

August 25, 2025

RULE PROJECT NO. 2024-043-060-CE**VIA ELECTRONIC SUBMITTAL**

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**Re: Texas Industry Project Comments on Proposed Compliance History Rule
(2024-043-060-CE)**

Dear Ms. Ricco:

The Texas Industry Project (“TIP”) appreciates the opportunity to submit comments on the Texas Commission on Environmental Quality’s (“TCEQ”) proposed revisions to 30 Texas Administrative Code (“TAC”) Part 60 (the “Proposal”). TIP is composed of more than 50 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility, transportation, and national defense industries with operations in Texas.

TIP understands that the Proposal was issued in response to the 2023 Sunset Advisory Commission Report (the “Sunset Report”) and Senate Bill (“SB”) 1397. In particular, the Sunset Report directed TCEQ “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 multiple violations of the same type.”¹ While TIP appreciates TCEQ’s efforts to implement this directive, TIP is concerned that without targeted changes, the Proposal will over-apply repeat violator status and obscure those cases where it is truly warranted. TIP also recommends a change to TCEQ’s existing compliance history scoring process to account for the significant and unrepresentative impacts of TCEQ’s enforcement backlog on compliance histories.

I. Violation Dates for Repeat Violator Status

TIP requests that TCEQ revise 30 TAC 60.2(f) to align with the statutory requirement that violations considered for repeat violator status are limited to those that “*occurred* in the preceding five years.” (emphasis added).

¹ TCEQ Sunset Advisory Commission Staff Report with Final Results 2022-23, page A2 (June 2023).

A. Statute limits consideration based on the date violations occurred

Texas Water Code Section 5.754(c)(2)(B) states that the criteria for classifying a repeat violator includes “giving consideration to the size and complexity of the site at which the violations occurred, and *limiting consideration to violations* of the same nature and the same environmental media *that occurred in the preceding five years.*” (emphasis added). The plain language of the statute makes clear that repeat violator status must be based on the dates the violations actually occurred – not the date of any final enforcement action.

However, TCEQ currently uses the date of the final enforcement action when evaluating compliance history (*i.e.*, if a violation was resolved in an Agreed Order within the preceding five-year period, it is included in the compliance history regardless of the date the violation occurred). While TIP has specific concerns with this approach, discussed in more detail below, the statute expressly prohibits such an assessment for repeat violator status.

B. TIP proposed revision

TIP proposes the following addition to TCEQ’s proposed 30 TAC 60.2(f):

A person may be classified as a repeat violator at a site when multiple major, moderate, or minor violations of the same nature and the same environmental media occurs during the preceding five-year compliance period. Only those violations that occurred within the preceding five-year compliance period shall be included in this evaluation.

This addition will accurately track the statutory requirement, reduce ambiguity, and simplify the evaluation process for repeat violations.

II. Violation Dates for Compliance History Scoring Under 30 TAC 60.1(b) and 60.2(g)

Separate from repeat violator classifications, TIP requests that TCEQ revise 30 TAC 60.1(b) and 60.2(g) to limit assessment of compliance history points to only those violations that occurred in the preceding five-year period.

A. Current TCEQ approach and backlog creates unrepresentative scores

As discussed above, TCEQ currently uses the date of final enforcement action when evaluating compliance history in the prior five-year period, without regard for the date the violations actually occurred. This approach can obscure the actual compliance status at a site. In many cases, a site has already addressed a violation and returned to compliance by the time TCEQ initiates enforcement. The violation may not be resolved in a final enforcement action (*e.g.*, Agreed Order) until years later.

TCEQ’s current multi-year enforcement backlog has exacerbated this issue. When violations are promptly resolved with a final enforcement action (*i.e.*, within a year or two of the

occurrence), the violations can be timely added to the compliance history to be more reflective of the site's current status. However, under TCEQ's current backlog, a single Agreed Order covering multiple years can cause a site to become "unsatisfactory," even if it corrected all the violations years ago and has otherwise returned to compliance. For example, backlogged enforcement for violations between 2018 - 2020 may be resolved in an August 2025 Agreed Order. Because the violations are included in the 2025 final enforcement action, they would continue to impact the compliance history score until 2030 – more than a decade after the violations occurred.

This outcome penalizes sites for delays outside their control and blurs the line between historic compliance and current performance. The continued impact of historic violations also obscures the efforts of sites that have achieved significant improvements in their compliance. TIP understands that one of the main purposes of compliance history evaluations is to provide members of the public with insight into a site's environmental compliance. However, the current practice is not reflective of current, actual performance.

TCEQ's Proposal has already acknowledged the need for targeted changes to 30 TAC 60.1(b) to ensure that "compliance history will more closely reflect the performance of the site at the time the violations were documented as opposed to several months later" and provide "greater certainty to the regulated community as to how an entity is performing at the time an enforcement action begins." TIP approves of TCEQ's attempts to move compliance history evaluations closer in time to the date the violations occurred. However, this same desire for accuracy and certainty supports broader changes to compliance history scoring.

TIP further notes that the Texas legislature has consistently indicated that violations should be evaluated based on the date they occurred. This is evident both in Texas Water Code Section 5.754(c)(2)(B), discussed above, and the grounds for revocation of a permit in Texas Water Code Section 7.302(b)(2) ("having a record of environmental *violations in the preceding five years* at the permitted or exempted site") (emphasis added).

B. TIP proposed revision

TIP proposes the following additions to 30 TAC 60.1(b):

Compliance period. The compliance history period includes the five years prior to the date the permit application is received by the executive director. . . Except as used in §60.2(f) of this title (relating to Classification) for determination of repeat violator, notices of violation may only be used as a component of compliance history for a period not to exceed one year from the date of issuance. Only those violations that occurred within the five-year compliance period may be used as a component of compliance history.

TIP also proposes the following additions to 30 TAC 60.2(g):

60.2(g)(1)(A): The number of major violations that occurred in the preceding five-year period contained in . . .

60.2(g)(1)(B): The number of moderate violations that occurred in the preceding five-year period contained in . . .

60.2(g)(1)(C): The number of minor violations that occurred in the preceding five-year period contained in . . .

TIP's targeted changes would provide consistency across the repeat violator program and general compliance history scoring to better align with legislative mandates and create internal consistency in the rule. These changes would also more accurately reflect the current compliance status of a site.

III. Use of "Same Nature" for Repeat Violator

TIP requests that TCEQ revise 30 TAC 60.2(f) to include specific equipment and root causes when evaluating "same nature" for repeat violator status.

A. Current "root citation" approach will over-apply repeat violator status

Under existing 60.2(f)(1), "[s]ame 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." While TCEQ has not proposed to change this definition, the Proposal's addition of minor and moderate violations, combined with the existing definition of "same nature," will create an unrepresentative number of repeat violators.

In particular, under existing 60.2(f)(1)'s "root citation" approach, violations of general permit requirements (e.g., 30 TAC 116.115 for New Source Review permit condition violations) could be considered for repeat violator points. Under 30 TAC 60.2(d)(2), a moderate violation includes "any unauthorized release, emission, or discharge of pollutants that is not classified as a major violation." Accordingly, even the smallest emissions events are at least a "moderate" violation. As a result, several short emissions events and other minor New Source Review permit violations (all violations of 30 TAC 116.115) could form the basis for repeat violator status.

The existing "root citation" approach, when applied to moderate violations, would disproportionately impact those high complexity sites like refineries and chemical plants. These facilities have more emissions points, more permit obligations, and a resulting greater risk of minor noncompliance with said conditions. As the Sunset Report noted, "[w]hen updating the agency's compliance history rating formula, TCEQ should determine whether its current formula adequately allows for comparing the compliance performance of facilities of similar complexity."² Without targeted changes, the Proposal will exacerbate these comparison issues, as highly complex sites more easily trigger repeat violator status than moderately complex sites.

² *Id.*

B. TIP proposed revisions

To address this concern, TIP proposes the following change to 30 TAC 60.2(f)(1):

Same nature is defined as violations that involve the same equipment, same root cause, and 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.”~~

Requiring all three components (same equipment, same root cause, and same root citation) would address one of the key issues raised in the Sunset Report, namely that “TCEQ also only considers major violations with the same root citation — the same specific statutory or rule violation — regardless of whether a facility has multiple violations resulting from a common pattern or practice.”³ A focus on the specific equipment and root causes would better identify a common pattern or practice, rather than an assortment of unrelated issues that happen to violate the same rule subsection.

TIP’s proposed addition of root cause is also consistent with longstanding TCEQ guidance and statutory language on enforcement for repeat Title V violations. For example, Texas Water Code Section 7.00251 states that, when evaluating self-disclosed Title V violations for enforcement, “the commission may not include in the enforcement action . . . violations that are *not repeat violations due to the same root cause* from two consecutive investigations within the most recent five-year period. . .” (emphasis added).

IV. Repeat Violator Points – Scoring Moderate Violations

TIP requests that TCEQ revise proposed 30 TAC 60.2(f)(2) to reduce the number of points assigned for “moderate” violations.

A. Ten-point moderate violations will inflate repeat violator points

TCEQ’s proposed additions in 30 TAC 60.2(f)(2) would set a point value of 10 points for each moderate violation and a 150-point total for repeat violator status at sites with more than 15 complexity points. As discussed above, based on the broad language of 30 TAC 60.2(d)(2), even the smallest emissions events are at least a “moderate” violation.

Under the Proposal, a site that experiences just three one-hour emissions events each year could be considered a repeat violator. The Sunset Report consistently noted its concern with “habitual noncompliance” and provided examples of facilities with over 40 air emissions events over a five-year period.⁴ However, the Proposal would allow for only 15 total emissions events (or some smaller number of events plus reporting or recordkeeping violations). TIP is concerned that this low threshold will provide an inaccurate representation of compliance at a site. A site may

³ *Id.* at page 34.

⁴ *Id.* at page 35.

have a successful compliance program, but continue to experience small and infrequent emissions events. Such a scenario is not indicative of “habitual noncompliance.”

B. TIP proposed revisions

TIP proposes that TCEQ revise 30 TAC 60.2(f)(2) to assess 5 points for each moderate violation. A 5-point assessment would provide additional flexibility given the broad variety of emissions events that could be classified as a moderate violation (*i.e.*, anything that does not trigger “major” status). This level would also still be sufficient to trigger repeat violator status below the 40+ emission event examples in the Sunset Report.

V. Repeat Violator Points – Totals for Highly Complex Sites

TIP requests that TCEQ revise proposed 30 TAC 60.2(f) to increase the point threshold for repeat violator status at sites with over 30 complexity points.

A. 15 complexity point threshold will create unrepresentative comparisons

The Proposal uses a 15 complexity point threshold to establish the two levels for repeat violator status (*i.e.*, 100 points or 150 points). While TIP understands TCEQ’s use of 15 points for less complex sites, the lack of differentiation above the 15-point threshold will disproportionately disadvantage highly complex sites.

In particular, many refineries and chemical plants have 30 or more complexity points. As discussed above, these facilities have more emissions points, more permit obligations, and a resulting greater risk of minor noncompliance with said conditions. Even with TIP’s proposed changes to scoring for moderate violations, a single major violation would instantly put a highly complex site at risk of triggering repeat violator status if a few other minor and moderate violations are triggered by noncompliance with their varied permit obligations. In contrast, because it has fewer permit obligation and fewer associated opportunities for minor and moderate violations, a site with only 15 complexity points is at a lower risk of reaching 150 points – even after a major violation.

The Sunset Report directed that “TCEQ should determine whether its current formula adequately allows for comparing the compliance performance of facilities of similar complexity.”⁵ However, if not changed, 30 TAC 60.2(f)(3) would compare a 50+ complexity point site and a 15 complexity point site – two sites that are far from “similar complexity.” As a result, highly complex sites may be labeled as repeat violators simply because they are larger than their less complex counterparts, without consideration of their relative compliance.

⁵ *Id.* at page A2.

B. TIP proposed revisions

TIP proposes the following addition to 30 TAC 60.2(f)(3):

(A) Equal to or greater than 250 for sites with 30 or more complexity points; or (B) Equal to or greater than 150 for sites with 15 to 29 or
~~more~~ complexity points; or (C) Equal to or greater than 100 for sites with less than 15 complexity points.

This additional threshold for highly complex sites will offset the impact of a site's greater complexity on routine compliance issues and allow TCEQ and members of the public to more accurately evaluate recurring noncompliance.

VI. Repeat Violator Points - Totals by Media

TIP requests that TCEQ revise proposed 30 TAC 60.2(f)(3) to apply the point threshold for repeat violator separately for each media.

A. Statute requires point consideration of the same environmental media

TIP appreciates TCEQ's efforts to establish an objective point total to trigger repeat violator status. However, proposed 30 TAC 60.2(f)(3) states only that "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. . ." It does not specify whether these points are totaled across media (*i.e.*, 150 air violation points, or 75 air violation points and 75 water violation points).

As discussed above, Texas Water Code Section 5.754(c)(2)(B) requires that the consideration for repeat violator be limited "to violations of the same nature and the same environmental media." This statutory mandate for evaluation by "the same environmental media" indicates that the point total must also be assessed on a per-media basis.

B. TIP proposed revisions

TIP proposes the following addition to 30 TAC 60.2(f)(3):

A person is a repeat violator at a site when the number of repeat violation points for the same environmental media is: (A) Equal to or greater than 250 for sites with 30 or more complexity points; or
(B) Equal to or greater than 150 for sites with 15 to 29 ~~or more~~ complexity points; or (C) Equal to or greater than 100 for sites with less than 15 complexity points

This clarification would avoid over-application of repeat violator status based on a small number of emissions events and effluent violations – discrete issues that occur across different media.

VII. Mitigating Factors for Less Complex Sites

TIP requests that TCEQ include a defined process in 30 TAC 60.2 for reclassification of a site from unsatisfactory to satisfactory where a single violation caused a less complex site (15 or fewer points) to trigger unsatisfactory levels.

A. Additional mitigation options are necessary for less complex sites

The Proposal acknowledges that “the compliance history rule calculation methodology disproportionately impacts less complex entities.” While the changes in the Proposal provide some flexibility for less complex sites, very low complexity sites (*e.g.*, permit by rule upstream production facilities) can still easily trigger unsatisfactory status through a single emissions event and associated reporting or recordkeeping violations. A single emissions event is not an indication that a facility is an unsatisfactory performer.

B. TIP proposed revisions

TIP proposes a new 30 TAC 60.2(g)(3)(A)(v):

Demonstration by a site with 15 or fewer complexity points that its unsatisfactory status was due to a single violation that was corrected on or before the date it was classified as an unsatisfactory performer

This addition would provide a defined process for the executive director to adjust the status of otherwise satisfactory sites that were impacted by an outlier event and worked to promptly return to compliance. It would also maintain the executive director’s discretion to decide whether to apply the mitigating factor.

VIII. Effective Date for Repeat Violator Points

TIP requests that TCEQ include only those moderate and minor violations that occurred after September 1, 2023 in determining repeat violator status.

While TIP understands that repeat violator status necessarily involves a retrospective evaluation, the consideration of minor and moderate violations must be evaluated in light of SB 1397. SB 1397 amended the Water Code and required TCEQ to address these two categories of violations beginning on September 1, 2023. Application of repeat violator points to violations that occurred before September 1, 2023 would be inconsistent with both Texas Government Code 311.022 (prospective operation of statutes) and general principles of due process and fair notice.

We appreciate your consideration of the foregoing comments. If you have any questions, please contact me at Harrison.reback@bakerbotts.com.

Respectfully,

A handwritten signature in blue ink that reads "Harrison Reback". The signature is written in a cursive, flowing style.

Harrison Reback