

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** December 15, 2021

**DATE OF REQUEST:** November 23, 2021

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Lee Bellware/Agenda Coordinator, (512) 239-6095

**CAPTION:** Docket No. 2020-1173-RUL. Consideration for publication of, and hearing on, proposed new Section 60.4 of 30 TAC Chapter 60, Compliance History.

The proposed rulemaking would add new Section 60.4, which would allow for the executive director to designate and reclassify the compliance history classification for a site involved in an emergency event that causes or results in exigent circumstances. (Melissa Cordell, Jess Robinson; Rule Project No. 2020-049-060-CE)

Craig Pritzlaff  
\_\_\_\_\_  
**Director**

Susan M. Jablonski, P.E.  
\_\_\_\_\_  
**Deputy Director**

Lee Bellware  
\_\_\_\_\_  
**Agenda Coordinator**

Copy to CCC Secretary? NO  YES

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** November 23, 2021

**Thru:** Laurie Gharis, Chief Clerk  
Toby Baker, Executive Director

**From:** Craig Pritzlaff, Director  
Office of Compliance and Enforcement

**Docket No.:** 2020-1173-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 60, Compliance History  
Site Classification Changes Due to Exigent Circumstances  
Rule Project No. 2020-049-060-CE

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

Several large emergency incidents at industrial facilities in the past few years have caused significant impacts to public health and the environment, which have resulted in scrutiny of the compliance histories of the regulated entities involved in these incidents. The executive director is requesting authority to make designation to and reclassify a site's compliance history classification under 30 Texas Administrative Code (TAC) Chapter 60 in a manner different than the rules currently allow for a site involved in an emergency event that causes or results in exigent circumstances.

**Scope of the rulemaking:**

The executive director proposes revising Chapter 60 by adding a new section 30 TAC §60.4.

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

This new section would provide a process for the executive director to designate a site's compliance history classification as "under review," and to reclassify it to "suspended" if the executive director determines that exigent circumstances exist due to an event at a site, such as a major explosion or fire, that significantly impacts the surrounding community and environment, causes emergency response efforts by federal or state authorities to address pollutants, contaminants, or other materials regulated by the agency, and results in certain urgent or grave consequences.

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

This rulemaking is not required by federal regulations or state statutes.

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

None.

**Statutory authority:**

The rulemaking would be proposed under Texas Water Code (TWC), §5.753, concerning Standards for Evaluating and Using Compliance History; and TWC, §5.754, concerning Classification and Use of Compliance History, both of which authorize rulemaking to establish compliance history standards. Additional authority exists under TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

Re: Docket No. 2020-1173-RUL

**Effect on the:**

**A.) Regulated community:**

The proposed rulemaking may result in fiscal implications for businesses or individuals if they have a site that is involved in exigent circumstances which necessitates a federal or state emergency response and results in urgent consequences. The estimated fiscal impact resulting from this proposed rule would vary for each site that the executive director decides to designate as "under review" and reclassify as "suspended." Any costs will depend on the specific situations and if the applicant is prevented from obtaining an authorization.

**B.) Public:**

No fiscal implications are anticipated for the public. The public benefit anticipated would be improved transparency and a more accurate compliance history classification for a site at which an event causes or results in exigent circumstances.

**C.) Agency programs:**

No fiscal implications are anticipated for the agency or the state.

**Stakeholder meetings:**

No stakeholder meeting was held; however, a public hearing will be offered during the comment period in January 2022.

**Potential controversial concerns and legislative interest:**

There is significant interest in this proposed rule from legislative members, environmental interest groups, and the regulated community.

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

This rulemaking would not necessarily affect any current policies or require development of new policies, but it could impact internal agency practices during implementation.

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

The purpose of this proposed rulemaking is to provide a more immediate and accurate measure of a site's performance following an exigent event. Without this rulemaking, if an exigent event occurs, an associated site's compliance history may not accurately account for the event.

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

**Anticipated proposal date:** December 15, 2021

**Anticipated *Texas Register* publication date:** December 31, 2021

**Anticipated public hearing date:** January 27, 2022

**Anticipated public comment period:** December 31, 2021 - February 1, 2022

**Anticipated adoption date:** June 1, 2022

**Agency contacts:**

Melissa Cordell, Rule Project Manager, Enforcement Division, (512) 239-2483

Jess Robinson, Staff Attorney, (512) 239-0455

Lee Bellware, Texas Register Rule/Agenda Coordinator, (512) 239-6095

**Attachments:**

None.

cc: Chief Clerk, 2 copies

Commissioners  
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Re: Docket No. 2020-1173-RUL

Executive Director's Office  
Jim Rizk  
Morgan Johnson  
Brody Burks  
Office of General Counsel  
Melissa Cordell  
Jess Robinson  
Lee Bellware

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §60.4.

### **Background and Summary of the Factual Basis for the Proposed Rule**

Several large emergency incidents at industrial facilities in the past few years have caused significant impacts to public health and the environment, which have resulted in scrutiny of the compliance histories of the regulated entities involved in these incidents. The commission determined it is appropriate for the executive director to have the ability to make a designation to and reclassify a site's compliance history classification under Chapter 60 in a manner different than the rules currently allow. The commission proposes new §60.4. This section would provide a process for the executive director to initially designate a site's compliance history classification as "under review" and then later reclassify it to "suspended" if the executive director determines that exigent circumstances exist due to a significant emergency event at the site, such as a major explosion or fire that causes major community disruption and substantial commitment of emergency response resources by federal or state authorities. Exigent circumstances must include those that significantly impact the surrounding community, result in significant emergency response efforts by federal or state authorities to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency, and result in certain urgent consequences. The occurrence of such an emergency event requires immediate, significant response by the agency but currently does not impact the site's compliance history classification until it results in a compliance history component, as identified

in §60.1(c), which is considered during an annual classification. The purpose of this proposed rulemaking is to communicate to the regulated entity and the public that a review of such a site's performance is underway, provide a more immediate and accurate measure of a site's performance in light of such an event, and make compliance history a more effective tool to provide oversight and ensure regulatory consistency.

For those sites subject to Chapter 60, the agency currently recalculates compliance history scores annually based on information from the previous five years and classifies sites as unsatisfactory, satisfactory, or high performers, or as unclassified if there is no compliance information about the site. Because compliance history scores are calculated on an annual basis, the impact of an emergency event with exigent circumstances on a site's compliance history will likely be delayed until any components related to the event are finalized and considered in an annual calculation, which may not happen for many months or years following the event. Therefore, the site's current classification may not accurately measure a site's performance in light of a significant emergency event at the site. To ensure the agency's compliance history program and dependent agency processes promote regulatory consistency through prompt recognition of such an event, the commission proposes new §60.4. This rule would authorize the executive director to make a designation to and reclassify the compliance history classification for a site where an emergency event has created exigent circumstances.

## **Section Discussion**

### *§60.4, Site Classification Changes Due to Exigent Circumstances*

The commission proposes new §60.4(a), concerning Site Classification Under Review, to establish that the executive director may designate a site's current compliance history classification as "under review" if the executive director determines that exigent circumstances exist due to a significant emergency event at the site. For circumstances to be "exigent," they must meet specified criteria as identified in three categories. For the executive director to move forward with the designation prescribed in this proposed rule, the event must meet all three categories of exigent circumstances.

First, the circumstances must result in significant disruption to one or more local communities of people. Whether community disruption is "significant" is intended to be determined on a case-by-case basis by looking at the event's impacts on the surrounding community. The extent of an event's impacts can depend on contextual factors. For example, communities vary in size and resources, and an event occurring in one community may not provide a significant disruption whereas a similar event may do so in another community.

Second, the circumstances must cause significant commitment of emergency response resources by a federal or state governmental authority to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency.

Third, for circumstances to be "exigent," they must have resulted in the occurrence of at least one of the conditions listed in proposed subsection (a)(3)(A) - (C) or one of the conditions listed in proposed subsection (a)(3)(D)(i) - (iv). Each of the listed conditions is a potential result of the type of significant emergency event the commission determined must be urgently accounted for in a site's compliance history classification. For the purposes of proposed subsection (a)(3)(D)(iv), "injury or death of a person directly attributable to the release" is intended to capture injuries or death that are directly caused by the actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency. It is not intended to encompass injuries or death that are caused indirectly by any such event, such as an injury sustained by an individual slipping in a parking lot during an evacuation.

If all three of these categories are determined to be met, any designation of a site's compliance history classification as "under review" is effective immediately. The executive director will issue written notice of the "under review" designation to the site's known owner and operator. The "under review" designation shall thereafter expire on the 91st day after the date of the executive director's written notice of the designation unless the executive director beforehand initiates the process to reclassify the site to "suspended." Upon the initiation of the process to reclassify, the executive director will issue a Notice of Decision to Reclassify as proposed under subparagraph (b) of this section.



The commission proposes new §60.4(b), concerning Notice of Decision to Reclassify, to establish that the executive director may decide to reclassify a site's compliance history classification to "suspended." In making the decision, the executive director must consider available information including facts as to whether the event in question was caused through any fault of the site's owner or operator. If the initiation of the process to reclassify has been made by the executive director, a decision to reclassify to "suspended", must be made no sooner than 30 days and no later than 90 days after the site's classification is designated as "under review." The commission has determined that providing a time limit for the executive director's authority to make such a decision provides a measure of regulatory certainty. This subsection would also clarify that the site will not be actually reclassified until the effective date identified in proposed subsection (f), which would depend on whether the site owner or operator files a motion for the commission to review the executive director's decision to reclassify.

The commission proposes new §60.4(c), concerning Evaluation of Permit Applications, to prohibit the agency from taking action to issue, renew, amend, or modify a permit specific to a site for which the executive director has issued a Notice a Decision to Reclassify until the agency has evaluated the permitting action in light of the emergency event that caused or resulted in the exigent circumstances. The purpose of the required evaluation of pending permit applications is not to pause, prolong, or stop permitting actions that are appropriate in light of the event. For the purpose of this subsection, a "permit specific to a site" includes authorizations through standard

permits, individual permits, or other authorizations that require affirmative action by the agency and that, if issued, would authorize regulated activities at the site where the event occurred. The evaluation under proposed §60.4(c) would not be required for other authorizations if the authorizations are claimed by regulated entities without the need for permit application review by the TCEQ—*e.g.*, certain general permits and permits by rule (PBRs). The purpose of this permit application evaluation is to ensure the site's proposed permitting actions are appropriate in light of the emergency event. Until the permit application evaluation is complete, the agency would not take action on proposed permit applications. The proposed evaluation would enable the agency to address concerns from the event by: (1) approving the permit; (2) approving the permit with changes to address conditions that caused or resulted from the event; or (3) denying the permit. As stated in proposed new §60.4(c) and (g)(1), this evaluation process applies to the processing of any permit applications for the site that are pending with the TCEQ at the time of the executive director's Notice of Decision to Reclassify, and it applies to the processing of any such applications that become pending unless and until the executive director's decision is withdrawn or set aside, or until a resulting "suspended" reclassification ends under proposed §60.4(h).

The commission proposes new §60.4(d), concerning Demonstration that Reclassification Not Warranted, to establish that the site owner or operator would have the opportunity to demonstrate to the executive director that reclassification of the site to suspended is not warranted. The commission recognizes that the site owner or operator may have additional information relevant to the executive director's decision

to reclassify. The demonstration is not intended to be a formal procedure or a prerequisite to filing a motion for commission review, but rather to allow the site owner or operator an opportunity to provide additional information to the executive director. The executive director's decision to reclassify the site would be withdrawn if the executive director determines that reclassification is not warranted. If that happens, a written notice of the determination will be provided to the site owner or operator.

The commission proposes new §60.4(e), concerning Motion for Commission Review of the Executive Director's Decision, to provide a process for appealing the executive director's decision to reclassify a site's compliance history to suspended. Any motion for commission review under this proposed subsection would be subject to the procedural requirements set forth in the subsection, including procedures for filing the motion; contents of the motion; disposition of the motion by commission action; disposition of the motion absent commission action; and provisions setting forth the effect of the reclassification during the pendency of any judicial review of the decision.

The commission proposes new §60.4(f), concerning Effective Date of Reclassification. Proposed new §60.4(f)(1) and (2) would set forth the dates upon which the executive director's decision to reclassify a site would become final and, therefore, when the reclassification would become effective. For purposes of judicial review, the agency action to reclassify a site's compliance history would be final and appealable on the effective date as proposed in new §60.4(f).

The commission proposes new §60.4(g), concerning Effects of Reclassification, to identify the effects of a site reclassification to suspended once the reclassification becomes effective. Under proposed new §60.4(g)(1), the agency would continue to evaluate a site's permitting applications in accordance with subsection (c) for the duration of the reclassification. Under proposed §60.4(g)(2), the site would also be treated as an unsatisfactory performer as identified in §60.3, Use of Compliance History. The commission does not intend for a site's reclassification to suspended, by itself, to change the underlying compliance history numerical points associated with the site.

The commission proposes new §60.4(h), concerning Duration of Reclassification, to establish that any reclassification of a site to suspended would be effective for at least one year from the effective date of reclassification and thereafter until the earlier of three conditions. Under proposed §60.4(h)(1), the site reclassification would end if the executive director decides that the reclassification is no longer warranted. The executive director's decision would be based on whether the exigent circumstances have been resolved, the cause of the event has been identified, and corrective actions have been implemented so as to appropriately reduce or eliminate the likelihood that the same or a similar event would reoccur. The commission intends for this decision to be in the sole discretion of the executive director. The commission intends this proposed subsection to be an additional incentive for the site owner or operator to resolve and address the significant emergency event as expeditiously as possible.

Under proposed new §60.4(h)(2), the site reclassification would end when an enforcement action arising from the event either: (1) has resolved and resulted in a component in the site's compliance history that is accounted for in an annual classification; or (2) is neither pending nor anticipated to be brought by or on behalf of the agency. Alternatively, under proposed new §60.4(h)(3), the site reclassification would end three years after the effective date of the reclassification if the reclassification does not previously end by satisfying the conditions of subsection (h)(1) or (2). Once a suspended reclassification ends under the proposed rule, the site would be assigned a classification according to its site rating under existing §60.2, Classification.

The commission proposes that the new §60.4 would apply to events beginning on or after the effective date of the rule.

**Fiscal Note: Costs to State and Local Government**

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rule would be in effect, no fiscal implications are anticipated for the agency or the state.

Certain units of local government may experience fiscal implications as a result of administration or enforcement of the proposed rule if they have a site that is involved in a significant emergency event that results in exigent circumstances. The estimated fiscal impact resulting from this proposed rule would vary for each site that the

executive director designates as "under review" and decides to reclassify as "suspended." Any potential costs would depend on the specific situation and whether the applicant is prevented from obtaining an authorization.

### **Public Benefits and Costs**

Ms. Bears determined that, for each year of the first five years the proposed rule would be in effect, the public benefit anticipated would be improved transparency and a more accurate compliance history classification for a site at which a significant emergency event results in exigent circumstances.

The proposed rulemaking may result in fiscal implications for businesses or individuals if they have a site that is involved in a significant emergency event that results in exigent circumstances. The estimated fiscal impact resulting from this proposed rule would vary for each site that the executive director decides to designate as "under review" and reclassify as "suspended". Any costs would depend on the specific situation and if the applicant is prevented from obtaining an authorization.

### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule would be in effect.

### **Rural Community Impact Statement**

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed rule would be in effect. The rulemaking would apply statewide and have the same effect in rural communities as in urban communities.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule would be in effect.

### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule would be in effect.

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking would not require the creation of new employee positions or eliminate current employee positions, and it

would not require an increase or decrease in fees paid to the agency. The proposed rulemaking alters an existing regulation by providing a way to designate a site's compliance history classification as "under review" and creating an additional compliance history classification. The proposed rulemaking would not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

#### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and it determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because the proposed rule does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The commission determined the proposed rule does not fall under the definition of a major environmental rule because the specific intent of the rule is to promote and ensure regulatory consistency in agency processes by creating a mechanism to designate site compliance history classifications as "under review" and by creating a new compliance history classification. The new designation and classification are



appropriate for sites where an event occurred that causes or results in exigent circumstances, as described in the proposed rule; and if the executive director decides to designate a site classification as "under review" and reclassify it to "suspended," it ensures agency processes such as permitting actions are appropriately accounting for the event. The purpose of the proposed rulemaking is to provide a more immediate and accurate measure of a site's performance in light of such an event and to make compliance history a more effective tool to provide oversight and ensure regulatory consistency. By ensuring regulatory consistency, the TCEQ's compliance history program better effectuates its statutory purpose under Texas Water Code, §5.753 and §5.754.

Additionally, the commission determined the proposed rule is not a major environmental rule because it is not expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission intends that designating a site's compliance history classification as "under review" and reclassifying it under the proposed rule would be a regulatory tool that is used sparingly and reserved as a response to rare and impactful events. Accordingly, any exercise by the executive director of the authority in the proposed rule is not expected to affect many regulated entities in the state. Furthermore, any directly attributable costs to regulated entities whose site is subject to a Notice of Decision to Reclassify under this rule would depend on the results of the agency's evaluation of any applications for permits specific to the site. Any such costs may also depend on whether the applicant is

prevented from obtaining an authorization.

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated the proposed rule and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rule is to provide a more immediate and accurate measure of a site's performance in light of certain events and to make compliance history a more effective tool to provide oversight and ensure regulatory consistency as required by Texas Water Code, §5.753. The proposed rule does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this proposed rule does not meet the definition of a taking under Texas Government Code, §2007.002(5), and therefore will not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the

Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the proposed rulemaking consistent with the applicable CMP goals and policies.

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

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

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

that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable to: areas with the potential to develop agricultural or silvicultural NPS water quality problems; on-site disposal systems; underground storage tanks; or Texas Pollutant Discharge Elimination System permits for stormwater discharges. This rulemaking does not relax the standards related to dredging, the discharge of dredge material, compensatory mitigation, and authorization of development in critical areas or to dredging, the discharge, disposal, and placement of dredged material, compensatory mitigation, and the authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements.

Promulgation and enforcement of this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and because this rule does not create or have a direct or significant adverse effect on any coastal natural resource areas.

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

### **Effect on Sites Subject to the Federal Operating Permits Program**

The commission determined that the proposed rule could impact sites subject to the Federal Operating Permits Program, but only if the executive director decides that a site's compliance history classification should be reclassified to "suspended", and the agency is scheduled to act on an application for a new or renewed federal operating permit for the site prior to the noticed reclassification being set aside or otherwise ended.

### **Announcement of Virtual Hearing**

The commission will hold a *virtual* public hearing on this proposal on January 27, 2022, at 2:00 p.m. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the virtual hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

### **Registration**

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments and/or want their attendance on record must **register by Tuesday, January 25, 2022**. To register for the hearing, please email [Rules@tceq.texas.gov](mailto:Rules@tceq.texas.gov) and provide the following information: your name, your affiliation, your email address, your phone number, and whether or

not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on **January 25, 2022**, to those who register for the hearing.

For the public who do not wish to provide oral comments, but would like to view the hearing, may do so at no cost at:

[https://teams.microsoft.com/l/meetup-join/19%3ameeting\\_MTRmYjg0NGYtYjhjYi00YWNjLThkNmUtMTUxZjk4MjUwYzli%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22bf237360-1655-4724-96f6-ba9493e841ba%22%2c%22IsBroadcastMeeting%22%3atrue%7d](https://teams.microsoft.com/l/meetup-join/19%3ameeting_MTRmYjg0NGYtYjhjYi00YWNjLThkNmUtMTUxZjk4MjUwYzli%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22bf237360-1655-4724-96f6-ba9493e841ba%22%2c%22IsBroadcastMeeting%22%3atrue%7d)

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Ms. Lee Bellware, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to [fax4808@tceq.texas.gov](mailto:fax4808@tceq.texas.gov). Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the *eComments* system. **All comments should**

**reference Rule Project Number 2020-049-060-CE. The comment period closes on February 1, 2022.** Please choose one of the methods provided to submit your *written* comments.

Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Melissa Cordell, Office of Compliance and Enforcement, (512) 239-2483.



## **§60.4**

### **Statutory Authority**

The new rule is proposed under the authority of Texas Water Code (TWC) §5.753, concerning Standards for Evaluating and Using Compliance History, and TWC, §5.754, concerning Classification and Use of Compliance History, which authorize rulemaking to establish compliance history standards, call upon the compliance history program to ensure consistency and authorize the commission to utilize a minimum of three classifications. These provisions do not restrict the application of such classifications to be at specific intervals. Additional authority exists under TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The proposed new rule implements TWC, §§5.102, 5.103, 5.753, and 5.754.

### **§60.4. Site Classification Changes Due to Exigent Circumstances.**

(a) Site Classification Under Review. Regardless of any other section of Chapter 60 of this title (relating to Compliance History), the executive director may designate a site’s current compliance history classification as "under review" if the executive director determines that exigent circumstances exist due to an event at the site. The

designation as "under review" is effective immediately and written notice will be issued to the site's owner and operator. Unless a Notice of Decision to Reclassify is issued under subparagraph (b) of this section, the designation shall expire on the 91st day after the date of the written notice of designation. For the purpose of this section, exigent circumstances must include:

(1) Significant community disruption;

(2) Emergency response by a federal or state authority to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency; and

(3) The event must have resulted in one or more of the following:

(A) the issuance of an emergency order by a federal or state governmental authority;

(B) the issuance of a temporary restraining order or temporary injunction at the request of the state, related to compliance with "applicable legal requirements" under the jurisdiction of the commission, as defined by §60.1(c)(1) of this title (relating to Compliance History);

(C) the use of significant federal or state resources, such as the activation of an incident command system; or

(D) an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency, which causes:

(i) the evacuation of persons from homes, places of employment, or other locations;

(ii) the sheltering in place by persons in homes, places of employment, or other locations;

(iii) the creation of a traffic hazard or interference with normal use of a navigable waterway, railway, or road; or

(iv) injury or death of a person directly attributable to the release.

(b) Notice of Decision to Reclassify. The executive director may then decide to reclassify a site's compliance history to "suspended." The executive director will consider any available information concerning whether the event in question was caused through any fault of the site's owner or operator. The executive director may make such a decision no sooner than 30 days and no later than 90 days after a site's

classification is designated as "under review," and the executive director shall send written notice to the site's owner or operator of the decision to reclassify the site's compliance history to suspended. The noticed reclassification shall not become final until the effective date under subsection (f) of this section.

(c) Evaluation of Permit Applications. To the extent any permit applications are pending for authorizations at the site, upon the executive director's written Notice of Decision to Reclassify a site's compliance history to "suspended" and until the agency has evaluated the pending permit application in light of the event, unless legally obligated otherwise or the decision is withdrawn or set aside, the agency shall not take action to issue, renew, amend, or modify a permit specific to the site. Based on the evaluation, the agency may:

(1) approve the permit;

(2) approve the permit with changes, which may include additional protective measures to address conditions that caused or resulted from the event; or

(3) deny the permit.

(d) Demonstration that Reclassification Not Warranted. At any time prior to filing a motion for commission review of the executive director's Notice of Decision to Reclassify, the site owner or operator may demonstrate to the executive director that

reclassification is not warranted. If the executive director determines that reclassification is not warranted, the executive director shall withdraw the decision to reclassify the site's compliance history to suspended by providing written notice to the site owner or operator.

(e) Motion for Commission Review of the Executive Director's Decision. The executive director's decision to reclassify a site's compliance history to suspended under this section may be appealed to the commission only by persons who own or operate the site, and pursuant to the following procedures:

(1) A motion for commission review of the executive director's decision shall be filed with the Chief Clerk not later than 90 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(2) The commission or the general counsel may, by written order, extend the period of time for taking action on the motion so long as the period for taking action is not extended beyond 180 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(3) The motion shall provide the name, address, and daytime telephone number of the person filing the motion, and a brief explanation of the person's owner or operator status as it relates to the site being reclassified.

(4) The motion shall state the grounds for the appeal and the specific relief sought. The appeal must also include all documentation and argument in support of the motion.

(5) At the request of the general counsel or a commissioner, the motion for review of the executive director's decision to reclassify will be scheduled for consideration during a commission meeting. At the commission meeting, the commission may act on the motion by affirming or setting aside the executive director's decision to reclassify in whole or in part. A Commission Order for its action under this paragraph shall not contain conclusions of law.

(6) If the commission does not act on the motion under paragraph (5) of this subsection, then the motion will be addressed as follows:

(A) Unless an extension of time is granted, if a motion for review of the executive director's decision to reclassify is not acted on by the commission within 115 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section, the motion is overruled by operation of law; or

(B) In the event of an extension, the motion is overruled by operation of law on the date fixed by the order granting the extension, or in the

absence of a fixed date, 180 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(7) During the pendency of any judicial review of the reclassification to suspended, the reclassification shall remain for the purpose of this rule.

(f) Effective Date of Reclassification.

(1) If no timely motion for commission review is filed pursuant to subsection (e) of this section, the site’s compliance history shall be reclassified to suspended on the 91st day after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section; or

(2) If a timely motion for commission review is filed pursuant to subsection (e) of this section, the site’s compliance history shall be reclassified to suspended on the date a commission order affirming the executive director's decision to reclassify is signed or, in the absence of such an order, on the date the motion is overruled by operation of law.

(g) Effects of Reclassification. While a site’s compliance history is reclassified to suspended under this section:

(1) The agency shall continue to evaluate applications for permits specific to the site under subsection (c) of this section; and

(2) The site shall be treated as an unsatisfactory performer for the purposes of §60.3 of this title (relating to Use of Compliance History).

(h) Duration of Reclassification. A site’s compliance history reclassification under this rule to suspended shall remain for at least one year after the effective date of reclassification, and then until the earliest of:

(1) the executive director provides written notice of the determination that the reclassification is no longer warranted, after the executive director decides that:

(A) the exigent circumstances have been resolved; and

(B) the cause of the event has been identified and corrective actions have been implemented that appropriately reduce or eliminate the likelihood that the same or a similar event will reoccur;

(2) an enforcement action arising from the event has been resolved and resulted in a component that is accounted for in the site’s compliance history, or such enforcement case is neither pending nor anticipated by the executive director; or



(3) three years after the effective date of reclassification.