The Texas Natural Resource Conservation Commission (commission or TNRCC) proposes new §60.2, Classification and §60.3, Use of Compliance History. The commission proposes these new sections to Chapter 60, Compliance History, 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, regarding compliance history.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 proposed rules is to establish the classification and use of the components of compliance history.

The commission currently has procedures for preparation of compliance summaries for permit applications for activities conducted under the authority of TWC, Chapters 26 and 27; and the Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361; and the Texas Radiation Control Act, THSC, Chapter 401. These procedures are specified in existing 30 TAC §281.21(d). Although these current procedures specify what a compliance summary shall cover, they do not actually specify how the compliance information should be utilized by the agency. The same is

true for the existing procedures for preparation of compliance summaries for permit applications for air emissions under the authority of the THSC, Texas Clean Air Act, Chapter 382, the components of which are specified in existing 30 TAC §116.122.

The commission is also required by TWC, §7.053 to consider compliance history (as one of several factors) for purposes of assessing administrative penalties in commission enforcement actions. The commission's Penalty Policy (effective January 1, 1999), reflects that the administrative penalty recommended in an enforcement action will be increased based on the number of times the respondent (as well as the site, if the site has changed owners during the compliance period) has been through enforcement during the compliance period. The percentage increase in penalties recommended by the executive director is based upon site-specific history for all media, resulting in a 25% increase for the second time through enforcement, a 50% increase for the third time through enforcement, and a 100% increase for the fourth time or more through enforcement. Additionally, a 10% increase is applied to the administrative penalty for each time through enforcement, entity-wide, in the same medium/media as the violations in the current case.

The commission currently uses compliance history as a criterion for eligibility to participate in the voluntary Clean Texas Program. Any facility that has been issued a findings order by the commission three years prior to the application date is ineligible to participate. Any facility that has been the subject of a state or federal district court judgment for environmental violations for up to three years prior to the application is also ineligible to participate. Lastly, any facility owner or operator with a

criminal conviction for violation of environmental laws, or whose employees have a criminal conviction for violation of environmental laws, is ineligible to participate.

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 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 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27; THSC, Chapters 361, 382, and 401; and §60.1 reflects this limitation.

Additionally, 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 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 to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) 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 proposed 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 proposed 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 proposing actions which the agency *may* take in response to a person's compliance history through this rulemaking.

SECTION BY SECTION DISCUSSION

The commission proposes these new sections to Chapter 60 in order to implement the requirements of HB 2912.

The commission proposes the addition of new §60.2, Classification. Under proposed §60.2(a), the executive director would evaluate the compliance history and classify each site as needed for the actions listed in §60.1(a)(1) beginning September 1, 2003 and every six months thereafter. The commission proposes to classify sites initially as needed due to the complexity of compiling all the required information. 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 by September 1, 2003. Additionally, the commission proposes that, for purposes of classification in this chapter, "site" shall mean all units, facilities, equipment, structures, or regulated 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. This definition clarifies what information will be included in the evaluation and classification. The commission also proposes to 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 proposes a six-month interval for this purpose. Additionally, proposed §60.2(a) reflects that a site would be classified into one of three categories. The three classifications in proposed §60.2(a)(1) - (3), as required by TWC, §5.754(b), are: a high performer, which is a site that has an above-average compliance record; an average performer, which is a site that generally complies with environmental regulations; or a poor performer, which is a site that performs below average.

The commission proposes 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 proposed rule states that if there is no compliance information about the person's site at the time the executive director develops the compliance history classification, then the classification defaults to "average performer." The proposed rule further states that the executive director may conduct an investigation to develop a compliance history.

The commission proposes 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). New §60.2(c) requires the executive director to determine whether a violation of an applicable legal requirement within the TNRCC's jurisdiction is of either major, moderate, or minor significance. This would only apply to violations of applicable legal requirements included in an order or notice of violation (NOV) 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 commission proposes new §60.2(c)(1) to reflect the type of violation which would be considered a major violation. Major violations are described in proposed new §60.2(c)(1)(A) - (G): any violation

for which the TNRCC has agreed with the United States Environmental Protection Agency (EPA) to take formal enforcement action, in accordance with the EPA/TNRCC Enforcement Memorandum of Understanding, dated April 1, 1999; 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; any action or inaction that has caused adverse effects on human health, safety, or the environment, or that has resulted in pollutants released at levels or volumes sufficient to cause adverse effects on human health, safety, or the environment; falsification of data, documents, or reports; any violation included in a criminal conviction; or any violation similar in character or impact determined by the executive director to be a major violation.

The commission proposes new §60.2(c)(2) to reflect the type of violation which would be considered a moderate violation. Moderate violations are set forth in the items proposed in new §60.2(c)(2)(A) - (F): complete or substantial failure to monitor, analyze, or test a release, emission, or discharge; complete or substantial failure to maintain records; having an operator who is not licensed or whose level of license, certification, or other authorization is inadequate to meet applicable rule requirements; any release, emission, or discharge that is not classified as a major violation; complete or substantial failure to conduct required unit or facility inspections; or any violation similar in character or impact determined by the executive director to be a moderate violation.

The commission proposes new §60.2(c)(3) to reflect the type of violation which would be considered a minor violation. Minor violations are the items proposed in new §60.2(c)(3)(A) - (E): those violations that indicate that most, but not all of, a monitoring or testing requirement, including required unit or

facility inspections, was met; those violations that indicate that most, but not all of, an analysis or waste characterization requirement was met; those violations that indicate that most, but not all of, a requirement addressing the submittal or maintenance of required data, documents, notifications, plans, or reports was met; those violations that indicate that most, but not all of, an operation and maintenance requirement was met; or any violation similar in character or impact determined by the executive director to be a minor violation.

The commission proposes 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 proposes to classify a person as a “repeat violator” at a site when the same major violation as described in §60.2(c)(1) is documented more than once within the compliance period at the same site. 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, then the person is a repeat violator. 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 proposes 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 is proposed to be addressed through the consideration of a person's compliance history. The commission invites 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 invites 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. For example, one might propose that those that have a low complexity factor would need fewer repetitive violations to be considered a "repeat violator" than those with a higher complexity factor. Please include specific proposals for how the number of violations would be matched to the complexity of the sites. The commission also invites 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. Specifically, can the circumstances in which a repeat violator's permit may be revoked be handled by the role repeat violations play in classifications of compliance history?

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…." Proposed new §60.3(c)(2) reflects this requirement by stating that the commission may enhance an administrative penalty based on compliance history. Compliance history incorporates major, moderate, and minor violations. The commission proposes to limit the definition of a repeat violator to persons who repeat violations categorized as "major" because TWC, §5.754(f) requires enhanced administrative penalties for repeat violators, which is in addition to the enhancement of penalties for consideration of

compliance history. Furthermore, the number and complexity of sites owned or operated by the person is addressed through the consideration of a person's compliance history.

The commission proposes new §60.2(e), concerning the complexity factor, 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. In proposed new §60.2(e)(1), the commission proposes to assign every site a complexity factor of 5, 3, or 1, based generally upon the site's primary Standard Industrial Classification (SIC) and processes. The commission recognizes that compliance history classification of widely varying types of sites requires consideration of the complexity of the type of facilities at the site. The simplest measure of complexity is the number of points of emission, discharge, or release to the environment at the site. Analysis of the number of facilities per site was performed for all the accounts in the existing air program point source database (PSDB). PSDB was used because it is a single database that has relatively comprehensive data. It was expected that, in general, those sites that are relatively complex for air are also relatively complex for the other media. The commission is considering further analysis to ensure that the complexity factor is correct for other media. Because similar businesses may have similar levels of complexity, the accounts were grouped according to their reported primary SIC major group (the first two digits of a four-digit SIC code) which reflects their primary business. There were a few SIC major codes so broad that, to obtain similar complexity, the analysis had to be done for the individual four-digit SICs, as opposed to the two-digit major group (i.e., 9661, 2911, 4226, 2611, and 2621). Then, an average number of facilities per account, based on facility identification numbers reported in PSDB, was calculated for each SIC.

The SICs were sorted in descending order based on the average number of facilities. Next, a relative level of complexity was assigned to each SIC. The commission believes that this approach provides a sufficient level of analysis to accomplish its intent to assign a relative complexity factor. The complexity factor of 5 would include those industrial classifications and process generally determined to be the most complex. The complexity factor of 3 would include those determined to be less complex than those with the complexity factor of 5, but not the least complex. Everything else not listed would default to a complexity factor of 1. The industrial classification used to determine the classification rating for a site would be the *primary* classification for the entire site, as opposed to, for instance, the specific classification associated with the portion of the site which may be covered by a permit. Further analysis could result in certain SIC major groups being moved into a different complexity factor. The commission invites comments as to how to specifically consider the complexity of sites. Please include specific proposals for how the complexity of a site could be determined.

The commission proposes new §60.2(e)(2) to further address the requirements of TWC, §5.754(c)(2). The proposed language states that the number of sites owned or operated by a person will be taken into account for classifying a site. Specifically, for persons who own or operate less than 25 sites in the State of Texas, the complexity factor will remain unchanged from that determined in §60.2(e). For persons who own or operate 25 or more sites in the State of Texas, the complexity factor determined in paragraph (1) of this subsection will increase by one. The commission believes that the number of sites owned or operated by a person does not substantially impact their compliance and thus proposes a small adjustment factor. This will help to effectively balance the compliance history classification between those persons owning or operating a large number of sites, and those owning or operating fewer sites.

The commission proposes new §60.2(f), concerning 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. Although 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 of the person. Specifically, although information on all sites inside the State of Texas, as well as for final enforcement orders, court judgments, and criminal convictions outside Texas, would be included in compliance histories, the classification as determined through the proposed formula would only utilize the components for the site which is the subject of the classification. Ultimately, this would mean that there would not be one classification of high, poor, or average for each *person* with sites in the State of Texas; rather, each person would have a classification for *each of its sites* in the State of Texas. The executive director would determine each site rating based upon the method proposed in the paragraphs under new §60.2(f).

Overall, 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. Certain point values, as proposed, would be determined by the significance of the violations; other point values would be determined by the type and complexity of the component. Additional discussion of each formula calculation is subsequently provided in this preamble.

Proposed new §60.2(f)(1), concerning site rating, addresses the calculations to be performed for a location for which a permit application, enforcement, investigation, or participation in an innovative program is being considered. This paragraph would include the calculations to be performed for the site for the time period reviewed. 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.

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 and are issued by the executive director. 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 by the person. Further, orders represent final commission actions as opposed to allegations included in NOVs. 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 for violations in NOVs. The point values for violations in 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.

Proposed new §60.2(f)(1)(A) states that the number of major violations, as described in proposed §60.2(c)(1), contained in any of the components from §60.1(c)(1) and (2), except for criminal convictions, shall be multiplied by 100. This would include all major violations contained in any final enforcement orders (including 1660 orders approved by the commission on or after February 1, 2002), 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. Major violations contained in an NOV shall be multiplied by 5. The relative difference between orders and NOVs is a factor of 20. The commission has determined that major violations contained in these components should be weighted more heavily than those contained in NOVs because these components are final commission actions, whereas NOVs contain unadjudicated allegations that do not have final commission approval. Proposed new §60.2(f)(1)(A) further states that if the person is a repeat violator as described in proposed §60.2(d), then the result of multiplying the number of major violations by 100 shall further be multiplied by 2. This addresses the requirement in TWC, §5.574(c)(3) which states that, "In classifying a person's compliance history, the commission shall … consider the significance of the violation and whether the person is a repeat violator." In essence, if MA is the number of major violations contained in the applicable components for this site for the compliance period, then (MA x 100) equals the number of points for this portion of the formula. Additionally, if the person is a repeat violator, then (MA x 100) is further multiplied by 2: ((MA x 100) x 2). The above analysis is also true, except in the context of repeat violators, for moderate and minor violations contained in 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, and major, moderate, and minor violations contained in

NOVs. The weight of the multipliers are different, for the types of violations to reflect the severity of the violation and the finality of it.

The commission notes that a request for an opinion has been submitted to the Office of the Attorney General (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 asks "Whether 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 components of compliance history, the compliance period of five years, and any initial "exceptions" to the five-year backward look at compliance history components are included in the first phase of the compliance history rulemaking, §60.1. The commission is not proposing to reopen §60.1 through this rulemaking. However, if the OAG opinion, scheduled to be released sometime during the summer of 2002, finds that any portion of §60.1 is improper or unconstitutional, corrections will be made through additional rulemaking. In the interim between the time of the opinion being released and the effective date of subsequent rulemaking, should that be necessary, the commission will prepare compliance histories in accordance with the OAG opinion.

Proposed new §60.2(f)(1)(G) states that the number of counts in all criminal convictions from existing §60.1(c)(1) shall be multiplied by 500. 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.

Proposed new §60.2(f)(1)(H) states that the number of chronic excessive emissions events from §60.1(c)(4) shall be multiplied by 100. The commission has determined that chronic excessive emissions events should be weighted less than counts in criminal convictions, but equal to the weight of a major violation contained in a final commission action. The commission will propose 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.

Proposed new §60.2(f)(1)(I) states that the subtotals from subparagraphs (A) - (H) of this paragraph shall be added together. This would provide a subtotal for points associated with compliance history components for the site during the compliance period, including: violations (major, moderate, and minor) included in any final enforcement orders (including those 1660 orders approved by the commission on or after February 1, 2002), 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, as well as in NOVs, further taking into account, with regard to major violations, whether the person is a repeat violator; counts in criminal convictions; and chronic excessive emissions events.

Proposed new §60.2(f)(1)(J) states, "The sum in subparagraph (I) of this paragraph shall be divided by the complexity factor for the site, as determined from subsection (e) of this section." As stated previously in this preamble, the complexity factor is intended to address the requirements of TWC, §5.754(c)(2), which states that the commission shall give consideration to the complexity of facilities

and number of sites owned or operated by the person. As proposed, the point total obtained in proposed §60.2(f)(1)(I) would be divided by a complexity factor based generally upon the industrial classification and processes for the site of either 5, 3, or 1, which would be increased by one if the person owns or operates 25 or more sites (regulated by the commission) in the State of Texas. This division would help normalize the points because more complex sites generally have more regulations to comply with, and have the potential for a greater number of violations.

Proposed new §60.2(f)(1)(K) states, "The result in subparagraph (J) of this paragraph shall be divided by the number of investigations conducted at the site during the compliance period." The proposed rule further states that, for purposes of this chapter, investigations include record reviews and physical site evaluations. The types of record reviews that would be included under investigations are: wastewater discharge monitoring report evaluations; Title V permit certification evaluations; upset/maintenance report evaluations; reviews of reports submitted under 40 Code of Federal Regulations Parts 60, 61, and 63; review of reports submitted under 30 TAC Chapter 116 or 117; review of a stack performance test; and evaluation of continuous emission monitoring system or predictive emission monitoring system certifications. This division would be the final step in normalizing the points by averaging based upon the total number of investigations performed at the site during the compliance period. This factor would also indirectly take into account the complexity of a site, because generally, the more complex a regulated program, the more frequent the agency's investigation rotation schedule.

The commission proposes new §60.2(f)(2), concerning point ranges, which states that the executive director will assign a classification based upon the compliance history evaluation, utilizing the following

ranges for each classification, as proposed in subparagraphs (A) - (C): less than 10 points - high performer; 10 points to less than 100 points - average performer; and 100 or more points - poor performer. Once 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 categorize a site's performance. When selecting the proposed classification ranges, the commission reflected on the types of environmental performance that is seen in permitting actions and enforcement actions. The commission perceives that poorer performers have numerous violations or repetitive violations. Where enforcement orders have been issued two to four times in a five-year period for violations at that person's site. By utilizing these assumptions, the commission suggests that the proposed classification ranges are reasonable. It is important to note that these ranges are only proposed, and the numbers could go up or down based on comments received during the comment period. The commission specifically invites comments on the point range proposal.

The commission proposes new §60.2(f)(3), concerning mitigating factors, which states, "The executive director shall evaluate mitigating factors for the site and may reclassify the site based upon these factors." This would 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, but also on other, mitigating factors, as appropriate for the specific site. The purpose of proposed new §60.2(f)(3) is to allow the executive director to fully evaluate a person's demonstrated commitment to environmental excellence as part of the classification process.

Proposed new §60.2(f)(3)(A) includes as one mitigating factor "other compliance history components included in §60.1(c)(8) - (12) of this title." These positive components include: the date of letters notifying the executive director of an intended audit conducted and any violations disclosed under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995; the type of environmental management systems (EMS), if any, used for environmental compliance; any voluntary on-site compliance assessments conducted by the executive director under a special assistance program; participation in a voluntary pollution reduction program; and a description of early compliance with, or offer of, a product that meets future state or federal government environmental requirements. The commission solicits comments concerning whether and how to quantify the use of EMS and audits in the compliance history analysis and subsequent classification.

Proposed new §60.2(f)(3)(B) includes as another mitigating factor the situation in which a regional entity, all of whose other sites have a high performer classification, who for the purposes of regionalization, purchased a site with a poor performer classification. 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. For instance, if a river authority purchases a wastewater treatment facility with a poor performer classification, it would be doing so with the intent to improve performance at that facility and thereby protect or even improve water quality. The river authority should not be negatively impacted by the facility classification while it seeks permit amendments, or new or different authorizations to address existing problems. Similarly, proposed new §60.2(f)(3)(C) includes as another mitigating factor the situation in which a person, all of whose other sites have a high performer classification, purchased a site with a poor performer classification. The

commission does not want to deter persons with higher performance classifications from taking over sites with poorer performance classifications through the classification and use of compliance history.

The commission proposes new §60.3, Use of Compliance History, 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 inspections; and participation in innovative programs.

Proposed new §60.3(a), concerning permitting, would 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 proposed 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 proposed language in §60.3(a)(1) adds that the agency shall consider compliance history by: evaluating the person's site-specific compliance history and classification; and evaluating the person's entire compliance history, especially considering patterns of environmental compliance. Proposed subparagraph (A) refers to the site classification as proposed in §60.2(f). Proposed subparagraph (B) reflects the agency's ability to look not only at the site's classification in permit decisions regarding that site, but also at the person's entire environmental compliance history at other sites in Texas, as well as outside the State of Texas.

The commission proposes new §60.3(a)(2), concerning review of permit application. Under this paragraph, the commission proposes new §60.3(a)(2)(A), which states that the executive director or commission may require permit conditions or provisions, as appropriate, in response to compliance history. This would be done to help ensure that environmental compliance is achieved, and as a result, could assist a performer (poor or otherwise) in improving its classification.

The commission also proposes new §60.3(a)(2)(B), which states that if a person's site is classified as a poor performer, the executive director or commission may require one or more of several options designed to improve environmental performance at the site. This subparagraph would address 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."

Under proposed new §60.3(a)(2)(B), the commission proposes several options. Proposed §60.3(a)(2)(B)(i) would allow the executive director or commission to provide reduced permit renewal periods (for permits with terms) for the permits of poor performers. By reducing the term of a permit from five years to two years (at the time of application or renewal), as an example, the executive director or commission would have a more frequent opportunity to review the appropriateness of permit provisions, as well as the person's ability to comply with the permit provisions, and would be allowed more opportunity to modify the permit as needed to ensure or increase environmental compliance.

Proposed §60.3(a)(2)(B)(ii) would allow the executive director or commission to issue notices of deficiency (NODs) to require more specificity in the permit application for the permit applications of poor performers. By doing so, the executive director or commission could gain better understanding of the person's operation, and make a better determination as to the type and stringency of permit provisions which should be included in a permit.

Proposed §60.3(a)(2)(B)(iii) would allow the executive director or commission to address recurring problems on the part of a poor performer by using prescriptive, rather than performance-based, permit provisions, in order to improve the environment and ensure that specific operation controls are in place.

Proposed §60.3(a)(2)(B)(iv) would allow the executive director or commission to require a citizen outreach program in the permit of a poor performer. This would provide for increased public awareness about the person's operations, processes, waste management, operator training, emergency responses, etc.

Proposed §60.3(a)(2)(B)(v) would allow the executive director or commission to require a citizen advisory panel in the permit of a poor performer. This would provide a direct working relationship between the person and its neighbors, and facilitate operational improvements and/or changes that address public concerns regarding safety and environmental quality.

Proposed §60.3(a)(2)(B)(vi) would allow the executive director or commission to require monitoring, or require more, or more frequent, monitoring in the permit of a poor performer. This would provide

additional data that the person would use to monitor the operational performance of its process and/or facilities. With this additional information, the person could take action sooner to prevent or minimize permit violations and thus reduce unauthorized discharge or emissions of pollutants into the environment.

Proposed §60.3(a)(2)(B)(vii) would allow the executive director or commission to require an individual permit instead of a registration, general permit, or permit by rule. This would allow the executive director to draft a site-specific permit tailored to the individual process and/or facilities at the site. As a result, the executive director or commission could include permit provisions that more closely monitor operations, thereby improving compliance performance.

Proposed §60.3(a)(2)(B)(viii) provides that the executive director or commission may allow a person who is classified as a poor performer to obtain a co-permittee and/or obtain an independent operator. The executive director or commission may utilize this provision if the person is willing and there is another willing person that is capable of operating and maintaining the permitted site in some "partnership" with the permittee. The new co-permittee would presumably have good knowledge of the permitted operations and financial abilities to help ensure satisfactory performance and future upgrades and/or repairs.

Proposed §60.3(a)(2)(B)(ix) would allow the executive director or commission to require other items or actions related to site operations and/or monitoring, as warranted, to help ensure that the performance of a poor performer improves.

The commission proposes 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."

Proposed new §60.3(a)(3)(A) would include actions the agency shall take if the person's site is classified as a poor performer. Proposed §60.3(a)(3)(A)(i) states that the agency shall deny or suspend a person's authority 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."

Proposed §60.3(a)(3)(A)(ii) states that the agency shall deny a permit for, or renewal of, a flexible permit under 30 TAC 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…."

Proposed new §60.3(a)(3)(B) states that the actions the agency may take if a person's site is classified as a poor performer. Proposed 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."

Proposed 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."

Proposed 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. 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."

Proposed new §60.3(a)(3)(C) states that, notwithstanding 30 TAC §305.65(8), if 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."

Proposed new §60.3(a)(3)(D) reflects that the commission may deny or modify a permit of a repeat violator.

Proposed 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). The commission proposes that this would include, but would not be limited to, violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment, and proposes to include this language in the text of the rule.

The commission proposes new §60.3(a)(4), concerning additional use of compliance history, to address other uses of compliance history. Proposed 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 Texas Water Code, Chapter 26; considering the issuance, amendment, or renewal of a preconstruction permit, under Texas Health and Safety Code, Chapter 382; and making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under Texas Health and Safety Code, Chapter 401.

Proposed 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 Texas Water Code, 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 proposes new §60.3(a)(5), concerning compliance history evidence, which states, "Notwithstanding any other provision in this chapter, any party in a contested case hearing may submit any information pertaining to a person's compliance history, subject to the requirements of §80.127 of this title (relating to Evidence)." The commission has determined that it is appropriate to include this language in the proposed rule for clarity.

The commission proposes new §60.3(a)(6), concerning revocation or suspension of a permit. This would 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 proposed language states, "Compliance history classifications shall be used in commission decisions relating to the revocation or suspension of a permit."

The commission proposes new §60.3(a)(7), concerning repeat violator permit revocation. The proposed paragraph states, "Compliance history classifications shall be used in commission decisions relating to the revocation of a permit." This proposed 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 would reflect the conditions under which the agency might decide it appropriate to revoke the permit of a repeat violator: a criminal conviction; violations that caused or are expected to cause adverse effects on human health and safety or the environment; repeatedly operating without required authorization; documented falsification; or egregious violations. Furthermore, the number and complexity of each site owned or operated by the person is proposed to be addressed through the

consideration of a person's compliance history. The commission invites 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 invites 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. For example, one might propose that those that have a low complexity factor would need fewer repetitive violations to be considered a "repeat violator" than those with a higher complexity factor. Please include specific proposals for how the number of violations would be matched to the complexity of the sites. The commission also invites 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. Specifically, can the circumstances in which a repeat violator's permit may be revoked be handled by the role repeat violations play in classifications of compliance history?

Proposed new §60.3(b), concerning investigations, would address investigations performed at a person's site which is classified as a poor performer, as described in proposed §60.2. Specifically, the rule proposes, in §60.3(b)(1), that the agency could provide technical assistance to a person, in order to assist a poor performer in improving its compliance with applicable legal requirements. New §60.3(b)(2) proposes that the agency could increase the number of investigations performed at a person's site classified as a poor performer, to more closely monitor the person's actions and ensure that environmental compliance is being achieved. Both of the actions are currently taken by the agency in response to concerns about a regulated entity. Additionally, new §60.3(b)(3) proposes that the

agency shall perform any investigations as unannounced, when the person's site is classified as a poor performer, as required by TWC, §5.754(h)(1).

Proposed new §60.3(c), concerning enforcement, would address enforcement decisions by stating that, for enforcement decisions, the commission may address compliance history and repeat violator issues through both enhanced penalties and additional oversight. Proposed new §60.3(c)(1) states, "The agency may include more prescriptive ordering provisions in enforcement actions on poor performers." Currently, through the development of technical requirements included in commission enforcement actions, decisions are made based on the level of compliance at the site which is the subject of the enforcement action. This proposed rule would serve to enhance the existing practices by highlighting those respondents in enforcement actions who may need additional oversight.

Proposed new §60.3(c)(2) states that the commission may enhance an administrative penalty based on compliance history. This reflects the existing practice which is 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.

Proposed new §60.3(c)(3) states that the administrative penalty enhancement based on compliance history shall be multiplied by a factor of 2 for a repeat violator as defined in §60.4(b). This requirement addresses TWC, §5.754(f), which states that "the assessment methods … shall establish enhanced administrative penalties for repeat violators." The commission proposes to double the penalty enhancement 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 apply the doubling factor in every case.

Proposed new §60.3(d), concerning participation in innovative programs, would address participation in innovative programs by a person whose site is classified as a "poor performer" as described in proposed §60.2. Specifically, proposed new §60.3(d)(1) and (2) would reflect that the agency may, for a person's site classified as a "poor performer," recommend technical assistance, or provide assistance/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, proposed 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 for 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. Proposed 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 an average performer." (as described in §60.2(a)(2))

Proposed new §60.3(e), concerning review of classification or use, would address the circumstances under which a person may seek review of the executive director's classification of the person's site or the executive director's use of the person's compliance history. Proposed new §60.3(e)(1) states that 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 applicant's or respondent's compliance history. Proposed new §60.3(e)(2) states that 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 who disputes the executive director's classification of the applicant's site or use of the applicant's compliance history may file with 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 procedures set out in 30 TAC §50.139. Proposed new §60.3(e)(3) states that in any contested case hearing where compliance history classification or use is under review, the party disputing the classification or use shall bear the burden of proof.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed rules are in effect, there may be significant fiscal

implications to units of state and local government due to implementation of the proposed rules. The proposed rules require the commission to factor compliance history into certain decisions made by the commission. Only those units of government that own or operate a regulated site that receives a compliance history classification of poor, or sites that violate commission regulations on multiple occasions during the compliance history period, would potentially be fiscally impacted by the provisions in this rulemaking. Fiscal implications are not anticipated for all other units of state and local government due to implementation of the proposed rules.

This rulemaking is intended to implement certain provisions of HB 2912. The bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. The purpose of this rulemaking is to establish the classification and use of the components of compliance history.

The commission currently regulates approximately 220,000 sites, some of which are owned and operated by units of state and local government. The proposed rules would apply to all existing and new sites regulated by the commission, with the following exceptions, effective September 1, 2002. A previous rulemaking established that the time period analyzed for compliance will be the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first; for purposes of determining whether an announced investigation is appropriate, the five-year period preceding an

investigation; or the five years prior to the date the application for participation in an innovative program is received by the executive director.

The proposed rules would not apply to certain permit actions, as established in a previous rulemaking, such as: voluntary permit revocations; minor amendments and nonsubstantive corrections to permits; Texas Pollutant Discharge Elimination System and underground injection control minor permit modifications; Class 1 solid waste modifications, except for changes in ownership; municipal solid waste Class I modifications, except for temporary authorizations and municipal solid waste Class I modifications requiring public notice; permit alterations; administrative revisions; and certain air quality new source review permit amendments and minor permit revisions. The only exception is, if a motion for reconsideration or a motion to overturn is filed with respect to any of the actions listed previously in this paragraph, and is set for commission agenda, a compliance history shall be prepared by the executive director and filed with the Office of the Chief Clerk no later than six days before the motion is considered on the commission agenda.

The commission proposes to implement a point system which would assign points to various components of compliance history including, but not limited to, violations documented during the compliance period, with associated points based on the significance of violations, as well as whether the violations were included in an NOV and/or an enforcement order. Additionally, the commission would consider other factors in determining a site's compliance history classification, including whether the site had multiple major violations over the past five years, the complexity of the site, the number of sites owned by a person, and the number of investigations performed at the site. Following the analysis

of a site's compliance history, the commission intends to produce a point total for each site. The total points would then be put into a formula, with applicable moderating factors applied, and a final point total would be determined. The executive director would then assign a compliance history classification (high, average, or poor) to each site depending on the total number of points accumulated. The commission proposes to update the compliance history classification for each regulated site every six months.

The proposed rules would require the commission to use the compliance history classification in commission decisions in the following areas: the issuance, renewal, modification, denial, suspension, or revocation of a permit; enforcement penalties; the use of announced investigations; and participation in innovative programs. The overall effect on sites classified as poor performers is anticipated to vary widely, depending on the site and the overall compliance with commission regulations. The proposed rules would afford the commission flexibility in the type of actions intended to help bring poor performers into compliance with commission regulations. Examples of additional measures and assistance include, but are not limited to: providing or offering technical assistance; offering EMS assistance/oversight; requiring a public hearing; requesting a contested case hearing; denying or revoking a permit; reducing permit terms; requiring more prescriptive provisions in the permit; requiring additional monitoring; performing unannounced investigations; and denying participation in innovative and regulatory flexibility programs.

For those units of government with sites classified as poor, the overall costs resulting from implementation of the proposed rules are expected to vary for each site, depending on additional permit provisions required by the commission.

The following costs are only provided as examples, because there are so many variables which could affect the costs, including: the type of site and the statutes and regulations it is regulated under; the size of the site; whether more stringent permit provisions are specified or the permit is denied, suspended, or revoked; and what costs may be reduced at the same time other costs are incurred as a result of modifications to, or denial, suspension, or revocation of permits. For units of government that are required to convene a permit hearing, the commission estimates that the cost to affected units of government would be approximately $30,000 per permit. If the commission requires a site to renew its permit every two years instead of every five years, the affected site would have to pay an extra $10,000 in permit renewal fees. If the commission decides to revoke a permit, the revocation proceeding will cost the affected site approximately $50,000 for each revoked permit. If the commission decides to require additional monitoring systems for a large combustion source for sulfur dioxide (SO_2), nitrogen oxides (NO_x), and oxygen (O_2), the cost is estimated to range between $100,000 to $150,000. If the commission denies approval of a permit application, the applicant may have to resubmit the permit application with additional information. In the case of a municipal solid waste landfill permit, the cost to resubmit a permit application could exceed $250,000. All of these examples are worst-case scenarios. The commission intends to work closely with each site rated as a poor performer to try to raise the classification of the site utilizing options intended to minimize compliance costs.

In addition to permit-related costs, the proposed rules may result in increased costs from enforcement penalties for sites with multiple regulatory violations during the compliance period. The proposed rules would double the administrative penalty enhancement based on compliance history for a repeat violator, although the statutory maximums, which range from $2,500 to $10,000 per day per violation, would not be exceeded.

PUBLIC BENEFITS AND COSTS

Mr. Davis has also determined for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of implementing the proposed rules will be potentially increased environmental protection by linking a site's historical environmental performance with future authorizations provided by the commission.

This rulemaking is intended to implement certain provisions of HB 2912, which requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. The purpose of this rulemaking is to establish the classification and use of the components of compliance history.

The commission anticipates that the number of individuals and businesses that will be impacted economically due to implementation of the proposed rules will be very small. The commission currently regulates approximately 220,000 sites, the majority of which are owned and operated by individuals and businesses. The proposed rules would apply to all existing and new sites regulated by

the commission, with the exceptions provided in the FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT section of this preamble, effective September 1, 2002. The commission estimates that out of the approximate 220,000 sites currently regulated by the commission, only a very small number are anticipated to be classified as poor performers. For those businesses with sites classified as poor, the overall costs resulting from implementation of the proposed rules are expected to vary for each site, depending on additional permit provisions required by the commission.

The following costs are only provided as examples, because there are so many variables which could affect the costs, including: the type of site and the statutes and regulations it is regulated under; the size of the site; whether more stringent permit provisions are specified or the permit is denied, suspended, or revoked; and what costs may be reduced at the same time other costs are incurred as a result of modifications to, or denial, suspension, or revocation of permits. For businesses that are required to convene a permit hearing, the commission estimates that the cost would be approximately $30,000 per permit. If the commission requires a site to renew its permit every two years instead of every five years, the affected site would have to pay an extra $10,000 in permit renewal fees. If the commission decides to revoke a permit, the revocation proceeding will cost the affected site approximately $50,000 for each revoked permit. If the commission decides to require additional monitoring systems for a large combustion source for SO_2, NO_x, and O_2, the cost is estimated to range between $100,000 to $150,000. If the commission denies approval of a permit application, the applicant may have to resubmit the permit application with additional information. In the case of a municipal solid waste landfill permit operated by a private business, the cost to resubmit a permit application could exceed $250,000. All of these examples are worst-case scenarios. The commission intends to work closely with each site rated

as a poor performer to try to raise the classification of the site utilizing options intended to minimize compliance costs.

In addition to permit-related costs, the proposed rules may result in increased costs from enforcement penalties for sites with multiple regulatory violations during the compliance period. The proposed rules would double the administrative penalty enhancement based on compliance history for a repeat violator, although the statutory maximums, which range from $2,500 to $10,000 per day per violation, would not be exceeded.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications, which could be significant, for small or micro-businesses due to implementation of the proposed rules, which implement certain provisions of HB 2912. This bill requires the commission to develop a uniform standard for evaluating compliance history, to establish a set of standards for the classification of a person's compliance history, and to use compliance history classifications in certain commission decisions. The purpose of this rulemaking is to establish the classification and use of the components of compliance history.

The commission anticipates that the number of small and micro-businesses that will be impacted economically due to implementation of the proposed rules will be very small. The commission currently regulates approximately 220,000 sites, many of which are owned and operated by small or micro-businesses. The proposed rules would apply to all existing and new sites regulated by the commission, with the exceptions provided in the FISCAL NOTE: COSTS TO STATE AND LOCAL

GOVERNMENT section of this preamble, effective September 1, 2002. The commission estimates that out of the approximate 220,000 sites currently regulated by the commission, only a very small number are anticipated to be classified as poor performers. For those businesses with sites classified as poor, the overall costs resulting from implementation of the proposed rules are expected to vary for each site, depending on additional permit provisions required by the commission.

The commission anticipates that the number of small and micro-businesses that will be impacted economically due to implementation of the proposed rules will be very small, if any. The commission estimates that out of the approximate 220,000 sites currently regulated by the commission, only a very small number are anticipated to be classified as poor performers. For those small and micro-businesses with sites classified as poor, the overall costs resulting from implementation of the proposed rules are expected to vary for each site, depending on additional permit provisions required by the commission.

The following costs are only provided as examples, because there are so many variables which could affect the costs, including: the type of site and the statutes and regulations it is regulated under; the size of the site; whether more stringent permit provisions are specified or the permit is denied, suspended, or revoked; and what costs may be reduced at the same time other costs are incurred as a result of modifications to, or denial, suspension, or revocation of permits. For small and micro-businesses that are required to convene a permit hearing, the commission estimates that the cost would be approximately $30,000 per permit. If the commission requires a site to renew its permit every two years instead of every five years, the affected site would have to pay an extra $10,000 in permit renewal fees. If the commission decides to revoke a permit, the revocation proceeding will cost the

affected site approximately $50,000 for each revoked permit. If the commission decides to require additional monitoring systems for a large combustion source for SO_2, NO_x, and O_2, the cost is estimated to range between $100,000 to $150,000. If the commission denies approval of a permit application, the applicant may have to resubmit the permit application with additional information. In the case of a municipal solid waste landfill permit operated by a small or micro-business, the cost to resubmit a permit application could exceed $250,000. All of these examples are worst-case scenarios. The commission intends to work closely with each site rated as a poor performer to try to raise the classification of the site utilizing options intended to minimize compliance costs.

In addition to permit-related costs, the proposed rules may result in increased costs from enforcement penalties for sites with multiple regulatory violations during the compliance period. The proposed rules would double the administrative penalty enhancement based on compliance history for a repeat violator, although the statutory maximums, which range from $2,500 to $10,000 per day per violation, would not be exceeded.

The following is an analysis of the costs per employee for small and micro-businesses that are required to resubmit a municipal solid waste permit to comply with the proposed rules. Small and micro-businesses are defined as having fewer than 100 or 20 employees respectively. A small business that is required by the commission to resubmit a permit for a municipal solid waste landfill would have to pay up to an additional $2,500 per employee to comply with the proposed rules. A micro-business that is required by the commission to resubmit a permit for a municipal solid waste landfill would have to pay up to an additional $12,500 per employee to comply with the proposed rules. Since the proposed rules

could result in a number of different potential costs for affected small and micro-businesses, this example was chosen because it is one of the most costly.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the proposed 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 proposed 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 proposed rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the proposed rules do not meet any of the four applicability requirements listed in §2001.0225(a). The proposed rules do not exceed a standard set by federal law, because there is no comparable federal law. The proposed rules do not exceed an express requirement of state law, because they are consistent with the requirements of TWC, §5.754. The proposed rules do not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The proposed rules are not proposed to be adopted solely under the general powers of the agency, but will be adopted under the express requirements of TWC, §5.754.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rules is to establish a set of standards for the classification and use of a person's compliance history, as required by TWC, §5.754. Promulgation and enforcement of these proposed rules would not affect private real property which is the subject of the rules because the proposed rules set forth the standards for the classification and use of a person's compliance history, as required by TWC, §5.754. The subject proposed rules do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal 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 preliminary consistency determination for the proposed rules under 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. CMP goals applicable to the proposed 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 proposed rules for consistency with applicable goals of the CMP and determined that the proposed rules are consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the proposed rule include: §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 proposed rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to and remediation of coastal oil spills. This proposed rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Texas Department of Health (TDH) regarding wastewater discharges that could significantly adversely affect oyster reefs. This proposed rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements

applicable: to areas with the potential to develop agricultural or silvicultural NPS water quality problems; to on-site disposal systems; to USTs; or to National Pollutant Discharge Elimination System (NPDES) permits for stormwater discharges. This proposed rulemaking does not relax the standards related to dredging, the discharge of dredge material, compensatory mitigation, and authorization of development in critical areas or to dredging, the discharge, disposal, and placement of dredged material, compensatory mitigation, and the authorization of development in critical areas. This proposed rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the proposed rulemaking is to increase compliance with existing standards and rule requirements. This proposed rulemaking has been conducted consistent with the THSC, Chapter 382. Promulgation and enforcement of these proposed rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission seeks public comment on the consistency of the proposed rule with applicable CMP goals and policies.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on May 1, 2002, at 2:00 p.m. at the commission's central office, Building E, Room 201S, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion

during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., May 2, 2002, and should reference Rule Log Number 2001-071-060-AD. For further information, please contact Debra Barber, Policy and Regulations Division, at (512) 239-0412.

§60.2, §60.3

STATUTORY AUTHORITY

The new sections are proposed under THSC, §361.017 and §361.024, which provide 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 Texas Clean Air Act; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The new sections are also authorized 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.

The proposed new sections implement TWC, §5.754, relating to the classification and use of compliance history.

§60.2. Classification.

(a) Classifications. The executive director will evaluate the compliance history and classify each site as needed for the actions listed in §60.1(a)(1) of this title (relating to Compliance History) and beginning September 1, 2003, every six months thereafter. For the purposes of classification in this

chapter, "site" shall mean all units, facilities, equipment, structures, or regulated 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. Each site will 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. If there is no compliance information about the person's site at the time the executive director develops the compliance history classification, then the classification defaults to "average performer." The executive director may conduct an investigation to develop a compliance history.

(c) Major, moderate, and minor violations. In classifying a person'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 types of violations are:

(A) any violation for which the commission has agreed with the EPA to take formal enforcement action, in accordance with the EPA/TNRCC Enforcement Memorandum of Understanding, dated April 1, 1999;

(B) a violation of a commission enforcement order, court order, or consent decree;

(C) operating without required authorization or using a facility that does not possess required authorization;

(D) any action or inaction that has caused adverse effects on human health, safety, or the environment, or that has resulted in pollutants released at levels or volumes sufficient to cause adverse effects on human health, safety, or the environment;

(E) falsification of data, documents, or reports;

(F) any violation included in a criminal conviction; or

(G) any violation similar in character or impact determined by the executive director to be a major violation.

(2) Moderate types of violations are:

(A) complete or substantial failure to monitor, analyze, or test a release, emission, or discharge;

(B) complete or substantial failure to maintain records;

(C) having an operator whose level of license, certification, or other authorization is inadequate to meet applicable rule requirements;

(D) any release, emission, or discharge that is not classified as a major violation;

(E) complete or substantial failure to conduct required unit or facility inspections; or

(F) any violation similar in character or impact determined by the executive director to be a moderate violation.

(3) Minor types of violations are:

(A) those violations that indicate that most, but not all of, a monitoring or testing requirement, including required unit or facility inspections, was met;

(B) those violations that indicate that most, but not all of, an analysis or waste characterization requirement was met;

(C) those violations that indicate that most, but not all of, a requirement addressing the submittal or maintenance of required data, documents, notifications, plans, or reports was met;

(D) those violations that indicate that most, but not all of, an operation and maintenance requirement was met; or

(E) any violation similar in character or impact determined by the executive director to be a minor violation.

(d) Repeat violator. A person shall be considered a repeat violator at a site when the same major violation is documented more than once within the compliance period at the same site.

(e) Complexity factor.

(1) Every site will be assigned a complexity factor based upon its primary industrial classification and processes, as follows:

(A) a complexity factor of 5 if the industrial classification is:

(i) national security;

(ii) space research and technology;

(iii) chemicals and allied products;

(iv) petroleum refining;

(v) freight and warehouse - special warehousing and storage;

(vi) air transportation;

(vii) pulp or paper mills;

(viii) oil and gas extraction; or

(ix) cement kilns and manufacturing;

(B) a complexity factor of 3 if the industry classification is:

(i) electronic, including semiconductor;

(ii) communications;

(iii) manufacture of transportation equipment;

(iv) business services;

(v) primary metal and secondary metal refining and processing industries;

(vi) measurement instruments;

(vii) transportation services;

(viii) railroad;

(ix) food and kindred; or

(x) water transportation; or

(C) a complexity factor of 1 if the industry classification is any industry classification not covered in subparagraph (A) or (B) of this paragraph.

(2) The number of sites owned or operated by a person will be taken into account. For persons that own or operate less than 25 sites in the State of Texas, the complexity factor will remain unchanged from that determined in paragraph (1) of this subsection. For persons that own or operate 25 or more sites in the State of Texas, the complexity factor determined in paragraph (1) of this subsection will increase by one.

(f) Formula. The executive director will determine a site rating based upon the following method.

(1) Site rating. For the purpose of this subsection, the site refers to all units, facilities, equipment, structures, or regulated sources at one street address or location that are owned or operated by the same person, and for which a permit application, enforcement, investigation, or participation in an innovative program is being considered. For the time period reviewed, the following calculations shall be performed.

(A) The number of major violations contained in any final enforcement orders, court judgments, and consent decrees as specified in §60.1(c)(1) and (2) of this title shall be multiplied by 100. If the person is a repeat violator, then this number shall further be multiplied by 2.

(B) The number of moderate violations contained in any final enforcement orders, court judgments, and consent decrees as specified in §60.1(c)(1) and (2) of this title shall be multiplied by 60.

(C) The number of minor violations contained in any final enforcement orders, court judgments, and consent decrees as specified in §60.1(c)(1) and (2) of this title shall be multiplied by 20.

(D) The number of major violations contained in any notices of violation as specified in §60.1(c)(7) of this title shall be multiplied by 5. If the person is a repeat violator, then this number shall further be multiplied by 2.

(E) The number of moderate violations contained in any notices of violation as specified in §60.1(c)(7) of this title shall be multiplied by 3.

(F) The number of minor violations contained in any notices of violation as specified in §60.1(c)(7) of this title shall be multiplied by 1.

(G) The number of counts in all criminal convictions as specified in §60.1(c)(1) of this title shall be multiplied by 500.

(H) The number of chronic excessive emissions events as specified in §60.1(c)(4) of this title shall be multiplied by 100.

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

(J) The sum in subparagraph (I) of this paragraph shall be divided by the complexity factor for the site, as determined from subsection (e) of this section.

(K) The result in subparagraph (J) of this paragraph shall be divided by the number of investigations conducted at the site during the compliance period. For the purposes of this chapter, investigations include record reviews and physical site evaluations.

(2) Point ranges. The executive director will assign the site to a classification based upon the compliance history evaluation, utilizing the following ranges for each classification:

(A) less than 10 points - high performer;

(B) 10 points to less than 100 points - average performer; and

(C) 100 or more points - poor performer.

(3) Mitigating factors. The executive director shall evaluate mitigating factors for the site and may reclassify the site based upon these factors. The mitigating factors include:

(A) other compliance history components included in §60.1(c)(8) - (12) of this title;

(B) a regional entity, all of whose other sites have a high performer classification, who for the purposes of regionalization, purchased a site with a poor performer classification; and

(C) a person, all of whose other sites have a high performer classification, who purchased a site with a poor performer 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) entire compliance history, especially considering patterns of environmental compliance.

(2) Review of permit application. In the review of an application for a new, amended, modified, or renewed permit, the executive director or commission may:

(A) require permit conditions or provisions, as appropriate, in response to compliance history; and

(B) if a person's site is classified as a poor performer:

(i) provide reduced renewal periods (for permits with terms);

(ii) issue notices of deficiency (NODs) to require more specificity in the permit application and attachments;

(iii) address recurring problems by using prescriptive, rather than performance-based, permit provisions;

(iv) require a citizen outreach program in the permit;

(v) require a citizen advisory panel in the permit;

(vi) require monitoring, or more frequent monitoring;

(vii) require an individual permit authorization instead of a registration, general permit, or permit by rule;

(viii) allow a person to obtain a co-permittee and/or obtain an independent operator; or

(ix) require other items or actions related to site operations or monitoring, as warranted.

(3) Poor performers and repeat violators.

(A) If a person's site is classified as a poor performer, the agency shall:

(i) deny or suspend a person's authority 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 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 person's site is classified as a poor performer, the agency may take the following actions, including, but not limited to:

(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.

(C) If 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) The commission may deny or modify 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, but is not limited to, 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, Chapter 26;

(ii) considering the issuance, amendment, or renewal of a preconstruction permit, under Texas Health and Safety Code, Chapter 382; and

(iii) making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under Texas Health and Safety Code, 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 Texas Water Code, 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) Compliance history evidence. Notwithstanding any other provision in this chapter, any party in a contested case hearing may submit any information pertaining to a person's compliance history, subject to the requirements of §80.127 of this title (relating to Evidence).

(6) Revocation or suspension of a permit. Compliance history classifications shall be used in commission decisions relating to the revocation or suspension of a permit.

(7) 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 for:

(A) a criminal conviction;

(B) violations that caused or are expected to cause adverse effects on human health or safety or adverse effects on the environment;

(C) repeatedly operating without required authorization;

(D) documented falsification; or

(E) egregious violations.

(b) Investigations. If a person's 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 facility; and

(3) shall perform any investigations as unannounced.

(c) Enforcement. For enforcement decisions, the commission may address compliance history and repeat violator issues through both enhanced penalties and additional oversight.

(1) The agency may include more prescriptive ordering provisions in enforcement actions on poor performers.

(2) The commission may enhance an administrative penalty based on compliance history.

(3) The administrative penalty enhancement based on compliance history shall be multiplied by a factor of 2 for a repeat violator.

(d) Participation in innovative programs. If the person's site is classified as a poor performer, then the agency:

(1) may recommend technical assistance; or

(2) may provide assistance/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. In addition, a poor performer is prohibited from receiving regulatory incentives under its EMS until its compliance history classification has improved to an average performer.

(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) 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 applicant's or respondent's compliance history.

(2) 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 who disputes the executive director's classification of the applicant's site, or 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 procedures set out in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

(3) In any contested case hearing where compliance history classification or use is under review, the party disputing the classification or use shall bear the burden of proof.