

The Texas Natural Resource Conservation Commission (agency, commission, or TNRCC) adopts new §60.1, Compliance History. The commission adopts new Chapter 60 to implement certain requirements of House Bill (HB) 2912, 77th Legislature, 2001, regarding compliance history. Section 60.1 is adopted *with changes* to the proposed text as published in the October 12, 2001 issue of the *Texas Register* (26 TexReg 7974).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

House Bill 2912, 77th Legislature, 2001, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to “develop a uniform standard for evaluating compliance history.” The purpose of this adopted rule is to define the components of compliance history.

The commission currently has procedures for preparation of compliance summaries for permit applications for waste disposal activities conducted under the authority of TWC, Chapters 26 and 27, and the Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361, and the Texas Radiation Control Act, THSC, Chapter 401, and these procedures are specified in existing 30 TAC §281.21(d). These procedures specify that a compliance summary shall cover at least the two-year period preceding the date on which the technical review is completed and shall include: 1) the date(s) and descriptions of any citizen complaints received; 2) the date(s) of all agency inspections, and for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact; 3) the date(s) of any agency enforcement action and

the applicant's response to such action; 4) the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility contingency plan, if applicable; and 5) the name and telephone number of a person to contact for additional compliance history.

The commission currently has procedures for preparation of compliance summaries for permit applications for air emissions under the authority of the Texas Clean Air Act, THSC, Chapter 382, and these components are specified in existing 30 TAC §116.122. The associated procedures specify that a compliance summary shall cover five years and shall include the following compliance events and associated information involving the Texas facility that is the subject of the permit application: criminal convictions known to the commission and civil orders, judgments, and decrees; administrative enforcement orders; and compliance proceedings. For facilities with sites outside the State of Texas, the compliance summary shall include criminal convictions and civil judgments, administrative enforcement orders, and notices of violation issued by the United States Environmental Protection Agency (EPA). Furthermore, §116.122 specifies that violations of fugitive emission monitoring and recordkeeping requirements meeting certain criteria shall not be included in the compliance history.

The commission is also required by TWC, §7.053 to consider compliance history (as one of several factors) for purposes of assessing administrative penalties in commission enforcement actions. As reflected in the commission's penalty policy (first revision, effective January 1, 1999), when assessing compliance history for enforcement purposes, a five-year history of the violator is examined in all programs of all media under the jurisdiction of the commission for the specific site under enforcement. Additionally, in evaluating the violator, the histories of all of its locations in the state are considered for

the medium or media of concern in the enforcement action. For example, this includes multiple water or wastewater plants owned by a city; parent, sister, or daughter companies in a corporate entity; and companies owned by each partner in a partnership. Furthermore, if the site of the violation has undergone a change in ownership, both the five-year histories of the site itself and of the new owner are examined. The components of compliance history considered for enforcement purposes are previous commission or federal enforcement orders that include findings of fact and conclusions of law, district court orders, federal court orders, or criminal convictions related to environmental laws.

The commission currently uses compliance history as a criterion for participation in the voluntary Clean Texas Program. Any facility that has been issued a findings order by the commission within three years prior to the application date is ineligible to participate. Any facility that has been the subject of a state or federal district court judgment for up to three years prior to the application is also ineligible to participate. Lastly, any facility with a criminal conviction or whose employees have a criminal conviction for infraction of environmental laws is ineligible to participate.

Adopted new Chapter 60 will implement the requirement of HB 2912, §4.01 to “develop a uniform standard for evaluating compliance history” by specifying the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization requiring agency approval. As specified in TWC, §5.751, the compliance history requirements of HB 2912 do not apply to occupational licensing programs under the jurisdiction of the commission. As adopted, 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. This rule will not apply to permit actions such as: voluntary permit revocations; minor amendments and nonsubstantive corrections to permits; Texas pollutant discharge elimination system (TPDES) and underground injection control minor permit modifications; Class 1 solid waste modifications, except for changes in ownership; municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice; permit alterations; administrative revisions; or air quality new source review permit amendments which meet the criteria of 30 TAC §39.402 and minor permit revisions under 30 TAC Chapter 122, unless a motion for reconsideration or a motion to overturn is filed under 30 TAC §50.39 or §50.139 with respect to the listed permit actions and set for commission agenda. The bill further states that compliance history must be utilized in agency decisions regarding enforcement, the use of announced inspections, and participation in innovative programs. House Bill 2912 applies to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401.

New Chapter 60 adopts a compliance period of five years. The period of time will be based on the five-year period preceding 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 inspection is appropriate, the five-year period preceding an inspection; or the five-year period preceding the date the application for participation in an innovative program is received by the executive director, as applicable. According to HB 2912, §18.05, beginning February 1, 2002, the executive director shall develop compliance histories with the components specified in this chapter.

Additionally, §18.05 specifies that this adopted new chapter will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in adopted new §60.1.

The components of compliance history specified in new Chapter 60 include: 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 EPA; orders issued under TWC, §7.070; to the extent readily available, final enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states; chronic excessive emissions events; any information required by other law or any requirements necessary to maintain federal program authorization; dates of investigations; notices of violations; any notices of audits conducted and any violations disclosed under the Texas Environmental, Health, and Safety Audit Privilege Act (Texas Audit Act), 74th Legislature, 1995; the type of environmental management systems (EMS) used for environmental compliance; any voluntary on-site compliance assessments conducted by the executive director under a special assistance program; participation in a voluntary pollution reduction program; a description of early compliance with or offer of a product that meets future state or federal government environmental requirements; and the name and telephone number of an agency staff person to contact for additional information regarding compliance history. Additionally, compliance histories will cover all media, including air, water, and waste. Changes in ownership will also be reflected.

Adopted §60.1 only implements the first phase of HB 2912, §4.01, as it relates to the definition, or components of, compliance history. The next phase of the implementation of HB 2912, §4.01, relating to the use of compliance history, will be accomplished through additional rulemaking. House Bill 2912, §18.05(b), specifies that, not later than September 1, 2002, the commission by rule shall establish the standards for the classification and use of compliance history, as required by TWC, §5.754. This

additional rulemaking will include modifications to Chapter 60, as well as to other applicable chapters of commission rules for the purpose of implementing the compliance history requirements of HB 2912, §4.01.

The commission solicited comments regarding applicability and appropriate components for use in defining a person's compliance history. The commission received 561 comments in response to the public comment period referenced in the SUBMITTAL OF COMMENTS section of the proposal preamble. All comments are addressed in the RESPONSE TO COMMENTS section of this adoption preamble.

SECTION DISCUSSION

Section 60.1 is adopted with changes to the proposed text. Adopted new §60.1, Compliance History, will implement the requirements of TWC, §5.753. Specifically, the adopted language will establish the components of compliance history the agency must consider prior to certain decisions. In this phase of rulemaking associated with the implementation of HB 2912, §4.01 regarding compliance history, the way the agency will use compliance history in certain decisions is not addressed; rather, this adopted language will only address the applicability and components of compliance history.

The commission adopts new §60.1(a), concerning applicability, with changes to the proposed text. The majority of the changes to the proposed subsection have been made to break the text into additional paragraphs and subparagraphs for clarity. The adopted subsection states that the chapter will be applicable to persons subject to the requirements of TWC, Chapters 26 and 27 and THSC, Chapters

361, 382, and 401. The adopted subsection will mirror HB 2912, §4.01, as it creates new TWC, §5.754(e) by specifying that the agency will utilize compliance history when making decisions regarding the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit; enforcement; the use of announced investigations; and participation in innovative programs. This portion of the rule has been broken out into new paragraph (1)(A) - (D) for clarity and ease in reading. Additionally, the word “inspections” has been changed to “investigations” for consistency. This adopted subsection will also specify that, for purposes of this new chapter, “permit” means licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization. This is to reflect the definition of “permit” included in TWC, §5.751. This portion of the rule has been separated into new paragraph (2) for clarity and ease in reading. Additionally, the term “person” as used in this chapter is the same as found in 30 TAC Chapter 3.

The types of permits, licenses, certificates, registrations, approvals, permits by rule, and standard permits over which the commission has jurisdiction can be categorized into two groups. The first group can be referred to as a “no decision” process. This term includes a situation in which a person informs the agency, as required by rule, that they is engaging in a certain regulated activity for which there is no specific approval required. For example, changes to qualified facilities under 30 TAC §116.117 and §116.118. Additionally, the “no decision” process includes activities that are authorized by rule for which notification may or may not be required, but no agency approval is required for the site to be authorized. The following are examples of required notifications that do not require response by the agency: the on-site management of nonhazardous waste for which a notification is required by 30 TAC §335.6; underground or aboveground storage tanks registered under 30 TAC §334.7 or §334.127;

emissions authorized by 30 TAC Chapter 106, where no written site approval is required; emissions authorized by 30 TAC Chapter 116, Subchapter F, relating to Standard Permits, where no written site approval is required; and waste discharge (including storm water and wastewater) notices of intent under 30 TAC Chapter 205, where no written approval is required.

Other types of permits can be referred to as a “decision” process. This group includes authorizations which require notification or application, an agency review, and site-specific agency approval or response. Examples of this category include municipal solid waste transfer stations as required by 30 TAC §330.65, and tire processing facilities as required by 30 TAC §328.63. This category also includes the more traditional permit decisions, such as authorization for an air permit under 30 TAC §116.111, and authorization for a Class I underground injection control well under 30 TAC §331.7. Adopted new §60.1 will only be applied to those permits or other forms of authorization, including temporary authorizations, requiring the “decision” process. The language as proposed has been separated out into new paragraph (3) for clarity and ease in reading. Additionally, it has been modified for clarity to reflect that it refers to authorizations which require the agency to make a substantive review of and approval or disapproval of them, and defines “substantive review of an approval or disapproval” as an 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 regulator criteria that are prerequisites to issuance of such authorization.

The commission considered whether the actions under 30 TAC Chapter 101, Subchapter H, relating to Emissions Banking and Trading, are subject to the compliance history review requirements. The

commission determined that these actions are not subject to the compliance history review requirements because they are not a form of authorization. The actions under Subchapter H are compliance methods for achieving the emissions reductions required under the state implementation plan as required by 30 TAC Chapter 117, and providing flexibility for compliance with 30 TAC Chapters 115 and 117.

The commission considered whether executive director actions regarding the remediation of spills or other contamination are subject to the compliance history review requirements. These actions are required under commission rules and the executive director reviews the actions taken during remediation to determine compliance with the rules and gives approval to implement the next requirement. However, the executive director is not authorizing any new activity and thus the commission determined that these actions are not subject to the compliance history review requirements.

The commission also considered whether there are specific kinds of permit actions which do not require compliance histories to be compiled. The commission suggests that permit actions such as voluntary permit revocations; minor amendments and nonsubstantive corrections to permits; TPDES and underground injection control minor permit modifications; Class 1 solid waste modifications, except for changes in ownership; municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice; permit alterations; administrative revisions; and air quality new source review permit amendments which meet the criteria of §39.402(a)(1) - (3) and minor permit revisions under Chapter 122, do not substantially change the current authorizations, but add clarity, correct typographical errors, update contact information, or

make other minor changes where the minor changes are equally protective of human health and the environment or are de minimis or insignificant. Therefore, the commission has determined that this rule will not be applicable to these types of permit actions, unless a motion for reconsideration or a motion to overturn is filed under 30 TAC §50.39 or §50.139 with respect to the listed permit actions and has modified the language to specify that it only applies in a situation where the item is set for a commission agenda. However, the language regarding a motion for reconsideration or a motion to overturn has been moved to adopted §60.1(a)(8) for better organization and clarity. The proposed language regarding the permit actions to which this chapter does not apply has been slightly modified for clarity to read, “Notwithstanding paragraphs (2) and (3) of this subsection, this chapter does not apply to certain permit actions such as:”, has been separated out into new paragraph (4)(A) - (G) for clarity and ease in reading, and new language regarding air quality new source review permit amendments and minor permit revisions has been added at subparagraph (H) for further clarification.

The adoption will reflect that Chapter 60 does not apply to occupational licensing programs under the jurisdiction of the commission, which is stated in TWC, §5.751. The language as proposed has not been modified, but it has been separated out into new paragraph (5) for clarity and ease in reading.

The commission has moved the first sentence of proposed §60.1(b), Components, with changes, to new paragraph (6). First, this sentence now reads, “Beginning February 1, 2002, the executive director shall develop compliance histories with the components specified in this chapter,” as specified in HB 2912, §18.05(i), which states that *the changes made by HB 2912 in the definition of compliance history* apply to an action taken by the agency on or after February 1, 2002. The text of this first sentence has

been changed from “The components of compliance history as specified in adopted Chapter 60 shall apply to an action taken by the agency on or after February 1, 2002,” in answer to many questions raised by commenters as a result of the proposed language as to what the February 1, 2002 date actually applies to. Further discussion is provided in the RESPONSE TO COMMENTS section of this preamble. Additionally, this sentence was taken out of the Components subsection and moved into the Applicability subsection for better organization and clarity.

With regard to required implementation dates, as specified in HB 2912, §18.05, the adopted subsection reflects that new Chapter 60 applies as follows: in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Additionally, the compliance history requirements as adopted, apply to decisions by the executive director relating to other forms of authorization and innovative programs to begin September 1, 2002. The proposed language has been slightly modified, and has been renumbered from paragraphs (1) - (4) to new paragraph (7)(A) - (D), in response to comments made concerning this language, as well as other changes made to this subsection for clarity and ease in reading.

As stated previously, the language regarding a motion for reconsideration or a motion to overturn has been moved to adopted §60.1(a)(8) for better organization and clarity. The commission has determined that this chapter will not be applicable to the types of permit actions specified in adopted §60.1(a)(4) as not requiring the compilation of compliance histories, unless a motion for reconsideration or a motion to overturn is filed under 30 TAC §50.39 or §50.139 with respect to the listed permit actions and set for a commission agenda.

The commission adopts new §60.1(b), with changes to the proposed text. First, the first sentence of this proposed subsection has been modified and moved to new §60.1(a)(6) for better organization and clarity, in answer to many questions raised by commenters as a result of the proposed language as to what the February 1, 2002 date actually applies to. Further discussion is provided in the RESPONSE TO COMMENTS section of this preamble. Additionally, the second sentence of this proposed subsection, beginning, “The compliance history shall include multimedia ...,” along with the phrase at the end of the proposed subsection, “The components are:” have been moved from subsection (b) to new subsection (c) for better organization and clarity. The only remaining language in subsection (b) pertains to the compliance period, and thus, the title of this subsection has been changed to “Compliance period.”

The adopted language of subsection (b) has been further modified to require that compliance history cover no more than the five-year period prior to receipt of an application or initiation of an enforcement action, rather than “at least a five-year period” as proposed. This will include 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 EDPR, whichever occurs first; with regard to the use of announced investigations, the five-year period preceding an investigation; or the five-year period preceding the date the application for participation in an innovative program is received by the executive director. This portion of the rule reflects a change in what the five-year period with respect to an enforcement action is based on, changed from the proposal which was five years preceding the date of the investigation that initiates an enforcement action. Additionally, with regard to announced versus unannounced investigations, again the word “inspection” has been replaced with “investigation” for consistency throughout the rule. This adopted language is meant to establish by rule “a period for compliance history” as required by TWC, §5.753(e). Furthermore, language has been added to this subsection to specify in the rule that a compliance history may be supplemented for the time period needed to process a permit application. The adopted five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions. The commission believes that a five-year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance. Again, further discussion of the changes made to this subsection are provided in the **RESPONSE TO COMMENTS** section of this preamble.

The commission adopts new §60.1(c), Components, with changes to the proposed text, to specify the components of compliance history that the agency must consider under applicable circumstances. This adopted new subsection states that 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 only change made to this sentence was the removal of the phrase “under the commission’s jurisdiction.” This has been deleted because it is not an accurate statement due to the fact that HB 2912 requires the agency to include as components of compliance history, enforcement-related actions that have taken place outside the state of Texas and which are therefore, not under the commission’s jurisdiction.

With regard to the actual components of compliance history, the commission adopts new §60.1(c)(1), which was proposed as §60.1(b)(1), and which mirrors TWC, §5.753(b)(1). This paragraph provides that one component of compliance history must include any enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with an environmental law, regulation, permit, order, consent, decree, or other requirement under the jurisdiction of the commission or the EPA. The proposed text has been changed to “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 EPA. “Applicable legal requirement” means an environmental law, regulation, permit, order, consent decree, or other requirement.” The word “final” has been added to reflect that this component will not include draft or proposed enforcement orders, court judgments, or consent decrees. The definition of “applicable legal requirement,” instead of being contained within the first sentence of the text, has been separated out for clarity and originates directly from TWC, §5.752(1).

The commission adopts new §60.1(c)(2), which was proposed as §60.1(b)(2), to comply with the requirement of TWC, §5.753(b)(2), which provides that, notwithstanding any other provision of the

TWC, orders issued under TWC, §7.070 must be included in the agency's consideration of compliance history. The language was proposed as, "notwithstanding any other provision of the TWC, orders issued under TWC, §7.070 on or after February 1, 2002." February 1, 2002 was proposed because currently, commission orders issued under TWC, §7.070, include language specifically stating that the order is not intended to become a part of the respondent's compliance history. As of the effective date of TWC, §5.753(b)(2), which is February 1, 2002, the compliance history portion of TWC, §7.070, is superceded, and orders issued under this section of the statute will be considered in compliance history. In the interim, the commission has also modified the existing language in applicable proposed enforcement orders to reflect the February 1, 2002, change to these types of orders. The rule language has been modified to read, "notwithstanding any other provision of the TWC, orders developed under TWC, §7.070 and approved by the commission on or after February 1, 2002." This nominal change was made due to the timing of the commission's agendas in January 2002. Specifically, those agendas are scheduled for January 16, and January 30, 2002. Additionally, the issuance date (or effective date) of a commission order is, under 30 TAC §70.10(b), the date of hand-delivery of the order to the respondent, or three days after the date on which the commission mails notice of the order to the respondent, whichever is earlier. The adopted change will allow a more clear demarcation as to what orders will be included in compliance history.

The commission adopts new §60.1(c)(3), which was proposed as §60.1(b)(3), and which will require that, to the extent readily available to the executive director, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states must be considered as a component of compliance history. This component is required by TWC, §5.753(b)(3). The

commission intends to utilize the EPA Integrated Compliance Information System and its retrieval component, Online Tracking Information System or any subsequent equivalent system(s) to retrieve the administrative and civil enforcement information which is extracted from the program-specific EPA databases. Commission decisions regarding compliance history that are based upon information contained on the EPA Integrated Compliance Information System shall not be voided by the subsequent discovery of enforcement orders and court judgments relating to violations of environmental laws of other states that were not noted in the EPA Integrated Compliance Information System. The only change to the proposed text is the addition of the word “final” to reflect that this component will not include draft or proposed enforcement orders or court judgments.

The commission adopts new §60.1(c)(4), which was proposed as §60.1(b)(4), and which will require that chronic excessive emissions events be included as a component of compliance history. This implements HB 2912, §5.01, which adds chronic excessive emissions events as a statutory requirement in new THSC, §382.0216(j). The adopted paragraph will further state that, for purposes of new Chapter 60, the term “emissions event” is the same as defined in THSC, §382.0215(a).

The commission adopts new §60.1(c)(5), which was proposed as §60.1(b)(5), mirroring the language in TWC, §5.753(c), which states that any information required by other law or any requirement necessary to maintain federal program authorization must be included as a compliance history component.

The commission adopts new §60.1(c)(6), which was proposed as §60.1(b)(6), which will require that the dates of investigations conducted by the executive director or his contractors be included as a

component of compliance history. This information will reflect how many investigations have taken place during the five-year compliance period, allowing for a better perspective with regard to the other components of compliance history, especially those in adopted subsection (c)(1) - (5), and (7). For example, it will be important to know whether the facility had been inspected during the compliance period, and how many times when there are no notices of violations or orders present during the compliance period.

The commission adopts new §60.1(c)(7), which was proposed as §60.1(b)(7), with changes. Section 60.1(c)(7) states that all written notices of violation (NOVs), 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, must be included as a component of compliance history, specifying each violation of state environmental law, regulation, permit, order, consent decree, or other requirement. This requirement implements TWC, §5.753(d), which specifically states that an NOV administratively determined to be without merit will not be included in a compliance history. Additionally, an NOV that is included in a compliance history will be removed from the compliance history if the commission subsequently determines that the NOV was without merit, as required by TWC, §5.753(d). The commission is adopting the use of written NOVs issued on or after September 1, 1999, which is a change from the proposed February 1, 2002 date, in order to more effectively implement TWC, §5.753(d). Additional changes to this paragraph include the addition of language specifying that written notifications of a violation from a regulated entity (self-reported violations) are included in this category of compliance history component. Finally, the word “an” was changed to “a state” as it precedes “environmental law, regulation, permit, order, consent decree, or other

requirement” to limit the use of NOV’s to those regarding violation of Texas requirements. Further discussion of the changes made to this paragraph are provided in the RESPONSE TO COMMENTS section of this preamble.

The commission has determined that there are other components of compliance history that it should consider to fully evaluate a person’s commitment to environmental excellence. Therefore, the commission adopts new §60.1(c)(8), which was proposed as §60.1(b)(8), and which will require, as applicable, the date of letters notifying the executive director of an intended audit conducted under the Texas Audit Act, to be included as a component of compliance history. These voluntary compliance audits can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations. The language has been modified to read, “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.” The phrase “and any violations disclosed” has been added because the Texas Audit Act requires that violations disclosed be included in compliance histories. The Texas Audit Act, §10(i) states, “A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.”

The commission also adopts new §60.1(c)(9), which was proposed as §60.1(b)(9), and which will require the type of EMS, if any, used for environmental compliance to be included as a component of compliance history. The inclusion of EMS in compliance history satisfies the statutory requirement contained in HB 2997 to amend TWC, §26.028 by adding new subsection (e) and re-lettering existing

subsections (e) - (g) as subsections (f) - (h) to include information regarding an EMS in an applicant's compliance history and compliance summaries for which an authorization is sought. Environmental management systems are another voluntary tool that the regulated community may use to evaluate their own environmental management practices, confirm compliance with environmental rules and regulations, and emphasize management oversight of regulated activities.

The commission recognizes that small entities are very concerned about environmental compliance but may not have the resources needed to conduct detailed assessments of their regulated activities.

Therefore, the commission adopts new §60.1(c)(10), which was proposed as §60.1(b)(10), and which will require any voluntary on-site compliance assessments conducted by the executive director under a special assistance program, such as assessments conducted by Small Business Environmental Assistance Division under the site visit program to be included as a component of compliance history. These voluntary assessments are conducted upon request.

The commission also recognizes that voluntary pollution reduction programs are an important tool in addressing environmental concerns in the state beyond regulatory requirements, and reflects a person's commitment to environmental excellence. Therefore, the commission adopts new §60.1(c)(11), which was proposed as §60.1(b)(11), and which will require participation in a voluntary pollution reduction program to be included as a component of compliance history.

The commission adopts new §60.1(c)(12), which was proposed as §60.1(b)(12), and which will require, as a part of compliance history, a description of early compliance with or offer of a product that meets

future state or federal government environmental requirements. Accelerating the implementation of new requirements that are intended to benefit the environment is a choice that a person may make. This voluntary early compliance is also a reflection of a person's commitment to environmental excellence.

Finally, with regard to the components of compliance history, the commission adopts new §60.1(c)(13), which was proposed as §60.1(b)(13), and which requires that the name and telephone number of an agency staff person to contact for additional information regarding compliance history be included.

The commission adopts new §60.1(d), which was proposed as §60.1(c), Change in Ownership, with changes. Adopted §60.1(d) will state that 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, the adopted language states that for any part of the compliance period that involves a different, previous owner, the compliance history will include only the site under review. The distinction for previous owners is that adopted §60.1(b) will require that for the current owner of the site, the compliance history will include the site under review as well as other sites which are under the commission's jurisdiction and owned or operated by the same person. The words "be assessed for" have been changed to "include" in order to address concerns raised by commenters.

Further discussion can be found in the RESPONSE TO COMMENTS section of this preamble.

Additionally, the subsection has changed from (c) to (d) in response to other changes made for better organization and clarity. Similarly, reference to subsections (b) and (c) is now made, where as proposed it was only (b), due to the addition of a new subsection for organizational purposes.

Furthermore, the word "different" has been changed to "previous" for clarity, and the sentence, "For

the purposes of this rule, a change in operator shall be considered a change in ownership if the operator is a co-permittee.” has been added to clarify when an operator’s compliance history would be included.

The commission has determined that for purposes of developing compliance histories, “ownership” will only include the entity filing the permit application, under enforcement, being inspected, or applying for participation in an innovative program, as defined by its legal name. For example, any parent, sister, or daughter corporations related to the legal entity will not be included.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

Although the intent of this rule is to protect the environment and reduce the risk to human health from environmental exposure, this is not 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 rule 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 rule merely adds the new requirements relating to the components of compliance history. These requirements are contained in TWC, §5.753. 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 this adopted rule is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state.

Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because there is no comparable federal law. The adopted rule does not exceed an express requirement of state law, and it is consistent with the requirements of TWC, §5.753. The adopted rule does not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rule is not being adopted solely under the general powers of the agency, but is being adopted under the express requirements of TWC, §5.753. The commission invited public comment on the draft regulatory impact analysis determination. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The following is that assessment. The specific purpose of this adopted rule is to incorporate the new requirements relating to the components of compliance history, which are contained in TWC, §5.753. The subject adopted rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the Coastal Management Program.

HEARING AND COMMENTERS

The commission held a public hearing on this proposal in Austin on November 12, 2001, at the Texas Natural Resource Conservation Commission complex. No individuals provided oral comments at the hearing. The following provided written comments during the comment period: Representative Fred M. Bosse (Representative Bosse); Representative Lon Burnam (Representative Burnam); Representative Glen Maxey (Representative Maxey); Representative Ruth Jones McClendon (Representative McClendon); Representative Robert R. Puente (Representative Puente); Strasburger & Price, LLP on behalf of 7-Eleven, Inc. (7-Eleven); Alliance for a Clean Texas (ACT); American Public Works Association, Texas Chapter (TPWA); Association of Electric Companies of Texas, Inc. (AECT); Association of Texas Intrastate Natural Gas Pipelines (ATINGP); BP Amoco (BP); Brazos River Authority (BRA); Brown McCarroll, L.L.P. (Brown McCarroll); Cantey & Hanger, LLP (Cantey & Hanger); City of Fort Worth Water Department (Fort Worth); Birch & Becker, L.L.P. on behalf of the City of Garland, City of San Antonio, Greenville Electric Utility System, and San Miguel Electric Cooperative, Inc. (Birch & Becker); the City of Plano (Plano); ExxonMobil Chemical Company (EMCC); ExxonMobil Refining & Supply Company (ExxonMobil Refining); Galveston-Houston

Association for Smog Prevention (GHASP); Reaud, Morgan & Quinn, Inc., on behalf of Huntsman Corporation, Huntsman Petrochemical Corporation, and Huntsman Polymers Corporation (Huntsman); Industry Council on the Environment (ICE); Jones, Day, Reavis & Pogue (Jones Day); North Texas Municipal Water District (NTMWD); Port of Houston Authority (PHA); Solid Waste Association of North America, Lone Star Chapter (TxSWANA); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Chemical Council (TCC); Texas Committee on Natural Resources (TCONR); Texas Cotton Ginners' Association (TCGA); Baker Botts L.L.P on behalf of the Texas Industry Project (TIP); Texas Mining and Reclamation Association (TMRA); Texas Municipal League (TML); Texas Petroleum Marketers & Convenience Store Association (TPCA); Thompson & Knight L.L.P. (Thompson & Knight); Vinson & Elkins L.L.P. (Vinson & Elkins); Waste Management of Texas, Inc. (WMT); and 532 individuals.

The following commenters supported the proposal, either in general, or in part: 7-Eleven; ACT; AECT; BP; Brown McCarroll; ExxonMobil Refining; ICE; NTMWD; Plano; TCC; TCONR; TMRA; TPCA; TxSWANA; and Vinson & Elkins.

The following commenters opposed the proposal in part and suggested changes to the proposal as stated in the RESPONSE TO COMMENTS section of this preamble: Representative Bosse; Representative Burnam; Representative Maxey; Representative McClendon; Representative Puente; 7-Eleven; ACT; TPWA; AECT; ATINGP; BP; Birch & Becker; BRA; Brown McCarroll; Cantey & Hanger; Fort Worth; Plano; EMCC; ExxonMobil Refining; GHASP; Huntsman; ICE; Jones Day; TxSWANA;

NTMWD; PHA; TABCC; TCFA; TCC; TCONR; TCGA; TIP; TMRA; TML; TPCA; Thompson & Knight; Vinson & Elkins; WMT; and 532 individuals.

RESPONSE TO COMMENTS

New Chapter 60 has been added to implement the requirements of TWC, §5.753. Specifically, the adopted language will establish the components of compliance history the agency must consider prior to certain decisions.

General

Jones Day commented, "This rule should provide, in text or in preamble, the outline of procedures for rehabilitating a facility from a poor compliance history. Failing to do so functions as a disincentive for extraordinary action by industry to bring problematic facilities into full compliance."

The commission responds that this comment is outside the scope of this rulemaking. The commission acknowledges that TWC, §5.754 requires the classification of a person's compliance history into one of a minimum of three classifications, including "poor," "average," and "high." The proposed rule is, however, only the first phase in developing the compliance history rules. House Bill 2912, §18.05(a) requires the commission to establish the components of compliance history, by rule, no later than February 1, 2002. This proposed rule establishes those components. House Bill 2912, §18.05(b) requires that the commission, by rule, shall establish the standards for classification and use of compliance history not later than September 1, 2002. This will be accomplished through the second phase of rulemaking. Although TWC, §5.754 requires

the commission to classify a person's compliance history, rehabilitation of a facility from a poor compliance history is outside the scope of this rulemaking. The ways a regulated entity could improve their compliance history will be apparent in the second phase of compliance history rulemaking in that instituting specific positive components will improve compliance history. In addition, the commission will be undertaking rulemaking governing the strategically-directed regulatory structure which will include regulatory tiers under which entities of all compliance history levels will be governed. No change has been made in response to this comment.

Brown McCarroll stated that it "believes that these proposed rules are generally faithful to the letter and substance of the statutory provisions for which they are proposed to implement. Thus, we are in general agreement on the TNRCC's approach on these proposed rules," but that it is providing specific comments that it believes will make these proposed rules clearer and more workable.

The commission appreciates this positive comment in support of the rule.

ExxonMobil Refining recommended that, "{a}ny consideration of historical environmental information in the matter of a permit action must be heavily weighted toward the compliance history of the facility making the application. Some consideration can be given to other related instate facilities, with the smallest consideration given to reports and information from other jurisdictions."

The commission responds that the issue of “weighting” the components of compliance history will be addressed in the next phase of rulemaking regarding the classification and use of compliance history. No changes have been made in response to this comment.

Several commenters provided comments regarding the possible inaccuracy of data included in a person’s compliance history, and many recommended that a regulated entity have the opportunity to review its compliance history prior to its use by the agency or its being made available to the public. ExxonMobil Refining recommended that the commission “give consideration to the problems created by rule language that will empower TNRCC to punish Texas permit applicants based upon possibly inaccurate, possibly erroneous notification of environmental problems at facilities in other jurisdictions.” AECT and ICE commented that they have concerns that a site’s compliance history has the potential to be inaccurate because the sources of information that comprise such compliance history may be inaccurate and/or mistakes may be made in the compilation of the information that comprises the site’s compliance history. To ensure that the compliance history for a site is accurate, AECT and ICE both suggested “that the rules and the associated preamble language provide that the person who owns or operates a site” be provided with an opportunity to review and, if necessary suggest corrections to “the compliance history the TNRCC has compiled” for the site before it uses such compliance history in any way or has made it available to the public. Similarly, Cantey & Hanger commented, "Compliance history drafts which the TNRCC assembles based on the Proposed Rule's components should be sent to a regulated entity to comment on before they are published." TABCC stated that it “believes that the TNRCC should have some procedure in place for allowing a company an opportunity to review raw compliance history data prior to it becoming publicly available, particularly if it contains

information from other states and the EPA.” Vinson & Elkins commented that the “proposed Phase I regulations do not provide the entity which is the subject of the compliance history review the opportunity to comment upon the summary. Presumably, this will be addressed in the Phase II rulemaking. Nonetheless, given the level of reliability and accuracy in information, particularly concerning compliance information from other states, and the recognition that a compliance summary also includes information about compliance with environmental laws, it is imperative that the entity whose actions will be judged have the opportunity to comment on the compliance summary.” TCC commented that it “believes that the regulated community should have the capability for prior review and correction of any data that will be added to the compliance history from external sources, and that this data should be publicly available. We do not believe it appropriate to use any source of data that is not publicly available. This is important because a company should have the opportunity to review out of state information before it is made public to ensure it is accurate.” Additionally, in general, BP endorsed the comments submitted by TCC. Jones Day commented, “The Commission should add procedures that allow a company to correct and supplement the compliance history on file for its facilities. Under this new rule, the accuracy of compliance history entered into the TNRCC files is too important to be left without mechanisms to ensure accuracy.” TIP commented that “{c}ompanies should be able to correct and supplement their compliance histories. This is particularly important to ensure that the aspects of a facility’s compliance history relating to size and complexity are included, but is also relevant for such items ... as reviewing the accuracy of out-of-state violations and updating positive aspects of compliance history. In this regard, the TNRCC should allow the regulated community constant access to the system for review of all aspects of compliance history. A system that

allows such review, as well as the ability to quickly correct any errors, is crucial to a successful program.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission appreciates the concern raised by the commenters and responds that a regulated entity currently has, and will continue to have, the ability to submit (additional) information for consideration on behalf of a claim that information included in its compliance history is inaccurate and/or erroneous. A regulated entity is free, and in fact encouraged, to provide information for consideration to correct inaccuracies at any time. However, due to the number of compliance histories that the agency will be preparing, it is not feasible to send drafts to regulated entities prior to their use by the agency. With regard to compliance histories being made “public,” the commission responds that it is subject to the Public Information Act. However, the information held by other states as well as the EPA, is not under the commission’s control with regard to its availability to the public, up until such time as the commission has such information in its possession, nor is the commission responsible for or able to correct such information as it resides under its area of jurisdiction. The commission responds that it will utilize information obtained from other jurisdictions and that it is a regulated person’s responsibility to ensure that any erroneous information is corrected by the entity with jurisdiction. With regard to the comment stating that the regulated community should be allowed constant access to the system for review of all aspects of compliance history, the commission responds that above and beyond the fact that it must adhere to the requirements of the Public Information Act, TWC, §5.1733, requires electronic posting of information. Specifically, it states, "The commission shall post public information on its website. Such information shall include but is not limited to the minutes of

advisory committee meetings, pending permit and enforcement actions, compliance histories, and emissions inventories by county and facility name." The agency is working towards this goal as it develops, proposes, and adopts rules pertaining to compliance histories. As soon as practicable, this information will be available via the agency's web site. No changes have been made in response to these comments.

One individual commented that he wishes the compliance history for regulated entities was accessible to the public via the web.

The commission responds that the issue of compliance histories being available to the public via the internet is outside the scope of this rulemaking. However, TWC, §5.1733, requires electronic posting of information. Specifically, it states, "The commission shall post public information on its website. Such information shall include but is not limited to the minutes of advisory committee meetings, pending permit and enforcement actions, compliance histories, and emissions inventories by county and facility name." The agency is working towards this goal as it develops, proposes, and adopts rules pertaining to compliance histories. As soon as practicable, this information will be available via the agency's web site. No change has been made in response to this comment.

TCONR commented, "The provisions of HB 2912 requiring the TNRCC to develop a uniform and effective compliance history program were key components of HB 2912. Unfortunately, some of the provisions in the proposed rules, if adopted, would undermine the legislature's intent to ensure that the

agency adopt a uniform compliance history program that will reward highly compliant regulated entities while assuring stricter oversight of chronic violators. We request that the TNRCC give serious consideration to the comments our organization has provided identifying the portions of the proposal that will act to frustrate legislative intent and allow repeat and serious violators of environmental laws to avoid any consequences."

The commission responds that certain components of the proposed rule have been modified to more effectively implement HB 2912. Further, the commission is working to effect compliance history rules that conform to the applicable requirements of HB 2912, meet legislative intent, and ensure a uniform compliance history program. However, the classification of compliance history, as reflected in the commenter's reference to "highly compliant regulated entities," "chronic violators," and "serious violators of environmental laws," and the use of compliance history, as reflected in the commenter's references to "award" as well as "avoid any consequences," are not addressed in this phase of compliance history rulemaking; rather, the classification and use of compliance history will be addressed in the second phase of compliance history rulemaking. No changes have been made in response to this comment.

GHASP and 506 individuals commented that a "comprehensive compliance history is one of the best tools for enforcing the regulations intended to protect Texas and Texans and improving the performance of industry. The Legislature decided that TNRCC should have and use that tool. Please see to it that the agency follows the law's intent and does not create rules that would result in an incomplete and ineffective compliance history." One of the individuals commented additionally that, "A

comprehensive compliance history would help you to enforce regulations. With such a tool, we can force Texas industries to operate according to twenty-first century standards, enhancing the state's wealth, health, and prospects for the future." Similarly, another individual commented, "TNRCC is so important to preserving our natural resources for all of our citizens, present and future. The Legislature gave clear directives for establishing compliance histories for polluters. As expected, industry is working to weaken that aspect. Texans are counting on you to stand up for them and require industry to follow the laws which protect our health and resources. Essential to this is the pollution compliance history. Please do your job for us." GHASP stated, "Having an effective compliance history database will allow the public and state agencies to discover patterns that could help pinpoint systematic issues within particular companies or industries. We believe that understanding our history is the key to understanding our future."

The commission responds that a comprehensive compliance history is an effective tool in enforcement of environmental regulations. The commission believes that these rules meet the intent of the legislation, and will result in complete and effective compliance histories, to the benefit of Texas and Texans. Although the compliance history rulemaking does not directly place any additional requirements upon regulated entities, the commission believes that, as intended, it will provide an impetus for regulated entities to comply with other environmental regulatory requirements. The commission further responds that it agrees regarding the benefits of an effective compliance history database, and points out that its new CCEDS is in the final stages of development. No change has been made in response to this comment.

One individual stated, "Do not accept a rule that backslides from current standards. The legislature clearly intended for TNRCC to create stronger, not weaker, compliance standards." Another individual stated that "the enforcement process has had to be used to correct problems after the fact that could have been more easily, and prophylactically, dealt with in the permit process. I understand that the Agency is proposing weakening some of the features of compliance history consideration that the Legislature envisioned. I urge you and the Agency to require complete and comprehensive review of compliance history during permitting."

The commission disagrees that the rule "backslides from current standards." The statute requires in TWC, §5.753(a), that the commission "develop a uniform standard of developing compliance history." In order to achieve this end, certain aspects of existing compliance history procedures or standards will have to change. For instance, certain current media- or program-specific requirements are not included in the adopted compliance history rule because they are not otherwise required by statute or to maintain federal program authorization, and because they are so media- or program-specific it is unreasonable to include them in a "uniform standard."

Ultimately, the uniform standard, coupled with the requirements for classification and use of compliance history which will be addressed in the second phase of rulemaking will provide for "stronger, not weaker, compliance standards." The commission also envisions that within the classification and use phase of compliance history rulemaking, the opportunity to more proactively address problems through the permit process will present itself; however, that is outside the scope of this phase of rulemaking. No change has been made in response to this comment.

TPWA stated that it “believes that the development of a uniform standard for evaluating compliance history based on specific factors is long overdue and TPWA commends both the Legislature and the TNRCC for tackling this difficult subject.” TPWA and TxSWANA both further stated that they support the TNRCC’s efforts to develop “a uniform standard for evaluating compliance history based on identified factors.” Both commenters stated that they expect the development of such a standard will help promote fairness in the consideration of compliance history in future TNRCC decision-making. Both commenters stated their appreciation of the opportunity to show support for many of the provisions the TNRCC has drafted into this phase of compliance history rulemaking, and to make suggestions for further refinement. Plano similarly commented that it appreciates the efforts of the commission to establish uniform standards for evaluating compliance histories in this phase of the compliance history rulemaking.

The commission appreciates these positive comments in response to the proposed rule.

Huntsman commented regarding a uniform standard. Specifically, Huntsman stated, "The proposed rule does not include a 'uniform standard for evaluating compliance history'" which is clearly required by the statute. Huntsman stated that "the legislation authorizing the proposed rule requires that certain elements be made a part of any compliance history." Huntsman further commented that the proposed rule lacks a "uniform standard" for evaluating the mandatory requirement as well as the other components proposed by the agency, citing as examples the failure to effectively distinguish between highly regulated and complex facilities and less regulated and more simple facilities.

The commission disagrees with the comment, although it acknowledges that TWC, §5.753(a) requires the development of a uniform standard of evaluating compliance history. The proposed rule is, however, only the first phase in developing this standard. House Bill 2912, §18.05(a) requires the commission to establish the components of compliance history, by rule, no later than February 1, 2002. This proposed rule establishes the components. This is the first step towards developing the uniform standard, as it provides for the same components across the board. House Bill 2912, §18.05(b) requires that the commission, by rule, shall establish the standards for classification and use of compliance history not later than September 1, 2002. This will be accomplished through the second phase of rulemaking. Although TWC, §5.754(c)(2) requires the commission to give "consideration to the number and complexity of facilities owned or operated by the person," this is outside the scope of the current rulemaking. It will be addressed in the second phase. No change has been made in response to this comment.

Additionally, Huntsman stated that "the requirement of a uniform standard is not a technicality. The regulated community is entitled to notice of the standard by which their compliance history will be evaluated, and the standard must be adequate to assure that the elements of a facility's compliance history are placed into a context that is both fair and useful. At a minimum, the standard should identify information that is relevant and meaningful to the question of whether a facility is making a good faith effort to maintain and upgrade its level of environmental compliance."

The commission agrees with this comment; however, what the commenter is addressing is at least partially outside the scope of this rulemaking. This is due to the fact that HB 2912 breaks the

development of the compliance history rule into two phases, and the current rulemaking is only the first phase, dealing with components. The classification and use of compliance history will be addressed through the next phase of rulemaking. The commission adds that through both phases of the rulemaking, "notice" of the standard by which compliance history will be evaluated will be provided. No change has been made in response to this comment.

Huntsman stated, "Section 5.753 cannot be read in isolation. The agency is developing a compliance history so that it can use it to rate members of the regulated community... It is clear that any set of rules that purport to rate a company's compliance history will publicly stigmatize the 'poor' performers. Facilities should not suffer the regulatory and competitive disadvantage that inevitably flows from a 'poor' rating unless that rating is based on objective and fair criteria that were in place before the history was compiled. Use of such a standard will insure that the ranks of 'good' and 'poor' companies include both small and large sources and that the process of evaluation is guided by standards that include both positive and negative information."

The commission responds that it is making every attempt to ensure that the criteria is "objective and fair" by soliciting comments and suggestions from the regulated community (industry, small businesses, environmental groups, and the public) through stakeholder meetings, public outreach, and publication of the proposed rule, while maintaining compliance with the enabling statutes. To that end, HB 2912 requires the commission to look at historical enforcement orders, consent decrees, court judgments, criminal convictions, and NOV's. These components are already utilized by the commission in its permitting and enforcement decisions. While rating a person's

compliance history, which is outside the scope of this rulemaking, new enforcement orders, consent decrees, court judgments, criminal convictions, and NOV's remain an effective component of commission decisions. No change has been made in response to this comment.

Huntsman commented that, "The absence of a uniform standard has a disproportionate impact on major sources. Everyone has a stake in achieving and maintaining attainment with federal air quality standards. However, it is beyond debate major sources will have a documented compliance history that includes both violations and enforcement actions because they get more regulatory and enforcement attention as a matter of law and policy." Huntsman listed the following items in support of its position. First, because major sources typically have environmental departments and have made compliance reporting requirements a formal part of their business operation, it can be expected that they will report planned and unplanned releases of regulated air pollutants more frequently than other regulated entities. Second, requirements in the wide variety of permits held by major sources increase the frequency of mandatory reporting and inspection. Third, regardless of whether a major source has had violations in the preceding year, the air inspection protocol in the state of Texas is such that they are subject to mandatory inspections. Fourth, the participation of major sources in voluntary sampling and monitoring programs will increase the frequency of inspections and improve the opportunity to detect and correct violations. Fifth, inspections at major sources, because of their size and complexity, can be expected to last longer than inspections of smaller and less complex operations. Huntsman stated that it believes that "any uniform standard must reflect the scrutiny given to major sources so that a company's final rating will represent a genuine comparison with other, less intensely regulated, sources."

Huntsman stated that, "The uniform standard should weigh violations and enforcement actions against the number of emission points and other regulated sources at the facility." Huntsman stated that chemical plants are complex, integrated operations that continually process a high volume of potentially hazardous material, and a goal of no violations presents many challenges. Huntsman stated that with regard to diligence and commitment to compliance, a small number of violations at a major source could be "less blameworthy" than a similar number of violations at a facility manifesting and shipping small quantities of hazardous waste. Huntsman stated that violations at a major source are more likely to lead to an NOV or enforcement action because, for one thing, "the margin for error has to be smaller at large operations." The agency, in setting priorities, has already placed major sources at a higher level of scrutiny and enforcement than smaller, more diffuse sources. The second reason, according to Huntsman, why violations at major sources are more likely to lead to NOV's or enforcement action is because "major sources have more emission points and regulated facilities to be inspected." Huntsman continued by stating that even so, if mandatory inspections were shifted away from major sources, this does not mean that fewer violations would be found.

Huntsman went on to say that "major sources should not be punished twice," and that "any uniform standard must make a comparison between the wide variety of regulated sources more meaningful." Huntsman suggested that the agency consider weighing the number of violations and enforcement actions at a facility against the number of regulated emission points and sources at the facility; the number of points inspected during a mandatory inspection; the duration of the mandatory inspection; and the frequency of mandatory inspections at the facility.

What the commenter is addressing is outside the scope of this current rulemaking. This is due to the fact that HB 2912 breaks the development of the compliance history rule into two phases, and the current rulemaking is only the first phase, dealing with components. The commenter raises several issues, including major sources, complexity of a facility, number of emission points at a facility, and the weight attributed to violations. These are all issues that will be addressed in the second phase of compliance history rulemaking dealing with the classification and use of compliance history. Although TWC, §5.754(c)(2) requires the commission to give "consideration to the number and complexity of facilities owned or operated by the person," and TWC, §5.754(c)(1) requires the commission to determine whether a violation "is of major, moderate, of minor significance," these things are outside the scope of the current rulemaking. No change has been made in response to these comments.

Huntsman commented that, "The uniform standard should reflect agency discretion in conducting inspections and bringing enforcement actions." Huntsman stated that the agency allocates its enforcement resources among a wide spectrum of regulated entities, and further, that even among the same class of regulated entity, the "frequency and intensity of investigations will be influenced by the availability of resources, agency priorities in different regions, the skill and motivation of particular agency employees and other similar factors." Huntsman stated that, "Any variation among the nonattainment regions where major sources are located in either the number of violations found or enforcement actions initiated is significant because the goal of attainment is uniform and the proposed rule weights all violations and enforcement actions equally." Huntsman, through quoting figures from the TNRCC Annual Enforcement Report for FY 2000, stated that the ratio of NOV's to investigations in

three of the TNRCC regions where it states most of the major sources in nonattainment areas are located are disproportionate. Specifically, Huntsman provided figures stating that the ratio of NOV's to investigations is 4% for the Houston regional office, 10% for the Beaumont regional office, and 21% for the Corpus Christi regional office. Huntsman stated that, "Any evaluation of a major source's compliance history should reflect the fact that some nonattainment regions issue more NOV's per inspection/investigations than others to industries that are similarly situated."

The commission responds by stating that the issues raised in this comment are beyond the scope of this rulemaking. This is due to the fact that HB 2912 breaks the development of the compliance history rule into two phases, and the current rulemaking is only the first phase, dealing with components. The commission acknowledges that TWC, §5.754(c)(2) requires the commission to give "consideration to the number and complexity of facilities owned or operated by the person," and TWC, §5.754(c)(1) requires the commission to determine whether a violation "is of major, moderate, of minor significance," but these will be addressed in the next phase of rulemaking. However, the commission would point out several things with regard to the figures provided by the commenter: 1) the commenter does not reflect that the Dallas/Fort Worth (DFW) region and the El Paso region are also nonattainment areas within the state, while in fact, although it may encompass many "major" air sources, the Corpus Christi region does not encompass a nonattainment area; 2) only certain counties within each of the four "nonattainment" TNRCC regions within the state are "nonattainment areas," while the figures from the TNRCC Annual Enforcement Report are for the entire region (not just those counties which are "nonattainment") and therefore include information regarding all air-related investigations performed and NOV's

issued in those regions; 3) the ratio of NOV's to investigations for the DFW and El Paso regions, using the same methodology as the commenter, are 20% and 21%, respectively; and 4) the "variation" between the ratios of NOV's to investigations in TNRCC regions cannot be attributed solely to the "frequency and intensity of investigations" as "influenced by the availability of resources, agency priorities in different regions, the skill and motivation of particular agency employees and other similar factors." In fact, it is certainly within the realm of possibility that the difference between any meaningful ratios is due, at least in part, to both the number of compliant entities within those regions as well as the level of compliance with applicable regulations by the majority of regulated entities within those regions. No changes have been made in response to this comment.

ICE stated, "Sixteen regions put TNRCC policy into practice, related to inspections, investigations, NOV resolution at the regional level, etc. These practices are not perfectly uniform region to region, and indeed may not be uniform from inspector to inspector. To ensure fairness in the evaluation of compliance histories, TNRCC should take measures to ensure that these practices are as uniform as possible throughout the agency. Additionally, in dealing with NOV's under Chapter 60, TNRCC should continue to allow 'informal resolution' to alleged NOV's. As an example, a PST site may be given 14 days to correct a deficiency and be re-inspected. This results in an alleged NOV 'going away.' Such a circumstance should not result in a file entry to the site's compliance history. Note that the 'alleged NOV' was not found to be without merit. Instead, it was successfully rectified informally, at great cost and time savings to the agency." ICE further stated that there "must be a 'due process' clause developed in the Chapter 60 language, which allows a responsible person to question, refute, and

correct inaccurate data that TNRCC generates as part of a compliance history. The person must be presented with the compliance history and have the opportunity to review it.”

The commission appreciates the commenter’s concerns regarding the uniformity of the regional offices putting TNRCC policy into practice. In order to address such concerns, the Field Operations Division began putting a Standard Operating Procedure in place in 1999. With regard to the comment concerning “informal resolution” of NOVs, and based on the example provided by the commenter, the commission interprets this to be a reference to verbal NOVs. Nothing about the compliance history rule has any effect on the ability of investigators to issue verbal NOVs, nor does the rule include verbal NOVs as a component of compliance history; rather, the rule specifically makes reference only to “written” NOVs. The commission would point out, however, that although it appreciates the distinction made by the commenter that in its example, the NOV was not found to be without merit, but rather was successfully rectified (or resolved), this has no direct bearing on the rule. Simply put, a verbal NOV that is addressed timely and adequately does not become a component of an entity’s compliance history. The distinction regarding “merit” only applies to written NOVs, and the distinction will be made regarding those violations found to be “without merit” (i.e., were cited in error by the TNRCC) versus those rectified or resolved (i.e., actions were taken to correct the violation). Resolved violations contained in a written NOV will be included in an entity’s compliance history.

The commission further responds that the process for securing an administrative determination that an NOV is without merit does not require rulemaking, as it is appropriately developed as a

protocol or process. As such, the Field Operations Division is providing a process for a person to contest the merit of an NOV. First, additional language will be added to the regional NOV so the recipient is aware of the first level of contact to contest a violation(s) in an NOV. It will state, "If you have additional information that we are unaware of, you have the opportunity to contest the violation(s) documented in this notice. Should you choose to do so, you must notify the appropriate Region Office within 10 days from the date of this letter. At that time, the regional section manager will schedule a violation review meeting to be conducted (within 21 days from the date of this letter OR specified date at specific time). However, please be advised that if you decide to participate in the violation review process, the TNRCC may still require you to adhere to the compliance schedule included in the attached Summary of Investigation Findings until an official decision is made regarding the status of any or all of the contested violations." A summary of the process in its entirety follows. Initially, if and when a person contacts the appropriate regional section manager (RSM) to contest a violation (via facsimile, e-mail, hand-delivery or mail), it should be done within ten days from the date of the NOV letter. At that time, a violation review meeting (VRM) will be scheduled. However, in order to qualify for a VRM, the person must have new information or documentation to support a basis to contest the violation(s). If this is the case, then the VRM will be conducted within 21 days or less from the date of the NOV letter. Meanwhile, the status of the compliance schedule in the Summary of Investigation Findings will be determined by the regional director (RD) on a case-by-case basis. Next, after a VRM is conducted, the person will be notified, in writing, within ten days after the meeting date if *any, none, or all* of the violations are being rescinded and, if necessary, a revised NOV will be issued under the section manager's signature. Next, the assigned investigator will draft the

VRM's minutes, so that each potential level of review will know what was discussed. Also, copies of all relevant correspondence will also be included along with the minutes and a checklist will be maintained by the appropriate level of management through out the appeal process. Then, the person has the option to pursue a contested NOV past the RSM by contacting the regional director within seven days from the date of the RSM's notification letter. At that time, the RD will review the RSM's decision for concurrence or disagreement. If the RD disagrees with the RSM's decision, the RD will coordinate a revised NOV to the regulated entity within ten days of the date the person contacted the RD; if the RD agrees with the RSM's decision, then the RD will communicate this to the person in writing within ten days of the date the person contacted the RD. Upon receipt of a notification letter that the RD concurs with the RSM's decision, the person has seven days from the date of that letter to contact the field operations director (FOD) to contest the violation(s) further. Then, the FOD will notify the regulated entity within ten days from the date the person contacted the FOD, that final concurrence with the RD and RSM has been determined or that the violation(s) will be rescinded in the form of a revised NOV. The FOD may choose to conduct an additional VRM. If the FOD elects an additional VRM, then, it will be scheduled within 21 from the date of the RD's letter. Within ten days after the VRM, the FOD will notify the person that final concurrence with the RD and RSM has been determined or that the violation(s) will be rescinded in the form of a revised NOV. This is the final level of the Regional NOV Appeal Process. At this point, if the regulated entity still contests some or all of the violations, it can be taken up through the enforcement process. 30 TAC Chapter 80 already addresses due process issues for enforcement actions. Additionally, as noted in the rule, any NOV determined to be without merit will be removed from consideration in compliance histories. The

commission further responds that a person currently has, and will continue to have, the ability to submit (additional) information for consideration on behalf of a claim that information included in its compliance history is inaccurate and/or erroneous. A regulated entity is free, and in fact encouraged, to provide information for consideration to correct inaccuracies at any time. However, due to the number of compliance histories that the agency will be preparing, it is not feasible to send drafts of compliance histories to regulated entities prior to their use by the agency. No changes have been made in response to these comments.

One individual suggested that if the TNRCC is lacking the resources to provide this kind of mandated service (compliance history) to the community, it should "speak up." The commenter stated, "I (am) sure you will find the support you need."

The commission appreciates the comment. However, the comment is outside the scope of this rulemaking.

One individual commented, "If Texas were a nation, we would be the 7th largest pollution producing nation in the world. What we do makes a tremendous difference, not just for this state, but for the world."

The commission agrees that actions taken by the state of Texas have a large impact, and responds that this is why these rules are being implemented. No change has been made in response to this comment.

One individual commented, "The citizens of Texas want and deserve no less than your dedication to ensuring that industry creates a compliance history at each and every industrial/commercial site. Anything less is negligence."

The commission agrees with this comment in part. Specifically, the intent of the proposed rule, as well as the next phase of rulemaking pertaining to compliance history, is to provide for a compliance history specific to each applicable regulated site in Texas. However, the commission has not proposed that industry create compliance history reports for each site; rather, the commission proposes that the agency shall prepare such reports. No change has been made in response to this comment.

Four individuals commented regarding their concerns with air quality in the state of Texas. Two specifically referenced concern with the quality of air in the Houston area. One specifically referenced concern with the quality of air in the Tyler area.

The commission responds that, while it appreciates the concerns raised by the commenters, the comments are outside the scope of this rulemaking. No change has been made in response to these comments.

ExxonMobil Refining commented, "It is important to note that the State of Texas is embarking upon a new type of rulemaking that may have a significant impact upon industry in this state. Of particular concern to companies with more than one facility location, especially those with significant numbers of

facilities outside of the state, is the potential for negative impacts on Texas facilities by historical events over which they had/have little participation or control.”

The commission agrees that this rulemaking may have a significant impact upon industry in this state. Additionally, the commission acknowledges that TWC, §5.574(c)(2) requires that the number and complexity of facilities owned or operated be taken into account. However, the commission does not agree that a person would not have participation or control of out-of-state facilities. The commission proposes to develop compliance history based upon the legal entity, not parent, daughter, sister corporations. That legal entity does have control and influence over all its facilities. Additionally, this issue will be addressed in more detail in the next phase of compliance history rulemaking. No changes have been made in response to this comment.

TIP noted that TWC, §5.754 requires the consideration of the “number and complexity of facilities owned or operated by the persons....” TIP stated, “It is paramount to the success of the entire compliance history program that the agency makes size and complexity a central consideration in all aspects of both the definition and use rulemaking. Small facilities with few emission or discharge points must be fairly compared to large facilities with numerous emission or discharge points. More importantly, if size and complexity do not play a central role in compliance history, large companies with multiple facilities will be treated unfairly when compared to small companies with one or only a few facilities. Simply put, compliance history must be compared to entity size and complexity, especially when out-of-state violations are considered a component. Size and complexity should be used to ‘normalize’ all compliance history components for all entities. Without some way to

incorporate size and complexity into each component of an entity's compliance history, the relative ranking of entities becomes arbitrary. Factors that could be considered in determining size and complexity include, but are not limited to: 1) location (attainment status); 2) the number of emission points; 3) the number of waste streams; 4) the number of air permit conditions applicable to a facility; 5) the number of wastewater permit parameters; 6) the degree of required and voluntary emissions controls that are in place at a facility; and 7) the number of environmental and health permits held by a facility. Utilizing such factors will enable the TNRCC to fairly consider the compliance history of one entity, relative to another. Size and complexity should be addressed in this rulemaking and not deferred to the use rulemaking. Otherwise, the definition of compliance history will not contain the components necessary to effectively address size and complexity in the use phase." Additionally, in general, BP endorsed the comments submitted by TIP.

What the commenter is addressing is outside the scope of this current rulemaking. Although TWC, §5.754(c)(2) requires the commission to give "consideration to the number and complexity of facilities owned or operated by the person," this is outside the scope of the current rulemaking. This is due to the fact that HB 2912 breaks the development of the compliance history rule into two phases, and the current rulemaking is only the first phase, dealing with components. The second phase of compliance history rulemaking will deal with the classification and use of compliance history, and this is where the size and complexity of facilities will be addressed. The commission does not agree that failure to address size and complexity in this current phase will result in an inability to effectively address these issues in the next phase. No change has been made in response to these comments.

ExxonMobil Refining stated, “In discussions with Commission officials, ExxonMobil’s representatives have consistently expressed their concern that the compliance history program must incorporate data regarding the size and complexity of a facility and related company facilities. For example, a small single facility company with only 1000 possible emission points can not be equally ranked against a company with many large in-state facilities each containing tens of thousands of possible emission points. Add into this equation large and numerous facilities in other jurisdictions across the country and the justification of a system where the compliance history of the individual facility carries much greater weight and which is balanced against the size and complexity of the facility becomes imperative.”

What the commenter is addressing is outside the scope of this current rulemaking. Although TWC, §5.754(c)(2) requires the commission to give "consideration to the number and complexity of facilities owned or operated by the person," this is outside the scope of the current rulemaking. House Bill 2912 breaks the development of the compliance history rule into two phases, and the current rulemaking is only the first phase, dealing with components. The second phase of compliance history rulemaking will deal with the classification and use of compliance history, and this is where the size and complexity of facilities will be addressed. No change has been made in response to these comments.

TIP commented that “{c}onsistent with the underlying legislation, the TNRCC has approached the implementation of HB 2912’s compliance history requirements in two phases... However, TIP would like to stress that the line dividing the two phases of the TNRCC’s compliance history initiative is not always clear. As a result, to the extent possible, the agency should refrain from deferring decisions on

certain issues until the compliance history use rulemaking. For example, although agency staff have stressed that size and complexity... are issues to be addressed in the use rulemaking, decisions made during the first phase will undoubtedly affect how those issues are approached in the second phase.”

Additionally, in general, BP endorsed the comments submitted by TIP.

The commission responds that, although it appreciates the commenter’s concern regarding deferring decisions on certain issues to the next phase of compliance history rulemaking, what the commenter is addressing is outside the scope of this current rulemaking. Although TWC, §5.754(c)(2) requires the commission to give "consideration to the number and complexity of facilities owned or operated by the person," this is outside the scope of the current rulemaking. This is due to the fact that HB 2912 breaks the development of the compliance history rule into two phases, and the current rulemaking is only the first phase, dealing with components. The second phase of compliance history rulemaking will deal with the classification and use of compliance history, and this is where the size and complexity of facilities will be addressed. No change has been made in response to these comments.

Vinson & Elkins stated, “The task of developing a uniform standard for evaluating compliance history is complex. As a preliminary matter, the phased approach to the compliance history rules does not provide an adequate opportunity to comment on the Phase I rulemaking, Definitions and the Components of Compliance History. It is extremely difficult to assess the definitions without knowing how these definitions will be implemented. The preamble language does not adequately address the variety of circumstances under which these proposed definitions could be applied. The TNRCC should

consider in the Phase II rulemaking additional comments addressing the definitions proposed in the Phase I rulemaking.”

The commission responds that the statute breaks this rulemaking up into two phases, requiring the definition or component phase to be in place by February 1, 2002. The preamble language does not address the circumstances under which the definitions could be applied because those issues will be addressed in the second phase of rulemaking concerning the classification and use of compliance history. The commission does not agree that it should consider additional comments regarding components in the phase II rulemaking. The section will not be reopened unless changes are proposed to that section. However, the commission asserts that it is impossible to go forward with the next phase of rulemaking without first establishing the components to work from. No changes have been made in response to this comment.

TMRA commented that it “maintains that the best course of action to take would be to combine the two phases of the rule. TMRA recognizes that the size of this endeavor and the deadlines in the Sunset Bill make it difficult for TNRCC to implement the compliance history portions of that Bill in a single phase. Still, TMRA believes that the impact of the phase 1 rules will not be known until the phase 2 rules are proposed. For example, phase 2 must include detailed provisions governing (1) the process for securing an administrative determination that an NOV is without merit, (2) the process for ranking an entity as a poor, average, or high performer, and (3) the weight to be given to the various identified components of compliance history in permit and enforcement proceedings. TMRA firmly believes that these important processes are inextricably intertwined with defining the components of compliance

history and categories of violations and, thus, could warrant amendments to provisions adopted in phase 1 before all is said and done. Thus, TMRA requests a commitment by TNRCC in the preamble to the final phase 1 rule that the phase 1 rule provisions will be re-opened, if necessary as part of phase 2.”

The commission responds that it appreciates the recognition of the difficulty of implementing the compliance history rulemaking in a single phase, and further appreciates the concern that it is difficult to assess the impact of the phase I rules prior to the proposal of the phase II rules.

Further, the commission agrees that the phase II rulemaking will address the process for ranking performers, and for weighting the components of compliance history. However, the commission does not agree that phase II must include in rule the “process for securing an administrative determination that an NOV is without merit.” Rather, the development and implementation of this process is outside the scope of this rulemaking, as it is appropriately developed as a protocol or process. As such, the Field Operations Division developed a process as previously discussed in this preamble. Additionally, the commission does not agree that it should consider additional comments to this phase of rulemaking in the phase II rulemaking. The section will not be reopened unless changes are proposed to that section. However, the commission asserts that it is impossible to go forward with the next phase of rulemaking without having a set list of components to work from. No changes have been made in response to these comments.

TMRA commented, “While it is too complex to resolve as part of this phase 1 rulemaking, TMRA believes TNRCC should confirm in the preamble to the final phase 1 rule that the phase 2 evaluation criteria will take into account the additional compliance burden that some highly regulated entities

carry. Many entities have to dedicate significantly more resources to environmental compliance than others of different size or industrial sector. For example, if a large and heavily regulated entity has a hundred thousand points of compliance across the State, having five NOV's in a single year is much less significant than if a small, relatively unregulated entity with only eight point of compliance has five NOV's in a single year. TMRA trusts that this issue will be recognized by TNRCC in the preamble to the phase 1 rule and addressed in the phase 2 rule. Toward that end, TMRA encourages TNRCC to begin developing a system which is based on the number of work hours/days/years per compliance requirement without incident. This could be one way to reward heavily regulated industries that are committed to environmental excellence and not punish them disproportionately for relatively infrequent compliance problems. If the TNRCC intends to rely upon SIC codes to determine the complexity of an entity's environmental compliance, TMRA trusts that the size and complexity of aggregate, clay, and coal/lignite mining activities will lead TNRCC to rank those industries' SIC codes in the highest tier of complexity."

The commission agrees with this comment in part, but responds that it is outside the scope of this phase of compliance history rulemaking. However, the commission confirms that the phase II compliance history rulemaking will give "consideration to the number and complexity of facilities owned or operated by the person," as required by TWC, §5.754(c)(2). No change has been made in response to this comment.

TIP stated that "it is important for the TNRCC to consider issues related to performance classifications in the current rulemaking and not defer all discussion on these critical issues until a final compliance

history definition rule has already been promulgated. The compliance history component process is related to performance classification. New TWC § 5.754(b) requires the agency to distinguish among poor, average, and high performers. However, a procedure for the ‘rehabilitation’ of poor performers is not addressed in the proposed rules. ‘Poor’ performers will be actively engaged in projects to improve their performance and the lack of a defined rehabilitation process will hinder such improvement efforts. At a minimum, the definition rule should provide a mechanism to track an improving trend in compliance components within a given five (5) year period.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with the comment. The commission recognizes that the compliance history components are related to performance classification, and responds that it is very specifically implementing this rulemaking in accordance with the schedule and separation of phases presented in applicable statutory language. The performance classification is clearly a part of the phase of compliance history rulemaking dealing with the classification and use of compliance history, which is the next phase. The commission contends that the written compliance history is the mechanism to track or detect trends over the five-year period. All the components that exist regarding a site will be captured in a document that the commission will review prior to specific decisions covered under HB 2912. No changes have been made in response to these comments.

BP stated, "The TNRCC's proposed compliance history rulemaking will be used as a tool to measure environmental performance. Such a tool should be balanced to include positive attributes and consideration for facility complexity."

The commission agrees with this comment. The commission has proposed "positive attributes" through this proposal, specifically in the proposed components of compliance history in §60.1(b)(8) - (12). Additionally, the commission acknowledges that TWC, §5.574(c)(2) requires that the complexity of a facility be taken into account. However, that issue will be addressed in the next phase of compliance history rulemaking. No changes have been made in response to this comment.

Jones Day suggested "including in the definition and/or use sections of the rule language regarding the record that must be created by the agency while building a compliance history. The compliance history will be used to classify companies and facilities; therefore, building a framework for 'final' agency decisions is important."

The commission interprets this comment to suggest that the actual report or summary which will be prepared for a person's compliance history should be described in rule, either in this phase of rulemaking, or in phase II. The commission responds that this is outside the scope of this rulemaking, because it would be impossible to describe such a document without having the classification and use rules in place. No change has been made in response to this comment.

TMRA stated, “The concept sheet handed out at the October 30, 2001 stakeholders’ meeting regarding phase 2 of the compliance history rules states that TNRCC ‘is considering the utilization of its Enforcement Initiation Criteria guidance as the basis for determining whether a violation falls into a major, moderate, or minor designation....’ TMRA believes this is appropriate and encourages TNRCC to also harmonize the rule with the Penalty Policy to the extent possible. TMRA believes that TNRCC should strive for as much consistency across its enforcement program as possible and, toward that end, the categories used in the compliance history rules should be harmonized with the Initiation Criteria and Penalty Policy as much as possible. The initial draft proposed phase 1 rule that was filed with the Chief Clerk included definitions of ‘Major, Moderate, and Minor’ NOV’s. TMRA understands that TNRCC has since decided to hold off on defining ‘Major, Moderate, and Minor’ categories of NOV’s in the phase 1 rulemaking. Although further comments are likely to be submitted in the phase 2 rulemaking (once the classifications are formally proposed and the significance of the classifications is clear),” TMRA made several “initial suggestions for TNRCC to consider as they draft the proposed phase 2 rules.”

The commission responds that these comments are outside the scope of this phase of compliance history rulemaking. The commission further states that the issues raised, to the extent applicable, will be dealt within the second phase of compliance history rulemaking. Specifically, TWC, §5.754(c)(1) requires the determination of whether a violation is of major, moderate, or minor significance, and as noted by the commenter, this will be addressed in phase II.

§60.1(a), Applicability

Jones Day and TIP commented regarding proposed §60.1(a). Jones Day stated that the commission should provide a definition of "person" for the proposed rule. Specifically, Jones Day stated, "The agency did not propose a definition of 'person' for purposes of this rule, noting in the preamble that TNRCC would use the generic definition found in 30 TAC Chapter 3. Just as TNRCC found cause to create a specific definition of 'permit' for this chapter, we believe that a specific definition of 'person' should also be established. The generally applicable definition of person is: An individual, corporation, organization, government or governmental subdivision or agency, business, trust, partnership, association, or any other legal entity. 30 TAC § 3.2(25). This broad definition could mean that the compliance history of a current owner/operator of a facility might include the compliance history of other 'persons' arguably related to the facility, such as subsidiaries, joint venture partners associated with other operations, parent corporations or holding companies. TNRCC recognizes this concern and apparently agrees that the compliance history should be that of the current owner/operator, when it wrote: The commission has determined that for purposes of developing compliance histories, 'ownership' would *only include the entity filing the permit application*, under enforcement, being inspected, or applying for participation in an innovative program, as defined by its legal name. For example, a parent, sister, or daughter corporation related to the legal entity would *not* be included. This would change current agency practice." (emphasis added) Jones Day stated, "We agree with TNRCC's conclusion. However, we do not believe that the issue is properly or adequately resolved through preamble language, particularly where the Agency itself recognizes that this changes current Agency practice. A definition, along with additional preamble language could clarify that, for purposes of this rule, only the compliance history of the current owner/operator would be relevant, not that of entities

that might have a relationship with the current owner/operator (e.g., parents, subsidiaries, joint venture partners)." Similarly, TIP commented that the term "person" should be defined similarly to the discussion of "ownership" in the proposal preamble, and that if the commission intends to defer consideration of the definition of "person" to the upcoming compliance history use rulemaking, it should state this in the preamble to the final rule. Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees that it should provide a definition of "person" for this rule. The commission has determined that the definition of "person" as provided for in existing 30 TAC §3.2(25) is both adequate and appropriate in relation to the compliance history rules. If the definition was intended to include parent, sister, or daughter corporation, or any other related entities, it would expressly state this. The fact that it does not include such language, coupled with the reinforcement of this concept in this adoption preamble, is sufficient. The commission further adds that it's basis for creating a specific definition of "permit" for this chapter is based on the fact that the enabling statute, in TWC, §5.752(3), defines "permit" as specified in this rule. No changes have been made in response to these comments.

Regarding proposed §60.1(a), ExxonMobil Refining recommended that, "in considering the applicability of a facility's compliance history, that facility history should be tied to a single air account number, Texas Water discharge number, or hazardous waste generator number. This will allow the

commission to place proper weight to violations attributable to the facility/applicant while placing violations attributable to other facilities in other jurisdictions in a lower weighted classification.”

The commission disagrees with this comment. The commission has determined that it is appropriate to perform a multimedia compliance history review based on the fact that the applicable statutory language repeatedly refers to the compliance history of a “person.” It does not say “for a person, by media or by permit.” This implies an “encompassing” compliance history. Further, the statute requires that components of compliance history include enforcement orders, court judgments, and criminal convictions for environmental violations within the state of Texas, as well as enforcement orders, court judgments, and criminal convictions for environmental violations in other states. Again, it does not say “orders, etc. concerning the permit which is the subject of the permit application, enforcement action, investigation, etc.” What the commenter suggests would limit the compliance history determination to the instant site, permit, and program area, while the statute references “person” (as opposed to site), and states that all regulated sites, inside and outside the state of Texas, must be taken into account. No changes have been made in response to this comment.

ICE, 7-Eleven, and TCPA commented with regard to proposed §60.1(a), (adopted as §60.1(a)(2)), that the term “permit” is intended to include only those agency actions which require a “decision” by the commission, or “final agency actions,” meaning that “an agency decision is made based on factual information and findings in an administrative record that may be appealed, and is ultimately subject to judicial review.” The commenters concluded that agency “authorizations” should be limited to those

that will result in final agency action, and ICE recommended that proposed §60.1(a) should be revised in part to read: “For the purposes of this chapter, the term ‘permit’ means licenses....or other forms of authorization which constitute final agency action.” 7-Eleven and TCPA recommended that the language should read, “... or other forms of authorization which, upon issuance, constitute final agency action.”

The commission responds that the definition of permit as provided for in adopted §60.1(a)(2) is taken directly from TWC, §5.752(3). The language in the statute does not provide any limitations as suggested by the commenters. Further, the language at TWC, §5.754(e) and (e)(1), which will be implemented by rule in phase II of the compliance history rulemaking, states, “The commission by rule shall provide for the use of compliance history classifications in commission decisions regarding: (1) the issuance, renewal, amendment, modification, denial, suspension, or revocations of a permit.” It provides no limiting language that this only applies to “final” agency action. Rather, the commission has determined that it is appropriate to distinguish between what it describes in the proposal preamble as “decision” versus “no decision” processes in order to clarify that there are in fact many types of submittals required which bear the names of the types of authorization specified in the definition of permit provided by the statute which do not constitute any decision-making on the part of the agency upon receipt. However, some of the authorizations that fall under the “decision” process as described for purposes of this rulemaking may not constitute decisions on “final agency action.” No change has been made in response to this comment.

ICE, 7-Eleven, and TPCA commented regarding proposed §60.1(a), stating that the definition of the term “permit” in the proposed rule (adopted §60.1(a)(2)) is overly broad in that it covers practically all official actions by the TNRCC. “The key/operative rule language which limits the forms of agency ‘permitting’ actions that require use of compliance history is the” sentence which states that: “This rule only applies to forms of authorizations... that require some level of notification to the agency; review; and approval or response.” (This language is found in adopted §60.1(a)(3)). ICE stated that it believes that agency review should be specifically termed either “technical review” or “substantive review,” as these terms imply some further study and evaluation of the submittal beyond date-stamping and generating a form letter in response. 7-Eleven and TPCA strongly recommended that, at a minimum, the commission should “delete or modify the language ‘or response’ as used in Section 60.1(a). This sentence offers three qualifiers to narrow the scope of ‘authorizations’ which will be made after review of compliance history: those which involve (i) some level of notification to that agency; (ii) review; and (iii) approval or response. However, the language ‘or response’ is so broad and ambiguous that the category of covered authorizations is limited only by clause (i) and (ii), i.e., authorizations for which ‘notification’ is given to the agency and for which ‘review’ is made. If, as stated in the draft preamble, the goal of the rule is to limit the applicability of the rule to those authorizations involving a ‘decision’ by the agency, then it seems clear that further definition is needed to narrow the universe of decisions beyond those which involve a ‘notification’ and ‘review.’ We would recommend that the following language be inserted after ‘notification to the agency...’:

notification to the Commission, and which, after receipt by the Commission, requires the Commission or Executive Director 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 Commission or the Executive Director 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.

ICE commented that it generally agrees with the discussion of "no decision" authorizations in the proposal preamble. However, ICE continued by saying that there are “a number of other ‘no decision’ examples or occurrences which TNRCC may not be inclined to drop out of compliance history consideration, if the proposed language stands.” ICE and AECT proposed the following revisions to proposed §60.1(a), (adopted as §60.1(a)(3)). First, ICE proposed that the underlined verbiage be added to the sentence, “...this rule only applies to forms of authorization, including temporary authorizations, that require some level of notification to the agency; *technical review by the agency*; and approval or response.” Subsequent to this sentence, ICE and AECT both recommended that the following language be added.

This rule does not apply to situations in which a person informs the commission, as required by a rule, that it is engaging in a certain regulated activity for which there is no specific authorization required, such as changes to qualified facilities under 30 TAC §§116.117 and 116.118. This rule also does not apply to activities that are authorized by rule for which notification may or may not be required, but no commission response is required for the site to be authorized. Examples of such activities include, but are not limited to, the management of waste for which a notification is required by 30 TAC § 335.6;

underground or aboveground storage tanks registered under 30 TAC § 334.7 or 334.127; emissions authorized by Chapter 116, Subchapter F of this title (relating to Standard Permit), where no written site approval is required; and wastewater or stormwater discharge notices of intent, where no written approval is required.....” AECT further proposed that “emissions authorized by 30 TAC Chapter 106, where no written site approval is required” be included prior to the recommended language regarding “emissions authorized by Chapter 116...

The commission responds that the definition of permit as provided for in adopted §60.1(a)(2) is taken directly from TWC, §5.752(3). It provides no limiting language that this only applies to “final” agency action or to “technical reviews.” Rather, the commission has determined that it is appropriate to distinguish between what it describes in the proposal preamble as “decision” versus “no decision” processes in order to clarify that there are in fact many types of submittals required which bear the names of the types of authorization specified in the definition of permit provided by the statute which do not constitute any decision-making on the part of the agency upon receipt. However, some of the authorizations that fall under the “decision” process as described for purposes of this rulemaking may not constitute decisions on “final agency action.” With regard to the suggestion to add the “technical review by the agency,” the commission responds that the use of the word “technical” is not appropriate, since there are different levels of “technicality” of the review of different authorization requests, and to include the word invites confusion and disputes. Further, some of the reviews conducted on requests for authorization, and which the commission has determined the authorizations fall into the “decision” process, do not actually require a “technical” review in truest sense. The commission also had determined that it is not necessary to include “by the agency” as this is implicit in the language already provided. Additionally, the

discussions regarding what authorizations do apply, versus those that do not, is spelled out, in fairly generic terms, in adopted §60.1(a)(3) and (4). The specific examples suggested by the commenters are more appropriately addressed in the preamble, and were, in fact, included in the proposal preamble, as well as in the adopted preamble. To present a partial list within the rule invites confusion and possible misinterpretation. To attempt to provide an all-encompassing list of agency authorizations which fall into either the “decision” or “no decision” categories would also create problems, with either an erroneous oversight or omission, or authorizations changing or being added or deleted. The commission agrees that the proposed language needs clarity and has modified the text at §60.1(a)(3) to read: 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.

Vinson & Elkins commented, with regard to proposed §60.1(a), (adopted as §60.1(a)(4)), that it agreed with the proposal that actions related to emissions banking and trading, executive director actions

regarding remediation of spills or other contamination, and minor amendments, should not be subject to the compliance history review requirements.

The commission appreciates this positive comment in support of the proposed rule.

Concerning proposed §60.1(a), (adopted as §60.1(a)(4)), ExxonMobil Refining recommended “that the TNRCC add to the list of permit actions to which this rule does not apply permits by rule and standard permits. Exclusion of these types of permits will allow the TNRCC to focus it’s limited resources on issues with greater potential to affect the environment while allowing industry to operate within the regulations in an efficient manner. ExxonMobil believes that this exclusion can be included in the rule and is a logical interpretation of the statutory language as these permit types are generally claimed through notification requirements and do not require up-front action by the agency. Similarly, TIP stated that the “compliance history requirements of HB 2912 should not be applicable to permits by rule or standard permits. This is consistent with the underlying legislation which requires the agency to utilize compliance history when ‘making decisions’ regarding various agency actions. Activities that are authorized by rule and standard permit are not based on any agency decisions. As a result, the compliance history requirements of HB 2912 should not be associated with permits by rule or standard permits.” Additionally, in general, BP endorsed the comments submitted by TCC.

The commission disagrees with this comment. TWC, §5.752(3), defines “permit” to include a “license, certificate, registration, approval, *permit by rule*, *standard permit*, or other form of authorization issued by the commission....” (emphasis added) However, the commission agrees

that most permits by rule and standard permits should be excluded from the compliance history review requirement because they do not require specific commission approval. However there are permits by rule and standard permits that require a written site approval before construction. Those permits by rule and standard permits will be subject to compliance history review. In fact, in the SECTION DISCUSSION of the proposal preamble, the exclusion from compliance history review for permits by rule that do not require written site approval is discussed. Therefore, the commission proposes no changes to the rule in response to these comments.

Regarding proposed §60.1(a), (adopted as §60.1(a)(4)), BP commented, "TNRCC indicates this proposal is not subject to permit actions such as 'voluntary permit revocations; minor amendments and nonsubstantive corrections to permits...' Similarly, TNRCC should consider deleting applicability for permits by rule (PBR), as well. PBRs meet certain insignificance thresholds; therefore, no decision, or little if any review, is required on the part of the TNRCC. Therefore, PBRs, like minor amendments, should not be subject to this rule. This is consistent with the underlying legislation which requires the agency to utilize compliance history when 'making decisions' regarding various agency actions."

BP further commented that "Class II modifications, like Class I solid waste modification, should not be subject to this rulemaking because these changes do not constitute substantive changes in design or management practices in the permit.... Furthermore, Title V permits, which already require independent certification of compliance, should not be subject to this rulemaking. Title V is a 'codification' of existing requirements rather than an agency approval of substantive 'new' requirements. Therefore, these federal permits should not be subject to these provisions."

The commission agrees that most permits by rule should be excluded from the compliance history review requirement because they do not require commission approval. However, there are permits by rule that require a written site approval before construction and those permits by rule will be subject to compliance history review. Additionally, in the SECTION DISCUSSION of the proposed rule preamble, the exclusion from compliance history review for permits by rule that do not require written site approval is discussed. The commission disagrees with the comment that Class 2 modifications should not be subject to this rulemaking. The commission acknowledges that Class 2 modifications apply to changes a permittee needs to make to respond to technological advancements and new regulations and do not substantially change design specifications or management practices. However, unlike minor amendments or Class 1 modifications, Class 2 modifications are not limited to changes which maintain or improve the capacity of a facility to protect human health or the environment. Class 2 modifications also require a public notice and comment prior to final action and require the notice to state that the permittee's compliance history is available from the agency. Additionally, it is the commission's current practice to require a compliance history for Class 2 modifications. For these reasons, no change has been made in response to this comment. Finally, the commission disagrees with the comment that the Title V permits should not be subject to compliance history review. The statute does not exclude federal operating permits from the requirement. The annual compliance certification requirement is not equivalent to a compliance history review. The commission proposes no changes to the rule in response to these comments.

7-Eleven, ICE, and TCPA all commented regarding the language of proposed §60.1(a), as found in adopted §60.1(a)(4). 7-Eleven and ICE stated that it should be supplemented or revised to further clarify which agency “authorizations” do not require “agency review and approval or response.” ICE stated, “TNRCC is clearly wanting to avoid taking ‘underground or aboveground storage tanks registered under 30 TAC §334.7 or §334.127’ into the compliance history ‘generation’ process, until a compliance inspection is done - and maybe then only if deficiencies are found. This is probably due to the large number of PST sites and the time commitment by TNRCC staff required for compliance history generation. Clarification should be made in the rule, so that it is clear at what point in time or under what circumstances a compliance history is needed or determined for a PST location. Regarding facilities regulated under Chapter 334, it is fairly clear that construction notifications will not be part of a compliance history, as they do not undergo significant agency review. However, the annual certification of compliance must undergo some technical review, or the agency is not assuring that those certifications are complete and accurate. The version of the rule under consideration does not indicate whether verbal notification to a responsible person that their compliance certification form is incomplete constitutes review and response by the agency.”

7-Eleven and TCPA also commented regarding “ambiguity about other types of UST-related submittals” other than underground storage tank (UST) and aboveground storage tank (AST) registrations, “which result in an agency response or approval, such as the annual certification of compliance, which results in issuance of notice by TNRCC that the annual certification has been made. Because this rule creates a mandatory duty for TNRCC to consider compliance history prior to taking certain agency actions, failure to do so could be challenged by an ‘affected party’ in an administrative

appeal or state court suit against TNRCC alleging failure to consider compliance history in an agency decision. Such a suit could be brought to challenge issuance of the TNRCC confirmation of UST operators' annual certifications. UST operators cannot receive fuel deliveries without having first received a certification from the TNRCC confirming the receipt by the TNRCC of annual compliance certifications by the UST operators. Unless the rule is further clarified, it is foreseeable that fuel deliveries for facilities which operate USTs could be interrupted during an administrative or civil judicial challenge to issuance of the TNRCC certification. Such a challenge could allege, under the current wording of the rule, that the TNRCC confirmation of certification requires consideration of compliance history because it {is} the certification that, on its fact, is an 'authorization' that 'requires some level of notification to the agency; review; and approval or response.'"

The commission appreciates the positive response to the proposal, and further responds that the examples provided in the proposal preamble were just that, examples, and were not intended to provide an all-inclusive list. Rather, the intention is not to include an exhaustive list in the rule, for many reasons. First, the commission has jurisdiction over many programs, with many different types of authorizations. To try to incorporate an exhaustive list by rule leaves the commission open to a situation where some type(s) of authorization are erroneously overlooked or omitted. Further, new programs and associated authorizations can be added to the commission's area of jurisdiction, and existing programs can be modified or deleted. An exhaustive list of authorizations in the compliance history rules would require that the compliance history rules be constantly updated to stay current with other rules. With regard to the issue of petroleum storage tank (PST) registrations being excluded from the compliance history generation process, while the

commission agrees that the PST regulated community is large, the reason for excluding PST registrations, as stated in the proposal preamble, is that they are notifications required to be submitted by the regulated entity which do not require any approval, review, or response on the part of the agency (in other words, they fall under the “no decision” process as described).

Petroleum storage tank registrations are rather an “after-the-fact” notice that PSTs have already (within the preceding 30 days) been installed, modified, or removed from service. With regard to the PST annual certifications, the commission responds that they also do not require any approval, or authorization to operate, on the part of the agency (again, falling under the “no decision” process as described). Certainly the contents of the annual certifications will be verified at the time agency investigations are performed, but to expect that the agency would have to independently verify that the certification is accurate at the time it is submitted would defeat the whole concept behind the self-certification program. In fact, 30 TAC §334.8(c)(3)(C) states, “The agency's issuance of a delivery certificate for an UST(s) does not constitute agency certification or affirmation of the compliance status of the tank(s) in question with agency UST technical and/or administrative requirements, and this issuance does not preclude the agency from investigating these tanks and pursuing enforcement actions under the Texas Water Code when apparent violations are discovered.” If, upon investigation, it is determined that the certification was “inaccurate,” an NOV would be issued containing both the technical violation(s) and the failure to submit accurate information, and subsequent enforcement action could be initiated, ultimately resulting in a commission enforcement order. The violations contained in such NOVs and enforcement orders would be included in subsequent compliance histories (during the next five years) for that person for use in determining whether announced investigations can be conducted,

in “decision process” authorization decisions, in subsequent enforcement actions, and in determinations as to whether the person can participate in an innovative programs. Additionally, a verbal notice that a PST annual certification (or any other required document submitted) is not complete does not constitute the “decision process” review and response contemplated in the proposal preamble. The commission recognizes that UST operators must make available to a common carrier a valid, current delivery certificate before delivery of a regulated substance into the UST(s) can be accepted. However, the commission asserts that, even if an administrative or civil judicial challenge to issuance of the certification was raised for any reason, deliveries would not have to stop until such time as the certification was actually revoked. No changes have been made in response to these comments.

ICE stated that proposed §60.1(a) “should be revised to provide that violations that are voluntarily disclosed under the Texas Environmental, Health and Safety Audit Privilege will not be considered a part of an entity’s compliance history. The purpose of that Act is to encourage voluntary compliance with environmental laws. Entities will be discouraged from using the Act to voluntarily disclose violations if such violations will be included in their compliance history.”

The commission disagrees with this comment. Violations disclosed under the Texas Audit Act are included under §60.1(c)(7) and as required by the Act will be noted as voluntarily disclosed. No change has been made in response to the comment.

AECT commented regarding proposed §60.1(a), regarding what is now adopted §60.1(a)(4), stating that it agrees with the TNRCC's discussion of "no decision" processes in the proposal preamble, and that it generally agrees with the examples of such authorizations provided. However, AECT requested that this language "be revised to include additional language relating to the definition and examples of 'no decision' processes." AECT added, "One example the TNRCC provides ... of a 'no decision' process is 'the on-site management of nonhazardous waste for which a notification is required by 30 TAC §335.6.' That description is too narrow and should be modified to include management of any wastes, whether hazardous or non-hazardous, for which notification is required under §335.6, but no permit is required. This is because all notifications under §335.6 constitute situations 'in which a person informs the TNRCC... that it is engaging in a certain regulated activity, which the TNRCC defines ... as being a type of 'no decision' process. In addition, the reference to 'waste discharge notices of intent under 30 TAC Chapter 205, where no written approval is required' needs to be revised to cover all wastewater or stormwater notices of intent, including those required by the Multi-Sector Stormwater General Permit. Further, AECT suggests that notification of used oil handler activities under 30 TAC §§324.11 - 324.14 should be provided as an example of a 'no decision' process."

The commission appreciates the positive comment in support of the rule. The on-site management of nonhazardous waste for which a notification is required by §335.6 is listed as one example of a "no decision" process. The agency acknowledges there could be others, including the hazardous waste example noted in the comment. The list of examples in the proposal preamble was not intended to be a comprehensive list of authorizations meeting the criteria of a "no decision" process, for many reasons. First, the commission has jurisdiction over many programs, with

many different types of authorizations. To try to incorporate an exhaustive list by rule leaves the commission open to a situation where some type(s) of authorization are erroneously overlooked or omitted. Further, new programs and associated authorizations can be added to the commission's area of jurisdiction, and existing programs can be modified or deleted. An exhaustive list of authorizations in the compliance history rules would require that the compliance history rules be constantly updated to stay current with other rules. The commission agrees that there are notifications of hazardous waste management required under §335.6 where no permit or agency approval is required which also would be "no decision" processes. Additionally, with regard to the commenter's request for clarification on "waste discharge notices of intent under 30 TAC Chapter 203, where no written approval is required," the commission responds that the term "wastes" is the term used in Chapter 205 and it does cover both stormwater and wastewater discharges. Additionally, this has been clarified in the SECTION DISCUSSION of this adoption preamble, by adding the parenthetical statement as follows: "...and waste discharges (including stormwater and wastewater) notices of intent under 30 TAC Chapter 205..." The commission also agrees that used oil registrations would be an example of a "no decision" process. For these registrations, the agency verifies that financial assurance is adequate and that required information is submitted; however, agency review and approval is not required. No changes have been made in response to this comment.

Plano commented regarding proposed §60.1(a). Plano expressed concern that the term "minor," as it is used in proposed §60.1(a), now adopted §60.1(a)(4)(C), with regard to proposed exceptions to the use of compliance history for minor amendments and modifications to permits, is not defined. Plano

expressed concern that this leaves the determination as to whether an amendment or modification is "minor" to a "purely subjective opinion," and suggested that the term "minor" be defined so as to remove any subjectivity and ensure equal treatment of parties.

The commission agrees that clarification of the rule is appropriate. The term “minor amendment” is already defined in the commission’s rules. Specifically, 30 TAC §305.62 defines “minor amendment” and “major amendment” as those terms relate to water and waste permits and 30 TAC §305.62 and §305.72 define “minor modifications” as those terms relate to TPDES and UIC permits. Although the commission’s air program does not have a definition of “minor amendments,” that concept is captured in certain air permitting actions. For example, minor permit revisions to federal operating permits would not be subject to compliance history review. Further, in the new source review program, permit amendments that meet the provisions of THSC, §382.056(h) (implemented in 30 TAC §39.402) would also be excluded from the requirements of this chapter. The commission believes that it is appropriate to exclude minor permit revisions under Chapter 122 because these revisions, consistent with 40 CFR Part 70, are not considered significant. Similarly, the NSR permit amendments addressed by §39.402(a)(1) - (3) are those that authorize de minimis or insignificant increases in air emissions. To clarify this, the commission has added language at adopted §60.1(a)(4)(H) stating that this chapter does not apply to “air quality new source review permit amendments which meet the criteria of 30 TAC §39.402(a)(1) - (3) and minor permit revisions under 30 TAC Chapter 122.”

TCONR commented that the first sentence of proposed §60.1(b), now in adopted §60.1(a)(6), which states that the "components of compliance history shall apply to an action taken by the agency on or after February 1, 2002," is confusing and unnecessary. TCONR asked, "Does the agency mean that only enforcement actions taken after February 2002 are included as components of compliance history? ... {t}hat was rejected by the legislature. We do not believe the agency intends this result. The preamble does not specifically clarify this provision, however. We request that it either be stricken or that the adopted rule clarify that the agency does not intend to limit the components of compliance history to enforcement actions taken by the agency after February 1, 2002." Similarly, BP and TCFA stated, "In the introductory paragraph of §60.1(b), TNRCC indicates the components specified in this chapter 'apply to an action taken by the agency on or after February 1, 2002.' Because this statement is written into the introductory paragraph, the reader assumes the thirteen components are all triggered on a February 1, 2002 date. If this is not the case, TNRCC should rewrite this section for clarity."

The commission responds that this language was taken from HB 2912, §18.05(i), which states, "The changes made by this Act in the definition of compliance history apply to an action taken by the Texas Natural Resource Conservation Commission on or after February 1, 2002. An action taken by the Texas Natural Resource Conservation Commission before February 1, 2002, is governed by the law in effect on the date the action is taken, and the former law is continued in effect for that purpose." The commission recognizes that the proposed language has proven to be confusing, particularly with regard to the use of the term "an action taken by the agency." The "action" does not refer to the "actions" which constitute the components of compliance history included in this subsection in paragraphs (1) - (13); rather, it refers to the "actions" taken by the

agency which require the development and consideration of a compliance history as part of the decision-making process, as specified in subsection (a) of this section. In other words, the statement is intended to reflect that the definition of compliance history as provided by Chapter 60 (i.e., the components, and further, meaning these components as opposed to the components specified in existing 30 TAC Chapters 116 and 281 and the enforcement penalty policy) will be used in developing compliance histories for permit or participation in innovative program applications, enforcement actions, and decisions on announced versus unannounced investigations which the agency receives (or otherwise initiates action on, as further delineated in the proposed subsection) on or after February 1, 2002. The commission did not intend to imply that it would not look back to components of compliance history that occurred during the five years prior to February 1, 2002, as it in fact does intend to utilize components which occurred during the five years prior, except as specified for NOVs and for orders issued under TWC, §7.070. As such, the commission has modified the language to read, “Beginning February 1, 2002, the executive director shall develop compliance histories with the components specified in this chapter.” Additionally, the sentence has been moved from proposed §60.1(b) to adopted §60.1(a)(6) in order to put it in chronological order along with the classification and use effective date of the next phase of rulemaking, and to move it from the subsection on components to the subsection on applicability for better organization and clarity.

Concerning proposed §60.1(b), Brown McCarroll stated that the plain reading of the first sentence of this subsection, adopted as §60.1(a)(6), “appears to indicate that the components of a compliance history as specified in the proposed rules would apply to actions (e.g., decisions on permitting?) by the

agency on or after February 1, 2002.” Brown McCarroll continued, “This sentence is confusing and subject to interpretation that is not consistent with other provisions of these proposed rules. This language appears to be based on...” HB 2912, §18.05(i). “This provision in the statute is equally confusing in its context, because other effective date provisions of the statute in regard to compliance history specified that decisions by the agency on permits apply only to applications submitted after September 1, 2002, and various other actions by the agency also have a trigger date of September 1, 2002. Both this statutory provision and the proposed rule provision appear to conflict with statutory and regulatory provisions concerning the September 1, 2002, effective date. For example, in an agency decision on a permit, is it to consider the compliance history provisions of the proposed rule or those of the old rules if the application is submitted in March 2002? Any decision by the agency on such a permit would be considered an ‘action taken by the agency’ and would appear to require consideration of the new compliance history components as required by proposed §60.1(b). Nevertheless, proposed §60.1(a)(1) regarding applicability specifies that the agency is to consider the new components of compliance history under these proposed rules only for applications submitted on or after September 1, 2002. Therefore, according to proposed §60.1(a)(1), for an application submitted in March 2002, the agency should consider compliance history as provided in the current rules in evaluating the application.”

Brown McCarroll added, “it does not appear as though the first sentence of proposed §60.1(b) or corresponding provision in the statute apply to any other agency ‘actions taken’ that are not enumerated in {proposed} §60.1(a)(1) - (4) and HB 2912 §18.05(f), (g), (h), and (j) (i.e., other ‘actions taken’ that do not include consideration of permits, inspections, flexible permitting, and imposition of penalties).

In what other types of actions taken by the agency must the Commission consider the new components of compliance history after February 1, 2002, but before September 1, 2002? We do not believe there are any such agency actions envisioned by the statute or the proposed rules. Brown McCarroll believes that the proper interpretation of both the statutory provision and the proposed regulatory provision should be that compliance history elements or events, as enumerated in {proposed} §60.1(b)(1) - (13), are to be considered components of the new compliance history scheme on or after February 1, 2002, only. In other words, those elements or events established before February 1, 2002, are considered part of the current compliance history scheme. Those elements or events established on or after February 1, 2002, become components of the new compliance history scheme. For example, any enforcement orders, judgments, or consent decrees issued on or after February 1, 2002, would be one of the enumerated components of compliance history under {proposed} §60.1(b) to be used in matters for which the agency must consider compliance history under the proposed scheme on or after September 1, 2002. In agency decisionmaking where it must consider compliance history prior to September 1, 2002, however, the commissioners would still consider the compliance history as it is determined today. This scenario would not, however, leave a gap in the time period for the current compliance history scheme. During the period between February 1, 2002, and September 1, 2002, compliance history elements or events would be considered as compliance history components under the current scheme and under the proposed scheme. Thus, for example, an enforcement order issued March 1, 2002, could be considered a component of the current compliance history scheme in a permitting decision by the Commissioners in June 2002, and considered a component of the new compliance history scheme in a permitting decision on or after September 1, 2002. In order to provide clarity on this issue, we propose the following language to replace the first sentence of {proposed}

§60.1(b): (b) Components. Only compliance history elements or events that are established (e.g. enforcement order issued) on or after February 1, 2002, are deemed components of compliance history as specified in this chapter.”

The commission does not agree with these comments. In addition to the response provided to the previous comment in this preamble regarding the modification and movement of the language in the first sentence of the subsection, the commission points out that proposed §60.1(a)(1) does not say that the agency is to consider the new components of compliance history only for applications submitted on or after September 1, 2002. Rather, it says that, with regard to permit applications, “this chapter applies in the consideration of” only applications submitted on or after September 1, 2002. The language in proposed §60.1(a)(1), as well as the language contained in proposed §60.1(a)(2) - (4), is taken from HB 2912, §18.05(g), (h), (j), and (b), respectively. These provisions of HB 2912 taken in their entirety, along with HB 2912, §18.05(i) and (a), provide clear directive that the *components* of compliance history provided for in §60.1(b) will be used in developing compliance histories (under existing rules) for actions (where compliance histories are currently required) *initiated* on or after February 1, 2002. Further, between February 1, 2002, and August 31, 2002, for those actions (where compliance histories are currently required) *initiated* on or after February 1, 2002, the existing rules regarding the *use* of compliance history stay in effect; only the components used in developing compliance histories during that time will change, if or as applicable, during that time. Then, beginning September 1, 2002, the *classification and use* of compliance history developed under HB 2912 (in the second phase of compliance history rulemaking) will become effective for *all* actions requiring compliance histories

initiated on or after that date, superceding the existing compliance history use rules and the enforcement penalty policy as it applies to compliance history. The commission has also somewhat modified the presentation of the information in proposed §60.1(a) - (d), now adopted §60.1(a)(7)(A) - (D), and coupled with the changes and movement of the language in the first sentence of this subparagraph as noted previously, believes the meaning and significance of these dates is clarified. However, the commission does not agree with the commenter's interpretation of HB 2912 or the proposed rules for the reasons outlined, and therefore, no change has been made in response to these comments.

AECT commented that it strongly agrees with the first sentence in proposed §60.1(b), now in adopted §60.1(a)(6), which states, "The components of compliance history shall apply to an action taken by the agency on or after February 1, 2002," for several reasons. AECT cited as an example that "the Sunset Bill is clear that NOVs that are administratively determined to be without merit are not to be a component of a site's compliance history. For all NOVs issued before these rules become effective (which the Bill requires be not later than February 1, 2002), there has been and will be no procedure for requesting or obtaining an administrative determination that such NOVs are without merit. Therefore, such NOVs would be included in a site's compliance history, even if they are without merit. Such a result would be unfair and contrary to the Sunset Bill."

Although the commission appreciates the positive comment in response to the proposed rules, it fears that the commenter has misunderstood the intent of this language. First, as discussed in the responses to the previous two comments in this preamble, the proposed language was not intended

to imply that only the “components” as outlined in proposed §60.1(b)(1) - (13) which occur on or after February 1, 2002, would be included in a person’s compliance history; rather, it means that the components (including those occurring within the five years preceding the effective date of this rule) as defined in proposed §60.1(b)(1) - (13), as opposed to components as specified in existing rules, will be used in developing compliance histories for those actions (which require compliance histories) which are *initiated* (as outlined in the rule) on or after February 1, 2002. In order to help clarify this, the commission has modified and moved the language in the first sentence of this subparagraph as noted previously. Further, the commission does not agree that it was the legislative intent that NOV’s issued before these rules become effective all be excluded from a person’s compliance history. The commission appreciates the concern raised by the commenters and responds that a regulated entity currently has, and will continue to have, the ability to submit (additional) information for consideration on behalf of a claim that information included in its compliance history is inaccurate and/or erroneous. A regulated entity is free, and in fact encouraged, to provide information for consideration to correct inaccuracies at any time. Further discussion of this issue can be found in this adoption preamble with the specific discussions of proposed §60.1(b)(7), which is now §60.1(c)(7). No changes have been made in response to this comment.

Regarding proposed §60.1(b), ATINGP stated that the first sentence of this proposed subsection, now in adopted §60.1(a)(6), “seems to conflict with the effective date provision carefully set forth in {proposed} §60.1(a)(1) - (4). We understand that this section intends to provide that the new components of compliance history can be incorporated into the existing regulatory programs that

consider compliance history under §§7.053, 166.122 and 281.21 during the transition period from February 1, 2002 through August 31, 2002. To clarify the intent of this section, we suggest that the staff reword that sentence as follows: ‘The components of compliance history as specified in this chapter shall apply to an action taken by the agency pursuant to 30 Tex. Admin. Code §§7.053, 166.122 and 281.21 on or after February 1, 2002, and before September 1, 2002.’” In a similar comment, PHA stated, “It is unclear when the rule becomes effective. Proposed §60.1(b) notes that the components of compliance history set forth in the rule apply to action taken by the agency on or after February 1, 2002. Proposed §60.1(a) however indicates that the effective date for consideration of compliance history in those decisions of the agency that are covered by the rule (e.g. decisions regarding permit issuance, renewal, amendment, modification ,denial, suspension or revocation; enforcement; use of unannounced inspections; and participation in innovative programs) is September 1, 2002. PHA requests clarification of the effective date of proposed §60.1.”

The commission recognizes that the proposed language has proven to be confusing, particularly with regard to the use of the term “an action taken by the agency.” The “action” does not refer to the “actions” which constitute the components of compliance history included in this subsection in paragraphs (1) - (13); rather, it refers to the “actions” taken by the agency which require the development and consideration of a compliance history as part of the decision-making process, as specified in subsection (a) of this section. Further, the commission agrees with the commenter’s interpretation that this section is intended to provide that the new components of compliance history will be incorporated into the existing programs that consider compliance history during the time period between February 1, 2002, and August 31, 2002. In order to help clarify this

issue, the commission has modified the language to read, “Beginning February 1, 2002, the executive director shall develop compliance histories with the components specified in this chapter,” and further, moved it to adopted §60.1(a)(6) for better organization and clarification.

No additional changes have been made in response to these comments.

Brown McCarroll commented, regarding proposed §60.1(a)(3), which is adopted §60.1(a)(7)(C), that it “believes that the phrase ‘a proceeding that is initiated or an action that is brought on or after September 1, 2002’ may lead to confusion regarding when a proceeding is initiated or an action brought without further guidance or clarification on the TNRCC’s part. For example, in an enforcement case, is the proceeding initiated or action brought when the Executive Director (“ED”) sends a respondent a notice of violation (“NOV”) letter or when the ED’s preliminary report and petition is filed? Brown McCarroll believes that the proper trigger for this provision is when the ED’s preliminary report and petition is issued and served on a respondent. Although we do not believe it is necessary to address this issue in the rule itself, we recommend that guidance in the preamble to the rules adopting these provisions be provided by the TNRCC in order to clarify this issue.”

The commission responds that it has modified the language in adopted §60.1(b), relating to compliance period, to reflect that the initiation of an enforcement action is the date of an initial enforcement settlement offer or the filing date of an EDPR, whichever occurs first. The proposed language indicated that it was the investigation date which initiated enforcement; the commission has determined that this change is appropriate as it more accurately reflects the initiation of an enforcement action. Further, the verbiage includes the date of “an initial enforcement settlement

offer” because an EDPR is not issued in all enforcement actions. Thus, the language in adopted §60.1(a)(7)(C) means that for any enforcement action initiated on or after September 1, 2002, the compliance history classification and use as will be included in this new chapter on or before September 1, 2002, through the second phase of rulemaking, will apply. In other words, for an enforcement action initiated on September 2, 2002, through the issuance of an initial settlement offer, the compliance history use portion of the commission’s penalty policy will be superceded by the requirements of Chapter 60, and the previous five-year compliance history for the respondent in that enforcement matter will be compiled and used in accordance with Chapter 60. The commission intends to adopt corresponding changes to its penalty policy. The other proceedings or actions referenced in §60.1(a)(7)(C) are with regard to the suspension or revocation of a permit, which would also be addressed through an enforcement action.

Concerning proposed §60.1(a)(4), which is adopted as §60.1(a)(7)(D), Brown McCarroll stated that it “believes that the trigger for consideration of these compliance history provisions on other forms of request for authorization or a request for participation in innovative programs should be on the date the request is submitted to the ED, not the date upon which the ED takes action. We believe this change would provide more certainty for those persons making such requests. Otherwise, persons filing such requests before the effective date, September 2, 2002, would not know whether the ED would consider their request in conjunction with the new compliance history provisions or the old. Further, it would provide more certainty for the ED’s staff in compiling the compliance history of the requestor, since they would know with clarity whether the old or new compliance history provisions would apply. Further, the TNRCC Sunset law is consistent with this recommendation, as the trigger for issuance,

amendment, modification or renewal of permits by the Commission is the date the application is submitted.” Brown McCarroll therefore recommended the following revision to proposed §60.1(a)(4): “(4) with respect to compliance history, on requests to the executive director for other forms of authorization or requests for participation in an innovative program, except for flexible permitting, only to such requests submitted on or after September 1, 2002.”

The commission agrees, and has modified adopted §60.1(a)(7)(D), in conformance with other modifications made to this language for clarification, to read, “Beginning September 1, 2002, this chapter shall apply to the use of compliance history in agency decisions relating to: ... (D) applications submitted on or after this date for other forms of authorization, or participation in an innovative program, except for flexible permitting.”

Concerning proposed §60.1(a), (at adopted §60.1(a)(8)), WMT commented that it strongly disagrees with the portion of the applicability of compliance history language concerning permit actions which states the rule does not apply to certain permit actions "unless a motion for reconsideration or a motion to overturn is filed." WMT stated, "The effect of this provision is that minor permit actions will become major events simply because any third party believes that a facility is a bad actor. To predicate the consideration of compliance history in a minor TNRCC permit action on the random event of the filing of a motion in opposition to the TNRCC's action is inconsistent with the goal of the legislation. There is adequate opportunity to advance that theory in other more significant permit proceedings. In addition, there is a substantial potential that a facility that is actively opposed on general principle (rather than by virtue of being a bad actor) will suffer a disproportionate impact under the draft rule.

Consequently, WMT requests that the final rule not allow the introduction of compliance history considerations to matters that the TNRCC considers minor and for which the TNRCC does not even require public notice. At a minimum, compliance history should not be considered if it is the sole basis for the Motion for Reconsideration or Motion to Overturn Executive Director's Decision." Similarly, Vinson & Elkins stated, "The proposed rule exempts certain minor permit actions from compliance history considerations. We believe that this is the correct approach but do not agree that compliance history considerations should be introduced randomly into these minor permit actions by the filing of a 'Motion for Reconsideration' or 'Motion to Overturn.' The occasions for consideration of compliance history should be predetermined by the rules with certainty by the agency and not by the opposition to an agency action."

The commission has changed the rule to require the executive director to file a compliance history with the office of the chief clerk if a motion for reconsideration or a motion to overturn has been filed and set for a commission agenda. Any item that is set for a commission agenda should have a compliance history prepared to allow the commissioners to be fully informed. Additionally, this language has been separated and moved to adopted §60.1(a)(8) for clarity.

Jones Day commented regarding proposed §60.1(a) and (b), which is adopted §60.1(a) and (c). Jones Day commented, "The proposed rule references in Section §60.1(a) & (b) a plan to take compliance history into account in the context of applications to participate in 'innovative' programs. We request that the agency revise this language to include 'innovative programs and other programs and contributions.' Emphasizing the term 'innovative' may create the impression that only new or unusual

approaches to environmental protection are relevant. This could exclude from consideration under this Chapter those TNRCC programs that may contain effective environmental protection strategies but might not be viewed as 'innovative.' The Agency should be clear that it does not intend to apply a pre-conceived or fixed notion of what programs will be covered by this Chapter."

The commission responds that HB 2912 specifically defines what is included in compliance history and more specifically, what programs are defined as innovative programs. In TWC, §5.752, Definitions, HB 2912 defines "innovative program" to mean a program developed by the commission under TWC, Chapter 5, Subchapter Q; TWC, Chapter 26 or 27; or THSC, Chapter 361, 382, or 401; that provides incentives to a person in return for benefits to the environment that exceed benefits that would result from compliance with applicable legal requirements under the commission's jurisdiction; the flexible permit program administered by the commission under THSC, Chapter 382; or the regulatory flexibility program administered by the commission under TWC, §5.758. In this definition of innovative programs, the legislature included a broad range of programs that do not emphasize that only new or unusual approaches to environmental protection are relevant. Based on the definition provided in HB 2912, the commission plans to designate which existing programs are included in that definition. The commission does not agree with adding the verbiage "other programs and contributions" since the statute was very specific which programs of the commission should use compliance history in determining their eligibility to participate and also broad in their definition of innovative programs to not limit to only "new or unusual approaches." Therefore, the commission makes no change in response to this comment.

§60.1(b), Compliance Period

Concerning proposed §60.1(b), TCGA commented that it is concerned "with the language that allows the TNRCC to review *at least* five years of compliance history." TCGA stated that while it understands there may be specific circumstances where more than five years would be reasonable, it believes these instances are limited, and should be spelled out in the proposed rule, if they are to be included.

The commission responds that it has deleted the "at least" phrase from the rule as it was proposed with regard to the compliance period to be reviewed, but has also clarified in the language that a person's compliance history may be supplemented past (i.e., brought current) the receipt date of an application in order to account for application processing time. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than the five years prior to the receipt date of an application.

Plano and WMT commented regarding proposed §60.1(b). Plano raised concerns with the "at least five year" compliance period, as included in proposed §60.1(b). Plano stated that it agrees that a five-year period is appropriate for developing compliance history. Additionally, it agreed that it is appropriate to obtain supplemental information for the additional time period needed to process a permit application. However, Plano expressed concerns with leaving the time frame open-ended, and not specifying what criteria would be used to determine whether compliance history information in excess of five years is

necessary, as this could lead to discriminatory treatment of a party. Plano stated that, "As it is currently written, proposed §60.1(b) allows for a great amount of subjectivity on the part of the TNRCC in terms of determining the time period for which a compliance history should be developed for a party. Theoretically, since there is no maximum limit on the time period, a compliance history could be developed to reach as far back as 20 years or more even though that much history may not be appropriate." Plano recommended that the compliance history period be limited to five years, allowing for supplementation for the time period needed to process a permit application, and stated that it believes that this provides for an adequate period of time over which to detect any overall pattern related to compliance. Similarly, WMT commented, "There should be certainty in the compliance history period considered. WMT recognizes that most of the 'components' of compliance history are set out in H.B. 2912, but the relevant period for consideration of compliance history is not specifically set out in the law. WMT takes issue with the proposed rule language that 'the compliance history shall cover at least a five year period.' This is a significant change from the original draft rule that limited the period to a five year maximum. While the preamble explains this shift as a change to allow the TNRCC to bring the compliance history current to the point of the action under consideration, the proposed rule is much broader. Without a standard to determine when the agency will limit the review to five years or extend it to six, ten, or beyond, application of the proposed rule is arbitrary by definition. If left as drafted, an applicant and an opposing party could argue indefinitely about the proper length of time to consider the facility's compliance history. A set timeframe with the history brought current to the point of decision should be the rule and it should be clearly stated."

The commission appreciates the positive comment in support of a five-year compliance history period. Additionally, the commission responds that it has deleted the “at least” phrase from the rules as it was proposed with regard to the compliance period to be reviewed, but has also clarified in the language that a person’s compliance history may be supplemented past (i.e., brought current) the receipt date of an application in order to account for application processing time. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change addresses the concern that the rule is open-ended or allows for subjectivity.

Regarding proposed §60.1(b), TCONR stated, "We support the language used in the proposed rule establishing the compliance period as including 'at least' a five-year period. In the preamble to the proposed rule, the TNRCC gives an example of the need to develop compliance history for a longer period than 5 years (to supplement compliance history within a time period needed to process a permit application)." TCONR expressed its concern that in certain agency programs, a five-year compliance period might not provide adequate data to assess the person's previous compliance history. TCONR cited as an example, a situation in which there may not have been an investigation at the site within the previous five-year period, and stated that "the rule reasonably allows for a more flexible compliance period, allowing consideration of compliance data from more than 5 years back." TCONR further requested that the rule include the following language, "In instances where the site that is under review has been in operation for less than five years and no inspections have been conducted since the site began operation, the commission shall conduct at least one unannounced inspection before taking any

action to which this section applies. Any notices of violation or other enforcement action resulting from that inspection shall be included in the compliance history." TCONR stated that the suggested language is consistent with TWC, §5.754(d) which requires the commission to establish methods of assessing the compliance history of regulated entities for which it does not have adequate compliance information. TCONR also stated that this statutory requirement should be carried through in the next phase of rulemaking concerning classification and use of compliance history.

The commission appreciates the positive comment in support of the proposed compliance history period of "at least" five years. However, the commission responds that it has deleted the "at least" phrase from the rule language, but has also clarified in the language that a person's compliance history may be supplemented past (i.e., brought current) the receipt date of an application in order to account for application processing time. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not open-ended and does not allow for subjectivity. The commission does not agree, however, with the suggestion to add additional language regarding inadequate compliance history information. The commission acknowledges that the statute requires the commission to establish methods of assessing the compliance history of regulated entities for which it does not have adequate compliance information and will address this issue during the next phase of rulemaking. The commission concurs that should it conduct an investigation in response to a permit application submitted by a

person having no previous investigations, it would be appropriate to update the compliance history with the results of the investigation. No changes have been made in response to these comments.

Concerning proposed §60.1(b), Cantey & Hanger commented, "Proposed Rule §60.1(b) says that compliance history shall cover at least five years. If there were no inspections within the last five years, but had been inspections prior to that time period, those should not be utilized as a component in a regulated entity's compliance history. Five years is a substantial enough time period to penalize a regulated entity which may have had a violation during an inspection, but the regulated entity should not continue to have a historical violation negatively impact its compliance history when there have been no violations during inspections within five years. The TNRCC has stated in the Proposed Rule commentary that a 'five year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance.' Thus, the language in the Proposed Rule should be changed to 'compliance history shall cover a five year period.'"

The commission agrees that the proposal did not provide certainty, and responds that it has modified the language by deleting the "at least" phrase from the rule language, and has also clarified in the language that a person's compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change

ensures that the rule is not open-ended and does not allow for subjectivity, while providing a reasonable period of time for compliance history consideration.

Regarding proposed §60.1(b), BP suggested that, with regard to the proposal that compliance history cover at least a five-year period be modified to delete "at least" and read, "... the compliance history should cover a five year period except for those plants subject to an annual inspection. Such plants will be subject to a two year period." BP stated, "Plants subject to annual inspections with Notice of Violations would be forced to correct deficiencies, and thus any findings from 5 years prior should be corrected in most typical circumstances. Therefore, there is no basis to perform a 5-year look-back."

The commission responds that it has deleted "at least" from the rule. However, the commission disagrees that plants subject to an annual investigation should be subject to a two-year compliance period. First, TWC, §5.753, requires the commission to "develop a uniform standard for evaluating compliance history." The statute does not provide for exceptions for those sites subject to annual investigations. Furthermore, under no circumstances does an NOV "force" a person to correct deficiencies; instead, an NOV notifies a person of alleged violations, and in most instances provides an opportunity for the person to correct the violations without additional action being taken (i.e., formal enforcement action being initiated). A best-case scenario would be one in which the recipient of an NOV timely addresses the deficiencies noted, and further, keeps them corrected such that the violations are not present during the following investigation, annual or otherwise. Additionally, although the classification and use of compliance history will not be addressed until the next phase of rulemaking, the commission anticipates that in a situation where

an annual investigation resulting in an NOV is conducted in one year and an NOV is issued, and investigations are conducted in each of the following four years without the issuance of an NOV (because the violations noted the first year have been corrected), the compliance history would reflect positively on the person. In fact, the commission noted in the proposal preamble that, with regard to the inclusion of the dates of investigations as a component of compliance history (proposed §60.1(b)(6)), this information will reflect how many investigations have taken place during the five-year compliance period, allowing for a better perspective with regard to the other components of compliance history, especially those in adopted subsection (c)(1) - (5), and (7). For example, it will be important to know whether the facility had been inspected during the compliance period, and how many times, when there are no NOV's or orders present during the compliance period. Conversely, though, if violations are noted each year, those violations should be included in the regulated entity's compliance history. No change has been made in response to this comment.

Birch & Becker commented regarding proposed §60.1(b). The commenter stated, "It is impossible to evaluate whether a minimum of five years is an appropriate time period prior to the issuance of the Phase II rules. The Phase II rules are expected to contain key provisions related to the definition of repeat violators, the classification of violators, the consequences of compliance history designations, etc. For example, if under the Phase II rules it is very easy to become a 'repeat violator' after only two or three NOV's, then five years may be too long of a compliance period since a large percentage of the regulated community, especially those with large or complicated facilities, may become identified as repeat violators." Additionally, Birch & Becker commented that the "proposed 'at least a five-year

period' definition of compliance history is vague. Again, we assume that this definition will be refined and illuminated under the Phase II rules, and will likely prompt additional comments.”

Although it appreciates the commenter's concerns regarding it being difficult to evaluate certain aspects of the phase I rulemaking without seeing the phase II rulemaking, the commission responds that in light of current agency rules and procedures pertaining to compliance history, it is confident that the five-year period is an appropriate period of time for evaluating a person's compliance history, and that it is not necessary to have the phase II rulemaking in place to make this determination. Furthermore, the commission has modified the proposed rule language by deleting the “at least” phrase, and has also clarified in the language that a person's compliance history may be supplemented past (i.e., brought current) the receipt date of an application in order to account for application processing time. This would be the only circumstance for which the agency would generate a compliance history for longer than a five- year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not vague or open-ended and does not allow for subjectivity, while providing a reasonable period of time for compliance history consideration. No other changes to the rule have been made in response to this comment.

NTMWD, TMRA, and TxSWANA commented regarding proposed §60.1(b). NTMWD, TMRA, and TxSWANA stated that the use of the phrase “at least” results in the compliance history being indefinite, and thus, the rule does not establish by rule a set, identifiable compliance history period as required by HB 2912, adding that the proposal preamble acknowledges this lack of a definite time frame. The

commenters further stated that the commission should remove the phrase “at least” from the proposed rule in order to establish a set period of time, as the statute does not empower the commission to establish a period for compliance history on a case-by-case basis. NTMWD, TMRA, and TxSWANA went on to say that the remainder of proposed §60.1(b) limits the compliance period to no more than five years under certain circumstances, including the use of compliance history in making decisions regarding enforcement actions, inspections, or participation in innovative programs. But, the commenters added, these limits are not sufficient because they do not apply to all cases in which compliance history would be a factor for consideration, expressly not applying to permitting cases. NTMWD stated, “This indeterminate length of compliance history {for permitting cases} makes it very difficult for an entity to ‘clean up’ its record before entering into a new permitting process, and conceivably could negatively affect permitting efforts for an unknown, extended period of years.” NTMWD and TxSWANA also commented that the explanation provided in the preamble to the proposed rule for the extension of the compliance history time period past five years appears to be inconsistent with the provisions of the proposed rule itself, and specifically the provision to consider at least five years. NTMWD and TxSWANA both commented that the proposal preamble contemplates looking at the five years preceding the submission of the application plus the months or years *thereafter* required to complete the processing of the application. The preamble does not contemplate looking back more than five years from the date the application is submitted to the commission, yet the proposed rule provides that the ‘compliance period includes *at least* the five years prior to the date the permit application is received by the executive director. They stated that the inclusion of the phrase “at least” allows the commission to look back further than five years prior to the submission of the application, and that this does not appear to be the intent of the rule as a whole. As such, they added,

the phrase “at least” should be deleted from the proposed rule. TMRA added, “The draft rule may also be inconsistent with the Commissioners’ views on how the compliance period should be defined. At the September 26, 2001 Agenda, Commissioner Marquez expressed concern about the inclusion of the open-ended ‘at least five years’ compliance history period. He suggested further that in almost all cases, five years would be sufficient and invited the public to file comments on the point. TMRA agrees that five years is a sufficient time period. As suggested in the preamble to the rule, a five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions.”

The commission agrees that the proposal did not provide certainty, and responds that it has modified the language by deleting the “at least” phrase from the rule language, and has also clarified in the language that a person’s compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not open-ended while providing a reasonable period of time for compliance history consideration. The commission appreciates TMRA’s positive comment in support of the rule.

Regarding proposed §60.1(b), 7-Eleven stated it “disagrees with the proposal to authorize TNRCC to compile information regarding compliance history covering a period of ‘at least five years’. Five years is an adequate period of time to provide a clear picture of a site’s compliance history. The inclusion of the words ‘at least’ leads to subjectivity by agency enforcement and permitting personnel. The rule provides no criteria or standards for whether the 5 year period will be expanded. Accordingly, there will then be no consistent pattern for agency personnel to follow in generation of compliance history. TNRCC’s stated purpose for extensions of the five year period is to address the situation where a permit application or enforcement decision is initiated but is not resolved until more than five years has passed since events initially considered in the compliance history at the time of the original application. 7-Eleven suggested that this issue can be addressed by revising proposed §60.1(b) to read as follows.”

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 under the commission’s jurisdiction and owned or operated by the same person. 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 the inspection that initiates enforcement; for purposes of determining whether an announced inspection is appropriate, the five-year period preceding an inspection; for 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 or the date of the inspection that initiated enforcement, until the executive director makes its recommended decision on the application or enforcement action. The components are:...

Vinson & Elkins provided similar comments regarding proposed §60.1(b), offering a slightly different version of the final sentence offered by 7-Eleven. Specifically, Vinson & Elkins recommended: “The compliance history period may be extended forward from the ending date of the compliance history periods described above to include compliance history components that occur during the time that the matter is under consideration by the agency.” Vinson & Elkins added, “A compliance history that is more current is more relevant to a decision by the TNRCC and may better assist the decision maker with a more up-to-date picture of compliance history. However, the proposed rule goes beyond this stated purpose and leaves the compliance history period completely open. It is unclear what criteria will be employed to determine the length of a given compliance history and without such defined criteria the decision on any given matter will be arbitrary. Given the potential consequences of a negative compliance history, the regulated community should all be evaluated on a set standard.”

The commission agrees with these comments, and responds that it has modified the language by deleting the “at least” phrase from the rule language, and has also clarified in the language that a person’s compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not open-ended while providing a reasonable period of time for compliance history consideration.

Vinson & Elkins commented regarding proposed §60.1(b), stating, “The proposed time period for compliance history is inconsistent with statutory intent in both definition and application. The Legislature directed the Commission to establish a ‘*uniform* standard for evaluating compliance history’ (emphasis added). Use of a compliance history of ‘at least five years’ is inconsistent with this directive for uniformity because different compliance time periods could be used for different facilities and for different business entities.” Vinson & Elkins also stated, “The Legislature also directed the Commission to establish, by rule, ‘a period of compliance history,’ not a *range of time* or *minimum period* of compliance history. Furthermore, using a range of time would allow the Executive Director’s staff to subjectively and arbitrarily choose a time period on a case-by-case basis. The proposed 30 TAC §60.1(b) could result in application of multiple time periods, rather than ‘a time period for compliance.’ It would also allow Executive Director’s staff to use different time periods for different authorizations for the same entity (i.e. using x number of years in reviewing a permit application, while using y number of years in a penalty determination). These scenarios are not theoretical; in fact, the preamble explicitly acknowledges that the agency may apply a greater than five- year compliance period based on ‘case-by-case considerations.’ Such scenarios are inconsistent with the establishment of a single, uniformly applied compliance period envisioned by the Legislature.” Vinson & Elkins also stated, “The compliance history time period should cover five years prior to the action in question, i.e. filing of application, agency inspection, etc. and not extend prior to that five- year period. The objective of these rules is to provide uniformity in compliance history determinations. It would be inappropriate for the agency to have the discretion to compile compliance history information for more than five years prior to the event for some entities and not others. Therefore, the words ‘at least’ should be deleted from the references to the five year period.”

Additionally, Vinson & Elkins stated, “The preamble suggests that the agency may wish to extend the compliance period beyond five years forward to allow for the time during which a permit application is undergoing review. This is not unreasonable. The rules should only allow the agency to extend the compliance period forward in time to allow for these circumstances. Extending the period back in time is inappropriate because the inconsistent application of the compliance period is contrary to the statutory directive and has the potential to effectively prevent an entity from improving its compliance history record.” Finally, with regard to proposed §60.1(b), Vinson & Elkins proposed the following change.

The components of compliance history as specified in this chapter shall apply to an action taken by the agency on or after February 1, 2002. 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 under the commission’s jurisdiction and owned or operated by the same person. The period of compliance history shall be five years prior to the date the permit application is received by the executive director, the date of the inspection that initiates enforcement, the date of an announced inspection, or the date of receipt by the commission of an application for participation in an innovative program, as applicable.

The executive director may extend the compliance period forward from the end of the applicable five-year period for the purpose of including compliance history components that occur during the time the matter is under consideration by the agency.

The commission agrees with these comments, and responds that it has modified the language by deleting the “at least” phrase from the rule language, and has also clarified in the language that a person’s compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the

only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change promotes uniformity while providing a reasonable period of time for compliance history consideration.

TPWA commented regarding proposed §60.1(b), stating that the inclusion of the words "at least" makes the time period indefinite. TPWA submitted that, based upon the wording of the statute, requiring the commission to "establish a period for compliance history" and to do so "by rule," the commission "must adopt a rule establishing the number of years worth of compliance history that will be considered" in making decisions, and added that it does not believe that the proposed rule implements this directive. TPWA stated that the proposal preamble confirms that no set period has been established when it states that "the agency may develop a compliance history for a longer period based upon case-by-case considerations," and added that it does not believe the Legislature empowered the commission to establish this time-period on a case-by-case basis. TPWA stated that it "would further point out that the preamble's explanation for why a compliance history period might extend past five years is inconsistent with the rule itself," citing by way of example, the verbiage in the proposal preamble which states that the history might be supplemented for the time period needed to process a permit application. TPWA stated, "This statement contemplates looking at the five years preceding the application's submission plus the months or year thereafter required to complete the processing of the application. The preamble does not contemplate looking back more than five years prior to the receipt-date. Yet, the draft rule provides that the 'compliance period includes *at least* the five years prior to the date the permit application is received by the executive director.'" (emphasis added) The inclusion of

the words 'at least' could allow the TNRCC to look back farther than five years prior to the submission of the application." ICE provided very similar comments, adding, "The inclusion of the words 'at least' leads to subjectivity by agency personnel. There will then be no consistent pattern for agency personnel to follow in generation of compliance history." Finally, TPWA stated that it "realizes that other parts of section (b) limit the compliance period to no more than five years under certain circumstances. However, TPWA does not believe that these limits are sufficient because they do not apply to all cases in which compliance history would be a factor. Specifically, they do not apply to permitting cases."

The commission agrees with these comments, and responds that it has modified the language by deleting the "at least" phrase from the rule language, and has also clarified in the language that a person's compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not open-ended while providing a reasonable period of time for compliance history consideration.

TABCC commented regarding proposed §60.1(b), stating, "The proposed rules states that the compliance history will cover at least a five-year-period. TABCC has two concerns with this proposal. First, given the frequency of inspections by TNRCC and the possible drain on already limited agency resources, we believe that three years is enough time to give an adequate picture of compliance history.

And, secondly, the words ‘at least’ leave the door open to all infractions being considered forever, giving companies who do have a one-time major blemish on their compliance history, a blemish forever, with no way to ever move beyond that blemish, however, quickly they correct the error and however many subsequent ‘good’ inspection evaluations they earn.”

The commission disagrees with this comment in part. The commission does not agree that a three-year compliance period is an adequate period of time to reflect a person’s environmental compliance trends, and as such has made no change in response to this comment. However, the commission does agree with the comment regarding the inclusion of “at least” in the language regarding compliance histories, and has modified the language to delete all references to “at least,” thereby making it a definite time frame during which the agency can go backwards from the “initiation” of the applicable event to develop a person’s compliance history. The commission appreciates the commenter’s concern for agency resources and intends to compile compliance summaries electronically in order to maintain efficiency.

Concerning proposed §60.1(b), Brown McCarroll stated that an “issue arises in relationship to this proposed regulatory provision and certain preamble language to the proposed rule, where under the Commission’s penalty policy, when assessing compliance history for enforcement purposes, a five-year history of the alleged violator is examined in all programs.” The commenter asserted that under HB 2912, §18.05(i), “components of the new compliance history scheme begin to accrue on or after February 1, 2002, so according to the statute, TNRCC could not consider compliance history elements or events that take place before this date under the new scheme. Consequently, by statute, the TNRCC

is limited from considering five or more years of compliance history components under the new scheme before February 1, 2007. Additional language in that statutory provision specifically supports this position. The statute specifies: 'An action taken by the Texas Natural Resource Conservation Commission before February 1, 2002, is governed by the law in effect on the date the action is taken, and the former law is continued in effect for that purpose.' Thus, until February 1, 2007, in TNRCC decisionmaking, the Agency must consider two different compliance history schemes, to the extent it considered compliance history going back five years. Brown McCarroll recommends that TNRCC provide guidance or at least an explanation on how it will make such dual compliance history considerations."

The commission disagrees with these comments. The commission disagrees that HB 2912, §18.05(i) means, that "components of the new compliance history scheme *begin to accrue on or after February 1, 2002*" (emphasis added) as the commenter asserts. House Bill 2912, §18.05(i) states, "The changes made by this Act in the definition of compliance history *apply to an action taken by the Texas Natural Resource Conservation Commission on or after February 1, 2002. An action taken by the Texas Natural Resource Conservation Commission before February 1, 2002, is governed by the law in effect on the date the action is taken, and the former law is continued in effect for that purpose.*" (Emphasis added.) The commission recognizes that there has been some confusion regarding this language, particularly with regard to the use of the term "an action taken by the agency." The "action" does not refer to the "actions" which constitute the components of compliance history included in proposed §60.1(b)(1) - (13), (adopted as §60.1(c)(1) - (13)); rather, it refers to the "actions" taken by the agency which require the development and

consideration of a compliance history as part of the decision-making process, as specified in §60.1(a). Prior to February 1, 2002, when developing compliance histories, the agency will continue to utilize the components of compliance history currently specified in applicable rules or policies, or in other words, utilize the law in effect on that date regarding how the components are defined. On or after February 1, 2002, the agency will begin to utilize the components of compliance history as defined in new Chapter 60, but will apply those components to the use requirements of existing rules until September 1, 2002, when the second phase of this compliance history rulemaking will become effective. The commission will utilize components which occurred during the five years prior to February 1, 2002, except as specified for NOV's and for orders issued under TWC, §7.070, and further, for the reasons previously stated, disagrees that it is required to utilize two different methods of considering compliance histories up until September 1, 2007. Thus, no guidance or explanation as to how this would be enacted is necessary. No changes have been made in response to these comments.

TML commented regarding proposed §60.1(b), suggesting “that a shorter period, perhaps three years, will serve the purpose of HB 2912 and will provide greater incentive to cities and other members of the regulated community to improve their particular environmental records.” TML further stated that “it is probable that environmental compliance will become a political issue in cities that have or develop an unfavorable compliance record. Candidates for city office are likely to campaign on a platform of improving the environmental performance of a city that has developed such a record. In the vast majority of Texas cities, the term of office for their mayors and councilmembers is two years. Accordingly, a newly elected official who makes a concerted effort to improve the city’s compliance

history must serve two and a half terms before being able to demonstrate to his or her constituents that the efforts have been effective. A shorter period of time in which an unfavorable incident can be phased out of a city's record will encourage city officials to make efforts to improve more quickly, and will provide them with an earlier opportunity to demonstrate success to their voters. Also, five years is the term of city wastewater discharge permits, and prior to applying for renewal, a city should be allowed time to demonstrate within that time period that it has made positive efforts to remove blemishes from its compliance record. Finally, three years more nearly reflects the period of time between agency inspections. With a five-year period of consideration, a city that receives an unfavorable inspection report will never have the ability to nullify the effect of that report prior to the next time that the city applies for renewal of its permit.”

The commission disagrees that the compliance period should be less than five years. The commission does not agree that a three-year compliance period is an adequate period of time to reflect a person's environmental compliance trends, and as such has made no change in response to this comment. Furthermore, the commission responds that compliance histories will not be “static” over a five-year period. Although compliance history classification and use is outside the scope of this rulemaking and will be addressed in the next phase of compliance history rulemaking, the commission anticipates that compliance histories will be updated numerous times over a five-year period, providing ample opportunity to reflect improvement, or worsening, as applicable. The commission anticipates that this will provide incentive to local governmental officials, as well as all regulated entities, to act responsibly and timely in correcting problems and

deficiencies, and in taking “positive” steps to improve compliance. No changes have been made in response to this comment.

TIP commented regarding proposed §60.1(b), stating that it “provides that the compliance period must cover ‘at least’ five (5) years. The TNRCC should limit the compliance period to two (2) years. Two years is more than sufficient to provide enough information upon which to make decisions, while not overwhelming the agency with voluminous data. In addition, the proposed rules should address a procedure for ‘rolling off’ old compliance-related information that falls outside the compliance period. TIP is concerned that the strict five-year requirements may limit the agency’s ability to allow a shorter compliance period as an incentive for facilities that develop and maintain environmental management systems (‘EMS’). If the agency decides to continue to consider five years of compliance data, it should revise section 60.1(b) to not so limit EMS incentives. Finally, if the agency decides to continue to consider five years of compliance data, it should limit the maximum compliance period to five years, and delete the proposal to consider *at least* five years of data.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with this comment in part. The adopted five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions. The commission believes that a five-year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance. Additionally, with regard to components “rolling off” of a

person's compliance history, it is based on the date of the issuance, occurrence, or implementation of the components. Anything which occurred over five years prior to the preparation of a particular compliance history will no longer be counted. Furthermore, TWC, §5.753, requires the commission to "develop a uniform standard for evaluating compliance history," and responds that any "incentives" for development and maintenance of an EMS is outside the scope of this rulemaking. The commission has modified the language by deleting the "at least" phrase from the rule language, and has also clarified in the language that a person's compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not open-ended while providing a reasonable period of time for compliance history consideration.

ICE commented regarding proposed §60.1(b), stating that "a period of only three years may be sufficient to provide a good picture of a site's compliance history. Construction of compliance histories will be a monumental task for TNRCC staff, given the multiplicity of data sources, internal databases, types of regulated entities, and programs under which they are regulated. A shorter time period may lead TNRCC to build more histories on more entities in a given window - thereby delivering more productively on the Legislature's request. To make allowance for TNRCC to consider an extension over a three-year term...." ICE suggested the following revision to the proposed rule language.

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 under the commission's jurisdiction and owned or operated by the same person. The compliance history period includes the three years prior to the date the permit application is received by the executive director; the three-year period preceding the date of the inspection that initiates enforcement; for purposes of determining whether an announced inspection is appropriate, the three-year period preceding an inspection; or the three 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 or the date of the inspection that initiates enforcement, until the executive director makes its recommended decision on the application or enforcement action. The components are...

The commission disagrees with this comment in part. The adopted five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions. The commission believes that a five-year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance. However, the commission has modified the language by deleting the “at least” phrase from the rule language, and has also clarified in the language that a person’s compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five

years prior to the receipt date of an application. This change ensures that the rule is not open-ended while providing a reasonable period of time for compliance history consideration.

ACT commented regarding proposed §60.1(b), stating that it supports the proposed minimum five-year compliance period.

The commission appreciates the positive comment in support of the rule.

TPWA, TxSWANA, TCC, TCFA, and NTMWD commented regarding proposed §60.1(b). TPWA and TxSWANA stated that five years is too long of a time period, and that “turning around a facility with a poor compliance record should not take more than three years.” TPWA and TxSWANA both opined that problems identified in year one should be resolved by year three. Both commenters stated that an entity that takes an aggressive problem-solving approach to identified areas of noncompliance should “have that alacrity rewarded by being treated in accordance with its hard-fought new standard of compliance,” and further stated that the entity should not have to wait and suffer for an additional two years as a result of issues it pushed to overcome. In addition, TPWA and TxSWANA stated that “the use of compliance history is only a means of predicting whether entities are likely to be compliant in the future.” Both commenters stated “that the amount of compliance data recorded over three years is sufficient to assess an entity’s ongoing commitment to compliance. In the course of three years, there will occur at least three annual inspections at a landfill. (There will occur many more compliance history events if the multimedia distinction is left in the rule.) This number of inspections provides a sufficient record to assess whether an entity is effectively working toward full compliance.” Based on

these reasons, TWPW and TxSWANA stated that they believe “that the three-year compliance period would be sufficient for the purposes of this rule.” Similarly, TCC and TCFA stated that they question the need for a five-year history, and believe that three years would suffice. TCC and TCFA added, “Given the frequency of agency inspections, a three year period can provide the agency with adequate information on which to base compliance history. A three-year period exceeds the current procedure for compliance summary for” current permits, which they state is two years, with TCFA specifying permits of waste disposal activities. TCC and TCFA continued, “In addition, a longer five-year period can serve as a disincentive to potential business changes that could result in promoting a cleaner environment.” TCC added, “Three years would be a good middle ground among the various media requirements.” Both commenters stated that, should the agency continue to pursue a five-year history, TCC proposed that the agency should, at a minimum, remove ‘at least’ from the final rule.”

NTMWD stated “that five years is arguably too long of a period to consider when evaluating the compliance history of an owner, operator, or facility. The Commission has stated that one of the goals of this rule is to identify poor performers and to assist them with restructuring so as to get them out of the poor performer category. For many entities, compliance problems once identified will be corrected in a timely manner.” NTMWD added, “entities that take a proactive approach to correct identified compliance issues then continue to be penalized for what could be isolated compliance issues for a period of five years.” NTMWD stated that in permitting cases, even though those incidents have been resolved and the entity is currently operating an environmentally sound facility or business, a five-year period will penalize even compliant facilities for isolated incidents. NTMWD added that a “five year period will penalize even compliant facilities for isolated events,” and thus suggested a three-year period.

The commission disagrees in part with these comments. The adopted five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions. The commission believes that a five-year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance. However, the commission has modified the language by deleting the “at least” phrase from the rule language, and has also clarified in the language that a person’s compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not open-ended while providing a reasonable period of time for compliance history consideration. The commission disagrees that a five-year compliance history will serve as a disincentive to potential business changes that could result in promoting a cleaner environment, and responds that compliance histories will not be “static” over a five-year period. Although compliance history classification and use is outside the scope of this rulemaking and will be addressed in the next phase of compliance history rulemaking, the commission anticipates that compliance histories will be updated numerous times over a five-year period, providing ample opportunity to reflect improvement, or worsening, as applicable. The commission anticipates that this will provide incentive to regulated entities to act responsibly and timely in correcting problems and

deficiencies, and in taking “positive” steps to improve compliance. Such positives will be reflected in a compliance history. No changes have been made in response to this comment.

Regarding proposed §60.1(b), AECT commented that “AECT strongly disagrees with making the compliance history period ‘at least’ 5 years. First, three (3) years is an adequate period of time to provide a clear picture of a site’s compliance history.” AECT additionally commented that the inclusion of the words “at least” would result in too much uncertainty and subjectivity, and could lead to inconsistency. AECT commented that they recognize the need to extend the compliance history period to include the time period from the date the application for a permit or participation in an innovative program is filed or the date of the inspection that leads to enforcement, to the date the ED makes his recommendation on that application or enforcement action. AECT proposed a revised §60.1(b) to read as follows.

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 under the commission’s jurisdiction and owned or operated by the same person. The compliance history period includes the three years prior to the date the permit application is received by the executive director; the three-year period preceding the date of the inspection that initiates enforcement; for purposes of determining whether and announced inspection is appropriate, the three 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 or the date of the inspection that initiates enforcement until the executive director makes its recommended decision on the application or enforcement action. The components are...

The commission disagrees in part with this comment. The adopted five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions. The commission believes that a five-year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance. However, the commission has modified the language by deleting the “at least” phrase from the rule language, and has also clarified in the language that a person’s compliance history may be supplemented past the receipt date of an application in order to account for application processing time, or in other words, brought current. This would be the only circumstance for which the agency would generate a compliance history for longer than a five-year period, and under the rule the agency would not go backwards in time more than five years prior to the receipt date of an application. This change ensures that the rule is not open-ended while providing a reasonable period of time for compliance history consideration.

ExxonMobil Refining recommended, regarding proposed §60.1(b), “that the commission limit the compliance period to two years or to the last facility inspection. This will result in a manageable volume of data while providing sufficient information on which the commission can make its decisions.”

The commission disagrees in part with this comment. The adopted five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement

actions. The commission believes that a five-year period of time is both adequate and reasonable for consideration of compliance history because this time period is long enough to detect any overall pattern related to compliance. No change has been made in response to this comment.

§60.1(c), Components

Cantey & Hanger commented regarding proposed §60.1(b), adopted as §60.1(c), that "violations discovered through participation in innovative programs should not be counted towards a regulated entity's compliance history."

The commission responds that the definition of innovative programs under HB 2912 is broad and includes programs that require the use of permits or other authorizations as part of the innovative program. As such, the commission may conduct investigations to determine compliance with such authorizations. Noncompliance with a permit authorization from the commission can result in an NOV. The commission believes such violations should be included in compliance history, and the weight to be given to such violations will be addressed in the use phase of this rulemaking. Other types of innovative programs, such as those completed by the Small Business and Environmental Assistance Division of the commission, which is not associated with investigations or enforcement, and include compliance assistance site assistance visits for small businesses do not result in NOVs since the purpose of the visit is to assist the entity to come into compliance. The commission makes no change in response to this comment.

Cantey & Hanger commented regarding proposed §60.1(b), adopted as §60.1(c), that "there should be clarification within the Proposed Rule that upset maintenance notifications will not count towards a regulated entity's compliance history because they are not violations."

The commission responds that the statute requires that violations be included in compliance history. An upset or maintenance notification itself is not a violation unless the notice lacks information required by commission rules. Emissions which constitute a violation of commission rules, permits, or orders will be included in a person's compliance history. Emissions which do not constitute a violation of commission rules, permits, or orders will not be included in a person's compliance history. No change has been made in response to this comment.

Concerning proposed §60.1(b), adopted as §60.1(c), AECT and ICE stated that they agree "that, for multiple reasons, citizen complaints should not be a component of a site's compliance history" and further agree that NOV's "issued by EPA should not be a component of a site's compliance history."

The commission appreciates the positive comments in response to the proposed rule.

Jones Day commented, regarding proposed §60.1(b), adopted as §60.1(c), that "Out-of-state compliance history *on matters that would not be violations* under Texas or Federal environmental law should not be given any weight in Texas compliance history. This conclusion is consistent with the statute. In some other states, unusual, unique rules exist within Environmental, Health & Safety regulations; for example 1) a RCRA program that has additional requirements beyond the Federal

program and unlike Texas rules; 2) a new, innovative California rule with which industry, across the board, experiences a time lag in reaching full compliance; or 3) a local zoning rule that would be far outside the jurisdiction of the TNRCC in Texas. Other rules are embedded in out-of-state environmental regulations but are outside the jurisdiction of the TNRCC. The logic on page 17 of the proposed preamble regarding the decision not to include NOV's issued by the EPA applies equally to this point. In either the rule text or the preamble, the Commission should clarify that it will not exceed or expand the requirements of the statute on this point. To the extent the statute requires the agency to consider out-of-state compliance issues, those matters should be given reduced weight in determining a company's compliance history, due to the many uncertainties of such a program. The agency could add text to the preamble (perhaps at page 12), stating that Commission decisions regarding compliance history from other states will take into consideration whether the alleged out of state violation was also a violation of any federal or Texas law. Further, it should be clear that the Commission will encourage and use no less diligence and tools to prevent false out-of-state information from appearing in the compliance history of a Texas facility as it will for in-state information. Finally, the preamble should mention that the Commission will remove any false information that inadvertently is added."

The commission responds that TWC, §5.753(b)(3), requires that the components of compliance history must include, "to the extent readily available to the commission, enforcement orders, court judgments, and criminal convictions relating to *violations of environmental laws of other states.*" (Emphasis added.) As such, these components must remain. The statute does not limit those violations to those that would also be violation of Texas or Federal environmental laws. Additionally, the commission has added the word "final" prior to "enforcement orders" in the

adopted rule language. This is to ensure that draft settlement offers or otherwise unapproved items are not included in compliance histories. This inherently assumes that the person involved in one of these actions has been afforded the opportunity to refute the violations and assert due process rights. If, however, a person asserts that information included as a component of compliance history as prepared under these rules is erroneous, that person has the ability to provide documentation to that effect. If the agency agrees with that person's position, such information will be removed from that person's compliance history. No changes have been made in response to these comments.

ICE and AECT commented regarding proposed §60.1(b), adopted as §60.1(c), that they agree “that a site's compliance history should only include components that are related to the site and other sites that are owned or operated by the same person.” ICE continued, “However, the rule should be revised to make it clear that an entity's compliance record consists only of compliance matters regarding that particular entity, and not to that entity's parent or sister companies. The weighting scheme described by Ms. Ann McGinley of TNRCC on October 30th, of assigning no more than 25 percent of a compliance history ‘ranking’ to other sites the responsible person controls, appears acceptable to ICE. Of course, this particular matter will be addressed in rule-making under ‘Phase II’ of the proposed Chapter 60.”

The commission appreciates the positive comment in response to the rule. The commission has determined that the definition of “person” as provided for in existing 30 TAC §3.2(25) is both adequate and appropriate in relation to the compliance history rules. If the definition was

intended to include parent, sister, or daughter corporation, or any other related entities, it would expressly state this. The fact that it does not include such language, coupled with the reinforcement of this concept in this adoption preamble, is sufficient. Additionally, as stated by the commenter, the issue of addressing the “weighting” of any components will be included in the next phase of compliance history rulemaking, and is outside the scope of the current rulemaking. No changes have been made in response to these comments.

7-Eleven, TPCA, and ICE commented regarding proposed §60.1(b), adopted as §60.1(c). The commenters stated, “The first, unnumbered paragraph of {proposed} Section 60.1(b) limits the use of compliance history to information relating to the facility which is subject of the permit decision or enforcement action together with information for facilities owned by the specific person or entity which owns or operates the subject facility. This limitation correctly recognizes that it would be extremely difficult, if not impossible to fairly delineate when information from facilities that are not under the same direct ownership and management as the subject facility should be attributed to the subject facility.” 7-Eleven, TPCA, and ICE all stated that they strongly support “this limitation and would oppose any revision of the proposed rule to include in the definition of compliance history information from facilities that are not under the same director ownership and management as the subject facility.”

The commission appreciates the positive comments in support of the rule. However, to be clear in its intent, the commission emphasizes that it will base compliance history on the person applying for a permit or innovative program or under enforcement. The manager or operator is not specifically considered unless they, too, are an applicant.

Regarding proposed §60.1(b), adopted as §60.1(c), AECT stated that it agrees with the proposal preamble language that states that compliance history will only include components for the “entity filing the permit application, under enforcement, being inspected, or applying for participation in an innovative program, as defined by its legal name” and that “any parent, sister, or daughter corporation related to the legal entity would not be included {in the compliance history}.”

The commission appreciates the positive comment in response to the rule.

Regarding proposed §60.1(b), adopted as §60.1(c), TIP stated that it “provides that 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 under the commission’s jurisdiction and owned or operated by the same person.’ Sites are commonly owned by one legal entity and operated by a separate, related or unrelated legal entity. The proposed rules do not include a procedure for determining to which entity, the owner or the operator, the site’s compliance history will belong. If the TNRCC intends to attribute a facility’s compliance history to the owner, for example, in a permitting action involving the owner, and then attribute it to the operator, for example, in an enforcement action involving the operator, TIP is opposed to such ‘double-counting.’ The implementing legislation requires the TNRCC to address a ‘person’s compliance history.’ Including the same site in both the owner’s and operator’s compliance histories is inconsistent with legislative intent.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission responds that, for purposes of developing compliance histories, components would only include those attributed to the person filing the permit application, under enforcement, being investigated, or applying for participation in an innovative program, as defined by its legal name. In other words, only those compliance history components that had been previously taken by, or levied against, the applicant, respondent in an enforcement case, or the owner of the site to be investigated would be included in that person's compliance history. So if, for instance, an enforcement action was being initiated against the operator of a site, (i.e., the operator was the respondent in the action), in looking to that operator's compliance history, only those components attributed to the operator as the responsible party would be included in its compliance history. No change has been made to the rule as a result of this comment.

Fort Worth commented regarding proposed §60.1(b), adopted as §60.1(c), stating, "The wording in this paragraph appears to make a whole jurisdiction responsible for compliance with all facilities. It is recommended that the compliance history be specific to each facility, since facilities may be operated by separate divisions. For example, the wastewater treatment plant should not have a bad compliance history based on an air pollution violation at an airport, although both are owned and operated by the same city."

The commission disagrees with the suggestion that compliance histories be specific to each facility. The statutory language refers repeatedly to "a person's" compliance history. The commission recognizes that municipalities can "own" many different types of operations with varying compliance histories that are located at different sites. Since the statute further requires that the

commission consider the number and complexity of sites, Phase II of the compliance history rulemaking may address the commenter’s concerns in part, but this issue is outside the scope of this rulemaking. No changes have been made in response to this comment.

TCC and TCFA suggested that the commission “create a database or other registry that will allow industry to submit additional information for the compliance history. This type of information could include supplemental environmental projects, community awareness projects, participation with local community panels and other voluntary environmental projects.” TCC added, “TNRCC may not be aware of everything a company is doing that should be considered when looking at its compliance history. TNRCC could then decide what weight, if any, to give the information the company submits. If such an informal database is established, it would be appropriate for TNRCC to put the burden on the company to resubmit if anything in a prior representation changed (i.e. use of a community panel, etc.).” Additionally, in general, BP endorsed the comments submitted by TCC.

The commission disagrees with this comment. The commission does not agree that the examples of types of additional information suggested by the commenters are appropriate components. Supplemental environmental projects are actions performed as a way of offsetting some portion of an administrative penalty. As such, it is not an appropriate positive component of compliance history. Although community awareness projects and participation with local community panels have the potential for beneficial actions or activities, they do not have any direct bearing on a regulated entity’s environmental compliance, and as such are not appropriate compliance history components. Additionally, the concept of weighting any of the compliance history components is

outside the scope of this rulemaking, as it will be addressed in the second phase of compliance history rulemaking. No changes have been made in response to this comment.

Regarding proposed §60.1(b), adopted as §60.1(c), Jones Day stated, "The Commission should expand on the 'positive' factors that will be taken into account when determining compliance history. This will serve as an incentive to organizations to improve their environmental performance and practices. The additional factors that TNRCC should consider adding as 'positive' factors include: Investing or sharing resources to develop new technologies and paradigms to improve environmental performance, including working with the TNRCC or even competitors and sharing the privately funded work. Dedicating personnel and other professional resources to assist the agency with long term policy problems, legislative initiatives, enforceable commitments, and even active participation and leadership in local or state brownfield redevelopment programs. Engaging in 'mentoring' activities with suppliers or other organizations to improve environmental performance and practices. Providing public environmental protection or pollution prevention services or programs such as neighborhood solid or hazardous waste collection services, product recycling or 'take-back' programs, ride-sharing, and fare subsidies or other programs to decrease pollution associated with transportation. Designing, manufacturing, or subsidizing the sale or use of products or services that have a reduced 'environmental footprint' (e.g., products that use less energy or water, are easily recycled, use fewer toxic chemicals). Enrolling in TNRCC's VCP program. Participation in community information or outreach programs that involve the public in the environmental issues of the organization, including funding and conducting educational programs that teach neighborhoods, students, and organizations how to improve environmental performance. Active participation in Local Emergency Planning Commissions that help

protect communities from environmental risks. Initiating and implementing a substantial environmental, health and safety compliance employee reward program with real incentives for employees who find ways to improve facility performance. Purchasing and mandating use of effective professional environmental software to enhance environmental performance by front-line personnel responsible for environmental performance. Participating in SEPs. (When a facility voluntarily participates in a supplemental environmental project while settling an allegation by the TNRCC, such a choice has traditionally been noted in the back-up material as a positive factor. Increasing the use of SEPS has been a Commission priority for the past several years. However weighted, including SEP participation as a positive component of overall compliance history is a good policy and a good idea. A SEP focuses resources toward practical and often local environmental initiatives.) It is important that TNRCC place as much emphasis on a facility's positive environmental performance as it does on the traditional enforcement-driven issues. In the proposed draft, the listed 'positive' components for compliance history are stated too narrowly to encourage innovation or improved compliance performance.”

The commission responds that the wording of §60.1(c) in regard to positive aspects of compliance history is sufficiently broad to include activities directly related to a person's compliance and could include many of the examples cited above. The commission notes that the use of those terms in what is included in compliance history will be the subject of subsequent rulemaking on compliance history. The commission stresses that programs that will qualify as positive aspects of compliance history will have as part of their programs, positive and verifiable outcomes with regards to the environment and compliance with environmental law. The commission will create

criteria to determine whether a specific program counts under these positive aspects in subsequent actions on compliance history use. In response to the notation of supplemental environmental projects (SEPs) in the positive portion of compliance history, since SEPs are associated with a negative action by the company in as such as they have been assessed a penalty for a violation, it is not appropriate to include this as a “positive” component in compliance history. The commission makes no change in response to these comments.

EMCC commented regarding §60.1(b), adopted as §60.1(c), stating, "The rule language should be revised to make it clearer that each legal entity (person) will have their own compliance history in association with each site they own or operate, and that the action under review will only consider the compliance history of those persons directly involved in the proposed action. In the case of a different owner and operator, only the compliance histories of person(s) to whom the permit will be issued will be reviewed."

The commission does not agree that the language of the rule in phase I of the compliance history rulemaking needs to be modified with regard to the issues raised by the commenter. These issues will be addressed in the next phase of compliance history rulemaking concerning classification and use. Therefore, no changes have been made in response to this comment.

Birch & Becker commented regarding proposed §60.1(b), adopted as §60.1(c), stating that, “The rules do not address if or how compliance history events that occurred prior to February 1, 2002, will be used under the new program, although the rules imply that in the first few years of the program,

TNRCC will use pre-February 1, 2002 compliance data as necessary to build five years of compliance history. Effective September 1, 2002, compliance history will be considered on various agency decisions and actions. However, although the components of compliance history will apply to agency actions starting on February 1, 2002, under the proposed rules, compliance history shall cover at least a five-year period. Although pre-February 1, 2002, NOV's and TWC §7.070 orders are specifically excluded from consideration, the rules do not otherwise explain how pre-February 1, 2002, events will be used to establish five years of compliance history. Agreed orders and other compliance data negotiated under a prior regulatory scheme should not now be used for categorizing the compliance performance of entities under this new regulatory scheme. For example, in the past, an entity may have been the subject of an enforcement action concerning disputed allegations, but, in an effort to expeditiously resolve the dispute, the entity may have executed an agreed order with TNRCC. However, under the new compliance history scheme, the entity may have instead chosen to challenge the violation allegations to prevent tarnishing its compliance history record. Use of any pre-February 1, 2002, compliance data will raise constitutional retroactive law issues under the Texas Constitution, Art. I, § 16." The commenter further stated, "TNRCC should only use post-February 1, 2002, compliance data for decisions made under the new compliance history program after September 1, 2002. Since there will be a change in the use of compliance data and the consequences of certain compliance events, all regulated entities should be given adequate notice of the components of the new program."

The commission disagrees with this comment. First, the commission responds that, because the rules state that the compliance period shall cover a five-year period, and further that none of the

components other than NOVs and orders issued under TWC, §7.070 qualify a "start date" for when those components will be considered, it is implicit that compliance history events which constitute components occurring prior to February 1, 2002, will be included in a person's compliance history. In addition, the proposed rule does not violate the Texas Constitution prohibition against retroactive laws. The mere fact the proposed rule requires consideration of events that occurred prior to February 1, 2002, does not mean that the proposed rule is a constitutionally prohibited retroactive law. The retroactive law provision of the Texas Constitution operates only to prohibit the application of statutes which disturb or impair vested rights. The proposed rule does not impair any vested right of a regulated entity. The commission does not agree with the commenter's implication that regulated entities have not been given adequate notice of the components of the "new program," because all of the proposed "negative" components are currently utilized in compliance history determinations performed by the agency. Although the "positive" components are not currently considered in compliance history determinations, the commission responds that the inclusion of these components would not in any way raise concerns with constitutional retroactive law issues, because they are "positives." Thus, the proposed rule does not negatively alter the reasonable expectations of a regulated entity as to what will be considered in determining the entity's compliance history. The commission has made no changes in response to this comment.

TPWA and TxSWANA commented regarding proposed §60.1(b), adopted as §60.1(c). Both commenters strongly discouraged the use of the word 'multimedia' in §60.1(b) of the draft rule.

TPWA and TxSWANA both added that they predict "that considering compliance records across all

regulated media (i.e. solid waste, wastewater, and air) would affect cities to a much higher degree than private companies” because a city is more likely than a private entity to be involved in multiple media. They both stated that the commission should not adopt any rule that disproportionately disadvantages Texas cities in relation to private companies. Additionally, TPWA and TxSWANA stated that they believe that “although it might be a ‘city’ that is the permittee in regard to permits in multiple media (i.e. both a landfill and a wastewater treatment facility), the operational control of those media is usually very distinct. Both commenters posit that the “goals of this rule (identifying situations where there is poor compliance and working with those in control to rectify the situation) are not advanced by penalizing a city supervisor in one media for the acts of a city supervisor in another media when he had no control over those acts.” TPWA and TxSWANA both commented that “the consideration of multimedia data could lead to unintended consequences that are antithetical to the intent of this rule and its underlying legislation. To understand the possible consequences, consider the situation where a city has a terrible compliance record at its wastewater treatment plant and an exemplary record at its landfill. The landfill supervisor cannot influence or affect the operation of the wastewater treatment plant so the fact that the city’s wastewater treatment plant supervisor has incurred several notices of violation (NOVs) should not impact whether the city’s landfill supervisor is entitled to participate in an innovative landfill program. The other possible unintended result is that an ‘average’ ranking might result if the wastewater treatment plant’s compliance record is averaged with the landfill’s compliance record. Under these facts, the out-of-compliance wastewater treatment plant would be allowed to continue to operate out of compliance without suffering the consequences of a poor compliance record.”

NTMWD presented similar comments regarding proposed §60.1(b), adopted as §60.1(c). NTMWD stated that it respectfully requests that the commission remove the word “multimedia” from the proposed rule language, adding that the “consideration of a multimedia compliance history has direct effects on NTMWD and other large municipal governmental entities” because it will penalize large municipal governmental entities that operate multiple regulated facilities. “The compliance history at one facility will affect the permitting effort or enforcement penalty calculations at another facility. Entities that own multiple facilities face a greater possibility of having violations throughout those facilities. That is simply the nature of owning and operating more than one facility because there will be more opportunities for violations. Over time, even ‘good actors’ will be more likely to have violations if they operate multiple facilities. Compliance history should not be defined in such a way as to penalize entities that own and/or operate multiple facilities.” NTMWD stated that it owns and/or operates multiple wastewater treatment plants, two landfills, three transfer stations, and a water treatment facility in its service area. Further, NTMWD stated that it has taken over ownership and operation of several wastewater treatment plants due to its efforts to further the regionalization of wastewater treatment services in the area north of Dallas. NTMWD stated that “{m}any of these plants have not been well-operated prior to the District taking over daily operations, and thus, there is the very real possibility of enforcement actions being taken against the District while the District works, over a period of time, to bring these plants into compliance with Commission regulations. If multimedia compliance histories are considered by the Commission, NTMWD’s proactive approach to improving the operation of these facilities and furthering the Commission’s regionalization goals will negatively affect the District in other permitting activities, such as the permitting of a new regional landfill facility. Because of situations like this, the word ‘multimedia’ should be struck from” the proposed rule.”

Regarding proposed §60.1(b), adopted as §60.1(c), BRA stated that it “allows for unrelated facilities with unrelated compliance problems to be tied together for the purposes of compliance history.” BRA stated that it “is concerned that the proposed rule may be overly broad in its consideration of all media for compliance history purposes and that it may actually go further than the law directed in this area.”

The commission disagrees with these comments. First, many companies operating in Texas have multimedia concerns. The commission has determined that it is appropriate to perform a multimedia compliance history review based on the fact that the applicable statutory language repeatedly refers to the compliance history of a “person.” It does not say “for a person, by media.” This implies an “encompassing” compliance history. Further, the statute requires that components of compliance history include enforcement orders, court judgments, and criminal convictions for environmental violations within the state of Texas, as well as enforcement orders, court judgments, and criminal convictions for environmental violations in other states. Again, it does not say “orders, etc. concerning the media which is the subject of the permit application, enforcement action, investigation, etc.” What the commenter suggested would limit the compliance history determination, while the statute references “person” (as opposed to media), and states that all regulated sites, inside and outside the state of Texas, must be taken into account. It is possible and even likely that for a person owning multiple regulated sites, one or more sites may be regulated under one program or medium, while other sites are regulated under media. Thus, to include only one of a person’s media is in conflict with the purpose of developing a “comprehensive compliance history.” The commission is, however, limiting the compliance histories to only those components attributable to the entity filing the permit application, under

enforcement, being investigated, or applying for participation in an innovative program, as defined by its legal name; it will not include related entities such as parent, sister, or daughter corporations. The statute also requires that the commission consider the number and complexity of sites, which may address the commenter's concerns in part, but this issue is outside the scope of this rulemaking, and will be addressed in the next phase relating to compliance history classification and use. With regard to changes in ownership, it is the intention of the commission to implement the requirement of HB 2912 to develop a uniform standard for evaluating compliance history. The commission believes five years is both adequate and reasonable for considerations of compliance history because this time period is long enough to detect any overall pattern of related to compliance. The commission has determined that by looking at the entire five-year period for a site, even when a sale of a facility has occurred, an accurate compliance history picture will emerge. However, the commission believes it is necessary to allow some degree of flexibility for companies that purchase facilities, which is why the rule allows that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review. No changes have been made in response to these comments.

Regarding proposed §60.1(b), adopted as §60.1(c), Jones Day stated, "Clarify in the preamble how it is possible to build a positive compliance history when no prior compliance history currently appears in TNRCC records. In cases where no negative compliance history exists for a facility or company, that person should be able to build a positive compliance history through voluntary initiatives. At the TNRCC stakeholder meeting on August 6, 2001, TNRCC personnel stated that if no compliance history

existed in agency databases, then an inspection program might be required to give a facility its initial compliance history. Addressing this issue in some detail in the preamble of the definition section would prove helpful. The ability to build a positive compliance history before a TNRCC inspection would motivate facilities toward more voluntary improvements and activities. Practically speaking, inspecting every facility in the state so as to create a compliance history may prove unrealistic or burdensome to the point of detracting from other important agency programs."

The commission responds that this comment is outside the scope of this rulemaking. TWC, §5.754(d), requires that the “commission by rule shall establish methods of assessing the compliance history of regulated entities for which it does not have adequate compliance information. The methods *may* include requiring a compliance inspection to determine an entity’s eligibility for participation in a program that requires a high level of compliance.” (Emphasis added.) However, this issue, along with the other aspects of TWC, §5.754, will be addressed in phase II of the compliance history rulemaking, as required by HB 2912, §18.05(b), which states that the commission shall establish the standards for classification and use of compliance history not later than September 1, 2002. However, the commission anticipates that initially, companies will need to submit information on their positive compliance history components since the commission does not currently collect this information universally on all programs that may qualify as positives. Subsequently, this information will be collected during routine inspections of the regulated entity or again the entity could provide this information to the commission for inclusion in their compliance history as programs are adopted. The mechanism by which this

information could be provided to the commission will be determined in later commission actions regarding compliance history use. No changes have been made in response to this comment.

§60.1(c)(1)

Brown McCarroll, Vinson & Elkins, and Jones Day commented regarding proposed §60.1(b)(1), which is adopted as §60.1(c)(1). Brown McCarroll stated that it “believes that there are types of enforcement orders and consent decrees that, although they may relate to environmental laws, do not evidence culpability relating to compliance with environmental laws. For example, some consent decrees involve state and federal Superfund matters that have little if any bearing on compliance with environmental laws. Just because a person may be liable for remediation under some of these laws and enters into a consent decree to settle such liability, it does not mean that the person violated any environmental laws. In fact, in most situations, the potentially responsible party (‘PRP’) has violated no environmental laws but is agreeing to clean up the site or contribute to the cleanup to resolve potential liability associated with the site. In some situations, PRPs may seek an enforcement order to require the remediation activities they undertake in order to assure that they have the predicate by statute to file a contribution claim against other third party PRPs. ... Further, for those persons facing ‘arranger’ or ‘generator’ liability under state or federal Superfund, the nexus to compliance with environmental laws is even more attenuated, since such persons did not even own or operate the facility in question.” Brown McCarroll further stated that it “does not believe these types of orders or consent decrees should be considered negative components of a compliance history. At a minimum, we believe TNRCC should provide guidance that indicates such types of orders or consent decrees would be given much less

weight in agency decisionmaking, since they typically do not involve compliance with environmental laws. Alternatively, and more preferable in our opinion, that provision of the proposed rules should be amended to read as follows: (1) Any enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with an environmental law, regulation, permit, order, consent decree, or other requirement under the jurisdiction of the commission or the EPA, not including those orders, judgments, or decrees involving state or federal Superfund remediation liabilities.” Similarly, Vinson & Elkins stated that it agrees “with the Commission that the components of compliance history should not include citizen complaints, incidents where a facility must implement its contingency plan, and EPA NOVs. The Commission also should exclude from the components orders and consent decrees which a person enters into with EPA, TNRCC, or other states which involve remediation of a contaminated site under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Texas Superfund statute and other state equivalent statutes. These orders or consent decrees do not involve the violation of an environmental law or regulations, but often are the only mechanism available to enable a person to later recover costs for other persons responsible for the contamination. Making these documents components of compliance history will discourage entities from entering into voluntary consent decrees and undertaking clean up. This would unnecessarily prolong the process of securing necessary remediation activities for contaminated sites. We propose adding the following language to § 60.1(b)(1) and § 60.1(b)(3): ‘,except for orders or consent decrees entered into voluntarily to address the clean up of contamination at a site under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Texas Superfund statute or equivalent statutes from other states.’” Similarly, Jones Day commented, "We suggest a sentence in the preamble that applies a different treatment of

U.S. Superfund consent decrees from any other component in Texas compliance history. It is widely acknowledged that, in the unique world of federal Superfund, EPA consent decrees, especially those memorializing de minimus settlements, differ dramatically from the matters intended by the Texas Legislature to become part of TNRCC compliance history."

The commission appreciates the positive comment in support of the rule as it excludes complaints, incidents where a facility must implement its contingency plans, and EPA NOVs from the components of compliance history. The commission agrees that consent decrees and enforcement orders which are entered solely for the purpose of addressing remediation and do not involve noncompliance with environmental laws should be excluded from compliance history considerations. However, the commission has determined that the language in the rule already addresses this sufficiently. Specifically, with regard to adopted §60.1(c)(1), although this states in part, “relating to *compliance* with applicable legal requirements under the jurisdiction of the commission or the EPA,” (emphasis added), because this is considered one of the “negative” components, it is only intended to address violations of applicable legal requirements. This will be further addressed in the next phase of compliance history rulemaking concerning classification and use. Additionally, adopted §60.1(c)(3) specifically refers to violations, and as such is self-evident. No changes have been made in response to this comment.

TCFA, BP, BRA, and ATINGP commented regarding proposed §60.1(b)(1), which is adopted as §60.1(c)(1). BP and TCFA stated that they believe “it is imperative that consent decrees, especially those consent decrees entered into voluntarily in partnership with EPA should not be viewed as a

negative in the compliance history. At a minimum, TNRCC should set the trigger date on or after February 1, 2002 if all consent decrees are viewed equally.” BP added, “Our preference is for TNRCC to give positive weighting to voluntary decrees such as our recent BP/EPA/DOJ decree.” BP continued, stating that it “opposes any effort to penalize companies that negotiated consent decrees in good faith in an effort to meet EPA's emerging views of existing NSR rules. To view such an activity as a negative contributor to compliance would send the wrong signal to our industry's and the federal government's commitment for improved environmental performance in the refining sector. Therefore, TNRCC should give positive weighting to these decrees.” BRA stated that the proposed language “allows consent decrees to be considered as part of the compliance history.” Although BRA stated that it realizes that HB 2912 requires consent decrees to be included, it believes that is “bad public policy.” BRA added, “Including them could force regulated entities to increasingly focus on negotiations with regulators, which will surely result in longer timelines to fix environmental problems. It could also have the effect of causing permittees to avoid consent decrees altogether.” ATINGP stated that consent decrees, “with no admission of a violations should not be part of the compliance history. Otherwise, the TNRCC will be frustrating the legal process, discouraging rather {than} encouraging the informal resolution of disputes, and presuming a violation even though the decree or order negates that premise. In the alternative, a no admission consent decree should be assigned no weight in the TNRCC’s formula for determining the ranking system for poor, average, or high performers. The same criteria should be utilized for agreed orders and consent orders.”

The commission disagrees with these comments. Consent decrees imply violations even if they do not directly state this on their face. Consent decrees are by their nature entered into voluntarily,

as are the majority of enforcement orders issued by the commission. In fact, the enforcement orders issued under TWC, §7.070, contain language stating that neither party admits nor denies the allegations contained in the document. Court judgments may likewise be entered into voluntarily. The legislature has seen fit to require that “enforcement orders, court judgments, consent decrees, and criminal convictions” be included as components of compliance history. The commission has determined that, because of the nature of consent decrees, they should be treated similarly to enforcement orders, etc. Furthermore, the intent of the legislature was that the commission should not “wipe the slate clean” on any of the components of compliance history, and as such, no changes have been made in response to these comments.

Vinson & Elkins commented regarding proposed §60.1(b)(1), which is adopted as §60.1(c)(1), stating that the “proposed rule seems to expand the components mandated in H.B. 2912. The proposed rule substitutes the language ‘relating to compliance with an environmental law, regulation, permit, order, consent decree, or other requirement under the jurisdiction of commission or the EPA’ for the statutory language of ‘relating to compliance with applicable legal requirements under the jurisdiction of the commission or the United States Environmental Protection Agency.’ There is no explanation for the change in terminology of the proposed rule.” Vinson & Elkins recommended that the language of the paragraph be amended to read, “any enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government issued or entered for violation of a legal requirement under the jurisdiction of the commission or the EPA.”

The commission disagrees that the rule, as proposed, expands the components mandated in HB 2912. The language in proposed §60.1(b)(1) is taken from two sources in the TWC. First, TWC, §5.753(b)(1) states that the “components of compliance history must include 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.” (Emphasis added.)

Additionally, TWC, §5.752(1), defines the term “applicable legal requirement” as “an environmental law, regulation, permit, order, consent decree, or other requirement.” The commission simply replaced the term with its definition, as provided for in the statute. Therefore, the commission has not expanded the components mandated. However, in order to avoid any confusion, the definition of “applicable legal requirement,” instead of being contained within the first sentence of the text, has been separated out for clarity; the commission has modified the language in adopted §60.1(c)(1) to read: “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 EPA.

‘Applicable legal requirement’ means an environmental law, regulation, permit, order, consent decree, or other requirement.” The word “final” has been added to reflect that this component will not include draft or proposed enforcement orders, court judgments, or consent decrees.

TML commented regarding proposed §60.1(b)(1), (adopted as §60.1(c)(1)), stating that in the proposal preamble, the commission suggests that EPA NOVs “not be included in Chapter 60 because TNRCC does not have the opportunity to evaluate the merit of such notices of violation. However, {proposed}

§60.1(b)(1) states that components of compliance history includes ‘any enforcement orders, court judgments, consent decrees, and criminal convictions of this state and the federal government relating to compliance with an environmental law, regulation, permit, order, consent decree, or other requirement under the jurisdiction of the commission or the EPA.’ TML believes that the language ‘relating to compliance’ and ‘or other requirement’ may be interpreted to include EPA NOV’s. TML suggests substituting ‘establishing noncompliance’ in lieu of ‘relating to compliance’ and deleting ‘or other requirement.’ Alternatively or in addition, the phrase ‘provided that the commission has the opportunity to evaluate the merit thereof’ at the end of subsection (b)(1).”

The commission disagrees with this comment. The language in adopted §60.1(c)(1) is taken from two sources in the TWC. First, TWC, §5.753(b)(1), states that the “components of compliance history must include 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.” (Emphasis added.) Additionally, TWC, §5.752(1), defines the term “applicable legal requirement” as “an environmental law, regulation, permit, order, consent decree, or other requirement.” The commission simply replaced the term with its definition, as provided for in the statute. The commission disagrees that “relating to compliance” and “or other requirement” can be interpreted to include EPA NOV’s, especially when not read in context, and taken in consideration with other parts of the rule. First, the list of items required by statute to be included, (i.e., enforcement orders, court judgments, consent decrees, and criminal convictions) makes no mention of notices of violation. Second, notices of violation are addressed

separately in adopted §60.1(c)(7). The commission further disagrees that it is necessary the change “relating to compliance” to “establishing noncompliance” or to delete “or other requirement” because the proposed language mirrors the statute, and because the word “final” has been added in front of “enforcement orders” in both adopted §60.1(c)(1) and (3) to reflect that this component will not include draft or proposed enforcement orders or court judgments. The commission disagrees with the suggestion to add “provided that the commission has the opportunity to evaluate the merit thereof” at the end of this paragraph. The statutory language does not require the determination of merit for this particular component. Additionally, respondents in enforcement proceedings are afforded due process rights which they are entitled to take advantage of. If such an action is considered “final,” the merit of the action has been determined, as least in the eyes of the commission. No other changes have been made in response to this comment.

ATINGP commented regarding proposed §60.1(b)(1), which is adopted as §60.1(c)(1). ATINGP recommended that “this subsection be amended to insert the language ‘except for those determined administratively or judicially to be without merit’ following the clause ‘any enforcement orders.’ The TNRCC has recommended that NOV’s that are ‘administratively determined to be without merit’ are not to be included in compliance history. To maintain consistency with that provision,” ATINGP recommended that “the same standard be applicable to enforcement orders. A due process appeals process should also be established for determining the merit of these orders, as is more fully described in our comments” regarding proposed §60.1(b)(7).

The commission disagrees with this comment. First, the language concerning NOV's determined to be without merit being excluded from compliance histories is taken directly from TWC, §5.753(d), which stated in part, "A notice of violation administratively determined to be without merit shall not be included in a compliance history." Thus, it is more than a "recommendation," it is required by statute. Further, it is not necessary to "create" a due process appeals process for enforcement orders, as one already exists at 30 TAC Chapter 80. And finally, the commission notes that it has added the word "final" in front of "enforcement orders" in adopted §60.1(c)(1) and (3) to reflect that this component will not include draft or proposed enforcement orders or court judgments.

7-Eleven, TPCA, and ICE commented regarding proposed §60.1(b)(1) and (3), which is adopted as §60.1(c)(1) and (3). 7-Eleven, TPCA, and ICE commented that these two paragraphs "include the term 'enforcement orders' in the definition of compliance history. The term 'enforcement orders' is grouped together with judicial and criminal convictions. As currently proposed, this language would include in compliance history various categories of agency orders which make findings that are preliminary and subject to challenge by the subject facility or person. As recognized by the treatment of Notices of Violation in the proposed rule, Section 60.1(b)(7), it is inappropriate to categorically include in compliance history all agency findings until such time as the agency order is final, either by agreement of the parties, by failure to contest the order by the subject person, or after findings are made in a contested case hearing. It is recommended that the word 'final' be inserted before the words 'enforcement orders' in Sections 60.1(b)(1) and (3). Alternatively, subparagraphs (1) and (3) should be

revised to include language similar to Subparagraph (7) which excludes from compliance history those enforcement orders which have been successfully challenged by the subject person.”

The commission agrees with this comment, and has added the word “final” in front of “enforcement orders” in adopted §60.1(c)(1) and (3) to reflect that this component will not include draft or proposed enforcement orders or court judgments.

7-Eleven and TPCA commented regarding proposed §60.1(b)(1) and (3), which is adopted as §60.1(c)(1) and (3). 7-Eleven and TPCA commented that these two paragraphs “include ‘enforcement orders’ in compliance history but exclude certain ‘notices of violation.’ No practical definition is provided to distinguish ‘enforcement orders’ from ‘notices of violation.’ Without further definition, state actions that are merely NOV, and do not rise to the level of formal enforcement orders will be included in compliance history. As recognized by the TNRCC staff during stakeholder meetings, it is not possible to review and evaluate the underlying merits of other-state actions. Administrative efficiency and fairness dictate that where precise information is not available, TNRCC should use an objective, ‘bright line’ standard to define what is included in compliance history. To ensure that the compliance history only reflects the other-state actions which are a reliable reflection of the compliance history of the persons, i.e. actions taken after significant agency review,” 7-Eleven and TPCA recommended “that the term ‘enforcement orders’ be defined to only include actions which: (i) include a significant penalty assessment; (ii) make an explicit factual finding that a violation of environmental laws has occurred and ... have been resolved with finality.”

The commission responds that the statute requires at TWC, §5.753(d), that the set of compliance history components shall include NOV's. Within the adopted language of §60.1(c)(7), the word "an" was changed to "state" as it precedes "environmental law, regulation, permit, order, consent decree, or other requirement" to limit the use of NOV's to those regarding violation of Texas requirements. Additionally, the commission has added the word "final" in front of "enforcement orders" in both adopted §60.1(c)(1) and (3) to reflect that this component will not include draft or proposed enforcement orders or court judgments. The commission disagrees with the suggestion that out-of-state enforcement orders only be counted towards compliance history if they "include a significant penalty assessment." The inclusion (or not) of an administrative penalty has no bearing on the validity of the violations included, and further, the commenters do not suggest what constitutes "significant." Certainly, what is significant to one respondent may not be significant to another. Therefore, no change has been made in response to this comment. Additionally, the commission has no control over whether enforcement orders issued in other states contain an "explicit factual finding that a violation of environmental laws has occurred." It is certainly within the realm of possibility that other states have provisions similar to those in TWC, §7.070, allowing that state to issue orders without findings of fact and conclusions of law. No change has been made in response to this comment.

TCFA commented regarding proposed §60.1(b)(1) and (3), adopted as §60.1(c)(1) and (3). TCFA proposed to "exclude enforcement orders, consent decrees, and violations of laws in other states that occurred before February 1, 2002," from these compliance history components.

The commission disagrees with this recommendation, as the legislative intent was for the commission not to “wipe the slate clean” and only count as components of compliance history those things which occur on or after the effective date of these rules. Rather, the commission is to implement this rule and *continue*, as it currently does, to look backwards for compliance history components. Therefore, no change has been made in response to this comment.

TCC commented regarding proposed §60.1(b)(1) and (3), adopted as §60.1(c)(1) and (3). TCC stated, “The use of compliance history is undergoing a significant change with this and subsequent rulemaking. Thus, prior agreements with the agency should be excluded from the compliance history. Enforcement orders and consent decrees issued prior to this proposed rulemaking did not have the potential to be used for compliance history with such a significant impact as will be determined in the phase 2 of this rulemaking. Even if they were used, the significance was not known at the time the results were negotiated. And, violations of laws of other states have not been previously included in Texas compliance history. Therefore, TCC proposes to exclude enforcement orders, consent decrees, and violations of laws in other states that occurred before February 1, 2002 from the compliance history in Sections 60.1(b)(1) and (b)(3). That way, companies are on notice that such matters will be a part of compliance history in Texas and may lead to categorizing the company for regulatory purposes. It is patently unfair to go back and increase the significance of events after they have occurred.”

Additionally, in general, BP endorsed the comments submitted by TCC.

The commission disagrees with this comment. The legislative intent was for the commission not to “wipe the slate clean” and only count as components of compliance history those things which

occur on or after the effective date of these rules. Rather, the commission is to implement this rule and *continue*, as it currently does, to look backwards for compliance history components. All of the components of compliance history in adopted §60.1(c)(1) and (7) are currently utilized in the agency in developing compliance histories. Additionally, compliance histories currently generated for some air permits do include information on environmental violations outside the state of Texas. No change has been made in response to this comment.

§60.1(c)(2)

Representatives Puente, Burnam, Maxey, and McClendon commented regarding proposed §60.1(b)(2), (adopted as §60.1(c)(2)). All four representatives stated that the proposed rule would limit consideration of administrative penalty orders issued under TWC, §7.070 to those issued after February 1, 2002. Representative Puente stated that TWC, §7.070, provides that orders issued under this section of the TWC are not part of the entities' compliance history; however, HB 2912 expressly requires such orders to be included in compliance history, "notwithstanding" other provisions of the TWC.

Representative McClendon added that "orders issued under Section 7.070 are referred to as 'findings' orders. Section 7.070 provides that such orders are not part of an entities' compliance history.

However, HB 2912 expressly requires such orders to be included in compliance history, 'notwithstanding' other provisions of the Water Code."

The commission agrees that TWC, §5.753(b)(2), states that "notwithstanding any other provision of this code, orders issued under Section 7.070" must be included in the components of compliance history. However, the statute does not state "notwithstanding any provisions contained within

orders issued under §7.070.” Because of this, the commission has determined that the orders issued under TWC, §7.070 prior to February 1, 2002, cannot be included in a person's compliance history because the language included in these orders precludes this. Specifically, TWC, §7.070(1) - (3) states, “An agreed administrative order *may* include a reservation that: (1) the order is not an admission of a violation of a statute within the commission’s jurisdiction or of a rule adopted or an order or a permit issued under such a statute; (2) the occurrence of a violation is in dispute; *or* (3) the order is not intended to become a part of a party’s or a facility’s compliance history.” (Emphasis added.) In September of 1995, when the commission began to use orders crafted under the provisions of TWC, §7.070, (generally referred to as “1660 orders”), language was included stating that the occurrence of any violation is in dispute and the entry of the agreed order shall not constitute an admission by the respondent of any violation alleged in the order, nor of any statute or rule, and further that the order is not intended to become a part of the respondent's compliance history. The commission does not currently consider 1660 orders as a component of compliance history because of the language included and the associated understanding between the parties that they will not be considered for purposes of compliance history. Respondents in enforcement matters may have, at least in part, made their decision to settle rather than pursue an administrative hearing based on this language. In response to the provision in TWC, §5.753(b)(2), the commission has modified the language in 1660 orders being offered to respondents for settlement of applicable enforcement matters to state that if the order becomes effective prior to February 1, 2002, the order is not intended to become a part of the respondent's compliance history. The language, as noted previously in this preamble, has been modified to state that the order will become a part of the respondent's compliance history if it is approved by

the commission on or after February 1, 2002. No change has been made in response to this comment.

The commission would note that it also utilizes other orders not crafted under TWC, §7.070, generally referred to as "findings orders." These orders contain findings of fact and conclusions of law, and do not contain the provision stating that they will not become a part of the respondent's compliance history. Findings orders are used in some enforcement matters, based on specific criteria, and these are currently considered as a component of compliance history, and would continue to be included, even those issued prior to February 1, 2002, under the proposed rule. Further, the commission would point out that the verbiage in TWC, §7.070, does not state that NOVs which are the basis for orders issued under TWC, §7.070, shall not be considered in a person's compliance history, and neither does the language included in those orders; the commission currently considers, and will continue to consider those NOVs as components of compliance history, and as such, the violations contained in those orders will not be "lost" in compliance history considerations.

TCONR and ACT both commented regarding proposed §60.1(b)(2), (adopted as §60.1(c)(2)). TCONR stated that the "agency created exclusion - for administrative penalty orders issued under Water Code § 7.070 prior to February 1, 2002, ... violates the language and intent of the statute and should be withdrawn." TCONR asserted that HB 2912 did not exclude these orders, and stated that it believes the statutory requirement that the commission establish a uniform and effective compliance history program reflects an intent to include these orders notwithstanding the provisions of TWC, §7.070. ACT stated

that the proposed rules would “include only those §7.070 orders issued after February 1, 2002. ACT believes the statute is unambiguous: these orders are to be included in compliance history notwithstanding any other statutory provision... While it may lead to an unexpected result for those who thought 7.070 orders would not be a part of their compliance history, that is not sufficient basis for ignoring a clear statutory directive.”

The commission agrees that TWC, §5.753(b)(2), states that "notwithstanding any other provision of this code, orders issued under Section 7.070" must be included in the components of compliance history. However, the statute does not state “notwithstanding any provisions contained within orders issued under §7.070.” Because of this, the commission has determined that the orders issued under TWC, §7.070, prior to February 1, 2002, should not be included in a person's compliance history because the language included in these orders precludes this. Specifically, TWC, §7.070(1) - (3) states, “An agreed administrative order *may* include a reservation that: (1) the order is not an admission of a violation of a statute within the commission’s jurisdiction or of a rule adopted or an order or a permit issued under such a statute; (2) the occurrence of a violation is in dispute; *or* (3) the order is not intended to become a part of a party’s or a facility’s compliance history.” (emphasis added). In September of 1995, when the commission began to use orders crafted under the provisions of TWC, §7.070, (generally referred to as “1660 orders”), language was included stating that the occurrence of any violation is in dispute and the entry of the agreed order shall not constitute an admission by the respondent of any violation alleged in the order, nor of any statute or rule, and further that the order is not intended to become a part of the respondent's compliance history. The commission does not currently consider 1660 orders as

a component of compliance history because of the language included and the associated understanding between the parties that they will not be considered for purposes of compliance history. Respondents in enforcement matters may have, at least in part, made their decision to settle rather than pursue an administrative hearing based on this language. In response to the provision in TWC, §5.753(b)(2), the commission has modified the language in 1660 orders being offered to respondents for settlement of applicable enforcement matters to state that if the order is adopted prior to February 1, 2002, the order is not intended to become a part of the respondent's compliance history. The language, as noted previously in this preamble, has been modified to state that the order will become a part of the respondent's compliance history if it is approved by the commission on or after February 1, 2002. No change to the rule has been made in response to this comment.

The commission would note that it also utilizes other orders not crafted under TWC, §7.070, generally referred to as "findings orders." These orders contain findings of fact and conclusions of law, and do not contain the provision stating that they will not become a part of the respondent's compliance history. Findings orders are used in some enforcement matters, based on specific criteria, and these are currently considered as a component of compliance history, and would continue to be included, even those adopted prior to February 1, 2002, under the proposed rule. Further, the commission would point out that the verbiage in TWC, §7.070, does not state that NOVs which are the basis for orders issued under TWC, §7.070, shall not be considered in a person's compliance history, and neither does the language included in those orders; the commission currently considers, and will continue to consider those NOVs as components of

compliance history, and as such, the violations contained in those orders will not be “lost” in compliance history considerations.

BRA commented regarding proposed §60.1(b)(2), (adopted as §60.1(c)(2)), stating that while it realizes that orders issued under TWC, §7.070 are required by new TWC, Chapter 5, Subchapter Q to be included as components of compliance history, “the record should note that this overrides the provision in Section 7.070 that specifically states that such orders will not become part of the party’s compliance history.”

The commission responds that the language in TWC, §5.753(b)(2), and as included in the rule, speaks for itself. No change has been made in response to this comment.

Regarding proposed §60.1(b), (adopted as §60.1(c)(2)), TMRA stated that “Section 18.05 of HB 2912 does not clearly define when the beginning of the compliance history evaluation period should begin. Although it could be argued that §18.05(b) provides a basis for starting the evaluation period on September 1, 2002, TMRA recognizes that §18.05(a) could be interpreted as setting that date at February 1, 2002.” TMRA went on to say that “1660 Agreed orders issued before February of 2002 should not be included in the five-year evaluation for the following reasons: As TNRCC has pointed out in the preamble to the proposed rule, for at least the last five years, agreed orders issued pursuant to Water Code §7.070 without findings of fact and conclusions of law (a.k.a. ‘1660 Orders’) have included the phrase ‘this agreed order is not intended to become a part of the respondent’s compliance history.’ Indeed, TNRCC Enforcement and Legal staff have emphasized this provision in their form

1660 Orders in order to persuade respondents to settle who would have otherwise been prepared to challenge TNRCC's allegations in a contested case proceeding. TMRA therefore supports proposed §60.1(b)(2) as it excludes from consideration 1660 Orders issued before the above-referenced February 1, 2002 effective date and that were negotiated on the assumption that they would not be considered as part of the responding parties' compliance histories."

The commission appreciates the positive comment in support of the rule.

NTMWD stated that it supports proposed §60.1(b)(2), (adopted as §60.1(c)(2)), in that it excludes 1660 orders issued prior to February 1, 2002. NTMWD further stated that it bases this support on the language included in the orders, adding, "In fact, 1660 Agreed Orders have been acceptable to respondents who might otherwise have been prepared to challenge Commission allegations" due to the existence "of this provision that the Order would not become a part of respondent's compliance history."

The commission appreciates the positive comment in support of the rule.

ATINGP commented regarding proposed §60.1(b)(2), (adopted as §60.1(c)(2)), stating, "This provision should be revised to provide that a 1660 order is not a part of an entity's compliance history unless it is the result of an enforcement action that was commenced after February 1, 2002. Otherwise, enforcement actions that are on-going today will be caught in mid-stream with new rules applying to them. Through no fault of their own, on-going enforcement actions cannot be finalized in most cases

before February 1, 2002 due to the process of public notice and the Commission's agency posting timelines."

The commission disagrees with this comment. House Bill 2912 was enacted in May of 2001, and the imminence of this requirement has been known. At the time the language in the text of the commission's 1660 order was changed to reflect that 1660 orders adopted on or after February 1, 2002, would be included in a person's compliance history, there was ample time for a respondent to settle the case in time to ensure it could be adopted prior to February 1, 2002. In fact, the agency has made efforts to accommodate as many respondents as possible with regard to this issue. No change has been made in response to this comment.

Regarding proposed §60.1(b)(2), (adopted as §60.1(c)(2)), TIP stated, with regard to the proposed language stating that 1660 orders issued on or after February 1, 2002 will become a component of compliance history, "This requirement ignores the reality of the agreed order negotiation process and will inevitably result in many orders being included as components of compliance history resulting from violations that allegedly occurred long before February 1, 2002. As a result, the TNRCC should modify this requirement to include such orders that result from violations that allegedly occur on or after February 1, 2002." TIP further stated, "More importantly, however, proposed section 60.1(b) provides that 'the components of compliance history as specified in this chapter shall apply to an action taken by the agency on or after February 1, 2002.' Although this language is not entirely clear, when read in the context of section 60.1(b)(2), it appears that the agency intends to include in compliance history, compliance-related information resulting from events that occurred prior to

February 1, 2002. When the proposed five-year compliance period is considered, compliance-related information from as far back as February 1997 could be included in compliance histories under new rules.” TIP added, “At the time various agreements were entered into with the TNRCC, including, but not limited to, enforcement orders and consent decrees, companies could not have known that their decision would have such a significant impact on future agency actions. Moreover, court judgments and criminal convictions frequently involve settlement or plea decisions that may have been entered into on different terms had the effect of the instant rules been known at the time. As a result, basic fairness and due process require that the agency only apply the new rules to events that allegedly take place after February 1, 2002. This ‘clean slate’ approach is supported by the underlying legislation. Section 18.05 of HB 2912 only requires the TNRCC to establish the components of compliance history prior to February 1, 2002. It does not support the agency’s attempt to apply new rules to events that allegedly occurred as long ago as February 1997. To the extent the rules provide for such retroactive application, the TNRCC should limit applicability to events that allegedly occur after February 1, 2002. If the agency does not intend the current proposal to apply retroactively, it should revise the proposed language to more clearly reflect timing requirements, and include a discussion of timing in the preamble to the final rule that clarifies such non-retroactive intent.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with these comments. First, in response to the comment regarding this requirement “ignoring the reality of the agreed order negotiation process” and “inevitably resulting in many orders being included as components of compliance history resulting from violations that allegedly occurred long before February 1, 2002, the commission responds that HB

2912 was enacted in May of 2001, and the imminence of this requirement has been known. The commission does not agree that it should modify this requirement to include such orders that result from violations that allegedly occur on or after February 1, 2002. With regard to the comments concerning the uncertainty of the meaning of the first sentence in proposed §60.1(b)(2), now found at adopted §60.1(a)(6), the commission responds that this language was taken from HB 2912, §18.05(i), which states, "The changes made by this Act in the definition of compliance history apply to an action taken by the Texas Natural Resource Conservation Commission on or after February 1, 2002. An action taken by the Texas Natural Resource Conservation Commission before February 1, 2002, is governed by the law in effect on the date the action is taken, and the former law is continued in effect for that purpose." The commission recognizes that the proposed language has proven to be confusing, particularly with regard to the use of the term "an action taken by the agency." The "action" does not refer to the "actions" which constitute the components of compliance history included in this subsection in paragraphs (1) - (13); rather, it refers to the "actions" taken by the agency which require the development and consideration of a compliance history as part of the decision-making process, as specified in subsection (a) of this section. The commission did not intend to imply that it would not look back to components of compliance history that occurred during the five years prior to February 1, 2002, as it in fact does intend to utilize components which occurred during the five years prior, except as specified for NOV's and for orders issued under TWC, §7.070. As such, the commission has modified the language to read, "Beginning February 1, 2002, the executive director shall develop compliance histories with the components specified in this chapter." Additionally, the sentence has been moved from proposed §60.1(b) to adopted §60.1(a)(6) in order to put it in

chronological order along with the classification and use effective date of the next phase of rulemaking, and to move it from the subsection on components to the subsection on applicability for better organization and clarity. Further, the legislative intent was not for a “clean slate” approach, as stated in comments provided by Representative Bosse which can be seen in this preamble in the response to comments concerning adopted §60.1(c)(7), which was proposed as §60.1(b)(7). In fact, the legislative intent is for compliance history to include components which occurred prior to the implementation of this rule, and further, since the rule requires a five-year compliance period, then components which occurred as far back as 1997 will be included. No changes have been made in response to these comments.

§60.1(c)(3)

TIP commented regarding proposed §60.1(b)(3), (adopted as §60.1(c)(3)). TIP commented that the EPA’s Integrated Compliance Information System, and its retrieval component, the Online Targeting Information System (OTIS) can only be accessed by state regulatory agencies. TIP stated that since regulated entities have no way of verifying the accuracy of this information, the OTIS system should not be used. TIP commented that in the alternative, industry should be given access to information from any source used to review it for accuracy, and given the opportunity to correct any errors discovered. Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with this comment. The commission notes that while the OTIS database may only be accessible to state regulatory agencies, the compliance history data for

regulated entities will be made available to the public. The commission encourages regulated entities to verify the accuracy of their compliance history information and use this opportunity to correct any errors discovered. No change has been made in response to this comment.

BP commented regarding proposed §60.1(b)(3), (adopted as §60.1(c)(3)). BP stated, "In the preamble, TNRCC indicates the EPA Integrated Compliance Information System and its retrieval component, Online Tracking Information System, will be used to retrieve enforcement information to identify violations of environmental laws in other states. Any database utilized by TNRCC relating to compliance history for companies in other states must be readily available to the regulated party, as well as the TNRCC. In specific, the regulated party should have not only the opportunity to review the information but also the opportunity to make any necessary corrections to the database. Therefore, we suggest that TNRCC add language in §60.1(b)(3) as follows: 'to the extent readily available *to the regulated entity*, the executive director...'"

The commission does not agree with this comment. First, TWC, §5.753(b)(3), states "to the extent readily available to the commission." Additionally, the commission has no control over whether information maintained by other agencies is readily available to the regulated entity. However, the commission presumes that a regulated entity will maintain its own records pertaining to actions taken against it by environmental regulatory agencies, and further presumes that such information is also available to the regulated entity through open records and/or public information requirements for governmental bodies similar to those required in the State of Texas. Additionally, the commission responds that it is willing to consider new, updated, or corrected

information in its decision making. If the regulated entity determines after a compliance history is compiled that the information obtained through the EPA data system is incorrect, the regulated entity can supply correct information. No change has been made in response to this comment.

TCONR commented regarding proposed §60.1(b)(3), (adopted as §60.1(c)(3)). TCONR commented, "In the preamble to the proposed rule, the agency explains that it intends to rely entirely on the EPA Integrated Compliance Information System (ICIS) and the Online Tracking Information System (OTIS) to obtain federal and other state compliance history information. We are concerned about the agency's reliance solely on what may be outdated, incomplete or otherwise inadequate information concerning an entity's compliance in other jurisdictions. The final rule should include provisions requiring regulated entities to supply the TNRCC with the relevant enforcement orders, court judgments and criminal convictions from other jurisdiction. The TNRCC rule should also allow the agency to accept verifiable information from third parties about final actions taken for violations of environmental laws in other jurisdictions."

The commission disagrees with this comment. First, TWC, §5.753(b)(3), limits the inclusion of these as components of compliance history "to the extent readily available...." The commission notes that the compliance history data for regulated entities will be made available to the public. The commission encourages regulated entities to verify the accuracy of their compliance history information and use this opportunity to correct any errors discovered. No change has been made in response to this comment. Additionally, the commission will accept additional information from a third party in a hearing situation.

TIP commented regarding proposed §60.1(b)(3), (adopted as §60.1(c)(3)), stating that it would require the TNRCC, to the extent readily available, to include enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states as a component of compliance history. TIP acknowledged that this requirement is based on new TWC, §5.753, but stated that the current proposed rule language is not sufficient to prevent inaccurate, erroneous information originating from other jurisdictions from becoming a part of an entities compliance history. TIP suggested that out-of-state information should be given little weight relative to in-state information. Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with this comment. The commission notes that the compliance history data for regulated entities will be made available to the public. The commission encourages regulated entities to verify the accuracy of their compliance history information and use this opportunity to correct any errors discovered. Furthermore, the issue of “weighting” the components of compliance history is outside the scope of this rulemaking, and will be addressed in the next phase concerning the classification and use of compliance history. No change has been made in response to this comment.

ACT, AECT, ICE, and ExxonMobil Refining commented regarding proposed §60.1(b)(3), (adopted as §60.1(c)(3)). ACT commented that the rule proposes to rely solely on the information on the ICIS and OTIS systems for federal and other states’ compliance history information. ACT stated that it also provides that decisions made with data from these sources are not “voided” by the subsequent discovery of enforcement orders, judgments, or other information not in the database. ACT commented that they

are deeply concerned that these databases may be out-of-date or otherwise inadequately maintained by other states and thus may lack the full information on compliance history of regulated entities with operations in other states. ACT commented that this section must be amended to: “(1) require the regulated entity whose compliance history is under review to provide the TNRCC all enforcement orders, court judgments and criminal convictions relating to violations of environmental laws of other states; (2) provide that TNRCC will accept verifiable information from third parties regarding enforcement orders, court judgments or criminal convictions relating to violations of environmental laws of other states, Texas local governments, and other Texas state agencies when reviewing an entity’s compliance history in undertaking an action subject to this chapter.” ACT further stated that to exclude this information would be arbitrary and capricious. Similarly, AECT and ICE commented that they have concerns that a site’s compliance history has the potential to be inaccurate because the sources of information that comprise such compliance history may be inaccurate and/or mistakes may be made in the compilation of the information that comprises the site’s compliance history. One source of compliance history that AECT and ICE both stated they understand “has questionable accuracy is the EPA Integrated Compliance Information System and its retrieval component, Online Tracking Information System (“OTIS”),” which the TNRCC states is what it intends to use as the source of information regarding enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states. To ensure that the compliance history for a site is accurate, AECT and ICE both suggested “that the rules and the associated preamble language provide that the person who owns or operates a site” be provided with an opportunity to review and, if necessary suggest corrections to “the compliance history the TNRCC has compiled” for the site before it uses such compliance history in any way or has made it available to the public. ExxonMobil stated

that it is “concerned with the commission use of a federal data-base to track enforcement orders, court judgments, consent decrees etc. to which permit applicants are denied access to the information contained. It is imperative that all information on which a facility/company’s compliance history will be judged must be available to the company.”

The commission appreciates the concern raised by the commenters. The commission responds as ISIS and OTIS are the only available comprehensive data system, the commission believes that it is the appropriate source for compliance information. A regulated entity currently has, and will continue to have, the ability to submit (additional) information for consideration on behalf of a claim that information included in its compliance history is inaccurate and/or erroneous. A regulated entity is free, and in fact encouraged, to provide information for consideration to correct inaccuracies at any time. With regard to compliance histories being made “public,” the commission responds that they are subject to the Public Information Act. However, the information held by other states as well as the EPA is not under the commission’s control with regard to its availability to the public, up until such time as the commission has such information in its possession, nor is the commission responsible for or able to correct such information as it resides under its area of jurisdiction. The commission responds that it will utilize information obtained from other jurisdictions and that it is a regulated person’s responsibility to ensure that any erroneous information is corrected by the entity with jurisdiction. With regard to the comment stating that the regulated community should be allowed constant access to the system for review of all aspects of compliance history, the commission responds that above and beyond the fact that it must adhere to the requirements of the Public Information Act, TWC, §5.1733,

requires electronic posting of information. Specifically, it states, "The commission shall post public information on its website. Such information shall include but is not limited to the minutes of advisory committee meetings, pending permit and enforcement actions, compliance histories, and emissions inventories by county and facility name." The agency is working towards this goal as it develops, proposes, and adopts rules pertaining to compliance histories. As soon as practicable, this information will be available via the agency's web site. No changes have been made in response to these comments.

Cantey & Hanger commented regarding proposed §60.1(b)(3) (adopted as §60.1(c)(3)). Cantey & Hanger commented, "The TNRCC has indicated in stakeholders' meetings that Notices of Violation from other states would not be considered in compiling an entity's compliance history. However, Proposed Rule §60.1(b)(3) states that enforcement orders, court judgements and criminal convictions relating to environmental violations in other states will be utilized as components to the extent available to the Executive Director. Due to the inconsistencies between states in environmental laws and enforcement procedures, other states enforcement orders should not be utilized in determining the compliance history for a regulated entity in the state of Texas."

The commission disagrees with this comment. TWC, §5.753(b)(3), specifically requires the commission to include in the components of compliance history, "to the extent readily available to the commission, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states." Therefore, no change has been made in response to this comment.

§60.1(c)(4)

Jones Day, Vinson & Elkins, and Thompson & Knight commented regarding proposed §60.1(b)(4), (adopted as §60.1(c)(4)). Jones Day stated, "The proposed component referencing 'chronic excessive emissions events' should be defined in the rules." Vinson & Elkins stated, "Several critical terms in these rules are not defined. Nowhere in the Phase I rulemaking is the term 'chronic excessive emissions event' defined. While 'emissions event' is defined in HB 2912, what makes these emissions events 'chronic excessive,' and thus, a component of a person's compliance history is left up to the TNRCC to define in subsequent rulemaking or to interpret through policy or guidance." Thompson & Knight stated that "the Agency should define what constitutes 'chronic' and 'excessive' emission events in this rulemaking. Without notice and comment rulemaking to define these terms, the regulated community has no opportunity to comment upon the agency's interpretation of the terms, which are not defined by statute. We question whether an Agency's action can be legal if based upon after-the-fact interpretation and application of such subjective terms."

The commission responds that this is outside the scope of this rulemaking. The definition of "chronic excessive emissions events" will be addressed in the second phase of compliance history rulemaking concerning classification and use. No changes have been made in response to this comment.

Concerning proposed §60.1(b)(4), (adopted as §60.1(c)(4)), Vinson & Elkins stated, "This rulemaking is the first effort at creating a 'uniform standard for evaluating compliance history.' Such an objective

necessarily requires the definition of all critical terms. The term ‘chronic excessive emissions event’ is not defined and is subject to arbitrary interpretation by Executive Director staff. The term ‘chronic’ infers that excessive emissions events occurred repeatedly over a span of time. The applicable span of time and a threshold number of occurrences should be provided in 30 TAC §60.1(b)(4). Excessive emissions events that occurred at the site under review during another person’s ownership or operation should be excluded from the current owner or operator’s compliance history. Excessive emissions that pose a threat to human health or the environment will be in most cases subject to enforcement by the agency and therefore included in the compliance history under section (b)(1). The term ‘chronic excessive emissions event’ is not defined and should be deleted. To achieve uniformity a vague, subjective and undefined standard should not be included in the compliance history.”

The commission responds that the definition of this term is outside the scope of this rulemaking, and is being addressed in the second phase of compliance history rulemaking concerning classification and use. However, with regard to the proposal that excessive emissions events that occurred at the site under review during another person’s ownership or operation should not be assessed in the current owner or operator’s compliance history, the commission has determined that there is no reason to treat this component of compliance history any differently than any of the others. The rule states that compliance history at the site will be assessed for the full five years, even if ownership has changed during that time. Furthermore, the term “chronic excessive emissions event” cannot be deleted from the rule, as THSC, §382.0216(j), created in HB 2912, specifically requires that “the commission shall account for and consider chronic excessive emissions events and emissions events for which the commission has initiated enforcement in the

manner set forth by the commission in its review of an entity's compliance history." No changes have been made in response to these comments.

TIP, BP, TABCC, and ExxonMobil Refining all made similar comments regarding proposed §60.1(b)(4), (adopted as §60.1(c)(4)). TIP commented that proposed §60.1(b)(4) "requires that 'chronic excessive emission events' be considered a component of compliance history. However, the TNRCC has made no attempt to define 'chronic' or 'excessive.' In addition, while TIP acknowledges that HB 2912 requires the agency to include such events in a facility's compliance history, excessive emission events that constitute violations will presumably lead to notices of violations (NOVs) that will be included in a facility's compliance history, resulting in duplicative information. If the agency intends to postpone the development of a definition until the upcoming compliance history use rulemaking, it should state as much in the preamble to the final compliance history definition rulemaking." Additionally, in general, BP endorsed the comments submitted by TIP. BP stated, "Chronic excessive emission events should not be a 'stand-alone' component in the compliance history because this would create potential double counting. If a facility had a chronic excessive emission event, it is likely a notice of violation would be issued. Since a notice of violation is proposed as a component of compliance history, including both items would be redundant. Furthermore, TNRCC uses the term 'chronic excessive emission event' without providing a definition. BP believes that such an event must have off-site impact and be linked to documented, long-term, actual health effects." BP went on to say, "In addition, TNRCC should clarify that spills will not be considered as a chronic excessive emission event unless there is sufficient volatility to create a sustained health impact." TABCC stated, "While TABCC acknowledges that consideration of 'chronic excessive emissions

events' in compliance history is mandated by HB 2912, it appears that listing it as a separate component in addition to notices of violations would result in a duplication of 'negative' components in the formula. It is our understanding that every chronic excessive emissions event would result in an NOV, so every event would be counted twice: once as a chronic emissions event and once as an NOV. We encourage the agency to clarify and address this in the formula and the final rule." ExxonMobil Refining suggested that inclusion of "chronic excessive emission event" is inappropriate as it will result in considering an event that has already been addressed in an agreed order or other enforcement action, and therefore recommended that it be deleted as duplicative.

The commission responds that the definition of this term is outside the scope of this rulemaking, and is being addressed in the second phase of compliance history rulemaking concerning classification and use. House Bill 2912, Article 5, makes it very clear that the legislature intends that regulated entities address emissions. Additionally, THSC, §382.0216(j), created in HB 2912, specifically requires that "the commission shall account for and consider chronic excessive emissions events and emissions events for which the commission has initiated enforcement in the manner set forth by the commission in its review of an entity's compliance history." How chronic excessive emissions events, as well as all the other compliance history factors, will be "weighted" will be addressed in the next phase of compliance history rulemaking; however, it is apparent from the statute that chronic excessive emissions events are "stand-alone" compliance history components, and will be considered and weighted accordingly.

TCC commented regarding proposed §60.1(b)(4), (adopted as §60.1(c)(4)). TCC stated, “Proposed section 60.1(b)(4) includes chronic excessive emissions events as part of compliance history. TCC believes that excessive emissions events should be determined as such by heavier weighting on those events that have significant impact on the human health or the environment and that the other statutory criteria should have lighter weighting. There is nothing in the statute that indicates that the items should be weighted equally. The criteria for ‘excessive emissions events’ are provided by statute, but what constitutes ‘chronic excessive emissions events’ is not specified. Thus, we believe that ‘chronic excessive emissions events’ should only characterize a situation where multiple ‘excessive emissions events’ occur each and every year in the compliance history.” Additionally, in general, BP endorsed the comments submitted by TCC.

The commission responds that the definition of this term is outside the scope of this rulemaking, and is being addressed in the second phase of compliance history rulemaking concerning classification and use. Additionally, the comment concerning the “weighting” of chronic excessive emissions events is outside the scope of this rulemaking. Any issues regarding the weighting of components will be addressed during phase II of the compliance history rulemaking, dealing with the classification and use of compliance history. No changes have been made in response to this comment.

Birch & Becker commented regarding proposed §60.1(b)(4), (adopted as §60.1(c)(4)). The commenter stated, “The terms ‘chronic’ and ‘excessive’ that are used in qualifying emission events are not defined by statute or regulation, and it is unlikely that these terms will be defined prior to February 1, 2002.

Since the terms ... have not yet been defined, it is impossible to determine whether a facility is in compliance. Under HB 2912, the reporting of chronic excessive emission events is not required until sometime after January 1, 2003, which is the date by which TNRCC must make technical and equipment changes that are necessary to collect and process the emissions data. Chronic excessive emission events should not be used as components of compliance history until these key terms are defined by regulation, and this should be reflected in the text of the rule.”

The commission responds that the definition of “chronic excessive emissions events” will be addressed in the second phase of compliance history rulemaking concerning classification and use. The commission is required by statute to include this as a component of compliance history, but further responds that chronic excessive emissions events will not be utilized as a component of compliance history until such time as the concept is fleshed out in rule. No changes have been made in response to this comment.

Brown McCarroll commented regarding proposed §60.1(b)(4), (adopted as §60.1(c)(4)). Brown McCarroll stated that it “believes the term ‘chronic excessive emission events,’ without TNRCC guidance, would likely lead to inclusion of events that should not be part of the compliance history, especially a negative component of it. For example, plant sources that are very complex having numerous facilities will likely experience more upsets and unscheduled maintenance, shutdown, or startup events resulting in unauthorized emissions, than other, less complicated or complex sources. Thus, not all sources should be compared in making a determination regarding whether an owner or operator has had chronic excessive emission events. In making such determinations, only similar

sources with similar complexities should be compared, otherwise the comparisons are highly inappropriate. Furthermore, some facilities may present unique and complicated issues associated with preventing upsets, especially as to protection of plant personnel safety, and protection of equipment. An owner's or operator's corrective action efforts, which may include substantial, costly equipment modifications and re-engineering, should also be taken into account in making a chronic excessive emissions events determination. Consequently, Brown McCarroll recommends that TNRCC provide guidance associated with this compliance history component to clarify that such determination will be made in comparison with similar types of facilities and sources with similar complexity. Further, the agency should clarify that an owner's or operator's personnel safety and plant equipment protection and appropriate corrective action efforts will also be taken into account in such determinations."

The commission responds that this comment is outside the scope of this rulemaking. The issues raised are issues that will be dealt with in the second phase of compliance history rulemaking dealing with classification and use. No changes have been made in response to this comment.

§60.1(c)(5)

Thompson & Knight, TIP, and ExxonMobil Refining commented regarding proposed §60.1(b)(5), (adopted as §60.1(c)(5)). Thompson & Knight asked what constitutes "information required by law or any compliance-related requirement necessary to maintain federal program authorization?" Thompson & Knight further commented, "To give the regulated community adequate notice of what constitutes 'compliance history,' the rule must set out in reasonable detail the scope of this component of

compliance history. For example, the Agency could provide a listing of the statutory and regulatory requirements that are included in this provision. This is necessary given that this information may be used to deny or terminate permits or deny a facility's participation in certain regulatory programs."

Similarly, TIP stated the proposed language "provides that 'any information required by law, or any compliance-related requirement necessary to maintain federal program authorization' be included as a component of compliance history. TIP is not aware of any information that might be included under this language. As a result, the agency should provide examples of information that meets this requirement." Additionally, in general, BP endorsed the comments submitted by TIP. Similarly, ExxonMobil Refining recommended that this component be deleted. ExxonMobil Refining stated that this language "is so vague, open-ended, and imprecise that we can not determine any information that might be included under it."

The commission disagrees with this comment. This language is taken directly from TWC, §5.753, which states, "The set of components must also include any information required by other law or or any requirement necessary to maintain federal program authorization." It is included in the rule to ensure that, should some new requirement be enacted, it is covered immediately, even without updating this rule. Furthermore, it is included in case something has been erroneously omitted in developing these rules. It is not intended to replace any currently known requirement; rather it is intended as a "catch-all" as previously described. No changes have been made in response to this comment.

ACT commented regarding proposed §60.1(b)(5), (adopted as §60.1(c)(5)) that it “should be clarified to explicitly include violations that are required to be reported under federal programs being administered by the state, as well as violations and enforcement actions by local governments that are enforcing state or federal environmental laws (e.g. Harris County Pollution Control District’s enforcement program; municipal enforcement of pretreatment requirements, etc.). This would include such items as discharge permit violations under the TPDES program or deviation reports under the Title V program.”

The commission disagrees with this comment. The commission responds that “violations that are required to be reported under federal programs being administered by the state, as well as violations and enforcement actions by local governments that are enforcing state or federal environmental laws” are already included, to the extent applicable, in other components as proposed and adopted in this rulemaking. This language is included in the rule to ensure that, should some new requirement be enacted, it is covered immediately, even without updating this rule. Furthermore, it is included in case something has been erroneously omitted in developing these rules. It is not intended to replace any currently known requirement; rather it is intended as a “catch-all” as previously described. No changes have been made in response to this comment.

§60.1(c)(6)

ACT commented regarding proposed §60.1(b)(6), (adopted as §60.1(c)(6)), stating that it “should be modified to include the type of investigation (announced or unannounced). This information is relevant to the likelihood that the investigation would uncover violations.”

The commission disagrees that this modification should occur. The violations noted in any investigation will be incorporated into the compliance history, regardless of whether it was an announced or an unannounced investigation. Further, the underlying issue this raises is more relevant to the next phase of compliance history rulemaking concerning classification and use. However, the commission is not precluded from including such information about an investigation in a compliance history by leaving the language “as is.” No change has been made in response to this comment.

7-Eleven, TPCA, and ICE commented regarding proposed §60.1(b)(6), (adopted as §60.1(c)(6)), stating that it “should be clarified to only incorporate in compliance history the dates of investigations ‘conducted for the purpose of determining compliance with environmental laws.’” ICE further added, “The terms ‘inspections’ and ‘investigations’ as used in proposed §60.1(b) appear to be interchangeable.”

The commission disagrees with this comment in part. The commission asserts that it is not necessary to clarify in the rule that the component only includes investigations “conducted for the purpose of determining compliance with environmental laws.” This is implicit in the fact that all of the components only relate to environmental laws. Additionally, the commission agrees that the

words “inspections” and “investigations” were erroneously used interchangeably in the proposed rule. All references to “inspections” within the rule have been changed to “investigations” for consistency.

Vinson & Elkins, Jones Day, and ATINGP commented regarding proposed §60.1(b)(6), (adopted as §60.1(c)(6)). Vinson & Elkins stated that the reference in proposed §60.1(b)(6) “should be to the dates of TNRCC inspections rather than ‘investigations.’ An entity may be subject to an investigation and not be aware of it.” Similarly, Jones Day commented, "Throughout the proposed rule package, there is interchangeable use of 'investigation and 'inspection.' An inspection can be a positive, routine, even voluntary event. An investigation implies that the agency has a reason to suspect wrong-doing. The Commission should be deliberate in its use of these terms." Vinson & Elkins added that “it should be made clear that internal company investigations (i.e. audits) are not included.” Similarly, ATINGP recommended that this language be clarified to reflect that it is only applicable to investigations conducted by the TNRCC, the EPA, or one of their delegated agents. Vinson & Elkins also stated that “citizen complaints have been specifically excluded from the components of compliance history. However, HB 2912 requires the agency to undertake an investigation when it receives a citizen complaint. Without clarification, citizen complaints could be included in a compliance history summary, despite the deliberate exclusion. The Commission should clarify that investigations initiated by citizen complaints are not included in compliance summaries by virtue of...” the proposed paragraph.

The commission disagrees with this comment. The commission does not make a distinction between “inspections” and “investigations” in the manner in which the commenter suggests. As a matter of course, the individuals who work in the commission’s regional offices are referred to as “investigators” and the checks they make at sites are referred to as “investigations.” This is simply the “term of art” used, and refers to all “checks” performed as used. Additionally, the commission responds, regarding the dates of investigations, that it is only referring to those investigations conducted by the agency or its agents. With regard to citizen complaints, the commission responds, as stated in the proposal preamble, that complaints are not specifically included a component of compliance history, because other components would, in effect, include pertinent aspects of this same information. For instance, a citizen may file a complaint regarding an environmental incident. The executive director will investigate, and if a violation is documented, then the executive director will issue an NOV or initiate enforcement, as appropriate. Thus, the complaint will be part of the compliance history via the NOV or commission order. The commission notes that during the legislative process citizen complaints were not included in HB 2912. Complaints were excluded from the compliance history components, not to exclude any underlying violation(s), but in order to avoid having potentially unverified, unverifiable, or stacked complaints counted as a negative component of a person’s compliance history. The agency currently conducts an investigation in response to citizen complaints, and will continue to do so. However, it will not be until a complaint is verified that the underlying violation will be included in a person’s compliance history. No changes have been made in response to this comment.

AECT and TIP commented regarding proposed §60.1(b)(6), (adopted as §60.1(c)(6)). AECT suggested that, in order to provide a better and more realistic perspective, the language should be revised to read: “(6) the dates, durations, and types of investigations.” Similarly, TIP stated, “In addition to explaining what types of activities the term ‘investigation’ is meant to include, the TNRCC should note the *duration* of each investigation. There is significant variation state-wide in the amount of time that inspectors spend at a given site, even at sites of comparable size and complexity. An investigation lasting three days is not comparable to an investigation lasting three weeks. As a result, it is imperative that if the TNRCC intends to include dates of investigations as a component of compliance history, it should also include the duration of such investigations. In addition to the date and duration of the investigation, compliance histories should include the reason behind the investigation. Many different alleged occurrences, with considerable variances in their relevance to compliance history, result in ‘investigations.’ Finally, the agency should address in the preamble to the final rules how it intends to consider investigations performed by multi-agency teams.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with this comment. The emphasis is on whether or not a violation was observed during the investigation, not on the duration or type of, or reason for, investigations. Investigations can vary in duration, type, and rationale for performance for many reasons, not just inconsistencies among regional offices. The statute does not require specific information regarding investigations (other than as they apply in their results as those end up in notices of violations and/or enforcement orders, etc.) The commission proposed to include this as a component of compliance history with the intention of being able to reflect whether a lack of

violations during the compliance period was because no investigations had been performed during that time, or rather that investigations were performed but no violations were found. Because the emphasis in the statute is placed on violations discovered, and because there are so many potential reasons for the differences in duration, type, and rationale, no changes have been made in response to this comment. With regard to investigations performed by multi-agency teams, the commission will include only those investigations in which it, or one of its delegated local authorities, is the lead investigator.

BP commented, regarding proposed §60.1(b)(6), (adopted as §60.1(c)(6)), "Certain other components, such as ... item (6) the 'dates of investigations' do not 'fit' with the component listing. These items are general information useful in the compliance history but are not in and of themselves contributors.

TNRCC should reword accordingly."

The commission does not agree with this comment. The commission proposed to include this as a component of compliance history with the intention of being able to reflect whether a lack of violations during the compliance period was because no investigations had been performed during that time, or rather that investigations were performed but no violations were found. As such, the commission has determined that it is appropriate to leave it within the components of compliance history. No change has been made in response to this comment.

§60.1(c)(7)

Representative Bosse commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)).

Representative Bosse stated that, as he understands the proposed rule, "it would allow consideration of only those NOV's issued on or after February 1, 2002. This is contrary to my intent, and I believe the intent of the legislature, in arriving at the final version of HB 2912. The Sunset Advisory Commission recommendation, as embodied in the filed version of HB 2912 and as passed by the House, required consideration of all NOV's, past and present. I supported (and support) this on the basis that the NOV's make up a major part of the compliance record, and if only considered prospectively, there would not be a meaningful history for a number of years. The Senate Committee Substitute for HB 2912 provided for consideration of only future NOV's. The specific language, at Section 17.05(a) of the bill, read:

‘The use of compliance history for the purposes established by Section 5.754, Water Code, as added by this Act, apply only to violations that occur on or after the effective date of the rules adopted under this subsection.’ The provision was removed by amendment on the Senate floor, however, and the prospective limitation therefore did not appear in either the House or Senate version of H.B. 2912."

Representative Bosse further stated, "As further evidence of legislative intent on this matter, you should consider that, when the conference committee report was prepared, there was a drafting error and the prospective language, exactly as cited above, appeared in the draft. Prior to having the report signed by the conferees, and after conferring with most of them individually, I had this provision removed with liquid paper. If you will review the original conference committee report, you will notice this deletion in Section 18.05(a). By comparing the adopted conference report with the original council draft you will find that it is the ‘clean slate’ language that was deleted. NOV's were included in determination of compliance history because we found that they are reasonably reliable. We even included the safeguard of allowing removal of NOV's determined to be without merit. I know of no

policy that should excuse violators from the consequences of their past violations. I trust that the commission will follow the clear intent of the legislature and reject the published language that would limit consideration to future NOV's."

The commission appreciates the comment provided by Representative Bosse. In response to Representative Bosse's insight into the legislative intent, the commission has modified the language in adopted §60.1(c)(7) to reflect that all NOV's issued on or after September 1, 1999, will be included in a person's compliance history. The commission acknowledges that for the first two years the new compliance history rules are in place, NOV's will "lag behind" the five-year compliance period for all other components (except for 1660 orders, as discussed previously in this preamble). However, the commission has determined that this is the reasonable course of action for it to take, and that as a compromise position, it addresses, at least in part, the concerns of most commenters regarding this issue. First, information regarding NOV's which is housed electronically via databases is only consistently available in all program areas since the beginning of Fiscal Year 2000, starting September 1999. To include NOV's issued prior to this date, agency staff would have to conduct manual file reviews for the 220,000 plus regulated entities and associated sites in the state. From a resource perspective, this is not feasible with the expectation that other agency functions would continue "as normal." Second, with regard to the statute requiring that only NOV's "with merit" be included in compliance histories, the commission points out that the Field Operations Division implemented a Standard Operating Procedure in September of 1999, which includes standardization of procedures for conducting investigation, collecting evidence, issuing NOV's, follow-up, and many other issues, the commission has a very high level of

confidence that the majority of the NOV's issued since that time are meritorious. Additionally, the commission has no control over whether, or how many, regulated entities will now contest the merit of violations included in prior NOV's due to the inclusion of them in compliance histories. Based on the numbers, this could prove to be a monumental resource strain for the commission in simply responding; however, by compromising to an initial three-year prior history for NOV's, the commission is addressing the concerns of those commenters who raised the "clean slate" issue while initially limiting the number of years worth of NOV's which will be looked at to a shorter length of time than the rest of the components. Additionally, this will limit the potential resource strain on the agency because, first, the number of years for (now) potential claims on the part of regulated entities that their NOV's are unmeritorious, and second, the NOV's issued during that narrowed time are more likely to be meritorious because of the implementation of procedures by the Field Operations Division. The commission has determined that this is a reasonable, do-able approach to a compromise position which addresses everyone's concerns to at least some extent, without violating the requirements of the enabling statute. Furthermore, not all violations alleged in NOV's from September 1, 1997, to August 31, 1999, will be "lost" due to the exclusion of NOV's issued prior to September 1, 1999. Specifically, if those violations ended up being addressed through a findings enforcement order, they will be included in a person's compliance history.

Representatives Burnam, Maxey, McClendon, and Puente commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). Representatives Burnam, Maxey, and McClendon, and Puente all stated that the agency's proposal to consider only those NOV's issued after February 1, 2002, effectively gives regulated entities a "clean slate" for NOV's, and further stated that this "clean slate" provision was

specifically removed from HB 2912 during the session. Representatives Burnam, Maxey, McClendon, and Puente stated that the "Clean Slate Provision" was added by the Senate to its committee substitute of the House Bill. Representatives Burnam, Maxey, and McClendon added that Senator Harris corrected this problem with a floor amendment, which deleted this sentence. Representative Maxey went on to say "There is no legitimate rationale for TNRCC to ignore the will of the legislature." Representatives Burnam and McClendon stated, "The agency's stated rationale for ignoring the will of the legislature is flawed." Representatives Burnam, Maxey, and McClendon added that agency has been working on an enforcement tracking system for two years and they understood it was to be online this fall. Moreover, they continued, "the law already allows NOVs 'without merit' to be deleted from the compliance history." Representative Puente stated that it is a clear indication of the legislature's intent on this matter in that the provision was removed on the Senate floor and did not appear in the final versions of HB 2912 in either the House or Senate. He stated, "NOVs, past and present, make up an important part of an entity's compliance history and if only considered prospectively, would not allow for a meaningful review."

Representatives Burnam, Maxey, McClendon, and Puente further commented that the proposed rule would not include NOVs issued by the EPA, even though the statute makes "no distinction between state and federal NOVs." They all stated that "NOVs issued by state or federal agencies within a minimum of the past five years must be included in a compliance history."

The commission appreciates the comments provided by Representatives Burnam, Maxey, McClendon, and Puente. In response to their comments regarding the legislative intent, the

commission has modified the language in adopted §60.1(c)(7) to reflect that all NOV's issued on or after September 1, 1999, will be included in a person's compliance history. The commission acknowledges that for the first two years the new compliance history rules are in place, NOV's will "lag behind" the five-year compliance period for all other components (except for 1660 orders, as discussed previously in this preamble). However, the commission has determined that this is the reasonable course of action for it to take, as stated in the response to Representative Bosse's comment regarding this issue previously in this preamble. The commission's new tracking system is currently being phased into use. However, the information being migrated into it comes from all of the other, independent data tracking systems throughout the agency. These other systems are not equivalent to each other, nor are they as comprehensive as the new CCEDS. The commission can only migrate electronic information into the new system that exists in the existing systems. Based on the modification to this portion of the rule, requiring that NOV's issued on or after September 1999 be included in compliance histories, the commission is utilizing the electronic information from the last two years plus, which is present in the existing systems and is being migrated into CCEDS.

Regarding the issue of including NOV's issued by the EPA in the components of compliance history, TWC, §5.753(d) states, "the set of components shall include notices of violations..." and goes on to say that "a notice of violation administratively determined to be without merit shall not be included in a compliance history." Nowhere in this language does it make reference to NOV's issued by the EPA. Conversely, in §5.753(b)(1), the statute expressly requires that "enforcement orders, court judgments, consent decrees, and criminal convictions of this state *and the federal*

government" be included as components of compliance history. (emphasis added). Likewise, in §5.753(b)(3), the statute explicitly requires that, "to the extent readily available to the commission, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws *of other states*" be included as components of compliance history (emphasis added). Because the language in TWC, §5.753, makes no reference to the inclusion of NOV's issued by the EPA, the commission has determined that these should not be included as a component. The commission holds that this position is further substantiated by the fact that the language in TWC, §5.753, requires that only those NOV's with merit be included. EPA's electronic tracking system does not reflect when a violation contained in one of its NOV's has been determined to be without merit. And finally, the commission does not have the opportunity to evaluate the merit of NOV's issued by the EPA. Additionally, the EPA does not issue very many NOV's in the State of Texas, and so there will not be that much information "lost" by not including EPA NOV's. Therefore, the commission has determined that it is both appropriate and reasonable to exclude EPA NOV's, and that this does not violate the requirements of the enabling statute. No changes have been made with respect to this issue.

ACT, TCONR, and 17 individuals commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). The 17 individuals commented that the agency's proposal to consider only those NOV's issued after February 1, 2002, effectively gives regulated entities a "clean slate" for NOV's, and go on to say that this "clean slate" provision was "specifically taken out of the bill during the session." The individuals stated that this would essentially let plants "off the hook for bad behavior." Similarly, ACT stated that "the rule fails to require consideration of past notices of violation - even though that 'clean

slate' approach was *specifically* rejected by the legislature." TCONR stated that "the proposed rule limits the inclusion of notices of violation as a component of compliance history contrary to HB 2912 and undermines the legislative intent." TCONR stated that, with regard to the proposal to consider only those NOV's issued on or after February 1, 2002, TWC, §5.753(d), merely states that the set of components shall include NOV's. TCONR asserted that the legislature did not make any exception other than for NOV's determined to be without merit, did not set a future date for the agency to begin considering NOV's as a component of compliance history, and did not give the agency discretion to do so. TCONR added, "Indeed, this 'clean slate' provision, which favors regulated entities, was deliberately removed from HB 2912 during the legislative session. The language excluding notices of violation issued prior to February 1, 2002 should be deleted from the final rule and the rule should allow these notices of violation to be components of compliance history as contemplated by the legislature." Similarly, ACT stated that the proposal to only include NOV's issued on or after February 1, 2002, "is a blatant attempt to partially reinstate the 'clean slate' provision of HB 2912 that was specifically rejected by the legislature. The 'clean slate' provision was not in the House-passed version of HB 2912 - it was added by the Senate Natural Resources Committee. However, the Senate sponsor of HB 2912 specifically removed the provision during debate on the Senate Floor (Amendment 1 to HB 2912), and it does not reappear in the conference committee report that was approved by both the Senate and the House. No other provision of HB 2912 provides a basis for the 'clean slate' approach to NOV's. Moreover, the TNRCC's transparent attempt to rationalize this provision (i.e. the agency needs time to track and set evaluation procedures for NOV's) has no basis in law. Even if TNRCC cannot yet track NOV's via an automated database, that is woefully insufficient basis upon which to ignore clear

legislative intent.” ACT further commented that “the phrase ‘on or after February 1, 2002’ must be removed from proposed §60.1(b)(7).”

The commission responds that it has modified the language in adopted §60.1(c)(7) to reflect that all NOVs issued on or after September 1, 1999, will be included in a person’s compliance history. The commission acknowledges that for the first two years the new compliance history rules are in place, NOVs will “lag behind” the five-year compliance period for all other components (except for 1660 orders, as discussed previously in this preamble). However, the commission has determined that this is the reasonable course of action for it to take. Furthermore, the commission reiterates that not all violations alleged in NOVs from September 1, 1997 to August 31, 1999, will be “lost” due to the exclusion of NOVs issued prior to September 1, 1999. Specifically, if those violations were addressed through a findings enforcement order, they will be included in a person’s compliance history.

GHASP and 509 individuals commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating, “Notices of Violations (NOVs) are critical to creating useful compliance histories. Instead of implementing the law as written, the TNRCC is bowing to industry pressure by removing past NOVs from the compliance history component list. TNRCC is not above the law. When the state Legislature told the agency to include past NOVs in a company's compliance history, they meant it. TNRCC has no authority to now go against the Legislature's mandate and remove past violations from the list.”

One of the individuals commented that this is illegal. One of the individuals commented that, "not only is the TNRCC not above the law, it should be in the vanguard of showing how a state agency can

correct problems that are potentially harmful to our citizen's health." One of the individuals further commented that the commission should not accept a rule on compliance history that excludes past NOV's or NOV's issued by the EPA.

The commission responds that it has modified the language in adopted §60.1(c)(7) to reflect that all NOV's issued on or after September 1, 1999, will be included in a person's compliance history. The commission acknowledges that for the first two years the new compliance history rules are in place, NOV's will "lag behind" the five-year compliance period for all other components (except for 1660 orders, as discussed previously in this preamble). However, the commission has determined that this is the reasonable course of action for it to take, as stated in the response to Representative Bosse's comment regarding this issue previously in this preamble. As stated previously, the commission has determined that this is a reasonable, do-able approach to a compromise position which addresses everyone's concerns to at least some extent, without violating the requirements of the enabling statute. Furthermore, the commission reiterates that not all violations alleged in NOV's from September 1, 1997 to August 31, 1999, will be "lost" due to the exclusion of NOV's issued prior to September 1, 1999. Specifically, if those violations were addressed through a findings enforcement order, they will be included in a person's compliance history. The commission also responds that it is proposing these rules in an effort to ensure that Texas will be a leader in addressing problems that are potentially harmful to our citizens' health.

In response to the individual's comment that NOV's issued by the EPA should be included in the components of compliance history, the commission reiterates its response to a similar comment

raised by Representatives Burnam, Maxey, McClendon, and Puente earlier in this preamble.

Specifically, the statutory language does not support the inclusion of EPA NOVs, both because it makes no reference to the inclusion of NOVs issued by the EPA, unlike specifics included in other parts of the enabling language, and because the commission cannot verify the merit of EPA's NOVs. Additionally, the EPA does not issue very many NOVs in the State of Texas, and so there will not be that much information "lost" by not including EPA NOVs. Therefore, the commission has determined that it is both appropriate and reasonable to exclude EPA NOVs, and that this does not violate the requirements of the enabling statute. No changes have been made with respect to this issue.

TPWA, ICE, TxSWANA, NTMWD, and TMRA commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). All five commenters stated that they are supportive of the commission's decision not to consider NOVs that were issued prior February 1, 2002. TPWA stated that it "believes that it would be unfair for the TNRCC to change its draft rule to allow considerations of NOVs incurred in the past and that doing so would be akin to retroactively changing rules. Prior to the compliance history rule, certain NOVs were accepted even though the entity believed them to be unmeritorious simply because paying the fine associated with the NOV was less costly than contesting the merit of the NOV."

TPWA, NTMWD, and TMRA all expressed concerns that if those NOVs that entities considered to be unmeritorious could now affect an entity's compliance ranking, entities would seek to have those old NOVs declared unmeritorious. TPWA stated, "This rush to prove that old NOVs lacked merit would, of course, be very difficult and time-consuming on the part of both the entity and the agency." ICE expressed similar concerns that the agency would "be overrun by entities seeking determinations that

existing NOV's are without merit." TxSWANA further added, "The sheer number of such requests, coupled with the difficulty in proving or disproving issues that occurred some time ago would drain the commission's resources at a time when the commission is already overburdened with legislation implementation issues." NTMWD and TMRA both stated that prior to this rulemaking, NOV's have been issued inconsistently from TNRCC region to TNRCC region and even from investigator to investigator. In addition, they added that NOV's, both written and verbal, have not been tracked by a uniform system within the commission. It is common practice "for a fully compliant entity to be issued an NOV that it disagrees with" and that is resolved by providing additional information or by taking certain actions. NTMWD and TMRA added that, in such circumstances, the NOV's are rarely formally withdrawn or declared "without merit," stating that in many cases it would be difficult, if not impossible, to recreate the facts associated with an old NOV; thus, according to the commenters, seeking a present-day determination that an old NOV was "without merit," as contemplated by new TWC, §5.753(d), and the proposed rule will be practically impossible. NTMWD and TMRA both commented that in order to be fair to the regulated community, and ensure that the compliance period evaluation is an accurate reflection of an entity's ability and willingness to comply, the commission should maintain the current language of proposed §60.1(b)(7), which excludes NOV's issued before February 1, 2002. TPWA, ICE, and TxSWANA similarly all recommended that the commission should avoid making any changes to proposed §60.1(b)(7) that would result in NOV's issued prior to February 1, 2002 being considered in an entity's compliance history ranking.

The commission appreciates the positive comments in response to the rule. However, the language in adopted §60.1(c)(7) has been modified to reflect that all NOV's issued on or after September 1,

1999, will be included in a person's compliance history. The commission has determined that this is the reasonable course of action for it to take, and that as a compromise position, it addresses, at least in part, the concerns of most commenters regarding this issue. With regard to the statute requiring that only NOVs "with merit" be included in compliance histories, the commission points out that the Field Operations Division began implementing a Standard Operating Procedure in September of 1999, which includes standardization of procedures for conducting investigation, collecting evidence, issuing NOVs, follow-up, and many other issues, the commission has a very high level of confidence that the majority of the NOVs issued since that time are meritorious. Additionally, the commission has no control over whether, or how many, regulated entities will now contest the merit of violations included in prior NOVs due to the inclusion of them in compliance histories. Based on the numbers, the commission agrees that this could prove to be a monumental resource strain for the commission in simply responding; however, by compromising to an initial three-year prior history for NOVs, the commission is addressing the concerns of those commenters who raised the "clean slate" issue while initially limiting the number of years of NOVs which will be looked at to a shorter length of time than the rest of the components. Additionally, this will limit the potential resource strain on the agency because, first, the number of years for (now) potential claims on the part of regulated entities that their NOVs are unmeritorious is less than the full five-year compliance period for other components, and second, the NOVs issued during that narrowed time are more likely to be meritorious because of the implementation of procedures by the Field Operations Division. The commission has determined that this is a reasonable approach to a compromise position which addresses everyone's concerns to at least some extent, without violating the requirements of the enabling statute. Additionally,

the commission disagrees that this rulemaking constitutes retroactive rulemaking. The commission responds that NOVs are currently used in the compilation of compliance histories, in both permitting and enforcement. House Bill 2912 clearly contemplates the agency developing a compliance history period, and again, clearly directs the agency to “look back in time.”

Furthermore, recipients of NOVs have always had the opportunity to contest allegations contained in NOVs; this is not a new concept. In response to HB 2912, the Field Operations Division developed a protocol for addressing the contest of an allegation in an NOV; this is discussed previously in this preamble. Any person may now contest violations alleged in NOVs issued on or after September 1, 1999, utilizing the new protocol. However, the commission cannot “define” a compliance “history” without looking back in time. Regarding the comment that NOVs have not been tracked consistently, the commission has determined that information pertaining to NOVs which is housed electronically via databases, is consistently available in all program areas since the beginning of Fiscal Year 2000, starting September 1999. Furthermore, any NOVs, or portions thereof, determined to be without merit will be distinguished as such in the database system, and will not be included in compliance histories. No changes have been made in response to these comments.

TCFA commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that it “agrees with proposed language to include only written NOVs issued on or after February 1, 2002 as part of the compliance history. Since an NOV is simply an allegation, TCFA urges the commission to exclude any NOV that (1) is ultimately proven incorrect, (2) is the result of a minor violation that can be easily

corrected, (3) is dropped during the enforcement process and (4) does not proceed to an Agreed Order.”

The commission appreciates the positive comment in support of the rule. However, the commission notes that the language as proposed has been modified, as previously discussed in this preamble, and further, the commission disagrees, at least in part, with the commenter’s position on NOV’s which should be excluded. The commission agrees that NOV’s determined to be incorrect (as in, without merit) should not be included in a person’s compliance history, and this is required by the enabling statute. Regarding NOV’s dropped during the enforcement process, the commission responds that if they are dropped because the violations are determined to be without merit, then those too are required to be excluded from a person’s compliance history. The commission does not agree that an NOV which is “the result of a minor violation that can be easily corrected” should be excluded. In fact, TWC, §5.754, requires that in the next phase of compliance history rulemaking, the commission designate whether violations included in a person’s compliance history are of major, moderate, or minor significance. This requirement conveys that minor violations must be included in compliance histories. Additionally, the commission disagrees that NOV’s that do not proceed to an agreed order should, or can be, excluded from compliance histories. The reasons for this are twofold. First, the enabling statute does not limit the use of NOV’s only to those that result in an agreed order, or any other type of order for that matter (for example, a default order). Rather, the statute requires that NOV’s be included, after also requiring that enforcement orders be included, unless the NOV is determined to be without merit. There are many NOV’s issued that do not result in any sort of formal

enforcement action, because the regulated entity timely corrects the problems. In such an instance, the alleged violations contained within the NOV have been timely *resolved*. This is a separate and distinct concept from an NOV being *withdrawn* because it was determined to be without merit. Second, as mentioned previously, there are more than just *agreed* orders issued by the commission. There are default orders, which are issued when the respondent in an enforcement matter does not timely respond to an EDPR, thereby waiving his or her right to an administrative hearing. Additionally, orders issued subsequent to an administrative hearing are generally not *agreed* orders either. However, the fact that a regulated entity did not agree to the order does not mean that the violations contained in it are without merit. No changes have been made in response to this comment.

TCC commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). TCC stated that it “agrees with proposed language to include only *written* notices of violation (NOVs) issued on or after February 1, 2002 as part of the compliance history.” Additionally, in general, BP endorsed the comments submitted by TCC.

The commission appreciates the positive comment in response to the rule. But, the commission notes as discussed in previous response to comments that the rule language has been modified to include NOVs issued prior to February 1, 2001.

TIP commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that “the agency should only include NOVs in an entity’s compliance history if they result from violations that allegedly

occur on or after February 1, 2002. This would ensure fairness by recognizing the speed at which the negotiation process moves.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with these comments. First, in response to the comment regarding the “speed of the negotiation process,” the commission responds that HB 2912 was enacted in May of 2001, and the imminence of this requirement has been known. The fact that the allegations contained in an NOV occurred prior to February 1, 2002, has no bearing on this matter; the decision on the part of the respondent, at least in part, is one of deciding whether to contest the merit of an NOV based on the fact that the NOV will be included in any future compliance history determinations. Therefore, the commission does not agree that it should modify this requirement to include only NOVs that result from violations that allegedly occur on or after February 1, 2002. Further, the legislative intent was not for a “clean slate” approach. No changes have been made in response to this comment.

ExxonMobil Refining commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that it “supports recent information received from the Commission that NOVs from out-of-state, imposed upon non-Texas based facilities will not be included as part of the Compliance History.”

The commission appreciates this positive comment in support of the rule.

7-Eleven and TPCA commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that it should be “clarified to only include in compliance history ‘notices of violation issued *by the*

TNRCC....' Although the issue is discussed in the preamble to the rule, the current rule language does not explicitly exclude NOV's by other states and the US EPA."

The commission agrees with this comment, and has modified the language from "...specifying each violation of *an* environmental law..." to "...specifying each violation of *state* environmental law..." to help clarify this issue. The commission has determined that it is not appropriate to limit the language to only those NOV's "issued by the TNRCC" because NOV's can be issued by local authorities on behalf of the agency, and further, as additionally clarified in modifications to this language, written NOV's include those from a regulated person, such as monthly effluent reports required by water quality permits.

TCONR and ACT commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). TCONR commented on the preamble to the proposed rule as it states that the TNRCC intends to exclude NOV's issued by the EPA based upon the agency's claim that it has "no opportunity to evaluate the merit of those notices of violation." TCONR asserted that the "statute makes clear that components of compliance history are to include enforcement actions by the federal government. Moreover, the legislature did not make a distinction between notices of violation issued by EPA and those issued by the state." TCONR stated that the agency is capable of evaluating many EPA-issued NOV's to determine whether they are valid, and added that even if the agency has a valid reason to reject some EPA NOV's, it should not reject them all. TCONR asked, "What percent of EPA issued notices of violation does the agency believe would be invalid? What is the nature of these invalid notices of violation? Without disclosing this kind of pertinent information to the public, the TNRCC has stated no

valid factual basis for this exclusion of EPA notices of violation." TCONR added that the legislature created only one exception to the inclusion of NOV's, which is "for notices that are *determined* to be without merit." TCONR went on to say, "By adopting this exclusion, the agency would be *de facto* declaring all EPA notices of violation to be without merit" without any underlying determination.

TCONR commented that this also seems to fly in the face of the portion of the proposed rule which would allow for items such as notices of intent to perform an environmental audit to be included as a component of a person's compliance history without providing any mechanism for the agency to "evaluate the merit" of such representations. TCONR stated, "This proposed exclusion of EPA notices of violations violates the language and intent of the statute and should be withdrawn by the agency."

Similarly, ACT stated, "The preamble stated that the proposed rule does not include notices of violation from EPA (even though these currently are part of air permit compliance histories), and that such NOV's are not included because TNRCC does not have the 'opportunity' to evaluate their merit. ACT disagrees strongly with this approach. The statute does not distinguish between federal and state NOV's, and EPA NOV's should be included. If the entity against which the NOV has been issued believes the NOV is without merit, it can provide that information to TNRCC, which can, combined with information from EPA, evaluate the merit of the NOV."

The commission disagrees with these comments. TWC, §5.753(d) states, "the set of components shall include notices of violations..." and goes on to say that "a notice of violation administratively determined to be without merit shall not be included in a compliance history." Nowhere in this language does it make reference to NOV's issued by the EPA. Conversely, in §5.753(b)(1), the statute expressly requires that "enforcement orders, court judgments, consent decrees, and

criminal convictions of this state *and the federal government*" be included as components of compliance history (emphasis added). Likewise, in §5.753(b)(3), the statute explicitly requires that, "to the extent readily available to the commission, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws *of other states*" be included as components of compliance history. (emphasis added). Because the language in TWC, §5.753, makes no reference to the inclusion of NOV's issued by the EPA, the commission has determined that there is no expressed intent that these should be included as a component. The commission holds that this position is further substantiated by the fact that the language in TWC, §5.753, requires that only those NOV's with merit be included. Further, EPA's electronic tracking system does not reflect when a violation contained in one of its NOV's has been determined to be without merit. And finally, the commission does not have the opportunity to evaluate the merit of NOV's issued by the EPA. Additionally, the EPA does not issue very many NOV's in the State of Texas, and so there will not be that much information "lost" by not including EPA NOV's. Therefore, the commission has determined that it is both appropriate and reasonable exclude EPA NOV's, and that this does not violate the requirements of the enabling statute. No changes have been made with respect to this issue.

Plano commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). Plano stated that, in the preamble to the proposed rule, "the commission indicates that it does not wish to include notices of violations issued by the EPA because it does not have the opportunity to evaluate the merit of such notices of violation." Plano noted, however, that this limitation is not included in the verbiage of the proposed rule at §60.1(b)(7). Additionally, Plano requested clarification regarding the phrase "except

for those determined to be without merit" as contained in proposed §60.1(b)(7). Plano stated that it interprets this to mean that written notices of violations that have been determined *by the TNRCC* to be unfounded will not be included as a component of compliance history. (emphasis added). Based on these concerns, Plano recommended that proposed §60.1(b)(7) be amended to read as follows: "(7) all written notices of violation issued on or after February 1, 2002, except for those issued by the EPA or those administratively determined to be without merit by the TNRCC, specifying each violation of an environmental law, regulation, permit, order, consent decree, or other requirement."

The commission does not agree with this comment. First, the commission responds that because the proposed language does not make specific reference to NOV's issued by the EPA, whereas proposed §60.1(b)(1) does specify that enforcement actions taken by the federal government are included, it is not necessary to exclude NOV's issued by the EPA in the language. Furthermore, as pointed out by the commenter, this issue is addressed in the proposal preamble, and the commission has determined that this is adequate. Additionally, the commission does not agree that it is necessary to specify in the rule that the determination of the merit of an NOV is made by the agency. No changes has been made in response to this comment.

TIP commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that it is supportive of the commission's decision "not to consider NOV's issued by EPA based on the fact that the agency has no way to evaluate the merit of such notices. However, this logic also holds true for all out-of-state violations of any type. While TIP acknowledges that the implementing legislation requires the TNRCC to consider such violations, the agency's inability to evaluate their merit necessitates that such matters

be given very low weight relative to in-state violations.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission appreciates the positive comment in support of the rule. However, the issue of "weighting" is outside the scope of this rulemaking, and will be addressed in the next phase of compliance history rulemaking concerning classification and use.

WMT, PHA, and Vinson & Elkins commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). WMT commented, "There should be an independent and fair process to determine when an NOV is 'without merit.'" WMT further stated that, "in some instances the basis for the alleged violation is disputed. This phase of the TNRCC compliance history rulemaking acknowledges that NOVs may be 'administratively determined to be without merit' but it does not set up a process for review of challenged NOVs." WMT went on to say that it "requests that the TNRCC establish a review process outside of the normal enforcement chain-of-command to review the issuance of NOVs in this phase or in the second phase of compliance history rulemaking. Because NOVs will now have weight in the evaluation of a facility for TNRCC actions, fairness dictates an unbiased review process. WMT recommends that the TNRCC establish a system of review that is external to the TNRCC enforcement group. An NOV review committee should serve as an independent body in order to provide a consistency in analysis and interpretation of requirements across the TNRCC regions. The recommended NOV review process need not be cumbersome or complicated but it should be without a predisposition. WMT submits that an NOV committee may even serve to lessen the burden on TNRCC regional staff that will no doubt be challenged more often as a result of the compliance history."

Similarly, PHA requested “clarification regarding how a given notice of violation will be determined to be without merit including: (i) the circumstances under which the merit of a notice of violation is called into question; (ii) the process by which to obtain an administrative determination that a notice of violation is without merit; and (iii) the factors that will be considered by the agency in evaluating whether a notice of violation is without merit.” Vinson & Elkins recommended that the process for determining that an NOV is without merit be established “and that this be made part of Phase 2 of the rulemaking. An independent centralized review process will harmonize agency interpretations and bring consistency to the TNRCC regional office activities.”

The commission disagrees with these comments in part. Specifically, with regard to the commenters assertion that NOV's will *now* have some weight in the evaluation of a facility for TNRCC actions, the commission responds that NOV's are currently utilized in compliance histories for both permitting and enforcement; this is not a new component. Further, the commission does not agree that it is appropriate to set up a review process external to the agency. Rather, the commission has determined that this process must be internal. Additionally, the development and implementation of this process is outside the scope of this rulemaking. As such, the Field Operations Division developed a process as previously discussed in this preamble.

TPWA, ICE, AECT, TxSWANA, PHA, and Vinson & Elkins commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). ICE and AECT requested that the commission commit to establishing a system to promptly and objectively determine whether an NOV or an alleged violation in an NOV truly has merit. AECT stated, “Under such system, if anyone requests that the TNRCC staff

re-evaluate whether an NOV or an alleged violation in an NOV has merit or if the TNRCC staff becomes aware of information that may cast doubt on the validity of an NOV or alleged violation in an NOV, the TNRCC staff would be required to promptly and objectively conduct such a re-evaluation.” ICE and AECT both added that, for any NOV or alleged violation in an NOV that is determined to not have merit, they request that the TNRCC promptly designate in writing that the NOV is without merit. TPWA stated that it “would support the consideration of only those NOVs issued after the TNRCC develops a procedure for administratively determining NOVs to be unmeritorious.” TPWA, ICE, and TxSWANA stated that HB 2912, §5.753(d), states that NOVs should be included within an entity’s compliance history, but that an NOV “administratively determined to be without merit” should not be included. TPWA and TxSWANA both stated that they read this language to require the TNRCC to establish an administrative process for having NOVs declared to be unmeritorious. ICE and TxSWANA recommended that this process be established by rule. TPWA, ICE, and TxSWANA all commented that this process should be in place before NOVs should be included in an entity’s compliance history. TPWA and TxSWANA stated that “only those NOVs that are issued after this process has been established could be factored into a compliance history ranking.” AECT added, “In addition to requiring re-evaluation of NOVs that have already been issued, such a system should also require that before the TNRCC issues any NOV, it must notify the responsible entity of the apparent violation, allow that entity to present any information that it may have to demonstrate that the apparent violation is without merit, and objectively evaluate such information to confirm that the apparent violation does have merit. This is important because for most NOVs that subsequently would be determined to be without merit through the above-described system, the information necessary to determine that they are without merit will be available before the NOVs are issued, and if such

information is provided to, and evaluated by, the TNRCC staff before it issues the NOV's, the issuance of most meritless NOV's will be avoided." Similarly, PHA requested "clarification regarding procedure for removal of a notice of violation from a compliance history including: (i) the circumstances under which a person could challenge the inclusion of a notice of violation in a compliance history; (ii) the circumstances under which the merit of a notice of violation is called into question; (iii) the process by which to obtain an administrative determination that a notice of violation is without merit; and (iv) the factors that will be considered in evaluating whether a notice of violation is without merit." Vinson & Elkins stated, "The reference in section (b)(7) should be to allegations of violation of an environmental law since NOV's contain allegations not findings. Further, the rule implements a statutory directive that NOV's that are 'administratively determined to be without merit' should not be included in the compliance summary. The Phase I rulemaking does not provide a mechanism or procedure by which the merit of a NOV is considered. Nor does it specify the procedures by which an NOV can be dropped from compliance history when the allegation is subsequently not established. These procedures must be developed to so that the inclusion of NOV's in a compliance summary is fair."

The commission responds that the protocol for determining the merit of alleged violations contained in an NOV is specified in the previous response to comment in this preamble. It includes, as suggested, that the regulated entity be notified in writing whether the executive director agrees with the merit of the allegations. The commission does not agree that only NOV's issued subsequent to the initiation of this protocol be included in compliance histories. First, the inclusion of NOV's in compliance histories is not a new process. NOV's are currently included in compliance histories for both permitting and enforcement. Furthermore, regulated entities have

always had the ability to contest the merit of allegations contained within NOVs, although such a process has not previously been formalized. And finally, if anyone currently wants to contest the merit of any prior NOVs, the new protocol may be utilized to do so. The commission does not agree there should be a separate process for “notifying” the regulated entity of the alleged violations prior to issuing an NOV in order to allow the regulated entity to demonstrate that the allegation(s) are without merit. This is the purpose of issuing an NOV. To initiate such a process as suggested by the commenter would be redundant, at best. The apparent concern of the commenter is that an NOV should not be issued until it has been determined that the allegations contained in it have merit. However, the commission points out that, once an NOV, or some portion thereof, is determined to be without merit, the appropriate portion will be designated as “withdrawn” and will not be included in subsequent compliance histories, as required by the statute and stated in the rule. No changes have been made in response to this comment.

TIP commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), citing “the need for the creation of a process to evaluate NOVs prior to their consideration as a component of compliance history. Such a process would ensure consistency and fairness in a process that is by no means uniform. For example, TNRCC inspectors exercise considerable discretion when issuing NOVs. This discretion results in tremendous variance among methods used to arrive at the decision to issue an NOV. Moreover, an NOV may be issued for a single event at one facility, while five or six events are included in a single NOV for another facility. In addition, the process of determining the number of days a violation allegedly occurred is rarely applied consistently. These examples clearly support the

need for the creation of a review process capable of fairly comparing the weight to be given NOV's."

Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with this comment. First, the commission responds as it did in the previous response, that the process to evaluate NOV's prior to their consideration as a component of compliance history is redundant, at best. This is the purpose of issuing an NOV. The apparent concern of the commenter is that an NOV should not be issued until it has been determined that the allegations contained in it have merit. However, the commission points out that, once an NOV, or some portion thereof, is determined to be without merit, the appropriate portion will be designated as "withdrawn" and will not be included in subsequent compliance histories, as required by the statute and stated in the rule. Additionally, the commission responds that the statute requires it to consider "violations" rather than "events," and further points out that the issue of "weighting" violations will not be addressed until the next phase of rulemaking concerning compliance history classification and use. No changes have been made in response to this comment.

ATINGP, BRA, Thompson & Knight, and TIP commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). ATINGP stated that the "reference to NOV's 'administratively determined to be without merit' should be clarified and a process for that determination should be identified and created.

Otherwise, what would be the administrative process for determining the merits of the NOV? Due process requires a formal appeal process. NOV's by themselves are merely the TNRCC's allegations of violations. To rely on NOV's to make permitting or penalty decisions prior to or without providing the

right to a judicial or quasi-judicial appeal to an unbiased third party would violate the due process rights of the alleged violators. The opportunity to request a reconsideration of a NOV by the TNRCC itself would not satisfy due process requirements.” Similarly, BRA commented that while it realizes that new TWC, Subchapter Q requires NOVs to be considered as a component of compliance history, it believes this is a “serious due process concern. An entity could receive several non-substantive notices of violation that are never adjudicated and require no further action, and yet have these notices come back as items to consider in a permit application. The practical effect is to include accusations as part of the compliance record for consideration during the permitting process.” Thompson & Knight stated, “The rulemaking should define what constitutes a written NOV ‘administratively determined to be without merit’ and the procedures for obtaining such an administrative determination. The agency should describe the types of documentation or action that will suffice for an administrative determination that a notice of violation is without merit. Will the mere fact that the agency does not proceed with enforcement suffice? Will the Regions begin to issue letters that withdraw a notice of violation? For many years, the Agency’s practice has been to simply not respond and take no further action once a client provides facts or law that demonstrates that the situation alleged in a notice of violation was not a violation. Typically, there is not enforcement action and no withdrawal of the notice of violation. Depending on how the Agency defines ‘notice of violation,’ it appears that such inaction will no longer suffice.” TIP stated that “exactly what constitutes an NOV should be redefined for purposes of inclusion as a component of compliance history. Because NOVs are currently thought of as mere allegations, issued without allowing the recipient a chance to respond, inclusion of NOVs in a facility’s compliance history is patently unfair and may raise constitutional due process concerns. As a result, to the extent the TNRCC is required by the underlying legislation to include NOVs as a component of

compliance history, the agency should implement a procedure whereby NOV's are only issued after an investigation and response have taken place and the matter is considered closed or settled. Currently, the TNRCC does not have an efficient system to provide final closure to NOV's and associated fines. Such a mechanism is critical to the success of the compliance history program. If such procedures are not enacted, entities receiving NOV's will be more likely to expend additional effort to challenge allegations contained therein, which in turn will result in a substantial increase in agency resources to defend such allegations." Additionally, in general, BP endorsed the comments submitted by TIP.

The commission responds, as recognized by two of the commenters, that it is required by TWC, §5.753(d), to include NOV's as a component of compliance history. However, the statute further requires that NOV's determined to be without merit shall not be included in a compliance history. An NOV, or at least some portion of it, will be determined to be without merit when the regulated entity can provide additional information to demonstrate that the allegation(s) included were cited in error, or in other words, show that the violation(s) did not occur. The commission would point out that this is very distinct and different from showing that the alleged violations have been corrected, or "resolved." Resolving a violation does not mean that the NOV was without merit. The process which the executive director will use for addressing contested NOV's is provided for previously in this preamble. Additionally, the "mere fact that the agency does not proceed with enforcement" will not suffice in reflecting that an NOV is without merit. Not all NOV's issued by the executive director result in enforcement actions; therefore, this is not an appropriate method of determining "merit." No changes have been made in response to these comments. Furthermore, "fines" or administrative penalties are never directly associated with an NOV.

Rather, they are assessed as a result of an enforcement action. The commission does not agree that any additional procedures other than those already outlined in this preamble need to be put in place in order to reduce review of allegations. Rather, the commission believes that regardless of procedures implemented, regulated entities will be more likely to contest violations alleged in NOVs; it is only a matter of where in the process, whatever the process. No changes have been made in response to these comments.

Thompson & Knight commented regarding §60.1(b)(7), (adopted as §60.1(c)(7)), stating, “A ‘notice of violation’ should not include any allegation within a Notice of Violation letter that is noted as a ‘resolved violation’ or ‘violation deemed resolved.’ A resolved violation typically relates to a circumstance for which the investigator initially had insufficient information to confirm compliance, but which was subsequently answered to the investigator’s satisfaction. Our experience is that a resolved violation may involve questions of fact or law. Such situations should not be deemed a ‘notice of violation’ and become part of a facility’s compliance history where the law or facts ultimately demonstrate to the agency’s satisfaction that the violation was resolved prior to issuance of the letter.” Thompson & Knight further stated that if “the agency will deem each ‘resolved violation’ to be a ‘notice of violation,’ there must be a mechanism by which an entity can challenge a resolved violation. Currently, a regulated entity has little incentive to take a resolved violation to an enforcement hearing. Once the TNRCC has implemented the new compliance history program, there will be a strong incentive to challenge ‘resolved violations’ if they are deemed to be a ‘notice of violation’ and this part of the entity’s compliance history. Further, it has been our experience that some Regions issue ‘notices of violation’ for unresolved violations as an information-gathering device when the agency has

insufficient information to confirm compliance. We urge the TNRCC to cease using notices of violation in this manner, and to adopt a new practice of issuing requests for information in an effort to confirm compliance or noncompliance prior to issuing a notice of violation.”

The commission disagrees with the comment. An NOV, or at least some portion of it, will be determined to be without merit when the regulated entity can provide additional information to demonstrate that the allegation(s) included were cited in error, or in other words, show that the violation(s) did not occur. The commission would point out that this is very distinct and different from showing that the alleged violations have been corrected, or “resolved.” Resolving a violation does not mean that the NOV was without merit. The commission does not agree with the commenter’s assertion that a “resolved violation” is typically related to a circumstance for which the investigator initially had insufficient information to confirm compliance. This example constitutes a violation which would be withdrawn subsequent to the submittal of information showing that it had been cited in error. The process which the executive director will use for addressing contested NOVs is provided previously in this preamble. The commission points out that, once an NOV, or some portion thereof, is determined to be without merit, the appropriate portion will be designated as “withdrawn” and will not be included in subsequent compliance histories, and further will be removed from a compliance history if it has already been included in one, as required by the statute and stated in the rule. Further, the language at adopted §60.1(c)(1) has been modified by adding the word “final” in front of the reference to enforcement orders, to reflect that draft settlement offers and those orders not yet approved by the commission

will not be included in compliance history. No changes have been made in response to this comment.

Brown McCarroll commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that it believes “very strongly that the regulated community is entitled to and should be provided clearly articulated guidance on how its members may seek ‘without merit’ determinations in the event of confusion or misinterpretations of the facts and an objective, procedural forum for appealing minor, contested NOV’s, without having to commit the time and resources the contested case hearing process would warrant.” Brown McCarroll stated, as an example, that it understands the commission’s “distinction between NOV’s that are ‘resolved’ (i.e., violation corrected) and those that are ‘withdrawn.’” As part of the guidance and procedures we envision, if the TNRCC considers an Agency correspondence withdrawing an alleged violation to be ‘administratively determined to be without merit,’ the guidance could clarify this point.” Additionally, Brown McCarroll stated that it believes that there should be a mechanism “to obtain objective determinations on no merit appeals for minor, contested NOV’s,” as “most NOV’s ... contain allegations of minor violations that would not merit being challenged pursuant to the contested case hearing process. In the past, companies simply made changes that the TNRCC inspector requested as a result of these types of minor alleged violations, even if the company disagreed, in order to stay on good terms with the inspector and settle the matter in the most efficient manner possible. With the new rules, even minor, questionable NOV’s will be held against the company, which will prompt companies to challenge every questionable NOV, no matter how trivial it may be. We believe that this is the situation the Sunset Legislation has left the regulated community and TNRCC.” Brown McCarroll went on to say, “We realize that there is an informal, Region-based

process currently in place, but we believe it lacks objectivity in that one of the primary decisionmakers in making such a determination on a contested NOV is the inspector. We believe that the current procedures should be augmented or overhauled to provide for an appeal process to an objective decisionmaker within the Agency, such as a supervisor from the Region, at a minimum, and/or personnel from TNRCC headquarters in Austin.”

The commission responds that it has provided previously in this preamble the new, formalized mechanism for how NOVs will be determined to be without merit. All appeals of NOVs issued by the FOD will be handled utilizing the same protocol. Further, the commission has stated in this preamble the distinction it makes between “resolved” violations and those determined to be “without merit.” Finally, the commission would like to reiterate that the inclusion of NOVs in compliance histories is not a new process. NOVs are currently included in compliance histories for both permitting and enforcement. Furthermore, regulated entities have always had the ability to contest the merit of allegations contained within NOVs, although such a process has not previously been formalized.

Thompson & Knight commented regarding §60.1(b)(7), (adopted as §60.1(c)(7)), posing the question, “Are contested violations ‘notices of violation’ that will become part of the compliance history while the contest is pending?”

The commission responds that an NOV will be included as a component of compliance history until such time as it is determined to be without merit.

BP commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating, "The use of NOV's as a component of compliance history should be incorporated in a fair and equitable manner. In specific, TNRCC should give consideration to redefining the NOV because current NOV's are *allegations* without recipient response. Therefore, inclusion of these allegations in the compliance history is unfair. In addition, more than one NOV is frequently issued for the same alleged violation resulting in double counting of violations for purposes of the compliance history. Again, this creates potential fairness issues if such redundancies are considered."

The commission disagrees with this comment. The statute requires the inclusion of NOV's. Also, if subsequent NOV's are issued, it is because the violation has not been shown to have been corrected. If the NOV was issued in error (i.e., the regulated entity can show that the violation in fact did not occur, or in the case of a subsequent NOV, that it had been corrected prior to the issuance of the subsequent NOV, then this NOV would be "without merit" and would not be considered for purposes of compliance history. Further, the definition of NOV's is outside the scope of this rulemaking. No changes have been made in response to this comment.

ExxonMobil Refining commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), recommending that "in-state NOV's issued to Texas based facilities, if they are required by statute to be included as a component in the compliance history, should be redefined. An NOV is an allegation of violation, there has been no investigation and no rebuttal. TNRCC should redefine to its inspectors that NOV's are to be issued only after there has been investigation and the facility personnel have had an opportunity to respond to the allegations."

The commission responds that this comment is outside the scope of this rulemaking.

Thompson & Knight commented regarding §60.1(b)(7), (adopted as §60.1(c)(7)). Thompson & Knight stated, “What constitutes a ‘notice of violation’ for purposes of compliance history must be addressed by the Agency in this rulemaking. Absent a definition of this key term, the rulemaking is flawed because it fails to provide adequate notice of the components the agency will consider when making decisions on whether to issue or terminate permits or allow the regulated community to participate in certain regulatory programs. For example, currently a notice of violation is a letter that may include numerous resolved and unresolved alleged violations.” As a starting point, Thompson & Knight suggested, “A ‘notice of violation’ is a violation of statutes or rules under the jurisdiction of the TNRCC as alleged in a letter expressly identified as a “Notice of Violation’ issued by the TNRCC or in an Executive Director’s Preliminary Report (EDPR). If the TNRCC alleges a violation for the same event in both a Notice of Violation letter and EDPR, the event should be counted as a single notice of violation.”

The commission responds that, through the modifications made to the language in adopted §60.1(c)(7), at least some of the commenters concerns are addressed. The language has been modified to read, “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 specifying each violation of state environmental law, regulation, permit, order, consent decree, or other requirement.” Specifically, even as proposed, it only included written NOVs. It has now been modified to clarify that this includes self-reported

violations submitted by regulated entities. It does include NOV's submitted by a regulated entity subsequent to performing an audit under the Texas Audit Act; however, as required by the Texas Audit Act, these violations will be designated as being voluntarily disclosed. With regard to resolved and unresolved violations being included in NOV's, this is true in some instances. However, it has no bearing on whether or not violations included in an NOV will be included in a compliance history. The only thing that excludes something included in an NOV from inclusion in a compliance history is the fact that a violation is determined to be without merit. "Without merit" means that it is determined that the violation(s) were cited in error; in other words, they did not occur. A resolved violation is one that has been corrected. Furthermore, the commission does not agree that violations included in both an NOV and an EDPR should be counted as a single violation. The statute requires that violations must be considered; it does not require that "events" be considered. Furthermore, an NOV is issued subsequent to an investigation. An EDPR, if issued, is issued later in the enforcement process. The violations contained in any commission order that resulted from an EDPR would be included in a compliance history. The statute specifically requires that both NOV's and enforcement orders be considered in the components of compliance history.

ACT commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that "this section should be clarified to include all violations that are 'self-reported' to the agency: self-reported violations are essentially equivalent to (and clearly as meritorious) as notices of violation issued by the agency."

The commission agrees with this comment. The commission has modified the language in adopted §60.1(c)(7) to include written notification of a violation from a regulated person.

Canty & Hanger and Thompson & Knight commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). Cantey & Hanger commented, "There have been indications that the TNRCC is working with the EPA to be able to issue NOV's automatically any time a violation of a permit is alleged and that the NOV would count towards compliance history. The NOV's should not be included in a regulated entity's compliance history unless and until the NOV's have been found to have merit, i.e. either through an agreed order or a successful TNRCC contested case hearing or other adjudication. At a minimum, a formal process of appealing NOV's should be established if the TNRCC intends to count NOV's toward compliance history." Similarly, Thompson & Knight stated, "The Agency has indicated that it is planning to issue a notice of violation for every reported exceedance, such as may be noted in discharge monitoring reports, opacity reports, deviation reports and similar documents submitted to the agency pursuant to regulatory requirements. If that is, in fact, the Agency's intent, we believe that the Agency should give fair notice to the regulated community that these deviations will not become a part of their compliance history. Further, we question whether it is appropriate for the Agency to use HB 2912 in this manner. In promulgating HB 2912, the Legislature did not intend to increase the instances in which the Agency issues a notice of violation and institutes enforcement. Rather, the Legislature intended to 'create a uniform *standard for evaluating* compliance history.' A new incentive to increase the number of notices is not consistent with the statutory intent. Any plan to issue a 'notice of violation' for routine self-reporting has not been well thought out and is rife with problems. For example, new source performance standards (NSPS) require as little as a three percent limit for opacity

for some industries. The NSPS performance standard for opacity monitors, PS-1, allows as much as seven and one-half percent inaccuracy for monitors that comply with the specification... Is it the Agency's intent to issue a notice of violation for each reported exceedance of the 6-minute standard?"

The commission does not agree with this comment. In stakeholder meetings, staff discussed the possibility of sending an NOV in response to a notice of violation from a regulated entity.

However, the commission modified adopted §60.1(c)(7) to include the notification itself as an NOV. For example, water quality permits require that permit compliance be reported by the permittee, on a monthly basis. The commission questions the need to contest a self-reported violation. However, any such NOVs would be subject to the same protocol for contesting NOVs as any other NOV issued by the agency. No changes have been made in response to this comment.

TCGA commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). TCGA expressed concern with the use of NOVs in compliance history. TCGA stated, "While we understand that these will be used, we also believe that it is extremely important to carefully weigh their use for compliance history. Under the proposed rules, we are very concerned that a small business with a few minor violations may find themselves moving into a lower tier. The severity of the violation, and the promptness of response to the violation must be carefully weighed during this process, or smaller businesses may be unfairly impacted by this rulemaking."

While the commission appreciates the concern raised by the commenter, the commission responds that the issue of the weight of an NOV is outside the scope of this rulemaking. Weighting will be

addressed through the next phase of compliance history rulemaking concerning classification and use. No change has been made in response to this comment.

TABCC commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), stating that while it understands that under HB 2912, NOVs will be considered in compliance history, it also believes “that the agency’s consideration of NOVs will be the most important factor in the determination of compliance history. We are particularly concerned that limitations on resource and infrequency of inspection might result in a disparate impact on small business. Under the proposed rules, a small business with a few minor violations may find itself moving into a lower tier with limited means and opportunity for improvement.”

The commission responds that the comment is outside the scope of this rulemaking. The issue of number and complexity of NOVs is to be addressed in the next phase of compliance history rulemaking, as is the classification and use of compliance history. No changes have been made in response to this comment.

Jones Day commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). Jones Day commented, "NOVs, like out-of-state information, should be given less weight as a component of compliance history. Of course, resolved NOVs; i.e., those determined to be without any merit, should be given no weight at all."

The commission responds that the issue of weighting the components of compliance history is outside the scope of this rulemaking, and will be addressed in the next phase of rulemaking concerning the classification and use of compliance history. Additionally, the commission reiterates its distinction between “resolved NOV” and those determined to be “without merit.”

An NOV, or at least some portion of it, will be determined to be without merit when the regulated entity can provide additional information to demonstrate that the allegation(s) included were cited in error, or in other words, show that the violation(s) did not occur. The commission would point out that this is very distinct and different from showing that the alleged violations have been corrected, or “resolved.” Resolving a violation does not mean that the NOV was without merit.

No changes have been made in response to this comment.

Brown McCarroll, TCFA, TIP, and TCC commented regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)). Brown McCarroll stated that it believes the potential for double-counting is important relating to consideration of NOV. “In many situations, NOVs are resolved without agreed orders, which are also counted as a component of compliance history. With the added importance given to consideration of compliance history in TNRCC decisionmaking, we do not believe that NOV that are also included in orders should also be included as a component of a compliance history. Double-counting in this respect is unfair and distorts the true nature of a company’s compliance history.

Another instance of NOV double-counting involves situations where a permit or other authorization by the TNRCC incorporates a TNRCC rule provision. Violation of the rule should not result in two violation events. Similarly, under the Title V permitting program, for example, a violation of an air quality rule could result in violation of an incorporated new source review (‘NSR’) permit along with

the Title V permit, resulting in a single non-compliance event resulting in three violations. We strongly recommend that the TNRCC provide guidance confirming that it would not double- or triple-count NOVs as compliance history components in such situations.” Similarly, TCFA stated that “{m}any NOVs provide multiple citations for a single incident and we believe that a process should be put in place to avoid double or more counting of a single violation. An example of this is an NOV citing a section of the Texas Clean Air Act and a TNRCC rule for a single failure.” TIP stated that “more than one NOV is frequently issued for the same alleged violation (for example, where a special permit condition and a federal requirement are both implicated in a single noncompliance). Again, this creates obvious fairness issues and may raise constitutional due process concerns when NOVs are included as a component of compliance history. To the extent the agency believes it is required to consider NOVs, their unproven nature mandates that they be given very little weight relative to other compliance history components.” Additionally, in general, BP endorsed the comments submitted by TIP. TCC stated, “We do want the agency to realize that many NOVs provide multiple citations for a single incident and believe that a process should be put in place to avoid double or more counting of a single violation. An example of this is a NOV citing a section of the Texas Clean Air Act and a TNRCC rule for a single failure. Another example would be including the same violation as an NOV and a subsequent order.” Additionally, in general, BP endorsed the comments submitted by TCC. Thompson & Knight stated, “Often, the TNRCC asserts that a single event violates several regulatory and/or statutory provisions. In such instances, we believe that the event should constitute a single ‘notice of violation.’ We ask that the Agency address this issue in the definition of ‘notice of violation.’”

The commission responds that the statute requires it to consider “violations” rather than “events,” and that in fact, due to the fact that the statute requires both NOVs and enforcement orders to be included as components of compliance history, it contemplates the same violation being included in both. The commission reiterates that the FOD is implementing a new protocol for addressing the contest of an NOV, as described in detail previously in this preamble. Additionally, the statute requires that any NOVs determined to be without merit not be included in compliance histories. Further, the statute requires the commission to designate violations as either major, moderate, or minor in significance. However, the designation of major, moderate, and minor significance and the “weighting” of violations will be addressed in the next phase of rulemaking concerning the classification and use of compliance history. No changes have been made in response to this comment.

Fort Worth recommended regarding proposed §60.1(b)(7), (adopted as §60.1(c)(7)), that “a component of compliance history not be a component that an entity is working on long-term to correct,” citing as an example a sanitary sewer overflow that is unpreventable, stating that it should not be considered a component for a bad compliance history.

The commission disagrees with this comment. If a violation cited in an NOV is determined to have merit, then it will be included as a component of compliance history, in accordance with the requirement of the statute. No changes have been made in response to this comment.

§60.1(c)(8)

TPWA and TxSWANA commented regarding proposed §60.1(b)(8)), (adopted as §60.1(c)(8)), stating that the compliance history rule should specifically “exclude violations voluntarily disclosed under the Texas Environmental, Health, and Safety Audit Privilege Act (Texas Audit Act) from the compliance record to be considered by the Executive Director. The Texas Audit Act states that a ‘regulatory agency may not adopt a rule or impose a condition that circumvents the *purpose of this Act.*’

(Emphasis added.) The *purpose of the Act* - that purpose that cannot be circumvented - it ‘to encourage voluntary compliance with environmental and occupations health and safety laws.’” TPWA and TxSWANA both stated that they believe “that if voluntarily-disclosed violations can be used against an entity, then entities will be discouraged from voluntarily participating in the Texas Audit Act” and that this circumvents the purpose of the Texas Audit Act. TPWA and TxSWANA both stated that they believe, therefore, that §11 prohibits the TNRCC from using voluntarily-disclosed violations against an entity when compiling the entity’s compliance history. TPWA and TxSWANA further added that Texas Audit Act , §10 affords “immunity” to an entity that makes a voluntary disclosure of a violation. The commenters asserted that if voluntarily disclosed violations are allowed to negatively influence an entity’s compliance ranking, then the “immunity” will no longer be absolute; the entity might be “immune” from having to pay the specific penalty associated with the disclosed violation, but the entity would not be “immune” from the potentially more severe consequence of being ranked lower and therein being denied a permit or some incentive based on the inclusion of that violation in its compliance record. TPWA and TxSWANA both stated, “The repeal of ‘immunity’ would discourage entities from voluntarily disclosing violations and this would circumvent not only the general purpose of the Texas Audit Act, but also an express provision of the Texas Audit Act. This is prohibited under section 11 of the Texas Audit Act.”

The commission does not agree that the results of an environmental audit should be excluded from compliance history. The commission acknowledges that the Texas Audit Act, §5, grants a limited evidentiary privilege for audit reports developed according to the statute. The Texas Audit Act also provides for immunity from administrative and civil penalties relating to certain self-disclosed violations. Nothing in the proposed rule is intended to alter or limit any privilege or immunity provided in the Texas Audit Act. However, the Texas Audit Act, §10(i) states, “A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.” Therefore, violations voluntarily disclosed pursuant to an audit performed under the Texas Audit Act must be considered as part of an entity’s compliance history. Furthermore, the commission points out the issue of how components will be “weighted” will not be addressed in this phase of compliance history rulemaking; rather, “weighting” will be addressed in the second phase of rulemaking dealing with classification and use. The commission believes that it is appropriate to reflect the fact that a person has notified the agency of its intent to perform such an audit, because this can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations. However, the commission points out that it does not agree that the “immunity” provided for in the Texas Audit Act is “absolute.” The Texas Audit Act specifically states in §10(a) that, “*Except as provided in this section*, a person who makes a voluntary disclosure of a violation of an environmental or health and safety law is immune from an administrative, civil, or criminal penalty for the violation disclosed.” (emphasis added). The section then goes on to list numerous exceptions. The Texas Audit Act also defines “penalty” in §3(a)(5) as “an administrative, civil, or criminal sanction imposed by the state to punish a person for a violation of a statute or rule. The

term does not include a technical or remedial provision ordered by a regulatory authority.” No changes have been made in response to this comment.

TMRA and Brown McCarroll commented regarding proposed §60.1(b)(8), (adopted as §60.1(c)(8)). TMRA stated that it “is encouraged that TNRCC has recognized that the performance of environmental audits should be noted among the positive components of an entity’s compliance history. TMRA notes that the proposed rule is not clear on whether TNRCC will not include among the negative components of an entity’s compliance history any NOV’s, settlement agreements/orders resulting from voluntarily-disclosed violations under the Texas Environmental, Health, and Safety Audit Privilege Act (Texas Audit Act) or the EPA policy entitled ‘Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations’ (EPA Audit Policy).” Similarly, Brown McCarroll stated that it “agrees that the TNRCC should consider audits conducted under the Audit Privilege Act as a positive component of compliance history. Further, we understand that it is TNRCC’s position that any disclosures of violation pursuant to an audit under the Audit Privilege Act would not be considered a component of compliance history. We recommend that TNRCC provide guidance in the preamble to adoption of these rules that confirms this position.” TMRA continued, “The obvious intent behind the Texas Audit Act and the EPA Audit Policy is to encourage environmental audits and voluntary disclosure of violations discovered during those audits. If the settlement agreements/orders that result from voluntarily-disclosed violations are not expressly excluded from the definition of compliance history, the goals of the Texas Audit Act and the EPA audit Policy will be greatly compromised. Entities will think twice about conducting audits and disclosing violations if disclosure will have a negative impact on their compliance history. This will be especially true now that an entity’s

compliance history will be significantly elevated in importance, from the standpoint of an entity's ranking, eligibility for innovative programs, and impact on future permit or compliance hearings.”

TMRA continued, stating, “Section 10(i) of the Texas Audit Act provides that ‘a violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.’ Given the legislative intent of the Texas Audit Act, TMRA submits that this section should be read to mean that, if a voluntarily-disclosed violation is to be considered at all in an evaluation of an entity's compliance history, the violation should be viewed in a positive light given that it was voluntarily disclosed. In addition, Section 11 of the Texas Audit Act states that a ‘regulatory agency may not adopt a rule or impose a condition that circumvents the purpose of this Act.’ The purpose of the Texas Audit Act is ‘to encourage voluntary compliance with environmental and occupational health and safety laws.’ TMRA therefore believes that the Audit Act itself precludes TNRCC from negatively weighting voluntarily disclosed violations or the settlement agreements/orders that result from such disclosures.” TMRA added that it was “encouraged by statements made on this issue by TNRCC during the October 30, 2001 Stakeholder's Meeting on the phase 2 Compliance History Rule. Specifically, Ann McGinley, director, Enforcement Division, Office of Compliance and Enforcement, made it clear that TNRCC does not intend to have violations voluntarily disclosed under the Texas Audit Act count against an entity in the compliance history evaluation process. TMRA trusts that either the final phase 1 or phase 2 rule will make the intent clear with explicit language in the regulations.”

The commission appreciates the positive comments in support of the rule. The commission acknowledges that the Texas Audit Act, §5, grants a limited evidentiary privilege for audit reports

developed according to the statute. The Texas Audit Act also provides for immunity from administrative and civil penalties relating to certain self-disclosed violations. Nothing in the proposed rule is intended to alter or limit any privilege or immunity provided in the Texas Audit Act. However, Texas Audit Act, §10(i) states, “A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed.” Therefore, violations voluntarily disclosed pursuant to an audit performed under the Texas Audit Act must be considered as part of an entity’s compliance history. However, the commission points out the issue of how components will be “weighted” will not be addressed in this phase of compliance history rulemaking; rather, “weighting” will be addressed in the second phase of rulemaking dealing with classification and use. The commission believes that it is appropriate to reflect the fact that a person has notified the agency of its intent to perform such an audit, as this can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations. The commission has not proposed to include dates or disclosures made under the EPA policy entitled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevision of Violations.” No other changes have been made in response to this comment.

Vinson & Elkins commented regarding proposed §60.1(b)(8), (adopted as §60.1(c)(8)), recommending that the proposed language be modified to read, “the dates of any 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.” Vinson & Elkins noted “that violations disclosed under the Texas Environmental, Health, and Safety Audit Privilege Act are not addressed in the

proposed rule. It is consistent with the legislative intent of HB 2912 that these self-disclosed violations be a positive component of compliance history. Furthermore, self-disclosure and correction should be encouraged by the TNRCC both generally and specifically in the compliance history rules. As stated above, we recognize that this phase is not intended to ‘score’ the components and we anticipate commenting further on the weight given to self-disclosed violations in Phase 2.”

The commission agrees with this comment in part. Violations disclosed under the Texas Audit Act are included under §60.1(c)(7). However, as required by the Texas Audit Act, these violations will be noted as voluntarily disclosed. Finally, as stated by the commenter, how components will be “weighted” will not be addressed in this phase of compliance history rulemaking; rather, “weighting” will be addressed in the second phase of rulemaking dealing with classification and use.

ATINGP commented regarding proposed §60.1(b)(8), (adopted as §60.1(c)(8)), stating, “Dates of letters notifying the agency of such an audit should not be a part of compliance history as it may connote the existence of a compliance problem where none exists.”

The commission disagrees with this comment. As stated in the proposal preamble, the intent of including the date of letters notifying the agency of such an audit is to provide a “positive,” as this can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations. No change has been made in response to this comment.

Cantey & Hanger commented regarding proposed §60.1(b)(8), (adopted as §60.1(c)(8)). Cantey & Hanger commented, "As the Proposed Rule is written now, entities which have identified a violation could be penalized for discoveries made through the audit. The TNRCC suggested at stakeholders' meetings that a regulated entity would achieve 'good' points for performing an audit, but in the Proposed Rule the only mention of an audit conducted under Texas Environmental, Health & Safety Privilege Act is that the date of any notification letter would be a component. The rule should clarify that any discovery of a violation by an entity conducting an audit pursuant to the Act will not be a negative component in a regulated entity's compliance history. In other words, only violations the TNRCC discovers should have potential to negatively impact compliance history."

The commission agrees with the comment in part. The commission acknowledges that the Texas Audit Act, §5, grants a limited evidentiary privilege for audit reports developed according to the statute. The Texas Audit Act also provides for immunity from administrative and civil penalties relating to certain self-disclosed violations. Nothing in the proposed rule is intended to alter or limit any privilege or immunity provided in the Texas Audit Act. However, Texas Audit Act, §10(i) states, "A violation that has been voluntarily disclosed and to which immunity applies must be identified in a compliance history report as being voluntarily disclosed." Therefore, violations voluntarily disclosed pursuant to an audit performed under the Texas Audit Act must be considered as part of an entity's compliance history and are included in adopted §60.1(c)(7) relating to the inclusion of NOVs in a person's compliance history. Furthermore, the commission points out the issue of how components will be "weighted" will not be addressed in this phase of compliance history rulemaking; rather, "weighting" will be addressed in the second phase of

rulemaking dealing with classification and use. The commission believes that it is appropriate to reflect the fact that a person has notified the agency of its intent to perform such an audit, as this can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations.

However, the commission disagrees with the comment that only violations discovered by the agency should have the potential to negatively impact an entity's compliance history. The agency is not limited to considering only those violations it discovers. For example, HB 2912 added TWC, §7.0025, which specifies that the commission may initiate enforcement using information provided by a private individual. In addition, regulated entities are required to self-report certain violations to the agency. Therefore, it would be inappropriate to limit the types of violation which might negatively impact an entity's compliance history to those which were discovered by the agency. No changes have been made in response to this comment.

BP commented regarding proposed §60.1(b)(8), (adopted as §60.1(c)(8)). BP commented, "TNRCC lists the 'date of letters' notifying the executive director of an audit as a component of compliance history in §60.1(b)(8). TNRCC should clarify why the 'date' is critical. In general, BP believes that an audit should be viewed as a positive component of the compliance history as it demonstrates a company's proactive efforts towards compliance. Certainly, if this were a negative any disclosures submitted prior to February 1, 2002 should not be used against the company in this rulemaking."

The commission responds that, as stated in the proposal preamble, the intent of including an intended audit as a compliance history component is because voluntary compliance audits can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations. The reason for including the date of the notice of intent letter was because it provided a way of showing that a person had submitted such a letter of intent. The letter of intent is, by its nature, “before the fact” and the commission has determined that a notice of intent letter is the most practical means of noting when an environmental audit is conducted. This is based on the fact that a person is not required to self-disclose any violations discovered during such an audit, and therefore to look for something other than the notice of intent could keep those who choose not to self-disclose from obtaining the “positive” component associated with an environmental audit.

TIP commented regarding proposed §60.1(b)(8), (adopted as §60.1(c)(8)), stating, “In addition to clarifying that the existence of environmental audits is a positive component of an entity’s compliance history, the language should be changed to ensure that an increasing number of audits in a five (5) year period results in a beneficial impact on an entity's compliance history. A ‘yes/no’ format that only asks whether an entity has performed any audits in the last five (5) years, fails to award entities that conduct multiple environmental audits and discourages companies from conducting more than one audit per five {5} year period.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with these comments. First, the commission responds that the proposal preamble, as well as this adoption preamble, do make it clear that this component of compliance

history is intended to be a “positive” component. With regard to the issue of multiple environmental audits being counted during the five-year compliance period, the commission responds that how the components in this phase of the compliance history rulemaking will be used will be addressed through the second phase of compliance history rulemaking regarding the classification and use of compliance history, and is therefore outside the scope of this rulemaking. However, the commission disagrees that, as the commenter suggests, the “failure to award entities that conduct multiple environmental audits” would “discourage companies from conducting more than one audit per five-year compliance period.” The sole rationale for an entity performing an environmental audit should not be for “positives” on its compliance history record. Rather, the motivation should be that this can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations. The commission reiterates that it is not intending to imply that multiple environmental audits would *not* be counted; as stated earlier, this aspect of the compliance history rulemaking is simply not addressed during the current phase. Rather, the commission is simply disagreeing with the commenter’s assertion. No changes have been made in response to these comments.

§60.1(c)(9)

Huntsman commented regarding proposed §60.1(b)(9), (adopted as §60.1(c)(9)). Huntsman commented that, "The proposed rule does not provide a positive credit for environmental management systems." Huntsman stated, "Proposed rule §60.1(b)(9) purports to include environmental management systems (EMS) in a company's compliance history. However, proposed 30 TAC §90.2(e)(f) expressly provides

that companies that have been adjudicated liable for an environmental violation (whether civil or criminal) are not entitled to 'regulatory incentives' for a period of three years following the 'date the judgment was final.' Regulatory incentives include use of an EMS 'in a person's compliance history and compliance summaries.' 30 TAC §90.34(5). This conflict must be reconciled because with regard to compliance history concerns, EMS are one of the most effective means for a company to rehabilitate itself. Failure to recognize the rehabilitative value of an EMS in the compliance history process would be contrary to the public interest. It would discourage the implementation of EMS for three years-- exactly what the TNRCC would not want to happen."

The commission responds that the proposed rule only defines what will be included in a compliance history. The inclusion of an EMS as a positive aspect of compliance history will be addressed in subsequent rulemaking. With regard to the apparent conflict between the proposed Chapter 60 and Chapter 90 regarding EMS, the commission will clarify the intent of Chapter 90 versus Chapter 60 implementation language goals. Specifically, Chapter 90 only governs the commission's *voluntary* regulatory incentive program for the use of EMS. Under this program, a person can request an evaluation of its EMS for a specific site to qualify for specific regulatory incentives. Chapter 90 specifically implements the requirements of HB 2997, TWC, Chapter 5, Subchapter D. This chapter prohibits the award of requested regulatory incentives under this voluntary program for a period of three years after a civil or criminal judgment has been levied against the site requesting evaluation of their EMS. In addition to meeting the statutory requirements to establish the *voluntary* regulatory incentive program discussed above under Chapter 90, the commission is additionally required under HB 2997 which amended TWC,

§26.028, by adding new subsection (e) and relettering existing subsections (e) - (g) as subsections (f) - (h) to include information regarding an EMS in an applicant's compliance history and compliance summaries for which an authorization is sought. Therefore, proposed Chapter 60 language regarding inclusion of an EMS in compliance history has been developed to meet this requirement. Regardless of whether a person requests to participate in the voluntary EMS regulatory incentive program under Chapter 90, HB 2997 statutory language requires the consideration of EMS in all compliance histories and summaries. Therefore, the language in Chapter 90 does not supercede or prohibit the additional statutory requirements contained in HB 2997, but is meant to be a complimentary program to the compliance history requirements contained in Chapter 60 and encourage more entities to develop EMS. Therefore, the commission makes no change in response to these comments.

BP commented regarding proposed §60.1(b)(9), (adopted as §60.1(c)(9)). BP stated, "Concerning the 'type' of environmental management system (EMS), BP continues to believe that plants that operate under an ISO 14001 certified environmental management system set the standard for an acceptable EMS program. Such programs should be viewed very positively in the compliance history. Consistent with our comments on the TNRCC's proposed EMS rulemaking, ISO 14001 certified facilities should be ranked *at least* average in compliance history."

The commission notes that EMS are a very positive aspect of compliance history and that properly implemented ISO 14001 certified programs provide an excellent standard under which EMS can be developed. How an EMS will be considered as a positive component of compliance history will

be determined in subsequent rulemaking on compliance history use. The commission disagrees that ISO 14001 certified facilities should be ranked at least average in compliance history since the existence of an EMS in and of itself cannot guarantee an average ranking. If the regulated entity has an EMS, but still has significant negative compliance history data, then the existence of the EMS has not corrected those issues and it would not be appropriate to give that entity an average ranking solely because an EMS was in place. If an entity has an effective EMS, the regulated entity should be reducing negative aspects of compliance history over time and will, by nature of implementing the EMS, end up as an average or higher ranking. It is not appropriate to eliminate all other aspects of compliance history in determining compliance ranking solely because of the existence of an EMS. The commission makes no change to the rule in response to this comment.

TPCA and 7-Eleven commented regarding proposed §60.1(b)(9), (adopted as §60.1(c)(9)). TPCA stated that proposed §60.1(b)(9) “includes in compliance history the ‘type’ of environmental management system utilized by the subject person. This section should be revised to provide for the inclusion in compliance history of all relevant information concerning environmental management systems utilized by the subject person. We would recommend that the section be revised to include in compliance history ‘information indicating the degree to which environmental management systems are utilized by the person to achieve compliance.’”

The commission responds that the detail of information regarding the type of EMS included in the compliance history information for the regulated entity will be included in subsequent actions by

the commission regarding compliance history use. The type of EMS developed by an entity should indicate the degree to which the EMS are used for compliance purposes. Therefore, the commission makes no change in response to this comment.

ICE and AECT commented regarding proposed §60.1(b)(9), (adopted as §60.1(c)(9)), stating that it is concerned about the use of the term “type” in the proposed language “because environmental management systems may not be of a specified and branded ‘type,’ and yet still be very effective at ensuring compliance with environmental regulations.” AECT also suggested that the words “type of” be deleted from the proposed language. TCC made a similar comment regarding proposed §60.1(b)(9). Specifically, TCC suggested removal of the words “type of” in the proposed language “because the rule does not clarify the types of environmental management systems.” Additionally, in general, BP endorsed the comments submitted by TCC.

The commission responds that in order to measure one EMS against another, since not all EMS are equal in scope or effectiveness, the commission will need to consider against what standards the EMS are developed. All EMS are developed and reviewed for its effectiveness by some standard, whether formally adopted or internally developed. Therefore, the commission notes that every EMS must be able to be categorized in order to properly assess its impact as a positive component of compliance history. The commission used the language “type” to indicate that all EMS may not be considered equally as a positive aspect of compliance history. This will be further developed under subsequent actions by the commission governing compliance history use. No changes have been made in response to this comment.

Brown McCarroll commented regarding proposed §60.1(b)(9), (adopted as §60.1(c)(9)). Brown McCarroll stated that it “agrees with the TNRCC that having an environmental management system should be a positive component of compliance history. Nevertheless, we do not believe the absence of an environmental management system should be considered a negative component of compliance history. The TNRCC Sunset law, H.B. 2912, specified that the Commission would adopt a comprehensive program to provide regulatory incentives for the use of environmental management systems. *See* H.B. 2912, Section 1.12, adding § 5.131 to the Texas Water Code. It did not authorize the TNRCC to consider the lack of an environmental management system in a punitive manner. Consequently, we recommend that the TNRCC provide guidance to clarify that if a company has an environmental management system, it would be considered a positive component of its compliance history, but that lack of such a system would have a neutral effect on the company’s compliance history.”

The commission responds that the lack of an EMS would have a neutral effect on the company’s compliance history. The proposed rule language does not in any way indicate that the lack of an EMS would be considered in a punitive matter. The use of an EMS as a positive aspect of compliance history will be addressed in subsequent rulemaking on compliance history use. Therefore, the commission makes no change in response to this comment.

TIP commented regarding proposed §60.1(b)(9), (adopted as §60.1(c)(9)). TIP commented that proposed §60.1(b)(9) “provides that the ‘type’ of environmental management system, if any, used by an entity will be included as a component of compliance history. In addition to clarifying that maintenance

of an EMS is a positive component of an entity's compliance history, the agency should clarify the significance of its use of the word 'type' when referring to EMS. For instance, does 'type' imply that certain EMS's will not be considered a positive component of compliance history? Moreover, will only an EMS that is approved pursuant to Chapter 90 be considered a positive component of compliance history? The currently proposed EMS rules do not limit companies to certain types of EMS, nor should they." Additionally, in general, BP endorsed the comments submitted by TIP.

The commission responds that clarifying that the maintenance of an EMS is a positive component of compliance history in the proposed rule language does not add any indication of a greater or lesser EMS because all EMS must be maintained in order to be effective. Any EMS considered a positive aspect of compliance history under this rulemaking would have to be maintained to be effective. Therefore, the commission will not add additional language regarding the maintenance of an EMS to the proposed language. In response to the use of the word "type," the commission clarifies that not all EMS are created equal in their scope, effectiveness, and the standards by which they are developed under. Therefore, the commission will consider those elements in determining how much weight will be awarded to the use of an EMS as a positive aspect of compliance history. It is not the intention of the commission to only consider those EMS developed under Chapter 90 because the statute language in HB 2997 does not limit inclusion of EMS in compliance history to only EMS developed under HB 2997 standards. The "types" of EMS considered as positive components for compliance history will be addressed under subsequent rulemaking regarding compliance history use. Therefore, the commission makes no change in response to these comments.

§60.1(c)(11)

TIP, ATINGP, Brown McCarroll, and Vinson & Elkins commented regarding proposed §60.1(b)(11), (adopted as §60.1(c)(11)). TIP stated that proposed §60.1(b)(11) “provides that participation in voluntary pollution reduction programs will be considered a positive aspect of compliance history.

However, the agency has not identified any programs that would meet this requirement. In addition to clarifying that this requirement is a positive component of an entity’s compliance history, the TNRCC should clarify in the preamble to the final rule which current programs it intends this requirement to apply to, while leaving open the possibility that new programs may be included in the future.”

Additionally, in general, BP endorsed the comments submitted by TIP. ATINGP stated, “This section provides that the decision to participate in a voluntary pollution reduction program should be a part of an entity’s compliance history. This section should be further clarified so that it is clear that participation in any voluntary pollution reduction program, whether it is public or private, is part of the compliance history.” Further, ATINGP recommended “that this section be expanded or a new section added to reflect that an award from the TNRCC’s Environmental Excellence Award Program shall be a part of the compliance history.” Brown McCarroll stated, “Participation in a voluntary pollution reduction program would represent positive, beneficial actions with respect to the environment.

Likewise, Brown McCarroll believes that remediations pursuant to the Voluntary Cleanup Program also represent beneficial environmental conduct, and should be included as a component of compliance history.” Brown McCarroll recommended that the proposed language be revised to read, “(11)

Participation in a voluntary pollution reduction program or the Voluntary Cleanup Program.” Vinson & Elkins stated, “Unlike the components listed in § 60.1(b)(1) - (7), which are so comprehensive as to

almost guarantee double counting, the components in §60.1(b)(8) - (12), offer only limited opportunities to demonstrate compliance with environmental laws and regulations. It is not clear whether the voluntary pollution reduction programs for which an entity could receive credit under §60.1(b)(11) are only those sponsored or implemented by TNRCC, such as Clean Texas (i.e. Responsible Care), or if internal corporate programs or programs offered by EPA, other states, or trade organizations, would be credited as well.”

The commission responds that the language in the proposed rule does not limit what types of programs will qualify for credit to only those programs sponsored by the commission.

Specifically, what types of voluntary pollution reduction programs will qualify and how they will be used as positive aspects of compliance history will be the subject of subsequent rulemaking regarding compliance history use. Therefore, the commission makes no change in response to these comments.

§60.1(c)(12)

TIP commented regarding proposed §60.1(b)(12), (adopted as §60.1(c)(12)). With regard to this proposed paragraph, TIP stated, “In addition to clarifying that this requirement is a positive component of an entity’s compliance history, the TNRCC should clarify whether the beneficial impact of this component ends when the ‘future’ requirement takes effect. The agency should further clarify the effective period of this component in cases where an entity complies with a rule that will take effect in

less than five (5) years (i.e., less than the compliance history evaluation period).” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission responds that, as reflected in the proposal preamble, this is intended to be a “positive” component of compliance history. The preamble reflects that a description of a person’s early compliance with or offer of a product that meets future state or federal government environmental requirements is considered an appropriate positive component because accelerating the implementation of new requirements that are intended to benefit the environment is a choice that a person may make. Furthermore, this voluntary early compliance is also a reflection of a person’s commitment to environmental excellence. The intent is not that once the “future” requirement takes effect that the beneficial impact in a person’s compliance history ends; rather, the date upon which the applicable early compliance is achieved will be included as a “positive” for compliance histories compiled for the next five years. The same thing applies with regard to a situation where an entity complies with a rule that will take effect in less than five years.

Although the use of compliance histories is outside the scope of this rulemaking and will be addressed in the next phase of compliance history rulemaking, it is not anticipated that compliance histories will remain “static” during a five-year period. No changes have been made in response to this comment.

§60.1(c)(8) - (12), collectively

Representatives Burnam, Maxey, and McClendon commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)). Representatives Burnam, Maxey, and McClendon stated that the

commission is proposing to include a number of irrelevant items to compliance history, including things such as considering whether a company has filed a "notice of intent audit," the consideration of whether a company participates in a "voluntary pollution reduction program," and whether a company makes a product that will comply with future environmental regulations. They added that HB 2912 does not provide for the consideration of these factors in compliance history and does not give TNRCC the expressed direction to include them. Representatives Burnam, Maxey, and McClendon further added that §60.1(b)(8) - (12) "must be removed." Similarly, GHASP, ACT, and 505 individuals commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)). GHASP and the 505 individuals stated, "TNRCC is proposing to include a whole range of extra factors in the compliance history, like whether the company has ever filed a notice of intent to do an audit, or whether it is enrolled in some sort of voluntary pollution reduction program. These items are irrelevant to complying with environmental regulations and should be deleted from the rule altogether. TNRCC should stick to the list the Legislature created, and stop adding meaningless fluff to help polluters pretty-up a dirty record." Similarly, ACT stated that the "proposed rule would allow consideration of various factors that, while allowing a company to represent its good intentions for future performance, are *meaningless* for the purpose of reviewing its actual compliance performance history." One individual commented that the inclusion of these items would weaken existing practice. ACT further commented that these proposed paragraphs "include various factors that are completely irrelevant to compliance performance. Including these factors is contrary to the clear directives of HB 2912 regarding which factors must be part of compliance history. In fact, Section 5.753(b) as added by HB 2912, provides that the compliance history 'must' include certain factors; it does not say 'at a minimum; or 'include, but not limited to' certain factors and thus the agency does not have discretion to include the factors specified in

{proposed} 60.1(b)(8), (10), (11) or (12).” ACT continued, “Without waiving the foregoing, even if §5.753 (b) were interpreted as giving TNRCC discretion to include additional factors, the times in the proposed sections specified above are *irrelevant* to compliance performance and there can be no justification for their inclusion.” ACT stated that none of the components listed in the referenced paragraphs “are relevant to compliance performance. In fact, it is obvious from the preamble that these factors relate not to compliance performance, but rather to some general notion of ‘*commitment to environmental excellence.*’ While indications of such a commitment are surely important to determining a company’s *intent* or approach, they are not in any way indicative of actual compliance *performance*. As such, there can be no reasoned justification for including them as components of compliance history. TNRCC’s lack of rationale, objective and non-arbitrary approach to consideration of factors outside the ones specified in §5.753(b) is further evidence of the agency’s outright rejection of more relevant factors, such as complaint history and evidence that a facility has had to implement its emergency and contingency plan. Clearly, complaints *are* relevant to compliance performance, and they are recognized as such under current agency practice and rules. Sections 60.1(b)(8), (10), (11) and (12) should be eliminated from the final rule. If §60.1(b)(9) is included, it should be clarified to include any review of the effectiveness of the entity’s environmental management system.”

The commission disagrees with these comments. The statute does not limit the factors that can be considered. Specifically, TWC, §5.753(b) states, "The components of compliance history *must* include..." (emphasis added). It does not say "must only include," nor does it include any other such limiting language. Furthermore, in HB 2912, §1.12, which creates TWC, §5.131, Environmental Management Systems, it states in §5.131(b)(3)(A) that, "The commission by rule

shall adopt a comprehensive program that provides regulatory incentives to encourage the use of environmental management systems by regulated entities, state agencies, local governments, and other entities as determined by the commission. The incentives may include ... (3) to the extent consistent with federal requirements: (A) inclusion of information regarding an entity's use of an environmental management system in the entity's compliance history and compliance summaries."

Environmental management systems are one of the "positive" components include in adopted §60.1(c)(8) - (12). House Bill 2997 amends TWC, §26.028, to require inclusion of information regarding an EMS in an applicant's compliance history and compliance summaries for which an authorization is sought. The commission has determined that it is appropriate, as well as allowable, to include components other than those specified in the statute, in order to more fairly and fully evaluate a person's commitment to environmental excellence. These items are relevant in reviewing a person's compliance history as many volunteer programs demonstrate significant environmental impacts in the reduction of pollution and additional protection of human health and the environment; therefore, no change has been made in response to these comments.

Additionally, the commission does not agree that the inclusion of the "positive" items would weaken existing practice. Rather, the commission believes that including these items will present a more complete picture of a person's environmental record, providing a better position from which to evaluate a person's commitment to environmental excellence. No change has been made in response to these comments.

One individual commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)), stating that "meaningless cosmetics do not clean up our air and water; compliance with legislative directions in this case does."

The commission does not agree that the components proposed in §60.1(b)(8) - (12) constitute "meaningless cosmetics" and furthermore, has determined that these proposed components can lead to the clean up of Texas' air and water by their nature. The commission believes that including these items will present a more accurate picture of a person's environmental record, providing a better position from which to evaluate a person's commitment to environmental excellence. House Bill 2997 amends TWC, §26.028, to require inclusion of information regarding an EMS in an applicant's compliance history and compliance summaries for which an authorization is sought. Additionally, the commission has received legislative direction elsewhere in HB 2912, Article 4, as it adds new TWC, §5.755(b), regarding strategically directed regulatory structure. Although not included as a mandatory factor of compliance history under §5.753(b), this section requires that voluntary measures undertaken by a person to improve environmental quality must be taken into consideration in offering incentives under a strategically directed regulatory structure. No change has been made in response to this comment.

Two individuals commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)). One of the individuals specifically listed items 8 - 12, and commented that if a person is able to get points for intending to conduct an audit, then the results of that audit should be included in the compliance history as well. One of the individuals commented that "industries should be evaluated by

the results of their actions, not their intentions," and went on to say that the "extraneous details only serve to cloud the essential facts."

The commission responds that adopted §60.1(c)(7) includes any violations disclosed under an environmental audit. However, the commission points out that the issue of how components will be “weighted” will not be addressed in this phase of compliance history rulemaking; rather, “weighting” will be addressed in the second phase of rulemaking dealing with classification and use. The commission believes that it is appropriate to reflect the fact that a person has notified the agency of its intent to perform such an audit, as this can be a useful tool for members of the regulated community to determine if their practices conform to all applicable regulations. The commission does not agree that the components proposed in §60.1(b)(8) - (12) constitute "extraneous details" that “only serve to cloud the essential facts.” The commission believes that including these items will present a more accurate picture of a person's environmental record, providing a better position from which to evaluate a person's commitment to environmental excellence. House Bill 2997 amends TWC, §26.028, to require inclusion of information regarding an EMS in an applicant’s compliance history and compliance summaries for which an authorization is sought. Additionally, the commission has received legislative direction elsewhere in HB 2912, Article 4, as it adds new TWC, §5.755(b), regarding strategically directed regulatory structure. Although not included as a mandatory factor of compliance history under §5.753(b), this section requires that voluntary measures undertaken by a person to improve environmental quality must be taken into consideration in offering incentives under a strategically directed regulatory structure. No changes have been made in response to this comment.

TCONR commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)). TCONR commented that the proposed provisions in §60.1(b)(8) - (12) are "not only irrelevant to an entity's compliance history but also are neither required nor contemplated by" TWC, §5.753(b). "This list contains items that are only vaguely defined or are undefined and would allow consideration of meaningless items to be included in a compliance history...." TCONR commented that while it may be true, as stated in the proposal preamble, that voluntary compliance audits and other voluntary programs can be a useful tool for members of the regulated community, this "in no way justifies or explains why dates of audit notice letters or regulatees' representations about voluntary compliance efforts are relevant components of compliance history." TCONR further stated, "For example, the agency would include regulatee 'descriptions' about compliance with potential future regulations with no explanation of how it views these 'descriptions' as *history*. Moreover... there are not provisions in the proposed rule for the TNRCC to verify the accuracy or 'merit' of these representations by regulated entities. The inclusion of these exculpatory or ameliorative items in these subsections of the rule strongly signals an agency invitation for excuses that would not carry weight under the express language of the statute. These provisions undermine the plain language and intent of the statute and we request they be stricken from the final rule."

The commission disagrees with this comment. The statute does not limit the factors that can be considered. Specifically, TWC, §5.753(b) states, "The components of compliance history *must* include..." (emphasis added). It does not say "must only include," nor does it include any other such limiting language. House Bill 2997 amends TWC, §26.028, to require inclusion of information regarding an EMS in an applicant's compliance history and compliance summaries

for which an authorization is sought. Environmental management systems are one of the "positive" components include in adopted §60.1(c)(8) - (12). The commission has determined that it is appropriate, as well as allowable, to include components other than those specified in the statute, in order to more fairly and fully evaluate a person's commitment to environmental excellence. These items are not irrelevant in reviewing a person's compliance history; rather, the commission believes that including these items will present a more complete picture of a person's environmental record, providing a better position from which to evaluate a person's commitment to environmental excellence. Additionally, how the components of compliance history will be used and how voluntary pollution prevention program will be evaluated is outside the scope of this rulemaking and will be addressed in the next phase of rulemaking concerning the classification and use of compliance history.

The commission would like to point out that further in the statute, specifically TWC, §5.755, the commission is directed to "provide incentives for enhanced environmental performance," and to also offer incentives for entities that have taken "any voluntary measures undertaken by the person to improve environmental quality." These positive components will provide incentives for entities who are in the lowest classification to improve their performance. The state's natural environment, as well as the citizens of the state, will benefit from these extra steps that entities do not necessarily need to perform, but may elect to do, to improve their environmental performance. The commission disagrees that these components "contain(s) items that are only vaguely defined or are undefined and would allow consideration of meaningless items to be included in a compliance history." No changes have been made in response to this comment.

TIP commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)). TIP expressed the belief that proposed §60.1(b)(6), “where an investigation results in no significant findings,” and §60.1(b)(8) - (12), “in any situation, represent ‘positive components’ of compliance history. However, the TNRCC has made no effort, either in the preamble or the proposed rule itself, to differentiate between positive and negative aspects of compliance history. As a result, the agency should clarify in the preamble to the final rule that these proposed rule sections represent positive compliance history components.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees that it did not distinguish in the proposal preamble that the components in adopted §60.1(c)(8) - (12) are “positive” components. Specifically, the proposal preamble states, “The commission suggests that there are other components of compliance history that it should consider to fully evaluate a person’s commitment to environmental excellence.” This, taken in conjunction with the additional discussion in the proposal preamble regarding the specified components reflects the commission’s intent to consider these as positives. However, the commission also responds that the weighting of components contemplated by this comment will not be addressed until the next phase of compliance history rulemaking concerning classification and use.

NTMWD, TPWA, and TMRA commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)). NTMWD stated that it “supports the Commission’s inclusion of positive components of compliance history in an entity’s compliance record and believes that the positive

comments identified in the proposed rule are appropriate. Such positive components are a necessary part of the rules based on the Legislature's mandate to 'develop a strategically directed regulatory structure to provide incentives for enhanced environmental performance'" in TWC, §5.755(a). TPWA provided a very similar comment, adding that it "believes that the inclusion of positive components is the appropriate way to acknowledge actions that exceed the requirements and therein encourage environmental excellence." TMRA stated that it "strongly supports the use of positive components of compliance history in assessing the over-all compliance of an entity and commends TNRCC for including the items set out."

The commission appreciates the positive comments in response to the rule.

TxSWANA commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)), stating that it "supports the inclusion of positive components of compliance history in an entity's compliance record. Section 5.755(a) of the Sunset Bill requires the 'commission by rule {to} develop a strategically directed regulatory structure to provide incentives for enhanced environmental performance.' Section 5.755(b)(1) states that these incentives should be offered based on 'a person's compliance history classification...' TxSWANA believes that the inclusion of positive comments in a person's compliance history is necessary to implement these legislative mandates. In fact, TxSWANA believes that listing positive components as part of an entity's compliance record, factoring the positive components into the entity's over-all ranking, and providing incentives for positive components are all necessary parts of the two-phased rule. Absent incentives for good compliance and voluntary positive undertakings, this rule does not encourage entities to do any more than is necessary to avoid being ranked as a poor performer.

If positive components are factored in and there are incentives for having a good compliance history, however, then entities would be encouraged to reach above mere 'average' and aim to be a high performer. TxSWANA, therefore, strongly support the TNRCC's consideration of positive components of compliance history." TxSWANA further stated that it "believes that the positive components identified in the draft rule are all appropriate."

The commission appreciates the positive comments in response to the rule.

Vinson & Elkins commented regarding proposed §60.1(b)(8) - (12), (adopted as §60.1(c)(8) - (12)), stating that it applauds the commission's "recognition of a person's commitment towards environmental excellence in the components of compliance history. Credit for undertaking environmental assessments, implementation of environmental management systems, participation in voluntary pollution reduction programs, and for early compliance with future environmental requirements are all activities which demonstrate an entity's desire to operate efficiently within an environmentally beneficial framework."

The commission appreciates the positive comments in response to the rule.

§60.1(c)(13)

BP commented regarding proposed §60.1(b)(13), (adopted as §60.1(c)(13)). BP commented, "Certain other components, such as item (13) (the name and telephone number) ... do not 'fit' with the component listing. These items are general information useful in the compliance history but are not in

and of themselves contributors. TNRCC should reword accordingly." TCC commented that it believes this paragraph "should be removed as a component because agency staff names and telephone numbers do not relate to a regulated entity's compliance history."

The commission disagrees with this comment. The commission has determined that, while agency contact information is not a component that will have any effect on a person's compliance history, it is important information to include in a report. No change has been made in response to this comment.

Suggested additions to §60.1(c)

TxSWANA and TPWA commented regarding proposed §60.1(b), (adopted as §60.1(c)). The commenters suggested that the fact that the entity participates in innovative technologies should be a positive component in his compliance record. Providing incentives for the early use of technology designed to protect the environment or minimize the consumption of resources is the best way to protect the environment long-term. TxSWANA and TPWA maintained, "therefore, that participation in programs designed to promote innovative technologies (i.e. the TNRCC Innovative Technology Program or the EPA's Project XL) or individual use of innovative technologies designed to make better use of environmental resources (i.e. implementation of wet cell technology in landfilling) should count in favor of an entity in assessing his compliance record." Additionally, TxSWANA and TPWA both stated that the Clean Cities Program and the Clean Texas Program are programs sponsored by the TNRCC that seek to encourage environmental excellence. Participation in these programs is voluntary and requires member cities to meet certain standards. TxSWANA and TPWA commented, therefore,

that the willingness to participate in these programs shows the commitment to environmental excellence that the TNRCC seeks to promote through the use of positive compliance history components and should be added to the rule.

The commission responds that the specific examples cited by TxSWANA and TPWA would fall under participation in voluntary pollution reduction programs in the existing rule language.

Therefore, the addition of language to the proposed rule would not increase the types of programs that could be included as positive components. The degree to which these specific programs will be considered positive components of compliance history will be addressed in subsequent rulemaking regarding compliance history use. Therefore, the commission makes no change in response to these comments.

TxSWANA, TPWA, and NTMWD commented regarding proposed §60.1(b), (adopted as §60.1(c)).

The commenters all similarly stated that they believe that cities and private entities should be credited for purposefully constructing a facility larger than is necessary to serve the immediate community's needs in an effort to make available services to small outlying communities that could not afford to erect such facilities themselves. The commenters cited as an example that a medium-sized city might consider the future solid waste disposal needs of its neighboring small cities and unincorporated areas when deciding how much land to purchase and how large of a landfill to permit. In such a situation, the medium-sized city is putting forth its own resources to accommodate its less resource-intensive neighbors and this serves the regional interest. NTMWD cited as another example a regional entity's efforts to combine separate, smaller facilities into a regional facility that can be run more efficiently and

in a more environmentally sound manner. TxSWANA, TPWA, and NTMWD commented that the TNRCC should allow a credit for such acts of regional accommodation.

The commission responds that although community planning for future resource needs benefits the surrounding communities, it does not necessarily guarantee an increase in compliance, an improvement in the compliance history of the entity, or achievement of environmental improvement. It would also be very difficult to assess to what degree the project allows a facility to operate in a “more environmentally sound manner” and provides “regional accommodation.” For these reasons, to include these components in positive compliance history is out of scope of this proposed rulemaking. Therefore, the commission makes no change in response to these comments.

TIP commented regarding proposed §60.1(b), (adopted as §60.1(c)), stating that the commission “should also consider the addition of other clearly positive components of compliance history. For example, participation in community education programs and supplemental environmental projects (“SEPs”) should be added as positive components. The ability of companies to freely submit positive compliance-related information is critical to maintaining a fair program.” Additionally, in general, BP endorsed the comments submitted by TIP. ExxonMobil Refining further commented on proposed §60.1(b), recommending that, in addition to including participation in community education programs and SEPs, participation in Citizen Advisory Panel (CAP) and the CARE program should be included as well.

The commission responds that community outreach and education programs and the degree to which they are implemented varies widely among entities. It would be extremely difficult for the commission to determine whether a community outreach program is successful and effective as uniform standards used by all regulated entities for these types of programs do not exist. In addition, whether the outreach program results in environmental improvement is also difficult to determine. Therefore, it is not practical and the resources do not exist to evaluate every regulated entity's community outreach programs in order to determine their positive impact on compliance history. The commission makes no change in response to this comment. Additionally, SEPs are actions performed as a way of offsetting some portion of a respondent penalty in an enforcement action. As such, it is not an appropriate positive component of compliance history, and no change has been made in response to this comment. The commission further responds that other programs listed could potentially fall under participation in voluntary pollution reduction programs in the existing rule language. Therefore, the addition of language to the proposed rule would not increase the types of programs that could be included as positive components. The degree to which these specific programs will be considered positive components of compliance history will be addressed in subsequent rulemaking regarding compliance history use. Therefore, the commission makes no change in response to these comments.

BP commented regarding proposed §60.1(b), (adopted as §60.1(c)). BP suggested that the "TNRCC must balance the positive and negative aspects of the compliance history by adding additional proactive components to the listing." BP suggested the inclusion of the following: voluntary reductions in greenhouse gas emissions; introduction of clean fuels earlier than required; any additional controls

added outside of regulatory requirements; any voluntary cleanups; any wetlands voluntarily restored; any proactive efforts which benefit the environment, such as habitat improvements, coastal grass plantings, and other similar initiatives; proactive programs by a company in other states; financial contributions provided to the community through corporate funds; maintenance of green belt areas; recycling efforts; community involvement via groups like a CAP; company-sponsored, employee volunteer activities; and financial support for community monitoring or siren alert systems.

The commission responds that many of the specific examples cited by BP would fall under participation in voluntary pollution reduction programs in the existing rule language. Therefore, the addition of language to the proposed rule would not increase the types of programs that could be included as positive components. The degree to which these specific programs will be considered positive components of compliance history will be addressed in subsequent rulemaking regarding compliance history use. Therefore, the commission makes no change in response to these comments.

7-Eleven and TPCA commented regarding proposed §60.1(b), (adopted as §60.1(c)), stating that a “new subparagraph (14) should be added to Section 60.1(b) to explicitly provide the owner and/or operator of subject sites with an opportunity to review and correct the compliance history compiled by TNRCC *prior* to any use by TNRCC.”

The commission disagrees with this comment. A regulated entity currently has, and will continue to have, the ability to submit (additional) information for consideration on behalf of a claim that

information included in its compliance history is inaccurate and/or erroneous. A regulated entity is free, and in fact encouraged, to provide information for consideration to correct inaccuracies at any time. However, due to the number of compliance histories that the agency will be preparing, it is not feasible to send drafts to regulated entities prior to their use by the agency. No changes have been made in response to these comments.

EMCC, AECT, and ICE commented regarding proposed §60.1(b), (adopted as §60.1(c)). EMCC commented that it "would like to preserve some flexibility for a person to voluntarily submit supplemental information to their compliance history that would be pertinent. This would avoid limiting the positive information to that currently identified under {proposed} §60.1(b)(8) - (12)." AECT and ICE stated that they agree with including components of compliance history such as those proposed in paragraphs (8) - (12). However, the commenters added that "there may be some things a person might do that would be beneficial to the environment and should be encouraged, but that would not fit into any of the descriptions in proposed §60.1(b)(8) - (12)." Therefore, AECT and ICE suggested that a new paragraph be added to proposed §60.1(b) to include "other voluntary programs or efforts by a person that will help to ensure future compliance with environmental laws, regulations, and permits, and/or will benefit the environment and/or members of the public."

The commission responds that the proposed rule language does not preclude a person from voluntarily submitting supplemental information regarding their compliance history in the public record that would be pertinent. The commission notes that the mechanism by which this information would be available to the public may be different if it does not fall under one of the

categories listed in §60.1(c)(8) - (12). For example, if a company chooses to submit an environmental report for the general public, it would be available upon request with the company's files resident at the commission, but it may not be able to be posted on the external website database to be developed for use by the general public. The commission makes no change in response to this comment.

Huntsman commented regarding proposed §60.1(b), (adopted as §60.1(c)). Huntsman stated, "The uniform standard should credit companies that provide the information on which a violation or enforcement action is based." Huntsman stated that it does not expect the agency to reward it for doing what is required by law, or to disregard violations on the basis that they were self-reported. However, Huntsman stated that it believes that positive credit should not be limited to violations reported under the Texas Audit Act; rather, Huntsman believes the rule should provide for positive credit whenever an NOV or enforcement action is based on information provided by the facility. Huntsman further stated that self-reporting a violation demonstrates commitment to compliance and good faith, conserves agency resources, and enhances the likelihood of a meaningful resolution of the problem giving rise to the violation.

The commission disagrees with this comment. Many violations are required to be self-reported, and the act of not reporting them constitutes another violation in and of itself. Additionally, the commission responds that in some circumstances, a regulated entity is afforded "positive credit" in the assessment of an administrative penalty in an enforcement action when the regulated entity has reported violations not required to be reported. The proposal to include notices under the

Texas Audit Act is intended to reflect a proactive approach taken by a regulated entity in determining whether its practices conform to applicable requirements, as opposed to a reactive response to a violation which has already occurred. No change has been made in response to this comment.

Huntsman commented regarding proposed §60.1(b), (adopted as §60.1(c)). Huntsman commented that, "The uniform standard should provide credit for environmental projects that go 'beyond compliance.'" Huntsman added, "The proposed rule should provide positive credit for projects that can be shown to have provided a result that is 'beyond compliance.' From the standpoint of the community, these projects provide a benefit that would not otherwise be realized. The policy consideration that support a positive credit for audits in the proposed rule support a positive credit for projects that take a facility beyond compliance."

The commission responds that environmental projects that go beyond compliance would be captured under the existing §60.1(c)(8) - (12) as discussed in previous comments. The exact weight of these programs as a positive aspect of compliance history is not the subject of this rulemaking, but will be addressed in subsequent actions by the commission governing compliance history use. Therefore, the commission makes no change in response to this comment.

Huntsman commented regarding proposed §60.1(b), (adopted as §60.1(c)). Huntsman commented, "The uniform standard should provide credit for monitoring programs that go beyond regulatory requirements." Huntsman stated, "Source compliance monitoring is the best means a facility and the

State has of ensuring ongoing compliance with permit and regulatory requirements. Likewise, ambient or fence-line monitoring can provide 'real-time' data, allowing the site to immediately reduce impacts on the community. Long-term ambient or fence-line data trends also provide valuable information to the State and company to assist in strategic planning. Proposed section §60.1(b)(11) allows voluntary pollution reduction programs to be considered a positive aspect of compliance history. In this same spirit, the rule should also reward facilities that implement monitoring programs that go beyond that required by permits or regulations."

The commission disagrees with the comment. Although the commission agrees that compliance monitoring can be an effective tool in managing emissions, it is not in and of itself a pollution reduction activity. The commission has made no change in response to the comment.

Huntsman commented regarding proposed §60.1(b), (adopted as §60.1(c)). Huntsman stated that, "The uniform standard should reflect a company's cooperation in a criminal investigation." Huntsman stated that corporate criminal convictions are among the components that must be included in a compliance history, and furthermore, corporate criminal convictions are an important part of agency enforcement. But, Huntsman expressed concern because "corporate liability is vicarious: a corporation with a firm commitment to environmental compliance can be indicted for the culpable conduct of its employees." Huntsman stated that, "The federal Department of Justice has developed guidelines to assist federal prosecutors when they are considering the presentation of criminal charges against a corporation. The EPA audit policy contains a similar policy. The Texas Environmental Enforcement Task Force has dealt with the issue of when to indict a company for the wrongful conduct of its employees. Common

to all these approaches is the question of whether the corporation has cooperated in the investigation." Huntsman suggested that corporate cooperation or assistance in a state or federal investigation into environmental criminal offenses should be counted as a positive element of compliance history.

The commission does not agree with the comment, except in that TWC, §5.753(b), does require the inclusion of criminal convictions as a component of compliance history, and that the agency does pursue criminal convictions in some instances. However, the commission points out that as proposed, the only components of a person's compliance history are those components against, pursued by, etc. the person. In other words, if the permit applicant is a corporation, and an employee of that corporation has been convicted of an environmental criminal offense while in the employment of the applicant corporation, the individual's conviction would not be counted as a component of the applicant's compliance history. Furthermore, the commission does not agree with the comment that cooperation or assistance in a state or federal investigation into environmental criminal offenses should be counted as a positive element of compliance history. An entity's cooperation with a criminal investigation will be considered by the investigating and/or prosecuting entities during the course of the criminal investigation and/or trial. No changes have been made in response to this comment.

TCONR commented regarding proposed §60.1(b), (adopted as §60.1(c)). TCONR commented that "information such as dates and nature of inspections (announced or unannounced) and the number or nature of complaints concerning a facility is relevant to its compliance history. Self-reported violations - that is, violations required to be reported by regulated industries - are also relevant components of

compliance history. Self-reported violations by their nature can be expected to have merit and are similar to notices of violation. We request that the final rule incorporate these components, rather than the extenuating matters now included in the proposed rule. Astonishingly, the agency explains in its preamble that it did not include complaints received as a component of compliance history because '{t}hese items are not specifically included in TWC, §5.753 as required components of compliance history...' It is disingenuous for the TNRCC not to apply this same logic to the extraneous items set forth in the proposed rule subsections (b)(8) - (12) when these items are likewise 'not specifically included in TWC §5.753 as required components of compliance history.'"

The commission agrees with this comment in part. Specifically, with regard to self-reported violations, the commission agrees that they are relevant, and has modified the text at adopted §60.1(c)(7) to reflect that self-reported notices of violations will be included. Moreover, the commission would also point out that, as expressed in the proposal preamble, although complaints are not listed as a specific, separate component of compliance history, the underlying violation confirmed in substantiated complaints will be included in compliance histories. The commenter's representation of the commission's position on complaints has been taken out of context. The preamble goes on to say, "... and further, other components included in this proposal would, in effect, include pertinent aspects of this same information. For instance, a citizen may file a complaint regarding an environmental incident. The executive director will investigate, and if a violation is documented, then the executive director will issue a notice of violation or initiate enforcement, as appropriate. Thus, the complaint would be part of the compliance history via the notice of violation or commission order. The commission notes that during the legislative process

citizen complaints were not included in HB 2912." However, the commission does not agree that the nature of inspections should be included in the compliance history components. The violations noted in any investigation will be incorporated into the compliance history, regardless of whether it was an announced or an unannounced investigation. Further, the underlying issue this raises is more relevant to the next phase of compliance history rulemaking concerning classification and use. However, the commission is not precluded from including such information about an investigation in a compliance history by leaving the language "as is." No change has been made in response to this comment. The commission would point out that the dates of investigations are already included as a component at adopted §60.1(c)(6). Finally, the commission disagrees with the commenter's representation of how the commission has not, in its proposal, applied the same logic to "the extraneous items set forth in the proposed rule subsection (b)(8) - (12) when these items are 'not specifically included in TWC §5.753 as components of compliance history.'" No change has been made in response to this comment.

Vinson & Elkins commented regarding proposed §60.1(b), (adopted as §60.1(c)). Vinson & Elkins stated, "The general language of {proposed} §60.1(b), which appears to focus compliance history on the sites within the TNRCC's jurisdiction, suggests that the enumerated components may be similarly limited. If an entity's compliance history must include information concerning violations of environmental laws of other states, it also should include information concerning compliance with the laws and regulations of other states." Specifically, Vinson & Elkins recommended inclusion of a new §60.1(b)(13), "information concerning environmental management systems, participation in voluntary

pollution reduction programs, and compliance with environmental laws and regulations of other states submitted by the entity which is the subject of the compliance history review.”

How the commission will use compliance history information regarding out of state locations will be included in subsequent rulemaking regarding compliance history use. Therefore, the commission makes no change in response to this comment.

TIP and TCC commented regarding proposed §60.1(b), (adopted as §60.1(c)). TIP commented that the commission “should allow industry the option of submitting positive compliance-related information regarding out-of-state, as well as in-state sites. Examples include, but are not limited to, the use of EMS, participation in voluntary pollution reduction programs and voluntary audit disclosures to the EPA.” TCC commented that the commission “should balance its review of operations in other states by also providing a mechanism ... to consider positive contributions a company makes outside of Texas.” Additionally, in general, BP endorsed the comments submitted by TIP and TCC.

The commission responds that the proposed rule language does not preclude the submission of positive compliance related information to the commission to be included in their public record at the commission. The commission notes that the mechanism by which this information would be available to the public may be different if it does not fall under one of the categories listed in adopted §60.1(c)(8) - (12). For example, if a company chooses to submit an environmental report or audit results for the general public, it could be available upon request with the company’s files resident at the commission, but it may not be able to be posted on the external website database to

be developed for use by the general public. In addition, the company can submit information through their community outreach programs or environmental advocacy groups regarding their compliance history. The commission makes no change in response to this comment.

TIP commented regarding proposed §60.1(b), (adopted as §60.1(c)), stating, “The draft version of the proposed compliance history definition rule included community outreach programs as a (presumably positive) component of an entity’s compliance history. However, this requirement was deleted from the final proposal. Community outreach programs and community advisory committees are very beneficial aspects of industrial environmental compliance programs. The TNRCC should restore this as a positive component of compliance history. By removing this requirement, the agency has sent the message to industry and the public that it believes positive relationships between local communities and industry are not important.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission responds that community outreach programs and the degree to which they are implemented varies widely among entities. It would be extremely difficult for the commission to determine whether a community outreach program is successful and effective as uniform standards used by all regulated entities for these types of programs do not exist. In addition, whether the outreach program results in environmental improvement is also difficult to determine. Therefore, it is not practical and the resources do not exist to evaluate every regulated entity’s community outreach programs in order to determine their positive impact on compliance history. The commission makes no change in response to this comment.

Regarding proposed §60.1(b), (adopted as §60.1(c)), TIP stated that, the commission “should consider efforts to go beyond current (and known future) environmental requirements or ‘over control’ as positive components of compliance history. Such efforts might include, but are not limited to, enhanced monitoring and increased control device destruction/capture efficiency. Such a positive component would encourage innovation in the development of state-of-the-art technology, and reward companies that make an independent effort to improve compliance.” Additionally, in general, BP endorsed the comments submitted by TIP.

The commission responds that adopted §60.1(c)(8) - (12) of the rule language already consider efforts to go beyond compliance through these aspects of compliance history and therefore makes no change in response to this comment.

§60.1(d), Change in Ownership

Representatives Burnam, Maxey, McClendon, and Puente and 17 individuals commented regarding proposed §60.1(c), (adopted as §60.1(d)). Representatives Burnam, McClendon, and Puente commented that the proposed rule weakens existing compliance history standards instead of strengthening them. Representatives Burnam, Maxey, and McClendon added that HB 2912 was intended to make compliance history more comprehensive, but that the proposed rule would limit the compliance history review to only the legal entity named in the permit for the facility. Representatives Burnam, Maxey, McClendon, and Puente all stated that this is contrary to existing practice, in that it would not include parent, sister, subsidiary, or other closely related corporations. They further stated, "With this loophole, any company could avoid a comprehensive compliance history review merely by creating a new legal entity to run each of its facilities." Similarly, 17 individuals commented that the proposed rule would limit the compliance history review to only the legal entity named on the permit for the facility. The individuals stated that this is contrary to existing practice, in that it would not include parent, sister, subsidiary, or other closely related corporations. The individuals stated, "Nothing in HB 2912 was intended or could be construed to warrant this weakening of existing rules: HB 2912 was intended to make compliance histories more, not less, comprehensive. With this

loophole, any company could avoid a comprehensive compliance history review by creating legal entities to run each of its facilities."

The proposed rule is consistent with the plain language of HB 2912, which directs the commission to establish a set of standards for the classification of a "person's compliance history." The statutory definition does not include parent, sister, or subsidiary corporations. The TNRCC does not have the authority to adopt rules which are inconsistent with the language of HB 2912. The TNRCC believes that the establishing of a uniform definition of compliance history components will in fact, result in a more effective approach to considering compliance history by the agency. No changes have been made in response to these comments.

GHASP, TCONR, and 503 individuals commented regarding proposed §60.1(c), (adopted as §60.1(d)). The individuals and GHASP stated that the proposed rules would actually weaken existing practice by allowing corporate "shell games" and not including parent, sister, subsidiary, or other closely related corporations in the history. One of the individuals commented that "the compliance history should be a more transparent record that allows ordinary citizens to gain an accurate picture of a firm's compliance with the law. It should not be hobbled or made obscure by legal formalities such as corporate structure." Another of the individuals commented that, "Since so many large companies are made up of 'subs,' it is important that for reporting purposes, they are NOT broken out but seen as one." GHASP commented further that, "It is unfair to expect the public to sort out a tangled database of corporate aliases." Similarly, TCONR stated, "The preamble to the proposed rule states that the TNRCC intends to limit its compliance history reviews to the legal entity name in a permit or permit application. This

creates an enormous loophole that is not only contrary to current agency practice, but will also allow the compliance history program to be evaded and undermined. Indeed, as was noted by several individuals, including regulated community representatives, at the August 6, 2001 stakeholder meeting, the rule will actually provide an incentive for regulated corporate entities to use parent, sister, subsidiary or other closely related corporate entities in a shell game to avoid being pegged with a history of poor performance. For example, a company may form a separate subsidiary to run an individual facility or several facilities. Even if the company has been the poorest performer in the State of Texas since the beginning of environmental regulation, no evidence of its poor performance will be factored into permitting or enforcement actions by the TNRCC." Additionally, TCONR commented that proposed §60.1(c), regarding change of ownership, "would provide an incentive for a bad actor to evade application of the rule merely by changing its corporate name prior to the fifth year of a compliance period. TNRCC should not collude with bad actors to allow them to evade the new compliance history rules in this manner. We urge the agency to instead carry out the intent of the legislature to ensure that poor performers are not rewarded, no matter how inventive they may be in using alter-egos or an array of corporate names to hide their past actions. The adopted rule must provide that compliance history includes information on the compliance performance of a parent, subsidiary, sister and other closely related corporations or legal entities as is the existing practice of the agency."

The commission disagrees with these comments. First, not all "existing practices" look to parent, sister, subsidiary, or other closely related corporations. In existing 30 TAC §281.21(d), the rule only requires the development of a compliance history for the applicant. There is no requirement

for looking at related entities. Furthermore, TWC, §5.754(a) requires that, "the commission by rule shall establish a set of standards for the classification of *a person's* compliance history" (emphasis added). The statute only requires the development of a compliance history for the "person" and not any parent, sister, subsidiary, or other closely related corporations. The statute further requires in TWC, §5.753(a), that the commission "develop a uniform standard of developing compliance history." No change has been made in response to this comment.

ACT commented regarding proposed §60.1(c), (adopted as §60.1(d)), that a company could change its legal name in the fourth year of the five-year compliance period, and thereby avoid scrutiny of its statewide operations for the previous four years. ACT stated that the final rule should reflect existing agency practice of considering compliance history of closely related corporate entities.

The commission responds that by looking at the entire five-year period for a site, even when a sale of a facility has occurred, an accurate compliance history picture will emerge. However, the commission believes it is necessary to allow some degree of flexibility for companies that purchase facilities, which is why the proposed rule allows that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review. The proposed rule is consistent with the plain language of HB 2912, which directs the commission to establish a set of standards for the classification of a "person's compliance history." No changes have been made in response to this comment.

TIP commented regarding proposed §60.1(c), (adopted as §60.1(d)), that the proposed rule is inconsistent with the agency's current penalty policy (to consider parent, sister, and daughter companies of a corporate entity). TIP requested that the TNRCC specifically acknowledge in the preamble to the rule that the underlying legislation requires revisions to the penalty policy and that after the effective date of the legislation, the agency will refrain from applying the compliance history provisions of the penalty policy in agency enforcement actions. Additionally, in general, BP endorsed the comments submitted by TIP.

As stated in the preamble of the proposed rule, not including parent, sister, or daughter corporations for the purpose of developing compliance histories represents a change from past agency practice for enforcement actions. However, the commission does not believe it is appropriate to make changes to the penalty policy in this rulemaking. To the extent that the penalty policy needs to be changed, that will be done separate and apart from this rulemaking. No change to the rule has been made.

Vinson & Elkins commented regarding proposed §60.1(c), (adopted as §60.1(d)), that the rule should be reworded to provide that the compliance history of all parties who previously owned or operated a site during the applicable five-year period will not be considered in compiling the current owner or operator's history. Vinson & Elkins also commented that the proposed language suggests that the compliance history of a newly acquired site will be "assessed" against a new owner. In instances where the existing history for the site is negative, this may discourage responsible new owners from acquiring troubled facilities and may deter rehabilitation of those sites. Vinson & Elkins further added that it is

unclear whether a change in ownership distinction applies only to the site which is the subject of the action triggering the compliance history review, or whether it applies to all sites which can be mentioned in the compliance history. Vinson & Elkins added that the proposed rule does not account for the complexities of business transactions as shared facilities, joint ventures, and complex multi-owner sites are becoming more common. The commenter suggested clarifying that the transfer of ownership can occur within the boundaries of a site and by indicating that the compliance history of a previous owner will not be considered a component of the compliance history of a new owner. Finally, Vinson & Elkins suggested the following language to subsection (c).

Change in ownership. If ownership or operation of the site, or a facility within a site, under review changed during the applicable five-year period, only the compliance history of the current owner or operator will be considered. Information relating to compliance history of any previous owner or operator of the site, or facility within a site, under review shall not be considered a component of the compliance history of the current owner or operator. (1) If the change in ownership applies only to a facility within a site, only the compliance history for the facility within a site shall be considered. (2) Change in ownership will be considered for all sites or facilities identified on a compliance history.

The commission disagrees with these comments. The commission believes that five years is an appropriate amount of time to obtain an accurate picture of compliance for a site. However, the proposed rule does allow that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review. Additionally, a five-year compliance history will be prepared for the site under review. The commission believes this is a necessary amount of time to obtain an accurate picture of compliance for each site. The

commission has included components such as participation in a voluntary pollution reduction programs in the hope that rehabilitated facilities will be given adequate consideration.

Furthermore, the preamble to the proposed rule stated that for any part of the compliance history that involves a different owner, the compliance history would be assessed for only the site under review. It is the intention of the commission to implement the requirement of HB 2912 to develop a uniform standard for evaluating compliance history. The commission believes five years is an appropriate length of time to obtain an accurate picture of compliance for a site. Although the commission acknowledges that in some cases this will be complicated, no change has been made to the rule. However, the commission notes that it has added language to the end of adopted §60.1(d) for further clarity, stating, “For the purposes of this rule, a change in operator shall be considered a change in ownership if the operator is a co-permittee.”

TIP commented regarding proposed §60.1(c), (adopted as §60.1(d)), that a shorter one- or two-year compliance history should be reviewed for sites which are sold, as this will not penalize a high performing purchaser for buying property from a poor performing seller. Additionally, in general, BP endorsed the comments submitted by TIP.

The commission disagrees with this comment. Five years is an appropriate amount of time to obtain an accurate picture of compliance for a site. However, the proposed rule does allow that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review. No change has been made in response to this comment.

TML and Plano commented regarding proposed §60.1(c), (adopted as §60.1(d)). TML stated that the proposed change to not consider parent, sister, or daughter corporations should be incorporated into the rule, probably as a definition perhaps in Phase II if not Phase I. In addition, TML requested that regional projects be added to the list of entities not included in considering a persons compliance history. Similarly, Plano noted that in the preamble discussion of proposed §60.1(c), the commission has included a "definition" of what it considers ownership to be: "The commission has determined that for purposes of developing compliance histories, 'ownership' would only include the entity filing the permit application, under enforcement, being inspected, or applying for participation in an innovative program, as defined by its legal name. For example, any parent, sister, or daughter corporations related to the legal entity would not be included." Plano recommended inclusion of this definition in the rule for clarity of proposed §60.1(c).

The commission disagrees with this comment. The rule lists the components to be considered in compiling a person's compliance history. Therefore it is not necessary to define the term "person" in these rules. No change has been made in response to this comment.

TMRA commented regarding proposed §60.1(c), (adopted as §60.1(d)), stating that they are in support of TNRCC's interpretation that an entity's compliance record applied only to that entity and not to parent or sister companies.

The commission appreciates the positive comment in support of the rule. The proposed rule is consistent with the plain language of HB 2912, which directs the commission to establish a set of standards for the classification of a "person's compliance history."

Jones Day commented regarding proposed §60.1(c), (adopted as §60.1(d)). Jones Day commented, "If this section remains in this rulemaking package, additional language in the preamble should clarify that the agency contemplates tools and/or mechanisms by which a current owner can accelerate improvement of its own compliance history, as distinct from a predecessor owner's compliance history. Facility upgrades and other capitol expenditures that reduce the likelihood that the mistakes of a predecessor company will be repeated should be acknowledged in a meaningful way. In addition, this section of the rulemaking should *facilitate ways to encourage* high performing companies to purchase facilities from low performing companies and improve the environmental performance by incorporating those sites into the high performing company's programs and management systems. If the Commission provided for a mechanism by which the poor compliance history that traveled with a facility would exist for a shorter time period (perhaps two years) when the facility was sold to a high performing company, the policy of encouraging such sales would be promoted."

The commission responds that this comment is outside the scope of this rulemaking. The commission acknowledges that TWC, §5.754, requires the classification of a person's compliance history into one of a minimum of three classifications, including "poor," "average," and "high." The proposed rule is, however, only the first phase in developing the compliance history rules. House Bill 2912, §18.05(a), requires the commission to establish the components of compliance

history, by rule, no later than February 1, 2002. This is what the proposed rule is intended to accomplish, establishing the components. House Bill 2912, §18.05(b), requires that the commission, by rule, shall establish the standards for classification and use of compliance history not later than September 1, 2002. This will be accomplished through the second phase of rulemaking. Although TWC, §5.754, requires the commission to classify a person's compliance history, rehabilitation of a facility from a poor compliance history is outside the scope of this rulemaking. The ways a regulated entity could improve their compliance history will be apparent in the second phase of compliance history rulemaking in that instituting specific positive components will improve compliance history. In addition, the commission will be undertaking rulemaking governing the strategically directed regulatory structure which will include regulatory tiers under which entities of all compliance history levels will be governed. No change has been made in response to this comment.

Plano and NTMWD commented regarding proposed §60.1(c), (adopted as §60.1(d)). Plano requested that the commission clarify the applicability of compliance histories in situations where a party is a member of a regional water, wastewater, or solid waste authority. Plano cited as an example, that it is a member of the NTMWD, which is a political subdivision of the state of Texas providing regional water, wastewater, and solid waste disposal services. It stated that NTMWD is comprised of 13 member cities, serving a total of 61 cities, towns, and water supply corporations in five counties. Plano expressed concern about how any actions taken against member cities and NTMWD would affect the compliance histories of other member cities of NTMWD. Plano stated that it is unclear from the language of proposed §60.1 whether a citation issued to NTMWD would also be contained in another

member city's compliance history. NTMWD similarly stated that proposed §60.1(b) “provides that ‘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 under the commission’s jurisdiction and owned or operated by the same person.’” NTMWD further stated that the proposal preamble states, “‘For example, any parent, sister, or daughter corporation related to the legal entity would not be included’ in the definition of ‘ownership.’” NTMWD stated that it “agrees with the Commission on this issue, but believes that it should be clarified to address how compliance history will affect regional governmental entities that are made up of, for example, member cities. A reasonable analogy to the parent/sister company policy of not considering the compliance history of such related companies (i.e. looking only at the compliance history of the entity in question) is that for regional governmental entities, the Commission also will only look to the compliance history of the entity in question. Thus, if the compliance history of the regional entity is being evaluated, the Commission will not look at the individual compliance histories of member cities. The reverse would also be true. If the Commission were considering the compliance history of a member city, the compliance history of the regional governmental history would not be considered and would not affect the compliance history of the member city. Because there are a number of different types of regional entities in Texas, NTMWD believes that the Commission should clarify that the compliance history of a regional governmental entity will not affect the compliance history of a member of such entity, and vice versa.”

The commission responds that as proposed, only actions against, or activities of, the legal entity filing the permit application, under enforcement, being inspected, or applying for participation in an innovative program would be considered in a compliance history. In other words, if City A,

City B, and City C are all members of ABC District, and independent enforcement actions have been taken against both City A and ABC District during the five-year period prior to City C applying for a permit, the enforcement actions against City A and ABC District would not be counted in City C's compliance history. No change has been made in response to this comment.

Cantey & Hanger commented regarding proposed §60.1(c), (adopted as §60.1(d)). Cantey & Hanger commented, "It is unclear what entity (entities) the TNRCC will be evaluating when assembling the components for compliance history. The regulated entity's compliance history should be based on individual components for that particular entity rather than including all other entities related to the individual regulated entity in the compliance history, e.g. Partnership Y which has a percentage ownership in Corporation X should not have all Y's past enforcement orders included as a component in the compliance history assessment for X (and vice versa)."

The commission responds that, as specified in the proposal preamble, for purposes of developing compliance histories, ownership would only include the entity filing the permit application, under enforcement, being inspected, or applying for participation in an innovative program, as defined by its legal name. No change has been made to the rule in response to this comment.

BP and TCC commented regarding proposed §60.1(c), (adopted as §60.1(d)). BP stated, "TNRCC indicates in the proposed rule that if ownership of a site changes during the five-year compliance period, the compliance history for each site will remain distinct during that period. At a minimum, TNRCC should ensure that each company participating in mergers, acquisitions, shared sites, or

purchases of other sites should be allowed to keep their existing compliance history status for at least two years following the change. During this 'amnesty period,' the acquiring company could address any identified compliance issues." Additionally, BP commented that "other complex business relationships, while not defined as a 'change in ownership,' should be given special consideration in developing this rule related to compliance history. For example, there are some petrochemical plants that 'share' control devices. In these situations, a distinction should be made between the 'owner' of the equipment and the 'user' of the equipment when the owner and the user are not the same entity. Consider the following: If the 'owner' of a flare did not perform required flare testing, the 'owner' might be potentially impacted on their compliance history. The 'user' of the flare, however, should not be impacted. If a 'user' of a flare failed to properly report emissions they sent to the flare, then the 'user' might potentially be impacted on their compliance history, but the 'owner' should not be affected. The compliance history should provide equity for both the 'owner' and 'user' of a shared device." TCC stated that the TNRCC should give special consideration to joint ventures and assure that only compliance history from a specific joint venture is included in compliance history. TCC commented that other complex business relationships should be given special considerations, such as situations where petrochemical plants share control devices. In these situations, a distinction should be made between the owner of the equipment and the user of the equipment when they are not the same entity. Additionally, in general, BP endorsed the comments submitted by TCC.

The commission disagrees with these comments. It is the intention of the commission to implement the requirement of HB 2912 to develop a uniform standard for evaluating compliance history. The commission believes five years is both adequate and reasonable for considerations of

compliance history because this time period is long enough to detect any overall pattern related to compliance. The five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions. Additionally, the commission responds that, as specified in the proposal preamble, for purposes of developing compliance histories, ownership would only include the entity filing the permit application, under enforcement, being investigated, or applying for participation in an innovative program, as defined by its legal name. In the flare example provided, only those compliance history components that had been previously taken by, or levied against, the applicant, respondent in an enforcement case, or the owner of the site to be investigated would be included in that person's compliance history. No change has been made to the rule as a result of these comments.

TPCA, 7-Eleven, and ICE commented regarding proposed §60.1(c), (adopted as §60.1(d)). TPCA and 7-Eleven stated that the proposed rule and preamble do not address how the agency will address situations where a site is subject to remedial activity that may be implemented over many years. TPCA and 7-Eleven further commented that in such cases it is common for multiple parties to be owners or operators of a site, but at the same time these owners do not otherwise have any connection to the remedial obligation. Similarly, ICE stated that in the PST realm, compliance aspects are especially complex when property transfers take place, adding that many sites either have remediation systems in operation, or are obligated by site circumstances to put in a system. ICE asserted that TNRCC staff must take exceptional measures to establish the ownership/operation trail over time.

The commission responds that the fact that remedial action is required and has been, or is being undertaken, does not constitute a component of compliance history. Rather, it is the violations that may have resulted in the need to perform remediation that would be components. As such, those components (enforcement orders, court judgments, consent decrees, criminal convictions, NOVs) are dated, and would only be included in compliance histories compiled for five years subsequent to the dates of those components, even if the remediation activities took longer than five years. However, should the site change hands during the five-year period after the effective date of the component(s), the component(s) for the previous owner, at that site only, would still be included in compliance histories compiled for applicable applications submitted for, enforcement actions concerning, and investigations conducted at that site for the full five-year period. No changes have been made in response to this comment.

TPCA, ICE, and 7-Eleven commented regarding proposed §60.1(c), (adopted as §60.1(d)). TPCA, ICE, and 7-Eleven stated that they support the exclusion of all information pertaining to other facilities owned by a seller/transferor of the subject property. ICE stated that it disagrees that portions of the compliance history relating to a prior owner should be included. TPCA, ICE, and 7-Eleven all stated that they disagree that portions of the five-year compliance history relating to a prior owner of a subject property should be included in the new owners compliance history. TPCA and ICE asserted that HB 2912 does not explicitly call for an involuntary transfer of liability, and the compliance history rules should not modify existing state corporate law provisions concerning transfers of liabilities and legal obligations.

The commission appreciates that positive comments in support of the rule. It is the intention of the commission to implement the requirement of HB 2912 to develop a uniform standard for evaluating compliance history. The commission believes five years is both adequate and reasonable for considerations of compliance history because this time period is long enough to detect any overall pattern related to compliance. The commission has determined that by looking at the entire five-year period for a site, even when a sale of a facility has occurred, an accurate compliance history picture will emerge. However, the commission believes it is necessary to allow some degree of flexibility for companies that purchase facilities, which is why the rule allows that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review. The five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions. Furthermore, the rule is not intended to change existing state law; the rule applies only to the time period used to assess compliance history, and in no way applies to business liabilities covered by other laws. No changes have been made in response to these comments.

Vinson & Elkins and WMT commented regarding proposed §60.1(c), (adopted as §60.1(d)). Vinson & Elkins stated “we are aware that the valuation of compliance history is left to Phase 2 of the compliance history rulemaking. However, the ‘Change in ownerships’ section of the proposed rule suggests that the compliance history for a newly acquired site will be ‘assessed’ against a new owner. Although it is not clear that this will always be a negative consideration, in instances where the existing history for the site is negative, sale or acquisition of the site may be affected by the ‘assessment.’ This may

discourage responsible new owners from acquiring troubled facilities and may deter rehabilitation of those facilities. This is particularly true where the newly acquired facility's history may affect the potential new owner's other facilities' compliance history, i.e. if the site specific history is assessed against the new owner, a permit action at the new owner's other facility may be deterred. We believe that this phase should address only the ingredients and not determine or suggest the compliance history recipe. These rules should facilitate changes in ownership and provide an incentive for new owners that will restore compliance and not to create compliance history orphans." Vinson & Elkins recommended the following language to subsection (c).

Change in ownership. In addition to the requirements in subsection (b) of this section, if ownership of the site changed during the five-year compliance period, a distinction of compliance history for each owner during that five-year period shall be made. For any part of the compliance period that involves a different owner, the compliance history for only the site under review will be compiled.

Similarly, WMT commented, "The TNRCC should remove new owner disincentives in the draft rule." WMT stated that it is "concerned about the 'ownership' provision in section (c) of the proposed rule. WMT recommends that the current draft provision be changed to require that the information for the prior owner be *compiled* for only the facility in question but not 'assessed' as the draft rule states. 'Assessed' suggests that the prior owner's history will be 'counted' for compliance history purposes. If the rule remains as drafted, the buying and selling of facilities will be negatively impacted. Facilities with a bad compliance history will be significantly less attractive to prospective compliant purchasers that, if given the opportunity, would improve the facility's environmental performance. Perhaps, the

TNRCC plans to deal with the specifics of this assessment in Phase 2 of the compliance history rules, but the draft rule should be clarified to remove the suggestion that the facility's compliance history will count against a future owner."

The commission agrees in part with these comments. As such, the language in the proposed rule has been changed to read: "...for any part of the compliance period that involves a previous owner, the compliance history will include only the site under review." The word "assessed" has been removed from the draft rule. However, HB 2912 specifically requires that changes in ownership be included as a component of compliance history, so the commission will not remove changes in ownership as a component. Additionally, it is the intention of the commission to implement the requirement of HB 2912 to develop a uniform standard for evaluating compliance history. The commission believes five years is both adequate and reasonable for considerations of compliance history because this time period is long enough to detect any overall pattern of related to compliance. The commission has determined that by looking at the entire five-year period for a site, even when a sale of a facility has occurred, an accurate compliance history picture will emerge. However, the commission believes it is necessary to allow some degree of flexibility for companies that purchase facilities, which is why the proposed rule allows that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review. The five-year period is consistent with the length of time currently utilized in preparing many compliance summaries, and is also the length of time used in evaluating compliance history for purposes of commission enforcement actions.

PHA commented regarding proposed §60.1(c), (adopted as §60.1(d)), stating that when an entity acquires a facility from a wholly unrelated previous owner during the five-year period, the previous owner's compliance history is not an indication of the compliance record of the new owner. PHA commented that a distinction should be made where no corporate consanguinity exist.

The commission has determined that by looking at the entire five-year period for a site, even when a sale of a facility has occurred, an accurate compliance history picture will emerge. However, the commission believes it is necessary to allow some degree of flexibility for companies that purchase facilities, which is why the proposed rule allows that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the site under review. No changes have been made in response to this comment.

ATINGP commented regarding proposed §60.1(c), (adopted as §60.1(d)), stating that the language of the rule should be changed so that instead of referencing "site under review," the rule should be changed to "current owner" because HB 2912 directs the commission to consider the compliance history of a person, not a site. In addition, only the compliance history of the current owner is relevant to enforcement and permitting actions.

The commission disagrees with this comment. In preparing a compliance history for a specific site, the TNRCC will be preparing a history for each "person" who has owned the site during the past five years. The commission believes this is consistent with the intent of the legislation. No change was made to the rule as a result of this comment.

Fiscal Note

Birch & Becker commented, with regard to the Fiscal Note, that the “TNRCC has determined that, since the Phase I rules are entirely procedural in nature, there are no anticipated additional costs for units of state and local government.” The commenter added, “When read in conjunction with the Phase II rules, the currently proposed components might result in additional costs... It is impossible to evaluate the cost impact on the proposed rules without knowing how other substantive features of the compliance history rules will be defined in Phase II. Additionally comments on the cost issue may be submitted during the Phase II proposal.”

The commission responds that an additional Fiscal Note, from the perspective of the implementation of the second phase of compliance history rulemaking pertaining to classification and use, will be included in the proposal preamble for the second phase.

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.753, which requires the commission, by rule, to develop a uniform standard for evaluating compliance history; TWC, §5.102, which gives the commission general powers necessary and convenient to exercise jurisdiction authorized by the code; TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and TWC, §26.011, which gives the commission the

powers and duties to carry out its responsibilities specified in chapter 26 of the code. The new rule is also authorized under THSC, §361.011, which gives the commission powers and duties relating to solid waste management; THSC, §361.017, which gives the commission powers and duties necessary to manage industrial solid waste and hazardous municipal waste; THSC, §361.018, which gives the commission powers necessary to regulate the management of hazardous waste components of radioactive waste; THSC, §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; THSC, §382.011, which gives the commission general powers and duties to control the quality of the state's air; 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.

CHAPTER 60: COMPLIANCE HISTORY

§60.1

§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.

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

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

(B) enforcement;

(C) the use of announced investigations; and

(D) participation in innovative programs.

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

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

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

(A) voluntary permit revocations;

(B) minor amendments and nonsubstantive corrections to permits;

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

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

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

(F) permit alterations;

(G) administrative revisions; and

(H) air quality new source review permit amendments which meet the criteria of §39.402(a)(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).

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

(11) participation 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.