

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to 30 Texas Administrative Code (TAC) §60.1 and §60.2.

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

The commission proposes revisions to Chapter 60 to implement certain requirements of Senate Bill (SB) 1397, regarding compliance history. SB 1397, 88th Legislature, 2023, Section 13, amended Texas Water Code (TWC) §5.754 requiring the commission to consider major, moderate, and minor violations when determining repeat violators. This proposed rulemaking also addresses management recommendations adopted by the Sunset Advisory Commission that were not included in SB 1397 for the commission to review and update the agency's compliance history rating formula to ensure it accurately reflects a regulated entity's record of violations, including considerations of site complexity and cumulative violations or repeating violations; and to regularly update compliance history ratings.

### **Section by Section Discussion**

#### *§60.1, Compliance History*

The commission proposes revisions to §60.1(a)(6) and (7) to establish the effective date of the proposed rule. 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, when an application for a permit is received by the executive director, the version of Chapter 60 in effect at the time the application is received will be the version used for compliance history purposes. The commission

may consider new compliance history information as it deems necessary.

The proposal amends §60.1(b) to change the compliance period for enforcement actions to be calculated from the initial enforcement screening date. The compliance history period for an enforcement action is currently based on the date of the initial mailing of the enforcement settlement offer or petition, whichever occurs first. Since complicated cases may take substantial time to develop, the compliance history period could change while the settlement offer or petition is being drafted. Changing the start of the compliance period to the initial screening of an enforcement action means the compliance history will more closely reflect the performance of the site at the time the violations were documented as opposed to several months later. This provides greater certainty to the regulated community as to how an entity is performing at the time an enforcement action begins. This also means a site's compliance history will remain the same throughout the drafting and review process of the initial proposed agreed order or the petition instead of requiring additional reviews to verify whether the compliance history has changed during the process. In addition, clarification is made on how Notices of Violation are considered consistent with changes to §60.2(f).

Proposed §60.1(c)(8) changes the language referencing the Texas Environmental, Health, and Safety Audit Privilege Act. The Act was amended by the 85th Legislature in 2017 and the proposed language recognizes this change.

#### *§60.2, Classification*

The proposal amends §60.2(a) to change the frequency that the executive director shall evaluate the compliance history of each site from annually to bi-annually. This

implements a management recommendation adopted by the Sunset Advisory Commission to regularly update an entity's compliance history rating. The commission proposes that compliance histories be evaluated on March 1<sup>st</sup> and September 1<sup>st</sup> each year. Since 2002, when the rule originally established an annual review, technological advances have made it possible for the agency to increase the number of reviews per year without overburdening agency resources. Bi-annual reviews will allow for appropriate planning for announced and unannounced investigations, as well as increased oversight of unsatisfactory performers. More frequent evaluations better allow the commission to consider whether proceedings should be initiated to revoke a permit, or to amend a permit where statutes allow, of an unsatisfactory performer. The commission considered other evaluation periods and determined that evaluations more frequent than bi-annually may require shortening the appeal window to ensure appeal reviews could be completed before the next evaluation period begins.

The proposal amends §60.2(c) to change the methodology of grouping regulated entities from reliance on the North American Industry Classifications System (NAICS) to use of complexity points described in §60.2(e) as the commission has determined complexity to be a more accurate measurement criterion. In 2002, the commission determined Standard Industrial Classification (SIC) codes did not adequately capture the environmental complexity of the regulated community. In 2012, the commission listed NAICS codes as an option for grouping. However, over time, the commission found that the self-reported NAICS codes were frequently incorrect, inaccurate, or failed to fully describe the operations of the regulated site from an environmental impact standpoint. Therefore, the commission has not been able to effectively use

NAICS codes for complexity determinations. The commission proposes to use the complexity formula to establish groupings to improve accuracy and provide certainty to the regulated public as they are already familiar with the formula and its impact on a site.

The proposal amends §60.2(f) to reflect changes to the way in which the commission evaluates repeat violators as required by SB 1397. Previously, in determining whether an entity was a repeat violator, the commission evaluated only major violations of the same nature and the same environmental media that occurred during the five-year compliance period. Under the proposed rule, in accordance with SB 1397, the commission will evaluate major, moderate, and minor violations of the same nature and environmental media that occurred during the five-year compliance period.

The new formula considers “repeat violation points” for each violation of the same nature and the same environmental media documented in any final enforcement orders, court judgments, and criminal convictions that occurred at least three times during the five-year compliance period. The number of “repeat violation points” varies by classification of the violation with each minor violation receiving 2 repeat violation points, each moderate violation receiving 10 points, and each major violation receiving 50 points. The total of all repeat violation points assessed to a regulated entity is used to determine whether the regulated entity has exceeded the repeat violation point thresholds to be classified as a repeat violator. The commission has established repeat violation point thresholds based on complexity points. Regulated entities with 15 or more complexity points and 150 or more “repeat violation points” will be classified as

a repeat violator, while regulated entities with less than 15 complexity points and 100 or more “repeat violation points” will also be classified as a repeat violator.

The commission proposes changing §60.2(f)(1) and (2) and adding §60.2(f)(3).

Proposed §60.2(f)(1) adds moderate and minor violations to repeat violator consideration and removes the requirement that violations be documented on separate occasions. Currently, multiple violations of the same type may be consolidated into a single enforcement action. Historically, the commission has considered “separate occasion” to mean individual orders or enforcement actions. For example, if a regulated entity had two unauthorized discharges within one compliance year and the entity signed a single agreed order that contained both major violations, the commission treated it as a single major violation for purposes of the repeat violator criteria. The legislative directive of SB 1397 to include all minor, moderate, and major violations requires the removal of the “separate occasion” language to ensure all violations are considered. The change allows the commission to consider all repeat occurrences of similar violations documented during the five-year evaluation period rather than the number of orders or enforcement actions that contained similar violations.

Proposed §60.2(f)(2)(A) – (C) establishes “repeat violation point” values based on the classification of the violation. Each violation of the same nature and the same environmental media documented in any final enforcement orders, court judgments, and criminal convictions that occurred at least three times during the five-year compliance period is assessed repeat violation points based on the classification of the

violation. Each minor violation receives 2 repeat violation points, each moderate violation receives 10 points, and each major violation receives 50 points. This methodology allows the commission to clearly differentiate between repeat violators with significant actual or potential environmental harm from those entities that have repeat violations with minimal actual or potential environmental harm. For example, repeating a minor violation five times during a five-year period would be equally weighted with a single moderate violation, and repeating the same moderate violation five times during a five-year period would be weighted equally to one major violation.

Proposed §60.2(f)(3) establishes repeat violation point thresholds, based on complexity points, to determine repeat violator classifications. Under the proposal, a regulated entity is a repeat violator when: the site has less than a total of 15 complexity points and 100 or more repeat violation points; or the site has 15 or more complexity points and 150 or more repeat violation points. This approach continues to use 15 complexity points as the threshold and expands the criteria for repeat violators from three major violations for higher complex entities (150 points) to a combination of minor, moderate, and major violations (total 150 points) and two major violations for less complex entities (100 points) to a combination of minor, moderate and major violations (total 100 points). These thresholds ensure that the commission continues to hold repeat violators accountable without reducing environmental protections or standards. For example, higher complex regulated entities may reach the threshold by repeating the same moderate violation fifteen times within a five-year period, repeating the same minor violation seventy-five times within a five-year period, or some combination of violation points to reach the 150-point threshold.

The proposal moves "Repeat Violator Exemption" from existing §60.2(f)(2) to proposed §60.2(f)(4).

Proposed §60.2(g)(1)(L) changes the language referencing the Texas Environmental, Health, and Safety Audit Privilege Act. The Act was amended by the 85th Legislature in 2017 and the proposed language recognizes this change.

Proposed §60.2(g)(2) changes the site rating ranges for regulated entities. Currently, there is a common set of ranges for entities of all complexities. The commission proposes creating separate classification groups based on complexity points to address the Sunset Advisory Commission's management recommendation to compare entities of similar complexity to one another. The proposed rule establishes separate ranges for higher complex entities and less complex entities. Proposed §60.2(g)(2)(A) establishes the classification rating ranges for regulated entities with a complexity point total less than 15. For a regulated entity classified as less complex, a high performer is defined as having less than 0.10 points. A satisfactory performer is defined as having 0.10 points to 60 points. An unsatisfactory performer is defined as having more than 60 points.

Proposed §60.2(g)(2)(B) establishes the classification rating ranges for regulated entities with a complexity point total of 15 or more. A high performer is defined as having less 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.

As noted by the Sunset Advisory Commission, the compliance history rule calculation methodology disproportionately impacts less complex entities. The commission recognizes that, in general, less complex entities have fewer resources and face different challenges than their higher complexity counterparts. While the higher complexity entities are generally much larger in size, they tend to have more resources, represent a much smaller group of the regulated community, and typically have a potentially larger environmental footprint. The proposed rule allows for different classification thresholds for each complexity grouping, thereby accounting for their differences.

Proposed §60.2(g)(3)(A), (B)(i) and (ii) removes the specific point value that a regulated entity will receive following the application of a mitigating factor. Should a mitigating factor be granted to a regulated entity, the entity's rating will be adjusted to the maximum rating within the satisfactory classification for the entity's complexity point group. For regulated entities with less than 15 complexity points, the rating will be adjusted to 60. For regulated entities with 15 or more complexity points, the rating will be adjusted to 55.

Proposed §60.2(i) revises how a regulated entity can review their pending compliance history rating to match current practice by removing the submission of a Compliance History Review Form and replacing it with the registration for the Advanced Review of Compliance History (ARCH).



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

Kyle Girtten, analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for TCEQ and fiscal implications may result for units of local government as a result of implementation of the proposed rule. No fiscal implications are anticipated for other units of state government.

The General Appropriations Act (HB 1, 88th Legislature) authorized six full time equivalent (FTE) employees and \$315,000 in funding to implement statutory changes to TWC §5.754 in SB 1397, 88th Legislature, 2023 and directives from the Sunset Advisory Commission that relate to this rulemaking. The proposed rulemaking would require TCEQ to update its compliance history twice annually instead of once per year (§60.2), and the rulemaking would also result in the agency needing to modify its compliance history application. The agency and Advanced Review of Compliance History website would need to be updated.

Local governmental entities which are permittees that are subject to the requirements of Chapter 60 could have indirect fiscal impacts from this rulemaking. This rule applies to approximately 400,000 entities, and this number includes businesses as well as local government entities. Compliance history information must be used by TCEQ when making decisions regarding permitting, enforcement, announced investigations, and participation in innovative programs (§60.3). Should the proposed rulemaking result in a change to whether an entity is classified as a satisfactory/unsatisfactory performer or repeat violator (§60.2), such an entity may have increased or decreased

costs associated with permitting or administrative penalties. Ultimately, the fiscal impact on a regulated entity is dependent on compliance or non-compliance with the applicable environmental rules and regulations.

### **Public Benefits and Costs**

Mr. Girtten determined that for each year of the first five years the proposed rules are in effect, the public will benefit from having rules that are consistent with state law, specifically SB 1397 from the 88th Regular Legislative Session (2023) and directives from the Sunset Advisory Commission. The public will also benefit from having a more regularly updated record of regulated entities compliance status because the proposed rulemaking would require TCEQ to update compliance history information twice annually instead of once per year (§60.2).

Businesses which are permittees that are subject to the requirements of Chapter 60 could have indirect fiscal impacts from this rulemaking. Compliance history information must be used by TCEQ when making decisions regarding permitting, enforcement, announced investigations, and participation in innovative programs (§60.3). Should the proposed rulemaking result in a change to whether an entity is classified as a satisfactory/unsatisfactory performer or repeat violator (§60.2), such an entity may have increased or decreased costs associated with permitting or administrative penalties. Ultimately, the fiscal impact on a regulated entity is dependent on compliance or non-compliance with the applicable environmental rules and regulations.

### **Local Employment Impact Statement**

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

### **Rural Community Impact Statement**

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

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

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect. Based on directives from the Sunset Advisory Commission, the proposed rulemaking is designed to address inequities between small and large entities. With the changes proposed in this rulemaking and the creation of separate groups based on complexity points, less complex entities will be separated from larger, higher complexity entities and compared to similarly complex sites when determining satisfactory rating classification and repeat violator status. This will allow each of the two groups to be held to separate standards which account for the unique opportunities and challenges faced by each group.

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

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

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation, and it does not create, expand, repeal, or limit this regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

### **Draft Regulatory Impact Analysis**

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the proposed rule changes do not meet the definition of a "Major environmental rule" as defined in that statute. Although the intent of the proposed rule modifications are to protect the environment and

reduce the risk to human health from environmental exposure, they do not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Instead, the proposed rule changes merely modify the standards for the classification of a person's compliance history by setting the number of major, moderate, and minor violations needed to be classified as a repeat violator, to review and update the agency's compliance history rating formula to ensure it accurately reflects a regulated entity's record of violations, and to update compliance history ratings more often than once per fiscal year. The requirements for establishing standards for the classification of a person's compliance history are contained in TWC §5.754.

The proposed rule modifications are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the proposed rule modifications do not meet any of the four applicability requirements listed in §2001.0225(a). They do not exceed a standard set by federal law, because there is no comparable federal law. They do not exceed an express requirement of state law, because they are consistent with the requirements of TWC, §5.754. The proposed rule modifications do not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. They are not proposed to be adopted solely under the general powers of the agency but will be adopted under the express requirements of TWC §5.754 and management recommendations adopted by the Sunset Advisory Commission.

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

### **Takings Impact Assessment**

The commission evaluated the proposed rules and performed an assessment of whether the proposed rules constitute a taking under TGC, Chapter 2007. The specific purpose of the proposed rules is to implement certain requirements of Senate Bill (SB) 1397 and other legislative directives, regarding compliance history. The proposed rules will substantially advance this stated purpose by modifying the standards for the classification of a person's compliance history by setting the number of major, moderate, and minor violations needed to be classified as a repeat violator, to review and update the agency's compliance history rating formula to ensure it accurately reflects a regulated entity's record of violations, and to update compliance history ratings more often than once per fiscal year.

Promulgation and enforcement of these proposed rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the proposed rules will not burden private real property because they modify the standards for the classification of a person's compliance history by setting the number of major, moderate, and minor violations needed to be classified as a repeat violator, to review and update the

agency's compliance history rating formula to ensure it accurately reflects a regulated entity's record of violations, and to update compliance history ratings more often than once per fiscal year. The subject proposed rules do not affect a landowner's rights in private real property.

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

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §29.22, and found the proposed rulemaking consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule include: 31 TAC §26.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 31 TAC §26.12(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 §26.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; 31 TAC §26.12(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 §26.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 31 TAC §26.12(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 §26.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed the proposed rule for consistency with applicable goals of the CMP and determined that the proposed rule is consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the proposed rule include: 31 TAC §26.19, Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; 31 TAC §26.20, Prevention, Response, and Remediation of Oil Spills; 31 TAC §26.21, Discharge of Municipal and Industrial Wastewater to Coastal Waters; 31 TAC §26.22, Nonpoint Source (NPS) Water Pollution; 31 TAC §26.23, Development in Critical Areas; 31 TAC §26.25, Dredging and Dredged Material Disposal and Placement; 31 TAC §26.28, Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and 31 TAC §26.32, Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in



the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Department of State Health Services regarding wastewater discharges that could significantly adversely affect oyster reefs. This rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable to: areas with the potential to develop agricultural or silvicultural NPS water quality problems; on-site disposal systems; underground storage tanks; or Texas Pollutant Discharge Elimination System permits for stormwater discharges. This rulemaking does not relax the standards related to dredging; the discharge, disposal, and placement of dredge material; compensatory mitigation; and authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements.

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

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

### **Announcement of Hearing**

The commission will hold a hold a hybrid virtual and in-person public hearing on this proposal in Austin on August 18, 2025, at 10:00am in Building D, Room 191, located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing at 9:30am.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by August 14, 2025. To register for the hearing, please email [Rules@tceq.texas.gov](mailto:Rules@tceq.texas.gov) and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on August 15, 2025, to those who register for the hearing.

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

<https://events.teams.microsoft.com/event/d758c7a2-3f27-4605-bfe6-99749d686a8a@871a83a4-a1ce-4b7a-8156-3bcd93a08fba>

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

### **Submittal of Comments**

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to *fax4808@tceq.texas.gov*. Electronic comments may be submitted at: <https://tceq.commentinput.com/comment/search>. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2024-043-060-CE. The comment period closes on August 25, 2025. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Krista Clement, Office of Compliance and Enforcement, (512) 239-1234.

## **§60.1 and §60.2**

### **Statutory Authority**

The rule amendments are proposed under the authority of Texas Water Code (TWC) §5.753, concerning Standards for Evaluating and Using Compliance History, and TWC, §5.754, as amended by Senate Bill 1397, 88th Legislature, 2023, Section 13, concerning Classification and Use of Compliance History, which authorize rulemaking to establish compliance history standards, call upon the compliance history program to ensure consistency, and establish criteria for classifying a repeat violator. These provisions do not restrict the application of such classifications to be at specific intervals. Additional authority exists under TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state. The proposed rule amendments implements TWC, §§5.102, 5.103, 5.753, and 5.754.

### **§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 [Regardless of the applicability of] 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 March [September] 1, 2026 [2012], the executive director shall develop compliance histories with the components specified in this chapter. Prior to March [September] 1, 2026 [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 March [September] 1, 2026 [2012].

(7) Effective March [September] 1, 2026 [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 the initial enforcement screening [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] 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) [regardless of] 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), 85th Legislature, 2017, TEX. HEALTH AND SAFETY CODE ch. 1101 [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] Effective March 1, 2026, 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, 2026 [2003], and semi-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 complexity [North American Industry Classifications Systems (NAICS) codes] or other information available to the executive director. The complexity calculation is described in subsection (e) of this section (relating to Classification).

(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, AHWUMUs; and

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

(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, moderate, or minor 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 violation points. Each repeat violation will be:

(A) Assigned 2 points for each minor violation as documented in any final enforcement orders, court judgments, and criminal convictions;

(B) Assigned 10 points for each moderate violation as documented in any final enforcement orders, court judgments, and criminal convictions; and

(C) Assigned 50 points for each major violation as documented in any final enforcement orders, court judgments, and criminal convictions.

(3) A person is a repeat violator at a site when the number of repeat violation points is:

(A) Equal to or greater than 150 for sites with 15 or more complexity points; or.

(B) Equal to or greater than 100 for sites with less than 15 complexity points.

(4) [(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 Audit Act [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) For entities with less than 15 complexity points:

(i) [A] fewer than 0.10 points--high performer;

(ii) 0.10 points to 60 points--satisfactory performer; and

(iii) more than 60 points--unsatisfactory performer.

(B) For entities with 15 or more complexity points:

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

(ii) [B] 0.10 points to 55 points—satisfactory performer; and

(iii) [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 registering for the Advanced Review of Compliance History. [submitting a Compliance History Review Form to the commission by August 15 each year.]