

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts new §60.2 and §60.3. The commission adopts these new sections to Chapter 60 in order to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, relating to compliance history. Sections 60.2 and 60.3 are adopted *with changes* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2930).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

HB 2912, §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.” Section 5.754, Classification and Use of Compliance History, goes on to require the commission to “establish a set of standards for the classification of a person’s compliance history” and to provide for the use of compliance history classifications in certain commission decisions. The purpose of these adopted rules is to establish the classification and use of the components of compliance history.

HB 2912 modified some existing statutes and has added new statutory requirements relating to the classification and use of compliance history. Specifically, these include: TWC, §§7.053, 7.302, 7.303, 26.028(d), 26.0281, 26.040(h), 27.051(d), (e), and (h); and Texas Health and Safety Code (THSC), §§361.084(a) and (c), 361.088(f), 361.089(a), (e), and (f), 382.0518(c), 382.055(d), 382.056(o), 401.110, and 401.112(a). Recently adopted §60.1 (see January 4, 2002 issue of the *Texas Register* (27 TexReg 191)) implements HB 2912, §4.01, which created TWC, §5.753, requiring the

commission 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 decisions for other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization. HB 2912 further states, in TWC, §5.574(e), that compliance history must be utilized in agency decisions relating to enforcement, the use of announced investigations, and participation in innovative programs. HB 2912 compliance history provisions apply to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27; and THSC, Chapters 361, 382, and 401. Section 60.1 reflects this application.

In addition, HB 2912, §18.05 specifies that the classification and use of compliance history 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. The classification and use of compliance history will apply in the consideration of compliance history for actions taken by the agency relating to investigations and flexible permitting effective September 1, 2002. Additionally, it will also apply 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 in proceedings that are initiated or brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) will begin September 1, 2002. These applicability dates are specified in §60.1.

Section 60.1 implemented the first phase of HB 2912, §4.01, as it relates to the definition, or components of, compliance history. This next phase of the implementation of HB 2912, §4.01, is related to the classification and use of compliance history. HB 2912, §18.05(a), 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 adopted additional rulemaking includes modifications to Chapter 60, as well as to other applicable chapters of commission rules (30 TAC Chapters 50, 55, 116, 122, and 281) which are being adopted concurrently in this issue of the *Texas Register* for the purpose of implementing the compliance history requirements of HB 2912, §4.01.

In addition to specifying through rule what the agency is *required by statute* to do with regard to a person's compliance history, the commission is also adopting actions which the agency *may* take in response to a person's compliance history through this rulemaking.

The commission solicited comments relating to the compliance history classification, the formula, and how classification will be utilized. The commission received 538 comment letters in response to the public comment period referenced in the PUBLIC COMMENT section of this adoption preamble. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this adoption preamble.

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 the adopted rules do not meet the definition of a "major environmental rule" as defined in that

statute. Although the intent of these rules is to protect the environment and reduce the risk to human health from environmental exposure, they are not “major environmental rules” because they do 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 rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rules merely establish the standards for the classification and use of a person’s compliance history. The requirements of establishing standards for the classification and use of a person’s compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rules do not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because the federal laws applicable to program areas/media subject to these rules do not provide specific compliance criteria for the activities regulated by this rule (permitting, investigations, enforcement, and innovative programs). The applicable federal laws, Federal Clean Air Act, Clean Water Act, Solid Waste Disposal Act, Safe Drinking Water Act, and the Atomic Energy Act, with respect to implementation by the states generally require that the states have authority to enforce the federal program, but the federal laws provide the states discretion in law to enforce permitting, investigation, and enforcement standards. The adopted rules do not exceed an express requirement of state law, because they are consistent with the requirements of TWC, §5.754. The adopted rules do not exceed the requirements of a delegation agreement, because the delegation agreements do not establish express requirements for consideration of compliance histories in permitting, enforcement,

investigation, and innovative program decisions. Finally, the rules are not being adopted solely under the general powers of the commission, but are being adopted under the express requirements of TWC, §5.754, as well as THSC, §§361.017, 361.024, 382.017, and 401.051; and TWC, §§5.103, 5.105, 26.011, and 27.019.

The commission invited public comment on the draft regulatory impact analysis determination, but received no comments specific to this chapter.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these adopted rules in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because the adopted rules are an action that is taken in response to a real and substantial threat to public health and safety; are designed to significantly advance the health and safety purpose; and do not impose a greater burden than is necessary to achieve the health and safety purpose. Texas Government Code, §2007.003(b)(13), provides that an action that is taken in response to a real and substantial threat to public health and safety, that is designed to significantly advance the health and safety purpose, and that does not impose a greater burden than is necessary to achieve the health and safety purpose is exempt from Chapter 2007.

The real and substantial threat to public health and safety in this rulemaking involves regulated activity by poor performers and repeat violators, as specified in HB 2912, and how to consider such persons' compliance history when determining whether to authorize certain additional activities at a site, as well

as how to determine appropriate enforcement and investigation requirements. The adopted rules minimize the threat to public health and safety by providing a uniform standard for evaluating compliance history by specifying the components to be considered in evaluating compliance history for permit decisions, as well as decisions for other specified types of authorizations. Specifically, the rules specify the circumstances in which the commission may revoke the permit of a repeat violator and establish enhanced administrative penalties for repeat violators. They also provide for additional oversight of, and review of applications relating to, facilities owned or operated by poor performers.

The adopted rules do not impose a greater burden than is necessary to achieve the health and safety purpose because the rules track the standards, purposes, and requirements of HB 2912. Further, the rules clearly set out the standards for the classification of a person's compliance history and how those classifications will be used in certain commission decisions. As a result, the rules also clearly describe how a person can improve his compliance history classification.

The adopted rules are not subject to Texas Government Code, Chapter 2007 because they are exempt under the provisions of §2007.003(b)(13).

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to establish the standards for classification and use of a person's compliance history. The adopted rules substantially advance this purpose by providing for the executive director to evaluate the compliance history of, and classify, each site and person as needed for certain actions listed in the rules; also, annually thereafter the executive director shall evaluate the

compliance history of, and classify, each site and person. Further, for permit actions subject to compliance history review identified in the rules, the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit by evaluating the person's site-specific compliance history and classification and aggregate compliance history and classification, especially considering patterns of environmental compliance.

The adopted rules do not burden private real property because they promote compliance with existing laws and rules. Because the adopted rules do not impose new substantive standards for persons and sites, they do not burden real property in a manner which would be a statutory or constitutional taking. Specifically, the subject rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed regulations. Finally, there is no reasonable alternative that would accomplish the specified purpose of the rule because the rule is implementing a specific legislative mandate.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in, or will affect an action/authorization identified in, the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies. CMP goals applicable to the rule include: §501.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); §501.12(2), to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; §501.12(5), to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; §501.12(7), to make agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and §501.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed these rules for consistency with applicable goals of the CMP and determined that the rules are consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the proposed rule include: §501.14(d), Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; §501.14(e), Prevention, Response, and Remediation of Oil Spills; §501.14(f), Discharge of Municipal and Industrial Wastewater to Coastal Waters; §501.14(g), Nonpoint Source (NPS) Water Pollution; §501.14(h), Development in Critical Areas; §501.14(j), Dredging and Dredged Material Disposal and Placement; §501.14(m), Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and §501.14(q), Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Texas Department of Health (TDH) regarding wastewater discharges that could significantly adversely affect oyster reefs. This rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable: to areas with the potential to develop agricultural or silvicultural NPS water quality problems; to on-site disposal systems; to underground storage tanks (USTs); or to Texas Pollutant Discharge Elimination System (TPDES) permits for storm water discharges. This rulemaking does not relax the standards related to dredging, the discharge of dredge material, compensatory mitigation, and authorization of development in critical areas or to dredging, the discharge, disposal, and placement of dredged material, compensatory mitigation, and the authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal

Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements. This rulemaking has been conducted consistent with the THSC, Chapter 382. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed the rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of CNRAs (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking is the policy (31 TAC §501.14(q)) that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (31 TAC §501.14(q)).

The commission invited public comment on the consistency of the proposed rule with applicable CMP goals and policies, but received no comments specific to this section.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. Four individuals provided oral comments at the hearing. The following provided written comments during the comment period: the Honorable J.E. "Buster"

Brown, Texas Senate (Senator Brown); the Honorable Warren Chisum, Texas House of Representatives (Representative Chisum); 7-Eleven, Inc. (7-Eleven); Alliance for a Clean Texas (ACT); Allied Waste Systems, Inc. (Allied); American Electronics Association, Texas Chapter (AeA); AquaSource, Inc. (AquaSource); Association of Electric Companies of Texas, Inc. (AECT); Association of Texas Intrastate Natural Gas Pipelines (ATINGP); BFI Waste Systems of North America, Inc. (BFI); BP Products North America Inc. (BP); Brown McCarroll LLP (Brown McCarroll); Business Council for Sustainable Development (BCSD); Cantey & Hanger, LLP (C&H); Chaparral Steel (Chaparral); City of Fort Worth Water Department (Fort Worth); City of Garland (Garland); City of Plano (Plano); City of San Antonio (San Antonio); City Public Service (CPS); Dairy Farmers of America, Inc. (DFA); Downwinders at Risk (DAR); ExxonMobil Downstream/Chemical (ExxonMobil); Fort Worth Aluminum Foundry, Inc. (FWAF); Fort Worth Chamber of Commerce (Fort Worth COC); Greenville Electric Utility System (GEUS); Gull Industries Incorporated (GI²); Hunton & Williams (H&W); Huntsman Corporation, Huntsman Petrochemical Corporation, Huntsman International, and Huntsman Polymers Corporation (Huntsman); League of Conservation Voters Education Fund (LCVEF); Lone Star Chapter, Solid Waste Association of North America (TxSWANA); Lone Star Steel Company (LSS); Lower Colorado River Authority (LCRA); Martin Marietta Materials, Inc. (MMM); Midland Mfg. Co. (MMC); National Solid Wastes Management Association Texas Chapter (NSWMA); North Texas Municipal Water District (NTMWD); Occidental Chemical Corporation and Occidental Permian Ltd./Oxy USA LP (OxyChem and Oxy Permian); Oil City Iron Works, Inc. (OCIW); Onyx Environmental Services, LLC (Onyx); Port of Houston Authority (PHA); Public Citizen (PC); the commission's Public Interest Counsel (PIC); Reliant Energy (Reliant); Saint-Gobain Vetrotex America, Inc. (SGVA); San Miguel Electric Cooperative (SMEC); Southwest Steel Casting Company (SSCC); Texas Association of Business (TAB); Texas Association of Dairymen (TAD); Texas Broiler Council

(TBC); Texas Campaign for the Environment (TCE); Texas Cattle Feeders Association (TCFA); Texas Chemical Council (TCC); Texas Committee on Natural Resources (TCNR); Texas Compliance Advisory Panel (TCAP); Texas Department of Agriculture (the Honorable Susan Combs, Commissioner) (TDA); Texas Egg Council (TEC); Texas Farm Bureau (TFB); Texas Fund for Energy and Environmental Education SEED Coalition (SEED Coalition); Texas Industries, Inc. (TXI); Texas Industry Project (TIP); Texas Mining and Reclamation Association (TMRA); Texas Municipal League (TML); Texas Oil & Gas Association (TXOGA); Texas Pork Producers Association (TPPA); Texas Poultry Federation (TPF); Texas Turkey Federation (TTF); Thompson & Knight LLP (T&K); Trinity Coatings Company, Inc. (TCCI); TXU Energy (TXU); United States Department of Defense, Department of the Air Force (DOD); the University of Texas System (UT); Valero Energy Corporation (Valero); Vinson & Elkins, LLP (V&E); Waste Management of Texas, Inc. (WM); and 483 individuals.

The following commenters supported the proposal, either in general, or in part: ACT, Allied, AeA, AquaSource, AECT, BFI, BP, Brown McCarroll, Fort Worth, Garland, San Antonio, CPS, DAR, GEUS, Huntsman, LCVEF, TxSWANA, LSS, LCRA, NSWMA, NTMWD, OxyChem and Oxy Permian, PC, PIC, SMEC, TAB, TCE, TCC, TCONR, SEED Coalition, TMRA, TML, TXOGA, T&K, and TXU.

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: Senator Brown, Representative Chisum, 7-Eleven, ACT, Allied, AeA, AquaSource, AECT, ATINGP, BFI, BP, Brown McCarroll, BCSD, C&H, Chaparral, Fort Worth, Garland, Plano, San Antonio, CPS, DFA, DAR, ExxonMobil,

FWAF, Fort Worth COC, GEUS, GI², H&W, Huntsman, LCVEF, TxSWANA, LSS, LCRA, MMM, MMC, NSWMA, NTMWD, OxyChem and Oxy Permian, OCIW, Onyx, PHA, PC, PIC, Reliant, SGVA, SMEC, SSCC, TAB, TAD, TBC, TCE, TCFA, TCC, TCONR, TCAP, TDA, TEC, TFB, SEED Coalition, TXI, TIP, TMRA, TML, TXOGA, TPPA, TPF, TTF, T&K, TCCI, TXU, DOD, UT, Valero, V&E, WM, and 483 individuals.

SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS

The commission adopts new §60.2 and §60.3 in order to implement the requirements of HB 2912.

New §60.2, Classification, and §60.3, Use of Compliance History, are adopted with changes to the proposed text. These adopted new sections will implement the requirements of TWC, §5.754.

Specifically, the adopted language establishes a set of standards for the classification of a site's and a person's compliance history, and provides for the use of compliance history and classification in certain commission decisions, thereby meeting statutory directives. The framework for this rulemaking was begun with the adoption of §60.1, regarding compliance history components. The current rulemaking builds on the previous rulemaking by providing the process as to how the compliance history components will be utilized in classifying the environmental performance of sites and persons. Further, the current rulemaking establishes how the compliance histories and classifications will be used in applicable agency decisions. The commission's objective through this rulemaking has been to establish a compliance history classification system which provides an accurate and meaningful representation of the environmental compliance patterns of sites and persons. The commission's further objective is to create a uniform standard of evaluating and utilizing compliance histories and classifications, recognizing that the commission has a large regulated universe with vast ranges in the types of programs regulated, the size of owners and operators, the size and/or complexity of sites, and the

amount of regulatory oversight (investigations) of the program. This is by no means a simple task, and it is further compounded by the limits of resources (staff and information) available to the agency.

The commission has invited the participation of stakeholders in both phases of the compliance history rulemakings, and has taken very seriously the comments, suggestions, and criticisms of those stakeholders. The commission believes that, after thorough consideration, it has developed a compliance history rule that meets its objectives fairly, accurately, and in a manner that is meaningful to the agency, the regulated community, and to the citizens of the State of Texas, while meeting the statutory directives in HB 2912. Having said this, the commission also notes that it intends to monitor the implementation of this rule closely, and if it determines that modifications are necessary, additional rulemaking will be initiated. The rule achieves the commission's objectives by providing a formula through which point values are assigned to various compliance history components according to such things as the severity of violations noted, what type of enforcement action was utilized to address violations, whether violations were self-reported, what types of positive compliance measures have been taken, and how many investigations have been performed at a site. The adopted rule also addresses designation of a repeat violator, utilizing criteria required by the statute, by taking into account the number and complexity of sites.

General

OxyChem and Oxy Permian, AquaSource, NTMWD, AeA, Brown McCarroll, TXOGA, Allied, BFI, TxSWANA, NSWMA, TML, LSS, TAB, AECT, TRMA, Garland, San Antonio, GEUS, SMEC, Huntsman, BP, TXU, ACT, TCC, LCRA, Fort Worth, TCONR, TCE, LCVEF, DAR, SEED Coalition, PC, and 476 individuals all made comments to the effect that, in general, they are supportive

of the development of the compliance history rules for the betterment of Texas; they believe the commission has made a good effort in carrying out legislative directives; they appreciate the difficulty of the task; and/or they commend staff for their efforts in drafting the rules and working with stakeholders.

The commission appreciates the positive comments in support of the rules and the rulemaking.

MMM asked, with regard to the database in which all "site" and "person" information will be compiled: who will be able to access this database; can every company access their information; how will the commission assure database accuracy; will industry have the opportunity to proof the database before it is finalized by the commission; and how will a company's operations out-of-state be listed in the database?

The commission responds that, at least for the foreseeable future, only agency staff will be able to access the applicable databases; this is in order to ensure accuracy of information that has been fully collected and assembled.

Public access to the in-progress database could inaccurately reflect or prematurely disclose part of the agency's internal deliberations that will take place during and as part of development of the database. Consideration of mitigating factors for sites and persons may affect the results reflected in the database; until mitigating factors have been considered and applied, the database information is essentially still part of an agency deliberation as to how the database will be finalized. The database is under construction at the time this rule is being adopted. Generally,

information will be made available when it is technically feasible to produce the information, and the information has been collected and assembled, including having been subject to quality assurance and quality control (QA/QC) procedures and any errors corrected.

In response to the comment questioning how accuracy will be achieved, the agency will use QA/QC procedures. Although a person will not have the opportunity to proof the database, a person can always request information concerning records, compare it with its own documents, provide corrected or updated information, or question the accuracy of data. To the extent that factual information in question is independently available from other agency sources and in other formats, not in the format especially organized for development of the database, it will remain available from those sources, consistent with the Texas Public Information Act. New §60.3(f) sets forth the procedure for corrections of classifications for clerical errors. A person's operations out-of-state will not be listed in the database. Rather, the executive director will utilize a United States Environmental Protection Agency (EPA) database system to obtain information relating to out-of-state compliance.

GI², Fort Worth COC, C&H, TAB, TCC, TCCI, TCAP, PHA, OxyChem and Oxy Permian, Huntsman, BP, TXI, and AECT all provided similar comments suggesting that entities should have the ability to review and comment on their compliance histories prior to the information being made public, with some also suggesting that a method for requesting that inaccuracies be corrected be provided. Furthermore, TCCI stated that it believes that "historical compliance history information should not be made public." AECT recommended the addition of a new §60.2(g) to allow a 15-day preview period

by a site to review the compliance history for completeness and accuracy. TXU, Garland, San Antonio, GEUS, and SMEC supported the comments of AECT.

The commission responds that it did not modify the rules to allow a person to review compliance information prior to posting publicly due to the large number of sites and persons evaluated. The commission plans to make the classification ratings (poor, average, or high, by site as well as by person) available via the worldwide web. The classifications will be available as completed for permitting, enforcement, review of innovative programs, and for public review beginning September 1, 2002. On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history for each site, and classify each site and person. A person or interested party can then review the files and compare the compliance information with the compliance history developed by the agency. Staff will be available to discuss any errors, omissions, or other discrepancies. New §60.3(f) sets forth the procedure for corrections of classifications for clerical errors. Information related to compliance history is available as provided by the Texas Public Information Act. No changes have been made in response to these comments.

TCAP suggested "that a process be established for key areas of the agency (including Small Business and Environmental Assistance) to review decisions based on compliance history before those decisions are made public. This would help ensure that any activities that the executive director must evaluate as mitigating factors for the site are accounted for."

The commission responds that appropriate instructions and guidance documents will be developed to ensure consistency in review, evaluation, and decision-making. Small Business and Environmental Assistance (SBEA) is part of the executive director's staff, and will participate in the review process and evaluation, as appropriate. However, resources will not permit individual review by SBEA, and such a provision would impact the ability to provide technical services.

MMM stated that the hierarchy of penalties, and the point system and how it relates to violations need to be better defined. MMM further stated that a company having many operating sites "will be at a disadvantage for their rating."

The commission responds that this rule is not a penalty rule, except as it relates to the commission's authorization to utilize compliance history classification and repeat violator designation in assessing administrative penalties. Each site owned by a company will receive a site classification based upon its compliance history. Further, a company having many sites will receive additional criteria points that are used to determine the designation of repeat violators. All the site ratings will be averaged to obtain a person classification. No changes to the rule have been made in response to this comment.

MMM asked, "What is the precedence of compliance history in other states? How were laws written, and how are they being enforced?"

The commission responds that this is outside the scope of this rulemaking, as the use of compliance history in other states is not an issue for this rulemaking.

H&W stated that, throughout the compliance history rules, "it is unclear whether TNRCC intends to review a new site owner or operator's compliance history prior to the transfer of the permit to the new owner or operator," and requested that such clarification be made. By way of example, H&W referenced that in proposed §116.110, which is part of the compliance history rulemaking effort, it would seem that the commission does not intend to consider the new owner's compliance history prior to the transfer of a preconstruction air permit. However, H&W went on to say that under the current underground injection control (UIC) permit provisions, the commission "has recently required the preparation of the new owner's compliance history prior to transferring the permit to the new owner."

The commission responds that Chapter 60 does not require a compliance history review prior to the transfer of a permit to the new owner or operator. HB 2912, §18.05, states that compliance history is to be considered in decisions by the commission for the issuance, amendment, modification, or renewal of permits. Further, the comment is correct that while proposed §116.110 does not include consideration of the transferee's compliance history prior to the transfer, the current UIC permit provisions, for example, do require consideration of the transferee's compliance history prior to the transfer. Current rules found at 30 TAC §305.64, adopted under separate authority, and relating to consolidated permits, require the commission to consider the compliance history of a transferee. These requirements will continue to apply to consideration of compliance history of a transferee, where otherwise required. The commission notes that facilities regulated under Chapter 116 are not subject to 30 TAC Chapter 305, whereas UIC facilities are. The requirement to consider compliance history under Chapter 305 has not changed as a result of the adoption of new Chapter 60.

AquaSource stated that the rule proposal makes no mention of the inclusion of a person's activities in programs under the commission's jurisdiction which do not fall under TWC, Chapters 26 or 27, or THSC, Chapters 361, 382, or 401, and suggested that compliance with these other provisions should be recognized in the compliance history, perhaps under mitigating factors.

The commission disagrees with this comment, and responds that HB 2912 specifically includes only programs under TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401. For that reason, it is consistent with legislative direction to limit the scope of the compliance review to activities regulated under these chapters. No changes have been made in response to this comment.

Four individuals provided similar comments, recommending that the rules include not only the complete compliance history of a site, but also all the companies who owned the site, with one of the individuals asserting that this should include affiliates of the owner. One commenter further asserted that "using only violations that occurred after February 2002" will allow companies to mask their long-term performance. One individual stated a compliance history should include "violations, enforcement actions, citizen complaints and inquiries made on any facility or company for perpetuity," negative and positive components, and that it should not be limited to "only the last few years, or only violations occurring after a certain date, or only violations where enforcement was issued." One individual also asserted, "The cumulative effects of surrounding sites should also be taken into consideration, especially when poorly performing facilities are adjacent to each other, because the compliance history of two or more sites may significantly elevate the risk factor in a community." One individual stated that compliance history should include both current and long-term history as many sites have a long-

lasting impact on the environment. This individual also asked how the performance of a new facility can equitably be compared to the performance of a facility built 20 years ago. He further stated, "An overall or additional rating based on the degree of protection to the environment of the facility would also be relevant to the public and TNRCC when evaluating a facility."

The commission responds that these comments are all outside the scope of this rulemaking, as the compliance period, components, and the issue of person were all addressed during Phase I of the compliance history rulemaking. The issue of cumulative effects is not a part of the directives in HB 2912, Article 4, nor was it included in the definition of compliance history. Cumulative effects will be addressed in policies developed in response to the requirements of TWC, §5.130. Further, the commission does not intend to change how it compares the performance of a new facility to an older facility, to the extent that the current rules provide for facility age to be taken into consideration. In fact, as recommended by the commenter, "the degree of protection to the environment" is often the type of factor considered in evaluating a facility, not a facility's age, as many compliance criteria are "environmentally-based"; they relate to air and water standards rather than the specific technology of the facility.

TCONR stated that it believes some of the provisions would undermine the legislative intent to create a "uniform compliance history program that will reward highly compliant regulated entities while assuring stricter oversight of chronic violators." TCONR asserted that the problems with the proposal "will likely provoke a new round of legislation" on the issue, unnecessarily taxing the resources of the TNRCC, the regulated community, and the public. ACT stated that the rulemaking "must not lose sight of the overall purposes of HB 2912's provisions regarding the development, classification and use

of compliance history." ACT asserted first that HB 2912 provided consistency across programs regarding components of compliance history. Second, ACT asserted that HB 2912 provides for two central purposes for the classification system: to provide incentives for high performers (through the strategically-directed regulatory structure), and to ensure that poor performers receive extra scrutiny without being afforded the greater flexibility awarded to some regulated entities. TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals support the comments made by ACT. Reliant asserted that generally, the rules "do not effectively encourage environmental improvement" which it believes should be one of the objectives, and that this is inherent in the legislation. TCE and LCVEF commented that they are "concerned that the proposed rules on compliance history are not strong enough and do not follow legislative intent." One individual expressed similar concerns.

This rulemaking encourages improved environmental performance and provides for additional oversight of poor performers. Further, the rules, as proposed and adopted, do meet legislative intent and will ensure consistency when evaluating a permit application or taking other actions. In addition, because almost all of the compliance history data can be maintained electronically, after the initial programming is complete, the impact on agency resources is expected to be minimal. These rules, as adopted, address a person's historical violations and set the stage for evaluating that history for patterns that can be effectively addressed through better permit provisions and enforcement. The strategically-directed regulatory structure provision of HB 2912 will be implemented through phased rulemaking, required to be effective by September 1, 2003, and September 1, 2005, respectively, and will further enhance the agency's efforts to develop a uniform standard for evaluating compliance history.

AeA stated that it believes the rules should contain incentives for high performers, including: all permit actions for the site should be classified as Priority 1 under the agency's Permit Timeframe Reduction Project; more flexibility in negotiating permit conditions; and easier or quicker access to information or resources that would affect a site's requirements.

The commission responds that this rulemaking seeks only to implement the requirements of TWC, §5.754, concerning classification and use of compliance history. Incentives will be the subject of a future rulemaking to implement TWC, §5.755, concerning strategically-directed regulatory structure. No changes have been made in response to this comment. However, the commission notes that adopted §60.2(e)(1)(M) provides that implementation of an environmental management system (EMS) certified under 30 TAC Chapter 90 is a positive factor in the formula for determining a site rating. Likewise, adopted §60.2(e)(1)(K) provides positives in the site rating formula for submittal of a notice of intent to perform an audit, as well as disclosures of violation(s) for which the site was granted immunity from administrative or civil penalty for those violation(s), under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995. Although these are not “incentives for high performers” in the sense of those suggested by the commenter, they do provide incentives for performing EMSs and environmental audits beyond the basic incentive that such things are beneficial to the environment and the State of Texas.

Huntsman expressed concern that the proposed rule does not include a uniform standard for evaluating compliance history as mandated by the legislature, adding that this requirement "is not a technicality.

The regulated community is entitled to notice of the standard by which their compliance history will be

evaluated, the standard must be neutral and 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, ambiguity in language and the role of unfettered discretion should be kept to a minimum. In addition, a mechanism should be present in the text of the phase 2 rule to mitigate against what would otherwise be an unfair application of the uniform standards caused by forces outside the control of the agency (i.e., legislative appropriations which affect the size and duties of the agency's workforce)." Huntsman added that a site designated as a poor performer will be publicly stigmatized, and that sites should not suffer this unless the rating is based on fair and objective criteria.

The commission has substantially revised the proposed rule. The commission believes the rule is reasonable and will provide consistent application. The rule also provides for a limited consideration of mitigating factors. Additionally, because almost all of the compliance history data can be maintained electronically, after the initial programming is complete, the impact on agency resources is expected to be minimal.

TML urged the commission to schedule reviews, and possible amendment of the compliance history rules on a periodic basis, citing as rationale for this suggestion, "Environmental regulation based on compliance history is a new concept about which neither TNRCC, the regulated community, or the environmental community can claim much expertise. Effectiveness of the rules cannot be ascertained until they have been experienced in practice, and the agency should plan to have stakeholder meetings on their effectiveness within at least two years of its adoption."

The commission agrees that the rules should be evaluated after a reasonable period of time following adoption. If the commission determines that the rules need to be amended or changed, a rulemaking project can be initiated for this purpose. Any subsequent rulemaking will provide for stakeholder input. No change was made to the rules as a result of this comment.

DOD stated that the TNRCC's intent to employ a multimedia compliance history approach exceeds any congressional waiver of federal sovereign immunity. States are not authorized to impose requirements relying on a waiver of sovereign immunity in a media-specific statute that incorporates requirements under a different statute. The proposed rule impermissibly provides TNRCC with greater enforcement authority against DOD installations than Congress has expressly allowed. Furthermore, DOD stated that the rule also violates sovereign immunity by considering environmental compliance outside of the State of Texas. The waivers of sovereign immunity do not give states the authority to enforce environmental regulations of other states. As such, DOD proposed the addition of subsection (e) to §60.3, with the heading "Department of Defense Installations or Facilities," and the following language: "The compliance history for each military service shall be limited to in-state compliance. Out-of-state compliance shall not be considered. Only such aspects of compliance history that correspond to the specific media for which the permit is being sought shall be considered."

The commission disagrees with this comment. Nothing in the proposed rule attempts to circumvent any immunity enjoyed by military installations. While federal entities are immune from civil penalties for environmental violations under certain circumstances, federal entities are not immune from complying with applicable environmental regulations. The TWC specifically directs the agency to consider the multimedia compliance history of an entity in both this state,

and in other states. To the extent that a federal entity is immune from civil penalties, it remains so. However, the commission is free to consider a federal entity's compliance history in an effort to ensure that a federal entity fully complies with all applicable environmental regulations. The agency is also permitted to consider a federal entity's compliance history to determine what, if any, additional requirements may be necessary in a permit to achieve compliance with environmental regulations. Furthermore, the proposed rule does not attempt to enforce the environmental regulations of other states. The rule simply follows the legislative directive to consider orders from other states. This consideration is necessary to get an accurate picture of a federal entity's compliance record in other states. The rule does not attempt to enforce specific regulations from other states in Texas. No changes have been made in response to this comment.

BCSD suggested that the commission "investigate the State of New Jersey's proposed Deferral Track Rule as a possible addition to the Texas compliance history rule," submitted material to further inform the TNRCC of the New Jersey process, and requested that TNRCC participate in the Technology Acceptance Reciprocity Partnership (TARP), which is a common pathway for participating states to evaluate and approve certain environmental technologies.

The commission responds that TWC, §5.755 requires the commission to develop, by rule, a strategically-directed regulatory structure to provide incentives for enhanced environmental performance. During development of that rule, the commission will be looking at other states' programs. It is not appropriate or necessary to add the Deferral Track Rule concept to the compliance history rules. The commission, in developing a strategically-directed regulatory structure, is reviewing other states' programs for applicability to Texas. Additional rule

development in 2003 will establish procedures for the use of incentives to enhance environmental performance. Also, decisions regarding participation in TARP are outside the scope of this rulemaking. No changes have been made in response to these comments.

Fiscal Note

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, TDA commented regarding the proposed Fiscal Note. DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the examples of compliance costs provided in the proposal preamble are unrealistically low. The commenters asserted that the costs provided are "generally for governmental units," and not reflective of costs to the private sector to obtain or renew permits. As an example, the commenters stated that "a contested permit hearing for an individual TPDES permit would normally involve a minimum cost of \$50,000 to \$100,000. Such costs need to be considered by the Commission, especially if the Commission would reduce the term of a permit, in response to a person's compliance history." Furthermore, the commenters stated that the fiscal note does not "account for the increased costs of permitting associated with changing the form or authorization from a registration to an individual permit. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration." CPS commented regarding the proposed Public Benefits and Costs section that there is significant cost associated with permit renewals, and that some of these costs are not accounted for the Fiscal Note section in the proposal preamble. CPS stated that in addition to permit renewal fees, there are also costs associated with publication of notices in newspapers, and the posting and maintenance of signs. According to CPS, it spent \$15,000 for public notice requirements for its five power plants' federal operating permits.

In response to comments that costs provided are unrealistically low, and that the costs provided are “generally for governmental units and not reflective of costs to the private sector,” the commission disagrees that is necessarily the case. All applicants are required to meet the same requirements for permitting, for example, whether or not the applicants are governmental entities or from the private sector. Similarly, costs for a contested permit can vary widely, and typically would depend more on the complexity of the contested case hearing and the associated issues rather than on whether the applicant is from the public or the private sector.

The commission agrees that there could be additional costs associated with permitting for entities classified as poor performer, including some of the costs described in the comments. The costs provided in the fiscal note are only provided as examples because there are many variables that could affect cost. The commission intends to work closely with each site that is rated as a poor performer to provide assistance in improving its compliance history so, if it is so motivated, the entity may raise the classification of the site. The agency will try to use options to minimize cost. No change to the rule has been made in response to these comments.

§60.2. Classification

The commission adopts new §60.2 with modifications to the proposal, as described in the following responses to comments.

§60.2

7-Eleven commented regarding proposed §60.2, stating that the adoption preamble should explain the commission's rationale and authority for the use of the word "average" throughout the compliance

history classification scheme. 7-Eleven asserted, "The term 'average' has an inherently mathematical meaning that requires calculation of an average, mid-point or 'mean' point along a continuum of points," and added that as proposed, the rule's references to "below" and "above" average are misleading and even meaningless. 7-Eleven stated that the proposed rule appears to incorporate language from TWC, §5.754(b)(1) - (3), assuming that the statutory language equates "average" with "acceptable," and further, stated, "Neither the text of the rule nor the current preamble to the draft rule offers any basis for concluding that the commonly understood meaning of the term 'average' regulatory performance (i.e., 50% have fewer violations, 50% have more violations) is intended to be 'acceptable' in the eyes of the legislature." 7-Eleven asserted that, if the commission is authorized to use the non mathematical meaning of the term "average," then it should explain this in the preamble, and could use the word "acceptable" instead of "average," but if the commission cannot identify such authority, it must build a meaningful use of the mathematical concept of average into the classification formula.

The legislature defined the term "average performer" in TWC, §5.754 as "an entity that generally complies with environmental regulations." Within the context of this section, average is not utilized as a mathematical term, but rather a qualitative label of performance. In other words, the use of the term "average performer" is intended to cover those sites or persons with an acceptable compliance history. As the commission has developed its formula, and intends on classifying each site and person, average is the group in the middle based upon the assigned points and other considerations.

§60.2(a)

Under adopted §60.2(a), the executive director will evaluate the compliance history of each site, and classify each site and person as needed for the actions listed in §60.1(a)(1). Due to the complexity of compiling all the required information, beginning September 1, 2002, the executive director will classify sites and persons as needed. The commission is developing an electronic database that will allow for the preparation of classifications electronically. The commission expects to be able to perform electronic analyses of each site and person by September 1, 2003. Additionally, for purposes of classification in this chapter and except with regard to portable units, "site" shall mean all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. This definition clarifies what information will be included in the evaluation and classification. The commission will also make updates to a person's classification at regular intervals, with an adequate period of time between intervals to allow the site sufficient time to improve its compliance with applicable requirements should it so choose. The commission adopts an annual interval for this purpose. Additionally, adopted §60.2(a) reflects that a site and a person will be classified into one of three categories. The three classifications in adopted §60.2(a)(1) - (3), as required by TWC, §5.754(b), are: a high performer, which is a site or person that has an above-average compliance record; an average performer, which is a site or person that generally complies with environmental regulations; or a poor performer, which is a site or person that performs below average.

The commission has modified the text of adopted §60.2(a). The text, “Beginning September 1, 2002,” has been added to this subsection, to provide a specific date for beginning to classify compliance histories under Chapter 60. The proposed rule required the executive director to evaluate compliance history of a site every six months, beginning September 1, 2003. After reviewing comments on this issue, the rule is revised to require reclassifications annually. An annual review will allow the executive director to assess compliance history for planning announced versus unannounced investigations, and additional assistance and oversight of poor performers. Re-evaluation will assist in determining whether permits should be revoked or amended, statutes permitting. Additionally, the word “will” has been changed to “shall” in the first sentence, and the phrase “of each site” has been added to reflect that compliance histories are prepared by site. The phrase “and person” has been added after “each site” in the first sentence in order to reflect that, in response to comments received, the commission has modified the rule to include compliance history classifications for sites *and* persons. For added clarity, the reference to September 1, 2003, and the annual reclassification has been broken out into a new sentence which reads, “On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify easy site and person.”

Additionally, the word “regulated” has been moved from its proposed location to precede the word “units” so that it modifies all of the items in the list in the sentence, appropriately reflecting that the term “site” for purposes of this chapter refers to those things at the site regulated by the commission. In response to comments received, the next sentence has been expanded to read, “Site includes any property *identified in the permit or* used in connection with the regulated activity *at the same street address or location.*” (Emphasis added). The additions to this sentence were made to more clearly reflect that the property may not always be “at the same street address

or location” but is considered part of the site if it is inherent in the permit for the site, and further to clarify that “site” is intended to encompass the location, even if the location has more than one street address. Further, the phrase, “and except with regard to portable units,” has been added to this sentence. In conjunction with this addition, the following sentence has also been added to this subsection: “A ‘site’ for a portable regulated unit or facility is any location where the unit or facility is or has operated.” The commission has made these additions to the definition of “Site” in §60.2(a) to ensure that the definition includes portable regulated units and facilities. Because a portable regulated unit or facility may operate at multiple locations, the operation of the unit or facility could result in site-specific compliance situations. In order to track the compliance history of a portable unit or facility, the compliance activity at each site will follow the unit or facility. For example, assume Company X owns portable units A, B, C, D, and E. Portable unit A would have its own “site” rating regardless of where, or at how many locations, unit A might have been located during the compliance period. Similarly, portable units B, C, D, and E would have their own “site” ratings. Those site ratings would then be averaged in and utilized in determining Company X’s classification along with all other sites owned or operated by Company X. Several program areas including air permitting, water quality, and municipal solid waste authorize or permit units or facilities which are routinely moved, and it is important that the rule account for such portable units and facilities. Finally, “and person” was also added to the final sentence, and “will” was changed to “shall,” both for the same reasons listed previously.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 478 individuals commented regarding proposed §60.2(a). The commenters stated that the compliance performance classification should not be limited to only a site, but should also be for the "regulated entity," or person. LCVEF, DAR,

SEED Coalition, and ACT stated that HB 2912 requires the consideration of all facilities in consideration of compliance history performance. Similarly, TCONR stated that the legislation does not limit the classification to a "site" and in fact references "a person's compliance history" and "classifications for regulated entities." ACT stated that the commission is not precluded from classifying performance at a single site, but that it must also classify a person's compliance history. TCONR further asserted that the site approach, as proposed, could penalize a high performer who purchases a poor performing site. 477 individuals added that consideration "must also be made to allow for following a given entity," even when the entity operates under several different names. One individual stated that the way a company manages its facilities overall, even though it may vary from site to site, will provide a good idea regarding how the company will handle a new or expanded facility. TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals support the comments made by ACT.

The commission agrees that TWC, §5.754 requires the classification of a person's compliance history. The commission is retaining the site classification also. The commission believes this meets legislative intent because this is the mechanism through which the commission can determine a person's classification. The commission disagrees that the site approach could penalize a high performer which purchases a poor performing site, because mitigation for such instances is included in adopted §60.2(e)(3). Regarding an entity operating under several different names, the definition of "person" was addressed in §60.1, relating to the components of compliance history.

Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(a). The commenters expressed concerns that certain portions of the proposed rule, specifically proposed §60.2(a) and (d),

are not consistent with the legislative directives in TWC, §5.754, to "establish a set of standards for the classification of a person's compliance history," contending that the legislature did not intend that acts or omissions of one person would reflect on the compliance history of another person. While the commenters stated that although they believe the mitigating factors in proposed §60.2(f)(3)(B) and (C) are "a step in the right direction," they do not believe this is adequate. As such, they have provided recommended rule changes to further address the issue, and further recommended that the commission "clarify the limits established in these changes, if adopted, in the preamble to the final rule. We are not recommending that the TNRCC do away with the site classification ranking. We appreciate that it is necessary to rank each site as opposed to each person for implementation and use purposes. We believe, however, that the changes discussed ... provide a site-by-site approach that is consistent with the legislative directive in the Sunset Bill." Specifically, Allied, BFI, TxSWANA, and NSWMA recommended that: the text of the first sentence in proposed §60.2(a) be changed from "classify each site as needed" to "classify each person's site history as needed"; the text of the sentence which, as they proposed elsewhere in this preamble, would now be §60.2(a)(2) read "each person's site history will be classified as"; and the text of proposed §60.2(d) be modified to include "for the same person" at the end of the sentence. Allied, BFI, TxSWANA, and NSWMA added that, if the commission chooses not to adopt the changes recommended, they have provided an alternative that would add new §60.3(f) regarding change of ownership moratorium, which is discussed elsewhere in this preamble.

The commission has modified adopted §60.2(a) to indicate that a compliance history classification will be developed for each site and person. Adopted §60.2(e) establishes the standards for the classification of a site and person's compliance history. The commission adopted a specific mechanism in §60.1 that takes into account ownership changes as TWC, §5.753(b)(4) requires that

changes in ownership be included as a component of compliance history. The statute does not direct the commission to shorten the compliance period reviewed based upon changes of ownership. The commission recognizes that every site has its unique circumstances, and has adopted §60.2(e)(3)(A)(iii) and (B), whereby the executive director may reclassify a poor performer site if it is acquired by a new owner or is operated by a new operator. The commission disagrees that any change to this language is necessary.

AquaSource, V&E, WM, TAB, Brown McCarroll, TCC, Allied, BFI, TxSWANA, NSWMA, MMM, TXOGA, OxyChem and Oxy Permian, Huntsman, BP, and TXI commented regarding proposed §60.2(a). The commenters expressed concern that the proposal to reevaluate compliance histories on a six-month interval raised a resource issue for the agency, which it asserted lacked sufficient staff to compile compliance histories. Additionally, they argued that there is nothing in the statute that requires reevaluation this often. Similarly, several of the commenters suggested that the reevaluation take place on an annual basis rather than every six months. TXI suggested instead that the classification would need to be reevaluated when a new action under §60.1(a)(1) is taken, and added that the language in the classification would need to be very clear that it is only a “snapshot in time” and is only intended to be utilized for the purpose for which it was prepared.

The commission agrees with the recommendation to conduct annual classifications. The statute requires the commission to classify regulated entities according to their compliance history, but does not require a specified frequency of classification. Annual classifications will meet statutory objectives and conserve limited agency resources. Section 60.2(a), as adopted, has been clarified to reflect that beginning September 1, 2002, the executive director will evaluate the compliance

history and determine the appropriate classification as needed for permitting, enforcement, announced investigations, and participation in innovative programs. On September 1, 2003, and annually thereafter, the executive director will evaluate compliance history and determine the appropriate classification for all sites and persons. However, the commission does not agree that compliance histories should only be reevaluated when a new action is taken. The commission has determined that a regularly-scheduled reevaluation is necessary because it allows the executive director to assess compliance history for planning purposes such as announced versus unannounced investigations and additional assistance and oversight of poor performers. Additionally, regular reevaluation allows the commission to consider whether proceedings should be initiated to revoke a permit, or to amend a permit where statutes allow, of a poor performer or someone whose performance is unacceptable.

In regard to sanitary sewer overflows (SSOs), Fort Worth commented regarding proposed §60.2(a). Fort Worth recommended that the definition of site be modified "to reflect that each street address where a SSO occurs within a municipal sewer collection system will be deemed a separate 'site' for purposes of the compliance history rules." Fort Worth stated that this is how such events are currently tracked by the agency, but added that if the definition of site is left as proposed, all sewer collection lines feeding a wastewater treatment plant could be deemed to be the same "site."

The commission does not agree that it is necessary to modify the definition of "site" as proposed by the commenter, because the collection system is considered an integral part of the permitted facility and as such will be considered the same site for compliance history purposes. However, the commission would also note that the complexity of municipal wastewater treatment systems is

recognized in adopted §60.2(d)(2)(A)(vi), and as such will be taken into consideration when considering repeat violator status. No changes have been made in response to this comment.

ATINGP, H&W, ExxonMobil, TXOGA, and 7-Eleven commented regarding proposed §60.2(a).

ATINGP recommended that the definition of site be modified to read: "'Site' shall mean all *regulated* units, facilities, equipment structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property used in connection with the regulated activity *located at the same address.*" ATINGP recommended the modification to the first sentence to clarify that the definition of sites applies only "to sites with regulated facilities." ATINGP recommended the modifications to the second sentence to clarify that "property used in connection with the regulated activity" must be located at the same address referenced in the first sentence. H&W recommended amending part of this subsection to read, "Site includes any property used in connection with the regulated activity, which property is owned or operated by the owner or operator of the site." H&W asserted that this is necessary to keep from including reference to violations at an unrelated treatment, storage or disposal facility in a site's compliance history. ExxonMobil suggested that the second sentence in the definition of "site" be modified to read, "Site may include any other property used as an integral part of the regulated activity," so as to clarify who is included in a single compliance history, and keep from opening up "unintended linkage." TXOGA provided the same comment and suggested language, stating that this would clarify the inclusion of nearby properties, such as docks, located at a separate physical address, which are critical to the "site" operation. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA. In a similar vein, 7-Eleven stated that the language should be modified to clarify that "site" includes only the property "used in conjunction with TNRCC-regulated activity."

The commission agrees with these comments in part. Specifically, the commission has modified the text of this subsection in part to read, "... 'site' means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person.'" The commission agrees that this change is appropriate in order to clarify that, in this definition, the word *regulated* applies not just to sources, but to units, facilities, equipment, and structures as well. Additionally, the commission has modified the next sentence to read, "Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location." The phrase "at the same street address or location" has been added in part to reflect that the activity will be in the same general physical location, although it may not literally be at the same street address, and coupled with the addition of the phrase "identified in the permit or," is intended to address situations such as those raised by TXOGA where for instance docks are nearby, and are critical to site operation, but are not located at the same street address. The commission does not agree that it is necessary to add the phrase "which property is owned or operated by the owner or operator of the site" to the second sentence regarding "site," because the preceding sentence already addresses this issue.

TMRA commented regarding proposed §60.2(a), recommending that the last sentence of the text of this provision be amended to read, "Each person's site history will be classified as:". TMRA stated that the statute refers to a "person's" compliance history. Additionally, the commission must determine whether a "person" is a repeat violator. As such, TMRA asserted that the intent is that the focus should be on a person's acts rather than the acts of previous owners or operators of a site.

The commission responds that it agrees that the statute refers to a “person’s” compliance history, and it has modified the rule to include the classification of a person as well as a site.

Reliant, TAB, and AECT all commented, regarding proposed §60.2(a), that they believe that five classifications are appropriate (high, high average, average, low average, or poor) as a single category for average is overly broad. Reliant went on to say that this approach would allow a person to have a better idea of where they stand in the classification scheme, and could assist them in improving their classification. TAB and AECT provided similar comments. TXU supported the comments made by AECT.

The commission declines to make the recommended change. Upon careful consideration, the commission has determined that it is appropriate, to denote three classifications of performers, consistent with HB 2912. Specifically, TWC, §5.754(b), establishes a minimum of three classifications for compliance history. The framework of §60.2 allows the commission, as well as the regulated community and the public, to determine the site rating based on a point system of major, moderate and minor violations; investigations; and implementation of a certified EMS under Chapter 90. Point ranges are then employed to assign a site a classification based upon its compliance history. These ranges clearly indicate the “standing” of the site and whether improved compliance with environmental laws and regulations is needed. The point ranges identified in §60.2(e)(2) and corresponding analysis are discussed in more detail in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Lastly, site ratings, as well as the site's and person's classifications, will be posted on the commission's website. A classification system based on three categories provides a clear and meaningful framework while apprising a person or site of its standing within this framework.

MMM commented regarding proposed §60.2(a). MMM asked whether a company can change its site classification from "poor" to "average" or "high" and, if so, how this can be accomplished?

The commission responds that a person can change its classification. In fact, the intent of the rule is to provide an incentive for all persons to strive to have the best compliance possible. The agency is willing to work with any person, especially poor performers, as noted through the actions described in adopted §60.3(b) and (d). The agency is required under TWC, §5.754(g), to provide additional oversight of poor performers, and if the person is improving its environmental performance at its site, that improvement will be documented in agency investigations and future compliance histories. A person can also implement "positive" compliance measures at its site, such as performing an approved environmental audit or implementing an EMS to assist in improving its performance. Furthermore, because the compliance history period is a "rolling" five-year window, simply through the passage of time improved compliance performance will be reflected in the lack of, or reduced number of, violations. In achieving and maintaining compliance with applicable rules, an entity can improve its classification.

V&E, WM, TAB, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(a).

V&E and WM recommended the addition of a new §60.2(a)(1), the end result of which would also be to make the phrase "Each site will now be classified as:" which would become new §60.2(a)(2), with

proposed paragraphs (1), (2), and (3) renumbered to subparagraphs (A), (B), and (C) under this new paragraph (2). The new language recommended by V&E and WM is as follows:

“(1) Following the September 1, 2003 classification, the executive director shall publish notice of each site classification in the Texas Register. Any person wishing to challenge the initial classification of a site must notify the executive director in writing no later than 30 days after publication of a site's classification. (A) The challenge shall set forth the basis for the dispute of the executive director's classification, and shall provide all documentation and argument for consideration of additional compliance history components, as defined in §60.1, or reevaluation of compliance history components already considered and recalculation of the site point score as determined below in paragraph (f). (B) If the person raising the challenge is other than the owner of the site, the owner of the site shall be notified and provided a copy of the challenge within 14 days of the executive director's receipt of the challenge. For purposes of this section only, the owner of a site is the permit holder(s) for the site. The owner shall have 14 days to reply to the challenge to the executive director and shall provide a copy of any reply to all persons that have challenged the site rating. (C) Within 30 days of the receipt of the reply or 45 days of the receipt of the challenge, whichever is later, the executive director shall evaluate the challenge(s) and reply(ies), if any, and notify the challenger and owner of the executive director's decision regarding the challenge. (D) A motion to overturn the executive director's decision may be filed within 10 days after the executive director's decision regarding the challenge is received by the challenger and owner. The disposition of any motion to overturn shall be determined in accordance with the provisions of §50.139(f). (E) The annual classifications made after the classification beginning September 3, 2002, shall be subject to the review process set forth in subparagraph (A) - (D) of this section but challenges shall be limited to evidence of new compliance

history components resulting from events that occurred or actions that have been taken or concluded since the last site compliance history rating was determined, except where a compliance history component that predates the previous evaluation date is offered by someone other than the owner and the owner knew or should have known of the compliance history component. This section is limited to new compliance history components and does not apply to compliance history components previously included in the executive director's evaluation or the scoring of previously included components. (F) Notwithstanding any limitation in this section, no person is precluded from raising issues regarding the site or person's compliance history in urging permit requirements or conditions to the executive director or the commission. However, this provision is limited to requesting new or additional permit requirements to the executive director or commission and shall not be construed to allow for reevaluation of the site's compliance history classification or use of the compliance history classification.”

Allied, BFI, TxSWANA, and NSWMA recommended the same language, except that they did not include subparagraph (F) in their recommendation. Allied, BFI, TxSWANA, and NSWMA stated that this proposal includes a process for initial appeals of classification decisions, providing entities a fair and adequate opportunity to challenge classifications to correct mistakes or urge the use of mitigating factors. They also asserted that without this process, the agency could be exposed to literally hundreds, even thousands of simultaneous appeals. TAB commented that it supports V&E's comments regarding establishing a process to challenge a site's compliance history classification and setting up a finite amount of time for such a consideration, adding that "it would be unfair and duplicitous to continue to subject companies to review of their 5-year compliance history every time they come before the agency for a permit or other authorization." WM stated that it recommends this addition to the rule because

the proposed rule will allow for different interpretations, with the agency exercising discretion and judgment in evaluating compliance history components and classifications, resulting in "fertile ground for dispute." Therefore, WM believes the classification process and any resulting disputes should be settled outside the contested case process. WM asserted that the recommended process would result in the consideration, challenge, and settling of compliance history components being addressed annually for all purposes. WM went on to say that, "For components that pre-date the last classification date and escaped review in that classification, a challenge may be brought to include such components and an exception to the closing of the prior classification is provided." WM stated that it is not recommending that compliance history issues "be removed from contested case hearings entirely," that it accepts that compliance history information may prove useful in preparing more appropriate permits, and this is why it recommends subparagraph (E) in particular.

The commission has given careful consideration to the issues raised by the commenters and adopts changes to §60.2 and §60.3 in response. Generally, the amended rules accomplish three overall objectives. First, classification disputes are removed from the contested case process for both permitting and enforcement matters. Second, the rights of parties to introduce evidence relating to actual compliance history are preserved. Third, an informal appeal process is established for the correction of clerical errors in a classification, and a formal appeal process is established for those sites or person classifications that are poor or that have an average performer site rating of 30 points or more, where it can be demonstrated that the challenge would result in a change of classification from poor to average or average to poor.

§60.2(a)(1)

MMM commented regarding proposed §60.2(a)(1), asking whether there will be an automatic confirmation process for entities classified as high performers.

The commission responds that there will not be an "automatic confirmation process" for entities classified as high performers.

§60.2(a)(2)

CPS commented regarding proposed §60.2(a)(2), stating that the term "average performer," as the vast majority of sites will be classified, has a negative connotation, and suggested that the term be replaced with "good performer."

The commission disagrees that any change to the rule is necessary, because the term "average performer" is taken directly from the statute. As such, no change to the rule has been made in response to this comment. The term "average" should not be viewed in a negative context. It is expected that a majority of sites and persons will fall in this classification, and there are no negative consequences as a result of this classification.

§60.2(a)(3)

MMM and ExxonMobil commented regarding proposed §60.2(a)(3). MMM asked whether all of an entity's sites will be classified as poor performers if one site has a poor classification, or if it will be a site-specific classification. Exxon Mobil recommended that the definition of a poor performer be modified to be a person who performs significantly below acceptable levels, asserting that the proposed definition implies that almost half of sites will be poor performers.

The commission responds that each site will have its own classification, and as such it is conceivable that one of a person's sites could have a poor performance classification, while all others of that person's sites would have a high performance classification. Simply having a poor classification at one site does not mean that all other sites will be classified as poor. The commission also notes that the rule has been modified such that a person as a whole will also have a performance classification based upon the average of all individual site classifications for sites owned or operated by that person in the State of Texas. The commission disagrees that the definition of poor performer needs to be modified; the definition of high, average, and poor are taken from the statute, and provide for qualitative definitions as opposed to mathematical definitions. No change has been made in response to this comment.

§60.2(b)

The commission adopts new §60.2(b), concerning inadequate information, to address the requirement of TWC, §5.754(d), which states, “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.” The adopted rule states that if there is no compliance information about the site at the time the executive director develops the compliance history classification, then the classification shall be designated as “average performer by default.” The word “person’s” was deleted from this sentence as it was unnecessary. The adopted rule further states that the executive director may conduct an investigation to develop a compliance history. Additionally, the subsection has been modified to include, “For purposes of this rule, ‘inadequate information’ shall be defined as no compliance information.”

TXOGA suggested, regarding proposed §60.2(b), specifically denoting as “average by default” a site that is average because of inadequate information. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission agrees with this comment and has modified §60.2(b) to reflect that change. Specifically, the revision changes “defaults to ‘average performer’” to “shall be designated as ‘average performer by default.’” This change provides additional information about the basis for these classifications to interested persons.

AquaSource commented regarding proposed §60.2(b), specifically questioning whether §60.2(b) would apply to “facilities recently acquired by established businesses or those facilities that are effectively too new to have a compliance history. If so, this would appear a disincentive for companies who would otherwise purchase undercapitalized and/or poorly operated facilities to ‘turn around.’”

The commission notes that commission decisions authorizing operation at a new site will take into consideration the person's compliance history at other sites, and the person's ability to comply with all applicable regulations, in accordance with adopted §60.3. With respect to the purchase of an established business, the classification is based on the site. Any prior compliance history within the compliance period continues to apply to the site. The executive director may apply the mitigation factor in adopted §60.2(e)(3)(A)(iii) or (B) to adjust the rating of the site. If there is no prior compliance history for the site, the site's classification will be designated as "average performer by default" under adopted §60.2(b). As adopted, the rule allows for executive director consideration when an average or high performer buys a poor performer. Thus, there should not be a disincentive to purchase undercapitalized or poorly operated facilities.

PIC commented regarding proposed §60.2(b). PIC expressed concern that a new site may receive an average performer classification due to lack of information, and that there may be little or no consideration of the compliance history of the person at other sites in Texas. Additionally, PIC provided two possible alternatives to the language in this subsection. Its first preference would read: "If there is no compliance information about the person's site at the time the executive director develops the compliance history classification, the executive director will use the lowest site rating from among the site ratings determined under subsection (f)(1) for other sites in Texas which the person has owned or operated for the entire compliance period. The classification of the site will then be determined under subsection (f)(2). If there is no compliance information about the person's site at the time the executive director develops the compliance history classification and the person owns or operates no other sites in Texas, then the classification defaults to 'average performer.' The executive director may conduct an investigation to develop a compliance history." PIC's second preference would replace the

text "use the lowest site rating from among the site ratings determined under subsection (f)(1) for other sites in Texas which the person has owned or operated for the entire compliance period" with "determine a site rating by averaging the site ratings of all other sites in Texas owned or operated by the person as determined under subsection (f)(1)."

The commission responds that the rule, as adopted, requires classification of a person, as well as each of its sites in Texas. The commission declines to modify the rule to incorporate one of the alternatives suggested by PIC related to how the site classification of an "average performer by default" can be incorporated into a person's classification. In adopted §60.2(e)(1)(L), a person classified as "average performer by default" will be assigned 3.01 points, which is the mathematical average of the average performer group. Without any information, the commission believes this is the most appropriate site rating to include in a person's rating because it is a true average. A person's classification will then be developed by averaging the site ratings of all the sites owned or operated by that person. No change has been made in response to this comment.

C&H commented regarding proposed §60.2(b), stating that the fact that the rule allows for a classification to default to "average" when there is no information on a regulated entity upon which to base a compliance history, and that the agency can investigate the site to create a compliance history, "may create inequitable results for small businesses." C&H provided, as an example, a situation in which a small business is investigated for the first time in order to develop a compliance history classification, the site could end up with a "disproportionately high compliance calculation" resulting in a classification of "poor performer" only because there is no complexity factor or number of investigations by which to divide (and thereby reduce) the compliance rating.

The commission responds that the commenter is correct in assessing the mathematical results of this scenario. The commission has intended for the site classifications to reflect the compliance performance of the site overall. The statute specifically provides for this method. Additionally, the formula for determining classification has been modified to allow for consideration of the number of investigations plus the addition of one point in the denominator. SBEA staff is available to provide compliance assistance to small businesses and local governments at any time.

V&E, TAB, and TXI commented regarding proposed §60.2(b). V&E stated that the rule does not adequately address the legislative requirement to establish "methods of assessing the compliance history of regulated entities for which it does not have adequate information," which could include "requiring a compliance inspection to determine eligibility in a program that requires a high level of compliance." V&E stated that the proposed rule does not make clear what differentiates between adequate and inadequate information. As such, V&E suggested that the rule should provide that the executive director shall conduct a compliance investigation at the request of any person whose site defaults into the average performer category due to inadequate information. ACT commented regarding proposed §60.2(b), stating that the rules should state that the executive director will conduct at least one investigation of a site for which there is no information pertaining to compliance history prior to making any decision regarding a permit renewal or amendment application for the site. In a similar vein, TAB and TXI suggested that the word "no" be deleted from this subsection and replaced with the word "inadequate," as the statute requires the commission to determine compliance history for a company for which the agency does not have adequate information. TAB stated that the agency could have some information about a site, but not enough to develop "an informed classification of the site." TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT.

The commission asserts that it is appropriate to consider, for classification and use purposes, any information the commission has available that reflects the compliance history of a site or person. As a result, the commission has determined that the only circumstance in which the commission will conclude that there is inadequate information such that an entity's classification will default to average under this section of the rule, will be the situation in which there is no compliance information about the site. Based on this analysis, the commission has clarified that, for purposes of this rule, "inadequate information" shall be defined as no compliance information, and has determined that no other change to the rule is necessary in response to this comment.

H&W commented regarding proposed §60.2(b), asserting that clarification is needed in this subsection regarding what type of investigation the agency might perform to develop a compliance history, because if the language "is intended to mean the TNRCC may conduct a compliance inspection of the site, the rule should clearly state this fact, so that site owners and operators will be on notice that they are subject to being inspected whenever they seek a permit or other agency decision in which the site's compliance history must be considered."

The commission responds that it has adopted language which reflects this intent. The definition of "investigation" included in these rules provides a wide range of options for the commission to use in gathering compliance information and through this rulemaking, regulated entities are on notice of the commission's intent to use any or all of these options. Based on this analysis, the commission has determined that no change in the rule language is necessary in response to this comment. Additionally, regulated entities are already subject to investigation at any time, including when they submit permit applications.

§60.2(c)

The commission adopts new §60.2(c), concerning major, moderate, and minor violations, to implement the requirements of HB 2912, §4.01, which enacted new TWC, §5.754(c)(1). Adopted new §60.2(c) requires the executive director to determine whether a violation of an applicable legal requirement within the commission's jurisdiction is of either major, moderate, or minor significance. This will only apply to violations of applicable legal requirements included in an order, notice of violation (NOV), court judgment, or criminal conviction issued for a violation in the State of Texas. The commission's rationale for categorizing the enumerated violations as either major, moderate, or minor is based on the commission's experience in evaluating the severity of various violations and their impacts, or potential impacts, to human health and the environment. The text of this provision has been corrected from "classifying a person's compliance history" as proposed, to "classifying a site's compliance history" in order to accurately reflect the situation in which violations are designated as major, moderate, or minor.

The commission adopts new §60.2(c)(1) to reflect which violations will be considered major. Major violations are described in adopted new §60.2(c)(1)(A) - (E): a violation of a commission enforcement order, court order, or consent decree; operating without required authorization or using a facility that does not possess required authorization; an unauthorized release, emission or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment; falsification of data, documents, or reports; or any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

The commission adopts new §60.2(c)(2) to reflect which violations will be considered moderate. Moderate violations are set forth in the items adopted in new §60.2(c)(2)(A) - (G): complete or substantial failure to monitor, analyze, or test a release, emission, or discharge, as required by a commission rule or permit; complete or substantial failure to maintain records, as required by a commission rule or permit; not having an operator whose level of license, certification, or other authorization is adequate to meet applicable rule requirements; any unauthorized release, emission, or discharge of pollutants that is not classified as a major violation; complete or substantial failure to conduct a unit or facility inspection, as required by a commission rule or permit; any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction; or maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.

The commission adopts new §60.2(c)(3) to reflect which violations will be considered minor. Minor violations are the items adopted in new §60.2(c)(3)(A) - (D): performing most, but not all, of monitoring or testing requirements, including required unit or facility inspections; performing most, but not all, of analysis or waste characterization requirements; performing most, but not all, of requirements addressing the submittal or maintenance of required data, documents, notifications, plans, or reports; or maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate.

Specifically, for major violations as proposed under §60.2(c)(1), the commission has deleted subparagraph (A) regarding violations for which the commission has agreed with the EPA to take

formal enforcement action, in accordance with EPA/TNRCC Enforcement Memorandum Of Understanding (MOU) dated April 1, 1999. The commission decided that rather than base violation classification on enforcement initiation criteria, it would be more appropriate to assess these violations using a method similar to the method used in the commission's penalty policy, which generally assesses significance based on impact or potential to impact human health, safety, or the environment. As a result of this deletion, proposed subparagraphs (B) - (F) have been renumbered and adopted as subparagraphs (A) - (E), respectively. Additionally, the subparagraph proposed as (D) and adopted as (C) has been modified to read "an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment." This subparagraph was restructured and clarified to reflect that the subparagraph addresses only unauthorized releases, emissions, or discharges of pollutants. Because "adverse effects" contemplated in this subparagraph are a reaction to a release, emission, or discharge of pollutants, the commission has adopted that phrase in lieu of the proposed "any action or inaction." In response to comments received recommending two levels of convictions, the subparagraph proposed as (F) and adopted as (E) has been modified to read "any violation included in a criminal conviction which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction." The subparagraph proposed as (G), regarding "any violation similar in character or impact determined by the executive director to be a major violation" has been deleted in response to comments that this was too vague and broad.

With respect to moderate violations as proposed under §60.2(c)(2), the commission has modified subparagraphs (A), (B), and (E) by adding "as required by a commission rule or permit" to the end of the proposed language to clarify that this rule does not create new requirements. The phrase "submit

or” has been added to adopted subparagraph (B) just prior to the phrase “maintain records,” in order to reflect that this provision addresses not only a person’s failure to maintain records, but also the failure to submit records. Subparagraph (C) has been reworded for clarity. Subparagraph (D) has been modified to mirror the language in adopted §60.2(c)(1)(C). The word “required” has been replaced with “a” in adopted subparagraph (E) to correspond with the other change made to this subparagraph, and the word “or” has been deleted from the end of this subparagraph, as it no longer precedes the final subparagraph in paragraph (2). Proposed subparagraph (F) regarding “any violation similar in character or impact determined by the executive director to be a moderate violation” has been deleted in response to comments that this was too vague and broad. In its place, the commission has adopted “any violation included in a criminal conviction, for a strict liability offense, in which the statute dispenses with any intent element needed to be proven to secure the conviction.” Additionally, the word “and” is added to the end of adopted subparagraph (F), as it precedes the final subparagraph in paragraph (2). Finally, the commission has adopted a new subparagraph (G) which states “maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.” This subparagraph has been added to capture those types of operation or maintenance violations that could cause a release, emission, or discharge of pollutants, or that could cause a violation concerning the noncompliant levels of an otherwise authorized release, emission, or discharge of pollutants.

With respect to minor violations as proposed under §60.2(c)(3), the commission has modified subparagraphs (A) - (C) by changing “those violations that indicate that” to “performing” for grammatical consistency with the other subparagraph of this paragraph. Subparagraph (D) was changed to read “maintaining or operating regulated units, facilities, equipment, structures, or sources in a

manner not otherwise classified as moderate” to clarify the difference between moderate and minor operation and maintenance issues. The commission also deleted proposed subparagraph (E) in response to comments asserting that this provision was too vague.

AquaSource stated, regarding proposed §60.2(c), that it believes that violations in NOV's should not be designated as major, moderate, or minor for scoring purposes. AquaSource argued that NOV's are merely allegations by the executive director's regional staff, and are not adjudicated decisions nor competent evidence that any violation actually occurred. Furthermore, AquaSource asserted that a regulated entity has not had an opportunity to present countervailing or rebutting evidence by the time an NOV is issued by staff, adding that it believes that it is inappropriate to classify violations alleged in NOV's because they are based on incomplete, one-sided information. AquaSource requested that the commission delete or clarify that it will not include NOV's as part of the scoring system for major, moderate, or minor classification of violations. As an alternative, AquaSource recommended that a separate category for NOV's be established, and that the formula should score allegations in an NOV as multiplied by 1.

The commission disagrees with this comment. TWC, §5.753, specifically requires the commission to include NOV's as a component of compliance history. Under TWC, §5.754(c)(1), the commission must “determine whether a violation of an applicable legal requirement is of major, moderate, or minor significance” in classifying a person's compliance history. These sections provide the basis for categorizing violations in NOV's as major, moderate, or minor. The commission recognizes that violations in NOV's are unadjudicated and do not have final commission approval. The rule reflects this fact by giving a lesser weight to violations listed in

NOVs than those contained in commission orders. Furthermore, as the statute requires, violations listed in NOVs will not be included in an entity's compliance history if the entity can establish that the violation is without merit. The Field Operations Division has established standard operating procedures for contesting the merit of an NOV. Any violation contained in an NOV that is administratively determined to be without merit will not be included in the compliance history. No changes have been made in response to this comment.

AquaSource commented regarding proposed §60.2(c), stating that the major, moderate, and minor classifications "have little meaning without an ability to assess any future changes to the commission's 1999 penalty policy" which AquaSource notes uses a similar classification system. AquaSource further asked when the commission will propose the updates to the penalty policy as mentioned in the proposal preamble, and whether the changes will be "promulgated as a rule pursuant to the Administrative Procedure Act subject to public comment and hearing?"

The commission responds that changes to the penalty policy are outside the scope of this rulemaking; however, the major, moderate, and minor classifications are based on the penalty policy.

V&E commented regarding proposed §60.2(c), suggesting that, for clarity, the text should be changed from "an applicable legal requirement is of major, moderate, or minor significance" to "an applicable legal requirement is a component that is of major, moderate, or minor significance." Additionally, V&E stated that, while it concurs with the application of major, moderate, and minor designations for

violations of Texas laws and regulations, it does not believe that it is appropriate for violations of federal and other states' laws to be evaluated in this manner.

The commission disagrees that the suggested change to the proposed rule would add clarity due to the specific meaning and use of “components” in §60.1. The commission also disagrees that violations of federal laws should be exempt from the major, moderate, or minor classification because the state has substantially adopted these same federal regulations as a part of its authorized programs. Violations of other states’ laws will not be classified as major, moderate, or minor. No changes have been made in response to this comment.

Fort Worth commented regarding proposed §60.2(c). For the same reasons stated under the discussion of Fort Worth's recommendation for modification to the definition of site in proposed §60.2(a), Fort Worth recommended that an SSO event for a municipal sewer collection system with an approved inflow and infiltration (I&I) prevention program should be classified as either moderate or even a minor violation, rather than a major violation, based upon the degree to which it is determined the SSO was avoidable or otherwise under the control of the city. Fort Worth added that in most cases, an SSO occurs in conjunction with excessive rainfall, and as such is significantly diluted.

The commission responds that it is inappropriate to predetermine the classification of a discharge from an SSO. Such discharges will be assessed based upon the site-specific circumstances. No change to the rule has been made in response to this comment.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, TDA, and UT commented regarding proposed §60.2(c). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF asserted that this subsection is too vague and subjective, stating, "Most violations are likely to come within the 'catchall' language set forth at the end of each category." The commenters stated that, because the rule assigns an objective value to each type of violation within the formula, this subsection should be modified to include more objective descriptions of what constitutes each type of violation. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration." UT expressed concern regarding whether this subsection provides adequate guidance on how to characterize violations such that characterizations across the regulated universe will be consistent, and further questioned "the procedure that will be used to apply these characterizations and whether the entity will have any opportunity for input or appeal." UT asserted that this is particularly important because the executive director has such wide latitude to apply a characterization to "any violation similar in character or impact determined by the executive director..." to be either major, moderate, or minor in significance.

This subsection has been modified, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, to provide more specificity and to follow the assessment of violations similar to the commission's penalty policy. The agency will institute the proper QA/QC for violation classifications and will develop appropriate instruction and guidance material for staff to ensure consistency in violation classification. Finally, the commission notes that this classification is based upon that used in the penalty policy, which has provided consistency in application for the public, regulated entities, and the agency since 1997.

PHA, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(c). The commenters suggested that the rule be modified to specifically state that the agency would be classifying violations included in an order or NOV for a violation occurring in the State of Texas.

The commission disagrees that this subsection needs additional clarification. The adoption preamble to §60.1 has already clarified that violations to be classified are those violations of state law or rules or federal laws or regulations occurring in the State of Texas. No change has been made in response to this comment.

TXOGA asserted, regarding proposed §60.2(c), that generally, the ranking of violations as major, moderate, or minor "is too ambiguous for facilities to accurately replicate their rating." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission disagrees with the commenter that the process of ranking violations as major, moderate, and minor is too ambiguous for a person to accurately replicate its rating. The commission has, however, modified the descriptions of major, moderate, and minor in response to other comments received for clarity and ease of use, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The descriptions are similar to those in the penalty policy, and as such, penalty policy worksheets may provide assistance in determining designations of major, moderate, or minor. Determination of a site's ranking and classification can be replicated.

§60.2(c)(1)

TXI, BP, and Brown McCarroll commented regarding proposed §60.2(c)(1). TXI proposed that subparagraphs (A), (B), (C), (F), and (G) of this paragraph should be deleted, and stated that subparagraph (D) should be kept as the "primary example" of major significance, along with proposed subparagraph (E) which would involve "knowing violations." TXI asserted that this approach would "result in an emphasis on the nature of the violation itself rather than whether it happens to fall within a certain type of violation." BP asserted that in general, the things which should be designated as major are "felony criminal intent, severe impact to the environment, or violation of a commission order or similar decree," and expressed particular concern with how the discretionary items in the high priority violator (HPV)/significant noncomplier (SNC) criteria would be handled. Brown McCarroll suggested that the rule should exclude self-reported violations from those designated as major, to provide incentives for regulated entities to self-report, unless the violations are otherwise required to be reported by either EPA or the commission. As such, Brown McCarroll recommended that the text of paragraph (1) be modified to read: "Major types of violations are those violations listed below that are not self-reported, where such reporting is not otherwise required by EPA or Commission rule or order:". TXOGA endorsed the comments submitted by Brown McCarroll.

The commission responds that modifications to this paragraph have been made in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble with regard to §60.2(c). The commission modified the language in adopted §60.2(c)(1) from “major types of violations” to “major violations.” The commission agrees that self-reported violations not otherwise required to be reported should be treated in a less negative manner. Therefore, the commission has adopted language in §60.2(e)(1)(K) that provides positive points for violations self-reported under the Texas

Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended where the site was granted immunity from administrative or civil penalty for those violations.

Additionally, the commission adopted §60.2(e)(3)(A)(iv) as a mitigating factor. This factor includes voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Audit Privilege Act, or that is reported under the Audit Privilege Act but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency.

7-Eleven commented regarding proposed §60.2(c)(1). 7-Eleven recommended that this paragraph be modified to require that all major violations consist of an actual or potential adverse effect on human health, safety, or the environment, or actually or potentially prevent the enforcement of regulatory requirements. 7-Eleven asserted that, as proposed, this paragraph and associated subparagraphs imply that certain violations categorized as major will not even have the potential for harmful impacts, and added that the only other category of violation which would justify classification as a major violation would be those which "undermine or prevent the agency's ability to determine compliance." As such, 7-Eleven recommended that this paragraph be revised as follows:

“(1) A major violation is any action or omission in violation of Commission regulations which (a) has caused adverse effects on human health, safety or the environment, (b) has resulted in pollutants being released at levels or volumes sufficient to cause adverse effects on human health, safety or the environment, or (c) which actually or potentially prevents the Commission from determining a person's compliance with commission regulations; and which also involves: {Omit subpara. (D), renumber remaining sections accordingly.}”

The commission responds that modifications to this paragraph have been made in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble with regard to §60.2(c). Furthermore, actual harm should not be required in every instance, because where a person may have caused harm but failed to maintain records, the agency will not necessarily be able to show that harm resulted. This would provide a disincentive for recordkeeping and monitoring. The commission decided that rather than base violation classification on when enforcement is initiated, it would be more appropriate to assess these violations using a method similar to the commission's penalty policy, which generally assesses significance based on impact or potential to impact human health, safety, or the environment.

7-Eleven commented regarding proposed §60.2(c)(1), recommending that a new subparagraph (H) be added to this paragraph, to read, "notwithstanding the above, for the purpose of determining that a person is a Repeat Violator under Sub-section 60.2(d), 'major violations' shall only include final enforcement orders, court judgments and consent decrees." 7-Eleven stated that the definition of major violation, as used in designating a repeat violator, and in that it includes NOV's, appears to exceed statutory authority, adding, "It is highly unlikely that HB 2912 or resulting TWC Sections 5.752-5.754 were intended to, or actually provided authority to the Commission to deny or modify permits based on the unverified allegations of an NOV."

The commission disagrees with this comment. TWC, §5.753, specifically requires the commission to include NOV's as a component of compliance history. Under TWC, §5.754(c)(1), the commission must "determine whether a violation of an applicable legal requirement is of major,

moderate, or minor significance” in classifying a person’s compliance history. These sections provide the basis for categorizing violations in NOV’s as major, moderate, or minor. The commission recognizes that violations in NOV’s are unadjudicated and do not have final commission approval. The rule reflects this fact by giving a lesser weight to violations listed in NOV’s than those contained in commission orders. Furthermore, violations listed in NOV’s will not be included in an entity’s compliance history if the entity can establish that the violation is without merit. The Field Operations Division has established standard operating procedures for contesting the merit of an NOV. Any violation contained in an NOV that is administratively determined to be without merit will not be included in the compliance history. However, the commission notes that the rule has been modified from proposal with regard to what constitutes a major violation. Additionally, the commission has clarified that in order for a site to be designated as a repeat violator, the major violations must be documented on separate occasions. Given these changes, the commission has determined that major violations, whether documented in an NOV or an order, are of such significance that a repeat violator designation is appropriate when triggered according to adopted §60.2(d), except when the executive director determines that the nature of the violations and the conditions leading to the violations do not warrant the designation.

§60.2(c)(1)(A)

V&E, Reliant, TAB, NTMWD, TXI, T&K, H&W, TMRA, UT, ExxonMobil, Valero, AECT, ATINGP, TXU, TIP, Brown McCarroll, TXOGA, 7-Eleven, TCC, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(1)(A). The commenters stated that violations which are more clerical in nature should not be considered major; rather, it should only be those violations

which are "substantive and have the potential to cause harm." H&W recommended that each violation in the MOU be reviewed and reclassified "in accordance with the degree to which the violation represents a significant deviation from the regulatory program and the impact the violation has or may have on the environment." TAB, TXI, T&K, ExxonMobil, Valero, TIP, AECT, TMRA, and TXOGA made comments of the same nature, stating that the Memorandum of Agreement was developed for different purposes. TXI and T&K recommended that subparagraph (A) be deleted from the rule. NTMWD, Valero, and TIP also expressed concern with certain "documentation type" violations being included as major violations, asserting that this approach is inconsistent with the commission's penalty policy, which "distinguishes for the purposes of determining the base penalty between violations that harm or have the potential to harm human health or the environment and those violations that are solely related to documentation." TMRA provided similar comments, as did UT, who recommended either deleting this subparagraph from the rule or limiting it to those HPVs or SNCs "that otherwise meet the remaining criteria."

The commission responds that modifications to this subparagraph have been made in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble with regard to §60.2(c). The commission disagrees specifically with the recommendation that every major violation must result in actual or potential harm or must be substantive. Instances of intentional wrongdoing or fraud, or ignoring requirements of orders or failing to obtain authorization may not per se harm the environment, but could undermine the entire system of environmental regulation, and are therefore of major significance. The commission has deleted proposed §60.2(c)(1)(A) because it determined that, rather than base violation classification on when enforcement is initiated, it would be more

appropriate to assess these violations similar to the commission's penalty policy which generally assesses significance based upon impact or potential to impact human health, safety, or the environment.

ACT commented regarding proposed §60.2(c)(1)(A), stating that it is supportive of the proposal to make "all SNC, HPV and other similar violations 'major' violations." ACT further asserted that similar types of reporting and monitoring violations in programs which are not the subject of federal authorizations should also be considered major violations, stating, "Accurate, timely and compliant reporting and monitoring are critical to the integrity of all TNRCC regulatory programs." TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission appreciates the positive comment in support of the rules. However, the commission has deleted proposed §60.2(c)(1)(A) in response to other comments received. The commission disagrees with the suggestion that reporting and monitoring violations be classified as major violations. Although a failure to report and monitor is a significant violation, and could make it difficult to determine if one of the violations designated as "major" has occurred, such a violation reflects, at most, potential for a serious environmental consequence. Therefore, the commission has included violations for failing to monitor or report under adopted §60.2(c)(2), i.e. as "moderate violations." In addition, §60.2(c)(1), as adopted, is more consistent with the evaluations made under the commission's penalty policy relating to reporting and monitoring violations, and this consistency is important for uniform application of these rules.

§60.2(c)(1)(A) (proposed as §60.2(c)(1)(B))

AquaSource, V&E, TXI, T&K, Brown McCarroll, TXOGA, TCC, OxyChem and Oxy Permian, Huntsman, and BP commented regarding proposed §60.2(c)(1)(B). AquaSource recommended that the rule be clarified to reflect that the violation of a commission enforcement order, court order, or consent decree would have to occur while the order or decree was still in effect in order to be counted towards compliance history. Additionally, the commenters recommended that any such violation must be of one of the order or decree's substantive requirements. T&K commented that it is inappropriate to raise violations of commission orders, court orders, and consent decrees to a major classification for violations of minor requirements such as recordkeeping and administrative provisions, and added that these violations should be accounted for in the proposed formula based on the type of violation. TXOGA also stated that not all consent decrees should be counted as major violations, stating that "EPA has recently used large company-wide consent decrees as an effective mechanism to accelerate emission reductions from Pulp & Paper Mills, Electric Utilities, Petroleum Refineries and, more recently, Chemical Refining Operations. They provide a win-win scenario for government, industry and the environment." TXOGA asserted that the proposed rules treat these consent decrees as a "blemish on the affected company's record," and as such will deter others from taking such actions. Therefore, TXOGA asserts that these consent decrees should not be counted as a negative component of compliance history. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TXOGA.

The commission acknowledges that some violations of commission orders, court orders, and consent decrees may be for violations that would otherwise be considered moderate or minor violations under the provisions of these rules. The commission believes that a person who is the subject of an enforcement action receives ample opportunity to comply. The commission expects

compliance with its orders, EPA orders, and court judgments. Accordingly, it is appropriate to attach increased significance to violations of commission orders, EPA orders, and court judgments, as well as other court orders and consent decrees. Violation of a commission order, court order, or consent decree can only occur while that order or decree is still in effect.

§60.2(c)(1)(B) (proposed as §60.2(c)(1)(C))

FWAF, MMC, OCIW, SSCC, TXI, T&K, H&W, and TXOGA commented regarding proposed §60.2(c)(1)(C). FWAF, MMC, OCIW, and SSCC stated that while they agree that operating a facility without a permit constitutes a major violation, they do not agree that "authorization" should include sources that can qualify for a Permit by Rule (Standard Exemption). TXI recommended the deletion of proposed subparagraph (C). In a similar vein, T&K asserted that this should be a major violation only if the facility and authorization are "major," and that "it should not apply to facilities that can be authorized by a permit-by-rule, general permit, or other similar authorization." H&W also stated that it strongly disagrees with the proposed provision categorizing the use of a facility that does not possess required authorization as a major violation, as it asserts that "it is impossible for regulated entities to always know whether a third party facility has obtained all of the required authorization necessary to conduct all of their operations," and as such recommended that this either be changed to minor or deleted from the rule. TXOGA asserted that this subparagraph should be modified by deleting the last phrase stating, "or using a facility that does not possess required authorization," stating that it is redundant, and if the phrase is left, could be read to mean that it is intended to "penalize an operator for using a third party vendor which, unknown to the contracting party, does not hold proper authorization." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that obtaining appropriate authorization prior to conducting a regulated activity is a fundamental part of the regulatory process. It is a person's responsibility to ensure that it possesses all required authorizations and to maintain compliance with such authorizations and applicable rules. Additionally, it is a person's responsibility, when utilizing a third party for such activities as waste disposal, to ensure that the third party has appropriate authorizations in order to ensure protection of human health, safety, and the environment. No changes have been made in response to these comments.

TML, TAB, TCAP, and TCCI commented regarding proposed §60.2(c)(1)(C). TML suggested that operating without necessary authorization be reduced from a major violation to a moderate violation, and based this recommendation on three reasons. First, TML asserted that this designation as a major violation seems to conflict with the Enforcement Initiation Criteria which allows that if certain requirements are met, a person found to be operating without a required permit would be provided the opportunity to come into compliance rather than automatic initiation of a formal enforcement action. Second, TML expressed concern that the rule could be interpreted to apply to a person who has a permit but has failed to pay permit-related fees in a timely manner and are, therefore, operating without the required authorization. And third, TML stated that "there is no distinction built into the rule based on the type of facility that is being operated," giving as an example the distinction, from an environmental standpoint, of a city operating without a required wastewater treatment plant permit versus a city operating a clean air fleet of vehicles without a required permit. TAB stated that, by designating operating without a required authorization as a major violation, it appears that the commission is "loading the compliance history formula in such a way that small business as a whole is almost guaranteed to fail," as this would result in "a large number of well-intentioned small businesses

being thrown into the poor category without any real chance to redeem themselves prior to the classification." TAB added that as proposed, this would overturn the Enforcement Initiation Criteria B17, which allows that under certain circumstances, operating a facility without a required permit by rule does not result in automatic enforcement without an opportunity to achieve compliance first (i.e. it is a Category B violation). TCAP expressed similar concerns that this provision conflicts with Enforcement Initiation Criteria B17. TAB and TCAP, therefore, asserted that operating without a required permit by rule should be classified as a moderate violation, allowing persons "who were not aware of the permit by rule requirements to come into compliance within a specified period." In a similar vein, TCCI expressed concerns that some regulated entities would be committing a major violation by operating without required authorization, and asserted that "some voluntary correction opportunities should be given to entities that have been ignorant of the law or were under the impression that they were exempt." As such, TCCI requested that "trying to become compliant" not be counted as "major" if the regulated entity voluntarily enters the permitting process and conforms to the law.

The commission has not modified the rule in response to these comments. The classification of major, moderate, or minor as adopted is more similar to the penalty policy and does not dictate how the commission will address such a violation (e.g., NOV or order), as is the purpose of the Enforcement Initiation Criteria. If the commission addresses a violation for operating without authorization through a NOV, the subsequent assigned point value will be substantially less than if such action is addressed through other means of enforcement. With regard to the concern about failure to pay permit-related fees in a timely manner, the commission responds that this rule does not impose additional requirements on a permittee. Failure to pay a fee is not treated as

operating without authorization. With regard to TML's third point concerning the type of facility that is being operated, the commission responds that §60.1 generally defines the term "permit" to mean licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization. Further, Chapter 60 applies only to persons subject to the requirements of TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401. The commission believes that authorization in any form is a critical mechanism for protection of human health, safety, and the environment, and as such, failure to obtain that authorization is of great significance. The commission is not changing its procedure of allowing small businesses to become compliant with permitting requirements in response to NOV's if the agency has not previously notified that person of such requirements. The commission is, however, in this rulemaking, indicating the significance of the need to acquire authorization prior to initiating those activities that require authorization and assigning appropriate points to those violations. A small business who receives an NOV for operating without a permit will receive five points. Only in the event that the person does not obtain the required authorization within a reasonable time will the commission initiate an additional investigation and subsequent enforcement, should the violation be continuing. The commission agrees that most small businesses are well intentioned, and does not anticipate that many of these businesses will be classified as poor performers as a result of this type of violation being considered as major. The commission also encourages TCAP and TAB to remind small businesses of the importance of obtaining authorization prior to engaging in those activities that require authorization.

§60.2(c)(1)(C) (proposed as §60.2(c)(1)(D))

AquaSource, V&E, TAB, AECT, CPS, Valero, ATINGP, TIP, and TCC commented regarding proposed §60.2(c)(1)(D). AquaSource recommended the deletion of the phrase "or that has resulted in pollutants released at levels or volumes sufficient to cause adverse effects on human health, safety or the environment" from this subparagraph, as it believes that there must be some documented harm for a violation to be designated as major. TCC asserted that the word "safety" should be stricken from the rule, as the commission is not charged with regulating safety. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TCC. Similarly, V&E stated that the language in this subparagraph is too broad, that there should be a record of the determination made that the violation is significant, and further that the word "safety" should be stricken from the provision as safety is not part of the commission's mission or under its jurisdiction. As such, V&E recommended the following text to replace the proposed language: "(D) Any action or inaction that has caused significant adverse effects on human health or the environment, or that has resulted in pollutants released at levels or volumes sufficient to cause significant adverse effects on human health or the environment as determined by the executive director." ATINGP also recommended the insertion of the word "significant" prior to "adverse effects" where it appears in the proposed subparagraph, as it asserts the proposal is too vague and does not establish any threshold level to be met. TAB and AECT both made comments regarding the use of the word "safety" in the proposal, stating that it should be removed, as the commission does not have the authority to regulate safety, other than in reference to human health. CPS stated that the language is too vague, and recommended that "adverse effects" be defined, and that the rule designate who will determine whether an action has caused adverse effects. Valero and TIP recommended that the text of this subparagraph be modified to read, "any action or inaction that has resulted in pollutants released at levels or volumes that have caused significant adverse effects on human health, safety, or the environment." Valero and TIP argued that the rule as proposed is too

broad, and would encompass too many violations which could arguably have an "adverse effect."

Valero and TIP added that, at a minimum, the preamble should provide substantial discussion of what the commission considers an "adverse impact," which would prove useful to both the regulated community and the field investigators. TXU supports the comments made by AECT. ATINGP also requested clarification regarding what types of actions or inactions are contemplated by this provision, and what standard "sufficient to cause an adverse effect" references to. ATINGP stated that as it understands from discussions with commission staff, the provision is intended to correspond with "major violation" as it is described in the penalty policy. The commenter suggested that if this is the case, the rule could be modified to state that "a major violation for purposes of compliance history ranking is 'major violation as defined in the TNRCC's Penalty Policy.'" ATINGP asserted that this would serve two purposes: 1) the regulated community would "have clear notice of the body of law and policy to which the TNRCC will refer in making decisions on which violations are major for compliance history program"; and 2) as the penalty policy is modified, there would not be the need for additional rulemaking.

The commission disagrees that the term “safety” in §60.2(c)(1)(C) should be removed. THSC, Chapter 361, as well as TWC, Chapter 26, specifically define pollution to address “public health, safety, or welfare” (Emphasis added). In the Texas Clean Air Act (TCAA), §382.026, authorizes the commission to issue an order under an air emergency under TWC, §5.514. TWC, §5.514, provides that if the commission finds that a general condition of air pollution exists that creates an emergency requiring immediate action to protect human health or *safety*, the commission, with the concurrence of the governor, may issue an emergency order (Emphasis added). Finally, under THSC, §401.001, it is the state’s responsibility to protect public *safety* and the environment

(Emphasis added). “Safety” is referred to in these statutes in the context of protecting the public, not regulating safety per se. The commission is not extending its authority with the use of the term “safety” in this adopted subparagraph. No change has been made in response to these comments.

The commission modified the language in proposed §60.2(c)(1)(D), adopted as §60.2(c)(1)(C), in response to comments to clarify that this subparagraph describes only unauthorized releases, emissions, or discharges of pollutants. With this clarification, the commission further responds that the rule language concerning “adverse effects” is not overly broad and declines to modify language to include “significant” in this provision.

Examples of major violations under this subparagraph are: a discharge of poorly treated wastewater which caused an immediate fish kill; a large emission of ammonia gas caused by an operator inappropriately opening a valve, causing plant neighbors to experience burning nostrils and tearing eyes; an unauthorized discharge of perchloroethylene to a major aquifer, making that part of the aquifer unusable; and an authorized discharge of material that has high total dissolved solids to an aquifer with drinkable water which, as a result of that discharge, can now only be used for certain livestock watering and limited irrigation.

Other examples of major violations under this subparagraph are: a noncompliant discharge of poorly treated effluent that contains pollutants at a level that over time would deplete certain aquatic population, thereby depriving the fish community of a food resource; or a short-term noncompliant discharge of a pollutant at levels that scientific literature indicates is harmful, yet

the buffering capacity of that particular water body at that specific location assimilates the pollutant without the harmful effects occurring. Another example includes a noncompliant emission of an air pollutant at a concentration and volume sufficient to cause chemical burns on the skin; however, due to high winds, the pollutant is dissipated prior to encountering plant neighbors.

Adverse effects will be evaluated based on a case-by-case analysis of the unauthorized release, emission, or discharge. The commission will utilize peer-reviewed scientific literature, as well as applicable standards, such as 30 TAC Chapter 307, relating to Texas Surface Water Quality Standards, to evaluate the harm the pollutant may cause.

ATINGP commented regarding proposed §60.2(c)(1)(D), requesting that the commission "consider a rural area exemption to the second clause of" subparagraph (D), as this clause "provides that a major violation need not actually cause an adverse effect." ATINGP asserted that a "release from a facility located in a rural area with no nearby receptors should be weighted differently than a release from a facility in the middle of a populated area that actually causes significant harm." As such, ATINGP requested that "a release in quantity sufficient to cause a significant adverse effect... with no human habitat within one-half mile from the property line be considered a moderate violation instead of a major violation."

The commission disagrees with this recommendation because it is charged with the protection of human health, safety, and the environment, and an exemption as proposed by the commenter

would not be protective of environmental receptors. As such, no change has been made in response to this comment.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(c)(1)(D). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF recommended that the text of this subparagraph be modified from "...or that has resulted in pollutants released at levels..." to "...or that has resulted in the unauthorized release of pollutants at levels..." The commenters asserted that this modification should be made to clarify that only unauthorized releases would be considered a major violation. By way of example, the commenters stated that rules and/or permits often allow sites to discharge water containing pollutants. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission agrees that the rule should be specific to unauthorized releases, and has modified the rule accordingly.

Onyx commented regarding proposed §60.2(c)(1)(D). Onyx stated that it is a commercial hazardous waste treatment and storage facility, for which the majority of wastes handled are not "identified, packaged, or transported" to its sites by its own personnel. As such, Onyx stated that it does not believe that releases that occur at its facilities "due to inaccurate profiling of wastes" by the generator, the shipment of wastes by the generator "that do not meet approved profiles, or releases from containers not packaged by Onyx" should be considered as a factor in Onyx's compliance history classification, provided Onyx "immediately initiates efforts to control and remediate the release."

The circumstances described in this comment constitute violations under current rules. Further, TWC, §26.121, provides that it is a violation to “cause, suffer, allow, or permit the discharge of any waste or the performance of any activity” in violation of Chapter 26 or any commission rule. TWC, §26.121, also provides that no person may “commit any other act or engage in any other activity which in itself or in conjunction with any other... activity... will cause pollution of any of the water in the state....” To the extent the circumstances described in this comment are subject to this prohibition, they constitute a violation and may be subject to enforcement. To the extent that they are mitigated by immediate control and remediation by the facility in question, those extenuating circumstances can be taken into account in case-by-case enforcement-related decisions. No changes have been made in response to this comment.

Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(c)(1)(D), stating that this subparagraph should be more clearly defined to reflect that incidents that are not under the regulatory authority of the commission would not be included in this compliance history program. As such, the commenters recommended that the proposed text be modified to read, "(D) any action or inaction that is also subject to the regulatory authority of the TNRCC that has caused adverse effects...."

The commission does not agree that the commenters’ suggested change is necessary. Section 60.1 specified that this rule is applicable to authorizations requiring approval or disapproval by the agency. Further, the commission modified the subparagraph to designate as a major violation an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment. Thus,

should EPA issue an NOV for an unauthorized emission, that violation would be within the jurisdiction of the commission. Alternatively, should EPA issue an NOV related to an effluent violation covered by a TPDES permit, that unauthorized discharge is also under commission jurisdiction.

T&K commented regarding proposed §60.2(c)(1)(D), stating that it supports this provision, adding it believes this is the only provision consistent with the commission's stated rationale in the proposal preamble.

The commission appreciates the positive comment in support of the rule, and notes that the subparagraph has been restructured and clarified to reflect that the subparagraph addresses only unauthorized releases, emissions, or discharges of pollutants.

§60.2(c)(1)(E) (proposed as §60.2(c)(1)(F))

AquaSource, V&E, WM, TXI, T&K, ExxonMobil, Allied, BFI, TxSWANA, and NSWMA commented about proposed §60.2(c)(1)(F) concerning the assessment of all criminal violations as “major violations” under this subparagraph, which is associated with proposed §60.3(a)(7)(A) (“Repeat violator”). The commenters suggested that felonies should be considered as major violations, but misdemeanors should be considered moderate violations.

The commission has determined that criminal convictions should be classified as “major violations” when the prosecutor must prove a mens rea or intent element to support the underlying criminal violation, but should be classified as “moderate violations” when the

conviction is based on a strict liability statute. Many environmental crimes are not classified as misdemeanors or felonies. The commission has determined that any criminal violation where the prosecutor is required to prove a culpable mental state is of such a serious nature that the violation should be classified as a major violation for the purpose of this rule. The revised rule language, as adopted at §60.2(c)(1)(E), states “any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.” Additionally, adopted §60.2(c)(2)(F) states “any violation included in a criminal conviction, for a strict liability offense, in which the statute dispenses with any intent element needed to be proven to secure the conviction,” and adopted §60.3(a)(6)(A), proposed as §60.3(a)(7)(A), states, “a criminal conviction classified as major under §60.2(c)(1)(F) of this title.”

Proposed §60.2(c)(1)(G)

Fort Worth COC, C&H, Reliant, AECT, TXI, T&K, H&W, TMRA, Brown McCarroll, 7-Eleven, Garland, San Antonio, GEUS, SMEC, Allied, BFI, TxSWANA, and NSWMA all provided similar comments regarding proposed §60.2(c)(1)(G), stating that the executive director should not have the open-ended discretion to classify a violation as major. Several commenters recommended that this subparagraph be deleted. TXOGA endorsed the comments submitted by Brown McCarroll.

The commission responds that this subparagraph has been deleted in response to these comments as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

AquaSource and V&E commented regarding proposed §60.2(c)(1)(G). AquaSource recommended that the commission should make the decision as to whether a violation is similar in character or impact to be a major violation, rather than the executive director, and stated that the executive director does not have "judicatory powers" to make this decision. On the other hand, V&E stated that proposed §60.2(c)(1)(G), (2)(F), and (3)(E) should be deleted as "similar in character or impact" is too vague. In the alternative, V&E suggested adding some certainty by inserting "significant human health or environmental" prior to the word "impact" in each subparagraph.

The commission responds that this subparagraph has been deleted as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)

PIC, Valero, TIP, and one individual commented regarding proposed §60.2(c)(2). PIC disagreed "with the rule's classification of the following violations as moderate: A) complete failure to monitor, analyze, or test a release, emission, or discharge; and B) complete failure to maintain records. Such violations demonstrate a blatant disregard for regulatory processes and authority and seriously call into question the competence of the responsible owners and operators. Therefore, PIC submits that these are 'major' violations. Furthermore, the classification of these violations as 'moderate' potentially contradicts §60.2(c)(1)(D). These violations could be 'major' under that provision because a complete failure to monitor or maintain records could constitute 'inaction' that contributes to adverse effects on human health or the environment." One individual expressed similar concerns, stating that complete or substantial failure to monitor should be a major violation, because without proper monitoring, it cannot be determined whether the major violations listed in proposed §60.2(c)(1)(D) have occurred. Valero and TIP stated that the phrase "complete or substantial failure" should be more clearly defined in proposed subparagraphs (A), (B), and (E) of this paragraph, or within the preamble.

The commission responds that it disagrees with the comment related to classifying the violations in proposed §60.2(c)(2)(A) and (B) as major violations. As discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, the commission has generally patterned these classifications on the commission's penalty policy. The commission does not dispute the importance of proposed subparagraphs (A) and (B) in the regulatory process. However, the commission has determined that it is appropriate to distinguish these violations from those categorized as major. The adopted rule classifies monitoring or testing that is mostly adequate as minor, because in this case there would be a substantial amount of information with

which to evaluate a facility. However, where there has been a complete or substantial failure to monitor or test, then the violations are classified as moderate. This methodology is similar to the methodology used in the commission's penalty policy. The use of similar methodology is important for consistency and ease of application. The commission will evaluate releases, emissions, and discharges separately from the requirements to monitor or maintain records. Regarding the phrase "complete or substantial failure," the commission disagrees that proposed subparagraphs (A), (B), and (E) should be more clearly defined. The commission responds that these are the types of assessments that commission staff routinely make, and in context with §60.2(c)(2) such assessments are readily understood in accordance with the plain meaning of the words. No changes have been made in response to these comments. The commission did, however, change the language from "moderate types of violations" to "moderate violations."

V&E, WM, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(2), suggesting the addition of new subparagraph (G) which would read, "any other violation included in a criminal conviction." V&E, Allied, BFI, TxSWANA, and NSWMA asserted that the suggested change would recognize that criminal conduct varies widely and convictions can result from a range of relatively minor violations to a much greater deviation of the law. WM recommended that the commission distinguish between misdemeanor and felony counts. V&E further asserted that its suggested changes/additions to proposed §60.2(c)(1)(F) and (2)(G), and (f)(1)(G) and (H) recognize that "many environmental crimes are not classified as misdemeanors or felonies."

The commission agrees that many environmental crimes are not classified as misdemeanors or felonies, and has therefore determined that it is appropriate to distinguish between those criminal

convictions that require the prosecutor to prove a culpable mental state or a level of intent from those criminal convictions where the statute plainly dispenses with any intent element. The commission has determined that any criminal violation where the prosecutor is required to prove a culpable mental state is of such a serious nature that the violation should be classified as a major violation for the purpose of this rule. The commission has revised the rule as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)(A)

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, T&K, TDA, and TXOGA commented regarding proposed §60.2(c)(2)(A). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF recommended that the text of this subparagraph be modified from "Complete or substantial failure to monitor..." to "Complete or substantial and unexcused failure to monitor...." The commenters asserted that this modification should be made to clarify that only unauthorized releases would be considered moderate. By way of example, the commenters stated that commission rules allow certain discharges to occur without sampling under certain conditions. Similarly, T&K requested clarification to the effect that this provision applies to the failure to undertake such activities which are "required by rule or permit for which the agency issues" an NOV, and does not apply to "mechanical breakdowns or other data failures of continuous opacity monitoring systems (COMs) and/or continuous emissions monitoring systems (CEMs) that are reported by the business entity." Further, T&K requested clarification regarding what constitutes a "test." TXOGA stated that this subparagraph should be modified to add "as required" after "test," so as to reflect that this is not intended to establish new requirements. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that §60.2(c)(2)(A) has been clarified in response to comments as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The rule lists “monitor, analyze, or test” to include all terms typically utilized to indicate evaluation of the quality or characteristics of a release, emission, or discharge. The rule is not intended to impose new requirements for monitoring, analyzing, and testing. Additionally, the commission notes that if the failure is truly excused, enforcement would not result.

§60.2(c)(2)(B)

T&K, TXOGA, and one individual commented regarding proposed §60.2(c)(2)(B). The individual stated that complete or substantial failure to keep records should be a major violation, because without proper recordkeeping, it cannot be determined whether the major violations listed in proposed §60.2(c)(1)(D) have occurred. T&K requested clarification regarding the scope of this provision, asking whether it is "a failure to have any records for a program area, ...; a failure to have any records in one aspect of a program area; a failure to maintain records required by all program areas; or even a failure to have a single record such as one daily production record." TXOGA stated that this subparagraph should be modified to add "as required" at the end of the sentence, so as to reflect that this is not intended to establish new requirements. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission disagrees that adopted §60.2(c)(2)(B) should be a major violation. While a failure to maintain records is a significant violation and could make it difficult to determine if one of the violations designated as “major” has occurred, the violation reflects, at most, potential for a

serious environmental consequence. The subparagraph has been modified to clarify that it describes a failure to comply with a specific rule or permit, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, the phrase “as required by commission rule or permit” has been added to the text to reflect that this rule is not intended to impose new requirements.

§60.2(c)(2)(C)

T&K and 7-Eleven commented regarding proposed §60.2(c)(2)(C). T&K asked whether this provision is "intended to include a short lapse in certification." 7-Eleven recommended that the text of this subparagraph be modified "to clarify that 'having' an inadequately licensed operator is not a violation of law; i.e., only 'use' of such an operator constitutes a moderate violation."

The commission responds that §60.2(c)(2)(C) simply describes a violation type and is not specific to the length of time that a violation occurs. This subparagraph has been reworded for clarity as described previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)(D)

CPS, Valero, TIP, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(c)(2)(D). CPS objected to the designation of "any release, emission or discharge that is not classified as a major source" as a moderate violation, and recommended that "emissions that are properly reported as upset, maintenance, start-up or shutdown events or deviations under Title V be exempted." CPS stated that categorizing releases that occur under certain circumstances as "criteria for

poor compliance" unjustly penalizes persons who properly maintain their equipment, and added that properly reported releases should not be held against a person's good compliance history. Valero and TIP stated that the language in this subparagraph should be modified to read, "any unauthorized release, emission, or discharge that is not classified as a major or minor violation." Garland, San Antonio, GEUS, and SMEC asserted that the text should be modified to read "any reportable release," because as proposed, the rule would include insignificant releases which are not violations under state or federal law.

The commission responds that it has revised the rule by adding the word “unauthorized” in response to comments as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The rule language specifies that a release must be sufficient to cause adverse effects on human health, safety, or the environment.

§60.2(c)(2)(E)

CPS commented regarding proposed §60.2(c)(2)(E). CPS objected to the proposed language, asserting that a person would "be held accountable for inspections carried out by the TNRCC regional office," which the person has no control over. CPS added that the language in the proposal preamble which stated "...generally the more complex a regulated program, the more frequent the agency's investigation rotation schedule," doesn't take into account the differences in size of, and number of investigators in, each TNRCC Regional Office.

The commission responds that this subparagraph concerns inspections that the person is required to perform under commission rules or under a permit provision. The language has been clarified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)(F)

V&E, TMRA, 7-Eleven, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(2)(F). V&E, TMRA, Allied, BFI, TxSWANA, and NSWMA stated that §60.2(c)(1)(G), (2)(F), and (3)(E) should be deleted as "similar in character or impact" is too vague. In the alternative, V&E suggested adding some certainty by inserting "significant human health or environmental" prior to the word "impact" in each subparagraph. 7-Eleven recommended that the language of this subparagraph be modified to read, "Any otherwise major or minor violation of similar character or impact determined by the Executive Director to be a moderate violation," asserting that this change would clarify that "it is within the Executive Director's authority to revise downward the point value of a major violation, or to revise upward that point value of a minor violation."

The commission responds that this subparagraph has been deleted from the rule in response to comments, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(3)

Valero and TIP commented regarding proposed §60.2(c)(3), stating that the phrase "those violations that indicate that most, but not all..." should be more clearly defined in proposed subparagraphs (A) - (D) of this paragraph, or within the preamble.

The commission disagrees that proposed subparagraphs (A) - (C) should be more clearly defined. These are assessments that commission staff routinely make and in context with §60.2(c)(2) are readily understood in accordance with the plain meaning. Proposed §60.2(c)(3)(D) was deleted and replaced with operational and maintenance language as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission modified §60.2(c)(3) by changing "minor types of violations" to "minor violations." The commission has also deleted the phrase "those violations that indicate that" from proposed subparagraphs (A), (B), and (C).

ATINGP commented regarding proposed §60.2(c)(3). ATINGP asserted that because there is no category of self-reported violations, there is no incentive to self-report. ATINGP stated that it believes that all self-reported violations should be considered minor, but recommended the following be added as an additional subparagraph designating certain violations as minor: "non-compliance with a permit condition or other applicable requirement occurs during the compliance period due to weather conditions or other factors and the entity self-reports these violations."

The commission agrees that self-reported violations not otherwise required to be reported should be treated in a positive manner. Therefore, the commission has adopted language in §60.2(e)(1)(K) that provides positive points for violations self-reported under the Texas

Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended, where the site was granted immunity from administrative or civil penalty for those violations. Additionally, the commission adopted §60.2(e)(3)(A)(iv) as a mitigating factor. This factor includes voluntarily reporting a violation to the executive director that is not otherwise required to be reported, and that is not reported under the Audit Privilege Act, or that is reported under the Audit Privilege Act but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency. No other changes have been made in response to this comment.

§60.2(c)(3)(A)

One individual commented regarding proposed §60.2(c)(3)(A), stating that partial or inadequate monitoring or testing should be a moderate violation, because it could substantially impair the ability to evaluate a facility, and as such should not be considered minor.

The commission disagrees with this comment. The commission believes that the extent of the deficiency should be a consideration in determining whether a violation is moderate or minor. The adopted rule classifies monitoring or testing that is completely or substantially deficient as moderate, because it could substantially impair the ability to evaluate a facility. This methodology is similar to the commission's penalty policy. The commission believes this approach is important for consistency and ease of application.

§60.2(c)(3)(B)

One individual commented regarding proposed §60.2(c)(3)(B), stating that partial or inadequate monitoring, testing, or recordkeeping should be a moderate violation, because it could substantially impair the ability to evaluate a facility, and as such should not be considered minor.

The commission disagrees with this comment. The extent of the deficiency should be a consideration in determining whether a violation is moderate or minor. The adopted rule classifies monitoring or testing that is mostly adequate as minor, because in this case there would be a substantial amount of information with which to evaluate a facility. This methodology is similar to the commission's penalty policy. This approach is important for consistency and ease of application.

§60.2(c)(3)(E)

V&E, TMRA, 7-Eleven, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(3)(E). V&E stated that proposed §60.2(c)(1)(G), (2)(F), and (3)(E) should be deleted as the phrase "similar in character or impact" is too vague. In the alternative, V&E suggested adding some certainty by inserting "significant human health or environmental" prior to the word "impact" in each subparagraph. TMRA, Allied, BFI, TxSWANA, and NSWMA, having also recommended the deletion of proposed §60.2(c)(1)(G) and (2)(F), suggested that subsection (c)(3)(E) be modified to read: "any other violation not categorized as a 'major' or a 'moderate.'" Allied, BFI, TxSWANA, and NSWMA further included "under this section" at the end of the proposed language. Allied, BFI, TxSWANA, and NSWMA TMRA, Allied, BFI, TxSWANA, and NSWMA asserted that it is appropriate that minor serve as the default classification. 7-Eleven recommended that the language of subparagraph (E) be

modified to read, "Any otherwise major or moderate violation of similar character or impact determined by the Executive Director to be a minor violation," asserting that this change would clarify that "it is within the Executive Director's authority to revise downward the point value of either a major violation or a moderate violation."

The commission responds that proposed §60.2(c)(3)(E) has been deleted from the adopted rule, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(d)

The commission adopts new §60.2(d), concerning repeat violator, to address the requirements of TWC, §5.754(c)(2), which states that the commission, in classifying a person's compliance history, shall establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person. The commission may classify a person as a "repeat violator" at a site when, on multiple, separate occasions, a major violation(s) as described in §60.2(c)(1) occurs during the compliance period based upon the criteria in adopted §60.2(d)(1). Each criterion has point values that will be assigned to a site based upon the specifics applicable to the site. All the assigned points will be summed to get a total, called total criteria points. The total criteria points will be compared with the ranges in §60.2(d)(1)(A) - (C) to determine whether the site is a repeat violator if the site has multiple major violations. Specifically, a person is a repeat violator at a site when: A) the site has had a major violation(s) documented on at least two occasions and has total criteria points ranging from 0 to 8; B) the site has had a major violation(s) documented on at least three occasions and has total criteria points ranging from 9 to 24; or C) the site has had a major violation(s)

documented on at least four occasions and has total criteria points greater than 24. For example, if 30 TAC §101.4, is cited for an air emission that caused a nuisance and caused respiratory distress in neighbors four years ago, and another similar release occurs this year and the same rule is cited in an NOV, order, or judgment, and the site has seven total criteria points as determined in adopted §60.2(d)(2) - (5), then the person is a repeat violator at that site. If, on the other hand, the site has 11 total criteria points, and there were no other major violations at the site during the compliance period, the person is not considered a repeat violator at the site. It is also important to note that it is not necessary for the major violations to be “same or similar.” Because designation as a repeat violator at a site is limited to repeats of major violations only for purposes of this rule, and because the criteria for designation as a repeat violator is so specific, the commission has determined that it is appropriate to look at any major violation at the site, rather than limiting it to only “same or similar” major violations. Additionally, the commission has added language to the adopted rule to reflect that the major violations must be documented on separate occasions in order to count towards repeat violator designation.

Finally, the commission has adopted §60.2(d)(6) which states that the executive director shall designate a person as a repeat violator unless the executive director determines the nature of the violations and the conditions leading to the violations do not warrant the designation. The commission adopted this provision because it is concerned with the potential for unintended consequences resulting from being designated as a repeat violator. The commission is particularly concerned that violations that occurred prior to the effective date of this rule could result in a person being designated as a repeat violator at a site, without any ability to consider the specific circumstances surrounding the violations. The complexity criteria, which are considered in determining when a person is a repeat violator at a site, may not apply at all to a large class of entities including small towns, utilities, small businesses, and

agricultural facilities. The commission has determined that this exception is appropriate because some of the more punitive aspects of the rule apply when the repeat violator designation is made. However, the commission expects the executive director to be stringent when considering a repeat violator exemption.

The ranges in §60.2(d)(1) were determined by evaluating the typical points that a person would have at a simple site and a complicated site. For example, a person that has at least three of the types of permits listed in §60.2(d)(1)(A), two sites in Texas, 600 or more Facility Identification Numbers (FINs), five to ten external outfalls and 20 to 50 active hazardous waste units is typical of the most complicated industrial sites in the state. In contrast, the commission believes that a typical simple site: would not have any permits listed in §60.2(d)(1)(A), but may have permits listed in §60.2(d)(1)(B) or (C); would own or operate one site in the state; would have less than 44 FINs; would not have permitted external outfalls because it would be connected to another person's collection system; and would have fewer than ten active hazardous waste management units. These descriptions are based on analyses of reports from commission databases showing the number of people owning multiple sites, the number of people owning multiple hazardous waste management units, the number of people owning sites with multiple FINs, and the number people with multiple external outfalls.

TWC, §5.754(f), requires that the methods established for assessing compliance histories "shall specify the circumstances in which the commission may revoke the permit of a repeat violator and shall establish enhanced administrative penalties for repeat violators." Because the statute requires that consideration be given to the revocation of a permit of a repeat violator, the commission proposed to limit repeat violators to only persons who repeat those violations categorized as "major" as revocation

of a permit based on repeat violations is an extreme measure which should be limited to cases of significant violations. Furthermore, the number and complexity of each site owned or operated by the person was proposed to be addressed through the consideration of a person's compliance history. The commission invited comments on the following: 1) how to specifically consider the number and complexity of sites with respect to permit revocations and enhanced penalties for repeat violators; 2) how to establish criteria for classifying a repeat violator, giving consideration to the number and complexity of sites in the definition of "repeat violators" itself; and 3) the relationship between TWC, §5.754(c)(2), relating to criteria for classifying a repeat violator and §5.754(f), relating to permit revocation of a repeat violator. The commission received several comments in response to the commission solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Additionally, the commission is required by TWC, §7.053, Factors to be Considered in Determination of Penalty Amount, to consider, "In determining the amount of an administrative penalty ... with respect to the alleged violator ... the history and extent of previous violations...." Adopted new §60.3(c)(2) reflects this requirement by stating that the commission shall consider compliance history classification when assessing an administrative penalty. Compliance history incorporates major, moderate, and minor violations. The commission will utilize the same definition of repeat violator in the enforcement process as adopted in §60.2(d). TWC, §5.754(f), requires enhanced administrative penalties for repeat violators, and that requirement is adopted in §60.3(c)(3). Furthermore, the number and complexity of sites owned or operated by the person is addressed through the criteria utilized to determine whether, for purposes of this chapter, a person is a repeat violator.

The commission adopts new §60.2(d)(2), concerning complexity points, to address the requirements of TWC, §5.754(c)(2), which states that the commission, in classifying a person's compliance history, shall establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person. The commission invited comments as to how to specifically consider the complexity of sites. The commission received several comments in response to the commission solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. In adopted §60.2(d)(2), every site will be assigned complexity points based upon its types of permits. Specifically, in adopted §60.2(d)(2)(A), four points are assigned for each permit type listed in clauses (i) - (vi) of this subparagraph issued to a person at a site:

Radioactive Waste Disposal; Hazardous or Industrial Non-Hazardous Storage Processing or Disposal; Municipal Solid Waste Type I; Prevention of Significant Deterioration; Phase I - Municipal Separate Storm Sewer System; and TPDES or National Pollutant Discharge Elimination System (NPDES)

Industrial or Municipal Major. In adopted §60.2(d)(2)(B), three points are assigned for each permit type listed in clauses (i) - (v) of this subparagraph issued to a person at a site: Underground Injection Control Class I/III; Municipal Solid Waste Type I AE; Municipal Solid Waste Type IV, V, or VI; Municipal Solid Waste Tire Registration; and TPDES or NPDES Industrial or Municipal Minor. In

adopted §60.2(d)(2)(C), two points are assigned for each permit type listed in clauses (i) and (ii) of this subparagraph issued to a person at a site or utilized by a person at a site: New source review individual permit or permit by rule requiring submission of a PI-7 under 30 TAC Chapter 106; and any other individual site-specific water quality permits not referenced in subparagraphs (A) or (B) of this

paragraph or any water quality general permit. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

The commission adopts new §60.2(d)(3), concerning number of site points, to further address the requirements of TWC, §5.754(c)(2), regarding consideration of the number of sites owned by a person in making repeat violator designations. This paragraph, as adopted, states that the following point values are assigned based on the number of sites in Texas owned or operated by a person: one point when a person owns or operates one site only; two points when a person owns or operates two sites only; three points when a person owns or operates three sites only; four points when a person owns or operates four sites only; five points when a person owns or operates five sites only; six points when a person owns or operates six to ten sites; seven points when a person owns or operates 11 to 100 sites; and eight points when a person owns or operates over 100 sites. This will help to effectively balance the repeat violator designation between those persons owning or operating a large number of sites, and those owning or operating fewer sites.

As a result of comments received, the commission has determined that it is also appropriate to take into account the size of a site and the site's location in making a repeat violator designation. As such, the commission adopts §60.2(d)(4), concerning size. This adopted paragraph states that every site shall be assigned points based upon size as determined by the number of FINs, Water Quality external outfalls, and Active Hazardous Waste Management Units (AHWMUs) at a site. Specifically, adopted §60.2(d)(4)(A), regarding FINs, states: four points are assigned for sites with 600 or more FINs; three points are assigned for sites with at least 110, but fewer than 600, FINs; two points are assigned for sites with at least 44, but fewer than 110, FINs; and one point is assigned for sites with at least one but

fewer than 44 FINs. Adopted §60.2(d)(4)(B), regarding Water Quality external outfalls, states: four points are assigned for a site with ten or more external outfalls; three points are assigned for a site with at least five, but fewer than ten, external outfalls; two points are assigned for sites with at least two, but fewer than five, external outfalls; and one point is assigned for sites with one external outfall. Adopted §60.2(d)(4)(C), regarding AHWMUs, states: four points are assigned for sites with 50 or more AHWMUs; three points are assigned for sites with at least 20, but fewer than 50, AHWMUs; two points are assigned for sites with at least ten, but fewer than 20, AHWMUs; and one point is assigned for sites with at least one but fewer than ten AHWMUs.

With regard to the location of a site, the commission adopts §60.2(d)(5), concerning nonattainment area points, which reflects that a site located in a nonattainment area shall be assigned one point. This provision takes into account the fact that regulations are generally more stringent and complex for sites located in nonattainment areas.

The commission has adopted §60.2(d)(6) which states that the executive director shall designate a person as a repeat violator unless the executive director determines the nature of the violations and the conditions leading to the violations do not warrant the designation. This provision provides that, when justification exists, the executive director may exempt a site from the repeat violator designation.

The adopted rule specifies the criteria to be utilized to determine repeat violator status in adopted paragraphs (2) - (5). As proposed, §60.2(e) addressed site complexity, and was based on a site's primary Standard Industrial Classification (SIC) code. Because the commission agrees with commenters that this approach did not adequately reflect the complexity of sites or reflect the

requirements of the statute, proposed subsection (e) has been deleted, and replaced with adopted §60.2(d)(2), which now addresses the assignment of points to a site based upon complexity. As adopted, complexity is based upon the number and types of permits issued to a person at a site. The commission recognizes that there are many different ways to deal with complexity and appreciates the suggestions provided by commenters. The commission has determined, based on examples provided by commenters, that the number and types of permits issued to a site are a better determinant of complexity because they more accurately reflect the level of regulation and thus, the comparative number of requirements that must be met, and has, therefore, modified the rule accordingly.

As an example, Company X operates under a hazardous waste permit, a TPDES major permit, a water quality general permit, a prevention of significant deterioration (PSD) permit, and three UIC Class I permits at a site. The points assigned to this person at this site would be four points for the hazardous waste permit; four points for the PSD permit; four points for the TPDES permit; three points total for the UIC permits; and two points for the general storm water permit. In another example, Company Y is a small quantity generator of hazardous waste, operates under a storm water general permit, and three permits by rules related to sources of air emissions. The number of points assigned to this person at this site would be two points for the new source review permits (i.e., the three permits by rule); and two points for the storm water general permit. In another example, City A operates under a Municipal Solid Waste (MSW) Type I permit at a site that also has a UST system. This city would be assigned four points for the MSW permit, and no additional points are assigned for the UST system, because those systems are not authorized by permits. City K operates under a TPDES Municipal permit at a specific site. City K would be assigned three points for the TPDES permit. City M has a Phase I Municipal Separate Storm Sewer System permit. In this example, the site is the city, and the

complexity is based only on this permit, as is the compliance history. Four points would be assigned for this site. Dairy J has 300 animals, which does not require specific permit authorization. This site is not assigned any points because it does not operate under an authorization specified in adopted §60.2(d)(2)(A) - (D).

In addition to the complexity of a site, the commission has deleted proposed §60.2(e)(2) and instead adopted paragraph (3) concerning the number of sites. Again, this modification to the rule has been made in response to comments. The modification to take this criteria out of the “complexity factor” and move it in the rule so that it has direct bearing on the repeat violator designation has been made to address the statutory requirement to take into account the number of sites when considering whether a person is a repeat violator. Additionally, it has been modified from a single determining number of sites (25, as proposed), to a range of sites owned in the State of Texas. The commission determined that this modification was appropriate because it more adequately reflects the range of business ownership in Texas. The commission utilized reports from its air accounts database and petroleum storage tank database to evaluate the general number of people who own multiple sites in Texas, and make the determinations regarding where the breaks in number of sites owned should occur. The commission did not include other suggestions made by commenters because the suggestions did not accurately reflect the full range of business ownership in Texas.

The commission, in response to comments received, has also adopted §60.2(d)(4), which takes into account the size of a site as a criteria for determining repeat violator status. Specifically, the adopted language states that every site shall be assigned points based upon size. The first criteria under adopted subparagraph (A) is based upon FINs. The commission has determined that this is appropriate because

FINs are reflective of the number of emission points at a site and thus, are an additional indicator that complements the complexity of that site. The commission based the numbers on an evaluation of data in the air database looking at distinctive clusters. The second criteria, adopted under subparagraph (B), is based upon Water Quality external outfalls. The commission has determined that this is appropriate because it is also an additional indicator that complements the complexity of the site. The commission based the numbers on an evaluation of the water quality database looking for distinctive clusters. The third criteria, adopted under subparagraph (C), is based upon AHWMUs. The commission has determined that this is appropriate because it also complements the complexity of the site. The commission evaluated specific groupings utilizing its hazardous waste database. The commission did not include other suggestions made by commenters because they included items not tracked by the agency or not under the regulatory jurisdiction of the agency.

Finally, with regard to repeat violators and in response to comments received, the commission has adopted §60.2(d)(5) concerning nonattainment area points, which reflects that if a site is located in a nonattainment area, it shall be assigned one point. The commission has determined that this is appropriate because generally, sites located within a nonattainment area are subject to more stringent environmental requirements.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 478 individuals commented regarding proposed §60.2(d). TCE, LCVEF, DAR, SEED Coalition, TCONR, PC, and 477 individuals stated that a person designated as a repeat violator should automatically be classified as a poor performer. TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, and 478 individuals further stated that the designation of a repeat violator should not be limited to a repeat of the same regulation. TCONR and

ACT stated that the intent of HB 2912 is that "a repeat violator is person or entity who repeatedly commits violations of environmental laws, rules, permits and orders, regardless of the type of violation committed." Additionally, ACT asserted that "defining a 'repeat' violator for overall compliance performance purposes is different than enhancing penalties for a specific violation that has occurred more than once at a facility. TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission responds that it agrees with the commenters' suggestion that a repeat violator is a person who repeatedly commits violations. As such, the adopted rule states that a person is a repeat violator at a site when, on multiple, separate occasions, a major violation(s) occurs during the compliance period based upon the criteria in the adopted paragraph.

TCC expressed concern, with regard to proposed §60.2(d), that the concept of a repeat violator as referenced in TWC, §5.754, was not intended to reflect what is currently included in the commission's penalty policy, adding that because the designation of repeat violator has such significant ramifications, it should not be an automatic process. TCC asserted that the determination of repeat violator should be made at the highest levels in the agency and should not be based on any simple numeric standard. On another note, TCC expressed concern that "the agency is attempting to accomplish the ranking of facilities into categories using a data base that was created for a completely different purpose," asserting that by limiting the development of compliance history scores to only that data contained in Consolidated Compliance and Enforcement Data System (CCEDS), comparative judgments cannot be made. TCC asserted that CCEDS was developed to generate investigation reports, not to compare different businesses, and went on to say that to use CCEDS for compliance histories is to "both fail to

recognize the purpose for which CCEDS was created and to implement the statute in an inequitable manner." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC.

The commission responds that §60.2(d), as adopted, has been modified in response to comments. The adopted rule does maintain a point-driven automatic determination of repeat violator. Due to the number of persons that must be evaluated by the agency, it is not practical for the highest levels in the agency to be involved in each classification of a repeat violator. The commission does not agree that the database to be utilized for compliance histories is inappropriate. This database does contain violations that are components of compliance history, from NOVs, audits, orders, and court judgments. Additionally, it does contain other relevant information that will be utilized in the repeat violator assessment. However, the commission has determined that it is appropriate to consider the circumstances surrounding the violations and the conditions leading to the violations. As such, the commission has modified §60.2(d)(1) to say “a person may be classified as a repeat violator...” and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

PIC commented regarding proposed §60.2(d), stating that it is supportive of relating the complexity of the site to the number of violations required to define the site as a “repeat violator.” PIC supported considering complexity only in the context of §60.2(d), and not as a divisor in the entire site rating formula. Additionally, PIC disagreed with the rule’s requirement that the same major violation needs to occur repeatedly in order to make a “repeat violator” finding, asserting that "if there are multiple major violations occurring during the compliance period, regardless of whether the same exact

violations are documented, this is a valid basis to make a 'repeat violator' finding." As such, PIC proposed "that the following be classified as repeat violators: highly complex sites (with a complexity factor of 5 as determined under §60.2(e)(1)) with 4 or more major violations during the compliance period; moderately complex sites (with a complexity factor of 3 as determined under §60.2(e)(1)) with 3 or more major violations during the compliance period; any other site with 2 or more major violations during the compliance period."

The commission appreciates the positive comment in support of the rule. Additionally, the commission responds that this subsection of the rule has been modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. In particular, as adopted, complexity is only considered with regard to designation as a repeat violator, and has been removed as a divisor in the site rating formula. Additionally, as adopted, repeat violator designation is not limited to the repeat of the same or similar major violation during the compliance period; rather, it has been modified to include, at a site, the occurrence of two or more, as applicable, of any of the violations designated as "major" under adopted §60.2(c)(1). And finally, the repeat violator designation has been modified similar to the commenter's suggestion, in that the number of occurrences of a major violation required at a site to invoke the repeat violator designation is dependant upon the total criteria points for that site. The total criteria points are based upon the complexity of the site, the number of sites owned or operated by the same person in the State of Texas, the size of the site, and whether the site is located in a nonattainment area.

Reliant, AECT, ExxonMobil, TCC, Brown McCarroll, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(d). Reliant, TXI, ExxonMobil, and Brown McCarroll commented that the definition of repeat violator as proposed is not consistent with TWC, §5.754(c)(2), because it does not consider either the number or complexity of sites owned or operated by the same person. ExxonMobil also stated that "consideration of such factors in the overall formula denominator is not the same." AECT made a similar comment, stating that consideration must be given to the complexity of sites in designating a repeat violator. Brown McCarroll also asserted that the definition should provide for situations in which subsequent violations may be excused by a compliance agreement between the regulated entity and the executive director. TXOGA endorsed the comments submitted by Brown McCarroll. TXI stated that the following must be added to the subsection: "In classifying repeat violators, the Commission shall give consideration to the number and complexity of facilities owned or operated by the person." Additionally, Reliant stated that the rule should take into account that the more complex a site is, the more opportunity there is for "errors or minor deviations." As such, Reliant asserted that the threshold for determining more complex sites to be repeat violators should be higher than for less complex sites. ExxonMobil and TCC provided similar comments, stating that the language should be restricted to the same violation from the same point source, and the number of recurrences to trigger repeat violator status should be increased as the complexity increases. AECT commented that the commission must consider both "the number of environmental regulatory requirements that apply to the site and how easy it would be for the TNRCC to identify an exceedance of any regulatory requirements." AECT asserted that the rule should consider the number of continuous emissions monitoring system (CEMS) at a site in determining a repeat violator, because exceedances of environmental requirements is much easier at a site with a CEMS than at a site without a CEMS. AECT also stated that, as it understands it, "if CEMS data show that the emissions of an air

pollutant exceeded an applicable limit more than once during the quarter or semi-annual CEMS reporting period, such exceedances will only count as one violation relative to determining if the site will be a 'repeat violator.' AECT strongly agrees with such position and requests that it be clearly stated in the rules and/or preamble language." TXU supported the comments made by AECT. Similarly, TXI proposed that the following be added to the subsection: "For purposes of this subsection, CEMS data may not be considered as documentation of major violations." Garland, San Antonio, GEUS, and SMEC expressed similar concerns regarding the likelihood of sites with CEMS or other sophisticated monitoring equipment in place being designated as a repeat violator, adding that it is not fair, a violation of equal protection statutes, and could result in "the misleading perception that many complex facilities in Texas are recalcitrant repeat violators." Additionally, Garland, San Antonio, GEUS, and SMEC suggested that the rule be modified to reflect that there must be a violation of the same specific regulation to be designated as a repeat, as opposed to a repeat of a violation listed in §60.2(c)(1).

The commission responds that this subsection of the rule has been modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, the commission is providing some examples of the classification calculations at the end of the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The rule has not been modified with regard to monitoring frequency. A person with CEMS reports monitoring information on a quarterly basis and those reports are usually reviewed upon receipt by the agency. If the monitoring data indicates violations of emission limits during the quarterly period, a resulting NOV would reference the emission violation one time, regardless of the specific

number of occurrences documented in the data. The emission violation in the NOV would be assessed for a major or moderate classification. A determination would be made based on overall average of the violations. Based on this averaging, the commission does not expect occasional exceedances to result in classification as a major violation.

7-Eleven and TMRA commented regarding proposed §60.2(d). 7-Eleven objected to using NOVs in determining whether a person is a repeat violator. Additionally, 7-Eleven suggested that violations under a previous owner should not be included when determining whether a person is a repeat violator. Furthermore, 7-Eleven asserted that the rule as proposed would "radically modify existing contractual relationships," stating that it is "modification of existing laws which are deigned *{sic}* to allow buyers to elect to merge or not merge with a seller. This is a fundamentally unfair modification of contracts which were entered into in the past five years and which are now modified by these regulations to impose additional liabilities on buyers. Looking forward, these provisions would mandate that all future buyers assume a significant new category of liability from sellers. 7-Eleven also asserted that the "rule formulation would make small operator compliance financially more difficult and may even cause low-performing sites to be abandoned. It is foreseeable that an automatic transfer of negative compliance history would absolutely decrease property values at such sites, leading to less collateral value, decreased credit worthiness and an inability to finance the maintenance or upgrade of legally required capital equipment." TMRA recommended that a person should not be punished as a repeat violator if part of the compliance history belongs to a previous owner.

The commission disagrees with these comments. TWC, §5.753, specifically requires the commission to include NOVs as a component of compliance history. Under TWC, §5.754(c)(1),

the commission must “determine whether a violation of an applicable legal requirement is of major, moderate, or minor significance” in classifying a person’s compliance history. These sections provide the basis for categorizing violations in NOVs as major, moderate, or minor. The commission recognizes that violations in NOVs are unadjudicated and do not have final commission approval. The rule reflects this fact by giving a lesser weight to violations listed in NOVs than those contained in commission orders. Furthermore, violations listed in NOVs will not be included in an entity’s compliance history if the commission determines that the violation is without merit. The Field Operations Division has established standard operating procedures for contesting the merit of an NOV. Any violation contained in an NOV that is administratively determined to be without merit will not be included in the compliance history. Furthermore, in adopting §60.1, the commission was clear that all violations at a site apply to compliance history, even if the site changes ownership during the compliance period. The commission has adopted §60.2(e)(3)(A)(iii) and (B) to mitigate compliance history of a poor performing site purchased by an average or high performer, if appropriate. The commission disagrees, in part, with TMRA’s comment concerning repeat violator status transferring to a purchaser of a site. Throughout this rule, the compliance history is tied to a “site.” With the transfer of a site from one owner to another, the compliance history related to that site also transfers to the new owner. To counter this effect and to encourage transfers of sites to better performing entities, the rule provides the executive director with the authority to consider this transfer and whether it is appropriate to reclassify the site based on the transfer. In other decisions related to a repeat violator designation, the executive director and the commission would also be able to consider the circumstances underlying the transfer before making a decision affecting the site. However, the commission has modified §60.2(d)(1) to say “a person may be classified as a repeat violator...”

and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

TAB, BP, TXOGA, TCC, V&E, AECT, and ATINGP commented regarding proposed §60.2(d).

ATINGP, TCC, and TAB stated that this provision in the proposed rule is inconsistent with the statute, which states that the commission shall establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person. Rather, TCC stated that the designation should follow a determination based on the established criteria as specified in the statute. TCC suggested that this process be similar to that provided for "excessive emissions events." Specifically, TCC recommended the following criteria: 1) number of violations of an identical or similar nature on the same equipment or unit, same pollutant, same cause, etc. (where appropriate); 2) size, number, and complexity of the facilities; and 3) willingness and speed with which the violations are corrected. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TCC. ATINGP submitted similar comments. TXOGA asserted that the word "site" should be replaced with the word "facility" to be consistent with legislative mandate. TXOGA stated, "In no instance does the legislative language broaden the 'repeat violator' term by linking it with separate events at a 'site' as TNRCC is attempting to do," referencing the language at TWC, §5.754(c)(2), which references "the complexity of facilities." Additionally, TXOGA stated that the preamble should clearly explain "that the 'repeat violator' term is linked to events at the same facility for same causes, same pollutant, etc.," adding, "It is simply illogical to claim that events at different pieces of equipment are 'repeat' if the nature of those events is substantially different." OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TXOGA. BP stated that it is

concerned that the proposal is biased against large, complex operators, and asserted that the "significance of the violation and evidence that the person consistently disregards the regulatory process by failing to make timely and substantial attempts to correct the violations must be considered before making a determination." Finally, BP asserted that such a determination should only be made after discussing the situation with the regulated entity, and after review and approval "at the highest levels within the agency." V&E commented that while it supports identifying a repeat violator as "a person...at a site," the rule should clarify whether the same major violation "must occur at the same location at the site, to the same unit." V&E commented that to interpret the proposal to mean the same major violation occurring anywhere at the site seems unfair for a large and complex facility, as, when "coupled with the breadth of a major violation" most, if not all large facilities would be repeat violators. Similarly, AECT requested that a major violation must have occurred at the same facility, unit, or piece of equipment in order to cause a site to be designated as a repeat violator. V&E suggested that the rule be modified so that a site with a complexity factor of five is not held to the same standard for purposes of being designated a repeat violator as a site with a complexity factor of three or one. Similarly, AECT requested that the threshold for being designated as a repeat violator should be higher for sites with a higher complexity factor as provided in proposed §60.2(e)(1) than for sites with a lower complexity factor. TXU supported the comments made by AECT.

The commission responds that this section has been modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission does not agree that a repeat violator term should be linked to events only at the same facility, for the same cause, for the same pollutant because adopted §60.2(c)(1) now contains violations that are serious or critical to human

health, safety, and the environment, and the commission believes that repeated major events such as those contained in that paragraph should be considered in the repeat violator assessment.

TWC, §5.754, requires the agency to consider the number and complexity of facilities owned and operated by the person, and consider the significance of the violation. This direction supports looking at all units, facilities, and pieces of equipment in making this determination. The word “site” was chosen for this rule so as not to confuse anyone regarding how different programs utilize the term “facility.” The commission disagrees that this is inconsistent with the statutory mandate.

Regarding proposed §60.2(d), C&H stated that violations should only be classified as repeat when they are designated as "major" violations, and occur within two years of each other at the same site owned or operated by the same person. C&H also stated that being categorized as a repeat violator should not result in automatic permit revocation, and stated that the word "shall" should be replaced with "may" in rule language pertaining to permit revocation. Additionally, C&H stated that a site's complexity, and the length of time which has passed between the violations should be taken into account when determining what constitutes a repeat violator.

The commission agrees that only major violations should count toward the repeat violator classification; however, it does not agree with the suggested two-year period at the same site owned or operated by the same person. The commission, in §60.1, specifically adopted a five-year compliance period and believes that this entire period should be evaluated for major violations. Additionally, §60.1 states that the entire history of the site should be captured in the compliance period, even if the site changed ownership. The commission has revised proposed §60.3(a)(7),

adopted as §60.3(a)(6), relating to permit revocation. The revocation is permissive as opposed to mandatory. The commission is taking into account the site's complexity, under this adopted rule, but disagrees that the length of time between occurrences of major violations should be taken into account. However, the commission notes that it has modified §60.2(d)(1) to say "a person may be classified as a repeat violator..." and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

Valero, T&K, Chaparral, and TIP commented regarding proposed §60.2(d). Valero and TIP commented that increasing the number of violations necessary to become a repeat violator based on the size and complexity of the site is one possible way to address size and complexity in relation to repeat violator determinations. Valero also requested that the language in this subsection be modified to read: "A person shall be considered a repeat violator at a site when the same major violation is documented in final enforcement orders, court judgments, or consent decrees more than once within the compliance period at the same equipment." TIP made a similar comment. And, TIP also asserted that a person should not be considered a repeat violator for two separate violations, one included in a 1660 order, and one included in a findings order, stating that the Findings Order Criteria is intended to encompass more serious violations. T&K and Chaparral provided very similar comments. Additionally, T&K and Chaparral stated that, by limiting the definition of repeat violator to the same major violation at the same emission unit, waste unit, etc., complexity and number of facilities is "sufficiently taken into account." Finally, T&K and Chaparral both asserted that the commission should republish its revised definition of repeat violator to provide adequate notice.

The commission responds that §60.2(d) has been modified in response to comments received. The commission disagrees that it should use only major violations documented in final orders, court judgments, or consent decrees, and as such, the rule as adopted still contemplates the use of NOVs. However, practically speaking, the discovery of a violation classified as major will, except for small businesses operating without a permit, result in an enforcement action, and thus a documented violation will be in an enforcement order or court judgment. As previously discussed in this preamble, the commission disagrees with the limitation of only using the same major violation at the same emission unit, waste unit, etc. The commission believes that the criteria used in adopted §60.2(d) sufficiently addresses size, complexity, and number of facilities. The definition of repeat violator has been changed in response to specific comments on the proposed rule by affected persons. The commission specifically requested comments on this issue as the basis for determining whether to revise the commission's approach on the issue. As a result, the rule, as proposed, provided adequate notice that the commission would consider comments and the definitions might change. Therefore, the commission does not agree that republishing is necessary.

ATINGP, TIP, and Huntsman commented regarding proposed §60.2(d). ATINGP stated that "'repeat' connotes more than two times in a five year period," and that the repercussions are too high for only two violations to constitute a repeat violator. Additionally, ATINGP stated that only violations in an "enforcement order of the agency or another appropriate tribunal that reflect a release that caused a significant adverse impact to human health, safety and the environment should be taken into account." Furthermore, ATINGP recommended that the rule be clarified to reflect "that in a situation where a violation of a rule, statute or other applicable requirement is cited, that citation will be counted only

once, even if more than one count is recorded under it." TIP asserted that the "definition of repeat violator should limit all repeat violator impacts to the site in question," adding that certain language in the preamble and proposed rule would seem to suggest otherwise. TIP also expressed concern with the term "same major violation" in the definition of repeat violator, specifically based on its concerns with the proposed language in §60.2(c)(1)(A) regarding HPV/SNC criteria not necessarily having an impact on human health. Finally, with regard to the issue of repeat violator, TIP stated that the commission should clarify that "same major violation" means that the violations must be discovered by the agency during different and unrelated investigations, and that they must be communicated to the person by two separate NOV's, stating that as the definition is proposed, a single NOV with two separate violations of the same citation over two different periods of time, and/or for two different pieces of equipment, could constitute "repeat violator" status. Huntsman provided a similar comment, suggesting that, "at a minimum, a repeat violation must implicate the same regulation as a previous violation, must be discovered in a separate and unrelated review or inspection and must be documented in a separate NOV or agreed order. The rule should specifically prohibit 'splitting' violations discovered during a single inspection or review into two or more NOV's or agreed orders." TIP commented that, due to the drastic nature of permit revocation, it should be limited to only poor performing sites that are also classified as a "repeat violator," and even then, only when additional factors are met, such as "a consistent disregard for the regulatory process."

The commission responds that §60.2(d) has been modified in response to comments received, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission disagrees that only violations involving a release that causes a significant impact to human health, safety and the environment should be

taken into account. Adopted §60.2(c)(1) now contains violations that are serious or critical to human health, safety, and the environment, and the commission believes that repeated major events such as those contained in that paragraph should be considered in the repeat violator assessment. The commission does agree with ATINGP as to how a violation is cited in a compliance history. For example, if the commission documents an exceedance of a permitted effluent limit, the violation would include a citation of the specific permit condition in addition to 30 TAC §305.125(1) and TWC, §26.121. These citations will be evaluated as one violation, even though there are three appropriate citations. Another example might include a violation of a rule requiring an inspection of valves for leakage. If the investigator discovered ten out of 250 valves were not inspected, the citation for compliance history would include the specific rule citation, any permit condition, and THSC, §382.085(b). This group of citations would appear once as opposed to ten times for purposes of compliance history.

The commission agrees that the definition of repeat violator applies to the one site in question. The commission modified the definition of repeat violator which no longer requires the repeat of the same major violation because the definition of major violation has significantly changed. The commission agrees that major violations must be documented on different occasions, because the term “repeat” is defined in *Merriam Webster’s Collegiate Dictionary, Tenth Edition*, as to make, do, or perform again. But, these violations do not necessarily have to be communicated by separate NOV’s or other enforcement actions. Additionally, the definition of repeat violator contemplates a review of violations site by site, not by specific pieces of equipment. The commission’s Field Operations Division includes all violations discovered during an investigation in one NOV, or if appropriate, one order. The commission does not anticipate a change to this

procedure, and has not modified the rule in response to this comment. The commission has modified adopted §60.3(a)(6), proposed as §60.3(a)(7), to specify that the circumstance under which a repeat violator's permit may be revoked is when that violator is classified as a poor performer or for cause, including subparagraphs (A) - (D), as originally proposed.

NTMWD commented regarding proposed §60.2(d). NTMWD expressed concern regarding the definition of repeat violator, stating that HB 2912 focuses on a "person" rather than the acts of prior owners and/or operators as a site. NTMWD stated that as proposed, regional entities could be identified as repeat violators at sites based on the actions or inactions of the previous owner and/or operator, thereby punishing entities for the actions of others. NTMWD added that the punishment is especially severe when the significant point values and administrative penalty enhancements associated with designation as a repeat violator are taken into consideration. Therefore, NTMWD recommended that the language of the subsection be changed to read, "at the same site for the same person."

The commission appreciates the impact that the classification of repeat violator will have on a site. The commission has determined that a site should retain its entire compliance history as contemplated by §60.1, and thus, the commission has retained all the history for the compliance period, no matter how many owners. The commission has addressed the commenter's concern in adopted §60.2(e)(3) whereby the executive director may reclassify a poor performer site if acquired by a new owner or if operated by a new operator including if the acquisition is for purposes of regionalization. If the executive director utilizes mitigation factors to reclassify a site, then the *consequences* of the repeat violations on classification do not exist because they only apply to a repeat violator that is also a poor performer. Further, penalty enhancements would only

result in the situation where (an) additional violation(s) occurs subsequent to the designation as a repeat violator, and the violation(s) warrants formal enforcement action. Finally, the commission has modified §60.2(d)(1) to say “a person may be classified as a repeat violator...” and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(d). Allied, BFI, TxSWANA, and NSWMA commented that a new owner should not acquire the history of the previous owner(s). The commenters suggested that the commission should classify a site for only that period of time a person owns the site or have a three-year moratorium for a site purchased by another person. Additionally, Allied, BFI, TxSWANA, and NSWMA expressed concern with the use of the word "documented" in the text of this proposed subsection, stating that it is necessary to clarify that conceptually, this is "tied to agency-documentation via the components listed in 30 TAC §60.1(c)(1), (2), and (7)," rather than the submission of self-reported data. Allied, BFI, TxSWANA, and NSWMA added that they understand that self-reported data could lead to repeat violator status, but requested clarification that a violation would not be considered "documented" unless it has been set out in one of the official compliance history components. As such, they requested the addition of the phrase "in a component listed in §60.1(c)(1), (2) or (7) of this title" after the word "documented" in this subsection.

The commission appreciates the impact that the classification of repeat violator will have on a site. The commission has determined that a site should retain its entire compliance history as contemplated by §60.1, and thus, the commission has retained all the history for the compliance period, no matter how many owners. The commission has addressed the commenters’s concern in

adopted §60.2(e)(3) whereby the executive director may reclassify a poor performer site if acquired by a new owner or if operated by a new operator. Additionally, the commission has modified §60.2(d)(1) to say “a person may be classified as a repeat violator...” and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation. With regard to use of the word “documented” in §60.2(c), the commission is referring to any documented violation, whether that documentation be from the agency or its agents or by the submission of self-reported data. The commission disagrees that any change to this language is necessary.

C&H and TCAP commented regarding proposed §60.2(d). C&H stated that the rule should clarify that the designation of a person as a repeat violator is not an independent classification from poor, average, and high, but rather is a label to be used in making compliance history-related decisions. Additionally, C&H commented that the repeat violator designation should not be included on the agency's website along with the person's compliance history classification. TCAP expressed concern that sites with average or high performance classifications "that are in the process of taking corrective actions to improve performance, could be designated as a 'repeat violator,'" and that the label "repeat violator" will generate an "automatic negative association by the public even if this association is unwarranted." As such, TCAP asked that the commission "be sensitive in the way you present information to the public."

The commission does not intend to publish a separate list of repeat violators on the agency website.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(d). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF requested clarification that a person could not be designated as a repeat violator as a result of a single investigation. The commenters added that this approach would appear to be inconsistent with the legislative intent addressing "'unacceptable' compliance history," quoting the language at TWC, §5.754(i), which references a "recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations." The commenters went on to state that the statutory language regarding "timely and substantial attempt to correct" a violation means that a "person should not be penalized as a 'repeat violator' merely because a violation has not been entirely corrected at the time of a second inspection." The commenters also stated that the final rule should make it clear that the "computation of the site rating is not tied to the Commission's penalty matrix" which sometimes involves the assessment of monetary penalties for each day a violation occurs. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission responds that repeat violator is referenced in TWC, §5.754(c) and (f), relating to classification of a person's compliance history and the circumstances under which the commission may revoke a permit. TWC, §5.754(i) sets forth the circumstances in which the commission shall deny a permit application. Conduct that meets the "repeat violator" definition may or may not meet the threshold of an "unacceptable compliance history." The commission agrees that more than one investigation would be required prior to classifying a person as a repeat violator.

However, the commission does not agree that a person should not be classified as a repeat violator where a violation has not been entirely corrected at the time of a second investigation. If that

second investigation is conducted when the entity is not operating under an approved compliance schedule, whether in an NOV, order, or court judgment, and the violation still exists, then it is appropriate to utilize that investigation toward consideration of repeat violator status.

Fort Worth commented regarding proposed §60.2(d). For the same reasons stated under the discussion of Fort Worth's recommendation for modification to the definition of site in proposed §60.2(a), Fort Worth asserted that it would be unfair and unreasonable to designate a city as a repeat violator for an SSO event, assuming that an SSO would be considered a major violation, unless the events occurred at the same street address or location during the compliance period.

The commission disagrees that a violation for an SSO should occur at the same street address or location in order to be considered a repeat violation. However, unauthorized releases during SSO events may not always be assessed as major violations based upon the specific circumstances surrounding each release. No changes have been made in response to this comment.

Proposed §60.2(e)

Extensive comments were received relating to proposed §60.2(e). While the comments varied in their perspectives, in response to many of the comments the commission has deleted this proposed subsection, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, and has instead adopted new §60.2(d). Many of the comments received on proposed §60.2(e) generally are summarized and grouped here, and a consolidated response is provided at the conclusion of those comments.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 478 individuals commented regarding proposed §60.2(e). The commenters stated that facilities should be compared to like facilities, based upon complexity and scale (i.e., refineries to refineries, concentrated animal feeding operations (CAFOs) to CAFOs, etc.). TCONR further stated that the presumably unintended result of the rule as proposed would be to create a compliance history program that is more strict for some types of sites than for others. ACT commented that HB 2912 directs the commission to consider two things in classifying a person's compliance history: whether the violations are of major, moderate, or minor significance; and whether the person is a repeat violator. Furthermore, ACT stated that HB 2912 provides that "complexity and number of facilities" is only to be taken into consideration in "establishing criteria for classifying a repeat violator." As such, ACT asserted that "the complexity factor should be used for persons or entities, not sites, and it can be used only for evaluating repeat violators." TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. In adopted §60.2(d), relating to repeat violator, the commission does compare sites based upon similarities as points are given based upon complexity, number of sites owned, size, and location in a nonattainment area. Generally, small and less complex sites will be compared equally for the number of major violations in their compliance period. Similarly, larger or more complex sites will be compared equally for the number of major violations in their compliance period. And finally, the most complex and largest sites will be compared against the same standard. It is in this manner that the commission believes that "like facilities" are compared,

even though their primary business functions may be different. Additionally, the commission notes that, as adopted, the complexity factor has been limited to consideration for purposes of repeat violator designation, and is no longer included as a divisor in the site rating formula.

TXI, T&K, Chaparral, and AeA commented regarding proposed §60.2(e). TXI stated that it does not agree with the use of a standard formula for determining compliance history classification, and as such, does not agree with the concept of a complexity factor. However, TXI stated that it does believe that a site's complexity and the number of regulatory programs to which the site is subject should be taken into account in classifying compliance history, but believes this can be accomplished without the use of a formula. However, TXI and AeA added that if the commission decides to maintain a formula, with a complexity factor, they recommend including standards for complexity based on the number of programs to which a site is subject. T&K and Chaparral made a similar suggestion. Finally, TXI stated that if the commission does not adopt the suggested approach, it recommends the addition of lightweight aggregate plants to the list of SIC codes with a complexity of five. Similarly, T&K and Chaparral recommended that primary steel mills; lime plants; and radioactive, hazardous, and municipal waste facilities be added to the complexity factor five, and T&K further included electric power plants. T&K and Chaparral also recommended using four-digit SIC codes rather than the 2-digit SIC major group as proposed. Additionally, T&K and Chaparral asserted that there must be included in the rule a method of challenging the complexity factor, whatever method is ultimately adopted, "to ensure that the assigned complexity is rational and justified, taking into consideration the regulatory burden on any specific facility."

UT commented regarding proposed §60.2(e). UT stated that while it appreciates the desire for a simple and easily automated system for determining complexity, it believes the proposed method does not achieve the legislative mandate. UT asserted that the following should be included in the determination: size; number of employees; and the number, scope, and complexity of applicable air, water, waste, and community right-to-know regulatory requirements. As such, UT recommended three things: 1) restructure subsection (e) "to illustrate types of industries or sites that have the full range of circumstances to satisfy the complexity criteria for each ranking;" 2) create a system by which the executive director can look at site-specific circumstances to "make a reasoned decision on the complexity factor of a site" when a regulated entity requests such a determination, rather than automatically defaulting to a complexity value of "1"; and 3) whatever methodology is utilized, university campuses should have a complexity value of 5. UT stated that university campuses can be very complex, in that they "may operate a power plant, operate wastewater facilities, own and operate underground storage tanks (UST) and have significant regulatory responsibilities under RCRA because of the numerous research labs and facilities."

TIP commented, regarding proposed §60.2(e), that relying on a single medium to determine complexity in a multi-media setting ignores the legislative mandate regarding the consideration of complexity. TIP recommended as a possible alternative a system that applies three separate complexity ranges based on the number of outfall parameters, Title V applicable requirements, and compliance obligations under Resource Conservation and Recovery Act (RCRA) permits. Alternatively, TIP recommended the approach of increasing the number of existing complexity factors to take waste, water, and other programs into account. TIP also expressed concerns with the "general grouping of industry sectors" in the proposal, asserting that "the electric utility industry appears to have been completely ignored," as

were the waste management industry, the wholesale goods sector (including bulk terminals and stations), and the retail trade sector (including service stations). Furthermore, TIP asserted that certain complex industries such as semiconductor manufacturing and metal refining and processing "should be elevated to a higher complexity factor." TIP also commented that the addition of new industry sectors into certain complexity groups in the future will require additional rulemaking, "whereas a program based on compliance agreements automatically adjusts to changing circumstances." TIP also commented regarding the size of a site, stating that size is a more important component of complexity than allowed for in the proposal. TIP asserted first that the number of sites owned or operated by a person "substantially impacts compliance" in that there must be coordination of policies regarding compliance, EMSs, and enforcement. Additionally, TIP stated that "the proposal appears to envision a company-wide compliance history that would be reviewed in addition to a site's specific compliance history and classification." And, TIP asserted that the 25-site threshold is too high, and fails to take into account the size of a specific site. As such, TIP recommended that the rule be modified to lower the threshold for number of sites, and add additional factors to include the number of employees, and suggested that a tiered approach would be a better way of addressing this component.

ExxonMobil commented regarding proposed §60.2(e), asserting that by making the complexity factor a specific list in the rule rather than providing a method of determining complexity, "the agency will have to go through rule revision procedures each time an addendum to the list is needed." Additionally, ExxonMobil asserted that the following should be added at the following complexity levels: power plants at 5; waste management (reclamation, treatment, and disposal) at 5; wholesale goods - nondurable at 5; and retail trade - gasoline service station at least at 3. ExxonMobil also stated both complexity and size were supposed to have been taken into account, and as such, recommended an

expanded complexity matrix, "with a secondary parameter to differentiate facilities within a like classification based upon size."

Regarding proposed §60.2(e), ATINGP suggested that, in addition to the SIC major group, the rule take into account the following factors by adjusting the complexity factor upward for each of the following that apply: the number of emission points at a site; the number of applicable requirements that a facility is subject to at a site; the number of employees necessary to adequately operate the site exceeds 50 and for each additional 100 employees the complexity factor shall increase by 0.5; and an evaluation of the site and federal regulations, assigning a complexity weight or value to those requirements. ATINGP asserted that this would account for large, complex operations with more opportunities for violations than for smaller operations with fewer such opportunities. Finally, ATINGP suggested that the commission "establish the standards by which complexity will be evaluated in the rule and, if necessary, develop a guidance document post-rulemaking to complete the evaluation."

7-Eleven commented regarding proposed §60.2(e). 7-Eleven first stated that the rule "should recognize that *numerosity* of facilities creates significant challenges for maintaining regulatory compliance." Additionally, 7-Eleven asserted that the complexity factors "should not be rigidly pre-selected." 7-Eleven proposed that, in addition to certain industries being categorized as complex, there should be another mechanism for designating other facilities as complex, such as: state objective criteria which, if met, would add complexity points to the compliance history formula denominator; allow facilities with multiple SIC codes to receive complexity points where components of facility processes either meet objective complexity criteria or are included within designated complex SIC codes; and provide an

explicit mechanism for such relevant complexity information to be submitted and included in the analysis and calculation of site compliance history classification.

TCCI and TCAP commented regarding proposed §60.2(e). TCCI expressed concerns that the complexity factor in proposed §60.2(e) and (f)(1)(J) will have an adverse effect on small businesses. While stating that it does not know how to solve this issue, TCCI stated that it "appears that a small polluter could be perceived as a worse company than a large company that pollutes," and is concerned with the inequities. Similarly, TCAP stated that it is concerned that the complexity factor allowing for a reduction of the compliance history score for a site designated as complex "may create inequities between large and small entities," and hopes that the rule will be written so as not to "set up implicit discrimination against entities who pollute less."

Fort Worth COC commented, regarding proposed §60.2(e), "The proposed rules should take into account that there could be industries that warrant a higher complexity than 1."

The commission responds that the proposed subsection has been deleted, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. Three other criteria will also be utilized in determining a repeat violator designation. They include the

size of the site (based upon FINs, number of external outfalls, and the number of AHWMUs), whether the site is located in a nonattainment area, and the total number of sites owned or operated by the person in the State of Texas. As adopted, the rule takes into account a greater range of sites owned or operated. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

In addition, the formula, as adopted, is intended to treat small and large entities equally. For instance, §60.2(e)(1)(L) has been adopted as part of significant revisions to the formula for determining a site rating. This provision utilizes the number of investigations conducted during the compliance period, plus one, as a divisor in the formula, regardless of whether violations were documented during the investigation. The addition of one also provides cushioning for those sites which may not be investigated frequently.

Proposed §60.2(e)(1)

Extensive comments were received relating to proposed §60.2(e). While the comments varied in their perspectives, in response to many of the comments the commission has deleted this proposed subsection, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, and has instead adopted new §60.2(d). The comments received on proposed §60.2(e)(1) are summarized and grouped here, and consolidated responses are provided at the conclusion of those comments.

Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(e)(1). The commenters stated that the complexity formula needs to be revised, adding that as proposed it does not

adequately reflect the complexity of a site. The commenters asserted that other factors which could be utilized include: "number of employees operating the plant, the skill and training of employees, the types and volumes of materials handled, the physical size of equipment used in the operation, maintenance requirements, hours of operation, monitoring requirements, discharge rates, etc."

Furthermore, the commenters asserted that there should be a system for allowing industry to participate in the assigning of complexity factors; recommended that instead of three categories of complexity there should be five; asserted that electric power generation facilities, municipal solid waste landfills, and wastewater treatments plants should be reclassified at higher levels; and recommended that the complexity of municipal operations should be recognized.

Huntsman commented regarding proposed §60.2(e)(1). Huntsman stated, "A complexity factor of 5 has been adopted that includes most of the major industrial groupings in Texas." Specifically, Huntsman suggested that the complexity factor for the high end of the scale should be expressed as a range, perhaps from five to 30, and that in addition to the SIC code, other elements of complexity should be considered to increase the complexity factor. Huntsman asserted that the following could be utilized for this purpose: the number of emission points and other regulated sources at the site; the number of permits held at the site; the number of special conditions in each permit held by the site; the number of state and federal programs which apply to operations at the site (i.e., new source performance standards (NSPS), national emission standards for Hazardous Air Pollutants (NESHAPS), RCRA, etc.); the number of mandatory annual reports required from the site; the number of hazardous waste manifests generated by the site; the number of compliance and analytical tests which must be performed at the site each year; the location of the site in a designated nonattainment area; the number of employees at the

site; and the classification of the site as a "major source" under an applicable statute or inspection protocol.

C&H and SGVA commented regarding proposed §60.2(e)(1). C&H stated that there should be flexibility in the rule to allow the assignment of a complexity factor of 5 or 3 even if the industry is not specified in the rule, as there could be industries the agency has failed to assess but would warrant a higher complexity factor than 1. SGVA made a similar comment, stating that the rule should provide a mechanism for industries to change their complexity factor, using §60.2(e)(1) as a guideline. C&H also commented that the use of the complexity factor in the compliance calculation creates a disparity for smaller businesses, similar to its comment regarding §60.2(b).

AquaSource, SGVA, Reliant, AECT, CPS, Onyx, Fort Worth, and TXU commented regarding proposed §60.2(e)(1). AquaSource recommended that domestic wastewater operation have a complexity factor of 3. As an example, AquaSource stated that there is often influent from many different sources (domestic and industrial), and the operator may not know when a source may "inject improper material." Fort Worth also asserted that large municipal publicly owned treatment works (POTWs) should have a complexity factor of 5, because a large POTW is as complex as other industry types given a complexity factor of 5, and is more complex than some of the industries given a complexity factor of 3. Similarly, SGVA stated that it believes that fiberglass manufacturers, SIC 3229, should have a complexity factor of 5. SGVA stated as justification for this that the first part of the glass melting process is not less complex than cement kilns and cement manufacturing processes, which are given a complexity factor of 5 in the proposed rule. Additionally, SGVA asserted that the second part of its manufacturing process is no less complex than the processes associated with chemical

and allied products, which also are given a complexity factor of 5 in the proposed rule. Reliant stated that it believes the assignment of a complexity factor of 1 to electric power plants is an oversight, and that they should have a complexity factor of 5. Reliant and AECT stated that they believe the determination should be based on how heavily sites are regulated. TXU also stated that electric generating facilities should have a complexity factor of 5. For similar reasons, CPS also recommended that electronic generating facilities and their associated handling equipment should be rated at the highest complexity factor of 5. Onyx similarly asserted that permitted hazardous waste incineration facilities, based upon the nature of these operations and the number of regulations governing them, should be given a complexity factor of 5. TXU supported the comments made by AECT.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(e)(1). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF stated that CAFOs are highly regulated and should have a complexity factor of 5. The commenters listed the various programs under which CAFOs are regulated, including: TPDES permitting, air emissions, often-times fuel operations, pollution prevention plans, and numerous recordkeeping requirements. Additionally, the commenters stated that on the basis of the number of emission, discharge, or land application points associated with a typical site, CAFOs are highly complex, as most sites include a number of pens or barns, multiple retention lagoons, and one or more on-site land application area. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

V&E commented regarding proposed §60.2(e)(1), stating that it appreciates the "recognition" of chemical and petrochemical plants, and petroleum refineries as highly complex, but does not think the proposal goes far enough to reflect the true complexity of regulated entities. V&E, therefore,

recommended the addition of a fourth complexity category for refineries and chemical operations based on the "number of regulated units, types of processes (i.e. batch or continuous), number of specific products produced, or other criteria indicative of site complexity."

Regarding proposed §60.2(e)(1), MMM stated that its sites' SIC codes are: 1422, 1423, and 1429 (Crushing Plants/Rock Quarries); 1442 (Sand Plants); 2951 (Hot Mix Asphalt Plants); 3273 (Ready-Mix Concrete); 5032 (Material Distribution Yards); and 4231 (Trucking). MMM asked which complexity factor it will fall under, and further asked whether each SIC will have its own classification.

OxyChem and Oxy Permian commented regarding proposed §60.2(e)(1). OxyChem and Oxy Permian stated that the complexity rankings provided for in the proposed rule, based on SIC codes, may not take all aspects of the site into account. OxyChem and Oxy Permian suggested the following five criteria: 1) is the site located in a nonattainment area; 2) is the site a major source; 3) is the site a Risk Management Plan (RMP) site; 4) is the facility a large quantity generator of hazardous waste, or does the site have a RCRA hazardous waste management permit; and 5) does the site have a TPDES industrial wastewater discharge permit. Specifically, the commenters recommended that, for each of the aforementioned that apply, the baseline complexity factor be increased by a value of 1. OxyChem and Oxy Permian further noted that it would be possible for a site not to trigger any of the aforementioned criteria, and as such recommend a baseline complexity factor of 1.

Valero, TIP, BP, TXOGA, and TCC commented regarding proposed §60.2(e)(1). TCC asserted that the proposed rule does not capture the elements of complexity, suggesting that ranges be utilized in establishing complexity. TCC stated that it appreciates the proposal's attempt to include complexity in

the overall compliance history determinations and believes that it is an appropriate factor. Valero and TIP stated that basing the complexity on SIC codes fails to capture many compliance obligations, including things such as the "number of permit conditions and parameters, the frequency of monitoring, the number of emission points (both EPNs and the number of fugitive components), and other significant factors" which can vary greatly between industries as well as within industries. Valero, TIP, BP, TXOGA, and TCC made reference to the American Petroleum Institute (API)/American Chemistry Council (ACC) Compliance Rate Denominator Study, which Valero asserted "developed compliance obligation estimates for model small, medium, and large facilities in chemical manufacturing and petroleum refining and for industry as a whole." According to Valero, TIP, BP, TXOGA, and TCC, the study suggests that a general correlation exists between compliance obligations and facility size. Valero added that it believes that the complexity of large petroleum refineries/petrochemical plants is at least two orders of magnitude higher than the simpler sites, and if the commission intends to keep the rule simple, the complexity factors should be changed to 100, 10, and 1. BP, TXOGA, and TCC suggested that the number of emission point numbers (EPNs), number of wastewater discharge outfalls, number of elements in the notice of registration, and/or the number of solid waste management units might more appropriately be used to address complexity, and BP added, as might "the number of Title V requirements for a site, the age of the facility, and the location of the facility (in an attainment versus nonattainment area)." TXOGA added that whether the site is located in a nonattainment area should be considered as well. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

TMRA commented regarding proposed §60.2(e)(1). TMRA stated that it is not opposed to a default list, but is specifically interested in the recognition of "mining" as an industry warranting a complexity

factor of 5, "and in no instance less than 3." Additionally, TMRA suggested that certain objective criteria should be added to the rule in order to add certain industry groups or sub-groups to one of the two higher complexity groups. Specifically, TMRA recommended the addition of the following criteria to either the rule or the preamble: "A complexity factor of 5 should be assigned to sites larger than 10,000 acres and/or which operate under permits in three or more distinct TNRCC program areas (e.g. air, solid waste, water quality, water rights, etc...);" and "A complexity factor of 3 should be assigned to sites larger than 1,000 acres and/or which operate under permits in two or more distinct TNRCC program areas." TMRA asserted that the larger a facility is, the harder it is to manage environmental compliance at the site, and the higher the risk of violations, and stated that the commission recognized this as a factor during the March 27, 2002 agenda when the rule was approved for proposal. Finally, TMRA stated that it does not support a "case-specific approach based on a list of objective criteria, such as size, number of permit/regulated units, etc., with associated complexity points added to the denominator of the classification formula" as it asserts this would create too much administrative burden on the agency and would likely result in inconsistency.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. Three other criteria will also be utilized in determining a repeat violator designation. They include the

size of the site (based upon FINs, number of external outfalls, and the number of AHWMUs), whether the site is located in a nonattainment area, and the total number of sites owned or operated by the person in the State of Texas. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

TDA commented, regarding proposed §60.2(e)(1), "The assignment of complexity factors for different industries is questionable when all industries (regardless of such factor) will be evaluated based on the same matrix to determine high, average or below performers." TDA suggested that a better approach might be to utilize a separate (high, average, or poor) matrix for each of the three complexity levels. TDA further asserted that it seems inconsistent to compare the compliance histories of two totally different industries when one industry has a significantly higher opportunity to accrue violations based on its complexity than the other industry. Additionally, TDA stated that the complexity level for CAFOs "appears far too low," asserting that it must have been arbitrarily assigned as "the industry is subject to numerous record keeping, reporting and permitting requirements."

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission disagrees that the rule should evaluate different industries separately. The adopted rule does allow for a consistent evaluation of compliance history while taking into account the opportunity level to accrue violations. No changes have been made in response to this comment.

FWAF, MMC, OCIW, and SSCC commented regarding proposed §60.2(e)(1). FWAF, MMC, OCIW, and SSCC proposed that the rules take into account the age of a facility, specifically suggesting that the complexity factor be increased by 1 if the site is 15 years or older. FWAF and SSCC based this proposal on advances in technology, meaning that new facilities are better equipped to comply with lower emission and discharge limits.

The commission disagrees with this comment. All regulated entities have an obligation to comply with the law no matter what level of regulatory burden they carry. However, in response to other comments received, the commission has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Proposed §60.2(e)(1)(A)

V&E, WM, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(e)(1)(A). V&E suggested the addition of "(x) wholesale trade - nondurable goods;" and V&E, WM, Allied, BFI, TxSWANA, and NSWMA all suggested the addition of "(xi) waste management and remediation services." V&E stated that the rule does not take into account the complexity of these two industry types. Allied, BFI, TxSWANA, and NSWMA stated that they believe if the proposal is changed to move away from a strict categorization approach to a more objective approach, then the number of commission program areas that must issue authorizations or be involved with reviewing a given operation should come into play when considering complexity of a site, as should the size of the site.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. Three other criteria will also be utilized in determining a repeat violator designation. They include the size of the site (based upon FINs, number of external outfalls, and the number of AHWMUs), whether the site is located in a nonattainment area, and the total number of sites owned or operated by the person in the State of Texas. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

Proposed §60.2(e)(1)(B)(v)

FWAF, MMC, OCIW, SSCC, and LSS commented regarding proposed §60.2(e)(1)(B)(v). FWAF, MMC, OCIW, and SSCC proposed that primary metal and secondary metal refining and processing industries have a complexity factor of 5, stating that the other types of facilities assigned to a complexity factor of 3 appear to be significantly less complex than a foundry, while the types of facilities assigned to a complexity factor of 5 appear to be similar in complexity to foundry operations. LSS also requested that primary metal and secondary refining industries be moved from a complexity factor of 3 to a complexity factor of 5. LSS described its processes, and stated that it must comply with various air, water, and solid and hazardous waste regulations and permits. LSS asserted that its processes "are on a complexity par with industries included in complexity factor 5."

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

Proposed §60.2(e)(2)

With regard to proposed §60.2(e)(2), PIC asserted that determining ratings and classifications on a site-specific basis satisfies the statutory provisions requiring consideration of an entity's number of sites and that further consideration of that criterion under proposed §60.2(e)(2) is unsupported.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. However, the commission does not agree with the commenter that determining ratings and classification on a site-specific basis satisfies the statutory provisions regarding consideration of number of sites. The commission has adopted §60.2(d)(3) to account for the number of sites owned by a person as part of the repeat violator designation criteria, as required by TWC, §5.754(c)(2).

AquaSource, V&E, Reliant, AECT, and TXOGA commented regarding proposed §60.2(e)(2).

AquaSource stated that it concurs with the additional complexity factor as assigned in this paragraph, and suggested further the addition of another point for persons with more than 100 sites, and the addition of another point for persons with more than 200 sites. On the other hand, V&E stated that there is no justification provided for the 25-site threshold, and further stated that "it is not clear whether the consideration of the number of sites owned, as required by the statute, is real or merely illusory."

Reliant stated that the use of 25 sites as the cut-off is a simplistic approach that does not address complex sites, asserting that a single complex site is subject to greater regulatory burden than 25 less complex sites. AECT provided similar comments. Reliant and AECT both suggested a tiered approach. Reliant suggested adding to the end of the proposed language, "only if the site is owned or operated by a person that owns or operates at least the following number of sites based on the site's complexity factor: A) 20 sites, if the complexity factor is 1; B) 10 sites, if the complexity factor is 3; and C) 5 sites, if the complexity factor is 5." AECT provided the same suggestion, while further suggesting the replacement of the existing text with "The complexity factor determined in paragraph (1) of this subsection will increase by one," thereby removing completely the proposal regarding the use of 25 sites as a trigger. TXU supported the comments submitted by AECT. TXOGA added that the "legislative language adds further support to TXOGA's belief that some consideration of number of EPNs, for example, (a more direct link to a 'facility') should be incorporated into this rulemaking." Finally, TXOGA stated that it supports Brown McCarroll's suggestions regarding complexity.

OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this

preamble. The commission has instead adopted §60.2(d)(3) to account for the number of sites owned by a person as part of the repeat violator designation criteria, as required by TWC, §5.754(c)(2). The adopted paragraph utilizes a tiered approach, assigning points toward the total repeat violator designation criteria based upon how many sites are owned or operated in the State of Texas by a person.

7-Eleven commented regarding proposed §60.2(e)(2). 7-Eleven stated that it supports "a close linkage between the Repeat Violator standard and the relative complexity of a person's environmental compliance obligations. This linkage, however, must recognize and implement the legislative mandate to give equal weight to the difficulty presented by mandating regulatory programs at numerous separate facilities." 7-Eleven recommended that the following language be added to the end of this proposed paragraph: "For persons that own or operate 100 or more sites in the State of Texas, the complexity factor determined in paragraph (1) of this section will increase by an additional one point. For each additional 100 sites owned or operated by such persons in the State of Texas, the complexity factor determined in paragraph (1) of this section will increase by an additional one point." Further, in order to address the number of facilities issue with regard to repeat violators, 7-Eleven recommended the addition of another sentence, to read: "With respect to the criteria for designation of a person as a Repeat Violator, for every 100 facilities owned or operated by a person in the State of Texas, the number of major violations which must be documented in the compliance period in order to be considered a Repeat Violator under Section 60.2 will increase by one."

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this

preamble. The commission has instead adopted §60.2(d)(3) to account for the number of sites owned by a person as part of the repeat violator designation criteria, as required by TWC, §5.754(c)(2). The adopted paragraph utilizes a tiered approach, assigning points toward the total repeat violator designation criteria based upon how many sites are owned or operated in the State of Texas by a person.

§60.2(e) (proposed as §60.2(f))

The commission adopts new §60.2(e), proposed as §60.2(f), concerning the formula, to effectively and equitably implement the requirement of TWC, §5.754(a), for the commission to establish by rule, a set of standards for the classification of a person's compliance history. TWC, §5.753, requires that the components of compliance history include not only the site which is the subject of the permit application, enforcement action, investigation, or application for the participation in an innovative program but also information pertaining to all regulated sites in the State of Texas as well as outside Texas. The commission has determined that it is appropriate, for purposes of classification, to distinguish between the site which is the subject of the commission decision and any other sites owned or operated by the person. Specifically, although information on all sites inside the State of Texas, as well as information on final enforcement orders, court judgments, and criminal convictions outside Texas, will be included in compliance histories, the classification for a site will be based on only information on the site which is the subject of the classification. In addition, the site ratings for each individual site owned or operated by a person in the State of Texas will then be averaged to provide a classification of high, poor, or average for each *person* with sites in the State of Texas. The executive director will determine each site rating based upon the method adopted in the paragraphs under new §60.2(e).

The commission has determined that the numbers used for multipliers and/or factors are appropriate and will effectively and equitably provide for performance classifications based upon compliance history.

The point values assigned to the individual components and factors were chosen to provide a broad enough range to be able to detect clusters or natural gradations of performance across sites. Certain point values, as adopted, will be determined by the significance of the violations; other point values will be determined by the type and complexity of the component. Additional discussion of each formula calculation is subsequently provided in this preamble. The commission received a number of comments suggesting various point systems or alternatives, and considered all of those comments in developing the new process. The commission has incorporated the best of all of these suggestions in the formula being adopted.

Adopted new §60.2(e)(1), proposed as §60.2(f)(1), concerning site rating, addresses the calculations to be performed for a site for which a permit application, enforcement action, investigation, or participation in an innovative program is being considered. Paragraph (1) includes the calculations to be performed for the site for the time period reviewed, based upon the compliance history at the site. The commission deleted the definition of “site” as proposed in this paragraph because it is already defined in §60.2(a).

The point values were assigned to violations in NOVs, final orders, court judgments, and criminal convictions in a way that demonstrates the relative seriousness of the enforcement action conducted by the state. Violations in NOVs carry the lowest points because NOVs are the least serious of the commission’s enforcement options. Violations in final orders carry significantly more points than violations in NOVs because orders contain violations that are more serious or substantial than those in

NOVs, or contain violations that have been repeated or unaddressed. Further, orders represent final commission actions as opposed to allegations included in NOVs. In addition, in response to comments received, the commission is adopting modifications to the rule to further distinguish between adjudicated orders and non-adjudicated (expedited) orders, and also to distinguish between expedited orders containing a denial of liability (those issued under TWC, §7.070 (1660 orders)), and those without a denial of liability. The commission utilizes legal action through the courts for persons violating commission orders in situations where injunctive relief may be necessary and when, in the executive director's judgment, higher penalties are warranted. Thus, violations in court actions are assigned higher points than violations in NOVs. The point values for violations in adjudicated orders and judgments are the same. The commission considers the most severe form of enforcement to be criminal prosecution and has assigned the highest point value for violations included in criminal convictions.

Adopted new §60.2(e)(1)(A), proposed as §60.2(f)(1)(A), has been modified in response to comments received. Subparagraph (A) reflects the multiplier for the number of major violations, depending upon the type of enforcement document containing the violations. This subparagraph has been modified from proposal to provide for a wider range of points to reflect the differences in the variety of enforcement actions as well as to provide incentives for a person to settle enforcement cases expeditiously. As adopted, the rule provides the following point assignment for major violations: any adjudicated final court judgments and default judgments shall be multiplied by 160; any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 140; any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 120; any final prohibitory emergency

orders issued by the commission shall be multiplied by 120; any agreed final enforcement orders without a denial of liability shall be multiplied by 100; and any agreed final enforcement orders containing a denial of liability shall be multiplied by 80. The commission has determined that it is appropriate to provide such distinctions between enforcement resolution types by their associated point values because it more accurately reflects distinctions between the different “levels” of enforcement actions available to the commission and the severity of the violations included in those actions.

The commission has determined that major violations contained in these components should be weighted more heavily than those contained in NOV's because these components are final commission actions, whereas NOV's are the lowest level of enforcement. The reference to repeat violators has been removed from adopted §60.2(e)(1)(A), but the requirement regarding repeat violators in TWC, §5.574(c)(3), is addressed in adopted §60.2(e)(1)(J), as discussed subsequently in this preamble. Specifically, adopted §60.2(e)(1)(J) provides for a significant addition to the number of points in the formula based on a person's designation as a repeat violator at a site, and as such, will serve as a driver towards the poor performer classification. The commission has determined that this is especially appropriate in light of the modification to the definition of major violation and modification to the repeat violator designation, whereby complexity, size, the number of sites in Texas, and location in a nonattainment area are all taken into consideration before determining that a person is a repeat violator at a site.

Adopted new §60.2(e)(1)(B), proposed as §60.2(f)(1)(B), and new §60.2(e)(1)(C), proposed as §60.2(f)(1)(C), have been modified in response to comments received. Moderate and minor violations have been assigned multiples in the same manner as previously described for major violations.

Adopted new §60.2(e)(1)(D), proposed as §60.2(f)(1)(D), has been modified in response to comments received. Specifically, the reference to repeat violators has been removed from adopted §60.2(e)(1)(D). However, the requirement in TWC, §5.574(c)(3), regarding repeat violators is addressed in adopted §60.2(e)(1)(J), through the addition of 500 points in the formula for repeat violators, as discussed elsewhere in this preamble.

The commission has determined that major violations contained in NOV's should be weighted less than those contained in other types of enforcement because NOV's are the lowest level of enforcement. The weight of the multipliers is different for the types of violations to reflect the severity of the violation and the fact that NOV's are the lowest level of enforcement. This same analysis and distinction is also adopted for moderate and minor violations contained in any NOV's, in adopted §60.2(e)(1)(E) and (F), which were proposed as §60.2(f)(1)(E) and (F). Subparagraphs (E) and (F) have been adopted without substantive modification.

Adopted new §60.2(e)(1)(G) has been modified from proposal as §60.2(f)(1)(G) in response to comments. The commission has determined that all counts in criminal convictions should be weighted more heavily than violations contained in final administrative orders or other final actions, even those classified as major violations. Based upon comments received, the commission has determined that it is appropriate to distinguish between the most serious criminal convictions and those of a less serious nature. Specifically, subparagraph (G) has been divided into two clauses, and has been modified to read: The number of counts in all criminal convictions: (i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the

United States Code (USC) shall be multiplied by 500; and (ii) under TWC, §§7.147 - 7.151, 7.154, 7.157, 7.159, 7.160, 7.162(a)(6) - (8), 7.163(a)(4), 7.165 - 7.167, 7.171, 7.177 - 7.181, and all misdemeanor convictions under the Texas Penal Code, TWC, THSC, or the USC shall be multiplied by 250.

Adopted new §60.2(e)(1)(H), which was proposed as §60.2(f)(1)(H), states that the number of chronic excessive emissions events from §60.1(c)(4) shall be multiplied by 100, as proposed. The commission has proposed criteria for determining chronic excessive emissions events in another rulemaking (Rule Log Number 2001-075-101-AI) to implement HB 2912, §5.01. Until that rulemaking is adopted, the executive director will not use, and the commission will not consider, this multiplier in classifying a site.

Adopted new §60.2(e)(1)(I) states that the subtotals from subparagraphs (A) - (H) of this paragraph shall be added together. This will provide a total for points associated with compliance history components for the site during the compliance period, including: violations (major, moderate, and minor) included in any NOV's or any final enforcement orders, court judgments, and consent decrees of this state and the federal government relating to compliance with applicable legal requirements under the jurisdiction of the commission or the EPA for the compliance period. Section 60.2(e)(1)(I) has not been modified since proposed as §60.2(f)(1)(I).

The commission has deleted the use of a complexity factor in the formula, as proposed in §60.2(f)(1)(J), limiting the use of complexity to the repeat violator designation. This is discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of

this preamble, specifically in the discussion regarding §60.2(d). Instead, the commission has adopted in subparagraph (J) the following language: “If the person is a repeat violator as determined under subsection (d) of this section, then 500 points shall be added to the total in subparagraph (I) of this paragraph. If the person is not a repeat violator as determined under subsection (d) of this section, then zero points shall be added to the total in subparagraph (I) of this paragraph.” This significant addition to the number of points in the formula based on a person’s designation as a repeat violator at a site will serve as a driver towards the poor performer classification. The commission has determined that this is especially appropriate in light of the modification to the definition of major violation and modification to the repeat violator designation, whereby complexity, size, the number of sites in Texas, and location in a nonattainment area are all taken into consideration before determining that a person is a repeat violator at a site.

In response to comments received regarding proposed §60.2(f)(3)(A), concerning mitigating factors, the commission has adopted language at §60.2(e)(1)(K), regarding environmental audits. Specifically, subparagraph (K) reads: If the total in subparagraph (J) of this paragraph is greater than zero, then: (i) subtract 1 point from the total in subparagraph (J) of this paragraph for each notice of an intended audit submitted to the agency during the compliance period; or (ii) if a violation(s) was disclosed as a result of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended, and the site was granted immunity from an administrative or civil penalty for that violation(s) under the agency’s Environmental Audit Program, then the following number(s) shall be subtracted from the total in subparagraph (J) of this paragraph: (I) the number of major violations multiplied by 5; (II) the number of moderate violations multiplied by 3; and (III) the number of minor violations multiplied by 1. This modification to the rule is intended to address

concerns that “positive points” should be awarded in the classification formula for at least some of the positive components from §60.1(c). First, subparagraph (K) requires that the subtotal in subparagraph (J) be greater than zero so that a site with no investigations during the compliance period does not receive a “high performer” classification merely by submitting a notice of intent to perform an environmental audit. Similarly, the commission has determined that it is not appropriate for a site to be classified as a “high performer” based solely on the disclosure of violations under an environmental audit. As such, the rule, as adopted, will provide “positive points” equivalent to the number of points assigned to major, moderate, and minor violations included in an NOV. A point for a notice of intended audit under clause (i) will only be subtracted from subparagraph (J) when there are no points under clause (ii) being subtracted for applicable violations disclosed as a result of the audit for which notice was provided.

Adopted new §60.2(e)(1)(L), proposed as §60.2(f)(1)(K), has been modified in response to comments received. As adopted, subparagraph (L) states: “The result of the calculations in subparagraph (I) - (K) of this paragraph shall be divided by the number of investigations conducted during the compliance period plus 1. If the value is less than zero, then the site rating shall be assigned a value of zero. For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director’s staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation, for the purposes of this chapter, may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. All sites with a classification of ‘average performer by default’ are assigned 3.01 points.” This division will normalize the total point value by averaging, based upon the total number of investigations performed at the site during the compliance period. The rule has been

modified from proposal to include the addition of one in the denominator to the total number of investigations performed at a site during the compliance period. This serves a two-fold purpose: first, it provides some cushioning for those sites which may not be investigated very frequently; and second, it ensures that there will never be a zero in the denominator, which is mathematically incorrect.

Additionally, the rule has been modified to more clearly and accurately reflect what constitutes an investigation for purposes of this chapter, specifying that it is something conducted by the executive director or his staff or agent, as opposed to being conducted by the regulated entity, or by a citizen, for example. The rule also has been modified to clarify that the investigation does not have to be conducted at the site. This modification allows for the inclusion of record reviews conducted at agency offices, as intended.

The rule has also been modified to exclude from the number of investigations counted in the denominator of the site rating formula those investigations initiated by citizen complaints, (although violations documented in NOVs and enforcement actions resulting from such investigations will still be counted in the site rating formula). As noted in the adoption preamble for Phase I of the compliance history rulemaking concerning components, complaints are not specifically included as a component of compliance history because other components will, 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, 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 also noted in the adoption preamble for Phase I 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. With regard to the current rulemaking, the commission has similarly determined that it is inappropriate to include complaint investigations in the denominator of the site rating formula, as the denominator serves to "equalize" the opportunities for violations to be documented at a site, in a positive manner (i.e. because the number of investigations serves as a divisor, the higher the number of investigations, the lower the overall site rating becomes). Specifically, including complaint investigations in the denominator could serve to inappropriately and undeservedly skew a site rating for the better. For instance, one or more complaints may be filed against a site on different occasions during the compliance period. Agency staff will investigate the complaint allegations, but may not be able to verify them even if they existed at the time the complaint was made. Under these circumstances, no NOV would be issued and no enforcement action would be initiated. Also, complaint investigations are generally limited in scope to the issue which was the subject of the complaint, as opposed to other investigations which are generally much broader in scope. Further, the agency has no control over how many complaints are made or who initiates complaints, but is required to investigate all complaints. All of these factors form the basis for the commission's determination that, from a fairness standpoint, it is as inappropriate to allow complaints to "positively" skew a site rating unjustifiably as it is inappropriate to allow complaints to unjustifiably "negatively" skew a site rating. Given these considerations, only any underlying violation(s) discovered through a complaint investigation will be included in a person's compliance history.

Finally, the last sentence of this adopted subparagraph has been added in response to other modifications to the rule which states that a person will be classified as a high, average, or poor

performer based upon a mathematical averaging of the points for each of the sites owned or operated by that person. In order to address the situation in which there is no information upon which to base a classification rating, and as such the site is assigned a classification of “average performer by default” under adopted §60.2(b), the commission has determined that it is appropriate to assign such sites the average of the point range for the average performer classification. Without such a provision, the point value for an “average performer by default” site would be zero and, when utilized in averaging scores for the person’s classification, would unfairly skew the total point score for the person. The adopted number 3.01 is the average point value of the average performer group in the sample population of 2736 sites utilized to determine the point ranges in adopted §60.2(e)(2), as discussed in more detail later in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

In response to comments received, the commission has adopted new language at §60.2(e)(1)(M) which reads: “If the person receives certification of an environmental management system (EMS) under Chapter 90 of this title (relating to Regulatory Flexibility and Environmental Management Systems) and has implemented the EMS at the site for more than one year, then multiply the result in subparagraph (L) of this paragraph by 0.9.” The addition of this provision provides certainty in the formula for those persons who implement certified EMSs. The commission has determined that it is only appropriate to include in the formula those EMSs certified under Chapter 90, as such EMSs have met certain criteria. In addition, it is appropriate to only provide this downward adjustment in point values for those certified EMSs which have been in place for at least one year, because it takes time subsequent to the implementation of an EMS for improvements to be seen. Finally, the commission has determined that it is appropriate to use a percentage reduction rather than a straight point value, as this provides a more

equitable result regardless of the complexity or size of a site. The commission notes that there is still an opportunity, under adopted §60.2(e)(3)(A)(ii), for a site's classification to be improved from poor to average based upon the implementation of an EMS which is not certified under Chapter 90. This is discussed in more detail in the portion of the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble regarding adopted §60.2(e)(3), proposed as §60.2(f)(3).

Proposed §60.2(f) has been changed to §60.2(e) due to modifications and deletions made earlier in the rule. Additionally, the commission has modified adopted §60.2(e), by changing the word "will" to "shall" for clarity and consistency.

MMM and Fort Worth COC commented regarding proposed §60.2(f). MMM asked how its operations out-of-state will be factored into its classification and site rating. Similarly, Fort Worth COC commented that the proposed rules are not clear concerning how points may be assigned for violations that have occurred at other facilities or in other states. Fort Worth COC also commented that there is no calculation regarding how the compliance history of one site will be impacted by other sites owned or operated by the same person.

The commission responds that out-of-state operations will not be "factored" into site ratings and they will have no bearing on the numbers used in the formula or the resulting point value used to classify a site and a person. However, any out-of-state enforcement actions will be included in the compliance history report as referenced in adopted §60.3(a)(1)(B), and will be used in consideration of a pattern of environmental compliance. The site rating will not be affected by the compliance history of other sites owned or operated by the person; however, the classification of

the person will be. The adopted rule provides for calculation of a classification for a person by averaging the site rating of each site owned or operated by that person in Texas.

C&H and Onyx commented regarding proposed §60.2(f). C&H stated, "Creating an objective calculation for a subjective compliance issue is unworkable." C&H further stated that the proposal is not sufficient to allow for alteration of a compliance classification if circumstances warrant it, or if the situation is unique, and added that the flexibility available is for positive factors, but not negative ones. C&H then provided an example of how the formula can be inappropriate: a small business, with only one investigation during the compliance period which resulted in an enforcement order being issued with two moderate violations would end up in the poor performer category with 120 points. Similarly, Onyx expressed a "general concern that the compliance history ratings may not accurately reflect the environmental performance of a facility." Onyx stated that, based upon its experience, compliance efforts cannot be accurately measured using a numerical system, because "acts of nature, power failures, uninformed customers, and other occurrences of this type all play a role in the compliance performance of a facility."

The commission disagrees that an objective calculation for compliance history is unworkable. The adopted rule will allow just such an objective evaluation of compliance. With regard to flexibility for positive or negative factors in the alteration of a classification, in accordance with §60.3(e), reclassification may be sought for only poor performers and average performers with 30 points or more and only if a change in classification will result. The rule also provides for correction of clerical errors in person or site classifications at any time. The modified formula ameliorates the issue of a person with infrequent investigations by raising the denominator by one in all cases.

The commission acknowledges that many things play a role in the compliance performance; however, not all of the examples enumerated by Onyx would result in violations. This subsection of the rule has been extensively modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

C&H commented regarding proposed §60.2(f). C&H stated that the rule creates a compliance history for an individual site, although §60.1(c) states that the compliance history shall include information specific to the site under review as well as additional sites owned or operated by the same person, and that there is no calculation regarding how one site might have its compliance history affected by other sites owned or operated by the same person. C&H also stated that the commission could have the ability to reduce the high performer classification without any standard or criteria on which to base that decision. C&H suggested that an optional percentage allocation should be set out in the rule. For instance, the calculated number for the compliance history rating for a site may be adjusted up or down by 10% based upon the compliance history ratings of other sites owned or operated by the same person. C&H further stated that the commission should not consider sites outside the State of Texas "since there is no analogous compliance history rule in other states or federal systems."

The commission responds that a site classification is specific to that site. Each additional site owned or operated by the same person within Texas will also receive a site classification. All the sites' ratings will be averaged to determine a person's classification. The executive director may change the classification of a poor performer to an average performer, but not to a high performer, based upon mitigating factors. In addition, the executive director may, upon the appeal of a classification, change the classification of either a poor performer, or an average

performer with 30 points or more, but not the classification of a high performer. This issue has been clarified in the rule. The commission disagrees that a specific “up or down” adjustment percentage be adopted because such an approach would not necessarily reflect the overall performance of the person and may blur patterns in compliance history that could be observed by an evaluation or mitigating factors. With regard to sites in other states, the statute specifically requires that compliance histories include orders, judgments, and convictions relating to violations of environmental laws of other states. No change was made to the rule in response to this comment.

V&E and 7-Eleven commented regarding proposed §60.2(f). V&E stated that it concurs with the approach of evaluating "a site independently and also in connection with other sites owned or operated by the same person." However, V&E also stated that the formula for a site "does not meet the statutory requirements of establishing standards for the classification of a person's compliance history." In a similar vein, 7-Eleven stated, "The Commission should clearly explain the legal basis for its decision to not develop a compliance history classification for persons that are owners or operators of regulated facilities," adding that the legislature mandated that each person's compliance history must be classified.

In response to comments, the rule has been modified. In addition to a classification specific to all sites owned or operated by the same person within Texas, all the site ratings will be averaged to determine a person’s classification.

TXI commented regarding proposed §60.2(f). TXI stated that it does not believe a formula should be used to determine compliance history classifications, as it asserts that a formula cannot anticipate all possible scenarios. TXI expressed concern that the commission will be criticized by opponents of a site if mitigating factors are used to raise a compliance history rating. As such, TXI recommended a qualitative approach, using the standards set out in the TWC. Specifically, TXI recommended the revision of proposed §60.2(f) to read: "In classifying a site's compliance history, the Commission shall consider the number and significance of violations, if any, at the site (as defined in subsection (c) of this section), the complexity of the operations and regulations applicable to the site (as defined in subsection (3) of this section), and whether the site is a repeat violator as defined in subsection (d) of this section."

Section 60.2(e)(3) and §60.3(e) anticipate that there may be scenarios where a strict formula approach does not capture all aspects of a site's compliance history and provide flexibility to modify a classification in such scenarios. Also, the commenter's suggested approach is not feasible considering the large number of sites to be evaluated under the statute. No changes have been made in response to this comment; however, this subsection of the rule has been substantially revised as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Huntsman commented regarding proposed §60.2(f). Huntsman asserted that "corporate liability is vicarious: a corporation with a firm commitment to environmental compliance can be indicted for the culpable conduct of its employees." Huntsman, therefore, suggested that when a corporation cooperates with regard to a federal or state investigation into environmental criminal offenses, "that conduct should be assigned a numeric value that can be divided into the violation points used to

calculate a site's compliance history. Alternatively, such cooperation could be considered as a mitigating factor under {proposed} §60.2(f)(3)."

Indictment, by itself, does not impact the site rating. Only the counts in criminal convictions against regulated entities will be assessed for use in the formula. The commission disagrees that the level of cooperation should be either assigned a numeric value or considered a mitigating factor because the interaction would be between the entity and an outside party, the prosecutor, and such interaction and the quality thereof would be difficult for the executive director to assess in any consistent manner. Information on the nature of the corporate criminal conviction may be provided, not as a mitigating factor, but in an appeal of classification under §60.3(e) if a site is classified as a poor performer or an average performer with 30 points or more. No changes have been made in response to this comment.

BP commented regarding proposed §60.2. BP stated that, rather than "establishing a set of standards for the classification of a person's compliance history" as directed by the legislature, the commission has chosen to utilize an algebraic formula. BP asserted that it believes this is a possible approach, but it must be "replicable," meaning that the same inputs must provide the same outputs. BP stated that it is not convinced that this will result based on the proposal, for many reasons. And, BP asserted that it is difficult to express complexity accurately in a numeric formula.

The accuracy of and the ability to replicate results through the use of the adopted formula conserves agency resources. In addition, other entities will know how to calculate rankings and classifications. Furthermore, the complexity factor has been modified in response to many

comments received. The complexity factor, as adopted, is used with regard to repeat violators in an attempt to recognize that some operations are inherently more technically challenging. Consequently, it is appropriate to consider complexity before adding the 500 points associated with repeat violator status to the total points used to classify a site.

LSS commented regarding proposed §60.2(f)(1). LSS stated that it appreciates "the difficulty in developing a ranking system for a broad range of environmental performance," and further, that it believes that weighting criminal convictions more heavily than enforcement actions, and enforcement actions more heavily than NOVs makes for a logical approach.

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

H&W commented regarding proposed §60.2(f)(1), stating that paragraph (1) should be clarified to reflect that the "formula requires only the addition of all of the violations documented to have been committed by the *site* under review."

The commission has added the phrase "based upon the compliance history at the site" to the text. The formula does not include compliance history components at other sites owned or operated by that person. A site is rated solely on the points resulting from its compliance history. However, classification of a person considers the rating of the site, as well as all other sites in Texas owned or operated by the person by averaging them together.

PIC commented regarding proposed §60.2(f)(1). PIC requested clarification regarding "whether the commission's intent in the proposal was for the person to face the consequences of 'repeat violator status' immediately upon the documentation of the violation that initially triggers this classification, or face the consequences only with respect to subsequent violations after this classification is initially triggered. For example, Company X receives a final order documenting the same major violation at its facility that was previously documented in a different final order the year before. There are no other components in Company X's compliance history. Under {proposed} §60.2(f)(1)(A), does Company X have 200 points or 400 points? PIC's interpretation of proposed {proposed} §60.2(d) and {proposed} §60.2(f)(1)(A) is that Company X would have 400 points; however, PIC seeks clarification."

The consequences of repeat violator status are immediate upon the issuance of the second (or third or fourth) document containing a major violation. However, the commission would also note that the adopted rule has been modified as to what constitutes repeat violator designation.

Specifically, it is not required that the same or similar major violation be documented during the compliance period; rather, it is the occurrence of any violations (more than one, two, or three, as applicable) designated as major under adopted §60.2(c)(1). For clarification, Company X would have had 400 points under the proposed rule.

BP commented regarding proposed §60.2(f)(1). BP asserted that the proposed rule, which assigns points to consent decrees, "will inhibit companies from entering into voluntary decrees with government," adding that this would not be good for government, industry, or the environment. BP made reference to a consent decree it entered with EPA, which it asserts was "outside the traditional enforcement realm."

The legislature has determined that “enforcement orders, court judgments, consent decrees, and criminal convictions” be included as components of compliance history. The adopted rule differentiates between consent decrees containing a denial of liability and those that do not by decreasing the multiplier from 140 to 120. The adopted rule differentiates between the types of court orders by allocating different point values for the violations contained therein.

GI² commented regarding proposed §60.2(f)(1), suggesting that NOVs generated from POTWs not be included in the site classification formula for a metal finishing site if the violations in the NOV have been corrected and the site has come back into compliance through self-monitoring and reporting.

The comment is outside the scope of this rulemaking, as the issue of NOVs was addressed in the first phase of the compliance history rulemaking. However, the POTW is not acting as an agent for the commission, so any NOV issued by the POTW would not be included as a compliance history component. No changes have been made in response to this comment.

Fort Worth COC, C&H, TAB, and TCC commented regarding proposed §60.2(f)(1). Fort Worth COC, C&H, TAB, and TCC stated that the rule should provide for a gradual decrease in the point values, or less weight, given to violations that occurred in the past. TCC recommended that "formula items within the past year could have a factor of 1; formula items that are between one and two years old, a factor of 0.8; formula items between two and three years old, a factor of 0.6; formula items between three and four years old, a factor of 0.4; and formula items between four and five years old, a factor of 0.2." TCC added that there might need to be adjustments made to the point ranges, but this would provide the commission with the ability to look at improvements as good indicators, and

declining performance as a bad indicator. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. Additionally, Fort Worth COC stated that similar consideration should be given to average or high performers purchasing poor performing sites. C&H stated that a new owner being "encumbered" by the violations of the previous owner is "not only blatantly unfair, but would discourage development and investment in Texas and impede real estate transactions throughout the state." TAB stated that it believes that a company's current compliance is a more accurate indicator of performance than past compliance.

The commission disagrees with these comments. With regard to a decrease in the point values, the commission determined during the first phase of compliance history rulemaking that a five-year compliance history is appropriate, and that by establishing this period a distinction is made between "newer" and "older" violations. "Older" violations (i.e., outside the compliance period) will not be counted as part of a person's compliance history. "Newer" violations (i.e., within the compliance period) will be counted as part of a person's compliance history, and will be assigned point values based upon their designation as major, moderate, or minor violations, and upon what type of action they were included in. The formula adopted by the commission as stated in §60.2 includes as a divisor the number of investigations conducted over the five-year period. Through this divisor, the impact of an older compliance history component will be decreased over time as additional investigations are conducted, provided that additional violations are not identified in those later investigations.

With regard to the issue of giving similar consideration to previous violations when an average or high performer purchases a poor performing site, the commission responds that this issue is

addressed under "mitigating factors" in adopted §60.2(e)(3), in that the executive director shall evaluate such a circumstance and may modify (raise) the classification for the purchased site. No changes have been made in response to these comments.

TAB, ATINGP, UT, Brown McCarroll, TCC, and PIC commented regarding proposed §60.2(f)(1).

TAB and TCC recommended that there be a distinction between "agreed orders and findings orders"

and that agreed orders should not be included in the compliance history formula. TAB gave as an

example the situation in which a company enters into an agreed order "as much to accelerate emissions reductions in advance of TNRCC adopting rules." ATINGP commented that violations in agreed

orders should be assigned less weight than violations in "orders of a tribunal after a full adjudication,"

basing this on the premise that a person "should not be penalized for finding a path that will bring a

quick and economical resolution to an enforcement action." ATINGP recommended that violations in

agreed orders should only be assigned point values twice those in NOV's. Similarly, UT recommended

that 1660 orders receive fewer points in the formula than findings orders, suggesting that if a major

violation in a findings order receives 100 points, the same violation in a 1660 order should receive 50

points. UT asserted that this approach would provide incentive for a regulated entity to agree to an

order. Additionally, TCC asserted that consent decrees should not be weighted the same as court

judgments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by

TCC. Brown McCarroll provided similar comments, asserting that violations in "no findings orders"

should have considerably less value than those in findings orders. TXOGA endorsed the comments

submitted by Brown McCarroll. PIC submitted "that violations in final court orders and consent

decrees should be weighted more heavily than violations in final administrative orders."

The commission modified the rule to distinguish between types of orders and types of court documents as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission points out that the example given by TAB is not an example of an enforcement order, and thus, orders entered as part of a state implementation plan (SIP) agreement are not included in compliance history.

Fort Worth COC, C&H, V&E, TAB, TXI, T&K, BP, Brown McCarroll, TXOGA, and TCC commented regarding proposed §60.2(f)(1). TCC stated that the inclusion of violations in NOVs for which scores are also added for violations included in orders or judgments "appears to create the circumstance where the issuance of an NOE (for which no points are added) would be preferable to the issuance of an NOV. Granted, the points for NOVs are small, this apparent inequity could be addressed by deleting NOVs that result in orders, judgments or decrees." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC.

TXOGA asserted that the rule "should not 'double count' violations unless there is evidence that the company is not making an effort to comply," stating that the proposed approach is not appropriate for operators who are making their best attempt to comply, as "{m}any violations simply cannot be corrected 'on the spot' of within several days of an inspector's visit." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA. Fort Worth COC, C&H, TAB, and TXI commented that the rule allows violations cited in an NOV, that are later included in a commission Order, to be counted twice. C&H and TAB asserted that the rule should state that the same violation, listed in both an NOV and any order or decree, can only be used once in the compliance history calculation. V&E expressed similar concerns, and stated that it concurs with TCC's recommendations.

As an alternative, V&E suggested that points be assigned to an NOV based upon the level of the violations contained in it, rather than assigning points for each violation in the NOV, thereby avoiding counting specific violations twice while recognizing the legislative directive to include NOVs. Brown McCarroll expressed similar concerns, and recommended that the following be added to the end of the first sentence in proposed subparagraph (D): "excluding such major violations that are also included in any final enforcement orders, court judgments, and consent decrees considered under paragraph (f)(1)(A) of this section." Brown McCarroll recommended the same approach to proposed subparagraphs (E) and (F). TXOGA endorsed the comments submitted by Brown McCarroll. T&K similarly asserted that the rule, as proposed, could result in not only double, but triple or even quadruple counting of a violation, as it moves from a self-disclosed violation, to an NOV, to an Executive Director's Preliminary Report and Petition (EDPRP), to a final enforcement order. As such, T&K recommended that the rule be clarified to reflect that violations listed in an EDPRP would not be included in the formula. T&K stated that it does not believe the commission is authorized by the statute to multiple counting of the same violation; but rather, the legislature's intention was to take into account, through the inclusion of NOVs, violations that do not proceed to enforcement and those violations contained in 1660 orders. BP asserted that by double-counting NOVs and orders, any person who disagrees with the NOV and avails itself of its due process rights is punished, and as such, recommended the elimination of any double-counting for purposes of this rule.

Commission records reflect that approximately 95% of all violations cited in an NOV are resolved prior to the need to initiate enforcement (or conversely, only 5% of violations cited in NOVs result in enforcement). An NOV provides a specific time period for the recipient to correct the violations. If all of the violations included are in fact corrected during that time period, then no

enforcement action is initiated. However, if all the violations are not corrected during the time period, then enforcement will be initiated. The commission has determined that it is appropriate to count those same violations in both the NOV and a subsequent order because the recipient was given an opportunity to come into compliance before enforcement was initiated and did not do so. It is also important to note that a violation noted in an NOV will receive a significantly lower point value than the same violation included in an order will receive. Additionally, a person may be able to demonstrate that an NOV was without merit, and in such cases, the specific violations cited in error will be removed from the compliance history and not counted toward site rating. The violations included in a Notice of Enforcement (NOE) letter or EDPRP will not be included in compliance history calculations, because those are the violations that, if confirmed, will appear in the commission order. In addition, there is no statutory mandate to include them in the compliance history. No changes have been made in response to these comments.

LSS commented regarding proposed §60.2(f)(1). LSS requested that self-reported NOV's not be included in the ratings formula as NOV's, but if included, LSS asserted that clarification is needed. Specifically, LSS provided, as an example, the situation where a wastewater permit requires operation of a continuous temperature recorder. LSS continued, "If the recorder fails to operate properly in the period between collection of the wastewater samples...that is an exceedance of the permit conditions and must be reported with the Daily Monitoring Reports (DMR)...Technically, this could be considered to be a self-reported violation, yet it is hardly indicative of a failure of a company's environmental program."

This comment is outside the scope of this rulemaking, as what constitutes an NOV was addressed in Phase I of the compliance history rulemaking concerning §60.1.

T&K and Chaparral commented regarding proposed §60.2(f)(1). T&K and Chaparral submitted essentially the same comment regarding the scope and use of self-reported violations as “notices of violation” under the proposed rules. In the preamble to Phase I, the commission stated that “NOVs” include self-reported violations that are submitted to the commission in various required reports, such as DMRs. T&K sought clarification of the agency’s intent to include such self-reported violations for two reasons. First, T&K argued that interpreting “NOVs” to include these self-reported violations is impermissibly broad. Had the legislature intended “notice of violation” to be a term of art different from its common usage, it would have included such a definition in the statute. It didn’t, and the commission cannot redefine “NOV” to have a meaning or subject matter different from the meaning the agency has uniformly applied in the past. Second, T&K argued that certain quoted passages in the preamble support the position that an NOV must be issued by the executive director to become part of a facility’s compliance history. In addition, T&K also asserted that some derivations that are self-disclosed by a regulated entity in these types of reports do not necessarily represent violations. As such, T&K recommended that only NOVs issued by the executive director should be included in the compliance history formula. In the alternative, T&K requested that the commission specifically clarify in the rule that self-reported violations in these types of reports will be included in the compliance history formula.

One of the components of compliance history listed in §60.1(c)(7) is “all written notices of violation, including written notification of a violation from a regulated entity.” This provision

specifically states that self-reported violations will be considered NOVs for the purposes of this rule. This is consistent with the legislature’s directive in TWC, §5.753(d), to include “notices of violation” as a component of a person’s compliance history. Nothing in TWC, §5.753(d), limits the agency’s consideration of “notices of violation” to only those notices that are issued by the executive director. It is appropriate for the commission to include self-reported violations in the category of “notices of violation” considered in the compliance history formula.

Fort Worth COC commented regarding proposed §60.2(f)(1). Fort Worth COC commented that there is a "double jeopardy" concern with, for instance, including as a component of compliance history a consent decree entered into prior to the compliance history rules. Fort Worth COC went on to say, "It seems inherently unfair, perhaps even illegal, to penalize the entity after the fact," when, if the entity had known at the time of negotiations that the decision would have impacts in the future, it might have made a different choice in legal action.

The commission responds that this comment is outside the scope of this rulemaking. The components of compliance history, as well as the timing and length of the compliance history period, were established in the first phase of the compliance history rulemaking. However, as noted in the proposal preamble to this rulemaking, there was a request for an opinion submitted to the OAG with regard to components of compliance history as promulgated under §60.1 (OAG Request Number RQ-0482-JC). The issue raised in the request for an opinion specifically asked “{w}hether it is proper or constitutional to construe the language of H.B. 2912, §18.05(i) to refer to notices of violation, enforcement orders, and other compliance history actions that are issued or occur prior to February 1, 2002.” The OAG issued Opinion No. JC-0515 on June 24, 2002. In

that opinion, the OAG determined “The provision of the Commission rule that establishes the time period for compliance history as five years before the agency’s regulatory authority is initiated or invoked, including compliance history before February 1, 2002, is consistent with section 5.753. The time period is also consistent with section 18.05(i) of House Bill 2912, an effective date provision applicable to the changes in the definition of compliance history made by section 5.753 and the rule implementing it.” Additionally, the OAG determined that “It is unnecessary to decide whether a regulated entity has a vested right under article I, section 16 of the Texas Constitution to have compliance history determined according to the law in effect when the relevant events took place. Even if such a right exists, the compliance history rule applies to programs designed to protect public health, safety, and welfare, and the Legislature is not precluded by article I, section 16 of the Texas Constitution from enacting retroactive statutes that are necessary to safeguard these interests.” As a result of this opinion, the commission will utilize historical NOV’s and enforcement actions issued during the five-year compliance period as provided for in §60.1. No changes have been made in response to this comment.

AquaSource, T&K, and Chaparral commented regarding proposed §60.2(f)(1). AquaSource stated that the rule should be clarified to reflect that one non-complying action will only count once, and gave as an example that an excursion of a permit limit should be counted only once, and not three times as a violation of the permit, of a rule, and of a statute. T&K and Chaparral provided similar comments, stating that for "purposes of the formula, the number of major, moderate or minor violations should equal the number of events of noncompliance."

The commission disagrees with the AquaSource comment that the rule requires amendment, but agrees with the concept that one non-complying action will only count as one violation, although there may be more than one legal basis of the violation. The commission also disagrees with T&K and Chaparral in that the number of events of noncompliance is a term utilized in the penalty policy and those events do not necessarily equal the number of violations. In the penalty policy, “events” means the number of times or the period of time that the violation occurred. Where the penalty policy is looking at number of events for each violation, the site rating for compliance history purposes is based on violations. As noted previously, a violation may be counted more than once in the compliance history formula. No changes to the rule have been made in response to these comments.

Plano commented regarding proposed §60.2(f)(1). Plano recommended that, rather than assign the complexity factors as proposed in §60.2(e) which are then utilized as a divisor in proposed §60.2(f)(1)(J), there should be a base point value assigned to each level of complexity. Specifically, Plano suggested that the formula be changed to: "(base complexity level points) - (violation points) - (investigations (> 1)) + (mitigation points) = total points," with the base complexity level points as 700, 600, or 500 for a complexity level of 5, 3, or 1, respectively. Plano further recommended modification to the point ranges in proposed §60.2(f)(2) based upon this formula.

The rule has been modified as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission received a number of comments suggesting various point systems or alternatives, and considered all of those comments in developing the new process. The new process includes the best of all of these

suggestions. The formula proposed by Plano does not take into account the repeat violator and chronic excessive emissions event issues that are required to be included by HB 2912.

T&K and Chaparral commented regarding proposed §60.2(f)(1). T&K and Chaparral stated that the commission "lacks authority to enhance the effect of repeat violator status by doubling the points added to the compliance rating if a company is a repeat violator." T&K and Chaparral added that the proposal appears to apply the doubling to any violations, even those wholly unrelated to past violations, and recommended that the rule clarify that the doubling only applies to a repeat of the same violation at the same facility or unit, not to any violation at any site owned or operated by one who has been classified as a repeat violator.

TWC, §5.754, specifically requires the commission to establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person, and to consider the significance of the violation and whether the person is a repeat violator. It is appropriate that the effect of being designated a repeat violator should be significant in terms of the person's site rating and resulting classification. This section of the rule has been modified as a result of other comments. The site will be assigned 500 points if it is a repeat violator rather than utilizing a multiplication factor as originally proposed. Based upon comments received, the commission has substantially modified the definition of repeat violation, which now requires two, three, or four major violations before receiving the repeat violator designation depending upon the criteria points for the site.

Huntsman commented regarding proposed §60.2(f)(1). Huntsman stated that the Phase II rules are "written so that violations at major sources will yield a disproportionately high total," adding that "chemical plants are complex, integrated operations that process a high volume of potentially hazardous material 24 hours a day, seven days a week, 52 weeks a year." Huntsman asserted that violations at a major source are more likely to lead to an NOV or enforcement action because the margin for error has to be smaller at large operations, and because major sources have more emission points and regulated facilities to be inspected. Huntsman further asserted that the proposed language for categorizing violations as either major, moderate, or minor and assigning them point values "is ambiguous and may have unintended result." By way of example, Huntsman asked whether ten violations or one would be faced by a site where, upon investigation, ten valves which have been tagged as leaking but have not been repaired are discovered? Huntsman specifically requested that commission seriously reconsider the proposed formula to "bring proportionality" into this phase of the rulemaking.

The commission agrees that major sources are more likely to have an NOV or enforcement action because of complexity and size, but does not believe that the assessment of major, moderate, or minor is ambiguous. Adopted §60.2(c) has been modified to clarify the terms "major," "moderate," and "minor." Adopted §60.2(d) has been modified to more appropriately evaluate whether a person is a repeat violator. Adopted §60.2(e) has been modified to account for differences in types of enforcement actions and the resulting point values.

The rule has been modified to take complexity and size into consideration in the context of repeat violators. The adopted rule specifies the criteria to be utilized to determine repeat violator status in adopted subsection (d)(2) - (6). As proposed, §60.2(e) addressed site complexity, and was based

on a site's primary SIC code. Because the commission agrees with the commenters that this approach did not adequately reflect the complexity of sites or reflect the requirements of the statute, proposed subsection (e) has been deleted, and replaced with adopted §60.2(d)(2), which now addresses the assignment of points to a site based upon complexity. As adopted, complexity is based upon the number and types of permits issued to a person at a site. The commission recognizes that there are many different ways to deal with complexity, and appreciates the suggestions provided by the commenters. The commission has determined, based on examples provided by the commenters, that the number and types of permits issued to a site are a better determinant of complexity because they more accurately reflect the level of regulation and thus, the comparative number of requirements that must be met, and, therefore, modified the rule accordingly.

§60.2(e)(1)(A) (proposed as §60.2(f)(1)(A))

The commission has modified the text in adopted §60.2(e)(1)(A) by: making distinctions between the types of enforcement actions and as a result, broadening the associated point values assigned to major violations contained in those actions from proposed 100 points for all, to a range of 160 points to 80 points; breaking the distinctions out into six clauses; deleting the text "as specified in §60.1(c)(1) and (2) of this title" for stylistic consistency between this and other subparagraphs; and deleting from subparagraph (A) the text, "If the person is a repeat violator, then this number shall further be multiplied by 2" because the treatment of repeat violators within the formula has been modified and moved to its own subparagraph. These changes were made to reflect the relative seriousness of the enforcement action conducted by the state. The commission is adopting modifications to the rule to further distinguish between adjudicated orders and non-adjudicated

(expedited) orders, and also to distinguish between expedited orders containing a denial of liability (those issued under TWC, §7.070 (1660 orders)), and those without a denial of liability. The commission utilizes legal action through the courts for persons violating commission orders, in situations where injunctive relief may be necessary, and when, in the executive director's judgment, higher penalties are warranted. Thus, violations in court actions are assigned higher points. The point values for violations in adjudicated orders and judgments are the same. The commission considers the most severe form of enforcement to be criminal prosecution and has assigned the highest point value for violations included in criminal convictions. The rule has been modified from proposal to provide for a wider range of points to reflect the differences in the variety of enforcement actions as well as to provide incentives for a person to settle enforcement cases expeditiously. The commission has determined that it is appropriate to provide such distinctions between enforcement resolution types and their associated point values, because it more accurately reflects distinctions between the different "levels" of enforcement actions available to the commission and the severity of the violations included in those actions.

AECT, V&E, TIP, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(f)(1)(A). AECT asserted that, due to the over-broad classification of major violations to include all HPVs, coupled with the definition of repeat violator as proposed without any reference to the complexity of a site, 100 points for each major violation is too stringent, as is the proposal to double the number for a repeat violator. TIP made a similar comment. V&E suggested, for clarification, that "at the site in question" be added after "repeat violator." Garland, San Antonio, GEUS, and SMEC commented that consideration should be given to reducing the point value assigned to violations in existing enforcement orders. Garland, San Antonio, GEUS, and SMEC based this on their assertion

that one major violation automatically categorizes a site as a poor performer under the proposed point ranges, and added that "this is of even more concern when older, existing orders are included in the initial compliance history calculations."

The commission responds that proposed §60.2(f)(1)(A) has been revised as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission retained a sliding scale for the points based upon the level of enforcement (e.g. NOV, order, court judgment) because it more accurately reflects distinctions between the different "levels" of enforcement actions available to the commission and the severity of the violations included in those actions. Section 60.2(e)(1)(J) has been modified to provide that an additional 500 points will be added to a repeat violator. It does not double the repeat violator score. Existing enforcement orders should not be assigned fewer points. One major violation will not automatically categorize a site as a poor performer because of the divisor in adopted §60.2(e)(1)(L). As adopted, §60.2(e)(1) clarifies that the violations used in the formula relate to the specific site.

§60.2(e)(1)(B) (proposed as §60.2(f)(1)(B))

The commission has modified the text in adopted §60.2(e)(1)(B) by: making distinctions between the types of enforcement actions and as a result, broadening the associated point values assigned to moderate violations contained in those actions from proposed 60 points for all, to a range of 45 points to 115 points; breaking those distinctions into five clauses; and deleting the text "as specified in §60.1(c)(1) and (2) of this title" for stylistic consistency between this and other subparagraphs. The point range rationale for §60.2(e)(1)(B) is the same for that at §60.2(e)(1)(A).

§60.2(e)(1)(C) (proposed as §60.2(f)(1)(C))

The commission has modified the text in adopted §60.2(e)(1)(C) by: making distinctions between the types of enforcement actions and as a result, broadening the associated point values assigned to moderate violations contained in those actions from proposed 20 points for all, to a range of 15 to 45 points; breaking the distinctions out into five clauses; and deleting the text “as specified in §60.1(c)(1) and (2) of this title” for stylistic consistency between this and other subparagraphs.

The point range rationale for §60.2(e)(1)(C) is the same for that at §60.2(e)(1)(A).

§60.2(e)(1)(D) (proposed as §60.2(f)(1)(D))

The commission has modified the text in adopted §60.2(e)(1)(D) by: deleting the text “as specified in §60.1(c)(7) of this title” for stylistic consistency between this and other subparagraphs; and deleting from subparagraph (D) the text, “If the person is a repeat violator, then this number shall further be multiplied by 2” because the treatment of repeat violators within the formula has been modified and moved to its own subparagraph.

V&E commented regarding proposed §60.2(f)(1)(D), suggesting that, for clarification, "at the site in question" be added after "repeat violator."

Adopted §60.2(e)(1) has been modified to specify that the violations used in the formula relate to the specific site for which a classification is being determined, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(e)(1)(E) (proposed as §60.2(f)(1)(E))

The commission has modified the text in adopted §60.2(e)(1)(E) by deleting the text “as specified in §60.1(c)(7) of this title” for stylistic consistency between this and other subparagraphs.

§60.2(e)(1)(F) (proposed as §60.2(f)(1)(F))

The commission has modified the text in adopted §60.2(e)(1)(F) by deleting the text “as specified in §60.1(c)(7) of this title” for stylistic consistency between this and other subparagraphs.

§60.2(e)(1)(G) (proposed as §60.2(f)(1)(G))

The commission has deleted the phrase “as specified in §60.1(c)(1) of this title” from adopted §60.2(e)(1)(G) for stylistic consistency between this and other subparagraphs. Additionally, this subparagraph was modified to differentiate between convictions that are major and moderate as determined in §60.2(c)(1) and (2) as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

OxyChem and Oxy Permian commented regarding proposed §60.2(f)(1)(G). OxyChem and Oxy Permian stated that, in general, they are in agreement with most of the factors, but they believe that the score for criminal convictions is very low. They provided a scenario in which a person with a criminal conviction could still receive a classification of average performer at a site, and went on to say that it may even be possible, based on the rule as proposed, for someone with a criminal conviction to receive a classification of high performer. OxyChem and Oxy Permian suggested as one possible alternative raising the point value assigned to a criminal conviction to something higher than 500 points in order to portray extreme noncompliance. OxyChem and Oxy Permian suggested as an alternative deleting proposed §60.2(f)(1)(G) and adding a new §60.2(f)(2)(D) as follows: “(D) If any site, regardless of its

compliance rating score, has had a criminal conviction during the review period, it will automatically be categorized as a poor performer described in §60.2(f)(2). The poor performer rating will be changed to that exhibited by the system, provided that the site has been either a high performer in the two consecutive years subsequent to the criminal conviction, or the site has been at least an average performer for the three consecutive years subsequent to the criminal conviction. If a site is unable to modify its rating during the review period in which the criminal conviction occurred, it will remain a poor performer until the term of the applicable review period expires, after which, its rating will be as described in §60.2(f)(2).”

Criminal convictions are an extremely serious issue as recognized by subsection (e)(1)(G), which requires that the number of counts in criminal convictions be multiplied by either 250 or 500 (depending on the kind of convictions). This could result in a score significantly in excess of 500. Automatically moving a person with a criminal conviction into the poor performer classification focuses only on this one issue and does not allow consideration of the entire compliance history for that person. The statute requires the commission to establish standards for the classification of a person’s compliance history. With this rulemaking, the commission has a compliance history evaluation mechanism and has assigned a point value to criminal convictions that indicate the serious nature of that specific compliance history component. In the site rating formula, criminal conviction points will drive that person toward the poor performer category; however, the final site rating will reflect the person’s entire compliance history at the site in question over the compliance period. The revised formula recognizes that there are distinctions between one criminal conviction and another and applies point values to reflect those distinctions.

AquaSource, V&E, WM, TAB, TXI, ExxonMobil, Brown McCarroll, TCC, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(f)(1)(G). AquaSource stated that, for the reasons it enumerated in its comments regarding proposed §60.2(c)(1)(F), it believes that the criminal convictions with a point value of 500 should be limited to "willful or intentional felony convictions sought and obtained by either the Task Force or a state agency." AquaSource contended that law enforcement is variable across the state, and additionally, it would not be fair to penalize a person who utilized seasonal employees or independent contractors whose convictions did not reflect the "employer's willingness or ability to comply with applicable law." Additionally, AquaSource stated that misdemeanor criminal convictions should be classified as to "actual and documented harm to human health and the environment." Similarly, V&E, WM, Allied, BFI, TxSWANA, and NSWMA suggested the modification of the text from "The number of counts in all criminal convictions" to "The number of major violation counts in criminal convictions." Further, V&E, WM, Allied, BFI, TxSWANA, and NSWMA suggested the addition of a new subparagraph (H) to read, "The number of moderate violation counts in criminal convictions as specified in §60.1(c)(1) of this title shall be multiplied by 100." V&E, Allied, BFI, TxSWANA, and NSWMA asserted that the suggested changes would recognize that criminal conduct varies widely, and convictions can result from a range of relatively minor violations to a much greater deviation of the law. WM, TAB, and TCC recommended that the commission distinguish between misdemeanor and felony counts, and ExxonMobil suggested that due to the severity of the penalties imposed by the proposal, only felony conviction brought by the commission, and perhaps EPA, should be included. V&E further asserted that its suggested changes and additions to proposed §60.2(c)(1)(F) and (2)(G), and (f)(1)(G) and (H) recognize that "many environmental crimes are not classified as misdemeanors or felonies." OxyChem and Oxy Permian,

Huntsman, and BP supported the comments submitted by TCC. Brown McCarroll recommended that this subparagraph be modified to read:

“The number of counts, which include a demonstrated degree of mental culpability, in all felony criminal convictions will be multiplied by 500. the number of counts, which include a demonstrated degree of mental culpability, in all misdemeanor criminal convictions will be multiplied by 200. Such counts where there is a demonstrated degree of mental culpability will be determined by the Executive Director on a case-by-case basis in light of the seriousness of the evidence presented at trial or the underlying facts that led to a criminal conviction.”

TXOGA endorsed the comments submitted by Brown McCarroll. TXI stated that "the mere fact that a count is included in a criminal conviction does not necessarily mean that it should be subject to the major multiples proposed" in this subparagraph, adding that the *mens rea* requirement that is generally applied to criminal cases is not necessarily required in environmental cases.

In response to this comment, §60.2(e)(1)(G) has been modified so that less serious criminal offenses will be assessed 250 points as opposed to the 500 points previously proposed. The more serious criminal offenses will continue to be assessed 500 points per criminal count. The revised formula recognizes that there are distinctions between one criminal conviction and another and applies point values to reflect those distinctions. As a result proposed §60.2(f)(1)(G), adopted as §60.2(e)(1)(G), is revised to read as follows: “(G) The number of counts in all criminal convictions: (i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the

Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and (ii) under TWC, §§7.147 - 7.151, 7.154, 7.157, 7.159, 7.160, 7.162(a)(6) - (8), 7.163(a)(4), 7.165 - 7.167, 7.171, 7.177 - 7.181, and all misdemeanor convictions under the Texas Penal Code, TWC, THSC, or the USC shall be multiplied by 250.”

§60.2(e)(1)(H) (proposed as §60.2(f)(1)(H))

The commission has deleted the phrase “as specified in §60.1(c)(4) of this title” from adopted §60.2(e)(1)(H) for stylistic consistency between this and other subparagraphs.

MMM commented regarding proposed §60.2(f)(1)(H). MMM asked, with regard to the term "chronic excessive emissions events," what the definition of "excessive" is. The commenter further asked how this component will be factored into classification and rating.

The concept of what constitutes an "excessive emissions event" and a "chronic excessive emissions event" is being addressed through other rulemaking, and is therefore outside the scope of this rulemaking. However, once the applicable rulemaking is adopted and those terms "defined," any instances of chronic excessive emissions events will be noted and included as a component of compliance history, with each occurrence during the compliance period being multiplied by 100 and added to the total points for a site.

OxyChem and Oxy Permian, Reliant, AECT, TAB, TXI, ExxonMobil, TIP, and TXOGA commented regarding proposed §60.2(f)(1)(H). Reliant and AECT stated that two events should not be considered chronic; rather, Reliant asserted that chronic is typically defined as "marked by long duration or

frequent recurrence," while AECT asserted that it is typically defined as "marked by frequent occurrence." TAB commented that, since the term chronic excessive emissions events is not defined in the rule, it should not be subject to a multiplier. Additionally, TAB stated that "undoubtedly" such violations will be deemed major, and as such will already be counted in the formula under proposed subparagraph (A) or (D) of this paragraph. TXI provided comments similar to TAB's. CPS objected "to the use of any properly reported upset, maintenance, start-up or shut-down events or deviations under Title V as 'chronic excessive emission events.'" CPS stated that categorizing releases that occur under certain circumstances as "criteria for poor compliance" unjustly penalizes persons who properly maintain their equipment, and added that properly reported releases should not be held against a person's good compliance history. TXU supports the comments made by AECT. ExxonMobil commented that this provision should not be applied retroactively, but instead should only apply to events that occur after the rulemaking on chronic excessive emissions events is in effect. TIP provided a similar comment. ExxonMobil also expressed concern with the other rulemaking considering having as few as two occurrences in five years considered "chronic."

The definition of chronic excessive emissions events is outside the scope of this rulemaking.

Properly reporting an emissions event does not ensure that the release will not be considered excessive. The compliance history will include all unauthorized emissions that are not exempted under 30 TAC Chapter 101. The commission agrees that chronic excessive emissions events will be defined once rulemaking for Chapter 101 is completed, and will not apply retroactively to emissions events that occurred prior to the effective date of that rulemaking. In light of the statutory deadline, the commission is proceeding with incorporation of a point value for chronic excessive emissions events into this rule. In addition, the specific definition adopted will not

change the seriousness of an emissions event in terms of compliance history and the rule appropriately captures this concept.

TXOGA commented, regarding proposed §60.2(f)(1)(H), that the "definition of chronic excessive emissions event should link to same piece of equipment, same pollutant, same cause, etc.," adding that the term chronic implies recurring, but more than two or three times. TXOGA stated that impacts should be based on national ambient air quality standards violations, and that, in addition, "values above an effects screening level might require additional review but are not necessarily evidence of impact." Additionally, TXOGA asserted that "the definition ... in the pending Chapter 101 rules is biased against large, complex operators. In the statutory language for 'excessive emission event,' the legislature specifically directed the agency to consider the frequency of a *facility's* emissions events." TXOGA requested that the commission describe how they intend to address size and complexity issues in the Chapter 101 rulemaking. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

These comments are outside the scope of this rulemaking.

Valero, T&K, TIP, TCC, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(f)(1)(H). Valero and TIP expressed concern at the impact of chronic excessive emissions events on compliance histories, since the determination of what constitutes excessive is still to be determined. Because of this, Valero, TIP, and T&K assert that chronic excessive emissions events "cannot reasonably be incorporated into the site rating formula at this time" especially considering the potential for significant impact on the compliance history rating with the proposed 100 points. TCC stated that it

is impossible to comment on whether the scoring associated with this subparagraph is appropriate without knowing what "chronic excessive emissions events" are. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. Similarly, T&K asserted that including chronic excessive emissions events "is improper as such is not a component of compliance history under" TWC, §5.753(b). Furthermore, T&K stated that its understanding is that "the procedure for determining whether emissions events become 'excessive' or 'chronic' are not anticipated to be enforcement procedures, further supporting the argument that these should not become part of a facility's compliance history." T&K added that the events leading to a determination that something is a chronic excessive emissions event will be included as compliance history components independently anyway. As such, T&K recommended that this subparagraph be deleted from the rule, and repropose after the term "chronic excessive emissions events" is defined in the applicable rulemaking. Garland, San Antonio, GEUS, and SMEC asserted that a person will be classified as a poor performer with a single violation of a rule that is not yet adopted, and recommended that this provision should be "less aggressive" until such time as the other rule is adopted. Additionally, Garland, San Antonio, GEUS, and SMEC expressed concern that the point value proposed is the same as that for a major, adjudicated violation, and that since chronic excessive emissions events will be enforced by the agency, this will "result in a double assessment of significant points for the same event." As such, Garland, San Antonio, GEUS, and SMEC recommended that the point value for this provision be reduced from 100 to 25.

Chronic excessive emissions events are retained in the classification formula in terms of compliance history because they constitute a serious threat to the environment, and the rule appropriately captures this concept. THSC, §382.0216(j), requires the commission to 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 a person's compliance history. The statutory directive requires the commission to develop the manner in which it will include chronic excessive emissions events in its review of a person's compliance history. As indicated in the proposal, the executive director will not use and the commission will not consider this multiplier in classifying a site until the rulemaking related to emissions events is adopted later this summer. The legislature's directive in THSC, §382.0216(j), evidences its intent that the commission account for chronic excessive emissions events in this rulemaking.

§60.2(e)(1)(I) (proposed as §60.2(f)(1)(I))

Brown McCarroll commented regarding proposed §60.2(f)(1)(I). Brown McCarroll suggested that subparagraph (I) be modified to account for the age of violations, stating that such an "aging" factor would help prevent a component from 4 to 5 years ago from having the same effect on a site's rating as a recent component. In addition, the aging factor would highlight trends toward compliance or non-compliance, with the most recent history being the strongest indicator." TXOGA endorsed the comments submitted by Brown McCarroll.

With regard to a decrease in the point values, the commission determined during the first phase of the compliance history rulemaking that a five-year compliance history is appropriate and, that by establishing this period a distinction is made between "newer" and "older" violations. "Older" violations (i.e., outside the compliance period) will not be counted as part of a person's compliance history. "Newer" violations (i.e., within the compliance period) will be counted as part of a person's compliance history and will be assigned point values based upon their

designation as major, moderate, or minor violations, and upon what type of action they were included in. The formula adopted by the commission as stated in §60.2 includes as a divisor the number of investigations conducted over the five-year period. Through this divisor, the impact of an older compliance history component will be decreased over time as additional investigations are conducted, provided that additional violations are not identified in those later investigations. No change in the rule language is necessary in response to this comment.

§60.2(e)(1)(J) (proposed as §60.2(f)(1)(J))

TCCI and TCAP commented regarding proposed §60.2(f)(1)(J). TCCI expressed concerns that the complexity factor in proposed §60.2(e) and (f)(1)(J) will have an adverse effect on small businesses. While stating that it does not know how to solve this issue, TCCI stated that it "appears that a small polluter could be perceived as a worse company than a large company that pollutes," and is concerned with the inequities. Similarly, TCAP stated that it is concerned that the complexity factor allowing for a reduction of the compliance history score for a site designated as complex "may create inequities between large and small entities," and hopes that the rule will be written so as not to "set up implicit discrimination against entities who pollute less."

In response to comments, the commission has modified this subparagraph as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The modified formula in adopted §60.2(e)(1) no longer includes complexity in the divisor; complexity is now considered in determining repeat violator status.

PIC commented regarding proposed §60.2(f)(1)(J), stating, "With respect to the complexity factor component determined under §60.2(e), the statute provides only that complexity of facility operations is to be considered when determining whether the person is a 'repeat violator.' TEXAS WATER CODE §5.754(c)(2). Therefore, consideration of the complexity factor should be limited to determining whether a person is a 'repeat violator' under §60.2(d)."

In response to comments, this subparagraph, as proposed, has been deleted; this was discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Complexity is to be used in determination of repeat violator status.

§60.2(e)(1)(L) (proposed as §60.2(f)(1)(K))

The commission has relettered proposed subparagraph (K) due to the addition of a new subparagraph prior to it. Additionally, the commission has changed the phrase “{t}he result in subparagraph (J)” to “{t}he result of the calculations in subparagraphs (I) - (K)” in order to more clearly reflect that the formula flows from subparagraphs (I) to (J) to (K), even if the “if/then” conditions in subparagraphs (J) and (K) are not met; deleted the phrase “at the site” from the text of this subparagraph as a correction in response to a comment received; changed “investigations” to “an investigation” as a result of modifying the discussion of what an investigation includes for purposes of this chapter; and deleted the text “include record reviews and physical site evaluations” and replaced it with a more detailed discussion of what constitutes an investigation, for clarity and in response to comments received.

MMM commented regarding proposed §60.2(f)(1)(K). MMM commented that the "site rating is partially based on the number of visits by a regulatory agency," and asked whether all visits are considered the same. MMM asked whether there should be a weighted average based on type or complexity of the investigation.

All investigations are counted the same in the compliance history classification formula. The complexity or type of investigation performed is directly related to the complexity or type of facility/site being investigated. The number of investigations is utilized as a normalization factor, as obviously more investigations can result in more violations being documented, but it is not intended to reflect complexity. No change has been made in response to this comment.

AquaSource and TCC commented regarding proposed §60.2(f)(1)(K). AquaSource stated that it believes that all monthly DMRs should be included in a compliance history. AquaSource further stated that it is unclear regarding the preamble language which states that DMR evaluations will be counted as "investigations." TCC stated that it is unclear regarding what will constitute a record review, and as such requested that the commission provide specific examples in the preamble of record reviews that will count as investigations. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC.

The commission responds that a definition of "investigation" has been included in adopted §60.2(e)(1)(L). For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An

investigation may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information related to compliance status. Examples of record reviews that will be included under investigations are: wastewater discharge monitoring report evaluations; Title V permit certification evaluations; emissions event notification evaluations; reviews of reports submitted under 40 Code of Federal Regulations Parts 60, 61, and 63; reviews of reports submitted under 30 TAC Chapters 116 or 117; reviews of stack performance tests; and evaluations of continuous emission monitoring system or predictive emission monitoring system certifications.

V&E, DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, WM, NTMWD, TDA, TMRA, ExxonMobil, TIP, Allied, BFI, TxSWANA, NSWMA, Reliant, AECT, ATINGP, and Brown McCarroll commented regarding proposed §60.2(f)(1)(K). V&E and WM suggested that the phrase "and each environmental audit notice sent to the agency pursuant to the Texas Environmental, Health, and Safety Audit Privilege Act, *Tex. Rev. Civ. Stat. Ann. art 4447cc(Vernon's)*" be added to the end of the proposed language. TMRA stated that it believes that environmental audits should be "given more express positive treatment in the site rating formula in order to maximize" incentives to conduct environmental audits. DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF stated that including audits as investigations would encourage the regulated community to conduct such audits, leading to improved compliance. They further suggested that a reasonable limit could be placed on the number of audits which could be counted as investigations. V&E, NTMWD, TMRA, TIP, ExxonMobil, Reliant, AECT, ATINGP, and Brown McCarroll also stated that "investigations" should include those conducted by the EPA, as well as other environmental regulatory agencies whose data is utilized in compliance history. Allied, BFI, TxSWANA, NSWMA, TMRA and TIP suggested that

investigations conducted by the Railroad Commission of Texas (RRC) should be included because these investigations could lead to TNRCC enforcement and could impact a site's compliance history.

NTMWD also stated that other types of record reviews should be added to the list provided in the proposal preamble, including, but not limited to: "quarterly groundwater monitoring reports, quarterly landfill gas monitoring reports, biomonitoring reports required pursuant to TPDES permits, and annual pretreatment program reports required pursuant to TPDES permits." Additionally, NTMWD asserted that there should be a process identified to allow the regulated community to request that additional reports be added to the list, which could be maintained on the commission's website. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration." TIP also asserted that because investigations vary in length from a matter of hours to a week or longer, the length of investigations should be considered as well.

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The preamble for the adoption of §60.1 specifically stated that NOV's issued by EPA are not compliance history components. Use of the fact of the investigation without allowing use of the information gleaned through that investigation would not be equitable. RRC is not an agent of the executive director; therefore, results of investigations conducted by that agency will not be included in compliance history under this rule. NTMWD listed additional good examples of reports that are typically reviewed upon receipt by the agency. If such a review is conducted, it will be counted as an investigation. The commission disagrees with the TIP suggestion that the length of an investigation should be considered in this subparagraph. The complexity or type of investigation performed is directly related to the complexity or type of facility/site being

investigated. The number of investigations is utilized as a normalization factor, as obviously more investigations can result in more violations being documented, but it is not intended to reflect complexity.

A wide range of investigations will be recognized and considered by the agency as part of the formula. The range and number of investigations will allow sufficient consideration of a site's overall compliance status without the addition of a further weighting factor based on the time spent to conduct an investigation.

Reliant, AECT, ATINGP, Brown McCarroll, TXOGA, AeA, TIP, ExxonMobil, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(f)(1)(K). Reliant, AECT, ATINGP, and Brown McCarroll agreed with the proposal that the number of investigations and record reviews be included in the divisor of the formula. Reliant, AECT, and Brown McCarroll suggested the following record reviews also be included: Title V deviation report evaluations; reviews of emissions inventories; CEMS evaluations and allowance tracking reports under the Acid Rain Program and similar programs; storm water discharge monitoring report evaluations; Toxic Release Inventory report evaluations; Comprehensive Environmental Responsibility, Compensation, and Liability Act (CERCLA)/Emergency Planning and Community Right-to-Know Act (EPCRA) release notification evaluations; and evaluations of monthly and annual waste receipt summaries submitted under 30 TAC Chapter 335. Brown McCarroll also included several more types of record reviews, including: TNRCC waste classification audits; UIC reports under §331.65, such as completion report evaluations, injection operation quarterly reports and/or monthly report evaluations, etc.; UST report evaluations under §334.10; industrial and hazardous waste reporting evaluations under §§335.71, 335.73, 335.113, 335.115, 335.117, 335.153,

335.155, and 335.164; financial assurance submittal evaluations; and report evaluations required under permits or other types of operations/authorizations. Brown McCarroll asserted that the list of record reviews should be "non-exclusive." TXOGA endorsed the comments submitted by Brown McCarroll, and additionally included in its list the "number of parameters in each DMR." Furthermore, TXOGA and ExxonMobil asserted that the text should be modified to read "for the site" instead of "at the site" in order to keep from limiting record reviews to those conducted at the site. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA. AeA stated that if the number of investigations is kept in the formula, it requests clarification of the term "investigation," stating that as proposed, it rules out investigations that are not conducted at the site, thereby ruling out record reviews. TIP made a similar comment. Similarly, Allied, BFI, TxSWANA, and NSWMA recommended changing "at the site" to "relating to the site." ATINGP more generically stated that "certain record reviews of self-reported data should also be included in this definition." AECT supported including TNRCC waste classification audits in the list of record reviews which should be considered investigations. TXU supported AECT's comments.

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission is not limiting investigations to a specific list of record reviews because the definition adopted in §60.2(e)(1)(L) states that an investigation is any evaluation made by the executive director or the executive director's staff or agent to determine compliance status. The commission does not agree with the TXOGA comment that investigations should include the number of parameters in each DMR. Review of a DMR will count as a single investigation

because it is a single report. The commission agrees with TXOGA that record reviews relate to a site, whether that review is conducted on or off the site.

Huntsman commented regarding proposed §60.2(f)(1)(K). Huntsman stated that the number of days an investigation lasts should define the numeric value assigned to a scheduled investigation, including any follow-up meetings. Huntsman asserted that the following should also be included as investigations: annual and quarterly effluent sampling reports required by both state and federal clean water legislation; all state, federal, and local reports, if the site is connected to a POTW as an Industrial User; annual waste summaries and other reports required by state and federal laws regulating hazardous waste; reporting requirements under the Toxic Substances Control Act, as well as separate reports to the United States Nuclear Regulatory Commission (NRC) under CERCLA; and the number of emission points on the site's annual emission inventory, because each emission point requires its own discrete set of emission calculations. With regard to this list, Huntsman also believes it should be included in the rule, and not merely in the preamble to the rule. Next, Huntsman expressed "concern with the use of 'review' or 'evaluation' as a trigger for counting an activity," because a company would get no credit for a complete and timely submission of the required reports if the agency does not have time to review them, and believes the rule should be revised to give credit for completion of such reports. Finally, Huntsman suggested that "any investigation triggered by a site's self-reporting should be double-counted to reflect the site's role in bringing the violation to the attention of the Agency."

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission determined not to list specific investigations in this subparagraph, but

included a definition of the term “investigation.” Submittal of a required report is not equivalent to an investigation. An investigation is an *evaluation* of compliance, and it is the evaluation of compliance that is significant because that is when the assessment of compliance occurs.

Additionally, not all the reports listed in the Huntsman recommendation, for example, reporting requirements under the Toxic Substances Control Act, are assessed by agency staff or agents, and thus are not appropriate to include in the site rating. The commission disagrees that self-reported violations should be double-counted, because they are only evaluated one time. In addition, the commission has adopted changes to the classification formula to give positive credit to sites that disclose violations under the Texas Environmental, Health, and Safety Audit Privilege Act and has added to the mitigating factors to allow for consideration of other self-reported violations not otherwise required to be self-reported.

T&K, ExxonMobil, Chaparral, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(f)(1)(K). T&K and Chaparral suggested that the definitions all be put into a definition section at the beginning of the chapter. Additionally, T&K and Chaparral requested that "investigations of citizen complaints" be added to the rule. T&K and Chaparral also stated that it supports the interpretation of record reviews as provided in the proposal preamble, but stated that it should be added to the rule for clarity as a separate definition. T&K and Chaparral further asserted that the following should be included in the definition of record reviews: regional review of upset/maintenance/emission events reports, deviation reports, discharge monitoring reports, NSPS excess emission reports, quarterly COMs reports, Annual Compliance Certifications, MACT notifications, and any other report which the TNRCC reviews for compliance issues." ExxonMobil asserted that the list of record reviews included in the proposal preamble "for the most part do not recognize other media regulations such as waste."

T&K and Chaparral asserted that "conducted at the site" should be deleted from the first sentence of proposed subparagraph (K), as "most 'record reviews' and many citizen complaint investigations are not conducted at the site." Allied, BFI, TxSWANA, and NSWMA stated that they believe the following reports involve reviews that can give rise to enforcement, and should therefore be included in this rule or preamble as record reviews: Landfill Gas Monitoring Reports; Groundwater Monitoring Reports (both Assessment and Detection Monitoring); Alternative Daily Cover Reports; Title V deviation reports; Emissions Inventories; Storm water Discharge Monitoring Reports; CERCLA/EPCRA Release Notifications; and TNRCC reviews of citizen-collected evidence submissions under 30 TAC §70.4. Allied, BFI, TxSWANA, and NSWMA added that they do not believe that this list should be considered "exclusive;" rather, they think there should be a mechanism for the regulated community to recommend additions to the list of "recognized record reviews," which could be available on the agency website and updated periodically.

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), as been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. T&K, Chaparral, Allied, BFI, TxSWANA, and NSWMA have listed additional good examples of reports that are typically reviewed upon receipt by the agency. If such a review is conducted, it will be counted as an investigation. The commission notes that CERCLA/EPCRA Release Notifications are not TNRCC requirements per se; however, agency rules do require similar types of reports which would count when reviewed. Additionally, citizen collected evidence submissions do not count as investigations because the individual submitting the evidence is not the executive director's agent. The commission determined not to list specific investigations in this subparagraph, but included a definition of the term "investigation." Finally, the commission

notes that it has specifically excluded investigations of citizen complaints from the definition of “investigation” for purposes of this chapter. This was done in order to keep complaint investigations from unfairly improving a site’s classification rating, as discussed in more detail previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Regarding proposed §60.2(f)(1)(K), TMRA provided a list of additional reports it believes should be included as investigations. TMRA explained that several of the reports included in its list are filed with either the RRC or the TDH "pursuant to the requirements of RCT and TDH permits and regulations but the information included in those reports exposes TMRA members," under TNRCC MOUs with these agencies, "to potential TNRCC enforcement." TMRA further asserted that the rules need to address how many record reviews a facility will be given credit for if it is equipped with CEMS or COMS. TMRA stated "that the final rule and preamble should recognize a far greater number of inspections at sites equipped with CEMS/COMS," as they monitor emissions continuously, and as a result are likely to result in a greater number of documented violations. TMRA stated that it believes CEMS/COMS reports should "qualify as at least weekly inspections to provide an adequate off-set to the significantly increased risk of violation detection." Finally, TMRA recommended that the commission provide for a process whereby the regulated community can verify the number of record reviews that will be counted towards compliance history and suggested that additional reports be added to the list, and that such a list could be maintained and updated on the agency's website.

The commission responds that proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO

COMMENTS section of this preamble. The commission decided not to list specific investigations in this subparagraph, but included a definition of the term “investigation.” The only investigations that will be included in the site rating are those that are conducted by the executive director or the executive director’s staff or agent. RRC and TDH are not agents of the executive director. Normally, one record review will be conducted on each CEMS report submitted, although there may be times when a record review consists of the evaluation of more than one CEMS report. The commission disagrees that CEMS/COMS reports should qualify as at least weekly investigations because the investigation is the actual evaluation of the monitoring data to determine compliance.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(1)(K). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the proposal omits "one of the most common types of investigations conducted at agricultural operations - investigations resulting from neighbor complaints." The commenters asserted that "investigations which determine that the neighbor complaint did not justify a notice of violation or other types of further action by TNRCC should be documented and included in the count of 'investigations' so as to accurately reflect all investigations." The commenters also asserted that annual soil sampling on CAFO land application areas should be included as investigations, and recommended that "and each annual soil sampling of land application areas" should be added to the end of the text of this subparagraph. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission disagrees that investigations resulting from neighbor complaints should be included in the number of investigations in the denominator of the site rating formula, and has modified the definition of investigation set forth in adopted §60.2(e)(1)(L) accordingly to exclude these types of investigations. The commission has made this modification in order to keep complaint investigations from unfairly improving a site's classification rating, as discussed in more detail previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, the commission disagrees that annual soil sampling of land application areas should be counted as an investigation, but rather any agency review or evaluation of that soil sampling would be counted as an investigation.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(1)(K). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the commission must ensure that record reviews that do not reveal violations are documented and memorialized so as to be included in the compliance history computation. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission agrees with this comment, and intends on implementing the rule in this manner. No changes to the rule have been made in response to this comment.

Plano, TAB, CPS, LSS, TIP, TXOGA, TCC, AeA, and ExxonMobil commented regarding proposed §60.2(f)(1)(K). Plano expressed concerns that the formula appears to penalize persons if they do not have enough investigations to divide into the total points, and added that the proposed system would actually benefit poor performers and hurt high performers. Plano and LSS stated that the reduced

number of investigations resulting from the implementation of an EMS serves as a further disincentive, based on the proposal that the number of investigations be used in the denominator of the formula.

TAB, TIP, TCC, and TXOGA made similar comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC. Similarly, CPS recommended that this portion of the formula be deleted. AeA further expressed concern that this aspect of the formula "significantly reduces the value of participating in the EMS program," due to the reduction of investigations provided as an EMS incentive. ExxonMobil provided similar comments regarding EMSs.

The commission disagrees that the formula penalizes persons “if they do not have enough investigations.” As adopted in §60.2(e)(1), the number of investigations is the only divisor utilized in this formula because this component allows the site rating to be normalized so that sites may be compared with one another based upon the number of opportunities for violations to be documented. The commission notes that high performers will not necessarily receive fewer investigations based on the classification. High performers will still be required to submit, as applicable, DMRs, deviation reports, or other required reports that are submitted monthly, quarterly, or annually. Further, all sites will be subject to investigations in response to complaints in accordance with the agency’s complaint response policy. With respect to compliance investigations not triggered by complaints, the commission may choose to direct its resources toward those facilities with a poorer compliance record. Poor performers may receive additional investigations, and will receive unannounced investigations. The commission disagrees that the formula provides a disincentive for entities to implement an EMS, because a major reason for implementing an EMS is to avoid violations in the first place. Additionally, the rule does give

credit for implementation of an EMS in either adopted §60.2(e)(1)(M) or (3)(A)(ii). No change in the rule language is necessary in response to this comment.

Plano and AeA commented regarding proposed §60.2(f)(1)(K). Plano requested clarification regarding the definition of "investigation" in this section, specifically with regard to whether an investigation refers to State-only investigations and/or record reviews or also includes local investigations and/or record reviews. Similarly, AeA recommended that this term exclude investigations prompted by complaints or compliance concerns. However, AeA expressed concern with the use of the number of investigations in the formula at all, as it appears to "reward those sites that are most often investigated."

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. A definition of "investigation" has been included in adopted §60.2(e)(1)(L). For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaint. An investigation may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. The commission agrees with AeA's position that investigations prompted by complaints should not be considered investigations under this rule. As discussed in more detail previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, although complaint investigations do evaluate compliance, they are generally limited in scope to only the issue which was the subject of the complaint. The commission has determined that to include complaint investigations in the denominator of the site rating formula

could inappropriately improve a site's rating and, therefore, has excluded complaint investigations from the definition of "investigation" under adopted §60.2(e)(1)(L).

TCAP commented regarding proposed §60.2(f)(1)(K). TCAP stated that small businesses typically have few or no investigations, and as such suggested that this factor be modified to "1 + number of investigations."

Adopted §60.2(e)(1)(L) has been modified to include the number of investigations conducted during the compliance period plus one. This serves a two-fold purpose. First, it provides some cushioning for those sites which may not be investigated very frequently. Second, it ensures that the denominator of the formula will not be zero, which is mathematically incorrect.

PIC commented regarding proposed §60.2(f)(1)(K). PIC stated that it objects to the use of the number of investigations at the site during the compliance period as a divisor in the formula. PIC added, "The statute does not require consideration to be given to the number of investigations. Moreover, even if some consideration of the number of investigations is reasonable, using the number of investigations as yet another divisor has the potential to vastly reduce the site rating in an unreasonable way. This is particularly true in the case of follow-up investigations used to determine whether violations previously documented continue to exist or have been properly addressed. Regardless of the outcome of the follow-up investigation, it does not seem reasonable to reduce the site rating by a factor based on this follow-up inspection that was needed only because of the site's initial violations(s)." Additionally, PIC asserted that this is also true in the case of complaint investigations, stating, "Under this formula, it seems that a site could actually benefit from receiving a complaint if the conditions complained of had

abated by the time the region investigator arrived at the site and no violations were documented. Even in cases where some minor or moderate violations were documented during the complaint investigation, the divisor is now increasing which could dramatically reduce the site rating that previously existed. Also, the rule's use of the number of investigations during the compliance period does not take into account whether there has been sufficient time for any violations documented during such an inspection to be pursued through NOV's, final orders, court judgments or consent decrees. In that sense, there seems to be no reasonable relationship between the numerator and the denominator of the formula."

The commission disagrees with the PIC position that the number of investigations should not be used as a divisor in the formula. As adopted in §60.2(e)(1), the number of investigations is the only divisor utilized in this formula because this component allows the site rating to be normalized so that sites may be compared with one another based upon the number of opportunities for violations to be documented. The commission acknowledges the issues raised by PIC related to follow-up investigations. However, it is only by conducting these investigations that the agency can confirm the current state of compliance at a site. A person should receive the benefit or consequences of such investigations as warranted by the situation. The commission agrees with PIC's concerns regarding complaint investigations and has excluded them from the definition of "investigation" as discussed in greater detail previously in the SECTION BY SECTION/RESPONSE TO COMMENTS section of this preamble.

§60.2(e)(1)(M)

V&E, TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding the addition of a new subparagraph in the formula. V&E suggested the addition of a new subparagraph that would read,

"The result in {proposed} subparagraph K of the paragraph shall be multiplied by 0.5 for a site that has an environmental management system that is qualified to receive regulatory incentives pursuant to Chapter 90." V&E asserted that "making certain positive components automatic will provide additional incentives to the regulated community to perform environmental audits and create environmental management systems" while meeting legislative intent and preserving the discretion of the executive director in evaluating compliance history components. TMRA, Allied, BFI, TxSWANA, and NSWMA provided very similar comments, but suggested a multiplier of 0.25.

The commission agrees that certified EMSs should receive positive points in the site classification formula. Because the commission has adopted Chapter 90, it is clear what components will be included and implemented in an EMS certified by the agency and therefore, the commission is comfortable with establishing a specific percentage reduction for these EMSs. The commission has adopted §60.2(e)(1)(M), as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission, however, adopted a multiplier of 0.9, resulting in a 10% reduction in the overall points for the site classification, because while the development and implementation of a system is important, it is the actual performance that is the most meaningful.

§60.2(e)(2) (proposed as §60.2(f)(2))

The commission adopts new §60.2(e)(2), proposed as §60.2(f)(2), concerning point ranges, which states that the executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification, as proposed in subparagraphs (A) - (C): fewer than

0.10 points, high performer; 0.10 points to 45 points, average performer; and more than 45 points, poor performer. The point ranges have been modified based upon use of the formula adopted in §60.2(e)(1) and evaluating data on a sample population of 2,736 sites in Texas. The sample population had 1,060 sites that were “average performer by default.” There were 830 sites that had zero points based upon at least one investigation. The highest point value was 500. All site ratings except the “average performer by default” were plotted and groupings were identified. There did appear to be a natural break at 0.10 point and that point value was selected as the division between high performers and average performers. On the high point value end of the graph, the groupings were not as distinguishable, but two break points were observable at 30 points and 60 points. Because there were two viable break points, the commission determined that the midpoint between them, or 45 points, would be a reasonable place to draw a line between the average performers and poor performers. The commission has evaluated compliance history for permitting and enforcement decisions for several years. The commission reviewed the data on the sample population and evaluated the specific sites that were grouped into each category. Based upon this considerable experience utilizing compliance history in its decisions prior to this rulemaking, the commission determined that the groupings were appropriate because the groupings were consistent with previous actions taken by the agency.

The average value of the average performer group based upon all the sites in that group is 3.01 points. In accordance with adopted §60.2(e)(1)(L), all sites with inadequate information to determine a site rating will be assigned a value of 3.01.

In the sample population, 33.26% of the sites would be high performers; 65.39% of the sites would be average performers; and 1.35% would be poor performers.

Points are assigned to the applicable components of a site's compliance history, and those points are applied to the formula. The executive director will then categorize a site's performance. The commission specifically invited comments on the point range proposal. The commission received several comments in response to this solicitation as to what point values to assign to each range. All comments are addressed elsewhere in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

The commission has modified the text of adopted paragraph §60.2(e)(2) from “{t}he executive director will assign the site a classification based upon the compliance history evaluation, utilizing the following ranges for each classification” to “{t}he executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification” in order to more clearly and accurately reflect what the classification is based on and how it is applied. The new language references paragraph (1) in order to be clear that the classification is specifically based upon application of the formula.

TXOGA and TCC commented regarding proposed §60.2(f)(2). TXOGA stated that it does not believe that a bell curve distribution is appropriate with regard to site classification. TXOGA asserted, "It is our understanding that the legislature intended this rule to delineate the bad actors rather than to penalize responsible operators by applying a 'label' through a 'forced distribution.'" The agency previously reported 94-98% compliance rates in TNRCC's 2001 enforcement report. Based on the agency's own study, we expect our industry to score favorably in the compliance history ranking, as well. Therefore, we anticipate an accurate compliance history ranking will score our facilities

favorably consistent with the agency's own inspection findings." TCC provided the same comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

The Annual Enforcement Report reflects a high level of compliance. The commission agrees with the commenters that a bell curve is not appropriate for compliance history classification. Based on the commission's experience with compliance history, most sites have an average environmental performance and the site classification ranges adopted in §60.2(e)(2) reflect this. The commission's evaluation of permit applicants for their potential ability to perform prior to issuing an initial permit helps minimize the number of persons in the poor category compared to the regulated universe.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 479 individuals commented regarding proposed §60.2(f)(2). TCE, LCVEF, DAR, SEED Coalition, TCONR, PC, and 477 individuals commented that the rule should be revised such that only legitimate "high performers" are rated as such. Another individual stated that this should be corrected prior to implementation of the rule. These commenters stated that the proposed rule results in too many sites being classified as high performers. Many commenters stated that a formula making it so easy to be classified as a high performer "will have no credibility with the public and will hurt those facilities that actually are high performers." Similarly, ACT commented that the proposed rule would "undermine the value of the process to the true high performers." ACT added that the proposal preamble did not provide a reasoned justification for this outcome. ACT asserted that according to the legislation, average performers should be those that generally comply with the law, while high performers should be those who do better than general

compliance. ACT stated that the "statutory language and intent can *only* be met with a qualitative classification scheme that leads to the following qualitative results: High performer (above-average - i.e. a few minor NOVs and no enforcement orders); Average performer (general compliance - i.e. a few isolated non-repeat violations with an enforcement order or two in the five-year period); and Poor performer (below average - i.e. repeat violators; more significant violations and more enforcement orders)." Additionally, ACT stated, "Again, the rules should seek to create a distribution similar to a bell shaped curve, with the vast majority of facilities that do what is generally required as being average performers, and reserving the high and poor performance label to those that deserve special consideration." TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT.

As discussed previously, forcing sites to a bell-shaped curve is not necessarily reflective of the true compliance status of the regulated universe. Based on the commission's experience with compliance history, most sites have an average environmental performance and the site classification ranges adopted in §60.2(e)(2) reflect this. The commission has modified the point ranges as a result of changing the formula in adopted §60.2(e)(1).

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(2). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF stated that the proposed point ranges "appear to be unrealistically low." The commenters based this on their assertion that a "person with a single major violation (in a final order, and with a complexity factor of one) is immediately placed into the poor performer category, and thereafter - for the next five years - would be subject to the entirety of the poor performer implications of compliance history," as would someone

with five minor violations in an enforcement order. The commenters expressed concern with the inclusion of NOV's issued on or after September 1, 1999, in classifying compliance history. The commenters stated, "in the past, the regulated community routinely resolved NOV's to avoid the costs of litigation, and persons were encouraged to settle NOV's by the Commission's penalty deferral policy, which was applied in the case of expedited settlements. Now, past NOV's, even those which were totally without merit, will become a part of a person's compliance history." The commenters also stated that they "have been unable to fully evaluate the impact of the proposed rule and associated point system on CAFOs or other regulated entities," because of the "vague and subjective nature of the classifications of violations as major, moderate or minor." As such, the commenters stated that they believe the threshold for poor performers is much too small, and should be more in the range of 500 points. TDA stated that the point ranges in the matrix appear to be arbitrary. Additionally, TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The OAG issued Opinion No. JC-0515 on June 24, 2002 which stated: "The provision of the Commission rule that establishes the time period for compliance history as five years before the agency's regulatory authority is initiated or invoked, including compliance history before February 1, 2002, is consistent with section 5.753. The time period is also consistent with section 18.05(i) of House Bill 2912, an effective date provision applicable to the changes in the definition of compliance history made by section 5.753 and the rule implementing it." Additionally, the OAG determined that "It is unnecessary to decide whether a regulated entity has a vested right under article I, section 16 of the Texas Constitution to have compliance history determined according to the law in effect when the relevant events took place. Even if such a right exists, the compliance history rule applies to programs designed to protect public health, safety, and welfare,

and the Legislature is not precluded by article I, section 16 of the Texas Constitution from enacting retroactive statutes that are necessary to safeguard these interests.” As a result of this opinion, the commission will utilize historical NOVs and enforcement actions issued during the five-year compliance period. As discussed in the adoption preamble for §60.1, if a person believes that a past NOV was issued without merit, that person may appeal to the regional management to review the NOV and factual situation. The threshold for poor performers has been modified due to modifications in the formula made in response to other comments.

T&K, ATINGP, Chaparral, and TCC commented regarding proposed §60.2(f)(2). T&K and Chaparral stated that the adopting of point ranges should be delayed until the rest of the use rule is implemented and a representative number of compliance history classifications have been run to demonstrate high, average, and poor performance. TCC stated that it is impossible to know if the point ranges are appropriate, because it is not possible for facilities to calculate their scores due to uncertainty regarding what the commission will be using in all of the factors. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. T&K and Chaparral added that they believe it "may be more reasonable to rank facilities as high, average or poor performers within the same complexity class." ATINGP asserted that the rulemaking is flawed, because the basis for the point ranges proposed is not adequately explained in the preamble or the rulemaking record.

The commission has modified and adopted §60.2(e)(2). Based on the commission’s experience with compliance history, most sites have an average environmental performance and the site classification ranges adopted in §60.2(e)(2) reflect this. A bell curve is not appropriate for compliance history classification as forcing sites to a bell-shaped curve is not necessarily reflective

of the true compliance status of the regulated universe. In addition, §60.2(d) has been modified so that complexity is used in the calculation of repeat violator status and is not used to group performers.

Plano and PIC commented regarding proposed §60.2(f)(2). Plano recommended that the point ranges be modified in conjunction with its recommendation to modify the formula, as discussed elsewhere in this preamble with regard to proposed §60.2(f)(1). Specifically, Plano suggested that the point ranges be 500 - 450 for a high performer, 449 - 250 for an average performer, and 249 - 0 for a poor performer, based upon the high performer rating beginning at the minimum based point level established for the lowest complexity level of 500 for a complexity level 1. PIC stated, "If, and only if, PIC's other comments regarding site rating score methodologies are followed, PIC makes the following corresponding comments regarding recommended point ranges for classification: less than 100 points - high performer; 100 points to 599 points - average performer; 600 points and above - poor performer."

Modifications to the site rating formula in adopted §60.2(e)(1) have been made, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Consequently, the point ranges used to establish a site's classification have been modified in adopted §60.2(e)(2). In addition, the complexity factor has been moved to the determination of repeat violator in §60.2(d).

§60.2(e)(2)(A) (proposed as §60.2(f)(2)(A))

The commission has changed the word "less" to "fewer" in adopted §60.2(e)(2)(A) for clarity.

§60.2(e)(3) (proposed as §60.2(f)(3))

The commission adopts new §60.2(e)(3), concerning mitigating factors, which states, “The executive director shall evaluate mitigating factors for a site classified as a poor performer.” This will allow the executive director to place a person’s site in a performance classification based not only on the actual points scored for the “negative” components, certified EMSs, and environmental audits, but also on other mitigating factors, as appropriate for the specific site. The purpose of adopted new §60.2(e)(3) is to allow the executive director to fully evaluate a person’s demonstrated commitment to environmental excellence at a site as part of the classification process.

The commission has modified the text from proposal of §60.2(e)(3) with the addition of “classified as a poor performer” to clarify that the mitigating factors only apply to sites which are classified as poor performer under adopted §60.2(e)(2). Additionally, the structure of subsection (e)(3) has been modified by moving the portion of proposed §60.2(f)(3) relating to reclassification of a site to subsection (e)(3)(A).

OxyChem and Oxy Permian commented regarding proposed §60.2(f)(3). OxyChem and Oxy Permian stated that they believe that all of the items referenced in proposed §60.2(f)(3)(A) (the positive components) should count positively towards a site's compliance history and are supportive of the commission's intent to allow voluntary programs to "play a part" in compliance histories. However, they expressed concern that even with these programs, it is possible that a site may not be a good performer, and as such, do not believe that it is incumbent on the executive director to base an upward adjustment of a compliance classification on the submittal of a letter of intent to conduct an environmental audit, or the presence of an EMS. OxyChem and Oxy Permian recommended rather

that, if a person believes that the compliance history classification for its site does not accurately reflect compliance at that site, and that its voluntary programs are high quality, then the burden of changing the rating belongs with the site rather than the executive director. OxyChem and Oxy Permian recommended that the language in proposed §60.2(f)(3) be modified to read: "(3) Mitigating factors. Sites may request that the executive director evaluate mitigating factors for the site. The executive director shall evaluate mitigating factors for the site and may reclassify the site based upon these factors. The mitigating factors include...." OxyChem and Oxy Permian stated that their recommended approach serves to: require the site to inform the executive director of its positive compliance programs and demonstrate that they are having a positive impact; compel others who do not participate in positive programs to undertake positive initiatives; and relieve the executive director of the potential to have to review hundreds or even thousands of site-specific programs.

The commission responds that §60.2(f)(3), adopted as §60.2(e)(3), has been modified to limit the use of mitigating factors to the evaluation of a site classified as a poor performer. The positive impact of an environmental audit is now considered under adopted §60.2(e)(1)(K). A notice of an intended audit will play a very small part in the compliance history; however, disclosures of violations will be more beneficial to a person who chooses to make such a disclosure assuming the disclosure is granted immunity from administrative or civil penalties. The commission placed audits and disclosures for which immunity is granted directly in the formula for which immunity is granted because it wanted to promote the use of these beneficial tools. EMSs may be considered under adopted §60.2(e)(1)(M) if certified by the agency, or under adopted §60.2(e)(3)(A)(ii) if not certified by the agency. A certified EMS may reduce a site rating by 10%, and it is anticipated that other types of EMSs would result in a less than 10% reduction. The commission believes that

it is appropriate to automatically evaluate mitigating factors for a site classified as a poor performer rather than require that person to make such a request due to the consequences required by statute of being in the poor performer classification.

PHA commented regarding proposed §60.2(f)(3). PHA suggested that the rule should provide a procedure for a person to submit information regarding any of the positive components. PHA asserted that the proposed rule acknowledges that such information originates with the regulated entity, and added that, "to give full effect to all aspects of compliance history," such information must be assimilated by the agency.

The commission responds that any person who desires to submit information regarding any of the positive components may submit their information to the Enforcement Division, MC-219, P. O. Box 13087, Austin, Texas 78711-3087. It is not necessary for the rule to establish a procedure for assimilation of such information, as the commission already has procedures for maintaining compliance information. The commission does have a complete record of all notices of audits and subsequent disclosures.

Plano, DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(3). Plano expressed concern that the rule does not require the executive director to reclassify a site when mitigating factors exist, and stated that without such a definite requirement, "there is no incentive for a facility owner to undertake mitigation efforts." Plano specifically cited as an example that it is "expensive and time-consuming to implement" an EMS, and as such, a person should be guaranteed that it will be counted, not merely considered. Plano, therefore, recommended

changing the word "may" to "shall" in this paragraph. Plano also asserted that mitigating factors should have an established number of points to be credited in the formula. DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the rule should provide specific point values for positive components to offset negative points. Without an objective point value for the positive components, the commenters asserted that the incentive to undertake the positive components is undercut. The commenters further added that the rule should provide a reward for "any prompt response and resolution of a compliance issue or NOV" through a reduction in the amount of the site rating in order to encourage prompt response. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission responds that positive points have now been included in adopted §60.2(e)(1)(K) and (M) for audits and certified EMSs, respectively. Additionally, adopted §60.2(e)(3)(A)(ii) includes other types of EMSs. The commission disagrees that the rule should require the executive director to reclassify a site when mitigating factors exist because the mere existence of any mitigating factor may not sufficiently offset the poor performance of that site. 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. Thus, the commission has retained the permissive language originally proposed. The commission does agree with DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF concerning the positive components of audits and EMSs. An objective point value has been added as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission has not made any changes concerning prompt response and resolution of a compliance issue or NOV,

because that is not a component of compliance history. However, prompt resolution may prevent the need for further enforcement action and therefore avoid the addition of points as a result of such action.

Brown McCarroll commented regarding proposed §60.2(f)(3). Brown McCarroll asserted that the proposal regarding mitigating factors is "too subjective and the rules should provide for a more predictable effect on site characterization," which would provide "concrete incentives." Brown McCarroll also stated that the commission "is charged with providing incentives for the use of environmental management systems and other methods of improving environmental performance" in TWC, §5.131 and §5.755. As such, Brown McCarroll recommended the following modification to proposed §60.2(f)(3):

“(3) Mitigating factors. The executive director shall adjust the site rating according to the following mitigating factors: (A) For each §60.1(c)(8) {Audit Privilege Act Notices and Disclosures} compliance history component for the site during the most recent two years of the compliance period, the site rating shall be reduced by 30 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (B) For each TNRCC-approved compliance history component specified in §60.1(c)(9) {Environmental Management Systems} currently implemented for the site, the site rating shall be reduced by 50 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (C) For each compliance history component identified in §60.1(c)(10) {voluntary on-site compliance assessment} for the site during the most recent two years of the compliance period, the site

rating shall be reduced by 30 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (D) For each compliance history component identified in §60.1(c)(11) {participation in voluntary pollution reduction programs} for the site during the most recent two years of the compliance period, the site rating shall be reduced by 20 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (E) For each compliance history component identified in §60.1(c)(12) {early compliance with or offer of a product that meets future stated or federal government environmental requirements} for the site during the most recent two years of the compliance period, the site rating shall be reduced by 20 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (F) A regional entity, all of whose other sites in the State have a high or average classification, who for the purposes of regionalization, purchased a site with a poor performer classification, the site rating shall be reduced by 50 points for a five-year period after purchase of the site; and (G) A person, all of whose other sites in the State have a high or average performer classification, who purchased a site with a poor performer classification, the site rating shall be reduced by 50 points for a five-year period after purchase of the site.”

TXOGA endorsed the comments submitted by Brown McCarroll.

The commission disagrees with these comments. Adopted §60.2(e)(3) has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The adopted rules now provide for specific positive points

for notices of intended audits, as well as disclosures of violation(s) for which immunity from administrative or civil penalties was granted, and certified EMSs; however, as adopted the rule retains the executive director's discretion for other types of EMSs, and other mitigating factors. 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 their relative importance and impact.

AquaSource and TIP commented regarding proposed §60.2(f)(3). AquaSource recommended the addition of a fourth and fifth category of mitigating factors. First, it suggested that the commission take into account the "capital commitment or amount of capital invested in attempting to reach compliance." AquaSource contended that it would prove to be a disincentive to commit such capital outlays if the commission does not provide for some recognition of it. Additionally, AquaSource suggested that the situation "where substantial progress has been made, but full compliance will still take more time" should be considered as a mitigating factor. TIP also recommended the addition of another mitigating factor "for companies that self report potential noncompliance outside of the Texas Audit Privilege Act." TIP asserted that this type of self-reporting "has a considerable positive impact on the environment and saves precious Agency resources," and further, "fosters a strong relationship between companies and regulators and should be encouraged to the greatest extent possible."

The commission disagrees that a mitigation factor based on the capital commitment or amount of capital invested in attempting to reach compliance should be added. Capital does not necessarily reflect compliance status and cannot always be independently verified. The commission does not believe that lack of this additional mitigating factor would prove to be a disincentive to the

purchase of poor performing sites because adopted §60.2(e)(3) already offers mitigation based upon such a purchase.

AquaSource suggested that partial compliance should be considered as a mitigating factor. The commission believes that partial compliance as it relates to purchasing and improving a poor performing site can be addressed by entering into a compliance agreement with the executive director at the time of purchase whereby a schedule for improvements and a return to compliance is specified. Compliance agreements do not count as part of a site's compliance history for site classification purposes. Such agreements do offer a provision to request an extension of time, if necessary, due to unforeseen circumstances. In these cases, the new owner will not be accruing additional violations as long as the new owner performs on the agreement. The commission has adopted §60.2(e)(3)(B), which states that when a person, all of whose other sites have a high or average performer classification, purchases a site with a poor performer classification or becomes permitted to operate a site with a poor performer classification and the person contemporaneously enters into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance, the executive director shall reclassify the site from poor performer to average performer with 45 points until such time as the next annual compliance history classification is performed. Further, the adopted rule states that the executive director may, at the time of subsequent compliance history classifications, reclassify the site from poor performer to average performer with 45 points based on the executive director's evaluation of the person's compliance with the terms of the compliance agreement. Because purchases of poor performing sites by average or high performing persons may have occurred prior to the effective date of this rule, the commission has adopted at §60.2(e)(3)(A)(iii) modifications to proposed §60.2(e)(3)(C) to

address this issue. Specifically, the modified language reflects that the executive director shall evaluate and may reclassify the site from poor performer to average performer when a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of the rule. Additionally, should a new owner enter into an agreed order with the commission, the new owner similarly would not be accruing additional violations for the issues addressed in that order as long as the new owner complies with the order.

The commission agrees with the TIP recommendation that noncompliance reported outside of the Texas Audit Privilege Act should be a mitigating factor because it recognizes that a site may perform other kinds of audits or self-evaluations that may be similar to environmental audits and provide the same benefits to the community. However, these audits or self-evaluations do not have the same conditions and requirements as environmental audits conducted under the Texas Audit Privilege Act, and thus, the commission has added these self disclosures in adopted §60.2(e)(3)(A)(iv) as a mitigating factor.

TCONR, ACT, and 472 individuals commented regarding proposed §60.2(f)(3). TCONR stated that the proposed rule, in requiring the executive director to evaluate mitigating factors, repeats the same "misstep" included in the Phase I compliance history rules, namely that the mitigating factors are not proper components of compliance history, are irrelevant, and are not authorized by HB 2912. ACT provided similar comments, adding that while such actions may imply a commitment to "environmental

excellence," they do not provide or constitute a measure of actual performance. However, ACT added that if the commission is going to consider these factors, it agrees with the approach of considering them in a qualitative sense, rather than quantitatively. TCONR asserted that the proposal gives the executive director discretion without providing any standards or guidance, and as such, opens the agency "to claims of discrimination in application of the rules and defeats the intent of HB 2912 to achieve a consistent and effective compliance history program." TCONR further stated, "The Phase II rules must make it clear that these 'mitigating factors' will not be used to downgrade the severity of violations, to conceal whether an entity is a repeat violator or move an entity from a 'poor performer' to an 'average performer' or from an 'average performer' to a 'high performer.'" To apply these components otherwise would penalize entities with actual good performance records and shield, as well as reward, repeat violators and poor performers." ACT provided very similar comments. TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT. Additionally, 471 individuals stated that the rule should not allow for the use of mitigating factors, because as proposed, the executive director is allowed to grant industries with bad records a status of average or high performer. One individual added that "this power in the hands of the ED is an invitation to bribery."

The commission responds that the mitigation factors are appropriate because they do allow the executive director to evaluate a person's commitment to environmental compliance. This provision, as adopted in §60.2(e)(3), is now limited to the evaluations of sites classified as poor performers. In some circumstances it may be appropriate to reclassify a site from poor performer to average performer if a program that substantially offsets the impact of poor regulatory

performance is implemented at that site. Mitigation requires the assessment of the specific situation and, therefore, flexibility is necessary.

Regarding proposed §60.2(f)(3), Fort Worth asserted that this paragraph should be modified to include as a new mitigating factor the situation in which a city has established a superior SSO prevention program. Fort Worth stated that this is appropriate because many SSOs "are preventable through use of an aggressive I&I reduction and line maintenance program such as that established by Fort Worth," and as such, the commission should only penalize a city for SSO events when the city does not have such a program in place.

The commission disagrees with this comment. The complexity of maintaining SSOs is already addressed in adopted §60.2(d)(2) concerning complexity of the site. No changes have been made to the rule in response to this comment.

ATINGP commented regarding proposed §60.2(f)(3). ATINGP stated that it supports the mitigating factors as proposed in the rule. Further, ATINGP recommends that the "white knight" provision be expanded "so that it applies to acquisitions that predate the effective date of the rules." ATINGP asserted that, if the OAG opinion referenced in the proposal preamble determines that the inclusion of components predating the effective date of the statute or the rules is appropriate, then "the natural gas pipeline industry will be unfairly impacted" because "many acquisitions and consolidations of natural gas pipelines has been occurring within the industry over the past decade." ATINGP expressed concern that many persons will be held accountable for compliance histories for which they are not responsible.

As such, ATINGP suggested that the "white knight" provision be expanded such that it applies to acquisitions completed any time during the applicable compliance period.

The commission responds that this provision has been modified to reflect that the executive director shall evaluate and may reclassify a site from poor performer to average performer when a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of the rule. This modification has been made to address the situation in which a site now classified as a poor performer was purchased during the five-year compliance period, but prior to the effective date of this rule, by a person all of whose other sites will now be classified as high or average performers under this rule. Adopted §60.2(e)(3)(A)(iii) and (B) applies specifically to a person who has purchased a site with a poor performer classification.

H&W commented regarding proposed §60.2(f)(3). H&W commented that the commission "should clarify the difference in 'regional entity' and 'person'" in this paragraph.

As explained further in the portion of this SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section concerning adopted §60.2(e)(3)(C), the commission has combined the provisions proposed as §60.2(f)(3)(B) and (C). Adopted §60.2(e)(3)(A)(iii) and (B) generally allows for mitigation where a person, all of whose other sites have a high or average performer classification, purchases a site with a poor performer classification, or becomes permitted to

operate a site with a poor performer classification, including a situation where a person acquires or takes over a poor performer site for the purpose of regionalization, and the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance.

Huntsman commented regarding proposed §60.2(f)(3). Huntsman asserted that "projects that can be shown to have provided a result that is 'beyond compliance'" should be treated as mitigating factors, adding that the "policy considerations that support a positive credit for audits in the proposed rule support" this modification to the rule. Similarly, Huntsman requested that "monitoring projects that go beyond required compliance," such as source compliance monitoring, and ambient or fence line monitoring, be treated as a mitigating factor under proposed §60.2(f)(3).

The commission disagrees with this recommendation. There is already benefit to a person who is implementing projects beyond the minimum requirements because those projects assist the person in maintaining operating conditions and emission or discharge levels that comply with its authorizations. This ability to stay in compliance results in a better site rating due to lack of, or reduction of, violations.

§60.2(e)(3)(A), (proposed as §60.2(f)(3), in part, and §60.2(f)(3)(A))

Adopted new §60.2(e)(3)(A) includes a portion of what was proposed as §60.2(f)(3). The portion of proposed §60.2(f)(3) relating to reclassification of a site has been split out and moved to this subparagraph. As a result of this modification to the structure of the rule, the subparagraphs proposed under §60.2(f)(3) have now become clauses under adopted §60.2(e)(3)(A), as discussed in more detail

later in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

The commission has modified the text from proposal with the addition of “from poor performer to average performer” to clarify that the mitigating factors can only be utilized to potentially upgrade the performance classification to average performer. The phrase “with 45 points” has also been added to reflect that if a site is reclassified from poor performer to average performer, the site rating will be set as the bottom of the average performer classification (e.g., 45 points). The site will then be averaged with any other sites owned or operated by the person in order to establish an aggregate rating for that person.

§60.2(e)(3)(A)(i), (proposed as §60.2(f)(3)(A))

Adopted §60.2(e)(3)(A)(i) includes as one mitigating factor “other compliance history components included in §60.1(c)(10) - (12) of this title.” These positive components include: any voluntary on-site compliance assessments conducted by the executive director under a special assistance program; participation in a voluntary pollution reduction program; and a description of early compliance with, or offer of, a product that meets future state or federal government environmental requirements. The commission solicited comments concerning whether and how to quantify the use of EMS and audits in the compliance history analysis and subsequent classification. The commission received several comments in response to this solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

The commission has modified adopted §60.2(e)(3)(A)(i) by changing the reference from §60.1(c)(8) - (12) to paragraphs (10) - (12), because environmental audits, as found in §60.1(c)(8), are now addressed under adopted §60.2(e)(1)(K) in the formula, and in adopted §60.2(e)(3)(D) as a mitigating factor. Additionally, EMSs, as found in §60.1(c)(9), are now addressed under adopted §60.2(e)(1)(M) and (3)(A)(ii).

MMM, Fort Worth COC, and C&H commented regarding proposed §60.2(f)(3)(A). MMM asked how "the positive things we as a site are doing, i.e., an EMS" will be factored into classification and site rating. Fort Worth COC and C&H stated that the rules should provide for the positive measures undertaken by an entity. C&H asserted that an objective value must be provided for positive components as long as there are objective values for negative components. Additionally, MMM asked if each site has to have an EMS, or will a company-wide EMS suffice.

The commission responds that the rule has been modified as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Specifically regarding implementation of an EMS, the commission has determined that an EMS must be implemented by site as opposed to company-wide in order to be credited as a positive component, because the compliance history classifications are determined on a site basis in addition to a person basis.

TML and LSS commented regarding proposed §60.2(f)(3)(A). TML commented that it believes the rule does not provide enough emphasis on positive environmental compliance, further stating that, "If implemented effectively, compliance-based regulation should lead to proactive efforts, and even

competition, among the regulated community to obtain better ratings." TML asserted that the rule, as proposed, does not provide sufficient opportunity for a city or other entity to demonstrate environmental responsibility or improve its rating, and went on to say that this is particularly apparent with regard to EMSs. TML advocated modification of the rule to include a new subparagraph (J), (K), or (L) to proposed §60.2(f)(1), to divide the result of the preceding paragraph by two if the person "has implemented and is operating an EMS that is compliance with TNRCC's EMS rules." Similarly, LSS made reference to the rulemaking required by HB 2997 regarding Regulatory Incentives for EMSs, and stated that the proposed compliance history rule "does not clearly define a means of awarding credit for companies that implement EMS."

The commission responds that it has modified the rule as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

V&E, WM, GI², Fort Worth COC, C&H, Reliant, AECT, TAB, T&K, ATINGP, AeA, UT, TIP, and 7-Eleven commented regarding proposed §60.2(f)(3)(A). V&E stated that "reclassification of a site based upon positive components of compliance history should be mandatory." V&E and TAB suggested that points should be established for all of the positive components. V&E added that points for positive components should be deducted from the total points for negative components. TIP provided a similar comment. Similarly, WM stated that it disagrees with the positive components being left to the discretion of the executive director because of resource issues and potential inconsistency. Reliant made similar comments. Reliant asserted that the rule should define positive components, and "recognize them in some way that is consistent with the compliance formula." AECT provided similar comments. TAB listed three reasons it believes the positive components should have point values

assigned: 1) there is a lack of certainty, as proposed; 2) with the lack of certainty comes less "incentive for a company to go to the time and expense of" implementing either an EMS or performing an environmental audit; and 3) as proposed, it leaves the executive director open to criticism, lessening the likelihood that he will use this discretionary factor to affect a compliance classification. AECT expressed concern that the proposed approach would create a negative perception on the part of the public that the executive director is "pro-regulated community," and believes it would be unwise to adopt such a rule. AECT, therefore, suggested that proposed §60.2(f)(1) be revised such that specific points are assigned to the components in proposed §60.1(c)(8) - (12). TXU supported the comments made by AECT. GI² suggested that positive points be included in the formula for "companies who achieve successful EMS, voluntary on-site compliance assessments and/or other Local, State or Federal environmental programs and promote environmental stewardship," as an incentive and as a method of raising a compliance rating. Similarly, Fort Worth COC and C&H stated that an entity with an EMS in place should receive a point reduction in the compliance history formula, because the EMS rules indicate the number of investigations conducted at a site will be reduced if an EMS is in place. Fort Worth COC and C&H asserted that this could result in a site with an EMS in place having a higher compliance history point total as there would be fewer investigations counted in the denominator in the formula. T&K asserted that EMSs and audits "should be addressed expressly in the formula as an incentive to encourage their use." T&K suggested that, for a site with an EMS meeting the minimum standards of 30 TAC, §90.32, a 10% per year reduction in total points should be given; additionally, a 10% per year reduction in points should be given "for each site-wide audit under the audit privilege act that covers an entire regulatory program under the jurisdiction of the TNRCC that is subject to the compliance history rule and applicable to the facility." T&K stated that under this scenario, if a facility was subject to TWC, Chapters 26 and 27, and THSC, Chapter 361, 382, and 401, it would receive up

to a 50% reduction in points. ATINGP stated that EMSs and environmental audits should be encouraged, and recommended that each be assigned a point value of 0.5 to be added as a divisor in the formula. AeA commented that, while it appreciates the need for flexibility, it "believes that by giving specific values to positive aspects of compliance history, TNRCC will encourage additional facilities to adopt more proactive measures for managing their environmental issues." Specifically, AeA recommended that a percentage reduction in the overall compliance score be set for certain components, either as absolute numbers, or ranges. UT also expressed concern that there are not specific high point values assigned to the mitigating factors. UT asserted that doing so would "reward those entities that demonstrate a commitment to environmental excellence and to the implementation of systems that endure continuous improvement in environmental compliance." Additionally, UT stated that "the application of mitigating factors to reach a defensible classification may also require an approach where the Executive Director will be required to write a 'reasoned justification' for a reclassification, accompanied by a 'motion to overturn' procedure for use either by the entity of the public to secure Commission review of the reclassification," and recommended the addition of such a procedure to proposed §60.2(f)(3). 7-Eleven stated that the commission should encourage environmental excellence by modifying the rule to require that the executive director assign points for all applicable factors from proposed §60.1(c)(8) - (12), adding that to minimize the resource commitment required to implement this, it could be limited to "those situations where mitigating factors are likely to have a practical impact, e.g., where the site classification is within 10 points of reaching a higher site classification."

The commission responds that the rule has been modified as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

TCC commented regarding proposed §60.2(f)(3)(A). TCC suggested that "the existence of an 'approved' EMS should result in a halving of the ultimate score, or in the alternative, a deduction of, say, 50 points from the final score." OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TCC. Garland, San Antonio, GEUS, and SMEC stated that the compliance history rules "do not provide a clear way out for an entity that has received a poor rating," adding that a mechanism for improving performance is to provide positive, sure incentives to sites. Therefore, Garland, San Antonio, GEUS, and SMEC recommended the addition of a new §60.2(f)(4), which would read: In addition to the discretionary mitigating factors identified above, the following may be used to reclassify the site by subtracting points from the final score in proposed §60.2(f)(1)(K): (A) Conduct an environmental audit of the site: subtract 10 points; (B) Implementation of an environmental management system: subtract 25 points.

The commission responds that it has modified the rules to include positive points for notices of intended audits, as well as disclosures of violation(s) which were granted immunity from administrative or civil penalties, and certified EMSs as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, non-certified EMSs, other positive components, and voluntarily reporting a violation or reporting a violation under the Texas Audit Privilege Act which is not granted immunity are also included in the mitigating factors as adopted.

Huntsman commented regarding proposed §60.2(f)(3)(A). Huntsman recommended that there be a value assigned to approved EMSs, which could be used to reduce the violation points in the formula, suggesting a sliding scale of 25% to 50%. Additionally, Huntsman expressed concern that "30 TAC

§90.2(e)(f) 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)." Huntsman raised this same issue in the Phase I compliance history rulemaking, to which the commission responded in part, "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 re-entering 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 supersede 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.*" (Emphasis added). Huntsman, although appreciative of the commission's willingness to consider this element as a mitigating factor, stated that it is still concerned "whether language used in response to its comments to the Phase 1 rule can preempt the express prohibition found at 30 TAC §90.34(5)," and requested that the commission incorporate its comments concerning the use of EMS into the text of the Phase II rule.

The commission responds that Chapter 90 does not supersede the requirements of Chapter 60, which expressly includes the type of EMS system as a component of the compliance history in §60.1, and is included in the development of a site rating in adopted §60.2. The commission has modified the rule in response to this comment.

PIC commented regarding proposed §60.2(f)(3)(A). PIC stated that it disagrees with the inclusion of mitigating factors which contain no parameters on the amount a site rating can be adjusted, adding that the executive director's unrestricted discretion to reclassify a site with no standards set forth in the rule violates the requirement of TWC, §5.754. PIC stated, "To the extent that the listed factors are to be used as positive components of compliance history, they should be assigned specific maximum point values that can then be subtracted from the site rating. These factors can only be included in the rule's 'set of standards' if they are valued quantitatively and applied to adjust the numeric site rating, rather than valued qualitatively and applied subjectively to place a person in an entirely different classification than determined by a site rating score calculated according to a detailed, prescriptive formula.

Moreover, the factors included under §60.3(f)(3)(A) should not be used to improve a site rating unless a site has shown demonstrated improvement in its compliance since the time the listed measures were implemented. If demonstrated compliance improvement is shown, the maximum reduction to a site rating that should be allowed is 100 points - the equivalent amount of points received for a major violation documented in a final order."

The commission responds that it does not agree with PIC. TWC, §5.754, does not preclude a qualitative evaluation of a person or site. The executive director can evaluate the mitigating factors in a consistent manner, in accordance with administrative law requirements. The

executive director has extensive expertise in evaluating compliance which is tied directly to the EMS program, voluntary self-disclosures, small business audits, early compliance, and pollution reduction. The rule has been structured to allow the executive director to take into account the particular circumstances related to a person or site when evaluating new ownership and the effectiveness of a new owner in improving compliance at a site. As discussed previously, flexibility is necessary due to widely varying factual circumstances of different persons and sites.

C&H, LSS, and BP commented regarding proposed §60.2(f)(3)(A). C&H and LSS stated that violations disclosed through a voluntary self-audit should not adversely affect a person's compliance history rating. C&H added that while self-audits can be counted as a positive factor in the rule, the rule should specifically state that any disclosures would not be "classified as violations for the purposes of compliance calculation." BP provided similar comments. LSS suggested that to include such self-reported violations in the compliance history as NOV's would prove to be a disincentive for companies to perform environmental audits.

The commission responds that it has revised adopted §60.2(e)(1)(K) to include the reduction of points when a person notifies the commission of an intended audit or when a person discloses violations after an audit which is conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, and the site was granted immunity from an administrative or civil penalty for that violation(s) by the agency. Additionally, the commission added a new §60.2(e)(3)(A)(iv) for voluntarily reporting a violation to the executive director that is not otherwise required to be reported, and that is not reported under the Texas Audit Privilege Act, or that is reported under the Texas Audit Privilege Act but is not granted immunity from an

administrative or civil penalty for that violation(s) by the agency. In regard to compliance history, violations disclosed under the Texas Audit Privilege Act are required to be included in the compliance history by that Act. However, the violations are noted in the compliance history as being self-disclosed.

C&H commented regarding proposed §60.2(f)(3)(A). C&H stated that the commission should implement in its compliance history calculation something similar to California's process by which, in its enforcement of hazardous waste standards, California decreases the base penalty amount by 5% for each previous consecutive investigation report in which no violations were noted. Similarly, C&H stated that the compliance history calculations should include another of California's enforcement processes in which it adjusts a penalty downward by 15% if the respondent has an ISO 14001 certificate.

The commission responds that it has modified the rule as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble to include positive points for implementation of a certified EMS, in addition to retaining non-certified EMSs in the mitigating factors. The commission elected a reduction of 10% for certified EMSs because the value of the EMS is more appropriately found through improved performance, and thus fewer violations, which will create a better score. The commission has not made a modification concerning previous consecutive investigation reports in which no violations were reported because §60.2(e)(1) already utilizes investigations as a divisor. This divisor may provide more benefits than a 5% reduction, depending upon the number of investigations performed during the compliance period, and thus another reduction is not warranted.

BP and CPS commented regarding proposed §60.2(f)(3)(A). BP stated that it supports the evaluation of a total site rating to determine its appropriateness based upon positive components. Similarly, CPS stated that it supports the inclusion of in-house audits, voluntary pollution control programs, and the use of EMSs in a positive manner, as the company can control the number of such things it conducts.

The commission appreciates the positive comments in support of the rule and notes that notices of intended environmental audits, as well as disclosures of violation(s) which are granted immunity from administrative or civil penalties, and certified EMSs are now specifically included in the formula for site rating rather than in mitigating factors.

AeA commented regarding proposed §60.2(f)(3). AeA recommended the addition of an incentive which would provide that, if a facility participates in the commission's EMS or other voluntary programs, it could use that to "mitigate" the occurrence of a one-time, non-criminal, major or moderate violation event." AeA suggested that a site's compliance history should not be "downgraded" as a result of a one-time event, even if it was a serious violation, if the following criteria are met: the site has an approved EMS in place; the site had a compliance history classification of above average or average in the six-month evaluation prior to the one-time event; the executive director is satisfied that the circumstances leading to the violation have been eliminated or fully remedied; and no additional major or moderate violations occur during the five-year compliance period.

The commission responds that it has modified the rule by adding §60.2(e)(1)(M) to include an agency-certified EMS as part of the site rating formula. The EMS adjustment in subparagraph

(M) is a 10% positive adjustment to the overall site rating. This modification should provide a similar outcome to that suggested by AeA.

§60.2(e)(3)(A)(ii) (proposed as §60.2(f)(3)(A) (in part))

The commission has adopted at §60.2(e)(3)(A)(ii) language which states that implementation of an EMS not certified under Chapter 90 at a site for more than one year will be given consideration as a mitigating factor in site classification. This is not new; during proposal of this rule, this was included in §60.2(f)(3)(A). However, it has been split out into a separate subparagraph at adoption because of the fact that, in response to comments received, adopted §60.2(e)(1)(M) provides for specific point values in the classification formula for agency-certified EMSs.

§60.2(e)(3)(A)(iii) (proposed as §60.2(f)(3)(B) and (C))

Adopted new §60.2(e)(3)(A)(iii) includes as another mitigating factor the situation in which a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule.

In order to avoid possible confusion, the commission has combined the two subparagraphs proposed as §60.2(f)(3)(B) and (C) as the two subparagraphs, as proposed, addressed similar situations. Adopted §60.2(e)(3)(A)(iii) will apply to a situation where a person, all of whose other sites have a high or average performer classification, purchases or becomes permitted to operate a site with a poor performer classification for the purpose of regionalization. The commission

continues to encourage regionalization and believes that compliance history should not be a roadblock to integrating poor performing facilities with high performing facilities.

Additionally, “or average” has been added to adopted §60.2(e)(3)(A)(iii) in response to comments received, in order to broaden the scope of those persons who may benefit from this mitigating factor. Limiting applicability of the provision to only those persons all of whose other sites have high performer classifications does not allow for mitigation where an average performer purchases or operates a poor performing site. The commission has adopted the revised language to encourage such purchases or changes in operation which should result in improved environmental performance. Additionally, the phrase “or became permitted to operate a site with a poor performer classification” has been added in response to comments received, in order to provide for the scenario in which one of the permittees is not the owner, but rather the operator of the site, and as such did not “purchase” the site, as discussed elsewhere in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Further, the following phrase has been added to this clause: “if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule.” This phrase has been added to address the situation in which a site now classified as a poor performer was purchased during the five-year compliance period, but prior to the effective date of this rule, by a person all of whose other sites will now be classified as high or average performers under this rule. Finally, the word “and” has been included at the end of this subparagraph, because an additional subparagraph has been added to this paragraph as adopted.

NTMWD, OxyChem and Oxy Permian, LCRA, and TIP commented regarding proposed §60.2(f)(3)(B). NTMWD suggested that the mitigating factor include regional entities all of whose other sites fall into either the average or high classification and include regional entities who become permitted to operate a poor performer site. LCRA stated that it "is encouraged that the TNRCC has recognized and appropriately addressed the situation in which a reputable entity acquires, with the intent to improve, a site with a poor performance ranking." However, LCRA expressed concern with the proposal that all other sites be high performers may not always be realistic, because sites with inadequate compliance information default to average. Therefore, LCRA recommended that the requirement that all other sites be high performers be limited to those sites with adequate compliance information such that they have not defaulted to average. OxyChem and Oxy Permian stated that they are supportive of this portion of the proposed rule in which a regional entity, all of whose other sites are high performers, may decide to buy another site with a poor performer classification. The commenters stated that they believe that it is beneficial to both the agency and the purchasing entity to acquire a poor performing site. However, OxyChem and Oxy Permian stated that it is important for the agency to realize that in determining whether to purchase a poor performing site, the high performing purchaser will review the restrictions placed on the poor performing site by the commission. As such, OxyChem and Oxy Permian stated that they believe the rules should provide incentives for high performers who acquire a poor performing site, such as the relaxation of certain requirements in proposed §60.3. TIP asserted that a disincentive could be created for high performing companies considering the purchase of poor performing sites by certain mandatory impacts for poor performers and repeat violators in the proposal.

The commission responds that it has modified adopted §60.2(e)(3)(A)(iii) and (B), as discussed elsewhere in this preamble. The commission responds to LCRA's concern by stating that the rule has been modified to include both average and high performer sites in the mitigating factor. Additionally, the commission responds that when mitigating factors are utilized to change the classification of a site from poor performer to average performer, the requirements found in §60.3 relating to poor performers no longer apply to that site.

TXI, TMRA, TIP, Garland, San Antonio, GEUS, SMEC, V&E, Reliant, and AECT commented regarding proposed §60.2(f)(3)(B). TXI recommended that average performers should also get the benefit of this mitigating factor. Similarly, TMRA recommended that if proposed paragraph (3)(B) and (C) are retained in the rule, "or average" should be added after the term "high" so as not to unduly punish entities with average compliance history classifications. TIP also stated that it is supportive of proposed subparagraphs (B) and (C), and believes that they should also apply to average performers. Garland, San Antonio, GEUS, and SMEC similarly commented that limiting this provision to high performers may prove to be a disincentive for regional entities to assume control of poor performing sites. V&E, Reliant, and AECT stated that this subparagraph should be modified to include average as well as high performing sites. V&E added that, as proposed, it would apply to very few persons, and "could only be used one time by a high performing person until the purchased site also becomes a high performer." V&E and AECT asserted that this modification would further the commission's stated goal of not deterring investment in poor performing facilities. AECT added that it believes that, as proposed, this subparagraph would rarely, if ever, apply to anyone having more than one site, based on its understanding that the number of high performing sites will be fairly small. TXU supported the comments of AECT.

The commission agrees with the commenters and has modified the rule accordingly, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Proposed §60.2(f)(3)(C)

As discussed previously, the commission has combined the two subparagraphs proposed as §60.2(f)(3)(B) and (C), providing a mitigating factor where a person, all of whose other sites have a high or average performer classification, purchases or becomes permitted to operate a site with a poor performer classification, if the person entered into a compliance agreement with the executive director.

MMM commented regarding proposed §60.2(f)(3)(C). MMM asked how acquiring a company which has a poor performer classification would affect the acquiring company's classification?

The commission responds that the compliance history components "attached" to a site are included in the compliance history classification for the acquiring company (i.e. points will be assigned for violations occurring during the five-year compliance period but prior to the acquisition).

However, the commission does not want the acquisition of a poor performing site to create a roadblock to integrating poor sites with higher performing ones, and as such is adopting, as a mitigating factor, the ability of the executive director to reclassify an otherwise poor performing site when it has been acquired by a person all of whose other sites have a high or average performance classification, if the person entered into a compliance agreement with the executive director.

§60.2(e)(3)(A)(iv)

The commission has adopted §60.2(e)(3)(A)(iv), which adds for evaluation, as a mitigating factor, voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, or that is reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency. This has been added in response to comments received, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(e)(3)(B)

The commission has adopted §60.2(e)(3)(B), which addresses the scenario in which a person, all of whose other sites have a high or average performer classification, purchases a site with a poor performer classification or becomes permitted to operate a site with a poor performer classification and the person contemporaneously enters into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance. Specifically, this provision provides that the executive director *shall* reclassify the site from poor performer to average performer with 45 points until such time as the next annual compliance history classification is performed. It further provides that the executive director *may*, at the time of subsequent compliance history classifications, reclassify the site from poor performer to average performer with 45 points, based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement. This has been added to the rule in response to comments, as it provides certainty regarding the initial reclassification of a site for average- or high-performer persons purchasing a poor performing site subsequent to the

effective date of this rule, and simultaneously entering into a compliance agreement with the executive director regarding bringing the site into compliance. The commission has determined, however, that it is appropriate to evaluate the person's efforts in meeting the terms of the compliance agreement during annual compliance history classifications to determine whether reclassification is warranted at that time. In other words, the existence of the compliance agreement does not assure the person of reclassification of the poor performing site; rather, it is the person's efforts with regard to bringing the site into compliance which will be considered as a mitigating factor during annual compliance history classifications. If, for example, a poor performing site, Site X, is purchased by ABC Company which is a high performer, and ABC Company and the executive director enter into a compliance agreement regarding Site X, then the classification of Site X becomes "average" until September 1st when the annual compliance history classification of all sites is calculated. This is true whether the purchase and entry into a compliance agreement occurred on September 2nd, or on August 30th. However, when the annual compliance history classification is calculated, and mitigating factors are considered for reclassification of the site, the time frames in, and the effective date of the compliance agreement will be taken into consideration.

§60.2(f)

The commission has adopted subsection (f) concerning person classification, which states, “The executive director shall assign a classification to a person by averaging the site ratings of all the sites owned and/or operated by that person.” As discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, numerous comments were received concerning the addition of a classification for a person. The commission agreed that these comments accurately reflected the legislative direction, and as such, adopted this subsection to reflect how the classification of a person will be calculated.

§60.2(g)

Adopted new §60.2(g) provides for the agency to provide Internet notice of person and site classifications within 30 days after the completion of the classification. Internet posting of classifications is consistent with the requirements of TWC, §5.1733, which provides that the commission shall post public information on its website. In addition, posting the information on the agency’s website serves as a mechanism to inform interested persons of the agency’s classifications in the event that corrections or appeals are deemed necessary.

§60.3

The commission adopts new §60.3, Use of Compliance History, with modifications to the proposal.

The commission adopts new §60.3 to address the requirements of TWC, §5.754(e), which states that the commission by rule shall provide for the use of compliance history classifications in commission decisions relating to: the issuance, renewal, amendment, modification, denial, suspension, or

revocation of a permit; enforcement; the use of announced investigations; and participation in innovative programs.

Adopted new §60.3(a), concerning permitting, will address the use of compliance history with regard to those permit actions identified in §60.1(a) which are subject to compliance history review. Specifically, the adopted language in §60.3(a)(1) states that, for permit actions subject to compliance history review identified in §60.1(a), the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit, reflecting the requirements of TWC, §5.754(e) and (g). The adopted language in §60.3(a)(1) adds under subparagraphs (A) and (B) that the agency shall consider compliance history by: evaluating the person's site-specific compliance history and classification; and evaluating the person's aggregate compliance history and classification, especially considering patterns of environmental compliance.

Adopted subparagraph (A) refers to the site classification as adopted in §60.2(e). Adopted subparagraph (B) refers to the person's classification as adopted in §60.2(f), and reflects the agency's ability to look at the *person's* overall classification and compliance history in permit decisions regarding a site, including the compliance history of that site, as well as the person's entire environmental compliance history at other sites owned or operated in Texas, and sites outside the State of Texas.

The commission adopts new §60.3(a)(2), concerning review of permit application. Under this paragraph, the commission adopts language which states that in the review of an application for a new, amended, modified, or renewed permit, the executive director or commission may require permit conditions or provisions to address an applicant's compliance history. It further states that poor performers are subject to any additional oversight necessary to improve environmental compliance.

This will ensure that environmental compliance is achieved, and as a result, will assist a performer (poor or otherwise) in improving its classification.

This paragraph addresses the requirements of TWC, §5.754(g), which states that rules adopted “for the use of compliance history shall provide for additional oversight of, and review of applications regarding, facilities owned or operated by a person whose compliance performance is in the lowest classification.” The commission intends to utilize any and all appropriate mechanisms to address compliance history issues. For example, the commission may impose reduced permit terms, more frequent monitoring, or more prescriptive permit conditions, if warranted. This determination, however, will be made on a case-by-case basis to ensure that any special permit provisions are appropriately tailored to the site under review and its compliance history.

The commission adopts new §60.3(a)(3), concerning poor performers and repeat violators, to address the requirements of TWC, §5.754(e)(1), which states that the agency shall consider compliance history in decisions to issue, renew, amend, modify, deny, suspend, or revoke a permit. Additionally, TWC, §5.754(i), states, “The commission shall consider the compliance history of a regulated entity when determining whether to grant the regulated entity’s application for a permit or permit amendment for any activity under the commission’s jurisdiction to which this Subchapter applies.”

Adopted new §60.3(a)(3)(A) will include actions the agency *shall* take if a site is classified as a poor performer.

Adopted §60.3(a)(3)(A)(i) states that the agency shall deny or suspend a person's authority relating to that site to discharge under a general permit issued under 30 TAC Chapter 205, if that person's site is classified as a poor performer. This reflects the modification to TWC, §26.040(h), made by HB 2912, §16.07, which requires, "Notwithstanding other provisions of this chapter, the commission, after hearing, shall deny or suspend a discharger's authority to discharge under a general permit if the commission determines that the discharger's compliance history is in the lowest classification under Sections 5.753 and 5.754 and rules adopted and procedures developed under those sections."

Adopted §60.3(a)(3)(A)(ii) states that the agency shall deny a permit relating to that site for, or renewal of, a flexible permit under Chapter 116, relating to Control of Air Pollution by Permits for New Construction or Modification, if the person's site is classified as a poor performer. This reflects the requirement in TWC, §5.754(h)(2), which states, "The commission by rule shall, at a minimum, prohibit a person whose compliance history is classified in the lowest classification developed under this section from: ... obtaining or renewing a flexible permit under the program administered by the commission under Chapter 382, Health and Safety Code...."

Adopted new §60.3(a)(3)(B) states the actions the agency *may* take upon application for a permit, permit renewal, modification, or amendment relating to that site if a site is classified as a poor performer.

Adopted new §60.3(a)(3)(B)(i) states that the agency may deny or amend a solid waste management facility permit if a person's site is classified as a poor performer. This reflects the modification to THSC, §361.089(a), made by HB 2912, §16.12, which states, "The commission may, for good cause,

deny or amend a permit it issues or has authority to issue for reasons pertaining to public health, air or water pollution, or land use, or for having a compliance history that is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.”

Adopted new §60.3(a)(3)(B)(ii) states that the agency may deny an original or renewal solid waste management facility permit if the person’s site is classified as a poor performer. This reflects the modification to THSC, §361.089(e), made by HB 2912, §16.12, which states, “The commission may deny an original or renewal permit if it is found, after notice and hearing, that: {1} the applicant or permit holder has a compliance history that is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.”

Adopted new §60.3(a)(3)(B)(iii) states that the agency may hold a hearing on an air permit amendment, modification, or renewal if the person’s site is classified as a poor performer and, as a result of the hearing, deny, amend, or modify the permit. This reflects the modification to THSC, §382.056(o), made by HB 2912, §16.15, which states, “Notwithstanding other provisions of this chapter, the commission may hold a hearing on a permit amendment, modification, or renewal if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections.”

Adopted new §60.3(a)(3)(C) states that, notwithstanding §305.65(8), if a site is classified as a poor performer or repeat violator and the agency determines that a person’s compliance history raises an

issue relating to the person's ability to comply with a material term of its hazardous waste management facility permit, then the agency shall provide an opportunity to request a contested case hearing for applications for a specified class of storage and processing permits. This reflects the modification to THSC, §361.088(f), made by HB 2912, §16.11, which requires, "Notwithstanding Subsection (e), if the commission determines that an applicant's compliance history under the method for evaluating compliance history developed by the commission under Section 5.754, Water Code, raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing."

Adopted new §60.3(a)(3)(D) reflects that, upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.

Adopted new §60.3(a)(3)(E) states that the commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This mirrors the requirement of TWC, §5.754(i). As adopted, this will include violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

The commission adopts new §60.3(a)(4), concerning additional use of compliance history, to address other uses of compliance history. Adopted new §60.3(a)(4)(A) states that the commission may consider compliance history when: evaluating an application to renew or amend a permit under TWC, Chapter 26; considering the issuance, amendment, or renewal of a preconstruction permit, under THSC,

Chapter 382; and making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under THSC, Chapter 401.

Adopted new §60.3(a)(4)(B) states that the commission shall consider compliance history when: considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste; considering if the use or installation of an injection well for the disposal of hazardous waste is in the public interest under TWC, Chapter 27; determining whether and under which conditions a preconstruction permit should be renewed; and making a licensing decision on an application to process or dispose of low-level radioactive waste from other persons.

The commission adopts new §60.3(a)(5), proposed as §60.3(a)(6), concerning revocation or suspension of a permit. This will address specifically the requirements of TWC, §5.754(e)(1), which states that the agency shall consider compliance history in decisions to issue, renew, amend, modify, deny, suspend, or revoke a permit. Specifically, the adopted language states, "...Compliance history classifications shall be used in commission decisions relating to the revocation or suspension of a permit."

The commission adopts new §60.3(a)(6), proposed as §60.3(a)(7), concerning repeat violator permit revocation. The adopted paragraph states, "In addition to the grounds for revocation or suspension under TWC, §§7.302 and 7.303, the commission may revoke a permit of a repeat violator if classified as a poor performer, or for cause, including:". This adopted provision addresses TWC, §5.754(f), which requires that the compliance history "assessment methods shall specify the circumstances in which the commission may revoke the permit of a repeat violator." The commission has determined

that the following conditions or situations will reflect the conditions under which the agency might decide if appropriate to revoke the permit of a repeat violator: a criminal conviction classified as major under §60.2(c)(1)(E); an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(c)(1)(B); repeatedly operating without required authorization; or documented falsification. Furthermore, the number and complexity of each site owned or operated by the person is addressed through the consideration of whether a person is a repeat violator at a site through adopted §60.2(d). The commission invited comments as to how to specifically consider the number and complexity of sites with respect to permit revocations and enhanced penalties for repeat violators. The commission also invited comments as to how to establish criteria for classifying a repeat violator, giving consideration to the number and complexity of sites in the definition of "repeat violators" itself. The commission also invited comment on the relationship between TWC, §5.754(c)(2), relating to criteria for classifying a repeat violator and §5.754(f), relating to permit revocation of a repeat violator. The commission received several comments in response to this solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.3

Fort Worth COC, C&H, OxyChem and Oxy Permian commented regarding proposed §60.3. Fort Worth COC and C&H commented that this section of the rule should provide incentives for high performers. C&H specifically suggested the following as incentives which should be included in the rule: reduced administrative penalties, decreased review times for permit amendments and modifications, longer terms for permits, recognition of a person's high performance record, automatic admission into innovative programs, scheduled investigations, and more flexibility in permitting. OxyChem and Oxy Permian stated that they are supportive of the initiatives in proposed §60.3, "and

strongly urge that the TNRCC actively pursue the actions described." However, OxyChem and Oxy Permian also believe that high performing sites should be rewarded, including such incentives as: expedited permit application review periods; limited public notice requirements for permits; and limited compliance investigations. OxyChem and Oxy Permian cited Occupational Health & Safety Administration's (OSHA's) Voluntary Protection Program (VPP) as an example of how high performing sites are rewarded with tangible benefits for good performance, and they stated that they believe that providing incentives in §60.3, along with the mitigating factors in proposed §60.2(f)(3), provide the commission with the opportunity to duplicate the success of the OSHA VPP.

The commission appreciates the positive comment in support of the rule. Additionally, the commission responds that this rulemaking seeks only to implement the requirements of TWC, §5.754, concerning classification and use of compliance history, and as such, the comments concerning the addition of incentives are outside the scope of this rulemaking. TWC, §5.755, requires the commission to develop, by rule, a strategically-directed regulatory structure to provide incentives for enhanced environmental performance. During development of the rule associated with that requirement, the commission will be considering other potential incentives. It is not appropriate or necessary to add the provisions suggested by the commenters to the compliance history rule. As discussed previously, rule development relating to strategically-directed regulatory structure in accordance with TWC, §5.755, in 2003 will establish additional procedures for the use of incentives to enhance environmental performance. No changes have been made in response to these comments.

§60.3(a)(1)

ACT commented regarding proposed §60.3(a)(1). ACT stated that the rules need clarification because they do not provide a definition of compliance history, and specifically, §60.3 "needs to provide that the violations themselves can be considered when adding conditions to permits." ACT recommended that proposed subparagraph (A) of this paragraph be modified to read "site-specific compliance history, violations and classification;" and that proposed subparagraph (B) be modified to read "entire compliance history and violations common to the site under review and other sites, especially considering any patterns of environmental compliance." TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT.

The commission has made no change in response to this comment because the adopted rules provide for consideration of both the site and person classification in commission decisions. Also, existing §60.1 identifies "violations" as a component of compliance history. Therefore, a site-specific compliance history will include the violations which are applicable to that site.

Additionally, the compliance history will include violations which occur at other sites. As the commission evaluates compliance history with regard to a permit action, it will consider both the specific site history and the history of that person at other sites, including violations common to the site under review. Information regarding compliance history at other sites is not included in the calculation of a site's classification rating. However, the person's classification does include the specific compliance history of all sites owned or operated in Texas. No change was made to the rule as a result of this comment.

TIP and BP commented regarding proposed §60.3(a)(1). TIP stated that the rule should be clarified to reflect "exactly when site classifications and/or entity-wide compliance history will be utilized in

permitting decisions. In addition, the entire classification portion of the proposed rule only mentions site classification, and not 'site-specific compliance histories.'" BP provided similar comments, stating that the commission "should explain how the site-specific compliance history could lead to a different decision than would otherwise be reached by a review of the classification," and further, "clarify when site classifications and entity-wide compliance history will be utilized in permitting decisions." TIP asserted that "all impacts associated with these rules should be limited to the site in question." TIP stated that the legislature directed the commission to promulgate rules regarding the use of compliance history, but that the proposal only speaks to using compliance history without providing specifics on how it will be utilized. TIP added, "The Agency's purpose through administrative rulemaking should be to implement clear standards that expand upon sometimes broad legislative directives; not to provide even less guidance than the underlying legislation."

The commission will use a site-specific compliance history and the person's aggregate compliance history every time it makes decisions relating to the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit. "Site," as defined in adopted §60.2(e)(1), is equivalent to "site-specific" as found in §60.3(a)(1)(A). TWC, §5.574, requires the commission to determine classifications of a person's compliance history, meaning that if that person owns or operates multiple facilities, the compliance at all of those locations will be taken into account in any permit or enforcement decision. As the commission evaluates compliance history with regard to a permit action, it will consider both the specific site history and the history of that person at other sites, including violations common to the site under review. Specifically, a permit may be written with specific provisions intended to address those issues that repeatedly occur at the person's site undergoing permit review, and/or at other sites owned or operated by that person.

For example, the commission may issue a permit with a provision that is based upon experiences occurring at other similar sites owned or operated by that person. In both of these instances, the purpose of the additional permit provision, presumably more detailed than other types of provisions, would be to underscore the importance of compliance relating to that particular operational issue and to avoid future noncompliance. Additionally, this same evaluation of violations at the site and common to multiple sites will be performed in the enforcement process and additional ordering provisions, or more detailed types of provisions may be included in an enforcement action as appropriate to those circumstances in order to avoid future noncompliance.

§60.3(a)(1)(B)

The commission has modified adopted §60.3(a)(1)(B) from proposal by changing the word “entire” to “aggregate” in order to clarify that it is not intended to extend the length of the compliance period to encompass the life of the site. Rather, this modification, especially coupled with the addition of the phrase “and classification” is intended to reflect that this subparagraph allows for consideration of the person’s compliance history (as defined by this chapter) at all other sites in the State of Texas owned or operated by that person, which includes environmental actions taken for sites outside the State of Texas as well. The addition of “and classification” is also appropriate because as adopted, §60.2(f) provides for the classification of a person through averaging the classification ratings for all sites in the State of Texas owned or operated by that person.

AquaSource commented regarding proposed §60.3(a)(1)(B), requesting clarification regarding the term "site" as used in the proposal. Because in proposed §60.2(a), "site" is described as all units, etc.

located at one street address, while elsewhere in the proposed rule and preamble reference is made to consideration of "out-of-state facilities and an entity's 'entire' compliance history," AquaSource asked whether the commission intends to consider the compliance record of all sites for those persons with more than one site, within and outside of Texas.

The commission clarifies that the term "site" is used in connection with classifying a particular set of regulated units at one location into one of the three categories of performers. Each classification in turn is part of a person's total compliance history that the commission will consider. With respect to out-of-state information, one of the listed components of compliance history in §60.1, the commission will consider information on enforcement orders, judgments, and criminal convictions at facilities outside Texas. No points are assigned to those enforcement actions occurring outside the State of Texas for inclusion in the site classification formula, but information on those actions is included for commission consideration on decisions relating to the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit. The information provided is based on the EPA database system, the only readily-available comprehensive data system.

Regarding proposed §60.3(a)(1)(B), C&H asserted that considering a person's compliance history outside the State of Texas when making a permit or enforcement decision for a site in Texas is "problematic." C&H stated that using EPA's database could still provide disparate results among different persons operating in various states. C&H also stated that it is "impractical to judge the compliance of a site in Texas by the compliance of a site in California since each site is dealing with significantly different rules and has a different enforcement emphasis," and that without a "more

consistent compliance history rating system nationwide," out-of-state compliance history issues should not be used in Texas.

The commission responds that, as discussed in the adoption preamble for the first phase of compliance history rulemaking, it is required by TWC, §5.753(b), 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.” As the EPA database system is the only readily 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 or any other interested party is free, and in fact encouraged, to provide information for consideration to correct inaccuracies at any time. No change has been made in response to this comment.

TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(a)(1)(B).

TMRA stated that subparagraph (B) should either be deleted, or it should be revised to read:

“compliance history at other sites, especially considering patterns of environmental compliance such as when a regulated entity's compliance history is unacceptable based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations.” TMRA asserted that these revisions are necessary because, as proposed, the provision does not make it clear that "entire compliance history" refers to a person's other sites' compliance histories rather than to a longer period

of time. Additionally, TMRA asserted that "patterns of environmental compliance" is not sufficiently defined. TMRA stated that the regulated community is entitled to more certainty than the proposed language provides, and added that the only place a "pattern" of conduct is referenced in the statute is at TWC, §5.754(i), and that this should provide the starting point. Allied, BFI, TxSWANA, and NSWMA provided similar comments.

The commission agrees with the comment regarding the need to clarify the rule language with respect to “entire compliance history,” and as such, the rule language as adopted has been changed from “entire compliance history” to “aggregate compliance history and classification.” In the context of adopted §60.3(a)(1)(B), “patterns of environmental compliance” refers to the general, overall conduct (good or bad), of the person and by the person who is the applicant at the site with a pending permit application, as well as at other sites owned or operated by that person, both in the State of Texas and in other states. The phrase “and classification” has been added after “compliance history” in adopted §60.3(a)(1)(B) because TWC, §5.754(e), requires the commission to use compliance history classifications in decisions regarding the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit. The commission believes it was the intent of the legislature that overall compliance patterns should be considered in deciding whether to issue a permit, or how to possibly modify a permit. As such, no other changes have been made to the rule in response to these comments.

§60.3(a)(2)

The commission has modified the text of adopted §60.3(a)(2) by deleting subparagraphs (A) and (B) and revising the language of the subsection. The rule now more concisely sets forth the

authority of the agency to impose permit conditions in response to compliance history and implements the provisions of TWC, §5.754(g). The adopted rule provides that the agency “may require permit conditions or provisions to address an applicant’s compliance history. Poor performers are subject to any additional oversight necessary to improve environmental compliance.”

ACT commented regarding proposed §60.3(a)(2). ACT asserted that paragraph (2) needs modification to "make it clear that the violations themselves can be considered and that permit conditions, including the type identified in (2)(B) could be added to any permit, if they are found to be appropriate." As such, ACT recommended that the word "may" be deleted from the end of this paragraph, that proposed subparagraph (A) of this paragraph be modified to read "may require permit conditions or provisions as appropriate, including, but not limited to, the type of provisions in (B) below, in response to the compliance history or specific violations;" and that proposed subparagraph (B) be modified to read "if a person's site is classified as a poor performer, shall consider and may add conditions which would:".

TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission agrees that the rules should reflect the authority of the agency to impose permit conditions or provisions to any permit. There may be circumstances, for example, where the commission may determine that it is appropriate to add special provisions to address the compliance history of an average performer. The commission notes, however, that the statute provides for additional oversight of poor performers. Thus, the rule has been modified to reflect the agency’s broad discretion to add permit conditions or provisions to address compliance history regardless of the person or site classification, and to impose any additional oversight necessary for

poor performers as required by TWC, §5.754(g). The commission intends to use any and all appropriate mechanisms to improve the environmental compliance of poor performers, in particular, but also any site for which compliance history raises concerns. The rule, as modified from the proposal, provides the commission the flexibility to address each situation based on the particular circumstances involving the site under review. The commission has determined that a case-by-case approach will lead to permit conditions that are appropriately tailored to the site and that are more effective in addressing compliance history. The commission also notes that no specific listing of potential permit conditions that may be added by the agency in response to compliance history would be comprehensive. Given these considerations, the commission has determined that the rule as revised from the proposal best achieves the objectives of TWC, §5.745(g).

T&K commented regarding proposed §60.3(a)(2), asserting that the provisions in proposed §60.3(a)(2)(A), and (B)(i), (iv) - (vi), (viii), and (ix) all exceed the commission's authority, requiring statutory authority to implement. T&K stated that each of these items "varies significantly" from the two items required by the statute to be adopted with respect to poor performers, and added that the rules of statutory construction "require that any additional items be of the same class as the listed items," with the items they've specified being "proscriptive, non-routine, and not routine components of the Commission's operations." Additionally, T&K asserted that clause (ix) "attempts to give the ED unbridled power in requiring permit provisions or conditions, without limits as to scope or cost." As such, T&K recommended that the specified items be deleted from the rule.

The commission responds that TWC, §5.754(g), does not prescribe, limit, or otherwise list the mechanisms that may be used by the agency to provide for additional oversight of poor performers in the review of permit applications. As described above, the commission intends to address compliance history in a manner that will allow case-by-case consideration of each facility. Further, the commission notes that §60.3(a)(2) has been revised to delete subparagraphs (A) and (B) as described previously. Adopted §60.3(a)(2) appropriately reflects the broad discretion granted by the statute.

§60.3(a)(2)(B)

AquaSource, CPS, and TXOGA commented regarding proposed §60.3(a)(2)(B). AquaSource asked what scope the commission envisions for citizen involvement through the use of citizen outreach programs or a citizen advisory panel. AquaSource further asked what legal basis there is for citizen participation. TXOGA expressed similar concerns. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TXOGA. CPS stated that "allowing more authority to the regional office to oversee operation of the facility would go much farther toward improving a poor permit performance" than reducing the term of a permit or requiring a citizen outreach program. CPS asserted that reducing a permit term would be difficult due to public notice requirements and review periods, and would tax the permitting staff who develop permit conditions. Additionally, CPS stated that there is significant cost associated with permit renewals, and that some of these costs are not accounted for in the Fiscal Note in the proposal preamble. CPS stated that in addition to permit renewal fees, there are also costs associated with publication of notices in newspapers, and the posting and maintenance of signs. CPS also stated that it believes that the public can register a complaint with the commission at

any time, and does not have to wait for a permit renewal, so that reducing permit terms to allow citizen input is unnecessary.

The commission responds that TWC, §5.754(g), directs the commission to provide for additional oversight of, and review of applications regarding facilities owned or operated by persons whose compliance performance is in the lowest classification. The statute does not limit or prescribe the mechanisms that may be used by the agency in addressing compliance history. The commission fully intends to use any appropriate mechanism to address compliance history and improve environmental compliance of poor performers. The commission has determined, however, that it is important to retain the flexibility to specifically tailor any special permit conditions necessary to address compliance history to the site under review. Thus, the commission has modified §60.3(a)(2) as described previously.

Regarding proposed §60.3(a)(2)(B)(i), Fort Worth expressed concern that there could be a conflict with the commission's rules requiring basin-wide permitting on a five-year cycle if the permit term of a poor performer is reduced.

The commission does not agree that this clause would have conflicted with the commission's rules regarding basin-wide permitting. As stated in §305.71(e), relating to Basin Permitting, permits *generally* will be issued to maintain a five-year cycle of the expiration date schedule in accordance with the basin permitting schedule. Also, §305.71(e) specifically states, "The commission *may* issue a permit for less than a five-year term *if it determines that a shorter term is necessary.*"

(Emphasis added.) The commission does note, however, that this provision is no longer included in the adopted rule for the reasons discussed previously in this preamble.

TXI commented regarding proposed §60.3(a)(2)(B)(ii). TXI recommended deletion of clause (ii), as it asserts that whether more specificity is required is a technical issue which should have nothing to do with a person's compliance history classification. TXI asserted that Chapter 281 and other technical permitting rules govern this issue, that if the permittee has met those requirements then more specificity is not required, and that a permit engineer could use this provision to drive up permitting costs unreasonably without providing any environmental benefit.

The commission has deleted subparagraph (B) from the adopted rule for the reasons discussed previously in this preamble. However, with regard to the commenter's concern, the commission agrees that requiring more specificity in the permit application is a function of the technical sufficiency of the application. However, by requesting additional information, the commission would gain a better understanding of the facility's operation, and this would facilitate a determination as to the type and stringency of permit provisions which should be included in a permit to improve environmental compliance. The commission will determine on a case-by-case basis whether more specificity in the application is necessary to ensure environmental compliance.

TXI commented regarding proposed §60.3(a)(2)(B)(iv) and (v). TXI stated that this provision may go beyond the commission's statutory authority, and further may be counterproductive. TXI asserted that mandating citizen interaction seems to go beyond the statutory requirement that the commission provide additional oversight of, and review of applications of, poor performers. TXI expressed concern that

such a mandate could worsen already poor relationships between the permittee and local citizenry, and "could certainly open the site up to additional liabilities not anticipated by the statutory language," adding that they could require both time and financial commitments that would be better spent working with the agency. As such, TXI recommended deletion of these clauses from the rule.

These clauses have been deleted from the rule for the reasons discussed previously in this preamble. The commission notes, however, that TWC, §5.754(g), does not limit or prescribe the mechanisms that may be used by the commission to provide for additional oversight of poor performers undergoing permit review.

TXI commented regarding proposed §60.3(a)(2)(B)(ix). TXI asserted that this clause, as a "catch-all provision" provides too much discretion for the executive director, and recommended that the text "as warranted" be replaced with "that are economically reasonable and technically practicable and that relate specifically to issues contained in the site's compliance history."

This provision has been deleted from the adopted rule for the reasons discussed previously in this preamble. However, the commission notes that TWC, §5.754(g), gives the agency broad discretion to exercise additional oversight over poor performers. The statute does not limit or prescribe the mechanisms that may be used in the exercise of this authority. The adopted rule ensures that the agency retains the flexibility to address each site's compliance history in the manner that is most effective to improve environmental compliance.

§60.3(a)(3)

T&K commented regarding proposed §60.3(a)(3). T&K stated that all of paragraph (3) "should be revised to clarify that the penalties in (A) - (E) relate specifically to the site that is classified as a poor performer or repeat violator rather than to a 'person.'"

The commission agrees that clarification is appropriate. Adopted §60.3(a)(3) has been modified to clarify that the provisions of that section apply to the "site" that is classified as a poor performer or a repeat violator rather than to the "person."

§60.3(a)(3)(A)

The commission has deleted the word "person's" from the text of subparagraph (A) as adopted, as it was unnecessary.

TXI commented regarding proposed §60.3(a)(3)(A)(i). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, rather than more generally to a "person," adding that this is consistent with the commission's proposed approach to compliance history. Additionally, TXI stated that this provision, which is not required by the TWC, "should only apply if the poor performer's classification has resulted, at least in part, from waste discharge problems." As such, TXI recommended that the text of this clause be modified to read: "deny or suspend the site's authority to discharge under a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges) if the site's compliance history contains violations of waste discharge requirements."

The commission disagrees with this comment. Adopted §60.3(a)(3)(A) is specific to a site classified as a poor performer. Therefore, to deny a person's authority to discharge under a general permit issued under Chapter 205 means that the person at that poor performing site will not be allowed to use the general permit. Additionally, this provision is required by TWC, §26.040(h). No changes were made in response to this comment; however, this subparagraph was modified by adding "relating to that site" to clarify the intent.

§60.3(a)(3)(A)(ii)

TXI commented regarding proposed §60.3(a)(3)(A)(ii). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, rather than more generally to a "person," adding that this is consistent with the commission's proposed approach to compliance history. As such, TXI recommended that the text of this clause be modified to read: "deny a permit from, or renewal of, a flexible permit for the site under Chapter 116 of this title...."

The commission disagrees with this comment. Adopted §60.3(a)(3)(A) is specific to a site classified as a poor performer. Therefore, to deny a person's authority to operate under a flexible permit under Chapter 116 means that the person at that poor performing site will not be allowed to use the flexible permit. No changes have been made in response to this comment; however, this subparagraph was modified by adding "relating to that site" to clarify the intent.

§60.3(a)(3)(B)

The commission has deleted the word “person’s” from the text of §60.3(a)(3)(B) as adopted, as it was unnecessary. Additionally, the phrase “upon application for a permit, permit renewal, modification, or amendment relating to that site” has been added to clarify when such an action may be taken by the commission.

TXI commented regarding proposed §60.3(a)(3)(B). TXI recommended that the text of subparagraph (B) be modified to read: "If a person's site is classified as a poor performer, the agency may take the following actions, among others, relative to an application for a permit for the site:".

The commission agrees with the commenter and has modified §60.3(a)(3)(B) to read, “If a site is classified as a poor performer, upon application for a permit, permit renewal, modification, or amendment, the agency may take the following actions, including:”.

§60.3(a)(3)(B)(i)

TXI commented regarding proposed §60.3(a)(3)(B)(i). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, and further, that it "should not apply to a site unless they relate to specific compliance problems contained in the site's compliance history." As such, TXI recommended that the text of clause (i) be modified by adding "if the compliance history contains repeated violations of solid waste management requirements" to the end of the clause.

The commission disagrees with this comment. Adopted §60.3(a)(3)(B)(i) is already specific to a site that is classified as a poor performer. Section 60.1(c) says that the compliance history shall include multimedia compliance-related information about a site, specific to the site which is under review, as well as other sites which are owned or operated by the same person. TWC, §5.754, requires the commission to establish a set of standards for the classification of a person's compliance history. The commission does not believe that it may select only a portion of a site's compliance history for this classification. Thus, §60.3(a)(3)(B)(i) appropriately considers the entire multimedia compliance history of the site. No change was made to the rule in response to this comment.

§60.3(a)(3)(B)(ii)

TXI commented regarding proposed §60.3(a)(3)(B)(ii). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, and further, that it "should not apply to a site unless they relate to specific compliance problems contained in the site's compliance history." As such, TXI recommended that the text of clause (ii) be modified by adding "if the compliance history contains repeated violations of solid waste management requirements" to the end of the clause.

The commission disagrees with this comment. Adopted §60.3(a)(3)(B)(ii) is already specific to a site that is classified as a poor performer. Section 60.1(c) says that the compliance history shall include multimedia compliance-related information about a site, specific to the site which is under review, as well as other sites which are owned or operated by the same person. TWC, §5.754, requires the commission to establish a set of standards for the classification of a person's

compliance history. The commission does not believe that it may select only a portion of a site's compliance history for this classification. Thus, §60.3(a)(3)(B)(ii) appropriately considers the entire multimedia compliance history of the site. No change was made to the rule in response to this comment.

§60.3(a)(3)(B)(iii)

The commission has added the phrase “and, as a result of the hearing, deny, amend, or modify the permit” to the text of adopted §60.3(a)(3)(B)(iii) in order to clarify and reflect that not only may the commission hold a hearing on such a permit, but that it may also take appropriate action as a result of the hearing.

TXI commented regarding proposed §60.3(a)(3)(B)(iii). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, and further, that it "should not apply to a site unless they relate to specific compliance problems contained in the site's compliance history." Furthermore, TXI recommended that the commission not subject itself to additional contested case hearings if they are not requested by an affected party. As such, TXI recommended that the text of subparagraph (B) be modified to read: "require the publication of notice and a hearing on an air permit amendment, modification or renewal if the site's compliance history contains repeated violations of air quality requirements and a hearing is requested by an affected person."

The commission disagrees with this comment. Adopted §60.3(a)(3)(B)(iii) is already specific to a site that is classified as a poor performer. Section 60.1(c) says that the compliance history shall

include multimedia compliance-related information about a site, specific to the site which is under review, as well as other sites which are owned or operated by the same person. TWC, §5.754, requires the commission to establish a set of standards for the classification of a person's compliance history. The commission does not believe that it may select only a portion of a site's compliance history for this classification. Thus, the commission believes that §60.3(a)(3)(B)(iii) should appropriately consider the entire multimedia compliance history of the site. The commission clarifies that holding a hearing is an optional action that can be taken with sites classified as a poor performer. This is consistent with THSC, §382.056(o), which gives the commission authority to hold a hearing if compliance history is of significant concern. No change was made to the rule as a result of this comment.

§60.3(a)(3)(C)

The commission has modified the text of adopted §60.3(a)(3)(C) by adding the phrase “a site is classified as a poor performer or repeat violator and” in order to clarify and accurately reflect that the site may either have a poor performer classification or be a repeat violator in order for this subparagraph to apply. Further, this change clarifies that it is the site which must have this classification or designation; this clarification is necessary in light of the fact that the rule, as adopted, provides for the compliance history classification of sites as well as persons.

V&E commented regarding proposed §60.3(a)(3)(C). V&E suggested, for clarity, that the text be modified from "if the agency determines..." to "if a person's site is classified as a poor performer or repeat violator and the agency determines...."

The commission agrees with the comment and has modified the text of adopted §60.3(a)(3)(C) to read “If a site is classified as a poor performer or repeat violator and the agency determines....”

§60.3(a)(3)(D)

The commission has added the phrase “upon application for a permit renewal or amendment” to the text of adopted §60.3(a)(3)(D) to clarify when such an action may be taken by the agency. Also, the commission changed the actions to “deny, modify, or amend a permit” in order to utilize the terminology specific to each media included under this chapter.

Reliant, AECT, TXI, T&K, TMRA, TXOGA, and TCC commented regarding proposed §60.3(a)(3)(D). TMRA asserted that it is appropriate to give consideration to the method or frequency of monitoring that resulted in the repeat violations. TMRA recommended that the text of subparagraph (D) be modified to read: “The commission may deny or modify a permit of a repeat violator (as defined by §60.2(d) of this title) after giving appropriate consideration to the method and frequency of monitoring that identified the violations in question.” T&K supported this comment. Reliant, AECT, and TCC stated that the list of specific types of violations that may be utilized to revoke the permit of a repeat violator should be included in this subparagraph as well, by adding "for" at the end of the proposed text, and adding new clauses: "(i) a criminal conviction; (ii) violations that caused or are expected to cause adverse effects on human health or safety or adverse effects on the environment; (iii) repeatedly operating without required authorizations; (iv) documented falsifications; or (v) egregious violations." TXU and T&K supported the comments of AECT. TXI similarly asserted that the proposed language is too broad, and proposed that it be revised as follows: “(D) The commission may deny or modify a permit of a repeat violator in the following circumstances: (i) the permit relates to a

site that is classified as a poor performer; and (ii) the repeat violator's compliance history contains repeated violations that fall within the scope of the proposed permit modification or the permit to be denied." T&K stated that this proposed provision exceeds the commission's authority, adding that "the statute does not authorize the Commission to deny or modify a permit on the basis of the designation as a repeat violator," but rather the commission has authority "to use a repeat violator's compliance history classification in decisions regarding issuance, denial, modification, suspension or revocation of a permit." TXOGA commented that TWC, §5.754(f), only directs the agency to specify the circumstances under which it may revoke the permit of a repeat violator, not modify the permit of a repeat violator, and added that even if the legislature had intended to provide such discretion to the commission, the proposed rule does not provide any circumstances under which modification would be appropriate. As such, TXOGA recommended that the word "modify" should be removed from this subparagraph, and added that even if such action were appropriate, "it should be limited to those extreme cases where the violator shows consistent disregard for the regulatory process." TCC provided the same comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

The commission responds that paragraph (3) has been modified to say, "upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator." This is a general, permissive rule that is appropriate and authorized under TWC, §5.754(e). The details of the site's compliance history will form the basis of this decision. The commission disagrees with TXOGA's suggestion to delete the word "modify" because the word modification is specifically listed in TWC, §5.754(e)(1). Additionally, the commission notes that the repeat violator designation has been modified significantly since proposal. First, with regard

to major violations, the commission has deleted proposed subparagraph (A) under §60.2(c)(1) regarding violations for which the commission has agreed with the EPA to take formal enforcement action, in accordance with EPA/TNRCC Enforcement MOU dated April 1, 1999. The commission decided that rather than base violation classification on when enforcement is initiated, it would be more appropriate to assess these violations using a method similar to the commission's penalty policy, which generally assesses significance based on impact or potential to impact human health, safety, or the environment. Additionally, as adopted, the repeat violator designation has been modified to include, at a site, the occurrence of two or more, as applicable based on specific criteria, of any violation designated as "major" under adopted §60.2(c)(1). The number of occurrences of a major violation required at a site to invoke the repeat violator designation is dependant upon the total criteria points for that site. As adopted, complexity has been removed as a divisor in the site rating formula and is now only considered as one of the criteria for designation as a repeat violator. The total criteria points are based upon the complexity of the site, the number of sites owned or operated by the same person in the State of Texas, the size of the site, and whether the site is located in a nonattainment area. The commission does not agree that it is appropriate to modify §60.3(a)(3)(D) to take into consideration the method or frequency of monitoring. If the monitoring data indicates violations of limits during the monitoring period, a resulting NOV would reference the violation one time, regardless of the specific number of occurrences documented in the data. The violation in the NOV would be assessed for a major, moderate, or minor classification based on overall average of the violations. Based on this averaging, the commission does not expect occasional exceedances to result in classification as a major violation.

§60.3(a)(3)(E)

The commission has deleted the phrase “but is not limited to” from the text of §60.3(a)(3)(E), as adopted, as it is redundant.

V&E and TIP commented regarding proposed §60.3(a)(3)(E). V&E suggested, for clarity, that the text be modified from "the commission shall deny..." to "If a person's site is classified as a poor performer or repeat violator and the commission shall deny...." TIP asserted that the rule should do more than repeat the statutory language with regard to "unacceptable compliance history," adding that the "Legislature surely expected the TNRCC to at least provide factors for determining when compliance histories will be deemed 'unacceptable.'"

The commission disagrees that this clarification is necessary. The rule language closely tracks the statutory language in TWC, §5.754(i), which does not qualify “regulated entity” by addressing site classification or repeat violator status. In adopted §60.3(a)(3)(E), the commission has provided factors for determining when compliance histories will be deemed unacceptable. The factors include violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment. Depending on the seriousness and extent of the violation, violations of such provisions would demonstrate both a recurring pattern and a consistent disregard for the regulatory process.

§60.3(a)(5), (proposed as §60.3(a)(6))

Proposed §60.3(a)(6) has been moved to adopted §60.3(a)(5), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity.

§60.3(a)(6), (proposed as §60.3(a)(7))

Proposed §60.3(a)(7) has been moved to adopted §60.3(a)(6), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The text of this paragraph has been modified from “Compliance history classifications shall be used in commission decisions relating to the revocation of a permit. The commission may revoke a permit of a repeat violator for:” to “In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as a poor performer, or for cause, including:”. The change to the text has been made because there are circumstances in which a repeat violator would not be classified as a poor performer at a site, but the compliance history and the nature of that history is such that revocation is appropriate. For example, violations that have occurred since the last classification were calculated may be of such a nature that revocation is appropriate. In addition, a violation may be of such a serious nature that, while the application of the classification formula does not result in a poor performer designation, the very nature of the violation demonstrates that the revocation of the entity’s permit is the appropriate remedy to be sought by the executive director. The revocation authority under this section is discretionary, and will allow the executive director and the commission to weigh the particular circumstances in determining whether revocation of a repeat violator’s permit is necessary and appropriate.

ACT asserted that "HB 2912 emphasized the role of compliance histories," directing the commission to provide methods for determining circumstances which might warrant revocation. ACT stated, "We believe revocation will only happen in relatively extreme cases, and the statute in no way *mandates* permit revocation for poor performers. The proposed rules suggest otherwise."

The commission agrees with this comment and has modified adopted §60.3(a)(6), proposed as §60.3(a)(7), to read, “In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as a poor performer, or for cause, including” the items specified in subparagraphs (A) - (D) of the adopted rule.

PIC commented regarding proposed §60.3(a)(7). PIC responded in the affirmative to the specific question posed in the proposal preamble regarding whether the circumstances in which a repeat violator’s permit may be revoked should be addressed by the role repeat violations play in classifications of compliance history, adding the "repeat violator status determination has the result of increasing a site rating by 100% under {proposed} §60.2(f)(1)(A) and (D) and, therefore, will likely be the key factor in identifying and classifying the poorest performing sites." Additionally, PIC stated, "When a repeat violator is classified as a 'poor performer,' this should be the circumstances in which that person’s permit may be revoked." As such, PIC suggested that paragraph (7) be revised to read as follows: “Repeat violator permit revocation. Compliance history classifications shall be used in commission decisions relating to the revocation of a permit. The commission may revoke a permit of a repeat violator classified as a poor performer.” Furthermore, PIC proposed the deletion of §60.3(a)(7)(A) - (E), stating, "If the commission has gone to the trouble of using formulas to give weight to the items listed in §60.3(a)(7)(A) - (E) and making classifications based on those ratings, then the revocation decision should be based on this classification rather than revisiting the individual violations which have already been addressed in the detailed formula. Because revocation is the most severe consequence a person may face in the agency’s permitting arena, it seems logical that no one

would face revocation unless they were in the worst compliance classification. Therefore, it follows that the only repeat violators who should face revocation are ones classified as poor performers."

The commission agrees, in part, with the PIC recommendation regarding adopted §60.3(a)(6), proposed as §60.3(a)(7), and has modified the language as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. This modification does allow the revocation decision to be based on classification rather than revisiting individual violations. Additionally, the commission included language that a permit of a repeat violator may be revoked for cause, including the things specified in subparagraphs (A) - (D) of the adopted rule.

TXI commented regarding proposed §60.3(a)(7). TXI asserted that since the statute requires that the number and complexity of facilities be taken into account in designating a repeat violator, and because these issues are accounted for in the classification, "it seems reasonable to use the classification as the starting point in determining whether a permit should be revoked." Accordingly, TXI recommended that the second sentence of this paragraph be modified to read, "The commission may revoke a permit of a repeat violator whose site is classified as, or meets the criteria for classification, as a poor performer, for:".

The commission generally agrees with this comment and has modified the paragraph as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

TMRA commented regarding proposed §60.3(a)(7). TMRA asserted that it is appropriate to give consideration to the method or frequency of monitoring that resulted in the repeat violations. TMRA recommended that the text of the paragraph be modified to read: "After giving appropriate consideration to the method and frequency of monitoring that identified the violations in question, the commission may revoke a permit of a repeat violator (as defined by §60.2(d) of this title) for...."

The commission disagrees with the recommendation made by TMRA. The commission will evaluate the details of the site's compliance history prior to making its decision. The commission, in adopted §60.3(a)(6), proposed as §60.3(a)(7), has established the criteria as to when a repeat violator's permit may be revoked. The commission is not mandated to revoke the permit of a repeat violator, but is expected to evaluate whether such an action is appropriate based upon the specific circumstances of that person. No change to the rule has been made in response to this comment.

7-Eleven and ATINGP commented regarding proposed §60.3(a)(7). 7-Eleven commented that the "criteria for revocation of permits should be uniform as between Repeat Violators and Poor Performers." 7-Eleven further commented that, because the status of repeat violator is site specific, it is possible that one of a person's sites may have a significantly different compliance history than its other sites, and as such, permit revocation criteria should focus on site-specific justifications, and should only be considered for the individual site at which multiple violations have occurred. ATINGP commented that the following criteria should be added to this subparagraph: "the conviction must have occurred at the site where the permit is proposed to be revoked, and must have been performed by the same person who now holds the permit."

The commission responds that adopted §60.3(a)(6), proposed as §60.3(a)(7), does focus on a specific site because a repeat violator as defined in adopted §60.2(d) says “a person is a repeat violator *at a site* when, on multiple, separate occasions, a major violation(s) occurs during the compliance period” based upon the criteria in the paragraph. (Emphasis added). No changes have been made in response to these comments.

§60.3(a)(6)(A), (proposed as §60.3(a)(7)(A))

Proposed §60.3(a)(7)(A) has been moved to adopted §60.3(a)(6)(A), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has added the phrase “classified as major under §60.2(c)(1)(E) of this title” to the text of adopted §60.3(a)(6)(A). This modification is as a result of modifications to adopted §60.2(c), where criminal convictions have been divided out into classifications of both major and moderate violations, whereas in the proposal, all criminal convictions were considered major violations. As such, it was necessary to clarify which criminal convictions may be considered cause for revoking the permit of a repeat violator. The commission has determined that it is appropriate to limit major violations based on this element to those criminal convictions requiring the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

AquaSource and TXI commented regarding proposed §60.3(a)(7)(A). AquaSource stated that, for the same reasons and in the same vein it enumerated in its comments regarding proposed §60.2(c)(1)(F) and §60.2(f)(1)(G), it urges the commission to make a distinction between "willful/intentional felony criminal convictions and misdemeanors." Additionally, AquaSource again stated that misdemeanor criminal convictions should be classified as to actual and documented harm to human health and the

environment. TXI reiterated its concern that criminal convictions are not necessarily indicative of major problems, and as such recommended that "involving a knowing violation of major significance under §60.2(c)(1)" be added to the end of this subparagraph.

The commission has determined that criminal convictions should be classified as “major violations” when the prosecutor must prove a *mens rea* or intent element to support the underlying criminal violation, but should be classified as a “moderate violation” when the conviction is based on a strict liability statute. The commission has determined that criminal violations that include an intent element are of such a serious nature that the violations should be classified as major violations. The revised rule language, as adopted, states:

§60.2(c)(1)(E): any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

§60.2(c)(2)(F): any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction.

§60.3(a)(6)(A): a criminal conviction classified as major under §60.2(c)(1)(E) of this title.

§60.3(a)(6)(B), (proposed as §60.3(a)(7)(B))

Proposed §60.3(a)(7)(B) has been moved to adopted §60.3(a)(6)(B), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has modified the text of adopted §60.3(a)(6)(B) from “violations that caused or are expected to cause adverse

effects on human health or safety or adverse effects on the environment” to “an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(c)(1)(C) of this title.”

This modification has been made in order to provide language consistent with modifications made to adopted §60.2(c)(1)(C) as discussed previously in the SECTION BY SECTION

DISCUSSION/RESPONSE TO COMMENTS section of this preamble, and to clarify and reflect that this subparagraph is referring to violations considered “major.”

TAB, AECT, CPS, TXI, TXOGA, and TCC commented regarding proposed §60.3(a)(7)(B). TAB and AECT commented regarding the use of the word "safety" in the proposal, stating that it should be removed, as the commission does not have the authority to regulate safety, other than in reference to human health. Similarly, TCC asserted that the word "safety" should be stricken from the rule, as the commission is not charged with regulating safety. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. CPS stated that the language in this subparagraph is too vague, and recommended that "adverse effects" be defined, and that the rule designate who will determine whether an action has caused adverse effects. TXI recommended that the word "repeat" be added before the word "violation" in this subparagraph, asserting that a single violation falling within this category should not subject a permittee to revocation of its permit. TXOGA stated that the same language regarding "violations that cause or are expected to cause adverse effects on human health or safety or adverse effects on the environment" which could potentially subject a repeat violator to a permit revocation, is a condition for designating a violation as major. TXOGA further asserted that since a "major violation of a NOV is considered less severe than a major violation of an enforcement order," there should be a distinction made in treatment for a repeat violator. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that this subparagraph has been modified to be consistent with adopted §60.2(c)(1)(C). Please see the discussion related to “adverse effects” and “safety” in the discussion of §60.2(c)(1)(C) in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission disagrees that the word “repeat” should be included in this subparagraph due to the changes made to adopted §60.3(a)(6), proposed as §60.3(a)(7), which now includes revocation of a permit of a repeat violator for cause. The commission believes that it may be appropriate for the commission to revoke a permit of a repeat violator classified as a poor performer who meets any of the criteria in subparagraph (B), even if they occur once. The commission disagrees with the TXOGA comment related to major violation of an NOV because adopted §60.3(a)(6) was modified to establish that the commission may revoke a permit of a repeat violator in two circumstances: if classified as a poor performer; or for cause.

§60.3(a)(6)(C), (proposed as §60.3(a)(7)(C))

Proposed §60.3(a)(7)(A) has been moved to adopted §60.3(a)(6)(A), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has modified the text of adopted §60.3(a)(6)(C) by adding the word “or” to the end of the text, as this subparagraph now precedes the final subparagraph of paragraph (6).

§60.3(a)(6)(D), (proposed as §60.3(a)(7)(D))

Proposed §60.3(a)(7)(A) has been moved to adopted §60.3(a)(6)(A), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has modified the text of adopted §60.3(a)(6)(D) by deleting the word “or” from the end of the text, as this subparagraph is now the final subparagraph of paragraph (6).

ATINGP commented regarding proposed §60.3(a)(7)(D). ATINGP commented that the following criteria should be added to this subparagraph: "the false statements must have been intentional and have been made in an application for a permit or a permit amendment or in a record or report required by an environmental regulation."

The commission disagrees with this comment. The commission has determined that it is not appropriate to limit the class of false statements which may result in a permit revocation to those intentional statements made in an application for a permit or permit amendment, or those in a record or report required by an environmental regulation. The commission expects that all documents submitted to it will be truthful and accurate, and that all regulated entities submitting documents to the agency will review those documents for accuracy. Thus, it is not necessary to make the modifications suggested by the commenter. No changes have been made as a result of this comment.

§60.3(a)(7)(E)

TXI, ATINGP commented regarding proposed §60.3(a)(7)(E). TXI recommended that this subparagraph be deleted from the rule, stating that the word "egregious" is "vague and undefined," and further that subparagraphs (A) - (D) are "broad enough to cover all instances where the Commission should consider revoking a permit." ATINGP commented that "the term 'egregious' should be defined and should take into account intentional and knowing disregard for compliance with an environmental regulation or requirement."

The commission responds that it agrees that subparagraphs (A) - (D) of proposed §60.3(a)(7), adopted as §60.3(a)(6), are sufficient and has deleted subparagraph (E). Further, the commission believes that as modified, subparagraphs (A) - (D), which include criminal convictions classified as major under §60.2(c)(1)(E); unauthorized releases, emissions, or discharges of pollutants classified as major under §60.2(c)(1)(C); repeatedly operating without required authorization; and documented falsification, take into account “knowing disregard for compliance with an environmental regulation or requirement.” As a result, proposed subparagraph (E) has been deleted.

§60.3(b)

Adopted new §60.3(b), concerning investigations, will address investigations performed at a site which is classified as a poor performer, as described in adopted §60.2. Specifically, as adopted in §60.3(b)(1), the agency can provide technical assistance to a person, in order to assist a poor performer in improving its compliance with applicable legal requirements. Adopted new §60.3(b)(2) states that the agency can increase the number of investigations conducted at a poor performing site, to more closely monitor the person’s actions and ensure that environmental compliance is being achieved. Both of these actions are currently taken by the agency in response to concerns about a regulated entity’s compliance efforts. Additionally, adopted new §60.3(b)(3) states that investigations at a poor performing site shall be unannounced as required by TWC, §5.754(h)(1).

The commission has deleted the word “person’s” from the text of adopted §60.3(b) for consistency with other portions of the rule, and because it was unnecessary. Additionally, the commission has changed the word “facility” to “site” in §60.3(b)(2) for consistency.

§60.3(c)

Adopted new §60.3(c), concerning enforcement, will address enforcement decisions by stating that, for enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements. The rule also provides that poor performers are subject to any additional oversight necessary to improve environmental compliance. Currently, through the development of technical requirements included in commission enforcement actions, decisions are made based on the compliance level at the site which is the subject of the enforcement action. This adopted rule will serve to enhance the existing practices by highlighting those respondents in enforcement actions who may need additional oversight.

Adopted new §60.3(c)(2) states that the commission shall consider compliance history classification when assessing an administrative penalty. This reflects the existing practice required by TWC, §7.053, Factors to be Considered in Determination of Penalty Amount, which states that, “In determining the amount of an administrative penalty, the commission shall consider ... with respect to the alleged violator ... the history and extent of previous violations....” The commission’s penalty policy currently reflects the process by which a determination is made regarding the appropriateness of enhancing an administrative penalty based on compliance history. The penalty policy will be updated for consistency with this rulemaking following adoption.

Adopted new §60.3(c)(3) states that the commission shall enhance an administrative penalty assessed on a repeat violator. This requirement addresses TWC, §5.754(f), which states that “the assessment methods ... shall establish enhanced administrative penalties for repeat violators.” The commission will enhance the penalty for compliance history because the respondent is a repeat violator and to deter

others from becoming repeat violators. Statutory penalty maximums found in TWC, §7.052, apply and may limit the ability of the commission to enhance administrative penalties in every case.

The commission has modified the text of adopted §60.3(c) by changing “enhanced penalties” to “penalty assessment.” This change has been made in conjunction with the modification made to adopted §60.3(c)(2) in response to a comment received. In essence, this modification allows for the possibility of a reduction of an administrative penalty based upon compliance history, rather than limiting it to only an enhancement of an administrative penalty.

One individual commented regarding proposed §60.3(c), "The system should provide for greater penalties for the bigger companies that have more means to comply, and more means to fight proposed violations."

The commission responds it is important to have a penalty mechanism that is consistent and fair for all to whom it applies. All persons have an obligation to comply with state law and commission rules, permits, and orders, no matter what their size. No changes have been made in response to this comment.

§60.3(c)(2)

CPS commented regarding proposed §60.3(c)(2), recommending that the rule allow for the reduction of an administrative penalty for a high, or good, performer.

The commission has modified adopted §60.3(c)(2) to read, “The commission shall consider compliance history classification when assessing an administrative penalty.” The commission is declining to decide upon this issue through this rulemaking. However, the commission will consider this comment when revising the penalty policy to implement HB 2912.

TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(c)(2). TMRA stated that TWC, §5.754(e), "provides that the 'commission *by rule* shall provide for the use of compliance history *classifications* in commission decisions regarding:....(2) enforcement.' (emphasis added). TNRCC's proposed implementation of penalty adjustment portion of this directive ... allows the TNRCC to 'enhance an administrative penalty based on compliance history.' There are three problems with this implementation attempt. First, it does not specify by rule how the compliance history enhancement factor will work, other than for repeat violators. Second, because the rule only allows for the TNRCC to enhance penalties and not to reduce them, it does not allow the TNRCC the full range of 'consideration' provided in the Sunset Bill. Third, the proposed rule in no way ties penalty adjustments to compliance history 'classification,' as mandated by the bill." As such, TMRA suggested modification to this paragraph, to better quantify how penalties will be reduced or enhanced based on classifications, distinguish between 1660 and findings orders, and allow the consideration of the method and frequency of monitoring which resulted in the documentation of repeat violations. Specifically, TMRA recommended the following:

“(2) The commission may enhance an administrative penalty based on compliance history in accordance with the following criteria: (A) If a person's site is classified as a poor performer, then (i) the penalty to be assessed on the second time through enforcement shall be increased by 50%; (ii) the

penalty to be assessed on the third time through enforcement shall be increased by 75%; and (iii) the penalty to be assessed on the fourth or any additional times through enforcement shall be increased by 100%. (B) If a person's site is classified as an average performer, then (i) the penalty to be assessed on the second time through enforcement shall be increased by 25%; (ii) the penalty to be assessed on the third time through enforcement shall be increased by 50%; and (iii) the penalty to be assessed on the fourth or any additional times through enforcement shall be increased by 100%. (C) If a person's site is classified as a high performer, then (i) the penalty to be assessed on the second time through enforcement shall be increased by 10%; (ii) the penalty to be assessed on the third time through enforcement shall be increased by 25%; and (iii) the penalty to be assessed on the fourth or any additional times through enforcement shall be increased by 50%. (D) Only the issuance of an order with findings of fact and conclusions of law shall constitute a "time through enforcement" for purposes of this section, except all orders issued after February 1, 2002 shall constitute a "time through enforcement," but those orders that do not contain findings of fact and conclusions of law shall result in a 50% lower enhancement factor than would otherwise be applicable under this section. (3) The commission may reduce an administrative penalty based on compliance history in accordance with the following criteria: (A) A 10% reduction factor shall be applied to a penalty if the person has, within the previous five year period, provided notice to the executive director of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995; (B) An additional 10% reduction factor shall be applied if the site has an environmental management system that is qualified to receive regulatory incentives pursuant to 30 TAC §90.32; and (C) An additional 5% reduction factor shall be applied to a penalty if any of the elements in §60.1(c)(10)-(12) applied to the site within the previous five year period. (4) The administrative penalty enhancement based on compliance history shall be multiplied by a factor of 2 for a repeat violator (as defined by §60.2(d) of

this title but reduce, as appropriate, to account for the method and frequency of monitoring that identified the violation.”

Allied, BFI, TxSWANA, and NSWMA provided the same comments, and the same proposed language, except that they did not recommend any modifications to proposed paragraph (3) except to renumber it as paragraph (4). Additionally, Allied, BFI, TxSWANA, and NSWMA recommended "that, for purposes of penalty enhancement, the TNRCC distinguish between findings orders and 1660 orders. Although findings orders and 1660 orders count equally in the site rating formula, we do not believe the longstanding agency practice of distinguishing between the two types of orders should be thrown out in the context of calculating enforcement penalties. To be sure, there is nothing in the Sunset Bill that in any way limits the TNRCC's authority to continue its longstanding practice of distinguishing between prior findings orders and 1660 orders when assessing administrative penalties."

The commission agrees with the statement that TWC, §5.754, requires the commission to, by rule, provide for the use of compliance history classifications in commission decisions regarding enforcement. Adopted §60.3(c)(2) has been modified to read, “The commission shall consider compliance history classification when assessing an administrative penalty.” The commission does not agree that the rule must be specific as to how compliance history classification will impact the administrative penalty. The rule, as adopted, will allow the commission to modify the penalty policy to allow a reduction in penalty based upon a person’s classification if the commission chooses to do so when considering revisions to its penalty policy. The commission has made no changes through this rulemaking in response to the comments regarding either penalty reductions

or distinguishing between 1660 orders and findings orders as they relate to administrative penalties.

§60.3(c)(3)

TXOGA, 7-Eleven, and TCC commented regarding proposed §60.3(c)(3). TXOGA stated that doubling the administrative penalty amount for a repeat violator is arbitrary, "and should be evaluated depending on the particular incident." Further, TXOGA asserted that, generally speaking, "penalty adjustments are best handled in the penalty policy rather than in rulemaking," and as such, recommended that this paragraph be deleted from the rule and addressed in the penalty policy, where enforcement discretion can be handled on a case-by-case basis. TCC provided the same comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC. 7-Eleven stated, "Enhancement of administrative penalties for Repeat Violators should address site complexity and/or numerosity by providing for penalty mitigation or deferral where Repeat Violator status is demonstrated to be a site-specific aberration resulting from complexity or numerosity of facilities; i.e., the Repeat Violator's site or sites are uniformly classified as High Performers." 7-Eleven added that, in such a situation, penalty enhancement for a repeat violator should be deferred or significantly mitigated.

The commission responds that it agrees with TXOGA that penalty adjustments are best handled in the penalty policy rather than in rulemaking, and as such, has modified §60.3(c)(3) to say that the commission shall enhance an administrative penalty assessed on a repeat violator. No other changes have been made in response to these comments.

§60.3(d)

Adopted new §60.3(d), concerning participation in innovative programs, will address participation in innovative programs by a person whose site is classified as a “poor performer” as described in adopted §60.2. Specifically, adopted new §60.3(d)(1) and (2) will reflect that the agency may, for a person’s site classified as a “poor performer,” recommend technical assistance, or provide assistance or oversight in development of an EMS and require specific environmental reporting to the agency as part of the EMS, either of which could assist a poor performer in improving its classification and ensure that environmental compliance is being achieved. Additionally, adopted new §60.3(d)(3) states that the agency shall prohibit a person whose site is classified as a poor performer from participating in the regulatory flexibility program at that site. This reflects the requirement in TWC, §5.754(h)(2), which states that, “The commission by rule shall, at a minimum, prohibit a person whose compliance history is classified in the lowest classification ... from ... participating in the regulatory flexibility program administered by the commission under” TWC, §5.758. Adopted new §60.3(d)(3) further states, “In addition, a poor performer is prohibited from receiving regulatory incentives under its EMS until its compliance history classification has improved to at least an average performer.”

The commission has modified the text of adopted §60.3(d) by deleting the word “person’s” for consistency with other portions of the rule, and because the word is unnecessary.

§60.3(d)(2)

The commission has modified the text of adopted §60.3(d)(2) by changing “assistance/oversight” to “assistance or oversight” for clarity.

§60.3(d)(3)

The commission has added the phrase “at least” in front of “an average performer” in the text of adopted §60.3(d)(3) for clarity, to reflect that a poor performer is not limited to only raising to, and maintaining a classification of, average performer in order to participate in a regulatory flexibility program. The commission has also added the phrase “at that site” to the end of the first sentence in this provision for clarity.

TXOGA commented regarding proposed §60.3(d)(3). TXOGA asserted that the proposal to restrict poor performers from participating in regulatory flexibility programs could create disincentives for high performing companies to purchase a poor performing site. As such, TXOGA recommended that language be added to proposed §60.3(d) "to provide relief in those cases of favorable new ownership." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission disagrees with the TXOGA recommendation because under adopted §60.2(e)(3), a poor performing site purchased by a high performing company may receive mitigating factors and be reclassified to average performer. Any disincentive creative by restriction from participating in regulatory flexibility programs should, therefore, be balanced by the mitigation available under §60.2(e)(3).

§60.3(e)

Adopted new §60.3(e) has been substantially changed from the proposal in response to comment. New §60.3 provides for appeals of person or site classifications under certain circumstances. A person or site classification of either poor performer or average performer with 30 points or more may be

appealed to the executive director. Any appeal under this subsection is subject to the procedural requirements set forth in this section including procedures for providing notice of the classification; the filing and service of documents; opportunities for reply briefs; a specified time period for the executive director to modify or affirm the classification; notice of the executive director's decision; automatic denial if the executive director fails to act on the 61st day after filing of the appeal; provisions setting forth the date when the executive director decision is effective, final, and appealable; and provisions setting forth how the agency will act on matters governed by TWC, §5.754(g), during the pendency of any judicial appeal.

Regarding proposed §60.3(e), Senator Brown commented that "there is not clear process for providing input into the development of the executive director's classification of an applicant or permittee, from either the regulated entity or interested citizens. One of the hallmarks of HB 2912 was to provide opportunities for public participation, and TNRCC could benefit from a controlled and timely flow of information on compliance history from all interested parties." Senator Brown encouraged the removal of the "opportunity to challenge the executive director's classification from within the contested case hearings process, and provide instead a simpler, quicker executive determination, with an opportunity for a motion to overturn," and recommended "a process with a clear ending point." Senator Brown stated that it was not the legislature's intent to "provide an additional avenue of challenge to every permit/enforcement proceeding on the basis of the details of the executive director's classification of the regulated entity's performance." He went on to say that once a classification is made, it should not change until additional information is received, and recalculated during the next classification period. He further asserted that to "provide an opportunity to challenge the rankings in every hearing, as current provision 60.3(e) does, would create numerous and repetitious opportunities for challenges

within the span of five-year compliance history. This could also necessitate the executive director's participation in every contested case hearing, which is contrary to the new hearings law that was adopted."

The commission agrees that the rules should provide avenues for input from regulated entities and interested citizens into the development of person and site classifications. The adopted rules achieve this objective by providing for the following: (i) posting of notice of the classifications on the website; (ii) a separate and defined process for appeal of those classifications where there is a regulatory impact associated with the classification; and (iii) opportunities to correct classifications based on clerical errors at any time. Generally, a person or site classification will stand unless an error in the classification has been made. Where a person or site has been classified as poor performer or average performer with 30 points or more, any person may file an appeal of that classification, but the appeal must be filed within 45 days of notice of the classification. The appeal process provides for resolution of the appeal at the agency no later than the 61st day after filing. Thus, the appeal process established for these classifications provides for timely resolution of disputes relating to classifications. The changes in §60.2 and §60.3, as adopted, also remove any dispute relating to classifications from the contested case hearing process. While the ability of any party to offer evidence relating to compliance history in a permitting or enforcement case is maintained, disputes regarding a person or site classification will not be issues that can be contested in these cases. A person or site classification will be established outside the contested case process and not litigated and re-litigated in the context of permitting and enforcement actions. Thus, the adopted rules do not provide an additional avenue of challenge to permitting and enforcement actions on the basis of person or site classifications.

C&H commented that, if a regulated entity petitions the agency to reconsider its compliance history rating prior to the six-month interval, that the agency should have the flexibility to reclassify the site at that time, rather than have to wait until the six-month interval is up. Similarly, AquaSource stated that the six-month reevaluation period may be too long for persons whose classifications were determined in error.

The commission responds that the rules, as amended, allow for an informal process for corrections of clerical errors in a person or site classification. As reflected in §60.3(f), the executive director, on his own motion or the request of any person, can at any time correct clerical errors. While the rules now provide for classifications to be made on an annual basis beginning with the September 1, 2003 classification, a person or site classification later determined to be in error can be corrected at any time. Thus, persons whose classifications are incorrect due to clerical errors do not have to wait until the next annual classification to have the error corrected.

Fort Worth COC commented regarding proposed §60.3(e), stating that there is no appeals process provided in the rule for "unique circumstances" such as the situation in which a person disagrees with, or has documentation to refute, its site's classification.

The commission responds that if errors have been made in classifications, those errors can be brought to the attention of the executive director and the correction can be made at any time under the provisions of adopted §60.3(f). Where there is a dispute about a classification or the

classification that would result if a challenge was successful has actual regulatory consequences, adopted §60.3(e) provides a limited appeal process.

Regarding proposed §60.3(e), AquaSource stated that "there is no economic or legal justification for requiring a regulated entity to request a contested case hearing and/or file a motion to overturn to have the executive director review or evaluate his initial classification." AquaSource further stated that any such review should be handled in a less formal, less costly, and less time-consuming manner.

While the commission does not agree that §60.3(e), as proposed, required regulated entities to file hearing requests or motions to overturn for executive director evaluation of classifications, this subsection has been changed significantly in response to comment. The commission agrees that the rules should provide for informal mechanisms for review where appropriate. The adopted rules provide for an informal and simple process for correction of error in a site or person classification. Where a mistake has been made in the classification, such as where a clerical error results in an incorrect database entry or where errors are made in adding the points in a ranking, these errors should be ones that can be brought to the attention of the executive director at any time and corrected as part of the executive director's ministerial functions. The adopted rule also provides for notice of any corrected classification to be promptly provided. A more formal, but straightforward process, is provided for appeals to certain classifications. As previously discussed, a challenge to a classification of poor performer or average performer with 30 points or more may be filed within 45 days of notice of the classification for consideration by the executive director. Thus, where there is a regulatory impact associated with the classification itself and

where there is a reasonable likelihood that a successful challenge may result in regulatory impact, a timely and expeditious mechanism for challenge of the classification is provided.

V&E, WM, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(e), suggesting the addition of the phrase "in a contested case hearing" prior to "only as follows."

The commission has not made the change suggested by the commenters because the commission has made other changes in response to comments which have resulted in a significant revision to §60.3(e) as previously noted in this preamble.

Regarding proposed §60.3(e), AECT and Reliant recommended striking "classification or" from the catchline of this subsection, and further striking "classification of a person's site or" from the text of this subsection. TXU supported the comments made by AECT.

The commission responds that adopted §60.3(e) now provides that classifications may not be contested issues in permitting or enforcement hearings. This subsection has been significantly revised from the proposal as noted earlier in this preamble.

TXI, T&K, and Chaparral commented regarding proposed §60.3(e). TXI restated that it is opposed to the routine reevaluation of compliance history classifications every six months, but stated that if this approach is maintained in the adopted rule, then this subsection should be modified to allow regulated entities the ability to appeal the executive director's classification to the commission. TXI asserted that this is particularly true in the case of sites classified as poor performers, and notes that TWC,

§5.754(b)(1), defines poor performers as "regulated entities that in the commission's judgment perform below average." TXI added that a contested case hearing is not necessarily required, "but an appeal process to the Commission appears to be required by statute and is reasonable given the dire regulatory consequences associated with a 'poor performer' classification." TXI went on to say that being classified as a poor performer "will have indirect consequences on issues such as public relations and potential liability that merit an appeal to the Commission." Finally, TXI stated, "If classifications are only developed in the context of individual applications or enforcement actions, then the review of such classifications can be addressed under proposed §60.3(e) as written." Similarly, T&K stated that there should be a process for a regulated entity to appeal the executive director's classification to the commission. T&K added that such a process "is imperative, given the fact that the classification can affect inspections, regulatory flexibility, penalties, and other programs that do not fall into the three categories for which review of the classification is provided in the proposal." In a similar vein, Chaparral stated, "Because the actual workings and integrity of the formula is not known at this time, we believe that, should a site's compliance history be classified as 'poor' the regulated entity should have an opportunity to review this classification by the Commission. The standard for such review should be whether the facility generally does not comply with environmental regulations, pursuant to TWC §5.754."

The commission notes that the rules now provide for annual person and site classifications beginning September 1, 2003, rather than every six months as originally proposed. Nonetheless, the commission agrees with the commenters that in the case of any classification of a site or person as poor, it is reasonable to provide for an appeal process given, in particular, the requirements of TWC, §5.754, that among other things, limits the availability of announced investigations and

flexible permits where a classification of poor is established. Given the statutory constraints of TWC, §5.754, the commission has also provided for an appeal process for those low average classifications for average performers with 30 points or more. The commission has provided for appeal of classifications for average performers in this lower range because in this range there is a reasonable likelihood that a successful appeal would result in a change of classification from average to poor. As adopted, the rules provide a mechanism for changing classification from poor to average and average to poor.

The commission does not agree, however, that the appeal of such classifications requires commission rather than executive director review. The commission notes that there are several regulatory processes where executive director determinations are final, for example, water quality certifications under §401 of the federal Clean Water Act and selections of remedial actions under 30 TAC §335.347. The commission also notes that an appeal under §60.3(e) will generally be based on a factual dispute that, if considered by the commission, might require the offer of testimony and evidence necessary to support a commission finding. Given the foregoing considerations, the commission supports establishing a finite, simple, and expedited mechanism for resolving classification disputes that benefits both the public and the regulated community, while limiting the impact on agency resources.

ATINGP commented regarding proposed §60.3(e). ATINGP stated that this subsection should be expanded to include an abbreviated review process, because due process concerns dictate that an opportunity for review of the classification of a person's site should be provided for in other instances besides those proposed in §60.3(e). ATINGP further stated that a "site's classification will become an

intangible asset of the regulated entity," with its site classification directly impacting the site's market value and marketability. ATINGP suggested that, for example, a site owner might want to "seek review of a site's ranking in contemplation of a transaction transferring ownership of the site."

The commission does not agree that an avenue for a formal appeal should be established for all person and site classifications due to perceived impact on market value or marketability. The commission has provided for formal appeals only for site or person classifications of poor performers or average performers with 30 points or more. That is, a formal appeal is provided for those classifications rated as poor and for those classifications in the lower range of average whose rankings are sufficiently close to poor that it is reasonably likely that a successful appeal would result in a change of classification from average to poor. The commission has limited formal appeals to the classifications identified since it is only in these circumstances where the classification itself results in adverse regulatory consequences. However, the commission is retaining the flexibility for the correction of clerical errors by the executive director at any time if it is discovered that there was a clerical error in the completion of the classification.

BP commented regarding proposed §60.3(e). BP reiterated its position that a person should be allowed the opportunity to review its classification and correct inaccuracies, but went on to say that once the agency and the person agree that the data is correct, and that no mitigating factors should be considered, the compliance history ranking should be final. BP asserted that it is at this time that the ranking could be published for public view. BP also asserted that the statute does not mandate a procedural addition to the permitting process, which would happen if compliance history ranking is allowed to become an issue in a contested case hearing, and as such, BP encouraged the commission to

review this subsection to "disallow the compliance history to be used solely as the basis for a contested case hearing. Even if TNRCC allows some opportunity for hearing, it should only be for those operators with a 'poor' compliance history ranking."

The commission responds that the rules, as adopted, provide for a mechanism for correction of clerical errors at any time. While the rules provide for notice of the classification to be posted on the website within 30 days of completion of the classification, and there is no additional process established for the agency and regulated entity to come to an agreement about the data used to calculate the classification, the underlying compliance data held by the agency is generally available to any interested person as provided by the Texas Public Information Act. Further, any correction to a classification or reclassification is also posted on the website. In response to the comments requesting that a procedural addition to the permitting process be avoided, the commission notes that the adopted rules do not allow for site or person classifications to be contested issues in permitting or enforcement hearings. While the commission will use classification and compliance history in its decisions as required by statute, generally the executive director's classification of sites and persons will be dispositive. However, parties will continue to be allowed to present evidence on compliance history in agency proceedings just as they did before enactment of HB 2912.

Regarding proposed §60.3(e), Brown McCarroll provided modified language for this subsection, stating that it is similar to language submitted by AECT. Brown McCarroll asserted that it does not believe there should be a continuing opportunity for anyone to challenge a site's classification, which, as envisioned in the proposal would include a separate proceeding, for which there is no legislative intent

of statutory authority. Additionally, Brown McCarroll asserted that there should be a mechanism for the site owner or operator to comment on a draft classification prior to its finalization. As such, Brown McCarroll provided the following language:

“(e) Review of classification or use. The executive director's classification of a person's site or use of a person's compliance history is subject to review only as follows. (1) Classification of compliance history. (A) Once the executive director has developed a draft classification for a site's compliance history, he shall provide written notice to the owner or operator of the proposal and of the compliance history information that supports such classification. (B) The owner or operator of the site shall have 14 days from the date of receipt of the draft classification to file comments on or to contest the executive director's draft classification. (C) After consideration of any comments or contests to the draft classification by the owner or operator of the site, the executive director shall revise, as appropriate, the draft classification and issue a final compliance history classification for the site. (D) The executive director shall provide written notice of his final classification of the site to the owner or operator. The executive director shall also cause to be published in the Texas Register notice of the availability of the compliance history classification for the site and contact information for requesting more information regarding such classification. (E) Any person who disputes the executive director's classification of a site's compliance history may file with the Office of the Chief Clerk a motion to overturn the executive director's classification. A motion to overturn must be filed in accordance with the procedure set out in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), except that the deadline for filing the motion to overturn is 30 days after notice of the availability of the final draft compliance history classification is published in the Texas Register. Such a dispute may not be addressed or decided through a contested case hearing. (F) The executive

director's annual compliance history classification may be contested only if the compliance history information that was considered as part of the classification process was different than the compliance history information that was considered as part of the classification process that led to the prior compliance history classification, or if new information is provided that would cause the site to change classifications and was not considered in the prior compliance history classification. (2) Use of compliance history. (A) For permit applications or enforcement matters where an opportunity for a contested case hearing exists under other law, a hearing may be requested by a person that otherwise has standing in the permit matter under consideration or is a party to the enforcement matter, as provided in the applicable rules, based on issues related to the use of the applicant's or respondent's compliance history. (B) For permit applications where an opportunity for a contested case hearing does not exist under other law, the applicant, public interest counsel, or other person disputes the executive director's use of the applicant's compliance history, may file with the Office of the Chief Clerk a motion to overturn the executive director's action on the application. A motion to overturn must be filed in accordance with the procedure set out in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), except that the deadline for filing the motion to overturn is 30 days after the agency mails notice of its use of the applicant's compliance history. (C) In any contested case hearing where compliance history use is under review, the party disputing the use shall bear the burden of proof.”

TXOGA endorsed the comments submitted by Brown McCarroll.

The commission has not made the changes to the rule as proposed by the commenters. However, the adopted rules have been substantially changed from the proposed rules. The process in the

adopted rule will provide an efficient method for review of classifications. While the adopted process does not include many of the suggested steps, it does set forth a process that will afford interested persons the opportunity to contest classifications under specified circumstances.

§60.3(e)(1)

Representative Chisum commented regarding proposed §60.3(e)(1). Representative Chisum expressed concern about how the proposed rules "would broaden, deepen and further complicate the contested case process. The legislature clearly intends for compliance history to be a factor in permitting and enforcement actions, but we never intended to allow parties in a contested case hearing to fight about whether the agency properly ranked or classified an entity." Representative Chisum stated that as he understands the proposal, it would allow parties in a contested case hearing the opportunity to litigate whether the agency properly classified a person's compliance history, in effect creating a trial within a trial. He further asserted that the rules "could even be read to say we are allowing the initiation of a contested case solely on the issue of compliance history *classification*. This is certainly not the intention of the legislature, especially in light of ongoing efforts to streamline the permitting process and especially the contested case aspect." Representative Chisum did allow that the "legislature does intend that the concept of compliance history be open for input from the public as well as the entity whose compliance history is in question, but certainly not in a contested case hearing" and stated that he is aware that other alternatives have been suggested to the commission.

The commission has made significant revisions to this subsection in response to comment. The commission agrees that a person or site classification itself should not be litigated in contested case hearings and has modified the rule accordingly.

AECT, Reliant, TXOGA, and TCC commented regarding proposed §60.3(e)(1). AECT and Reliant suggested the addition of "use of the" prior to "applicant's or respondent's compliance history" at the end of this paragraph. TXU supported the comments made by AECT. TXOGA stated that there should not be a continuing opportunity for challenge of the executive director's classification of a site, although this paragraph appears to allow for a contested case hearing based only on compliance history. TXOGA asserted that there is no statutory authority for such a requirement, and as such, encouraged the commission to adopt the suggestions regarding this issue made by AECT and endorsed by Brown McCarroll. TCC provided similar comments to those of TXOGA, adding that it strongly believes the compliance history ranking determinations should be final, and that it believes the determination should be reviewable for a finite period of time, perhaps 30 days; that there should be some threshold for persons other than the regulated entity; and that the review should be conducted by either the executive director or the commission, with no further consideration until the next interval. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

The commission responds that the rules, as modified from the proposal, do not allow a challenge to a classification itself in the contested case hearing process. Instead, classifications will be established for set intervals of time, unless a correction of error is made or the classification is one that is subject to challenge under the provisions of adopted §60.3(e), which provides for challenges to be filed with the executive director within 45 days of notice of the classification. Thus, the rules provide for certainty and finality in the classification, avoid litigating the classification in permitting and enforcement hearings, and establish opportunities for executive director review within a finite period of time where there is a regulatory impact associated with the classification. The commission has not included a distinct threshold for persons other than the

regulated entity to appeal the classification and finds no basis for doing so. Instead, any person filing an appeal must demonstrate that if the specific relief sought is granted, a change in person or site classification will result. That is, whether the person filing the challenge to the classification is the regulated entity or a member of the public, the appeal must demonstrate that the challenge will result in reclassification of a site from poor to average or average to poor. Given that there are no regulatory impacts associated with a particular score within a category, the commission believes that appeals should be limited to those circumstances where it can be demonstrated that a change from one category to another will result.

§60.3(e)(2)

Regarding proposed §60.3(e)(2), Reliant and AECT recommended striking "classification of the applicant's site, or" from the text of paragraph (2), and further recommended the addition of "except that the deadline for filing the motion to overturn is 30 days after the agency mails notice of its use of the applicant's compliance history" to the end of the paragraph. TXU supported the comments made by AECT.

The commission has substantially revised §60.3(e) in response to comment. Specifically, the adopted rules now provide that a person or site classification may not be a contested issue in a permitting or enforcement hearing.

§60.3(e)(3)

Reliant and AECT commented regarding proposed §60.3(e)(3), recommending striking "classification or" from the text of this paragraph. TXU supported the comments made by AECT.

As previously noted, the commission has substantially revised §60.3(e) in response to comment. In particular, the rules now provide that a person or site classification may not be a contested issue in a permitting or enforcement hearing.

§60.3(e)(3) and (4)

V&E, WM, TAB, TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(e)(3) and (4). V&E and WM suggested the addition of a new §60.3(e)(3), which would read: "A request for a contested case hearing based solely on issues related to the applicant's or respondent's compliance history or motion to overturn the executive director's action based solely on compliance history classification or use shall be denied unless the requestor or movant demonstrates that the classification or use, applying the formula provided in §60.2(f) and subject to the limitations of §60.2(a)(1), was based on incomplete or inaccurate information or misapplication of the formula and that the error, if corrected, will result in a change in the site classification." Allied, BFI, TxSWANA, and NSWMA made the same recommendation, except that they left out the phrase "and subject to the limitations of §60.2(a)(1)." As a result of this addition, V&E, Allied, BFI, TxSWANA, and NSWMA further suggested the renumbering of proposed §60.3(e)(3) to §60.3(e)(4), and replacing the phrase "is under review," with "is an issue, the limitations of §60.2(a)(1) shall apply and." The addition of another sentence, to read, "Issues regarding compliance history that do not alter the site classification using the formula provided in §60.2(f) are not relevant for purposes of §80.127." was also suggested. V&E stated that the suggested changes would: "1) settle disputes about the evaluation of items considered in the compliance history classification with certainty and finality; 2) prevent potentially inconsistent results from litigating the same matters in different contested case hearings; and 3) focus compliance history classification issues in contested case hearings on items that were not previously

considered or that have arisen since the last classification and potentially make a difference in the compliance history classification." Further, V&E asserted that the changes would limit to relevant matters the scope of compliance history classification issues in hearings, while they would not preclude discussion of a person's or site's compliance record in examining permit provisions nor would they prevent consideration of §60.1 components not previously considered. Allied, BFI, TxSWANA, and NSWMA stated that the proposed modifications would limit the admissibility and use of compliance history in TNRCC proceedings to a known standard. TAB commented that it supports V&E's comments regarding establishing a process to challenge a site's compliance history classification and setting up a finite amount of time for such a consideration, adding that "it would be unfair and duplicitous to continue to subject companies to review of their 5-year compliance history every time they come before the agency for a permit or other authorization." TMRA stated that, as proposed, this paragraph fails to establish a more consistent and predictable evidentiary standard for evaluating compliance history in contested case hearings on permit matters - a main purpose of HB 2912. TMRA quoted from the *Texas Sunset Commission Staff Report on the Sunset Review of TNRCC*, "{a}nother benefit of a consistent definition {of compliance history} is removing the unnecessary debate as to what constitutes a compliance history in contested cases. This should decrease the time and resources spent determining what evidence can be submitted in contested case hearings." TMRA asserted that the proposed language is open-ended, and the final rule should include language limiting the admissibility and use of compliance history in commission proceedings to a known standard so members of the regulated community can identify and prepare for the resource-consuming proceedings with an understanding of the standard for such evidence. As such, TMRA recommended almost the exact same changes as V&E's, with the following exceptions: 1) omitted the words and terms "solely," "based solely," and "and subject to the limitations of §60.2(a)(1)," from the proposed new §60.3(e)(3); 2) did

not recommend replacing the phrase "is under review," in what was proposed as §60.3(e); and 3) included the phrase "in any commission proceeding" prior to "for purposes of §80.127" in the sentence added to the end of what would now be new §60.3(e)(4).

The commission has not made the changes suggested by the commenters, but has made substantial revisions to the provisions of this subsection as discussed previously in this preamble. The commission finds that many of the objectives sought by the commenters are satisfied by the revised rule. The commission agrees that there should be certainty and finality in classifications, that potential inconsistencies in litigating classifications in different contested case hearings should be avoided, and that discussion of compliance history should not be precluded in permitting decisions. These objectives are achieved by the rule as adopted.

AECT recommended a review of the classification rule that allows for a motion to overturn the executive director's decision on a classification. Such a motion would be filed with the Office of the Chief Clerk, and must specify the new or different compliance history information and any other reason that the person reasonably believes supports a reclassification of the compliance history. AECT also recommended that a classification may only be challenged if the compliance history information that was considered as part of such classification process was different than the compliance history information that was considered as part of the classification process that led to the prior compliance history classification, and if the person challenging the classification reasonably believes that such different information is significant enough to support a change in the classification. TXU supported the comments made by AECT, as do Garland, San Antonio, GEUS, and SMEC.

The commission responds that, as discussed in this preamble, the rule, as adopted, no longer includes provisions for filing motions to overturn the executive director's classification. Instead, an informal process has been established for corrections of errors and a limited and expedited formal appeal process has been established for classifications for which there are regulatory impacts associated with the classification itself. Appellants who choose to avail themselves of the limited appeal process must demonstrate that if the specific relief sought is granted, a change in person or site classification will result.

§60.3(f)

Section 60.3(f) was added subsequent to proposal to provide that the executive director may correct clerical errors which are defined to include typographical and mathematical errors. Such corrections may be made at any time, not just during the annual classification, to negate any potential for a mis-classification that may otherwise result. New subsection (f) also provides that an appeal may be filed if such correction results in a change of classification but must be filed no later than 45 days after the correction is posted on the commission's website. The site owner and permit holder must be notified of any change of classification as provided by §60.3(e)(6).

§60.3(g), (proposed as §60.3(a)(5))

The commission has moved the provision proposed as §60.3(a)(5) and adopted it as §60.3(g).

Additionally, the commission has modified the language proposed as §60.3(a)(5). The proposed language could have been interpreted to provide that the issue of compliance history could be raised in the context of a permitting hearing in situations where the compliance history issue had not been

referred to the State Office of Administrative Hearings (SOAH). This would not have been consistent with the commission's intent.

Adopted new §60.3(g) provides that any party to a contested case hearing may submit information pertaining to compliance history, including the underlying components of classifications, subject to the requirements of 30 TAC §80.127. However, the rule now provides that a person or site classification itself shall not be a contested issue in a permitting or enforcement hearing.

Therefore, the rule as adopted removes the ability to challenge a person or site classification in the course of a contested case hearing, but allows the parties to offer evidence of noncompliance in the proceeding. This means that parties will not be able to litigate whether a classification should be poor, average, or high during the course of a permitting or enforcement hearing. However, the opportunity to present evidence relating to previous violations documented at the site, for example, will be maintained.

The modified language has been moved and adopted as §60.3(g) for better and more appropriate organization of the rule, as this provision applies to both permit and enforcement hearings. As proposed, it was erroneously placed under the subsection dealing solely with permitting issues.

NTMWD, V&E, WM, TXI, T&K, TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(a)(5). NTMWD, TMRA, Allied, BFI, TxSWANA, and NSWMA stated that, as proposed, paragraph (5) failed to establish a more consistent and predictable evidentiary standard for evaluating compliance history in contested case hearings on permit matters - a main purpose of HB 2912. NTMWD, TMRA, Allied, BFI, TxSWANA, and NSWMA quoted from the

Texas Sunset Commission Staff Report on the Sunset Review of TNRCC, "{a}nother benefit of a consistent definition {of compliance history} is removing the unnecessary debate as to what constitutes a compliance history in contested cases. This should decrease the time and resources spent determining what evidence can be submitted in contested case hearings." Both NTMWD and TMRA asserted that the proposed language is open-ended, and the final rule should include language limiting the admissibility and use of compliance history in commission proceedings to a known standard so members of the regulated community can identify and prepare for the resource-consuming proceedings with an understanding of the standard for such evidence. As such, TMRA, Allied, BFI, TxSWANA, and NSWMA recommended adding the phrase "and the limitations of paragraph (e) of this section" to the end of this paragraph, as did V&E and WM. T&K stated that the final rule should limit the admissibility and use of compliance history in commission proceedings to the components listed in §60.1(c). TXI recommended that this provision be revised to limit the submission of information pertaining to a site's compliance history, rather than to a person's compliance history, to ensure that a contested case hearing on a permit application is as focused as possible. Further, T&K supported the comments provided by TMRA and TXI.

The commission responds that adopted §60.3(g), proposed as §60.3(a)(5), specifically ties the offer of compliance history evidence to the admissibility requirements of §80.127. Thus, the rule sets forth the standard for such evidence, and that standard is the one uniformly used by the commission in contested case hearings. The commission has also modified the rule, as proposed, to reflect that person or site classifications may not be litigated in permitting or enforcement hearings. Thus, the issues that can be raised in contested case hearings are now focused on compliance history itself rather than classifications. However, the commission does not agree that

it is appropriate to limit the admissibility and use of compliance history in agency proceedings to the components listed in §60.1(c). The commission may consider information related to environmental compliance relevant to the proceeding whether or not it is included in §60.1(c). For example, if a party were to seek to introduce evidence related to actions taken to improve environmental compliance at the site, this evidence would be admissible under the adopted rules even if it were not identified as a component in §60.1(c). With regard to the recommendation that offers of evidence related to compliance history be limited to compliance history pertaining to the site rather than the person is contrary to the statutory framework for consideration of compliance history. Therefore, no change has been made to the rule in response to this recommendation.

AquaSource commented regarding proposed §60.3(a)(5). AquaSource stated that the proposed language in this paragraph stating "any party to a contested case hearing may submit *any* information pertaining to a person's compliance history" will "change the complexion of contested case hearings, as we know them." AquaSource contended that there are burden of proof and relevance issues, and that it is not clear how such evidence could be introduced in a permit hearing, "in light of the commission's recent rulemaking on the role of the executive director in hearings." AquaSource stated that "change in roles" would: require protestants to subpoena TNRCC regional staff who would then end up spending more time dealing with hearings and less time on investigations; lengthen the permitting process for everyone; result in high costs for applicants and the agency; and likely result in a backlog in the permitting process.

The commission first notes that this provision, adopted as §60.3(g), has been amended from the proposal to remove disputes relating to classifications from the contested case hearing process. In

addition, to be admitted, information relating to compliance history must also meet the standard in §80.127, which provides that compliance history evidence is subject to the Texas Rules of Civil Evidence. The commission further responds that commission rules provide that certified copies of agency compliance summaries are included in the chief clerk's files, forwarded to SOAH upon referral, and included in the administrative record of permitting proceedings. Thus, the compliance summary information compiled by the agency is included in the record of the proceeding. Whether or not the executive director participates as a party in a permit hearing, the compliance history information compiled for that permit action is available to the parties, the judge, and the commission. The commission recognizes that there may be circumstances where the actual testimony of commission staff may be sought for purposes of elaboration of the compliance summary just as it may also be sought for elaboration of other elements of permit review. However, the commission does not agree that adopted §60.3(g) will require that result.

Miscellaneous Comments

In order to provide grammatical correctness and clarity, as well as to improve readability, the commission has made non-substantive modifications to adopted §60.2 and §60.3 not specifically mentioned in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

V&E, WM, Allied, BFI, TxSWANA, and NSWMA recommended the addition of a new subsection (f) regarding a change of ownership moratorium. Specifically, V&E, Allied, BFI, TxSWANA, and NSWMA recommended the following language:

“(f) Change of ownership moratorium. The classification of compliance history pursuant to §60.2 for a recently acquired site shall not be included or considered as part of the classification of compliance history for the new owner. (1) Pursuant to §60.1(d), a distinction of compliance history of the site under each owner during the compliance period shall be made. (2) A site rated as a poor performer pursuant to §60.2 under a prior owner shall not be subject to the provision of §60.3(a)(3) for a period of three years after a change of ownership. (3) If after three years the site achieves a compliance history rating of average or high performer pursuant to §60.2, the compliance history components resulting from the prior ownership shall be deleted from the site compliance history and the site shall then be considered as part of the new owner's compliance history rating for all purposes. (4) If after three years the site fails to achieve a compliance history rating of average or high performer pursuant to §60.2, the compliance history components resulting from the prior ownership shall not be deleted from the site compliance history and the site shall then be considered as part of the new owner's compliance history rating for all purposes.”

The commenters asserted that the rule as proposed would deter a responsible, average performing person from acquiring a poor performing site, which could result in such a site not being rehabilitated. V&E, Allied, BFI, TxSWANA, and NSWMA further asserted that limiting the mitigating factor in proposed §60.2(f)(3)(B) and (C) to only high performers "is contrary to the goal of improving the compliance of poor performers." WM stated that the uncertainty of mitigation makes it unlikely that high performers will want to acquire poor sites. V&E stated that the "rules should facilitate beneficial changes in ownership and provide clear and certain relief for high and average performing new owners with a distinct period to restore compliance." V&E and WM recommended the deletion of proposed §60.2(f)(3)(B) and (C) along with the inclusion of the new language recommended for §60.3(f). Allied,

BFI, TxSWANA, and NSWMA offered the addition of this language as an alternative to modifications it suggested for proposed §60.2(a) and (d).

The commission has determined that the changes adopted in §60.2(e)(3) sufficiently address the concerns expressed by commenters related to beneficial changes in ownership. The commission believes that it is more prudent to allow the executive director to evaluate the facts and circumstances concerning the change in ownership, including an evaluation of the new owner and any new trends occurring since the time of purchase. The commission encourages the rehabilitation of poor performing sites, and anticipates that the executive director will exercise good judgment when considering the use of the mitigating factor to change the classification of a site. Additionally, by evaluating the site annually with the rest of the regulated community, the executive director will have an opportunity to look for the positive influence of the new owner.

Examples

The following paragraphs provide some examples of compliance histories and site ratings calculated according to the adopted formula.

Person 1 has a wastewater permit, Permit No. 22222 - 001. Person 1 has no other authorizations at this site and owns no other sites in the State of Texas. It has owned and operated the permitted site for the entire five-year compliance period. A review of commission compliance and enforcement information indicates that Person 1 was issued a Findings Order on July 10, 1999 for violations of: 1) 30 TAC §319.7(a), failure to maintain records; and 2) §305.125(1), Permit No. 22222 - 001, Effluent Limitations; and TWC, §26.121, failure to comply with permitted effluent limitations. Person 1 had 45

investigations during the compliance period; the agency conducted five physical investigations and 36 discharge monitoring reports were evaluated for compliance. Since September 1, 1999, Person 1 reported effluent violations for the following four months: November 30, 1999; August 31, 2000; December 31, 2001; and March 31, 2002.

Each violation was evaluated in order to classify it as major, moderate, or minor. Both the violations in the order were classified as moderate because the record violation involved a total lack of required records, and the effluent violation did not involve adverse effects to human health, safety, or the environment. Because these violations are included in a Findings Order, they are assigned 60 points each. The violations reported on the discharge monitoring report forms were assigned three points each, because they did not involve adverse effects. In summary, the points assigned to Person 1 are 60 points from the order and 12 points from the NOVs (discharge monitoring reports) or a total of 132 points.

Because there are no major violations, Person 1 is not a repeat violator and receives no additional points. There are no chronic excessive emissions events related to this site; thus, no additional points. Person 1 has no criminal convictions to contribute additional points.

Under the site rating formula, the site rating for Person 1 would be determined by adding all the applicable points for each violation in enforcement order, court orders, NOVs, criminal convictions, and chronic excessive emissions events. In this case the points total 132. This sum is then divided by the 46 investigations plus one to obtain a value of 2.87. There are no audits, EMS, or mitigating

factors on record for this site which would effect the calculation; thus, the site rating remains at 2.87.

Person 1 is classified as an average performer according to the ranges in adopted §60.2(e)(2).

Person 2 has three sites in Texas. Person 2 at Site 1 has a wastewater permit, operates hazardous waste units, and has an air permit. Person 2 has owned this site for the entire five-year compliance period under evaluation. A review of compliance and enforcement information indicates two effluent violations both cited as §305.125(1); Permit No. 3333 - 001, Effluent Limitations; and TWC, §26.121, failure to comply with permitted effluent limitations, reported in discharge monitoring reports. The reports were for December 11, 1999 and February 28, 2002. There is also an NOV for §335.69, failure to properly label a hazardous waste container. Additionally, there is an NOV for air violations including: §101.20(1) and (3) and §116.115; Permit No. 3322A Special Provision 3; USEPA Permit No. PSD-TX-323C2; 40 CFR §60.592(a); and THSC, §382.085(b), failure to equip each opened line or valve with a cap, plug, flange, or second valve; and §§101.20(1), 115.324(2)(C), and 116.115; Permit No. 3322A Provision 7F; 40 CFR §60.592(a); and THSC, §382.085(b), failure to monitor the emissions from two of 15 pipelines in liquid service.

The two wastewater violations are classified as moderate because the discharges did not result in adverse effects. The hazardous waste violation is classified as a minor violation, because only the date that accumulation began was missing on the label. The air violation concerning capping the line is a moderate violation, because it involves failing to maintain equipment in a way that could result in a release of pollutants. The air violation concerning failure to monitor two of 15 lines in liquid service is a minor violation, because most (87%) of the monitoring requirement was met.

On April 17, 1998, the commission issued a Findings Order against Person 2 at Site 1. This order contained three violations. The first violation addressed in the Order is §115.324(a)(7) and THSC, §382.085(b), failure to attach a weatherproof and visible tag with an identification number and the date the leak was discovered to a leaking component. This violation is classified as a minor violation, because Person 2 had checked 312 valves, noted ten leaking valves, and tagged nine valves resulting in most (90%) of the requirement being met. The second violation addressed in the Order is §§101.20(1), 115.112(a)(1), and 116.116; 40 CFR §60.112(a)(2), Standard Exemption 86(b); and THSC, §382.085(b), failure to store a volatile organic compound in a stationary tank, reservoir, or other container without the container being capable of maintaining working pressure to prevent any vapor gas loss or being equipped with at least a control device. This violation is classified as a moderate violation, because it includes maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants. The third violation addressed in the Order is §101.20(1); 40 CFR §60.7(c)(2) and (3); and THSC, §382.085(b), failure to submit an excess emissions report. This violation is classified as moderate, because it involves the complete failure to submit a report (100% of the requirement is not met).

Person 2 has no record of criminal convictions for this site. There are no major violations; thus, Person 2 at Site 1 is not a repeat violator. There are no chronic excessive emissions events at this site. Person 2 implemented an EMS three years ago that has not been certified by the executive director under Chapter 90.

Under the site rating formula, the Site 1 rating for Person 2 would be determined by adding all the applicable points for each violation in enforcement orders, court orders, NOVs, criminal convictions, and chronic excessive emissions events. In this case, there are two moderate violations in the Findings Order (60 points each) resulting in 120 points, and one minor violation in the Findings Order resulting in 20 points. There are three moderate violations in NOVs (three points each) resulting in nine points, and two minor violations in NOVs (one point each) resulting in two points. The total points resulting from the violations are 151. This value is then divided by the three investigations conducted by the agency, plus the 36 evaluations of discharge monitoring reports, plus one, or 151 divided by 40, resulting in a site rating of 3.75. Based on this site rating, Person 2 at Site 1 is an average performer.

Person 2 at Site 2 has two enforcement orders. The first order was issued as a Findings Order on April 2, 1999, and contains one violation. This violation is §305.125(1); TPDES Permit No. 11111 - 001, Effluent Limitations; and TWC, §26.121, failure to comply with the permitted effluent limitations. This violation is classified as a major because the dissolved oxygen in the receiving stream was measured at 0.5 milligrams per liter for the first 150 yards downstream of the point of discharge, and there were no aquatic animals observed for this distance.

The second enforcement order is a 1660 Order, was issued on June 25, 2002, and contains two violations. The first violation is §335.69(a)(4), failure to remove hazardous waste within 90 days. This violation is classified as a moderate violation, because the facility is not prepared for long-term storage and management of hazardous waste, and, thus, a release of pollutants could occur. The second violation is §335.4; and TWC, §26.121, unauthorized discharge of 10,000 gallons of a hazardous waste

with a pH of 13 into an estuary resulting in a fish kill. This violation is classified as a major violation, because aquatic life was adversely impacted by the discharge.

Since September 1, 1999, Person 2 at Site 2 has reported 12 months of effluent violations cited as §305.125(1); TPDES Permit No. 11111 - 001, Effluent Limitations; and TWC, §26.121. These violations are classified as moderate because there is no information to indicate that human health, safety, or the environment was impacted.

Person 2 at Site 2 has no criminal convictions and no chronic excessive emissions events.

Person 2 at Site 2 must be evaluated to determine whether the person should be considered a repeat violator. Under the complexity criteria, Person 2 at Site 2 receives four points for the TPDES permit, and two points for the New Source Review permit. Under the number of sites criteria, Person 2 at Site 2 receives three points, because Person 2 owns or operates three sites in the State of Texas. Based upon the size criteria, Person 2 at Site 2 receives one point for having less than 44 FINs; one point for one external permitted wastewater outfall; and one point for having fewer than ten active hazardous waste management units. The site is located in Brazoria County, which is part of a nonattainment area and, therefore, receives one point for the nonattainment area criteria. The total number of criteria points is 13. Based upon the ranges in adopted §60.2(d)(1), Person 2 at Site 2 is not a repeat violator.

Under the site rating formula, the Site 2 rating for Person 2 would be determined by adding all the applicable points for each violation in enforcement orders, court orders, NOV's, criminal convictions, and chronic excessive emissions events. In this case there is one major violation in the Findings Order

resulting in 100 points. There is one moderate violation in the 1660 Order resulting in 45 points, and one major violation in the 1660 Order resulting in 80 points. There are 12 moderate violations in NOV's (three points each) resulting in 36 points. The total points resulting from the violations is 261. This value is then divided by the five investigations conducted by the agency, plus 36 evaluations of discharge monitoring reports, plus one, or 261 divided by 42, resulting in a site rating of 6.21. Based on this site rating, Person 2 at Site 2 is an average performer.

Person 2 has a third site that is very small. This site has not been investigated by the agency during the five-year period. It is an average performer by default by definition and is assigned 3.01 points.

Each site has a site rating developed by using the site rating formula or the default value. Person 2 has an aggregate rating of 4.32 points which was obtained by summing the three site ratings ($3.75 + 6.21 + 3.01 = 12.97$), and then dividing by 3. Therefore, Person 2 is an average performer.

§60.2, §60.3

STATUTORY AUTHORITY

The new sections are adopted under THSC, §361.017 and §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, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The new sections are also adopted under 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; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule, and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

§60.2. Classification.

(a) Classifications. Beginning September 1, 2002, the executive director shall evaluate the compliance history of each site and classify each site and person as needed for the actions listed in §60.1(a)(1) of this title (relating to Compliance History). On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify each site and person. For the purposes of classification in this chapter, and except with regard to portable units, "site" means all regulated units, facilities, equipment, structures, or sources at one street address

or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A “site” for a portable regulated unit or facility is any location where the unit or facility is or has operated.

Each site and person shall be classified as:

- (1) a high performer, which has an above-average compliance record;
- (2) an average performer, which generally complies with environmental regulations; or
- (3) a poor performer, which performs below average.

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

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

- (1) Major violations are:

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

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

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

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

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

(2) Moderate violations are:

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

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

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

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

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

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

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

(3) Minor violations are:

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

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

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

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

(d) Repeat violator.

(1) Repeat violator criteria. A person may be classified as a repeat violator at a site when, on multiple, separate occasions, a major violation(s) occurs during the compliance period as provided in subparagraphs (A) - (C) of this paragraph. The total criteria points for a site equals the sum of points assigned to a specific site in paragraphs (2) - (5) of this subsection. A person is a repeat violator at a site when:

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

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

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

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

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

(i) Radioactive Waste Disposal;

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

(iii) Municipal Solid Waste Type I;

(iv) Prevention of Significant Deterioration;

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

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

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

- (i) Underground Injection Control Class I/III;
- (ii) Municipal Solid Waste Type I AE;
- (iii) Municipal Solid Waste Type IV, V, or VI;
- (iv) Municipal Solid Waste Tire Registration; and
- (v) TPDES or NPDES Industrial or Municipal Minor;

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

- (i) New Source Review individual permit or permit by rule requiring submission of a PI-7 under Chapter 106 of this title (relating to Permits by Rule); and
- (ii) any other individual site-specific water quality permit not referenced in subparagraph (A) or (B) of this paragraph or any water quality general permit.

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

- (A) 1 point when a person owns or operates one site only;
- (B) 2 points when a person owns or operates two sites only;
- (C) 3 points when a person owns or operates three sites only;
- (D) 4 points when a person owns or operates four sites only;
- (E) 5 points when a person owns or operates five sites only;
- (F) 6 points when a person owns or operates six to ten sites;
- (G) 7 points when a person owns or operates 11 to 100 sites; and
- (H) 8 points when a person owns or operates more than 100 sites.

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

- (A) Facility Identification Numbers (FINs):

- (i) 4 points for sites with 600 or more FINs;
- (ii) 3 points for sites with at least 110, but fewer than 600, FINs;
- (iii) 2 points for sites with at least 44, but fewer than 110, FINs; and
- (iv) 1 point for sites with at least one but fewer than 44 FINs;

(B) Water Quality external outfalls:

- (i) 4 points for a site with ten or more external outfalls;
- (ii) 3 points for a site with at least five, but fewer than ten, external outfalls;
- (iii) 2 points for sites with at least two, but fewer than five, external outfalls; and
- (iv) 1 point for sites with one external outfall;

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

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

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

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

and

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

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

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

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

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

(A) The number of major violations contained in:

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

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

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

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

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

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

(B) The number of moderate violations contained in:

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

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

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

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

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

(C) The number of minor violations contained in:

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

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

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

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

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

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

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

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

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

(i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony

convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and

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

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

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

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

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

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

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

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

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

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

(L) The result of the calculations in subparagraphs (I) - (K) of this paragraph shall be divided by the number of investigations conducted during the compliance period plus one. If the value is less than zero, then the site rating shall be assigned a value of zero. For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation, for the purposes of this chapter, may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. All sites with a classification of "average performer by default" are assigned 3.01 points.

(M) If the person receives certification of an environmental management system (EMS) under Chapter 90 of this title (relating to Regulatory Flexibility and Environmental Management Systems) and has implemented the EMS at the site for more than one year, then multiply the result in subparagraph (L) of this paragraph by 0.9.

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

(A) fewer than 0.10 points - high performer;

(B) 0.10 points to 45 points - average performer; and

(C) more than 45 points - poor performer.

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

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

(i) other compliance history components included in §60.1(c)(10) - (12)

of this title;

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

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

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

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

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

(ii) may, at the time of subsequent compliance history classifications, reclassify the site from poor performer to average performer with 45 points based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement.

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

(g) Notice of classifications. Notice of person and site classifications shall be posted on the commission's website within 30 days after the completion of the classification.

§60.3. Use of Compliance History.

(a) Permitting.

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

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

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

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

(3) Poor performers and repeat violators.

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

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

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

(B) If a site is classified as a poor performer, upon application for a permit, permit renewal, modification, or amendment relating to that site, the agency may take the following actions, including:

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

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

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

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

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

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

(4) Additional use of compliance history.

(A) The commission may consider compliance history when:

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

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

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

(B) The commission shall consider compliance history when:

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

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

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

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

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

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

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

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

(C) repeatedly operating without required authorization; or

(D) documented falsification.

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

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

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

(3) shall perform any investigations unannounced.

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

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

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

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

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

(1) may recommend technical assistance; or

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) conduct an announced investigation;

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

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

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

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

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

