

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** May 13, 2022

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

From: Craig Pritzlaff, Director
Office of Compliance and Enforcement

Docket No.: 2020-1173-RUL

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

Background and reason(s) for the rulemaking:

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

Scope of the rulemaking:

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

A.) Summary of what the rulemaking will do:

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

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

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

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

The following are recommendations that staff included in the rulemaking adoption:

- Modifications to §60.4(a), (b), and (d) to require notices be sent to both the site's owner and operator, using addresses readily identifiable through agency records.
- Modification to §60.4(e)(6)(B) to identify that, in a specific scenario, a motion for commission review will be overruled by operation of law on the 181st date after the date the executive director sends the written Notice of Decision to Reclassify under §60.4(b). This modification is being made to address an inconsistency between §60.4(e)(2) and (e)(6)(B) as proposed.
- Modifications to certain punctuation in §60.4(d), to correct inconsistencies with similar punctuation in other subsections of the rule.

Statutory authority:

The rulemaking will be adopted under Texas Water Code (TWC), §5.753, concerning Standards for Evaluating and Using Compliance History; and TWC, §5.754, concerning Classification and Use of

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Compliance History, both of which authorize rulemaking to establish compliance history standards. Additional authority exists under TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

Effect on the:

A.) Regulated community:

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

B.) Public:

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

C.) Agency programs:

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

Stakeholder meetings:

No stakeholder meeting was held; however, a public hearing was offered during the comment period on January 27, 2022.

Public comment:

The commission held a virtual public hearing on the published proposed rule on January 27, 2022. No comments were received at the virtual public hearing. The comment period closed on February 1, 2022.

The commission received comments from Air Alliance Houston (AAH), the Texas Association of Manufacturers (TAM), the Texas Chemical Council (TCC), the Texas Industry Project (TIP), Texas Molecular Holdings LLC (TMH), and the Texas Oil and Gas Association (TXOGA). AAH generally applauds the TCEQ for undertaking this rulemaking but urges the TCEQ to make certain changes to §60.4 as proposed. TAM, TCC, and TXOGA provided their comments in a joint submittal, and they appreciate the need for the rulemaking but recommend changes to the rule as proposed. TIP and TMH also recommend changes to the rule as proposed. Overall, the comments involved concerns regarding the number and specific criteria needed to amount to exigent circumstances; participation in the process by the regulated entity and the public; timeframes associated with the evaluation of the under review designation and duration of reclassification; whether the site's current compliance history classification should be a factor in evaluating the application of the proposed §60.4; the impact to the evaluation of permit applications; and the impact of treating a site as an unsatisfactory performer.

Significant changes from proposal:

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Based on the comments from TAM, TCC, TIP, and TXOGA, a modification was made to §60.4(a) to impose a time limit for the executive director to designate a site's classification as under review to occur no later than 90 days from the start of the exigent circumstances.

Based on the comments from TIP, the following modifications were made to:

- §60.4(a)(2) to require the emergency response at issue be by a "federal or state governmental authority."
- §60.4(g)(2) to allow the owner or operator of any site reclassified to suspended to demonstrate to the executive director that authorizations otherwise prohibited under §60.3(a)(3)(A)(i) and (ii) would still be appropriate and available. Upon such a demonstration, the executive director may decide to allow for such authorizations notwithstanding the prohibitions in §60.3(a)(3)(A)(i) and (ii).

Based on the comments from TAM, TCC, and TXOGA, a modification was made to §60.4(a)(3)(D)(i) to qualify relevant evacuations to be of off-site persons.

Several commenters are concerned about the inclusion of "shelters in place" as a potential criterion to determine the occurrence of exigent circumstances due to an event at a site. Sheltering remains as a potential criterion to define exigent circumstances under §60.4(a)(3), with the condition that it was caused by an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency. Subsection §60.4(a)(3)(D)(ii) was modified to limit relevant sheltering-in-place to be off-site of the location where the event in question occurred.

Potential controversial concerns and legislative interest:

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

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

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

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

The purpose of this proposed rulemaking is to provide a more immediate and accurate measure of a site's performance following a significant emergency event that results in exigent circumstances. Without this rulemaking, if such exigent circumstances occur, an associated site's compliance history may not accurately account for the event for many months or years.

Key points in the proposal rulemaking schedule:

Texas Register publication date: December 31, 2021

Anticipated *Texas Register* adoption publication date: June 17, 2022

Anticipated effective date: June 23, 2022

Six-month *Texas Register* filing deadline: July 1, 2022

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Attachments:

None.

cc: Chief Clerk, 2 copies
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