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Via E-Filing:

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Texas Commission on Environmental Quality
Office of Legal Services, MC 205
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RE: Harris County Attorney's Office Comments on Rule Project Number 2024-043-060-CE

Harris County Attorney's Office (HCAO) appreciates the opportunity to comment on the proposed revisions to Chapter 30 Texas Administrative Code (TAC) Chapter 60. HCAO writes mostly in support of the proposed changes and commends the Texas Commission on Environmental Quality (TCEQ) for their proposal to consider major, moderate, and minor violations when determining repeat violators. HCAO further commends TCEQ for increasing its compliance history assessments to be completed biannually. HCAO believes these changes will lead to more accurate compliance history determinations. Given the large industrial presence in Harris County, the accurate identification of repeat violators and poor compliance history is crucial for protecting human health and the environment.

HCAO respectfully recommends the following additions to this rule.

1. TCEQ should implement a set of factors to utilize when considering whether to consider new compliance history information.

TCEQ proposes to establish an effective date for the proposed rule. TCEQ states in the proposal that it will continue to use the version of the rule in effect at the time the compliance history classification was calculated in accordance with section 60.1(b). Thus, 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 of the rule used for assessing the applicant's compliance history. However, the proposal states that TCEQ "may consider new compliance history information as necessary." HCAO understands this to mean TCEQ may consider new information when reviewing a permit application that would not otherwise be considered under the newer version of the rule.

HCAO asks that TCEQ include a list of factors that it will consider when deciding whether it will use new compliance history information. These factors might include: whether violations of the same nature have repeatedly or frequently occurred at the relevant facility, whether violations are for off-site impacts, whether the facility is near a residential community, and whether local governments have issued violation notices at said facility. A list of factors will ensure TCEQ thoroughly considers whether to include new compliance information and also provides predictability regarding those decisions for industry and the public.

2. Local government inspections and written violation notices should affect compliance history in the same manner as TCEQ's.

While HCAO appreciates the updates TCEQ has made to its compliance history analysis, HCAO believes the inclusion of violations cited by local governments in a facility's compliance history will make for more accurate and complete compliance information. This is something HCAO has requested before.¹ Compliance history is utilized to determine whether a facility should be issued a permit or be authorized for a permit renewal, amendment, or modification and is used to determine whether a permit should be denied, suspended, or revoked.² The components of compliance history remain unchanged, they include, among other things, any final enforcement orders, court judgments, and criminal convictions related to compliance with legal requirements under the TCEQ's jurisdiction, and 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

¹ TCEQ Public Meeting on Permit Renewal for Air New Source Registration 116476 (Oct. 14, 2024) Timestamp 2:00 – 4:10.

² 30 TAC 60.1(a)(1).

violation from a regulated person, issued on or after September 1, 1999, except for those administratively determined to be without merit.³

Notices of violations (NOVs) issued by local governments are not included as a component of compliance history. While it might be assumed that these NOVs would be considered under the “all written notices” category enumerated above, in practice, they are not included in compliance history consideration. Harris County Pollution Control Services (PCS) conducts inspections, issues violations notices to facilities, and works with the State of Texas to ensure facilities are operating in compliance with state and federal law. HCAO, TCEQ, and the Texas Attorney General’s Office often rely on PCS inspections for their enforcement actions.

A driver of PCS inspections of regulated facilities is community complaints. TCEQ often forwards complaints they receive that are within Harris County’s jurisdiction directly to PCS. When a county investigator responds to a complaint, they are authorized to inspect a facility in the same manner as a TCEQ investigator.⁴ But when PCS or any other local government entity issues a written violation notice, that inspection and violation notice will have no effect on the facility’s compliance history unless the local government files a lawsuit and the court grants a judgment in their favor, which can take years. This significantly delays the ability to generate a compliance score that accurately reflects the facility’s true state of noncompliance. In contrast, TCEQ only has to issue a final enforcement order or a written notice of violation for a facility’s compliance history to be affected. Despite performing the same functions as TCEQ in this capacity, local governments are currently less able to affect a facility’s compliance history than TCEQ.

For example, TCEQ’s new rules make the unauthorized release, emission, or discharge of pollutants that caused harm to human health or the environment a major violation. For a facility with low (less than 15) complexity points, two major violations, such as an unauthorized release, will give the facility a rating of “unsatisfactory.” An unsatisfactory rating could lead TCEQ to deny a permit renewal. There are facilities all over Harris County that have frequent unauthorized harmful releases. For TCEQ to effectively prevent one of these bad actors from being able to renew their permit, all they would need to do is issue several written violation notices or craft a unilateral

³ 30 TAC 60.1(c)(1), (7).

⁴ Tex. Health & Safety Code Section 361.032, 382.111 and Texas Water Code Section 26.173.

administrative order, either of which would have to contain enough violations (major, moderate, or minor) to bring down the facility's compliance history to the level of being "unsatisfactory." Once that happens, the facility's permit renewal could be in jeopardy. Compare this to Harris County, which would have to obtain a court judgement to accomplish the same outcome. Obtaining a court judgement often takes years. This puts local governments at a significant disadvantage in their ability to take action to affect a facility's compliance history. Because TCEQ often refers complaints to PCS, the current compliance history scheme makes it potentially less likely for facilities in Harris County to receive unsatisfactory ratings than it is in other counties where TCEQ takes on the primary investigatory role or relies less on local government partners for support. Given the large presence of industry in Harris County and the resources the County has invested in pollution abatement, this reality concerns HCAO.

In practice this disparity means that permits are frequently renewed during the pendency of the enforcement action against a non-compliant facility. This exact scenario occurred during the permit renewal process for a non-compliant concrete batch plant in Harris County earlier this year. PCS observed serious violations at the facility as early as 2020, but despite almost twenty written notices of violation, these had no effect on the facility's compliance history. Harris County filed a lawsuit against the facility in 2023, and the facility's permit was up for renewal in 2024. Because neither the inspections, NOVs, nor the lawsuit affects compliance history, TCEQ assessed the facility's compliance history, found it to be satisfactory, and approved the permit for renewal. TCEQ had been out to the site and observed the violations themselves, but because Harris County, rather than TCEQ, was leading the enforcement action, the facility's compliance history remained unblemished. Despite HCAO's best efforts, the permit renewal was approved. The case against the facility is slotted for trial at the end of 2025, at which point a judgment may finally be rendered. Once a judgment is rendered, the facility's compliance history will finally be updated to reflect reality. Unfortunately, this permit has already been renewed and will be effective for another ten years. Only when the permit is up for renewal again in 2034 will TCEQ have a chance to review the facility's compliance history and consider its full history of multi-year violations. This outcome is illogical and can be avoided if NOVs issued by local governments are given weight in compliance considerations as TCEQ.

TCEQ enacted this new rulemaking in part based on recommendations made by the Sunset Advisory Commission. In 2022-2023 Staff Report of the Sunset Advisory Commission, the Commission observed that:

By not factoring all instances of noncompliance into compliance history ratings, TCEQ misses an opportunity to further incentivize full compliance. Compliance history ratings are meant to be a complete evaluation of a facility's compliance with regulations, not simply a reflection of formal enforcement history. Additional data could better inform existing compliance ratings, and potentially lead to compliance histories for some of the nearly 400,000 unclassified entities for which TCEQ currently has no compliance information. Any data showing noncompliance would not only better inform TCEQ's operations by enabling the agency to detect a regulated entity's pattern of behavior, but also increase transparency for the public and other regulated entities.⁵

One source of the information the Sunset Commission recommends that TCEQ seek could come from PCS investigations and/or NOV's. If productive, Harris County could send this information to TCEQ and have TCEQ adopt its findings. Doing so would help to remedy the problem identified by the Sunset Commission and lead to more accurate compliance history ratings.

Local governments should therefore be given parity with TCEQ – or at minimum, an enhanced ability – to influence a facility's compliance history, in recognition of their on-the-ground role and substantial investment in enforcement. If Harris County had this additional tool, it could better protect human health and the environment within its jurisdiction. Even if TCEQ does not give NOV's issued by local governments the same weight in compliance considerations as those issued by TCEQ, HCAO would request that TCEQ give more weight to local government actions than it currently does or to advise local governments as to how they can better prevent known bad actors from continually renewing their permits, causing real harm to our most vulnerable communities.

⁵ Sunset Advisory Commission, Texas Commission on Environmental Quality Sunset Staff Report with Commission Decisions (November 22, 2022) https://www.sunset.texas.gov/public/uploads/2022-12/TCEQ%20Staff%20Report%20with%20Commission%20Decisions_11-22-22.pdf, Page 44.

As always, we appreciate this opportunity to comment and look forward to TCEQ's response.

Sincerely,

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