

# **Texas Commission on Environmental Quality**

## **Interoffice Memorandum**

**To:** Commissioners **Date:** June 8, 2012

**Thru:** Bridget C. Bohac, Chief Clerk  
Zak Covar, Executive Director

**From:** Ramiro Garcia, Jr., Deputy Director  
Office of Compliance and Enforcement

**Docket No.:** 2011-1251-RUL

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

**Background and reason(s) for the rulemaking:**

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

**Scope of the rulemaking:**

**A.) Summary of what the rulemaking will do:**

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

**B.) Scope required by federal regulations or state statutes:**

There are no new federal regulations related to this rulemaking. HB 2694, §4.01, amends TWC, §5.751; §4.03 amends TWC, §5.753; §4.04 amends TWC, §5.753; §4.05 amends TWC, §5.754 and §5.755; and §4.07 amends TWC, §5.756. TWC, §5.754 expressly requires adoption of rules.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

None.

**Statutory authority:**

TWC, §§5.012, 5.103, 5.105, 5.122, 5.127, 5.751, 5.753, 5.754, 5.755, and 5.756

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Texas Government Code, §2001.006

**Effect on the:**

**A.) Regulated community:**

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

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

**B.) Public:**

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

**C.) Agency programs:**

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

**Stakeholder meetings:**

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

**Public comment:**

The proposal was published in the February 10, 2012, issue of the Texas Register (37 TexReg 622). The commission held a public hearing on March 6, 2012. The comment period closed on March 23, 2012. The commission received comments from State Representatives Lon Burnam, Ron Reynolds, Ruth Jones McClendon, Alma Allen, Scott Hochberg, Rafael Anchia, Jessica Farrar, and Carol Alvarado (Representatives), Allergy and Asthma Center of Corpus Christi, Alliance for a Clean Texas (ACT), Association of Electric Companies of Texas, Inc., Birch, Becker & Moorman, LLP, Clean Economy Coalition (Clean Economy), Clean Economy Coalition of Corpus Christi (Clean Economy Corpus Christi), Harris County Pollution Control Services Department, League of Women Voters of the Austin Area (League), Medina County Environmental Action Association

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(MCEAA), National Solid Wastes Management Association, Northern Arlington Ambience (NA Ambience), Public Citizen (Public Citizen), SEED Coalition, Sierra Club Lone Star Chapter (Sierra), South Central Texas Network (South Central Texas Network), TCEQ Office of Public Interest, Texas Association of Business, Texas Chapter of the Solid Waste Association of North America, Texas Chemical Council (TCC), Texas Industry Project (TIP), Texas Oil and Gas Association (TxOGA), Texas Organizing Project (TOP), Texas Pipeline Association (TPA), Turning Point Ranch, Waste Management of Texas, Inc., Westchester Association of Homeowners (Westchester), and 302 individuals. The commission received 330 written comments, and seven individuals provided oral comments at the public hearing. Of the 302 individual comments received, an overwhelming majority of them were a variation of the comments provided by ACT. Significant comments and concerns are discussed further.

The commission received many comments regarding the compliance history point range for determining unsatisfactory performers. Representatives, South Central Texas Network, Clean Economy, Clean Economy Corpus Christi, NA Ambience, MCEAA, Westchester, TOP and 281 individuals commented that changing the unsatisfactory rating cutoff from 45 points to 55 points would essentially “pardon polluters.” No changes were made to the proposed rules in response to these comments. The commission proposed an unsatisfactory rating threshold at 55 points based on an evaluation of the proposed compliance history formula. Because the compliance history formula utilized in the adopted rule is not the same formula used in the existing rule, a direct comparison is not prudent. Many components used in the adopted formula are different, including a major revision to the divisor which now includes complexity. For this reason, the comment that moving the unsatisfactory threshold to 55 “pardons” entities is not accurate. The commission has determined the site rating point range of 55 points or greater is appropriate for unsatisfactory performers.

Also, Representatives, South Central Texas, Clean Economy, Clean Economy Corpus Christi, NA Ambience, Westchester, MCEAA, Sierra Club, Public Citizen, ACT, and 271 individuals commented that the executive director would be able to “pardon polluters” at his discretion instead of adhering to a standard protocol. No changes were made to the proposed rules in response to these comments. The compliance history rules apply to a wide range of regulated entities with varying sizes and complexities. The commission recognizes that a rule of such broad application may create situations where unique factual circumstances may warrant the exercise of mitigating factors. The commission has not expanded the executive director’s discretion under these rules, the language has been part of the compliance history rules from the beginning. The commission has determined that the use of mitigating factors requires the exercise of discretion and consideration of site- or person-specific factors by the executive director because of widely varying factual circumstances. Because the factual circumstances surrounding other types of mitigating factors will vary from case to case, this discretionary approach is important so that the issues related to each mitigating factor can be sufficiently evaluated for its relative importance and impact.

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Additionally, Representatives, South Central Texas Network, NA Ambience, Sierra, Westchester, League, and 262 individuals commented that polluters will improve their compliance history score by signing up for supplemental programs, regardless of effectiveness and without measured returns for measured results. No changes were made to the rules in response to these comments. The four voluntary pollution reduction programs currently available to regulated entities require that a standard be met in order to be eligible for the credit provided in the adopted compliance history rule. In order for a regulated entity to participate in any one of these programs, the agency must take an action to allow participation. In addition, the regulated entity must meet standards established by each program to receive credit. The implication that a “polluter” will improve their compliance history score by simply signing up for one of these programs is inaccurate.

**Significant changes from proposal:**

In response to TPA’s comment that an additional industry grouping for transmission pipelines and related facilities be added to the rules, the commission added an additional grouping under §60.2(c) for NAICS codes 468110 and 486210 (Pipeline Transportation of Natural Gas), NAICS code 486910 (Pipeline Transportation of Refined Petroleum Products), and NAICS code 486990 (All Other Pipeline Transportation).

In response to comments received from TCC, TIP, and TxOGA, the commission has revised §60.2(e)(1)(A) to include nonattainment New Source Review permits and Underground Injection Control Class I/III permits as recipients of four program participation points. Additionally, the commission changed the amount of program participation points allocated for Municipal Solid Waste (MSW) Tire Registrations (MSW Type VIII) from two points to one point for this type of authorization. And, the commission added Air Quality Standard Permits to §60.2(e)(1)(D) which allocates one program participation point for these types of authorizations. The commission also revised §60.2(e)(2) to include size points for underground and above-ground storage tanks. In §60.2(e)(2)(E), the commission provides a point range for regulated entities to accrue one to four points based on the number of storage tanks at a site.

In response to comments received from Representatives, Westchester, NA Ambience, ACT, Sierra Club, and 252 individuals that the complexity point allocation makes it difficult for any complex or large facility to ever be classified as a repeat violator, the commission has revised §60.2(f)(1)(A) - (C). The commission revised the point ranges to ensure the repeat violator classification serves as a meaningful deterrent for all regulated entities. The commission eliminated the subparagraph requiring four or more violations. The commission revised the complexity point ranges for those with at least two violations from less than 9 complexity points to less than 15 complexity points. Adopted §60.2(f)(1)(A) was revised to provide that a person is a repeat violator at a site when “the site has had a major violation(s) documented on at least two occasions and has less than a total of 15 complexity points.” Adopted §60.2(f)(1)(B) was revised to provide that a person is a repeat

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violator at a site when “the site has had a major violation(s) documented on at least three occasions.” Proposed §60.2(f)(1)(C) was removed from the adopted rules.

**Potential controversial concerns and legislative interest:**

As outlined above, the commission received comments from State Representatives and organizations expressing concerns about this rulemaking. Although the adopted rules provide responses to these comments and reasoned justifications for the commission’s decisions, it is likely that the number of unsatisfactory performers, the allocation of complexity points, and repeat violator classification criteria will continue to be items of interest.

Another potential item of interest is the commission’s use of Notices of Violation (NOVs) in the adopted rulemaking. In the existing rules, the compliance period for NOVs is five years. Section 4.04 of HB 2694 amended TWC, §5.753(d) to limit the inclusion of NOVs as a mandatory component of compliance history to NOVs one-year-old or less. The adoption amends §60.1(b) to change the compliance period for NOVs to one year except as used in adopted §60.2(f) for determination of repeat violator. In evaluating repeat violators, the commission reviews all major violations documented in approved investigations in the last five years and final enforcement actions issued in the last five years to determine if a repeat violator classification is warranted.

**Does this rulemaking affect any current policies or require development of new policies?**

This rulemaking will require changes to the Penalty Policy. These changes include revising the nomenclature used to identify the compliance history classifications, revising rule citations, and clarifying component information cited in the policy

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

TWC, §5.753 requires the commission, by rule, to establish a set of standards for the classification of a person's compliance history as a means of evaluating compliance history. If the rulemaking is not completed, the newly amended statute and rulemaking would be in conflict regarding evaluation and use of compliance history. Staff recommends proceeding with rulemaking.

**Key points in the adoption rulemaking schedule:**

**Texas Register proposal publication date:** February 10, 2012

**Anticipated Texas Register publication date:** July 13, 2012

**Anticipated effective date:** July 19, 2012

**Six-month Texas Register filing deadline:** August 10, 2012

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**Attachments**

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