrial properties because the public has no way of being informed as to the true nature of environmental impacts.

3. We request that the compliance history rating be terminated with change of ownership.

4. Finally, we request that the Agency NOT table this proposed rulemaking. The current compliance history calculation will be improved by the proposed rule changes. While additional work is required, we do not feel that these proposed changes should be postponed until a complete revision can be achieved.

Thank you, for the opportunity to provide additional feedback regarding this very important rulemaking.

Julie Morelli, REM  
Westward Environmental, Inc.  
830-249-8284

Attachment 3: Draft Rule  
Chapter 60, Compliance History

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 proposal to amend Chapter 60 is made in response to discussions within the framework of the commission's Enforcement Process Review, a comprehensive self-review of enforcement functions. As a result of these discussions, the commission directed staff to improve the current compliance history rules by making changes to the components and the formula, redefining repeat violator, changing the average by default classification, adding requirements that clarify the responsibilities of both an owner and a prospective buyer prior to a change of ownership, adding language that allows a regulated entity access to its compliance history information prior to publication on the agency's Web site, and revising the appeal of classification language to allow all average performers the opportunity to appeal.

#### SECTION BY SECTION DISCUSSION

Administrative changes are proposed throughout the rules to be consistent with Texas Register requirements and agency guidelines.

The proposed amendment to §60.1(c)(7) would exclude self-reported violations as a component of compliance history until cited in an issued enforcement order. Examples of this type of self-reported data would be monthly Discharge Monitoring Reports required for facilities covered under a Texas Pollutant Discharge Elimination System permit and deviation reports for sources permitted under the Federal Operating Permit Program (Title V) in Texas.

The proposed amendment to §60.1(c)(10) would add language that describes the level of involvement in voluntary on-site compliance assessments that would be required before being included as a component of compliance history. This involvement is limited to persons who successfully respond to observations noted in any voluntary on-site compliance assessments conducted on behalf of the TCEQ, such as through the Compliance Commitment Partners program.

The proposed amendment to §60.1(c)(11) would add language that limits the level of participation in voluntary pollution reduction programs that would be included as a component of the compliance history. Participation would be limited to the highest levels of environmental performance recognized through a TCEQ-approved voluntary pollution reduction program, such as the Clean Texas Gold and Platinum membership levels.

The proposed amendment to §60.1(d) would add language that requires a current owner to disclose multimedia compliance-related information, such as the components listed in §60.1(c), to a prospective buyer. A prospective buyer shall, as part of the required due diligence, seek out the same information regarding the site's record of environmental performance from the owner, the commission's online compliance history database, through a review of TCEQ records, and/or request for information from the commission. This language would clarify the responsibilities of both an owner and a prospective buyer prior to a change of ownership.

The proposed amendment to §60.2(b) would change the classification designation of average by default to unclassified. The change to unclassified would clarify the meaning, generally indicating that there is no compliance information about the site at the time the executive director develops the compliance history classification for the five-year compliance rating period.

The proposed amendment to §60.2(d)(1) would define repeat violator as having more than one of the "same" major violation within the compliance period at the same site, on multiple, separate occasions. The "same" major violation would be defined as a violation of the same chapter, section, and subsection of a commission rule or statute. The outcome of this change would be fewer repeat violators.

The proposed amendment to §60.2(e)(1)(A) - (C) and (G) would exclude violations cited in federal orders from the formula used to determine a site rating; however, the violations would still be a component of the compliance history. The change is recommended because the commission does not receive the information from the federal investigation and is not a party to the findings or negotiations leading to the federal order. The exception being joint orders issued by TCEQ and the United States Environmental Protection Agency (EPA), where both TCEQ and EPA agree to the findings and are a party to the evidence captured and negotiations that occur prior to issuance. Joint orders are entered and tracked in the commission's Consolidated Compliance and Enforcement Data System (CCEDS) and are a component of a site's compliance history. The associated investigation, if applicable, and violation points are included in the formula determining the site rating. The outcome of this change would be fewer poor performers.

The proposed amendment to §60.2(e)(1)(L) would include the complexity points for each site in the denominator of the formula. The complexity points are determined in §60.2(d) for sites with major violations. This change would allow the complexity points to be calculated for every regulated entity and be added to the number of investigations in the denominator of the formula. The outcome of this change would positively affect all regulated entities by increasing the number of points in the denominator, thus lowering and improving site ratings. Those regulated entities in the average by default or unclassified category would not be affected.

The proposed amendment to §60.2(e)(1)(L) would also add language that excludes self-reported data, where no review or evaluation of that data occurred, from what is considered as an investigation for purposes of this chapter. If a review or evaluation of self-reported data is performed, that review would be included as an investigation in the compliance history formula used to determine the site rating and classification.

The proposed amendment to §60.2(e)(1)(L) would also remove the assignment of 3.01 rating points to sites in the average performer by default category. This change is needed if the average performer by default category is changed to unclassified as proposed in §60.2(b) and will eliminate any misunderstanding for this category of classification.

The proposed amendment to §60.2(e)(1) would add subparagraph (N) for the purpose of including positive components to the formula used to determine a site rating allowing for a 25% reduction to the overall site rating. Currently, these components are listed on the compliance history report, but are not

included in the formula to determine the site rating. This change would allow more positive factors to be added to the formula. Specifically, TCEQ intends to allow this 25% reduction in the overall site rating for Compliance Commitment (C2) Partners, described in §60.1(c)(10), and Clean Texas members at the Gold and Platinum levels, described in §60.1(c)(11).

The proposed amendment to §60.2(e)(1) would also add subparagraph (O) which would allow a regulated entity in the average by default or unclassified category, where there are no other components besides those described in §60.1(c)(9) - (12) to be classified as a high performer with a 0.00 site rating. This change would allow the commission to recognize the performance of sites that fall into this category.

The proposed amendment to §60.2(g) would add language that, upon request, a regulated entity would be allowed an opportunity to review its rating, classification, and compliance history components prior to posting on the commission's Web site. Although a regulated entity can request corrections to its compliance history components at any time throughout the year, this change would allow a regulated entity to correct and update its data and potentially change its rating and classification during the 30 days before the official rating and classification are posted. Because of the 30-day time limit, requests for corrections should be received well before the end of the 30 days in order to ensure that the corrected data is included in the published site rating and classification. In certain circumstances, this change could potentially eliminate the necessity to formally appeal a poor or average performer classification.

The proposed amendment to §60.3(e) would allow all classifications in the average and poor performer categories to be appealed. Currently, an appeal can be made only if the person or site is classified as

either a poor performer or average performer with a rating of 30 points or more. The proposed change would remove the "30 points or more" restriction and allow all persons or sites with an average performer classification the opportunity to be appealed in order to move into the high performer category.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, 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 or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules change the manner in which compliance history of a regulated entity is determined. The agency will incur costs to implement the proposed rules, but these costs are not expected to be significant. Only those local governments that own or operate regulated sites may be affected by the proposed rules. The proposed rules will likely result in fewer sites classified as poor and more sites classified as high or average and will, therefore, subject them to lower penalties in the event an agency enforcement order is issued.

The purpose of the proposed rules is to improve the current formula used to establish compliance history classifications that are used in certain commission decisions. The proposed rules would modify the definition of repeat violator to mean violators having more than one of the "same" major violation, change the current average by default classification to unclassified, and add language to allow a regulated entity the opportunity to view its rating, classification, and components of compliance history prior to posting on the agency's Web site. These changes are a result of the Enforcement Process Review, which was recently conducted by the agency. The proposed rules would exclude self-reported violations as a

component of compliance history until they are cited in a formal enforcement order. This change would affect regulated entities that have to submit monthly Discharge Monitoring Reports and Title V deviation reports. The proposed rules would exclude violations cited in federal orders from the formula used to determine a site rating; however, the violations would still be a component of the compliance history. Positive indicators such as early compliance with a rule or participation in an agency-supported voluntary program would be added to the formula. The proposed rules would add language to require a site owner to provide compliance history information to a prospective buyer. The proposed rules would also specify that prospective buyers must seek out compliance history information from the seller, from the agency's online compliance history database, or through a records review or request for information.

The proposed rules will require modifications to the compliance history formula, repeat violator designation, and change of ownership applicability fields in the agency's CCEDS database. The approximate cost of these changes is estimated to be \$14,500, and it is expected that current appropriations are sufficient to pay for these modifications.

Currently, the agency regulates 173,000 entities that are subject to Chapter 60, which establishes standards for evaluating compliance histories. Approximately 26,000 of these sites are owned or operated by local governments. The proposed rules will likely result in fewer sites classified as poor and more sites classified as high or average and will, therefore, subject them to lower penalties in the event an agency enforcement order is issued. Cost savings would vary depending on the enforcement order that is issued.

#### PUBLIC BENEFITS AND COSTS

Ms. Chamness 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 a more easily understood compliance history process and a more efficient use of that history in the permitting and enforcement activities of the agency.

Currently, there are 147,000 regulated sites that have compliance histories that are owned or operated by businesses or individuals. The proposed rules will likely result in fewer sites classified as poor and more sites classified as high or average and will, therefore, subject such sites to lower penalties in the event an agency enforcement order is issued. Cost savings would vary depending on the enforcement order that is issued.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Staff estimates that approximately 133,000 small or micro-businesses have sites with compliance histories. The proposed rules will likely result in fewer sites classified as poor and more sites classified as high or average and will, therefore, subject sites owned or operated by small or micro-businesses to lower penalties in the event an agency enforcement order is issued. Cost savings would vary depending on the enforcement order that is issued.

#### 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 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.

#### REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking amendments are not subject to §2001.0225 because they do not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of these rules is to protect the environment and reduce the risk to human health from environmental exposure, this rulemaking is not amending a "major environmental rule" because it does not 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. The proposed rules will not 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 rules merely amend requirements relating to the applicability, components, and use of compliance history. These requirements are contained in Texas Water Code (TWC), §§5.751, 5.753, and 5.754. The reason there is no adverse effect in a material way on the environment, or the public

health and safety of the state or a sector of the state is because these proposed rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state.

Furthermore, the proposed rule amendments do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The proposed rule amendments do not exceed a standard set by federal law, because there is no comparable federal law. The proposed amendments do not exceed an express requirement of state law, because they are consistent with the requirements of TWC, §§5.751, 5.753, and 5.754. The proposed amendments do not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The proposed amendments are not proposed to be adopted solely under the general powers of the agency, but would be adopted under the express requirements of TWC, §§5.751, 5.753, and 5.754. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for the proposed rule amendments in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by a state law, which is exempt under Texas Government Code, §2007.003(b)(4). Nevertheless, the commission further evaluated these proposed amendments and performed an assessment of whether these proposed rule amendments constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rule amendments is to allow for a more efficient and representative use of compliance history. The proposed rules would substantially advance this stated purpose by: adding complexity to the denominator of the

compliance history formula; considering self-reported violations as a component of compliance history only when they are included in an issued order or judgment; excluding violations cited in federal orders from the compliance history formula; considering ways to add positive factors, such as early compliance with a rule or participation in an agency-supported voluntary program to the compliance history formula; changing the average by default classification to unclassified; redefining repeat violator as having more than one of the "same" major violation; adding a requirement that prior to a sale of a regulated entity, the current owner shall provide compliance history information to the prospective buyer, and the buyer shall also seek out compliance history information; and allowing a regulated entity to request an opportunity to review its rating, classification, and compliance history components prior to posting on the agency's Web site.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed amendments do not affect a landowner's rights in private real property because this 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 otherwise exist in the absence of the amendments. In other words, these rule amendments are administrative in nature and do not burden, restrict, or limit the owner's right to property and reduce its value by 25% or more.

#### 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 proposed rules 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); §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; §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; §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; §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; §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 §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 proposed rules for consistency with applicable goals of the CMP and

determined that the proposed 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 rule include: 31 TAC §501.19, Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; §501.20, Discharge of Municipal and Industrial Wastewater to Coastal Waters; §501.22, Nonpoint Source (NPS) Water Pollution; §501.23, Development in Critical Areas; §501.25, Dredging and Dredged Material Disposal and Placement; §501.28, Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and §501.32, Emission of Air Pollutants.

This proposed 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. This proposed 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 Department of State Health Services regarding wastewater discharges that could significantly adversely affect oyster reefs. This proposed 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; on-site disposal systems; to underground storage tanks; or National Pollutant Discharge Elimination System (NPDES) permits for storm water discharges. This proposed 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 proposed 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 proposed rulemaking is to increase compliance with existing standards and rule requirements. This proposed rulemaking has been conducted consistent with Texas Health and Safety Code (THSC), Chapter 382.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and because the proposed rules are intended to be used as a tool to increase compliance with existing standards and rule requirements.

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.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Proposed changes to the compliance history rules may impact eligibility of sites for certain authorizations under the Federal Operating Permits Program rules in 30 TAC Chapter 122.

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on June 16, 2008, at 2:00 p.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member 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 Patricia Duron, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to John Gaete, 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.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2006-001-060-CE. The comment period closes June 23, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html). For further information, please contact Mary Wallin, Enforcement Division, (512) 239-1864.

**§§60.1 - 60.3**

**STATUTORY AUTHORITY**

The proposed amendments are authorized under Texas Health and Safety Code (THSC), §361.017 and §361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers 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 proposed amendments are also authorized under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

The proposed amendments implement TWC, §5.753 and §5.754, relating to the standard for evaluating compliancy history and the classification and use of 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 Texas Health and Safety Code (THSC), Chapters 361, 382, and 401.

(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 Texas Health and Safety Code (THSC), Chapters 361, 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 [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 permit and registration [Class I] modifications, except for temporary authorizations and municipal solid waste permit and registration [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)(1) - (3) of this title (relating to Applicability to Air Quality 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) Beginning February 1, 2002, the executive director shall develop compliance histories with the components specified in this chapter.

(7) Beginning September 1, 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 either the motion for reconsideration or the motion to overturn [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 [(EDPR)], 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.

(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 [EPA]. "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, and criminal convictions relating to violations of environmental laws of 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, issued within the five-year compliance period, specifying each violation of a state environmental law, rule, permit, order, consent decree, or other requirement, excluding violations self-reported by a regulated person and those administratively determined to be without merit [all written notices 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) the type of environmental management systems, if any, used for environmental compliance;

(10) successful response to observations noted in any voluntary on-site compliance assessments conducted by the executive director under a special assistance program;

(11) participation at the highest levels in a voluntary pollution reduction program;

(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. Prior to the sale of a site, the current owner shall disclose information regarding the environmental performance record of the site to a prospective buyer. The prospective buyer shall exercise due diligence to seek out information regarding environmental performance at the site from the current owner, the commission's online compliance history database, through a TCEQ records review, and/or request for information from the commission.

§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-average compliance record;
- (2) an average performer, which generally complies with environmental regulations; or
- (3) a poor performer, which performs below 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 category [classification] shall be designated as "unclassified [average performer by default]." The executive director may conduct an investigation to develop a compliance history.

(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 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.

(d) Repeat violator.

(1) Repeat violator criteria. A person may be classified as a repeat violator at a site when, on multiple, separate occasions, the same [a] major violation(s) occurs during the compliance

period as provided in subparagraphs (A) - (C) of this paragraph. The same major violation is defined as a violation at a site of the same chapter, section, and subsection of a commission rule or statute. The total criteria points for a site equals the sum of points assigned to a specific site in paragraphs (2) - (5) of this subsection. A person is a repeat violator at a site when:

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

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

(C) the site has had the same [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 IAE [I A.E];

(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 [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 [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: and

(C) active hazardous waste management units [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.

(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.

(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) Except for those violations being addressed solely by a federal enforcement action by the United States Environmental Protection Agency (EPA), the [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) Except for those violations being addressed solely by a federal enforcement action by the EPA, the [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) Except for those violations being addressed solely by a federal enforcement action by the EPA, the [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.

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

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

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

(G) Except for those violations being addressed solely by a federal enforcement action by the EPA, the [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, or the 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, or the THSC, or the USC shall be multiplied by 250.

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

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

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

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

(i) subtract 1 point from the total in subparagraph (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 (J) of this paragraph:

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

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

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

(L) The result of the calculations in subparagraphs (I) - (K) of this paragraph shall be divided by the number of investigations conducted during the compliance period plus one plus the number of complexity points assigned to the site according to subsection (d)(2) - (5) of this section. 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 and self-reported data when a review or evaluation of that data does not occur. 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 in the category [with a classification] of "unclassified [average performer by default]" will not receive a rating [are assigned 3.01 points].

(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 Systems]) and has implemented the environmental management system [EMS] at the site for more than one year, then multiply the result in subparagraph (L) of this paragraph by 0.9.

(N) If the person has any of the compliance history components listed in §60.1(c)(10) - (12) of this title, then multiply the result in subparagraph (L) or (M) of this paragraph by 0.75.

(O) In the case of an unclassified regulated entity, where there are no other components besides those listed in §60.1(c)(9) - (12) of this title, the executive director shall assign the site the classification of high performer.

(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 45 points--average performer; and

(C) more than 45 points--poor performer.

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

(A) The executive director may reclassify the site from poor performer to average performer with 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 environmental management system [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 average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with 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 average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with 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 poor performer to average performer with 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 poor performer to average performer with 45 points based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement.

(f) Person classification. The executive director shall assign a classification to a person by averaging the site ratings of all the sites owned and/or operated by that person in the State of Texas.

(g) Notice of classifications. Notice of person and site classifications shall be posted on the commission's Web site [website] within 30 days after the completion of the classification. A regulated entity may request to review its rating, classification, and compliance history components during the 30 days prior to posting on the commission's Web site.

#### §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. Poor performers are subject to any additional oversight necessary to improve environmental compliance.

(3) Poor performers and repeat violators.

(A) If a site is classified as 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 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 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 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 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) 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) 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 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 environmental management system [EMS]; and

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