

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§60.1 - 60.3. Sections 60.1 - 60.3 are adopted *with changes* to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 622).

Background and Summary of the Factual Basis for the Adopted Rules

The commission adopts revisions to Chapter 60 to implement certain requirements of House Bill (HB) 2694, regarding compliance history. HB 2694, 82nd Legislature, 2011, §§4.01 - 4.05 and 4.07, amended Texas Water Code (TWC), Chapter 5, Subchapter Q, requiring the commission to make changes to the compliance history rule. The purpose of this adopted rulemaking is to allow the commission to use new standards instead of the existing uniform standard for evaluating and using compliance history. In addition, the adopted rulemaking modifies the components and formula of compliance history in order to provide a more accurate measure of regulated entities' performance and make compliance history a more effective regulatory tool.

HB 2912, 77th Legislature, 2001, §4.01, amended TWC, Chapter 5, by adding Subchapter Q, TWC, §5.753, that required the commission to "develop a uniform standard for evaluating compliance history." At the time, the process for measuring or comparing compliance history across the commission's programs for air, water, and waste was inconsistent. In addition to the traditional use of compliance history in

permitting and enforcement decisions, this new performance-based regulation allowed the commission to use compliance history when determining eligibility for voluntary incentive programs. The idea behind these programs was to use compliance history to provide incentives for regulated entities to do more to protect the environment than law requires by making available benefits, such as regulatory flexibility and exemptions from some inspections. In late 2001 and early 2002, TCEQ held stakeholder meetings to develop this new system of compliance history. TCEQ interpreted the uniform standard to mean using an identical objective formula for all entities across all program areas. The compliance history system has remained unchanged since implementation.

In calculating an entity's compliance history classification, TCEQ currently assigns points for multiple components as well as points for a repeat violator classification that, when computed in an equation, produce a numerical score for each regulated entity. Generally, the lower the score, the better the classification. For instance, noncompliance issues, such as enforcement actions taken against a facility, adds points and proactive approaches towards compliance, such as participating in voluntary programs, subtracts points.

The commission currently recalculates compliance history scores annually based on information from the previous five years, and classifies regulated entities as poor, average, or high performers. HB 2912 also required the commission to assess the

compliance history of entities for which it does not have compliance information. The commission classifies these entities as average by default.

Section 4.01 of HB 2694 amends TWC, §5.751 to add TWC, Chapter 32, and Texas Health and Safety Code (THSC), Chapter 375, regarding applicability. Persons and entities covered by those chapters will now be subject to the compliance history rule.

Section 4.04 of HB 2694 amends TWC, §5.753(a) to remove the requirement for a uniform standard for evaluating compliance history, and replaces the uniform standard with a standard that ensures consistency and may account for differences among regulated entities.

Section 4.04 of HB 2694 amends TWC, §5.753(b) to remove enforcement actions from other states and the federal government, except actions by the United States Environmental Protection Agency (EPA), as mandatory components of compliance history and to clarify that enforcement actions from the EPA are mandatory components to the extent readily available to the commission.

Section 4.04 of HB 2694 amends TWC, §5.753(d) to limit the inclusion of notices of violation (NOV) as a mandatory component of compliance history to NOV's one-year-old or less. In addition, the commission must include a prominently displayed statement

emphasizing the NOV is only an allegation and not proof of an actual violation.

Section 4.04 of HB 2694 adds TWC, §5.753(d-1) to prohibit the commission from including a self-reported violation under Title V of the Federal Clean Air Act as an NOV for compliance history purposes, unless the commission issues a written NOV or the self-reported violation results in a final enforcement order or judgment.

Section 4.05 of HB 2694 amends TWC, §5.754(a) and (e) to clarify that the commission may, but is not required to, consider compliance history classifications when using compliance history in commission decisions regarding permitting, enforcement, announced inspections, and participation in innovative programs.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(1) to rename the compliance history classifications from poor, average, and high performers to unsatisfactory, satisfactory, and high performers. The amendment clarifies that unsatisfactory performers perform below minimal acceptable performance standards established by the commission and that high performers have an above-satisfactory compliance record.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(2) and (d) to allow the commission to establish a category of unclassified performers for which the commission does not have adequate compliance information about the site and to allow the commission to require

a compliance inspection to determine an entity's eligibility for participation in a program that requires a high level of compliance.

Section 4.05 of HB 2694 amends TWC, §5.754(b)(3) to require the commission to consider both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act.

Section 4.05 of HB 2694 amends TWC, §5.754(c)(2) to modify the classification of repeat violators. The commission must consider the size and complexity of the site at which the violations occurred, and limit consideration to violations of the same nature and same environmental media that occurred in the previous five years. The number of sites is no longer included as a criterion for repeat violator classification.

Section 4.05 of HB 2694 amends TWC, §5.754(c)(3) to require that compliance history classifications consider the size and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act, and the potential for a violation at the site that is attributable to the nature and complexity of the site.

Section 4.05 of HB 2694 amends TWC, §5.754(h) to state that persons classified as unsatisfactory performers are no longer prohibited from receiving announced investigations.

Section 4.07 of HB 2694 adds TWC, §5.756(e) to require a quality assurance and control procedure, including a 30-day period for the owner or operator of the site to review and comment on the information, before compliance performance information about a site may be placed on the Internet.

Section by Section Discussion

§60.1, Compliance History

The adoption amends §60.1(a) by adding TWC, Chapter 32, and THSC, Chapter 375, as required by HB 2694.

The commission adopts revisions to §60.1(a) (6) and (7) to address compliance histories calculated under the existing rule and the adopted rule. HB 2694, §4.31, has a savings clause for the commission to continue to use its current standard. The commission will continue to use the version of the rule in effect at the time the compliance history classification was calculated in accordance with §60.1(b). For example, if an application for a permit is received by the executive director, then the version of Chapter 60 in effect at the time the application is received will be the version used for compliance history purposes. Therefore, the compliance history rating generated under the existing version of this chapter will remain in effect for any actions applicable under that chapter. The commission may consider new compliance history information as it deems necessary.

In the existing rule, the compliance period for NOVs is five years. The adoption amends §60.1(b) to change the compliance period for NOVs to one year except as used in adopted §60.2(f) for determination of repeat violator. The compliance period remains unchanged for all other compliance history components. In evaluating repeat violators, the commission will review a five-year period for NOVs. The commission reviews all major violations documented in approved investigations in the last five years and final enforcement actions issued in the last five years to determine if a repeat violator classification is warranted.

The adoption amends §60.1(c)(1), (3), (7), (9) and (13) to change the components of compliance history.

Section §60.1(c)(1) is being revised because HB 2694 provides that the commission is only required to include consent decrees or criminal convictions of the federal government unless they are readily available. In addition, "any final" was deleted in the proposed rule although there was no intent to change the meaning of this section. In response to comments and because only final enforcement orders can feasibly be included in this component of compliance history, adopted §60.1(c)(1), adds the words "any final" to the rule language.

The adoption amends §60.1(c)(3) to reflect the changes the legislature made to TWC, §5.754 regarding the readily available components to be considered in compliance history. The commission shall now consider enforcement orders, court judgments, consent decrees, and criminal convictions relating to environmental rules of the EPA that are readily available to the commission as a component of compliance history. This section has also been revised to remove from consideration enforcement orders, court judgments, and criminal convictions of other states as a component of compliance history in accordance with HB 2694. In addition, "final" was deleted in the proposed rule although there was no intent to change the meaning of this section. In response to comments and because only final enforcement orders can feasibly be included in this component of compliance history, adopted §60.1(c)(3), adds the word "final" to the rule language.

The adoption amends §60.1(c)(7) regarding NOVs. Under the adoption, the components would include all written NOVs for a period of one year from the date of issuance for each NOV. NOVs will be considered for a five-year compliance period for determination of the repeat violator status. In the Compliance History Report, NOVs will be preceded with the statement, "A notice of violation represents a written allegation of a violation of a specific regulatory requirement from the commission to a regulated entity. A notice of violation is not a final enforcement action nor is it proof that a violation has actually occurred," as required by HB 2694. Information received by the commission as required

by Title V of the Federal Clean Air Act (42 United States Code (USC), §7661 *et seq.*) may not be included as an NOV component of compliance history unless the executive director issues a written NOV. The executive director has historically evaluated deviation reports during an investigation prior to making a compliance determination. An NOV would only be issued for deviations if the executive director's staff documented a violation. This is the current practice of the executive director and will not change under these rules.

The adoption amends §60.1(c)(8) to add the phrase "and having received immunity" to this section to reflect the intent of the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Act), 75th Legislature, 1997 (TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon's)). The adoption corrects a typographical error regarding the legislative session and year for the Audit Act and adds the citation to the statute. Under the Audit Act, immunity is only granted to violations that were properly disclosed and for which corrective action was undertaken in a reasonable amount of time. It is the commission's intent to ensure that corrective action has been undertaken before a violation is awarded self-audit points in the compliance history formula, as this is the commission's current practice.

The adoption amends §60.1(c)(9) relating to environmental management systems (EMS) to specify that the commission will consider an EMS approved under 30 TAC

Chapter 90 as a positive component of compliance history.

The adoption deletes §60.1(c)(13) to remove the name and address of the staff person as a compliance history component from the rule language. While this information will continue to be on the Compliance History Report, it is not a compliance-related component of the compliance history.

Section 60.1(d) has remained unchanged. Change of ownership remains a component of compliance history and any change of ownership will be shown on the compliance history. Any previous NOVs or orders will be assessed against new owners for the applicable compliance period, which is consistent with how the rules have been applied by the commission in the past.

§60.2, Classification

The adoption amends §60.2(a)(1) - (3) to change the classification nomenclature from high, average, and poor performers to high, satisfactory, and unsatisfactory performers. Under the adoption, a high performer has an above-satisfactory compliance record. A satisfactory performer generally complies with environmental regulations. An unsatisfactory performer performs below minimal acceptable performance standards established by the commission. The change in nomenclature is present in §60.2(g)(2)(B) and (C), (3), (3)(A), (A)(iii), (B), (B)(i) and (ii), and §60.3(a)(2), (3), (3)(A) - (C), (6), (b),

(c)(1), (d), (d)(3), and (e). This change has been applied throughout this section as applicable.

HB 2694 allows the commission to establish a category of unclassified performers, or regulated entities for which the commission does not have adequate compliance information about the site. The adoption amends §60.2(b) to change the current category from "average performer by default" to "unclassified." The commission considers any site that does not have compliance history points attributable to violation points, chronic excessive emissions points, repeat violator points, or self-audit points to be unclassified. Unclassified performers will include sites where the executive director may not have investigated the site in the last five years. The nomenclature change removes the implication that a regulated entity with no compliance information generally complies with environmental regulations.

The commission adopts §60.2(c). HB 2694 eliminates the commission's uniform standard for evaluating compliance history and allows the commission to account for differences among regulated entities. HB 2694 directs the commission to account for operation, complexity, and size of a site when determining compliance history. In order to more effectively compare regulated entities against those similarly situated, the adoption adds groupings based on the North American Industry Classifications System (NAICS). The executive director selected NAICS because it is a nationally recognized

standard applicable to all industries and is currently information readily available to the commission. The executive director initially proposed to organize regulated entities by the following groups: 1) NAICS codes 44711 and 44719, Gas Stations with Convenience Stores and other Gas Stations; 2) NAICS code 32411, Oil and Petroleum Refineries; 3) NAICS code 211, Oil and Gas Extraction; 4) NAICS code 212, Mining; 5) NAICS code 325, Chemical Manufacturing; 6) NAICS code 2211, Electric Power Generation; 7) NAICS code 562212, Solid Waste Landfills; 8) NAICS code 22132, Sewage Treatment Facilities; 9) NAICS code 23, Construction; 10) NAICS code 3273, Cement and Concrete Product Manufacturing; 11) NAICS codes 5621, 56221, 562213, 562219, Waste Management (excluding landfills); 12) NAICS code 11, Agriculture, Forestry, Fishing, and Hunting; 13) NAICS codes 486110 and 486210, Pipeline Transportation of Natural Gas, NAICS code 486910 Pipeline Transportation of Refined Petroleum Products, and NAICS code 486990 All Other Pipeline Transportation; and 14) All Other Regulated Entities. The commission added NAICS codes 486110, 486210, 486910, and 486990 in response to comments. Upon evaluation, the commission found that a large number of regulated entities had NAICS codes 486110, 486210, 486910, and 486990 as their primary business code.

The commission intends to use the groupings for reporting purposes at this time. For reporting purposes only, the sites would be grouped according to their reported primary NAICS group which reflects their primary business. The purpose of these groupings is to

facilitate comparison of similarly situated regulated entities within the same industry.

Any other use, such as formal ranking, a curve system, a stratified scoring formula, or classification point ranges based upon the groupings would be addressed through a future rulemaking. Any such rulemaking would not commence until sufficient and needed information has been compiled to determine how best to utilize the groupings.

The executive director recognizes that the use of NAICS codes is not an exact means to determine the complexity of a site, but that similar businesses may have similar levels of complexity. The executive director also recognizes that the current NAICS codes for some regulated entities are incorrect as reported to the commission. Therefore, other readily available information, such as complexity points gathered under adopted §60.2(e), may also be used for reporting purposes to group similarly complex entities.

The commission reletters existing §60.2(c) as adopted §60.2(d) due to the inclusion of adopted §60.2(c).

The commission adopts §60.2(e), concerning complexity points, to address the requirements of TWC, §5.754(b)(3), which states that the commission, in classifying a person's compliance history, must take into account both positive and negative factors related to the operation, size, and complexity of the site, including whether the site is subject to Title V of the Federal Clean Air Act (USC, §7661 *et seq.*). HB 2694 directs the commission to account for complexity and size for sites when determining compliance

history. In addition, HB 2694 removed the number of facilities owned or operated by a person as a consideration for establishing criteria for classifying a repeat violator. The adopted rule removes existing §60.2(d)(3) relating to the number of sites in Texas owned or operated by a person. The commission recognizes that the compliance history of widely varying types of sites requires various means to determine overall complexity. In this adopted rule, the commission has broadened the scope of data used to determine a site's complexity. Although data available to the commission have improved significantly since the existing rule was written, the commission recognizes that the data still have limitations. The points assigned under adopted §60.2(e) are based upon criteria points found in existing §60.2(d). The rulemaking uses complexity points for all sites. The term "complexity points" includes program participation, size, small business and local government, and nonattainment points. Under the existing rules, complexity points refer to those points assigned based upon the types of permits at the site, which is now known as "program participation" points.

In adopted §60.2(e)(1), the commission will assign every site "program participation" points ranging from factors of four, three, two, or one, based generally upon the site's program authorizations. A site will receive points for each of its program authorizations. As required by HB 2694, Title V Federal Operating Permits have been added to the rule. Other program authorizations and registrations, that are not included in the existing rule, such as Standard Air permits, Edwards Aquifer authorizations, Enclosed

Structures constructed over a closed Municipal Solid Waste (MSW) landfill permits and registrations, Industrial Hazardous Waste registrations, Radioactive Waste storage or processing licenses; Petroleum Storage Tank registrations, Stage II Vapor Recovery registrations, Sludge permits or registrations, MSW Type IV Arid Exempt (AE) permits and MSW Type IX permits, and Uranium licenses are to be added in adopted §60.2(e)(1).

Sites with permits and/or authorizations in the following program areas including: Radioactive Waste Disposal; Hazardous or Industrial Non-Hazardous Storage Processing or Disposal; MSW Type I; Prevention of Significant Deterioration (PSD); nonattainment New Source Review (NNSR); Phase I Municipal Separate Storm Sewer System; Texas Pollutant Discharge Elimination System (TPDES) or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major; and Underground Injection Control (UIC) Class I/III, will receive four points for each permit type issued to a person at a site. The commission added NNSR permits and moved UIC Class I/III to this section because they are of similar complexity of those permits listed in this section and in response to comments.

Sites with permits and/or authorizations in the following program areas including: MSW Type I AE and Type IV AE; MSW Type IV, V, or VI; and TPDES or NPDES Industrial or Municipal Minor, will receive three points for each permit type issued to a

person at the site. Adopted §60.2(e)(1)(B)(iii) added MSW Type IV AE to the list of program participation points in response to comments and to clarify that MSW Type IV AE permits were not intended to be excluded from the rules. Also, this section was renumbered to account for UIC Class I/III permit being moved to §60.2(e)(1)(A).

Sites with permits and/or authorizations in the following program areas including: Title V Federal Operating Permits; New Source Review (NSR) individual permit; and any other individual site-specific water quality permit not referenced previously or any water quality general permit, will receive two points. The commission recognizes that Title V permits can be broken down into two categories, General Operating Permits (GOPs) and Site Operating Permits (SOPs). While SOPs are sometimes more complex than GOPs, the converse is also true. The commission evaluated the possibility of assigning different points for Title V GOPs and SOPs. However, in its analysis, the commission determined that whether or not a permit was a GOP or an SOP is not an accurate indicator of the level of complexity. For example, many similarly sized Gas Compressor Stations across the state are authorized under both GOPs and SOPs. For this reason, the commission will assign two program participation points for all Title V permits.

Other registrations and authorizations readily available to the executive director that are applicable to the compliance history rule including: Edwards Aquifer; Enclosed

Structures constructed over a closed MSW landfill; Industrial Hazardous Waste Registrations; MSW Tire Registration; Radioactive Waste Storage and Processing; Petroleum Storage Tanks; Stage II Vapor Recovery; Sludge; Air Quality Standard Permits, Permit By Rules (PBRs) requiring submission of an application under 30 TAC Chapter 106; and Uranium licenses will receive one point. In response to comments, adopted §60.2(e)(1)(D)(x) adds MSW Type IX to the list of program participation points. The commission did not intend to exclude MSW Type IX from this section. PBRs that are registered or certified by the commission receive one program participation point. Recognizing that the names for forms used by the commission may change over time, adopted §60.2(e)(1)(D)(xi) replaces the phrase "a PI-7" to "an application." Medical Waste permit was deleted from §60.2(e)(1)(D)(iv) as it is already categorized as an MSW Type V authorization listed in §60.2(e)(1)(B). MSW Tire Registrations were moved from §60.2(e)(1)(B)(iv) to §60.2(e)(1)(D)(iv) because the commission determined that the level of complexity for this authorization is more similar to the other types of authorizations found under this subsection. Adopted §60.2.(e)(1)(d)(i) replaced the word "registration" with the word "authorization" to more accurately reflect the appropriate terminology used by the commission.

Adopted §60.2(e)(1)(D)(xiii) adds Air Quality Standard Permits to the list of program participation points in response to comments and to clarify that these permits were not intended to be excluded from the rules. The commission added Air Quality Standard

Permits to §60.1(e)(1)(D) since these authorizations are reflective of this level of complexity. Standard permits that are registered in the commission's central registry database are included in the program participation points section. Standard permits that are not captured by the commission's data systems will not receive program participation points. For example, Air Quality Standard Permits for Temporary Rock and Concrete Crushers ("Temporary Standard Permits") are not tracked by the commission's database and will not receive program participation points. The commission recognizes that, by their nature, these Temporary Standard Permits have a more limited environmental impact over a brief period of time, as compared with some of the other permit authorizations that are allocated program participation points, and therefore, will not receive complexity points for the operations of the site.

Under adopted §60.2(e)(2), the commission will assign points based upon the size of the site. Under the existing rule, size points are addressed under §60.2(d)(4). The commission recognizes that the point structure for size under the existing rule is limiting and does not account for a meaningful range of size for very complex sites.

Under the existing rule, the points assigned to size for each media ranged from one to four points, which did not allow enough degree of separation between large sites and small sites. Under the adopted rule, the executive director has changed the points assigned to each media for size. One measure of size is the number of points of emission, discharge, or potential release to the environment at the site. Generally, each of these

points or facilities requires authorization, which adds additional regulatory oversight and increased complexity. The commission currently has information on size through Facility Identification Numbers (FINs), Water Quality external outfalls, Underground and Aboveground Storage Tanks (USTs and ASTs), and Active Hazardous Waste Management Units (AHWMUs).

Under the adoption, the points assigned to the size factor for FINs will be calculated by multiplying the total number of FINs at a site by 0.02 and rounded up to the nearest whole number. The size factor for Water Quality external outfalls and AHWMUs will be based on the number of external outfalls and number of AHWMUs. A site with ten or more external outfalls or 50 or more AHWMUs will receive ten points. A site with at least five but fewer than ten external outfalls or at least 20 but fewer than 50 AHWMUs will receive five points. A site with at least two, but fewer than five external outfalls or at least ten but fewer than 20 AHWMUs will receive three points. A site with at least one external outfall or at least one, but fewer than ten AHWMUs will receive one point.

The commission adopts §60.2(e)(2)(D) to assign points to small entities. Small entities will be assigned three points to account for the complexity that arises from being a small entity. A small entity is defined as: a city with a population of less than 5,000; a county with a population of less than 25,000; or a small business. A small business is defined as any person, firm, or business, which employs, by direct payroll and/or through contract,

fewer than 100 full-time employees. A business that is a wholly owned subsidiary of a corporation shall not qualify as a small business if the parent organization does not qualify as a small business. The definition of small entity comes from the TCEQ's Enforcement Standard Operating Procedures. The commission recognizes that size alone cannot account for the complexity that a small entity faces, and therefore adds a separate provision of size points for those entities.

The commission adopts §60.2(e)(2)(E) to address points for USTs and ASTs. Sites with 11 or more USTs will receive four points. Sites with between five and ten USTs and sites with more than 11 ASTs will receive three points. Sites with three to four USTs and sites with three to ten ASTs will receive two points. Sites with one to two USTs and/or ASTs will receive one point. The commission adopts added §60.2(e)(2)(E) in response to comments and to more adequately capture size points.

Adopted §60.2(e)(3) addresses points for sites located in nonattainment areas. Points for sites located in nonattainment areas are in §60.2(d)(5) under the existing rule and no changes are recommended. The commission continues to assign every site located in a nonattainment area one point.

HB 2694 requires changes to the way in which the commission evaluates repeat violators. Previously, in determining whether or not an entity was a repeat violator, the

commission evaluated all major violations that occurred during the five-year compliance period. Under the adopted rule, in accordance with HB 2694, the commission will limit consideration to only those major violations that are of the same nature and the same environmental media that occurred in the preceding five years. The commission analyzed different methods to define "same nature." The commission defines same nature as violations that have the same root citation at the subsection level. For example, all rules under 30 TAC §334.50 (e.g. §334.50(a) or (b)(2)) are considered same nature. If a person is determined to be a repeat violator, the impact to the compliance history calculation remains the same as in the existing rule and 500 points will be added to the formula used to produce a compliance history score. If the person is not a repeat violator, then zero points will be added to the formula.

The adoption replaces the term "criteria points" with "complexity points" throughout §60.2(f).

The commission adopts §60.2(f)(1)(A) and (B), removing proposed §60.2(f)(1)(C) and replacing existing §60.2(d)(1)(A) - (C). In response to comments, adopted §60.2(f)(1)(A) and (B) revises the range of complexity points used to determine if a person is a repeat violator, simplifying the language. Under the adoption, a person is a repeat violator when: the site has had a major violation documented on at least two occasions and has less than a total of 15 complexity points or the site has had a major violation

documented on at least three occasions and complexity points greater than 15. With the limitation to violations only of the same nature and same environmental media, the likelihood of a complex facility having four violations within a five-year period is limited. In order to ensure that the repeat violator classification serves as a meaningful deterrent to all regulated entities, the commission adopts a revised range of complexity points in §60.2(f)(1)(A) and (B).

The adoption moves "Repeat Violator Exemption" from existing §60.2(d)(6) to adopted §60.2(f)(2).

The adoption moves "Formula" from existing §60.2(e) to adopted §60.2(g).

The current formula used for calculating compliance history is:

Figure 1: 30 TAC Chapter 60 - Preamble

Existing Formula for Site Ratings

$$\frac{(\text{Violation Points}) + (\text{Chronic Excessive Emissions Events Points}) + (\text{Repeat Violator Points}) - (\text{Self-Audit Points})}{(\text{Investigations} + 1)}$$

X (0.9 for Environmental Management System)

The commission adopts the following revised formula:

Figure 2: 30 TAC Chapter 60 - Preamble

Adopted Formula for Site Ratings

$$\frac{\begin{array}{l} \text{(Violation Points) + (Chronic Excessive Emissions Events Points) +} \\ \text{(Repeat Violator Points) - (Self-Audit Points)} \end{array}}{\begin{array}{l} \text{(No. of Investigations x 0.1) + (Complexity Points)} \end{array}} \times \begin{array}{l} \text{(Voluntary Program Points)} \\ \text{(If applicable)} \end{array}$$

The commission adopts §60.2(g)(1)(D) to incorporate a positive factor in the site's compliance history rating regarding compliance with orders. The site will receive the full amount of violation points attributable to an order for the first two years. Two years after the effective date of the order, if the entity is compliant with all ordering provisions and has resolved all violations, the points attributable to that order will be reduced. The reduction will be 25% for year three, 50% for year four, and 75% for year five. In adopted §60.2(g)(1)(D)(i) the commission added language in order to clarify that in the first two years violations points from an order will not receive any reduction and renumbered the subsequent paragraphs. The commission added the following language to §60.2(g)(1)(D)(i) "under two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.0." The commission adopts this order reduction provision to encourage compliance and encourage maintaining compliance.

Adopted §60.2(g)(1)(E) and (F) amend the multipliers used to calculate points assigned to violations contained in NOVs. Under the adoption, major violations shall be multiplied by ten (currently five in the existing rule) and moderate violations shall be multiplied by four (currently three in the existing rule). The commission is adopting this change to ensure the weight of the violations is more appropriate. Minor violations remain the same.

Adopted §60.2(g)(1)(L) amends the multipliers used to calculate points assigned to violations disclosed as a result of an audit conducted under the Audit Act, as amended, and the site received immunity from an administrative or civil penalty for that violation(s). Under the adoption, major violations shall be multiplied by ten (currently five in the existing rule) and moderate violations shall be multiplied by four (currently three in the existing rule). The commission is adopting this change to ensure the weight of the violations is more appropriate. Minor violations remain the same.

The commission revised existing §60.2(e)(1)(L) to adopted §60.2(g)(1)(M) to reflect that only investigations that do not result in a documented violation will be considered. The number of investigations conducted during the compliance period that do not document any violations will be multiplied by 0.1, rounded up to the nearest whole number, and added to the number of complexity points in §60.2(e). Investigations that do not document any violations will be the only investigations considered in the compliance

history formula. The executive director reviewed the investigations applicable to compliance history and determined that approximately 91% of all investigations do not result in documented violations. The commission determined that investigations that do not result in documented violations more accurately reflect a positive component of compliance history and the commission adopted this change to further encourage incentives for compliance. The commission will continue its current practice and will not include investigations that are the result of a complaint regardless of whether or not violations are documented. Adopted §60.2(g)(1)(M) added language to clarify that one point shall be used if no points exist in the denominator of the formula. The commission made this change to ensure that the formula does not inadvertently produce a site rating of zero due to lack of information.

The commission revised existing §60.2(e)(1)(M) to adopted §60.2(g)(1)(N) to incorporate the changes made to TWC, §5.755(b). An EMS is a way for sites to receive a reduction to their compliance history rating. The amount of reduction for implementing an active EMS has not changed and remains at 10%. The commission adopted additional incentives for entities that participate in other commission supported voluntary pollution reduction or early compliance programs. The commission adopts a reduction of 5% for each of the voluntary pollution reduction or early compliance programs applicable to a site. The maximum total of reduction available to an entity under adopted §60.2(g)(1)(N) is 25%: a 10% reduction is available for implementing an EMS

and a 5% reduction is available for participating in other commission supported voluntary reduction or early compliance programs (5% each). The commission currently supports these programs: 1) Pollution Prevention Site Assistance; 2) Clean Texas Voluntary Pollution Reduction; 3) Compliance Commitment; and (4) Mercury Convenience Switch Recovery. The commission may add additional voluntary pollution reduction programs administered by the Small Business and Environmental Assistance Division or that division's successor designated as innovative by the executive director in accordance with Chapter 90. HB 2694 added THSC, Chapter 375 to the applicable chapters of the compliance history. As such and in accordance with THSC, §375.101, the commission added Mercury Convenience Switch Recovery program to the list of voluntary pollution reduction programs eligible for a 5% reduction. Under the Mercury Convenience Switch Recovery program, sites are required to submit an annual report by November 15 of every year. If the site meets the terms of the program, then the compliance history reduction will be assessed for the following year's compliance history rating. Eligibility for a reduction to a compliance history rating for participation in these voluntary pollution reduction programs will be evaluated annually and will only be available for sites currently participating in these programs.

Adopted §60.2(g)(2) changes the site rating ranges for each classification based on the adopted formula. A high performer is defined as having fewer than 0.10 points. A satisfactory performer is defined as having 0.10 points to 55 points. An unsatisfactory

performer is defined as having more than 55 points. The commission reviewed the data available to it and determined that due to the changes in the compliance history formula, the site rating range for the unsatisfactory classification would have to be higher than the rating range for the previous poor performer classification. Specifically, the denominator was revised substantially to incorporate complexity points into the formula. Adding complexity points to the denominator required the amount of points attributable to investigations to be revised. Also, the multipliers for the violations points associated to NOVs were increased to reflect the appropriate weight for those violations. These changes to the formula required the commission to review and ultimately raise the site rating ranges for unsatisfactory performers.

The adoption amends existing §60.2(e)(3) to adopted §60.2(g)(3)(A) and (B)(i) and (ii) to correspond to the new point ranges in §60.2(g)(2). Adopted §60.2(g)(3)(A) states that the executive director may reclassify a site with 55 points based on the listed mitigating factors. Adopted §60.2(g)(3)(B)(i) and (ii) states that reclassification of a site under these clauses shall be applicable to a satisfactory performer with 55 points.

The adoption moves §60.2(f) in the existing rule to §60.2(h). Under the existing rule a person classification is assigned by averaging the site ratings of all the sites owned and/or operated by that person in the State of Texas. Under the adopted rule, the executive director will assign a classification to a person by adding the complexity

weighted site ratings of all the sites owned and/or operated by that person in the State of Texas. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site, multiplied by the percentage of complexity points that site represents of the person's total complexity points for all sites. This is depicted in the formula below.

Figure 3: 30 TAC Chapter 60 - Preamble

$$\boxed{\text{Site \#1 Compliance History Rating}} \times \frac{\text{Complexity Points for Site \#1}}{\text{Sum of all complexity points for all sites associated to the person}}$$

Each of these calculated amounts will be added together to determine the person's compliance history rating.

The adoption moves existing §60.2(g), to §60.2(i). The adoption revises the notice of classification to incorporate changes to TWC, §5.756. Every September 1, the executive director calculates new person and site classification ratings for compliance history. The compliance history ratings are published on the commission's Web site 30 days after the completion of a quality assurance, quality control (QAQC) review period conducted by executive director's staff. The commission regulates over 220,000 sites, some of which have more than one owner or operator. The executive director will only conduct a QAQC review of compliance history calculations where the person or site has a rating above

zero. A QAQC review will not be conducted on persons or sites who rank unclassified or have a rating of zero. TWC, §5.756 included a 30-day period for the owner or operator of the site to review and comment on the information. The executive director has historically conducted a QAQC review of the data provided and will continue to do so.

During the QAQC review, owners or operators who wish to review and comment on their compliance history information must submit a Compliance History Review Form (CHRF). The CHRF must be submitted by August 15 of each year and must be resubmitted annually to the commission. The executive director is exploring ways to simplify this process, including the development of a secure, web-based method that would allow owners and operators, or their designee, to complete the CHRF, review only their own compliance history and to submit comments to the commission all online. Regardless of the method developed for this process, for security purposes, the commission will ask that regulated entities designate one representative that will be granted access to the secure, online compliance history information. The designated representative will be able to share the information with others within their organization. The executive director will publish a press release on the commission's Web site on or about July 15 to remind the regulated community of the compliance history QAQC review period and will outline the process to be used. The commission will send a response to the requestors as soon as possible after September 1 of each year. The response to the CHRF will include the site, person and repeat violator

classifications, the points for the components used, grouping for the site, and the amount of complexity points for a site. The requestors will have 30 days to review the information. Should the requestor identify changes that need to be made to the compliance history information contained in the response, the commission encourages the requestor to notify the executive director as soon as possible so the executive director can evaluate the requested changes. At the conclusion of the 30-day QAQC review period, the information contained in the response will be made available to the public.

A person may file an appeal of the classification in accordance with adopted §60.3(e). The commission will post on the commission's Web site the compliance history rating for a person and site on or about November 1 of each year. The commission will still allow for an owner or operator of the regulated entity to submit a correction request, in accordance with adopted §60.3(f) at any time for review by executive director's staff.

§60.3, Use of Compliance History

This section describes activities the commission may take if a site is classified as an unsatisfactory performer or a satisfactory performer with 45 points or more. The commission revised §60.3(a)(3)(C) to correct an error in the citation from §305.65(8) to the appropriate citation of §305.65(9). Language in adopted §60.3(b)(3) reflects changes in HB 2694 which provides flexibility to the commission in conducting

investigations announced or unannounced.

The adoption amends §60.3(e) and (4). Section 60.3(e) is amended to state that a person or site classification may be appealed only if the person or site is classified as either an unsatisfactory performer, repeat violator, or a satisfactory performer with 45 points or more. The existing rule states that 30 points or more are needed to appeal. The change is necessary based on the adopted changes to the compliance history formula. The commission added repeat violators to the section because repeat violators may face the same additional scrutiny and regulatory restrictions that are assessed against unsatisfactory performers. Section 60.3(e)(4) is amended to state that any replies to an appeal must be filed no later than 15 days after the filing of the appeal to provide the commission with a more reasonable amount of time to reply. The existing rule provides ten days.

Final Regulatory Impact Analysis

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

economy, 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 rulemaking merely adds the new requirements relating to the components of compliance history. The commission has determined that the adopted rulemaking does not fall under the definition of a "major environmental rule" because the adopted amendments are primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The primary purpose of the adopted rulemaking is to implement HB 2694, 82nd Legislature, 2011, §§4.01 - 4.05 and 4.07, which amended TWC, Chapter 5, Subchapter Q, requiring changes to the compliance history rule. The adopted rulemaking revises the standards for use and evaluation of compliance history.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not

exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not adopted solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the Statutory Authority section of this preamble.

Takings Impact Assessment

The commission evaluated the adopted rules and performed an assessment of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement the statutory provisions of TWC, §§5.751 - 5.754 and 5.756. The adopted rules provide for standards for evaluating and using compliance history.

Promulgation and enforcement of the adopted amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulations do not affect a landowner's rights in real property because the clarification in the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the adopted clarification of the regulations. In other words, there are no burdens imposed on private real property under this rulemaking because they only

establish a new procedural mechanism for compliance history. Therefore, the adopted rules do not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the rules include: 31 TAC §501.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 31 TAC §501.12(2), to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; 31 TAC §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; 31 TAC §501.12(5), to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and

enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; 31 TAC §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 31 TAC §501.12(7), to make agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and 31 TAC §501.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed these rules for consistency with applicable goals of the CMP and determined that the rules are consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the adopted rules include: 31 TAC §501.19, Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; 31 TAC §501.20, Prevention, Response, and Remediation of Oil Spills; 31 TAC §501.21, Discharge of Municipal and Industrial Wastewater to Coastal Waters; 31 TAC §501.22, Nonpoint Source (NPS) Water Pollution; 31 TAC §501.23, Development in Critical Areas; 31 TAC §501.25, Dredging and Dredged Material Disposal and Placement; 31 TAC §501.28,

Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and 31 TAC §501.32, Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Department of State Health Services regarding wastewater discharges that could significantly adversely affect oyster reefs. This rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable: to areas with the potential to develop agricultural or silvicultural NPS water quality problems; to on-site disposal systems; to USTs; or to TPDES permits for storm water discharges. This rulemaking does not relax the standards related to dredging, the discharge of dredge material, compensatory mitigation, and authorization of development in critical areas or to dredging, the discharge, disposal, and placement of dredged material, compensatory mitigation, and the authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within

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

As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed the rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of CNRAs (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking is the policy (31 TAC §501.32) that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (31 TAC §501.32).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments on the consistency of this rulemaking were received.

Public Comment

The commission held a public hearing on March 6, 2012. The comment period closed on March 23, 2012. The commission received comments from State Representatives Lon Burnam, Ron Reynolds, Ruth Jones McClendon, Alma Allen, Scott Hochberg, Rafael Anchia, Jessica Farrar, and Carol Alvarado (Representatives); Allergy and Asthma Center of Corpus Christi (AACCC); Alliance for a Clean Texas (ACT); Association of Electric Companies of Texas, Inc. (AECT); Birch, Becker & Moorman, LLP (BBM); Clean Economy Coalition (Clean Economy); Clean Economy Coalition of Corpus Christi (Clean Economy Corpus Christi); Harris County Pollution Control Services Department (PCS); League of Women Voters of the Austin Area (League); Medina County Environmental Action Association (MCEAA); National Solid Wastes Management Association (NSWMA); Northern Arlington Ambience (NA Ambience); Public Citizen; SEED Coalition; Sierra Club Lone Star Chapter (Sierra Club); South Central Texas Network; TCEQ Office of Public Interest (OPIC); Texas Association of Business (TAB); Texas Chapter of the Solid Waste Association of North America (TxSWANA); Texas Chemical Council (TCC); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Organizing Project (TOP); Texas Pipeline Association (TPA); Turning Point Ranch; Waste Management of Texas, Inc. (WM); Westchester Association of Homeowners (Westchester); and over 300 individuals.

Response to Comments

Preamble

AECT commented that it supported the commission's inclusion of the language on Compliance History Reports stating that an NOV represents a written allegation of a violation of a specific regulatory requirement and is not a final enforcement action, nor proof that a violation actually occurred.

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

No changes were made to the proposed rules in response to this comment.

General

TAB and one individual supported the proposed rules.

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

No changes were made to the proposed rules in response to these comments.

MCEAA, Turning Point Ranch, and nine individuals commented in general opposition to the proposed rules citing reduced standards and weakened enforcement. Specifically, the comments included, but were not limited to, air pollution, disclosure of chemicals used in hydraulic fracturing, pollution related health concerns, the commission's

enforcement process, and the quality of the environment in general. SEED Coalition commented at the public hearing that the compliance history rules should be "tightened up and not relaxed."

The commission responds that, while it appreciates the concerns raised by the commenters, the comments are outside the scope of this rulemaking.

The commission determines a regulated entity's and a person's compliance history and uses the rating for regulatory decisions, such as denying permits or adding permit conditions, and enhancing administrative penalties. The commission responds this rulemaking does not limit or weaken the commission's enforcement authority or ability to assess penalties for violations of commission rules. No changes were made to the proposed rules in response to these comments.

Public Citizen requested a reasoned justification for the proposed changes to the rules.

The commission has provided justification for the changes to the rules in the preamble and in the Response to Comments section. HB 2694 required rulemaking to implement changes to the compliance history program to provide a more accurate measure of regulated entities' performance and make compliance history a more effective regulatory tool. No changes were made to the proposed rules in response to this comment.

Representatives, Public Citizen, Sierra Club, Westchester, NA Ambience, and 232 individuals commented that the commission should have provided more information to the public during the rulemaking, such as an analysis of how the proposed rules would apply to the regulated community. Representatives added that the commission refused to comply with requests to publish a database providing hypothetical classifications of entities based on the new formula until four days before the comment period closed and then it was lacking in crucial information. Public Citizen stated at the public hearing that the commission "knowingly obstructed our attempts to gain insight on the proposed compliance history ratings." NA Ambience stated that the commission should provide the "calculations of the State's 100 largest polluters as well as those of selected representative smaller polluters."

The commission responds that hypothetical compliance history scores for all sites and persons were provided in a searchable portable document format (PDF) on February 29, 2012, on the commission's Web site and the comment period was extended until March 23, 2012. Due to computer programming limitations during rule development, the individual scores provided did not reflect all aspects of the formula as proposed. Rather, the scores represented approximate numbers using a simplified model with several limitations, including: 1) the scores were generated using applicable

compliance-history data from September 1, 2006 - August 31, 2011; not the data that will be used to calculate scores under the proposed rules, 2) the scores did not accurately reduce points for compliance with administrative orders because the simplified model did not take into consideration compliance with the order, therefore, entities that have not yet achieved compliance with an order received a reduction under the simplified model that is not warranted, 3) points awarded for "small entities" are not completely reflective of the proposed rules because the simplified model allocated points for small businesses but did not allocate points for small cities and counties, and 4) reductions for voluntary programs are not completely reflective of the proposed rules, because if an entity has multiple voluntary programs, the simplified model did not accurately apply reductions for all programs. The commission received an additional request for the database to be provided in a sortable format. The commission needed to do additional programming to develop the requested format. On March 15, 2012, the commission notified the requestor that the requested format would be provided after the document was created. An Excel spreadsheet version of the database was provided on March 19, 2012, as soon as it was completed. No changes were made to the proposed rules in response to these comments.

Representatives, Public Citizen, MCEAA, the League, TOP, and 260 individuals commented that holding one public hearing at 10:00 a.m. in Austin did not give citizens enough of an opportunity to give feedback on the proposed rules and that additional public hearings should be held. Representatives added that at least three, but preferably five, additional hearings should be held. Public Citizen and one individual added that possible sites should include Port Arthur, Houston, Dallas, Texas City, Galveston, and Corpus Christi.

The commission responds that opportunity was given to provide comments orally or in writing at a stakeholder meeting on September 22, 2011, orally or in writing during the March 6, 2012, public hearing, and in writing until the end of the comment period. All comments, whether provided orally at a hearing or in writing, are given equal weight. Attendance at a hearing is not necessary to participate in the rule making process or to provide comments. No changes were made to the proposed rules in response to these comments.

TIP, Public Citizen, and TOP commented that the comment period should be extended past March 12, 2012. Additionally, Representatives, MCEAA, and five individuals requested that the comment period be extended past March 23, 2012.

The original comment period was from February 10 to March 12, 2012.

Based on requests from the public and regulated community, the comment period was extended until March 23, 2012, to receive additional written comments. No changes were made to the proposed rules in response to these comments.

§60.1(b)

TPA commented that it supports the proposed revisions concerning the compliance period for NOVs.

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

No changes were made to the proposed rules in response to this comment.

PCS and one individual commented in opposition to the one-year limitation of NOVs. In addition, PCS commented that the use of NOVs is too narrow and should be expanded to include at least five years.

The commission responds that HB 2694 limited the use of NOVs as a component of compliance history for a period not to exceed one year. No changes were made to the proposed rules in response to these comments.

TIP, TXOGA, and TCC commented that NOV's more than a year old should not be included in the repeat violator calculation because it is contrary to legislative intent.

The commission respectfully disagrees with these comments. HB 2694 amended TWC, §5.753 to limit the inclusion of NOV's as a mandatory component of compliance history to a period not to exceed one year from the date of issuance of the NOV. The commission has revised proposed §60.1(c) in accordance with this statutory provision. HB 2694 also amended TWC, §5.754 to provide that the commission must consider "violations of the same nature and the same environmental media that occurred in the preceding five years" in the repeat violator classification. To harmonize these two provisions and give effect to both, the commission has interpreted TWC, §5.754 to mean that all violations of the same nature and same environmental media must be considered by the commission for the preceding five-year period when classifying a person as a repeat violator. A review of the five-year compliance period for all violations is necessary to obtain an accurate picture of the compliance record for each site. In evaluating repeat violators, the commission will review a five-year period for NOV's. The commission reviews all major violations documented in approved investigations in the last five years and final enforcement actions issued in the last five years to determine if a repeat violator classification is

warranted. No changes were made to the proposed rules in response to these comments.

§60.1(c)(1)

BBM commented that the word "final" should be reinserted into the rule or at a minimum that the preamble to the final rules should note that the deletion does not change the current meaning of §60.1(c)(1). TIP and TXOGA commented that the word "final" should be retained and that the commission did not provide an explanation for the change. TIP and TXOGA believe only final orders should be counted.

The commission agrees that the words "any final" should precede "enforcement order" in §60.1(c)(1) and (3). The deletion of the words "any final" was not intended to change the meaning of the provision, but rather was an attempt to match the language of the statutory provision. Since only final enforcement orders can be feasibly included in this component of compliance history, the commission has determined that this interpretation is consistent with legislative intent. Changes were made to the proposed rules in response to this comment.

§60.1(c)(3)

PCS commented that the first clause of proposed §60.1(c)(3) is vague and suggests that

the commission clarify when enforcement actions from the EPA are mandatory components of compliance history.

The commission responds that HB 2694 gave the commission flexibility in gathering enforcement orders, court judgments, consent decrees, and criminal convictions relating to violations of EPA's rules. This flexibility is needed because the commission is reliant on the information being provided by EPA. No changes were made to the proposed rules in response to this comment.

§60.1(d)

TPA commented that it opposes the inclusion of prior enforcement actions in a new owner's compliance history.

The commission responds that prior enforcement actions will be included as a compliance history component despite a change of ownership. This is consistent with how compliance history has been applied by the commission in past decisions. Consideration of all enforcement actions at a site for the full five-year compliance period, even if the site changes ownership, is necessary to obtain an accurate picture of the site's compliance record. A new owner will receive both the positive and negative

components associated to the site in its compliance history calculation to ensure that an unsatisfactory performer cannot drop this negative rating by simply changing company names. The commission recognizes that a negative compliance history classification may deter a responsible company from taking on a site with compliance issues; however, the commission has the ability to use a mitigating factor to encourage this action. Under §60.2(g)(3), a person who has a high or satisfactory rating who purchases a site with an unsatisfactory rating may enter into a compliance agreement to correct any issues of noncompliance at a site and request a mitigating factor be applied to revise the site rating of the purchased site from unsatisfactory to satisfactory. This mitigating factor allows the commission to encourage compliance and improvement of site conditions at an unsatisfactory site without undue burden on a person's compliance history rating. No changes were made to the proposed rules in response to this comment.

§60.2(c)

AECT, TXOGA, and Turning Point Ranch commented that they support the proposed groupings by NAICS codes.

The commission appreciates the positive comments in support of the rules. No changes were made to the proposed rules in response to these

comments.

TCC requested clarification on how the commission will define the term "site."

Specifically, TCC asks whether "site" means "regulated entity."

The commission responds that the term "site," means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. The term "regulated entity" is often synonymous with the term "site." No changes were made to the proposed rules in response to this comment.

TCC requested that the commission provide a "streamlined process to allow regulated entities to correct NAICS code assignments in Central Registry."

The commission responds that this comment is outside the scope of this rulemaking. The commission currently has processes in place that allow the regulated community to make changes to NAICS codes through the Central

Registry Program. No changes were made to the proposed rules in response to this comment.

BBM, TCC, and TPA requested clarification concerning the use of the proposed industry groupings in the rule. TCC specifically commented that the classification is too broad and may not always reflect the activities that occur at a given site and asked if there is any flexibility. TPA commented that it opposed the use of a curved ranking system, where the commission would rank regulated entities against each other within industry grouping. TPA also stated that if the commission intends to use a curved ranking system, it must initiate a new rulemaking. In addition to its general comments in support of the proposed groupings based on NAICS codes, TXOGA commented that it encouraged the commission to monitor implementation of the compliance history rules to ensure that the groupings results in equity and to revisit the rules if the groupings did not achieve fairness in practice.

The commission responds that the groupings will be used as a reporting tool to group together sites with the same NAICS. The purpose of these groupings is to facilitate comparison of similarly situated regulated entities within the same industry. Any other use, such as formal ranking, a curve system, a stratified scoring formula, or classification point ranges based upon the groupings would be addressed through future rulemaking. Any

such rulemaking would not commence until sufficient and needed information has been compiled to determine how to best utilize the groupings. The commission recognizes that the use of NAICS codes is not an exact measure of complexity of a site, but responds that comparing businesses by industry is an effective way to compare regulated entities to those similarly situated. The executive director selected NAICS because it is a nationally recognized standard applicable to all industries and is currently information readily available to the commission. For reporting purposes, the sites would be grouped according to their reported primary NAICS group which reflects their primary business. No changes were made to the proposed rules in response to these comments.

TPA suggested that an additional designation under the NAICS system be included as an industry grouping under the rule. Specifically, TPA suggests that transmission pipelines and related facilities would not fall under any of the NAICS code groupings included in the proposed rule, but rather would be included in the "all others" grouping.

The commission agrees with this comment and the following NAICS codes are included to the groupings referenced in §60.2(c): 486110, 486210, 486910, and 486990. No changes were made to the rule in response to this comment.

TIP commented that the groupings should be removed from the rule because the use of NAICS codes to group regulated entities serves no purpose and would not be a good use of agency resources.

The commission respectfully disagrees with this comment. The use of groupings allows the commission to more effectively compare regulated entities to those similarly situated. The purpose of these groupings is to facilitate comparison of similarly situated regulated entities within the same industry. Any other use, such as formal ranking, a curve system, a stratified scoring formula, or classification point ranges based upon the groupings would be addressed through future rulemaking. Any such rulemaking would not commence until sufficient and needed information has been compiled to determine how to best utilize the groupings. No changes were made to the proposed rules in response to this comment.

NSWMA commented that the commission should delete the use of the NAICS for groupings and questioned the use of NAICS to initially classify the complexity of sites and stated the commission should use the complexity points proposed in the rules.

The commission respectfully disagrees with this comment. Although the

commission notes that the proposed rules do not use groupings to establish different scoring formulas based on NAICS code, the proposed groups allow the commission to more effectively compare regulated entities to those similarly situated. Furthermore, the commission also notes that NAICS codes are not a measure of complexity. No changes were made to the proposed rules in response to this comment.

§60.2(e)

AECT and TPA commented that they support the measuring of complexity of sites. TXOGA commented that it appreciates the commission's calculation of complexity points in order to account for both positive and negative factors.

The commission appreciates the positive comments in support of the rules. No changes were made to the proposed rules in response to these comments.

TXOGA stated that it is difficult to predict whether the new complexity point calculation will achieve legislative intent that large complex manufacturing sites were being fairly evaluated. TXOGA commented that it encourages the commission to evaluate the impact of the changes to the formula on large complex sites and to monitor implementation to ensure that the desired results are achieved in practice.

The commission appreciates this comment. No changes were made to the proposed rules in response to this comment.

TCC requested an explanation on how the commission determined the allocation of complexity points for each category.

The commission responds that the structure of criteria points utilized in the existing rule was used as the baseline for complexity points. The commission evaluated the types of permit authorizations for various sites in different media to determine program participation points. The program participation points awarded to each type of permit authorization were based on the permit complexity and corresponding level of regulation. The commission looked at various elements to determine size of a site and requested specific comments from the public on what elements to consider for size points. The commission endeavored to capture readily available data in each program area that would relate to operations. The commission also recognizes that size alone cannot account for the complexity that a small entity faces and added points for that reason. Sites in nonattainment areas were allotted one point as it was previously allotted one point under criteria points. Although location is not necessarily a measure of

complexity, the commission recognizes that sites in nonattainment areas often have more regulations to comply with. Details for each individual section can be found in the Section by Section Discussion for Program Participation Points and Size Points. No changes were made to the proposed rule in response to this comment.

TxSWANA commented at the public hearing that its members are concerned about whether complexity points will be properly allocated to sites with co-located facilities.

The commission responds that complexity points are allocated to the site appropriately. Complexity points are assigned to the regulated entity number for all activities that take place at a site. No changes were made to the proposed rules in response to this comment.

§60.2(e)(1)

TCC commented that the commission should move Title V, all NSR including NNSR and PSD permits, and Resource Conservation and Recovery Act (RCRA) authorizations including Class I UIC permits, thus giving each of these authorizations four complexity points. TCC further commented that Title V permits should receive the highest level of program participation points in order to satisfy legislative intent.

The commission evaluated these authorizations to determine appropriate placement for allocation of program participation points. The commission recognizes that Title V permits can be broken down into two categories, GOPs and SOPs. While SOPs are often times more complex than GOPs, the converse is often true. The commission evaluated the possibility of assigning different points for Title V GOPs and SOPs. However, in its analysis, the commission determined that whether or not a permit was a GOP or an SOP is not an accurate indicator of the level of complexity. For example, many similarly sized Gas Compressor Stations across the state are authorized under both GOPs and SOPs. For this reason, the commission will assign two program participation points for all Title V permits. The commission respectfully disagrees that it was the legislature's intent to deem Title V facilities as the most complex because the majority of Title V sources in Texas are the less-complex GOPs. Title V permitted sites may also receive program participation points for NNSR permits, PSD permits, NSR permits, standard permits, and PBRs.

The commission agrees that NNSR permits should receive four program participation points because these permits are similar to PSD permits. Under the proposed rule, PSD permits already receive four program participation points in §60.2(e)(1)(A)(iv). RCRA authorizations require

compliance with specific control and operational requirements and are consequently given the higher number of four participation points. The commission responds that some RCRA authorizations can obtain four complexity points under §60.2(e)(1)(A)(ii). The commission moved UIC Class I/III permits to this section because these permits are comparable to RCRA permits, which require significant geological and hydrological assessment. The following changes were made to the proposed rule in response to this comment: §60.2(e)(1)(A) was changed to include NNSR permits and to add UIC Class I/III permits.

BBM and TCC commented that PBRs should be given more points, rather than the one currently allocated under the proposed rule. TCC explained that PBRs should be given more program participation points because they are subject to Title V Reasonable Inquiry and the commission should not exclude those that do not require the submission of the PI-7. In addition, BBM requested clarification as to why PBRs were given one program participation point in the proposed compliance history formula.

The commission respectfully disagrees with these comments, in part. The commission responds that PBRs are just above *de minimis* in the hierarchy of air permit authorizations. Sites authorized under PBRs have fewer emissions, have fewer requirements, and are, therefore, less complex than

those sources requiring other types of authorization. Whether an authorization is subject to Title V Reasonable Inquiry does not justify an increase in program participation points. The commission evaluated the types of permits listed under each point value and found that PBRs were more similar to the types of authorization found in §60.2(e)(1)(D). The commission has no way to track PBRs that are not registered with the commission through the submission of an application, and therefore, must limit program participation points to only those registered. The following change was made to the proposed rule in response to these comments: The commission removed the phrase "a PI-7" from the rule and replaced it with "an application" to ensure that any change to the form name does not impact the points allotted to PBRs in this section.

TCC commented that the commission should revise the phrase "each permit type" in §60.2(e)(1)(A) - (D) to account for all permits at site and replace that phrase with "number of permits."

The commission respectfully disagrees with this comment. The commission has determined that the type of permit authorization is an adequate measure of complexity. If the commission was to give a point for every permit at a site then those points alone would overwhelm the formula to

such a degree that every area of the formula would have to be revised. An unintended consequence to this proposed change could result in permit splitting, which is a practice that the commission does not wish to encourage. No changes were made to the proposed rules in response to this comment.

TCC noted that a typo exists in §60.2(e)(1)(C) and that a dash should replace the "and" in the proposed rule.

The commission responds that it appreciates this comment and made this typographical correction.

TCC requested clarification of the language "or utilized by the person at a site . . ." used in §60.2(e)(1)(C) and (D).

The commission responds that an example of this situation would be when some of the authorizations found in these subparagraphs might be used by a person that is not the owner of the site. Specifically, Person A might be the owner of a convenience store with USTs, while Person B is the operator of the site. Person B might be the person that registers the UST. Similarly, at a construction site, Person M might own the site, while Person S is operating

at the site and might obtain a stormwater permit for construction activity.

No changes were made to the proposed rule in response to this comment.

TIP and TXOGA commented that the complexity points in the rule do not adequately or accurately account for complexity as outlined in the HB 2694. In addition, TIP, TXOGA, and TCC commented that standard permits and general permits that have identifiers should be assigned complexity points in §60.2(e)(1)(D)(xiii) and (xiv). BBM and NSWMA commented that the commission should add Air Standard Permits to §60.2(e)(1)(C) so that these permits would receive two program participation points.

In response to these comments, the commission reviewed all program areas to determine if data were readily available to better define the complexity of sites. The commission made the following changes.

Under §60.2(e)(1)(A), the commission added NNSR permits and moved UIC Class I/III permits to receive four points since these permits are similar to PSD and RCRA permits in this section.

The commission moved MSW Tire Registrations after a review of this authorization and determined Tire Registration more closely reflected the level of permits in §60.2(e)(1)(D). The commission added MSW Type IX to

§60.2(e)(1)(D) as it was determined this is the appropriate amount of program participation points for that authorization.

The commission added Air Quality Standard Permits to §60.2(e)(1)(D) since these authorizations are reflective of this level of complexity. The commission responds that standard permits that are captured in the commission's central registry database are included in the program participation points section. The commission responds that standard permits are just above *de minimis* in the hierarchy of air permit authorizations. Sites authorized under standard permits have fewer emissions, have fewer requirements, and are, therefore, less complex than those sources requiring other types of authorization. These permits receive one program participation point. Standard permits that are not captured by the commission's data systems will not receive program participation points. The example given by BBM was the lack of complexity points for Air Quality Standard Permit for a Temporary Rock and Concrete Crusher ("Temporary Standard Permit"). The Temporary Standard Permits are not complex, do not require permit application review, and the authorization is meant to expire after relatively short intervals of time due to the ever changing nature of the business. The commission recognizes that, by their nature, these Temporary Standard Permits have a more limited

environmental impact over a brief period of time, as compared with some of the other permit authorizations that are allocated program participation points, and therefore, will not receive complexity points for the operations of the site.

BBM commented that the commission interpretation of identical language regarding water quality general permits is contradictory to proposed §60.2(e)(1)(D)(x). In the past "water quality general permits" included stormwater general permits, such as Multi-Sector General Permit and construction general permits which got two points, now they only get one point. BBM noted that no functional difference exists between the storm water general permits and other water quality general permits for purposes of allocating complexity points.

The commission agrees with this comment. The following changes were made to the proposed rule in response to this comment: the commission removed "Stormwater permit" from §60.2(e)(1)(D)(x) from the proposed rule because it is included under §60.2(e)(1)(C)(iii).

NSWMA commented that each program and activity should be counted under program participation points, including amendments or modifications to permits. NSWMA commented that additional activity at a site (through amendment, modifications, or any

other type of authorization) would lead to increased compliance requirements and opportunities for violations and is subjected to increased enforcement opportunities. NSWMA stated that the higher number of compliance requirements, the more complex the operations, and the higher the complexity points for program participation should be.

The commission respectfully disagrees with this comment. Modifications or amendments to permits might increase regulatory requirements but might also reduce the number of regulatory requirements. The commission currently has no mechanism to measure the amount and type of regulatory change made from modifications or amendments for purposes of determining complexity. It would not be practically feasible for the commission to track these revisions to permits. The type of program participation points for permits at a site adequately addresses the complexity values for each site. No changes were made to the proposed rules in response to this comment.

WM and NSWMA commented that program participation points should be awarded to Type IX waste authorizations. In addition, WM commented that Type IV AE authorizations should be distinguished in the proposed rule similar to the way Type I and Type I AE are distinguished in the proposed rule. Specifically, WM recommended

Type IX registrations should receive the same number of program participation points as MSW Type IV, V, VII, or VIII facilities. WM went on to state that all waste "types" and the terminology designated under 30 TAC §330.5 should be used in this rule to avoid ambiguity and potential confusion.

The commission agrees with the essence of this comment, however respectfully disagrees with the number of points an MSW Type IX would receive. The following changes were made to the proposed rule in response to these comments. The commission added MSW Type IV AE to §60.2(e)(1)(B) and MSW Type IX to §60.2(e)(1)(D)(x). An MSW Type IX facility is less complex than an MSW Type I AE, IV, V, or VI facility and equivalent in complexity to those authorizations listed under §60.2(e)(1)(D). Therefore, the most appropriate category for MSW Type IX authorizations is under §60.2(e)(1)(D) and these authorizations have been added to §60.2(e)(1)(D)(x). The commission used common terminology to reference MSW Type VII and Type VIII permit authorizations in the proposed rule. MSW Type VII permit authorizations are more commonly known as sludge registrations or permits found in §60.2(e)(1)(D)(viii) and MSW Type VIII permit authorizations are more commonly known as Tire Registrations found in §60.2(e)(1)(D)(iv). The commission has not made a change to the proposed rule regarding the terminology used for MSW Type

VII and MSW Type VIII permit authorizations in response to these comments.

ACT, Sierra Club, and one individual suggested that the commission should reduce the amount of complexity points allocated to each authorization, citing concerns that it will be difficult for large, complex facilities to ever be classified as unsatisfactory performers. ACT noted that the proposed rule includes complexity points in the denominator of the formula and maintains that this structure makes it "virtually impossible for large, complex facilities to ever get an 'unsatisfactory' rating." ACT suggested that the commission retain the formula as proposed, but reduce the number of complexity points allocated to each authorization, permit, or license.

The commission respectfully disagrees with these comments. As demonstrated by test data provided to the public, the proposed compliance history formula can result in sites with high complexity points being classified as unsatisfactory performers. The commission reviewed the amount of complexity points available to all facilities and determined the values assigned are appropriate and reflective of a site's operations. No changes were made to the proposed rules in response to these comments.

§60.2(e)(2)

WM and NSWMA commented that the commission should assign size points to waste facilities for groundwater monitoring wells, gas probes and extraction wells, landfill gas monitoring pings and probes, leachate sumps, external water quality outfalls, including monitored storm water outfalls, and discrete non-hazardous waste disposal cells.

NSWMA also commented that the executive director should use the permit application, including the site plans, to determine size points.

The commission responds that while the commission agrees that it would be appropriate to include some of these proposed measures of size for waste facilities, there are no suitable measures that are currently tracked in the commission's data systems. Information included in facility operating plans and pollution prevention plans, as well as numbers of groundwater monitoring wells, gas probes and extraction wells, and leachate sumps are not readily available in existing data systems. The commission also responds that it is not feasible to include the content of permit applications and site plans in determining size points. The commission reviewed the amount of complexity points available to all facilities and determined the values assigned are appropriate and reflective of a site's operations. No changes were made to the proposed rules in response to these comments.

AECT supported proposed §60.2(e)(2)(A), particularly using the number of FINs as an

indicator of size.

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

No changes were made to the proposed rules in response to this comment.

TCC requested clarification on how the commission will define the term "site."

The commission responds that the term "site," means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. The term "regulated entity" is often synonymous with the term "site." No changes were made to the proposed rules in response to this comment.

§60.2(e)(2)(A)

TCC requested clarification on how the commission will determine the total number of FINs at a site. TCC suggested that a FIN to every pollutant at the facility and suggests an evaluation for determining FINs {(FINs x pollutant) + monitors}. TIP and TXOGA

commented that the commission should use total emission point numbers (EPNs) at a facility instead of FINs because EPNs more accurately reflect the size of a facility and they are more relevant because they are actual compliance points in a permit.

The commission appreciates, but respectfully disagrees with this comment. The total number of FINs at a site is determined by using data that is self-reported to the commission by the regulated community. Annually, sites that meet the reporting criteria in the commission's emissions inventory rule (30 TAC §101.10), submit their emissions inventory data, including the number of FINs, to the commission. This information is either submitted manually or electronically to the commission and is compiled in the State of Texas Air Reporting System (STARS). The FIN data is extracted from STARS. The commission evaluated other suggested means to gather data to represent the size of a facility, including pollutants emitted, monitors, and EPNs. The commission recognizes that all of these data points have value and appreciates the suggested comments. At this time, the commission does not have a viable mechanism for incorporating data regarding pollutants emitted from a site into the calculation of the formula. In response to these comments, the commission evaluated the use of EPNs and monitors for size complexity points. The commission respectfully disagrees with the use of monitors as a factor in determining size. Monitors are more representative

of the size of specific equipment and requirements of certain rules, rather than a measure of a site's overall size. Facilities may be piped in a wide-array of methods having one FIN connected to several EPNs, having one FIN connected to one EPN, having several FINs connected to a single EPN, etc. Based on 2010 emissions data and counting FINs and EPNs with non-zero reported emissions, there are approximately 51,310 FINs and 48,079 EPNs in the state. While FINs and EPNs are comparable, the commission determined that using FINs as a means to represent size is a better overall representation of a site's size than using other recommended data sets as FINs are the source of emissions. No changes were made to the proposed rules in response to these comments.

BBM commented that the rules disproportionately affect smaller businesses in a negative manner and specifically those that are considered not complex under the proposed version of the rule. BBM stated that it is easier for "non-complex" sites to be classified as unsatisfactory performers and more difficult to recover a satisfactory classification. Furthermore, BBM commented that the definition of small entity points is limited and does not adequately address the negative implications of the compliance history rating formula for non-complex sites.

The commission responds that complexity points for small business and

local governments are awarded three complexity points; this point value is appropriately equivalent to moderately complex program participation point values. Typically sites with higher complexity points will have a greater likelihood for investigations and, therefore, a greater likelihood that violations will be documented. The commission has provided avenues available to all sites to improve their compliance history rating (Order Reduction points, Audit Act points, etc.). No changes were made to the proposed rule in response to this comment.

§60.2(e)(3)

TCC stated that additional size points should be assigned to facilities that are located in nonattainment areas.

The commission respectfully disagrees with this comment. While being located in a nonattainment area may bring additional regulatory responsibilities, this does not have a direct correlation to size points. Being located in a nonattainment area is captured in program participation points and nonattainment points under complexity points. No changes were made to the proposed rules in response to this comment.

§60.2(f)

TPA commented that a company that is "working with TCEQ to demonstrate compliance in an Agreed Order" should not be put into the repeat violator category but should rather be allowed to demonstrate how it is working toward compliance.

The commission respectfully disagrees with this comment. The commission accounts for compliance with Agreed Orders through the addition of adopted §60.2(g)(1)(D). While a reduction in the weight that violations have as a component of an entity's compliance history may be appropriate as the entity demonstrates compliance, the repeat violator classification is intended to review all major violations at the site limited to the same nature and environmental media in the preceding five years. Compliance with an order is not a justification to remove a violation from the commission's purview while it considers the repeat violator classification. No changes were made to the proposed rule in response to this comment.

§60.2(f)(1)(A) - (C)

Representatives, Westchester, NA Ambience, ACT, Sierra Club, and 252 individuals commented that the complexity point allocation makes it difficult for any complex or large facility to ever be classified as a repeat violator. ACT also suggested to revise the amount of complexity points needed to trigger the repeat violator classification.

Specifically referring to §60.2(f)(1)(B), ACT commented that large industrial facilities or

major entities will easily reach the 25-point complexity point threshold, which provides that major violations must be documented on at least three occasions to trigger the repeat violator status. ACT suggested the number of violations needed to trigger the repeat violator classification could be changed and the complexity point thresholds in §60.2(f)(1)(A) and (B) could be raised, to 25 and 100 points, respectively. NA Ambience also stated that the threshold for complexity points should be raised.

The commission agrees with this comment in part. The commission used the structure and ranges in the proposed rule based on values that were more reflective of the existing criteria points. Those values and ranges are not appropriate given the changes based on complexity points. Complexity points are much broader in range and scope. The proposed rule did not take this into consideration and maintained the same range of points based on criteria points. Furthermore, HB 2694 limits the violations that count toward the repeat violator classification to only those violations that are of the same nature and same environmental media. With these changes, the likelihood of a complex facility having four violations of the same nature and same environmental media within a five-year period is limited. Considering the impact of these changes and after further analysis, the commission revised the point ranges to ensure the repeat violator classification serves as a meaningful deterrent for all regulated entities. The

commission eliminated the subparagraph requiring four or more violations. The commission revised the complexity point ranges for those with at least two violations from less than 9 complexity points to less than 15 complexity points based on a review of the range and scope of complexity points. The following changes were made to the proposed rule in response to these comments. Adopted §60.2(f)(1)(A) was revised to provide that a person is a repeat violator at a site when "the site has had a major violation(s) documented on at least two occasions and has less than a total of 15 complexity points." Adopted §60.2(f)(1)(B) was revised to provide that a person is a repeat violator at a site when "the site has had a major violation(s) documented on at least three occasions." Proposed §60.2(f)(1)(C) was removed from the adopted rule.

TCC commented that the commission should delete the phrase ranging from 0 to 8 in subsection (f)(1)(A) because it is unnecessary. TCC further recommended replacing this with the phrase 9 to 24 in subsection (f)(1)(B) with "but greater than 8."

The commission responds that this change is no longer necessary given the changes to this subsection of the rule. No changes were made in the proposed rule in response to this comment.

TPA supported the proposed revision to §60.2(f)(1) that limit applicable violations to those of the same nature and same environmental media, stating "it is appropriate that the term "repeat violator" be limited to one who engages in violations that are similar in kind during the relevant time period."

The commission appreciates the positive comment in support of the rules. No changes were made to the rule in response to this comment.

NSWMA, BBM, TCC, TIP, TxOGA, and TPA commented that additional clarification is needed as to how the commission defines same nature. TCC suggested that the commission change the proposed definition of same nature to "same nature is defined as violations from the same unit that have the same root cause and the same root citation at the lowest subsection level." Additionally, BBM, NSWMA, and TPA commented that they were concerned about the use of violations of the same root citation at the subsection level in determining repeat violator status due to broad range of violations that could result under certain rule subsections. TPA suggested that the commission ensure that the repeat violator provision be applied to those regulated entities that have repeatedly violated the same environmental regulations. TPA further stated that repeat violator classification should not occur because of "mere mechanical interpretation" of the root citation at the subsection level and that the repeat violator classification does not result from different steps in the enforcement process. TIP and

TXOGA commented that definition of same nature needs to be narrowed because the proposed definition could result in all violations of broad regulatory provisions being considered "same nature" and thus, repeat violations. As an example, TIP and TXOGA pointed out that all violations of a flexible permit are cited as violations of 30 TAC §116.715(a). TIP and TXOGA requested that the commission provide a more specific definition of "same nature" and provided an example of a more "precise" definition of same nature that would include violations that involve the same equipment as the same root cause of the violation.

ACT commented that it was concerned that using the root citation at the subsection level to determine whether multiple violations of the "same nature" have occurred will not be accurate.

NSWMA commented that it questions the definition of repeat violator and the proposed use of subsequent major violations under the same "root" regulatory section. NSWMA commented that the use of major violations of the same root regulatory section should be used as a "first screen" that creates a presumption of repeat violator classification which then leads to additional staff review to ensure that the violations were of the same nature and same environmental media.

The commission respectfully disagrees with these comments. The

commission responds that in order to make a repeat violator classification, millions of data sets must be reviewed. To accomplish this review in an efficient and timely manner, the commission must rely on its data systems. The commission reviewed multiple processes and data sets to address this issue and determined that using the subsection level of the rules to determine repeat violator classification was the best approach. If violations are identified as being repeat violations, but a person believes that they are not repeat violations, several levels of review are available to both the agency and the regulated community. The commission rules allow a QAQC procedure which can address this issue. The commission rules also allow that correction requests can be submitted to the commission at any time. In addition, adopted §60.3(e) allows those persons and sites classified as repeat violators to file an appeal. The commission defined same nature as root subsection level because the commission data systems were capable of this review. The commission evaluated other methods of defining same nature but found the constraints of the data systems would not allow that at this time. If using the subsection citation to a particular rule pulls in violations of very broad regulatory requirements, such as §281.25 then the commission can "flag" those rules for extra consideration before the repeat violator classification is made. The commission will review the efficiency of the data systems and determine if any citations need additional review. No

changes were made in the proposed rules in response to these comments.

NSWMA and TPA requested clarification on how the commission defines same environmental media. ACT commented that the term "same environmental media" is vague and suggests that the commission define the term in §60.2(f)(1). Public Citizen provided a comment that the proposed rules did not specify clearly what a violation of the same environment media is and how it is determined for repeat violator. Public Citizen further questioned if a "benzene leak is volatilized at one point and liquid at another, is it the same media?"

The commission responds that using the root citation at the subsection level for defining what violations are of the same nature also results in classification of violation by media, since that is how the commission's rules are organized. The same environmental media is defined as the program area code that is assigned to the violation or authorization due to the constraints of the data systems. No changes were made to the rules in response to these comments.

BBM supported the revisions to this portion of the rule and suggests adding "of the same nature and same environmental media" to the §60.2(f)(1)(A) - (C) after "violation(s)" to ensure the intent of the statute is met.

The commission appreciates the support of this portion of the rule but respectfully disagrees with the suggested language. The proposed rule includes the terms "violations of the same nature and the same environmental media" under §60.2(f)(1) to reflect the statutory intent. No changes were made in the proposed rule in response to this comment.

TPA commented that it is concerned with the potential that different steps of the enforcement process will be counted as separate violations that would trigger the repeat violator provision. TPA provided an example with a NOV and an Agreed Order that "concern the same root cause event" may be counted as separate violations on a regulated entities' compliance history resulting in a repeat violator classification.

The commission respectfully disagrees with this comment. If a violation is documented through different steps of the enforcement process then it should potentially trigger the repeat violator classification. The purpose of an NOV is to put the regulated entity on notice that an area of non-compliance was found during an investigation and provides a timeframe to correct the violation. If the violation is not corrected within the timeframe stated in the NOV and results in formal enforcement through an Agreed Order, then the repeat violator classification is appropriate. No changes

were made to the proposed rules in response to this comment.

PCS recommended that the repeat violator classification should not be limited to major violations only, stating that many instances of repeat or chronic non-compliance situations do not involve major violations.

The commission respectfully disagrees with this comment. The commission determined that only major violations, as defined under §60.2(d)(1), are appropriate to include in determining whether the repeat violator classification applies. The repeat violator classification has a significant impact on the compliance history score, and, therefore, should be reserved for violations that the commission has determined to be major. Although not included in the determination of repeat violator classification, moderate and minor violations are included as components in the compliance history formula and the points associated with these types of violations as defined in §60.2(g)(1)(B) and (C) will be used when calculating an entity's compliance history score. No changes were made to the proposed rules in response to this comment.

§60.2(f)(2)

Representatives, South Central Texas, Clean Economy, Clean Economy Corpus Christi,

NA Ambience, Westchester, MECAA, Sierra Club, Public Citizen, ACT, and 271 individuals commented that §60.2(f)(2) allows the executive director to "pardon polluters" by adjusting the repeat violator classification without any criteria or review. In addition, ACT stated that the exclusion of specific criteria in this section undermines the consistent application of the compliance history program and that this "non-transparent clemency" provision creates the opportunity for personal preference or political persuasion to influence the repeat violator classification. ACT suggested that §60.2(f)(2) should state that "the executive director shall designate a person as a repeat violator as provided in this subsection."

The commission respectfully disagrees with this comment. The executive director must have discretion to review violations that may result in a repeat violator classification, due to the substantial impact that this provision can have on a site's compliance history score. This discretion has always been considered a necessary tool in evaluating whether the repeat violator classification is warranted; however, the executive director has used it sparingly over the last ten years. The commission adopted this provision because it is concerned with the potential for unintended consequences resulting from being designated as a repeat violator. The commission is particularly concerned that violations that occurred prior to the effective date of this rule could result in a person being designated as a

repeat violator at a site, without any ability to consider the specific circumstances surrounding the violations. The commission has determined that this exception is appropriate because some of the more punitive aspects of the rule apply when the repeat violator classification is made. However, the commission expects the executive director to be stringent. Furthermore, HB 2694 limits the violations which the commission can consider when determining whether repeat violator classification applies to "violations of the same nature and same environmental media." Given this limitation, the commission recognizes without this discretion, a rigid unjustifiable application could occur. No changes were made to the proposed rule in response to these comments.

§60.2(g)(1)(D)

TPA and BBM supported the proposed provisions that would incorporate compliance with orders as a positive factor in a site's compliance history. BBM also stated that it believes the classification will be more accurate for a site on a year-to-year basis.

The commission appreciates the positive comment in support of the rules. No changes were made to the proposed rules in response to these comments.

TCC commented that changes to order reduction paragraph §60.2(g)(1)(D) should be made. Specifically it suggested that §60.2(g)(1)(D)(i) state that "under two years old the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.0" and that the following paragraphs should be renumbered accordingly.

The commission agrees with this comment. The commission intended to give full weight to the violations in orders for two years. The reduction points to orders will only be possible if the ordering provisions have been met and two years have passed. The following changes were made to the rule: under §60.2(g)(1)(D)(i) the following language was added: "under two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.0." The additional clause in this section required the subsequent clauses to be renumbered from clauses (i) - (iii) to clauses (ii) - (iv).

§60.2(g)(1)(E) and (F)

TCC, TIP, and TXOGA commented that the increase in the multipliers for NOVs is contrary to legislative intent because the legislature recognized that NOVs are unproven allegations and should not have the same impact. The intent was to reduce the impact of NOVs. In addition, TCC did not agree with the increase of multipliers in §60.2(g)(1)(E) and (F). TCC suggested that the commission leave the multipliers at previous levels.

The commission respectfully disagrees with these comments. The commission proposed this change to ensure the weight of the violations is more appropriate. In the existing rule, the weight of the violations, and the distinction between major, moderate, and minor violations, was not appropriate to truly reflect the impact of the violations. While the legislature directed the commission to use NOVs that are a year old or less, the legislature did not comment on the amount of points or weight to be given to NOVs. The comparison between the existing compliance history formula and the proposed compliance history formula cannot be taken on a one-for-one basis. There are too many distinctions between the two formulas to make this basic comparison. No changes were made to the proposed rule in response to these comments.

§60.2(g)(1)(K)

TCC suggested that allotting 500 points to repeat violators is punitive especially in light of the reduced points of investigations. TCC requested that the commission assign a lesser point value for repeat violators.

The commission respectfully disagrees with this comment. The commission set this value as a deterrent to repeat violations. The reduction of points for

investigations is offset by the addition of complexity points and is addressed in §60.2(g)(1)(M). No changes were made to the proposed rules in response to this comment.

§60.2(g)(1)(L)

TCC did not agree with increasing the violation multipliers in §60.2(g)(1)(L)(ii)(I) and (II). TCC suggested leaving the multipliers at previous levels. TIP and TXOGA commented that the multipliers for violations reported under the Audit Act should not be increased. TIP and TXOGA recommended using the existing levels, saying the change is not justified, and it would have the harmful effect of reducing an incentive to conduct an audit.

The commission responds that the increase in the multipliers for points associated to notices and violations disclosed under the Audit Act provide an additional reduction in violation points and the multipliers were changed to coincide with the amount of points increased for violations found in NOV's. No changes were made to the proposed rule in response to this comment.

§60.2(g)(1)(M)

BBM, TIP, TCC, and TXOGA commented that the number of investigations is an

important part of the current compliance history rating formula and help account for size and complexity because they are the driving forces behind the quantity of investigations performed at a facility. BBM, TIP, TCC, and TXOGA requested that all investigations be counted and that the formula should not exclude those investigations that document violations. BBM, TIP, TCC, and TXOGA requested that the commission should not multiply the number of investigation by 0.1 but use the previous standard in the old rule. TIP and TXOGA commented that the commission did not provide a reason in the preamble for why it chose to use a multiplier and that the use of a multiplier is contrary to legislative intent to "more fairly rate the compliance history of larger, more complex, facilities" because the multiplier will have a much greater impact on larger number of investigations.

The commission respectfully disagrees with these comments. The commission limited the number of investigations to only those investigations that do not document a violation because the commission determined that these investigations are a better indication of compliance. Investigations are an indicator of the degree of oversight that the commission undertakes which does increase for more complex facilities, but investigations are not necessarily the only indicators of size and complexity. Additionally, with the addition of complexity points to the denominator, it was necessary to reduce the points attributable to

investigations in order to equalize complexity points and investigation points in the compliance history formula. No changes were made to the proposed rules in response to these comments.

BBM commented that site assessments for temporary rock and concrete crushers should be counted as compliance investigation under the rule. BBM encouraged the commission to interpret the phrase "investigations" broadly.

The commission respectfully disagrees with this comment. Site assessments for temporary rock and concrete crushers and other similar permitting actions are not conducted with the intent of evaluating compliance. The commission conducts site assessments to assess the information provided in applications prior to the start of operations. No changes were made to the proposed rule in response to this comment.

PCS opposed the exclusion of investigations which result from citizen complaints. PCS also suggested that investigations and enforcement actions from local regulatory agencies should be included in the compliance history calculation.

The commission respectfully disagrees with this comment. The commission does not count investigations that result from citizen complaints in the

compliance history formula because the number of investigations acts as a positive influence of the compliance history score. The commission recognizes that the potential exists for inadvertent inflation that could result from multiple complaints from the public for the same issue. In addition, the potential would exist for an unscrupulous entity to affect its compliance history score by complaint investigations conducted at its site. Additionally, the commission has no existing system in place to feasibly capture investigations conducted by local regulatory entities when determining compliance history. No changes were made to the proposed rules in response to this comment.

§60.2(g)(1)(N)

Representatives, South Central Texas Network, NA Ambience, Sierra Club, Westchester, League, and 262 individuals commented that polluters will improve their compliance history score by signing up for supplemental programs, regardless of effectiveness and without measured returns for measured results. NA Ambience further stated that the benefits from these programs should only apply when they produce measurable results and the benefits received from these programs be in direct proportion to the results.

The commission respectfully disagrees with these comments. The four identified voluntary pollution reduction programs require that a standard

be met in order to be eligible for the credit. The Pollution Prevention Site Assistance program provides technical assistance to reduce pollution. In order for a site to be eligible for benefits the company must report annually for up to three years on projects undertaken to reduce pollution. The Clean Texas Voluntary Pollution Reduction program requires that companies not be unsatisfactory performers and set three-year beyond-compliance commitments. In order to be eligible for the program the entities must report annually on the progress of those commitments. The Compliance Commitment program requires that the entity demonstrate that they are in 100% compliance. The commission added Mercury Convenience Switch Recovery program to the list of voluntary pollution reduction programs eligible for a 5% reduction. Under the Mercury Convenience Switch Recovery program, sites remove mercury convenience switches from vehicles and send them to an approved processing facility where the mercury will be recycled. These sites are required to submit an annual report by November 15 of every year with the number of switches removed from eligible vehicles and the number of eligible vehicles processed at the site. Eligibility for a reduction to compliance history rating for participation in these voluntary pollution reduction programs will be evaluated annually and will only be available for sites currently participating in these programs. In order to participate in any one of these programs the agency

must take an action to allow participation. No changes were made to the rules in response to these comments.

ACT, NA Ambience, Sierra Club, Westchester, and five individuals commented that this provision gives polluters overly generous discounts for participating in environmental management and other pollution prevention programs. Furthermore, ACT stated that a 25% reduction in a compliance history score is too great a benefit for "mere participation in voluntary programs." ACT and Sierra Club commented that the cumulative percent discount that a regulated entity may receive through participating in voluntary pollution prevention programs should be reduced. Specifically, ACT commented that the maximum allowable reduction under this proposed section should be 20%, rather than the proposed 25%.

The commission disagrees with these comments. The commission has determined that a possible 25% reduction from early compliance, participation in voluntary pollution reduction programs, and receiving certification of an EMS is a positive benefit to the environment and incentivizes compliance. These programs encourage compliance with the commission rules and the commission supports the application of a reduction for these programs. HB 2694 directed the commission to include both positive and negative factors when considering a site's compliance

history. In response, the commission added voluntary program points as a positive factor in a site's compliance history score. EMS and voluntary pollution prevention programs are indications of positive operations undertaken at a site. No changes were made to the proposed rules in response to these comments.

ACT stated that since the results of various EMS and voluntary pollution reduction programs differ, they should not be rewarded identically.

The commission respectfully disagrees with this comment. EMS receives a 10% reduction while voluntary pollution reduction programs receive 5%. No changes were made to the proposed rules in response to this comment.

ACT provided suggested rule language for changes to §60.2(g)(1)(N). After the first sentence of §60.2(g)(1)(N), ACT suggests including this provision: "If, however, either due to third party auditing or the required assessment of the EMS it is found the program is not sufficiently meeting the goals established in the EMS, then the entity is not eligible to receive the 10% discount." ACT proposed language for §60.2(g)(1)(N): "To receive this additional discount however, the person must submit a certified description of how participation in the program led to actual, demonstrated environmental and compliance benefits."

The commission respectfully disagrees with this comment. The commission responds that it is rare that a third party certification of an EMS is removed but the auditor does have the ability to revoke the certification. Only entities with an EMS that meets the requirements under Chapter 90 will be eligible for the 10% credit. Proposed revisions to Chapter 90 would require that entities seeking incentives for an EMS must have been certified to a recognized EMS by an independent third party. Additionally, a reassessment is required at least every three years. The commission responds that while none of the four voluntary pollution reduction programs identified require a "certified description of ... benefits," each program requires that a standard be met in order to be eligible for the credit. The Pollution Prevention Site Assistance program provides technical assistance to reduce pollution. In order for a site to be eligible for benefits, the company must report annually for up to three years on projects undertaken to reduce pollution. The Clean Texas Voluntary Pollution Reduction program requires that companies not be poor performers and set three-year beyond-compliance commitments. In order to be eligible for the program, the entities must report annually on the progress of those commitments. The Compliance Commitment program requires that the entity demonstrate that they are in 100% compliance. In order to

participate in any one of these programs, the agency must take an action to allow participation. The commission added Mercury Convenience Switch Recovery program to the list of voluntary pollution reduction programs eligible for a 5% reduction. Under the Mercury Convenience Switch Recovery program, sites remove mercury convenience switches from vehicles and send them to an approved processing facility where the mercury will be recycled. These sites are required to submit an annual report by November 15 of every year with the number of switches removed from eligible vehicles and the number of eligible vehicles processed at the site. Eligibility for a reduction to compliance history rating for participation in these voluntary pollution reduction programs will be evaluated annually and will only be available for sites currently participating in these programs. Based on these programs' requirements, the proposed language is unnecessary. No changes were made to the proposed rule in response to this comment.

TCC requested 0.5 points for other EMS and Responsible Care or International Organization for Standardization (ISO) programs.

The commission respectfully disagrees with this comment. These types of EMS and Responsible Care or ISO programs are not reported to the

commission and therefore should not be considered in the compliance history formula. However, the commission does allow for these EMS programs to be considered as a mitigating factor for unsatisfactory performers. No changes were made in response to this comment.

§60.2(g)(2)

The commission received many comments regarding the compliance history point range for unsatisfactory performers. Representatives, South Central Texas Network, Clean Economy, Clean Economy Corpus Christi, NA Ambience, MCEAA, Westchester, TOP and 281 individuals also commented that increased compliance history leniency will cut the percentage of companies considered unsatisfactory from 5% to 3% without reducing an ounce of pollution and that the compliance standards should be raised, not made less effective by changing the unsatisfactory rating cutoff and raising the compliance history threshold was a way of pardoning the polluters.

OPIC generally supported the rules but commented that the thresholds for classification in proposed §60.2(g)(2) undermine the incentives and deterrents in the compliance history classification system. OPIC commented that the test run of the proposed formula showed a significant change in the percentages of regulated entities falling into higher classifications without improving compliance or benefiting the environment through voluntary measures. OPIC recommended that the commission revise proposed

§60.2(g)(2)(B) and (C) to maintain the current rule's threshold of 45 points for determining unsatisfactory performers.

ACT opposed the changes to the point ranges in §60.2(g)(2)(B) and (C). ACT stated "{b}y moving the threshold for what constitutes an unsatisfactory performer from 45 points to 55 points, ACT maintains that the commission passes thousands of entities from unsatisfactory to average and does nothing to increase compliance." ACT commented that it believes that this change weakens the compliance history program. ACT urged the commission to reduce the threshold back to 45 points.

Sierra Club commented at the public hearing that the "threshold" should be moved back to 40 points and in written comments stated that the commission "raise the classification threshold to move "from one category to another – as suggested by ACT's comments."

NA Ambience suggested that the threshold for unsatisfactory performers be lowered to 35 points.

The commission responds that the proposed unsatisfactory rating threshold was set at 55 points based on an evaluation of the proposed compliance history formula. Although the commission used the structure of

the previous version of the compliance history formula as guidance for the proposed compliance history formula, it is important to note that the two formulas are not directly comparable.

NOVs were a substantial component of the compliance history violation points under the existing rule. However, HB 2694 limits the use of NOVs as a component of compliance history to one year. In addition to this and other changes required by HB 2694, the formula has also been changed in several significant ways. For example, the divisor is substantially different which results in fundamental differences in the formula. In the existing rule, criteria points were only used in determining whether a site was a repeat violator. In the proposed rule, complexity points, an analogous, but broader concept than criteria points, are a direct component of the compliance history formula. Thus, one cannot make a direct comparison between the old formula and the new formula any more than one can make a direct comparison between criteria points and complexity points.

Additionally, investigations are included in a drastically different manner under the proposed rules than in the existing rules. First, only those investigations that do not result in documentation of violations are included in the formula. Second, these investigations are multiplied by 0.1, reducing their cumulative impact on a site's score. These changes to the

compliance history formula made it necessary to reevaluate the range of points necessary to trigger an unsatisfactory performer classification. The commission has determined the site rating point range of 55 points or greater is appropriate for unsatisfactory performers. No changes were made to the proposed rule in response to these comments.

§60.2(g)(2)(A)

OPIC commented that the proposed classification breakdown results in potentially dubious classifications and undermines the incentives and deterrents in the compliance history classification system. OPIC noted that the proposed formula continues to allow entities with violations to achieve a high classification, particularly if the site has high complexity points. OPIC commented that only entities with clean records of no violations within a five-year review period should have the ability to obtain a high classification and recommended the commission revise §60.2(g)(2)(A) to change the site rating range for high performer to zero.

The commission appreciates, but respectfully disagrees with this comment. Defining a high performer as a site that has no record of violations within the five-year review period would provide undue weight to minor violations and could potentially discourage compliance. The commission, by allowing a point range from zero to 0.10 for a site to be classified as a high

performer, provides an incentive for a site to work towards and maintain compliance. No changes were made to the proposed rules in response to this comment.

§60.2(g)(3)(A) and (B)

Representatives, South Central Texas, Clean Economy, Clean Economy Corpus Christi, NA Ambience, Westchester, MCEAA, Sierra Club, Public Citizen, ACT, and 271 individuals commented that the executive director will be able to "pardon polluters" at his discretion instead of adhering to a standard protocol. Representatives added that expanding the executive director's discretion in compliance history scoring would serve to increase the very "vagaries" of the existing formula and that there would be no record of the decision in the annual report released by the agency. Representatives and ACT also stated that the rules do not establish parameters for entity self-audits, an oversight that allows the executive director to completely reclassify an unsatisfactory site for voluntarily reporting a violation. ACT is concerned with this portion of the rule because it allows the executive director to reclassify a site based on a certain voluntary disclosure of a violation. While ACT noted that "honest self-auditing should be encouraged," it suggests providing "immunity from the negative consequences associated with the violation . . ." is sufficient to incent voluntary reporting. ACT is troubled that the executive director could reclassify a site, which could essentially forgive the entity of violations that exceed the severity of the violation that was voluntarily reported.

The commission responds that the compliance history rules apply to a wide range of regulated entities with varying sizes and complexities. The commission recognizes that a rule of such broad application may create situations where unique factual circumstances may warrant the exercise of mitigating factors. The commission has not expanded the executive director's discretion under these rules. The language has been part of the compliance history rules from the beginning. The commission has determined that the use of mitigating factors requires the exercise of discretion and consideration of site- or person-specific factors by the executive director because of widely varying factual circumstances. Because the factual circumstances surrounding other types of mitigating factors will vary from case to case, this discretionary approach is important so that the issues related to each mitigating factor can be sufficiently evaluated for its relative importance and impact. The commission has determined that having a mitigating factor for violations self-reported to the commission is valuable because it recognizes that a site may perform other kinds of audits or self-evaluations that may be similar to environmental audits and provide the same benefits to the community. However, these audits or self-evaluations do not have the same conditions and requirements as environmental audits conducted under the Audit Act, and thus are

appropriate as a mitigating factor. No changes were made to the proposed rules in response to these comments.

§60.2(h)

TCC requested that the commission provide an explanation why this change was made. It has been TCC's understanding that each site has its own compliance history rating.

The commission responds that HB 2694 directed the commission to take size and complexity into account when determining a person's compliance history. The commission reviewed the formula for classifying a person rating under the existing rule and determined that the existing calculation did not adequately take size and complexity of sites into consideration.

Under the existing rule, a person's classification is determined by averaging the site ratings of all the sites owned and/or operated by that person in the State of Texas. Under the adopted rule, the executive director will assign a classification to a person by adding the complexity weighted site ratings of all the sites owned and/or operated by that person in the State of Texas.

Under the adopted rule, complexity includes the size of sites. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site multiplied by the percentage of complexity points that site represents of the person's total complexity points for all sites. The

commission has determined that this calculation more accurately reflects a person's classification by taking into account the complexity of each site. No changes were made to the proposed rule in response to this comment.

§60.2(i)

AECT and TPA supported the proposed QAQC period.

The commission appreciates the positive comments in support of the rules. No changes were made to the proposed rules in response to these comments.

TCC commented that clarifying language should be added to this subsection of rule and suggested language. "The pending clarification shall undergo a quality assurance, quality control review period. An owner or operator of a site may review the pending compliance history rating upon request by submitting a CHRF to the commission with 14 calendar days of the notice."

The commission responds that its intent is to provide the regulated community sufficient time to submit a CHRF. A public notice will be posted to the agency's Web site on or about July 15 reminding the regulated community that a CHRF must be submitted to the agency by August 15.

Additionally, the commission intends to utilize an automated, web-based interface for this CHRF process which will further increase its efficiency. Utilizing this automated interface, the commission has determined that the amount of time provided to the regulated community to submit a CHRF is sufficient. No changes were made to the proposed rule in response to this comment.

BBM commented that the system proposed by the commission is unwieldy and places a hardship on the regulated entity and the commission. BBM requested that the commission amend §60.2(i) to only require an entity to submit the CHRF once to reduce the paper work or alternatively, utilize an online system. In addition, BBM also requested that the commission revise this procedure to require all unsatisfactory performers receive notice of the pending compliance history rating regardless of whether they filed a CHRF.

The commission respectfully disagrees with this comment. The commission recognizes that many changes take place during a year that would impact the desire to conduct a review or staffing changes may occur. It is imperative that the entity submit a CHRF annually to ensure that a person currently with the entity receives the requested information and that the information goes to the appropriate person. The commission is working on

developing an online system to streamline the process, however, if an online process cannot be utilized by a regulated entity, then the system outlined in the rule will govern the process for which the regulated entity can participate in the QAQC process. No changes were made to the proposed rule in response to this comment.

BBM suggested that the commission allow for an appeal procedure for pending compliance history ratings for unsatisfactory performers and that the pending rating would not be posted until the appeal process has run its course.

The commission respectfully disagrees with this comment. The commission needs to have the compliance history scores public and usable for agency actions. To stay the release of the compliance history scores for the duration of an appeals process which could last anywhere from 45 days to years is unreasonable. No changes were made to the proposed rules in response to this comment.

TIP and TXOGA commented that the commission should provide more detail regarding what information will be provided in response to the CHRF. TIP and TXOGA also stated that the rules appear to place the burden on the owner and operator.

The commission responds that the compliance history score, components that went into the compliance history score, the complexity score, repeat violator classification, and grouping information will be provided in response to the CHRF. The commission agrees that the rules do place the burden on the owner and operator to request this information but HB 2694 only allows the owner and operator to access this information. No changes were made to the proposed rules in response to these comments.

§60.3(a)

BBM commented that unsatisfactory sites should be able to obtain air standard permits and/or storm water general permits but require additional unannounced compliance investigations.

The commission determined that this comment is outside the scope of this rulemaking. The determination to authorize facilities under air general permits or water permits is addressed by specific programs and their governing rules. No changes were made to the proposed rules in response to this comment.

§60.3(d)

One individual commented that the proposed rules do not prohibit unsatisfactory

performers from participating in innovative programs and from receiving regulatory flexibility.

The commission respectfully disagrees with this comment. Under §60.3(d), an unsatisfactory performer is prohibited from participating in regulatory flexible programs at the site and is also prohibited from receiving additional regulatory incentives under an EMS. No changes were made to the proposed rules in response to this comment.

§60.3(e) and (4)

NSWMA commented that right of an appeal should not be limited to unsatisfactory performers or satisfactory performers with 45 points or higher. NSWMA commented that facilities that receive a repeat violator classification should also have the opportunity to appeal.

The commission agrees with this comment in part. Entities that have been classified as repeat violators will have the ability to recommend changes during the QAQC process and have the ability to submit a correction request if they believe a repeat violator classification is not warranted. However, the commission recognizes that repeat violators may face the same additional scrutiny and regulatory restrictions that are assessed

against unsatisfactory performers. Therefore, the commission has determined that persons classified as repeat violators should have the right to appeal. However, the right of an appeal is limited to unsatisfactory performers, repeat violators, and satisfactory performers with 45 points or higher because the executive director has a limited amount of time to review and address appeals under the rule, and removing this limitation may result in the submission of an unmanageable amount of appeals to the executive director. The following changes were made to the proposed rule in response to this comment: adopted §60.3(e) was revised to include repeat violators in the list of those eligible for an appeal of their compliance history classifications.

TxSWANA represented a suggestion of one of its members that there should be a way to correct compliance history scores other than the 30 days after the compliance history scores are released.

The commission responds that the rules allow for a site to submit a correction request and corrections to compliance history information can be made at any time. No changes were made to the proposed rules in response to this comment.

TIP and TXOGA commented that any threshold to allowing appeals is a fundamentally flawed approach and a company should have a right to an appeal to correct errors. TIP and TXOGA commented that at a minimum the commission should not increase the point threshold from 30 to 45 to file an appeal.

The commission respectfully disagrees with these comments. The commission has the correction request provision in the rule, under §60.3(f), to allow a person to correct errors regardless of the compliance history score. The appeals process is reserved for sites and persons that are classified as unsatisfactory, repeat violator, or satisfactory with 45 points or higher because the appeals process is a time sensitive process.

Unsatisfactory performers and repeat violators receive additional oversight and regulatory restriction by the commission and providing an avenue for them to supply additional information to the executive director to appeal the unsatisfactory classification is warranted. The commission added repeat violator to adopted §60.3(e). No changes were made to the proposed rule in response to these comments.

§§60.1 - 60.3

Statutory Authority

House Bill 2694 granted rulemaking authority to the commission under Texas Water Code (TWC), §5.754 to establish a set of standards for the classification and use of compliance history. The amendments are adopted under Texas Health and Safety Code (THSC), §361.017 and §361.024, which provide the commission with 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 amendments are also authorized under TWC, §5.103, which provides the commission with 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 TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

The adopted amendments implement TWC, §§5.751 - 5.754, and 5.756, relating to the standard for evaluating compliance history.

§60.1. Compliance History.

(a) **Applicability.** The provisions of this chapter are applicable to all persons subject to the requirements of Texas Water Code (TWC), Chapters 26, 27, and 32 and Texas Health and Safety Code (THSC), Chapters 361, 375, 382, and 401.

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

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

(B) enforcement;

(C) the use of announced investigations; and

(D) participation in innovative programs.

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

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

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

(A) voluntary permit revocations;

(B) minor amendments and nonsubstantive corrections to permits;

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

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

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

(F) permit alterations;

(G) administrative revisions; and

(H) air quality new source review permit amendments which meet the criteria of §39.402(a)(3)(A) - (C) and (5)(A) - (C) of this title (relating to Applicability to Air Quality Permits and Permit Amendments) and minor permit revisions under Chapter 122 of this title (relating to Federal Operating Permits Program).

(5) Further, this chapter does not apply to occupational licensing programs under the jurisdiction of the commission.

(6) Not later than September 1, 2012, the executive director shall develop compliance histories with the components specified in this chapter. Prior to September 1, 2012, the executive director shall continue in effect the standards and use of compliance history for any action (permitting, enforcement, or otherwise) that were in effect before September 1, 2012.

(7) Beginning September 1, 2012, this chapter shall apply to the use of compliance history in agency decisions relating to:

(A) applications submitted on or after this date for the issuance, amendment, modification, or renewal of permits;

(B) inspections and flexible permitting;

(C) a proceeding that is initiated or an action that is brought on or after this date for the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission; and

(D) applications submitted on or after this date for other forms of authorization, or participation in an innovative program, except for flexible permitting.

(8) If a motion for reconsideration or a motion to overturn is filed under §50.39 or §50.139 of this title (relating to Motion for Reconsideration; and Motion to Overturn Executive Director's Decision) with respect to any of the actions listed in paragraph (4) of this subsection, and is set for commission agenda, a compliance history shall be prepared by the executive director and filed with the Office of the Chief Clerk no later than six days before the Motion is considered on the commission agenda.

(b) Compliance period. The compliance history period includes the five years prior to the date the permit application is received by the executive director; the five-year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first; for purposes of determining whether an announced investigation is appropriate, the five-year period preceding an investigation; or the five years prior to the date the application for participation in an innovative program is received by the executive director. The compliance history period may be extended beyond the date the application for the permit or participation in an innovative program is received by the executive director, up through completion of review of the application. Except as used in §60.2(f) of this title (relating to Classification) for determination of repeat violator, notices of violation may only be used as a component of compliance history for a period not to exceed one year from the date of issuance.

(c) Components. The compliance history shall include multimedia compliance-related information about a person, specific to the site which is under review, as well as other sites which are owned or operated by the same person. The components are:

(1) any final enforcement orders, court judgments, and criminal convictions of this state relating to compliance with applicable legal requirements under the jurisdiction of the commission. "Applicable legal requirement" means an environmental law, regulation, permit, order, consent decree, or other requirement;

(2) notwithstanding any other provision of the TWC, orders developed under TWC, §7.070 and approved by the commission on or after February 1, 2002;

(3) to the extent readily available to the executive director, final enforcement orders, court judgments, consent decrees, and criminal convictions relating to violations of environmental rules of the United States Environmental Protection Agency;

(4) chronic excessive emissions events. For purposes of this chapter, the term "emissions event" is the same as defined in THSC, §382.0215(a);

(5) any information required by law or any compliance-related requirement necessary to maintain federal program authorization;

(6) the dates of investigations;

(7) all written notices of violation for a period not to exceed one year from the date of issuance of each notice of violation, including written notification of a violation from a regulated person, issued on or after September 1, 1999, except for those administratively determined to be without merit;

(8) the date of letters notifying the executive director of an intended audit conducted and any violations disclosed and having received immunity under the Texas Environmental, Health, and Safety Audit Privilege Act (Audit Act), 75th Legislature, 1997, TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon's);

(9) an environmental management system approved under Chapter 90 of this title (relating to Innovative Programs), if any, used for environmental compliance;

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

(11) participation in a voluntary pollution reduction program; and

(12) a description of early compliance with or offer of a product that meets future state or federal government environmental requirements.

(d) Change in ownership. In addition to the requirements in subsections (b) and (c) of this section, if ownership of the site changed during the five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. Specifically, for any part of the compliance period that involves a previous owner, the compliance history will include only the site under review. For the purposes of this rule, a change in operator shall be considered a change in ownership if the operator is a co-permittee.

§60.2. Classification.

(a) Classifications. Beginning September 1, 2002, the executive director shall evaluate the compliance history of each site and classify each site and person as needed for the actions listed in §60.1(a)(1) of this title (relating to Compliance History). On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify each site and person. For the purposes of classification in this chapter, and except with regard to portable units, "site" means all

regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. Each site and person shall be classified as:

(1) a high performer, which has an above-satisfactory compliance record;

(2) a satisfactory performer, which generally complies with environmental regulations; or

(3) an unsatisfactory performer, which performs below minimal acceptable performance standards established by the commission.

(b) Inadequate information. For purposes of this rule, "inadequate information" shall be defined as no compliance information. If there is no compliance information about the site at the time the executive director develops the compliance history classification, then the classification shall be designated as "unclassified." The executive director may conduct an investigation to develop a compliance history.

(c) Groupings. Sites will be divided into groupings based on North American Industry Classifications Systems (NAICS) codes or other information available to the executive director.

(d) Major, moderate, and minor violations. In classifying a site's compliance history, the executive director shall determine whether a documented violation of an applicable legal requirement is of major, moderate, or minor significance.

(1) Major violations are:

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

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

(C) an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment;

(D) falsification of data, documents, or reports; and

(E) any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

(2) Moderate violations are:

(A) complete or substantial failure to monitor, analyze, or test a release, emission, or discharge, as required by a commission rule or permit;

(B) complete or substantial failure to submit or maintain records, as required by a commission rule or permit;

(C) not having an operator whose level of license, certification, or other authorization is adequate to meet applicable rule requirements;

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

(E) complete or substantial failure to conduct a unit or facility inspection, as required by a commission rule or permit;

(F) any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction; and

(G) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.

(3) Minor violations are:

(A) performing most, but not all, of a monitoring or testing requirement, including required unit or facility inspections;

(B) performing most, but not all, of an analysis or waste characterization requirement;

(C) performing most, but not all, of a requirement addressing the submittal or maintenance of required data, documents, notifications, plans, or reports;
and

(D) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate.

(e) Complexity Points. All sites classified shall have complexity points as follows:

(1) Program Participation Points. A site shall be assigned Program Participation Points based upon its types of authorizations, as follows:

(A) four points for each permit type listed in clauses (i) - (viii) of this subparagraph issued to a person at a site:

(i) Radioactive Waste Disposal;

(ii) Hazardous or Industrial Non-Hazardous Storage Processing or Disposal;

(iii) Municipal Solid Waste Type I;

(iv) Prevention of Significant Deterioration;

(v) Phase I--Municipal Separate Storm Sewer System;

(vi) Texas Pollutant Discharge Elimination System (TPDES)
or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal
Major;

(vii) Nonattainment New Source Review; and

(viii) Underground Injection Control Class I/III;

(B) three points for each type of authorization listed in clauses (i) -
(iv) of this subparagraph issued to a person at a site:

(i) Municipal Solid Waste Type I AE;

(ii) Municipal Solid Waste Type IV, V, or VI;

(iii) Municipal Solid Waste Type IV AE; and

(iv) TPDES or NPDES Industrial or Municipal Minor;

(C) two points for each permit type listed in clauses (i) - (iii) of this subparagraph issued to a person at a site or utilized by a person at a site:

(i) Title V Federal Operating Permit;

(ii) New Source Review individual permit; and

(iii) any other individual site-specific water quality permit not referenced in subparagraph (A) or (B) of this paragraph or any water quality general permit;

(D) one point for each type of authorization listed in clauses (i) - (xiii) of this subparagraph issued to a person at a site or utilized by a person at a site:

(i) Edwards Aquifer authorization;

(ii) Enclosed Structure permit or registration relating to the use of land over a closed Municipal Solid Waste landfill;

(iii) Industrial Hazardous Waste registration;

(iv) Municipal Solid Waste Tire Registrations;

(v) Other types of Municipal Solid Waste permits or registrations not listed in subparagraphs (A) - (C) of this paragraph;

(vi) Petroleum Storage Tank registration;

(vii) Radioactive Waste Storage or Processing license;

(viii) Sludge registration or permit;

(ix) Stage II Vapor Recovery registration;

(x) Municipal Solid Waste Type IX;

(xi) Permit by Rule requiring submission of an application under Chapter 106 of this title (relating to Permits by Rule);

(xii) Uranium license; and

(xiii) Air Quality Standard Permits.

(2) Size. Every site shall be assigned points based upon size as determined by the following:

(A) Facility Identification Numbers (FINs): The total number of FINs at a site will be multiplied by 0.02 and rounded up to the nearest whole number.

(B) Water Quality external outfalls:

(i) 10 points for a site with ten or more external outfalls;

(ii) 5 points for a site with at least five, but fewer than ten, external outfalls;

(iii) 3 points for sites with at least two, but fewer than five, external outfalls; and

(iv) 1 point for sites with one external outfall;

(C) Active Hazardous Waste Management Units (AHWMUs):

(i) 10 points for sites with 50 or more AHWMUs;

(ii) 5 points for sites with at least 20, but fewer than 50,
AHWMUs;

(iii) 3 points for sites with at least ten, but fewer than 20,
AHWMUs; and

(iv) 1 point for sites with at least one but fewer than ten
AHWMUs.

(D) Small Entities shall receive 3 points. A small entity is defined as: a city with a population of less than 5,000; a county with a population of less than 25,000; or a small business. A small business is defined as any person, firm, or business which employs, by direct payroll and/or through contract, fewer than 100 full-time employees. A business that is a wholly owned subsidiary of a corporation shall not qualify as a small business if the parent organization does not qualify as a small business.

(E) Underground Storage Tanks (USTs) and Aboveground Storage
Tanks (ASTs):

- (i) 4 points for sites with 11 or more USTs;
- (ii) 3 points for sites with five to ten USTs;
- (iii) 3 points for sites with more than 11 ASTs;
- (iv) 2 points for sites with three to four USTs;
- (v) 2 points for sites with three to ten, ASTs;
- (vi) 1 point for sites with one to two USTs; and
- (vii) 1 point for sites with one to two ASTs.

(3) Nonattainment area points. Every site located in a nonattainment area shall be assigned 1 point.

(4) The subtotals from paragraphs (1) - (3) of this subsection shall be summed.

(f) Repeat violator.

(1) Repeat violator criteria. A person may be classified as a repeat violator at a site when, on multiple, separate occasions, major violations of the same nature and the same environmental media occurs during the preceding five-year compliance period as provided in subparagraphs (A) and (B) of this paragraph. Same nature is defined as violations that have the same root citation at the subsection level. For example, all rules under §334.50 of this title (relating to Release Detection) (e.g. §334.50(a) or (b)(2) of this title) would be considered same nature. The total complexity points for a site equals the sum of points assigned to a specific site in subsection (e) of this section. A person is a repeat violator at a site when:

(A) the site has had a major violation(s) documented on at least two occasions and has less than a total of 15 complexity points; or

(B) the site has had a major violation(s) documented on at least three occasions.

(2) Repeat violator exemption. The executive director shall designate a person as a repeat violator as provided in this subsection, unless the executive director

determines the nature of the violations and the conditions leading to the violations do not warrant the designation.

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

(1) Site rating. For the time period reviewed, the following calculations shall be performed based upon the compliance history at the site.

(A) The number of major violations contained in:

(i) any adjudicated final court judgments and default judgments, shall be multiplied by 160;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 140;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 120;

(iv) any final prohibitory emergency orders issued by the commission shall be multiplied by 120;

(v) any agreed final enforcement orders without a denial of liability shall be multiplied by 100; and

(vi) any agreed final enforcement orders containing a denial of liability shall be multiplied by 80.

(B) The number of moderate violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 115;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 95;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 75;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 60; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 45.

(C) The number of minor violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 45;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 35;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 25;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 20; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 15.

(D) The total number of points assigned for all resolved violations in subparagraphs (A) - (C) of this paragraph will be reduced based on achievement of compliance with all ordering provisions. For the first two years after the effective date of the enforcement order(s), court judgment(s), consent decree(s), and criminal conviction(s), the site will receive the total number of points assigned for violations in subparagraphs (A) - (C) of this paragraph. If all violations in subparagraphs (A) - (C) of this paragraph are resolved and compliance with all ordering provisions is achieved, for each enforcement order(s), court judgment(s), consent decree(s), and criminal conviction(s) :

(i) under two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 1.0;

(ii) over two years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.75;

(iii) over three years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.50; and

(iv) over four years old, the points associated with the violations in subparagraphs (A) - (C) of this paragraph will be multiplied by 0.25.

(E) The number of major violations contained in any notices of violation shall be multiplied by 10.

(F) The number of moderate violations contained in any notices of violation shall be multiplied by 4.

(G) The number of minor violations contained in any notices of violation shall be multiplied by 1.

(H) The number of counts in all criminal convictions:

(i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and

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

(I) The number of chronic excessive emissions events shall be multiplied by 100.

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

(K) If the person is a repeat violator as determined under subsection (f) of this section, then 500 points shall be added to the total in subparagraph (J) of this paragraph. If the person is not a repeat violator as determined under subsection (f) of this section, then zero points shall be added to the total in subparagraph (J) of this paragraph.

(L) If the total in subparagraph (K) of this paragraph is greater than zero, then:

(i) subtract 1 point from the total in subparagraph (K) of this paragraph for each notice of an intended audit conducted under the Audit Act submitted to the agency during the compliance period; or

(ii) if a violation(s) was disclosed as a result of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, (Audit Act), 75th Legislature, 1997, TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon's); as amended, and the site received immunity from an administrative or civil penalty for that violation(s) by the agency, then the following number(s) shall be subtracted from the total in subparagraph (K) of this paragraph:

(I) the number of major violations multiplied by 10;

(II) the number of moderate violations multiplied by 4; and

(III) the number of minor violations multiplied by 1.

(M) The result of the calculations in subparagraphs (J) - (L) of this paragraph shall be divided by the number of investigations conducted during the compliance period multiplied by 0.1 plus the number of complexity points in subsection

(e) of this section. If a site does not have any investigation points and the subtotal from subsection (e)(1) - (3) of this section equals zero, then one default point shall be used. Investigations that do not document any violations will be the only ones counted in the compliance history formula. The number of investigations multiplied by 0.1 shall be rounded up to the nearest whole number. If the value is less than zero, then the site rating shall be assigned a value of zero. For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation, for the purposes of this chapter, may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information.

(N) If the person receives certification of an environmental management system (EMS) under Chapter 90 of this title (relating to Innovative Programs) and has implemented the EMS at the site for more than one year, then multiply the result in subparagraph (M) of this paragraph by 0.90, which is $(1 - 0.10)$ and this is the maximum reduction that can be received for an EMS. If the person receives credit for a voluntary pollution reduction program or for early compliance, then multiply the result in subparagraph (M) of this paragraph by 0.95, which is $(1 - 0.05)$. The maximum reduction that a site's compliance history may be reduced through voluntary pollution reduction programs in this subparagraph is 0.85, which is $(1 - 0.15)$.

If site participates in both EMS and voluntary pollution reduction programs then the maximum reduction that a site's compliance history may be reduced through EMS and voluntary programs in this subparagraph is 0.75, which is $(1 - 0.10 - 0.15)$.

(2) Point ranges. The executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification:

(A) fewer than 0.10 points--high performer;

(B) 0.10 points to 55 points--satisfactory performer; and

(C) more than 55 points--unsatisfactory performer.

(3) Mitigating factors. The executive director shall evaluate mitigating factors for a site classified as an unsatisfactory performer.

(A) The executive director may reclassify the site from unsatisfactory to satisfactory performer with 55 points based upon the following mitigating factors:

(i) other compliance history components included in §60.1(c)(10) - (12) of this title;

(ii) implementation of an EMS not certified under Chapter 90 of this title at a site for more than one year;

(iii) a person, all of whose other sites have a high or satisfactory performer classification, purchased a site with an unsatisfactory performer classification or became permitted to operate a site with an unsatisfactory performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule; and

(iv) voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Audit Act, or that is reported under the Audit Act but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency.

(B) When a person, all of whose other sites have a high or satisfactory performer classification, purchased a site with an unsatisfactory performer

classification or became permitted to operate a site with an unsatisfactory performer classification and the person contemporaneously entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance, the executive director:

(i) shall reclassify the site from unsatisfactory performer to satisfactory performer with 55 points until such time as the next annual compliance history classification is performed; and

(ii) may, at the time of subsequent compliance history classifications, reclassify the site from unsatisfactory performer to satisfactory performer with 55 points based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement.

(h) Person classification. The executive director shall assign a classification to a person by adding the complexity weighted site ratings of all the sites owned and/or operated by that person in the State of Texas. Each site that a person is affiliated to will receive a point value based on the compliance history rating at the site multiplied by the percentage of complexity points that site represents of the person's total complexity points for all sites. Each of these calculated amounts will be added together to determine the person's compliance history rating.

(i) Notice of classifications. Notice of person and site classifications shall be posted on the commission's website after 30 days from the completion of the classification. The notice of classification shall undergo a quality assurance, quality control review period. An owner or operator of a site may review the pending compliance history rating upon request by submitting a Compliance History Review Form to the commission by August 15 each year.

§60.3. Use of Compliance History.

(a) Permitting.

(1) Permit actions subject to compliance history review. For permit actions subject to compliance history review identified in §60.1(a) of this title (relating to Compliance History), the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit by evaluating the person's:

(A) site-specific compliance history and classification; and

(B) aggregate compliance history and classification, especially considering patterns of environmental compliance.

(2) Review of permit application. In the review of any application for a new, amended, modified, or renewed permit, the executive director or commission may require permit conditions or provisions to address an applicant's compliance history. Unsatisfactory performers are subject to any additional oversight necessary to improve environmental compliance.

(3) Unsatisfactory performers and repeat violators.

(A) If a site is classified as an unsatisfactory performer, the agency shall:

(i) deny or suspend a person's authority relating to that site to discharge under a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges); and

(ii) deny a permit relating to that site for, or renewal of, a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(B) If a site is classified as an unsatisfactory performer, upon application for a permit, permit renewal, modification, or amendment relating to that site, the agency may take the following actions, including:

(i) deny or amend a solid waste management facility permit;

(ii) deny an original or renewal solid waste management facility permit; or

(iii) hold a hearing on an air permit amendment, modification, or renewal, and, as a result of the hearing, deny, amend, or modify the permit.

(C) If a site is classified as an unsatisfactory performer or repeat violator and the agency determines that a person's compliance history raises an issue regarding the person's ability to comply with a material term of its hazardous waste management facility permit, then the agency shall provide an opportunity to request a contested case hearing for applications meeting the criteria in §305.65(9) of this title (relating to Renewal).

(D) Upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.

(E) The commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This includes violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

(4) Additional use of compliance history.

(A) The commission may consider compliance history when:

(i) evaluating an application to renew or amend a permit under Texas Water Code (TWC), Chapter 26;

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

(iii) making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under THSC, Chapter 401.

(B) The commission shall consider compliance history when:

(i) considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste;

(ii) considering if the use or installation of an injection well for the disposal of hazardous waste is in the public interest under TWC, Chapter 27;

(iii) determining whether and under which conditions a preconstruction permit should be renewed; and

(iv) making a licensing decision on an application to process or dispose of low-level radioactive waste from other persons.

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

(6) Repeat violator permit revocation. In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as an unsatisfactory performer, or for cause, including:

(A) a criminal conviction classified as major under §60.2(d)(1)(E) of this title (relating to Classification);

(B) an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(d)(1)(C) of this title;

(C) repeatedly operating without required authorization; or

(D) documented falsification.

(b) Investigations. If a site is classified as an unsatisfactory performer, then the agency:

(1) may provide technical assistance to the person to improve the person's compliance with applicable legal requirements;

(2) may increase the number of investigations performed at the site; and

(3) may perform any investigations unannounced.

(c) Enforcement. For enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements.

(1) Unsatisfactory performers are subject to any additional oversight necessary to improve environmental compliance.

(2) The commission shall consider compliance history classification when assessing an administrative penalty.

(3) The commission shall enhance an administrative penalty assessed on a repeat violator.

(d) Participation in innovative programs. If the site is classified as an unsatisfactory performer, then the agency:

(1) may recommend technical assistance; or

(2) may provide assistance or oversight in development of an environmental management system (EMS) and require specific environmental reporting to the agency as part of the EMS; and

(3) shall prohibit that person from participating in the regulatory flexibility program at that site. In addition, an unsatisfactory performer is prohibited from receiving additional regulatory incentives under its EMS until its compliance history classification has improved to at least a satisfactory performer.

(e) Appeal of classification. A person or site classification may be appealed only if the person or site is classified as either an unsatisfactory performer, a repeat violator, or a satisfactory performer with 45 points or more. An appeal under this subsection shall be subject to the following procedures.

(1) An appeal shall be filed with the executive director no later than 45 days after notice of the classification is posted on the commission's website.

(2) An appeal shall state the grounds for the appeal and the specific relief sought. The appeal must demonstrate that if the specific relief sought is granted, a

change in site or person classification will result. The appeal must also include all documentation and argument in support of the appeal.

(3) Upon filing, the appellant shall serve a copy of the appeal including all supporting documentation by certified mail, return receipt requested, as provided in subparagraphs (A) and (B) of this paragraph.

(A) If an appeal of a person's classification is filed by a person other than the person classified, a copy shall be served on the person classified.

(B) If an appeal of a site classification is filed by a person other than the permit holder(s) or the owner of the classified site, a copy shall be served on the owner and permit holder (if different) of the classified site.

(4) Any replies to an appeal must be filed no later than 15 days after the filing of the appeal.

(5) In response to a timely filed appeal and any replies, the executive director may affirm or modify the classification.

(6) The executive director shall mail notice of his decision to affirm or modify the classification to the appellant, any person filing a reply, and the persons identified in paragraph (3)(A) and (B) of this subsection no later than 60 days after the filing of the appeal. An appeal is automatically denied on the 61st day after the filing of the appeal unless the executive director mails notice of his decision before that day.

(7) The executive director's decision is effective and for purposes of judicial review, constitutes final and appealable commission action on the date the executive director mails notice of his decision or the date the appeal is automatically denied.

(8) During the pendency of an appeal to the executive director or judicial review of the executive director's decision under this subsection, the agency shall not, for the person or site for which the classification is under appeal or judicial review:

(A) conduct an announced investigation;

(B) grant or renew a flexible permit under THSC, Chapter 382;

(C) allow participation in the regulatory flexibility program under TWC, §5.758; or

(D) grant authority to discharge under a general permit under TWC, §26.040(h).

(f) Corrections of classifications. The executive director, on his own motion or the request of any person, at any time may correct any clerical errors in person or site classifications. If a person classification is corrected, the executive director shall notify the person whose classification has been corrected. If a site classification is corrected, the executive director shall notify the site owner and permit holder (if different). If the correction results in a change to a classification that is subject to appeal under subsection (e) of this section, then an appeal may be filed no later than 45 days after posting of the correction on the commission's website. Clerical errors under this section include typographical errors and mathematical errors.

(g) Compliance history evidence. Any party in a contested case hearing may submit information pertaining to a person's compliance history, including the underlying components of classifications, subject to the requirements of §80.127 of this title (relating to Evidence). A person or site classification itself shall not be a contested issue in a permitting or enforcement hearing.