

# ACT

## Alliance for a Clean Texas



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The Alliance for a Clean Texas, its partner organizations and other supporting organizations appreciate the opportunity to comment on the proposed changes to Chapter 60 Compliance History Rules. We recognize that many of these changes – such as the provision only allowing for use of NOV's for one-year, are required by statute as part of HB 2694. We also recognize that the Legislature directed the TCEQ to now classify entities in a way that considers size, complexity and type of industry and we generally are supportive of that change. That being said, we believe that the TCEQ in this proposed rule is missing an opportunity to incent industries to improve their compliance and provide a disincentive to those entities that have a poor compliance history.

A particular issue we have with this proposed rulemaking is the fact that despite the major changes in how compliance history is used and calculated, it is nearly impossible to determine the practical impacts of these rule changes. While after repeated entreaties by the Texas Office of Public Citizen, the TCEQ did release 9,000 pages of information about compliance history and complexity points, the information does not allow a direct comparison between the old rules and the new ones, and because the information is released as a “PDF,” it is not searchable. We believe fundamentally this rulemaking should be delayed by 30 days and the TCEQ should provide the public with some actual examples and comparisons for either actual individual compliance history ratings or hypothetical examples. Without such an analysis or comparisons, it is very hard for the public to react to these proposed rules. We do believe based upon our own analysis that the practical effect will be to lower the number of facilities that are considered “poor” or “unsatisfactory” and increase the number that are “high”, without any actual environmental improvements, but additional time and comparisons would be helpful.

In addition, we believe that scheduling some public meetings in the area that will be most impacted by these rules – such as Corpus Christi, Houston and Beaumont-Port Arthur – would be helpful to the Commission and the public itself.

#### **HB 2694 (4.01 and Article 4): Compliance History**

Based upon our initial analysis of the proposed Chapter 60 Compliance History rule, many entities and customers will receive a higher compliance history classification than under the previous rule. Some fluctuation occurs after taking industry codes, types of permits, size, etc. into account. However, exaggerated rating discounts for optional pollution reduction programs do not incentivize meaningful voluntary measures. Likewise arbitrarily changing the compliance rating ranges to classify previously poor performing entities to satisfactory entities does nothing to strengthen compliance. We also do not believe that a uniform standard for evaluating compliance history should entail multiple openings for the Executive Director to negate a violation or alter an entity's classification. As a result of these shortcomings, we take this opportunity to submit comments on areas that need improvement.

Listed below are seven areas where we believe the rules as proposed are problematic.

**1. Allows the TCEQ Executive Director to pardon polluters by adjusting their repeat violator classification without any criteria or review**

*60.2.f.(2) 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*

Failure to provide specific criteria for the director to consider before omitting a repeat violator from an entity's status undermines even the best of efforts to add consistency to the compliance history program. The TCEQ has established rules for facilities to abide by and a violation must be viewed as such. A rule that allows the Executive Director to determine otherwise opens the door for personal preference or political persuasion, neither of which have a place in the state regulatory arena. As written, this is a completely non-transparent clemency provision with no right of appeal by the public. We believe this provision should be removed and it should state simply:

60.2. f(2). *The executive director shall designate a person as a repeat violator as provided in this subsection.*

Because the proposed rules already contemplate that entities can examine, assess and oppose their proposed compliance history, the executive director already has the ability to change the compliance history based on information that indicates a repeat violation was not in fact a repeat violation.

**2. Makes it very difficult for any “complex site” with many “complexity points” to ever be punished for or even be considered a repeat violator**

60.2 (f) (1) *Repeat violator criteria...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 9 complexity points ranging from 0 to 8;*

*(B) the site has had a major violation(s) documented on at least three occasions and has less than a total of 25 complexity points ranging from 0 to 24; or*

*(C) the site has had a major violation(s) documented on at least four occasions*

- The proposed language for repeat violations would make it very difficult for any facility with many “complexity points” to ever be considered a repeat violator. Because so many points are given for different kinds of permits, authorizations and even hazardous waste units, getting to “25” complexity points will be easy for any large industrial facility or major entity such as a large city, which may have water treatment, wastewater treatment, PSTs, municipal waste facilities and other regulated entities operating under one entity, meaning that the only way they would be penalized for being a repeat violator would be to have four or more violations over the last five years.
- The purpose of breaking up different sorts of facilities into different compliance categories was to obviate any such “one size fits all” approach. Setting a blanket complexity threshold at this level flies in the face of this very good logic and will once again completely hobble the ability of the compliance history program from serving its purpose

- There are several solutions to this problem: the number of violations could be lowered, the number of complexity points needed to reach a certain categories raised, or the values given complexity points need to be lowered.

For example, according to TCEQ central records, the Exxon-Mobile Chemical Baytown Chemical Plant currently has 307 permits, authorizations or licenses associated with it, though many of these may not be active. Even assuming half are active, at a minimum such a facility should have on the order of 150 complexity points. Thus, unless this plant had four or more violations that are considered repeat offenses, it would not be “charged” as a repeat offender.

We would suggest raising the points considerably, perhaps to twenty-five points for the first category and 100 points for the second, or as mentioned, lowering the number of complexity points per type of authorization. As an example, all of the proposed authorizations that are worth four points could be reduced to three, while those worth three could be reduced to two points.

**3. Makes complexity points a fundamental part of the compliance history formula, meaning it is virtually impossible for large, complex facilities to ever get an “unsatisfactory” rating**

Figure 2: 30 TAC Chapter 60--Preamble

Proposed Formula for Site Ratings

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

Figure 3: 30 TAC Chapter 60--Preamble

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

Under the proposed formula, the TCEQ would add complexity points into the denominator of the compliance history formula, making it extremely difficult for any complex site to ever receive an “unsatisfactory” rating. Thus, as already mentioned, a large complex city or chemical plant would likely have a very large denominator since it would have many complexity points. If the Exxon-Mobile Chemical Plant in Baytown currently has 307 authorizations, licenses or permits on file, it might have literally hundreds of complexity points.

The simplest way to address this problem is to keep the formula, but reduce the number of complexity points per authorization, permit or license as discussed above.

**4. Don’t specify what an emission of the “same environmental media” is and how it can be used in determining who is a repeat violator**

60.2 (f) (1) *Repeat violator criteria.* A person may be classified as a repeat violator at a site when, on multiple, separate occasions, [a] major violations [violations(s)] of the same nature and the same environmental media occurs during the preceding five-year compliance period as provided in subparagraphs (A)-(C) 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.

We suggest defining the words “same environmental media” in the repeat violator section. Otherwise, the vagueness gives the polluter the option to claim that while the root cause was the same it was not the same media because the event resulted in a liquid benzene event when the previous resulted in volatized benzene, and thus would not qualify as a repeat violation.

Also, while the subsections are generally well-ordered, they were not originally structured with the intention of prescribing which environmental natures result in repeat violator charges. Thus, relying on the structure to dictate which violations are considered repeat may not be an accurate account.

**5. Does not provide specifications regarding entity “self-audit”**

*60.2 (f) (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.*

*(iv) voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74<sup>th</sup> Legislature, 1995 but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency*

Providing the executive director with the ability to reclassify a site based on a voluntary violation report delivers a greater positive result than appropriate for reporting a single violation. While honest self-auditing should be encouraged, immunity from the negative consequences associated with the violation is the furthest the TCEQ should reward the report. However, the language of this rule allows the executive director to completely reclassify an unsatisfactory site, potentially forgiving the entity of violations exceeding the severity of the one(s) reported.\

**6. Give polluters overly generous discounts for participating in environmental management and other pollution prevention programs**

*60.2 (g) (1) (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 0.9. 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 for each commission supported voluntary program. The maximum reduction that a site’s compliance history may be reduced through voluntary programs in this subparagraph is 0.75.*

The discounts for participating in environmental management and other pollution prevention programs run by the TCEQ have been raised from 10% to 25%. Under the TCEQ's proposal, participation in three pollution prevention programs, combined with a one year or older environmental management plan, qualifies a facility for a 25% site rating discount. The results all EMS or voluntary pollution prevention programs are not equal and should not be rewarded identically. A 5% rating reduction for a program achieving minimal results removes any incentive for an entity to administer a highly effective pollution reduction program. Site rating reductions should be scaled to take impact into account. Discounting a site score by an entire quarter is too large of a reward to apply for mere participation in voluntary programs.

We suggest two changes. First in terms of the 10% discount for an EMS program, we would add the following sentence." 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 percent discount."

In addition, we would reduce the amount that additional programs could discount a person's compliance history to 0.80 and add the following sentence regarding other programs:

*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 for each commission supported voluntary program. **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 maximum reduction that a site's compliance history may be reduced through voluntary programs in this subparagraph is ~~0.75~~ **0.80**.*

**7. Change the ranking system to excuse thousands to excuse thousands of entities with unsatisfactory records**

*60.2 (g) (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:*

*(C) more than 55 points—unsatisfactory*

Despite proposing a formula for compliance history rating that will drastically improve most entities' score, the TCEQ also plans to increase the level at which unsatisfactory performance occurs from 45 points to 55 points. By arbitrarily bumping these levels up, the TCEQ weakens the effect of the compliance history program and renders it more inconsequential than ever. An unsatisfactory classification serves as a cue for the TCEQ to exercise heightened scrutiny and enforcement measures for poor performers. Lowering the standard for satisfactory to a compliance score of 55 points passes thousands of entities from unsatisfactory to average and does nothing to increase compliance. We urge the TCEQ to reduce the unsatisfactory trigger point back to 45. For the compliance program to actually perform its function, the TCEQ must reward those that are truly doing well and offer real incentives for poor performers to improve operational practices.

The Texas Office of Public Citizen and the Lone Star Chapter of the Sierra Club appreciate the opportunity to comment on these proposed changes. We hope the TCEQ will consider providing the public with some actual examples of how the proposed changes would impact compliance history rankings, and consider holding some public hearings in other cities in Texas. We believe this could be accomplished with a relatively short –30-day – time period.

Sincerely,

Public Citizen

Sierra Club

Environmental Defense Fund

Texas Impact

Air Alliance of Houston

Texas Campaign for the Environment

SEED Coalition

Environment Texas

Texas League of Conservation Voters

Re-Energize Texas

Environmental Integrity Project

Texas Center for Policy Studies

Greater Edwards Aquifer Alliance

Hill Country Alliance

National Wildlife Foundation

Clean Water Action

Baptist Commission on Christian Life

Downwinders at Risk

Clean Economy Coalition