Caroline Crow

Lone Star Legal Aid provides the attached comments on behalf of our represented client Better Brazoria—Clean Air & Clean Water related to Rule Project Number 2024-043-060-CE, a proposed rulemaking to make revisions to 30 Texas Administrative Code Chapter 60, Compliance History, under the requirements of Texas Health and Safety Code, § 361.1215; Texas Water Code § 26.0481; and Texas Government Code, Chapter 2001, Subchapter B.

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RE: Rule Project Number 2024-043-060-CE

To whom it may concern:

On behalf of our represented client Better Brazoria—Clean Air & Clean Water ("Better Brazoria" or "Commenters"), Lone Star Legal Aid ("LSLA") provides the following comments to the Texas Commission on Environmental Quality ("TCEQ") on Rule Project Number 2024-043-060-CE, a proposed rulemaking to make revisions to 30 Texas Administrative Code Chapter 60, Compliance History, under the requirements of Texas Health and Safety Code, § 361.1215; Texas Water Code § 26.0481; and Texas Government Code, Chapter 2001, Subchapter B.

I. INTRODUCTION

LSLA's mission is to protect and advance the civil legal rights of the millions of Texans living in poverty by providing free advocacy, legal representation, and community education to ensure equal access to justice. LSLA's service area encompasses one-third of the State of Texas, including 72 counties in the eastern and Gulf Coast regions of the state. LSLA's Environmental Justice Team focuses on the right to the fair distribution of environmental benefits and burdens and the right to equal protection from environmental hazards. LSLA advocates for these rights on behalf of impacted individuals and communities in LSLA's service area. These comments are submitted on

behalf of Better Brazoria – Clean Air & Clean Water, which serves and represents the low-income environmental justice community of Freeport, Brazoria County, and its residents.

Better Brazoria was formed to educate Freeport residents about environmental issues and to advocate for solutions to protect and improve air and water quality. To accomplish this mission, Better Brazoria holds community meetings to raise awareness about potentially harmful air and water pollution events in Freeport, Texas and Brazoria County. The group communicates with TCEQ and other state and local governmental entities to remain up to date on the latest developments in the area. Better Brazoria engages with the public participation component of the environmental permitting process by submitting comments, and engaging in hearings on air, water, and waste permits, and submitting comments, like these, on State and Federal Clean Air Act issues in the region. The group's goal is to encourage protection of public health through compliance with permitting schemes and environmental laws.

Better Brazoria (f/k/a/ Citizens for Clean Air and Clean Water) submits comments on the proposed rulemaking because it previously filed a lawsuit *Citizens for Clean Air and Clean Water v. Texas Commission on Environmental Quality Cause No. D-1-GN-20-001314* in the 345th Judicial District of Travis County, Texas. This lawsuit sought judicial review of TCEQ's use and calculation of compliance history related to a large industrial operator, Gladieux Metals Recycling located at 302 Midway Rd., Freeport, Texas 77542. Gladieux Metals Recycling has a history of civil and criminal enforcement actions.

Better Brazoria appreciates the opportunity to comment and applauds TCEQ's positive rule changes. Below, Better Brazoria explains its comments and concerns with some proposed rule revisions.

II. SPECIFIC COMMENTS ON RULE REVISION

TCEQ is revising portions of Chapter 60 related to Compliance History to implement requirements from Section 13 of Senate Bill 1397 ("S.B. 1397"), and to address recommendations from the Sunset Advisory Commission that were not included in S.B. 1397. Commenters understand these revisions are intended 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 regularly update compliance history ratings. Commenters applaud these efforts but offer further suggested changes below to better implement Sunset Advisory Commission recommendations and meet public need.

A. Repeat Violator Exemption

TCEQ's proposal amends § 60.2(f) to reflect changes in how the Commission evaluates repeat violators as required by S.B. 1397. In Section 13 of S.B. 1397, the Legislature mandated that TCEQ establish better criteria for establishing a "repeat violator" including: setting the number of major, moderate, and minor violations needed to be classified as a repeat violator.

The proposed rules allow the Executive Director to retain a significant amount of discretion to downgrade a compliance history rating or exempt a facility from a "repeat violator" status;

however, the Legislature intended this discretion to only be exercised when "exigent circumstances exist." S.B. No. 1397 at Section 13(c-1) *compare with* § 60.2(f)(4).

Section 60.2(f)(4) of the proposed rules allow an exemption from repeat violator status and/or downgrades to be completed if the Executive Director determines that the nature and conditions of the violations "do not warrant the designation." Better Brazoria believes that while agency discretion can allow for better outcomes in some instances, in this case, more concrete rules will provide more streamlined outcomes. As is, neither the public nor the regulated community knows exactly what conditions will warrant an exemption or downgrade.

Static criteria must be developed to exempt a repeat violator or offer forgiveness for violations resulting in a more preferable compliance history rating. As is, the rules identify the components of compliance history that will be weighed. If there are other components that can be weighed to result in a more beneficial designation, these must be enumerated in the rules. Otherwise, this discretionary authority could be inconsistently exercised. In the alternative, TCEQ could create a policy that is adopted by reference into the rules. That way the public and the regulated community can understand what enumerated factors will be considered for exemptions or downgrades.

The discretion that remains in the rules doesn't comport with the statutory charge, intending these allowances only in exigent circumstances where there are "events that cause significant impact to the surrounding community, with substantial emergency response efforts by state and federal authorities, and resulting in urgent consequences." Sunset Advisory Commission: Staff Report with Final Results (May 2022) at 33 ("Sunset Report"). The rules need to incorporate a definition of "exigent circumstances" that mirrors the Sunset Advisory Commission's definition. The rule as revised includes discretion that is much broader than the "exigent circumstances" limitation.

B. Semi-Annual Compliance Classification

Section 60.2(a) has been revised to require mandatory classifications of compliance history ratings "semi-annually" on March 1 and September 1. Better Brazoria applauds this rule revision, as more frequently running compliance history may result in more accurate ratings, especially where a facility has received violation notices.

While Better Brazoria appreciates that TCEQ will be evaluating compliance history more frequently, Better Brazoria is concerned that this may result in industrial operators being provided more opportunities to challenge unfavorable—but accurate—compliance history designations. Because compliance history will now be evaluated and rated twice a year, it is essential that appeals are minimized so that compliance ratings remain accurate. Better Brazoria advocates for a shortened appeal window to ensure that industrial operators are not afforded extended opportunities to appeal unfavorable compliance history classifications.

Additionally, Better Brazoria encourages TCEQ to better respond to the Sunset Report and also include a provision in the rules which allows the Commission to update compliance history "throughout the year as the agency receives additional information that could alter the rating, such as new enforcement actions" Sunset Advisory Commission: Staff Report with Final Results (May 2022) at A8, 39. A simple revision allowing additional information—such as enforcement actions

or notices of violations—to provide an impetus for the TCEQ to run a new compliance history rating, when necessary, will result in more accurate and less calculated ratings. For example, this additional provision may avoid gaming the system, ensure compliance histories are in order before they are run in either March and September, and spur more consistent compliance.

C. Change in Compliance Period Start Date

According to the current rules, § 60.1(b), the compliance history period can include (i) the five years prior to the date the permit application is received by the Executive Director; or (ii) the five year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first. This rule revision makes the compliance history date for purposes of an enforcement proceeding static and now only includes the initial enforcement screening date.

Better Brazoria appreciates that the Commission revised the rules to provide more certainty in establishing the effective date of a compliance history calculation; however, Better Brazoria believes that choosing the initial enforcement screening date is problematic. Better Brazoria is concerned that this early initial date could result in two different problematic outcomes (1) violations go unprosecuted due to limited resources; or (2) violations are not properly incorporated into a facility's compliance history rating.

Better Brazoria agrees that a date certain may prevent other inconsistencies, but Better Brazoria believes that if the facility is accumulating more violations, that the facility's compliance history calculation must be run again to ensure additional violations are appropriately incorporated and the resulting compliance history calculation accurately reflects the facility's compliance. Better Brazoria suggests additional language as follows: the five-year period preceding the date of an initial enforcement screening, unless additional violations accrue during the enforcement process, then the compliance history will be re-run to include all violations accrued from the initial enforcement screening date through resolution. This way, a facility's compliance rating will be accurately captured and reflect all accrued violations.

D. Complexity and Repeat Violator Thresholds still miss habitual noncompliance.

The Sunset Report recommended TCEQ update its rules related to how it calculates compliance history to consider all evidence of noncompliance and decrease emphasis on facility complexity. Sunset Report at 39. Better Brazoria is encouraged by these rule revisions because they may accomplish this in part, but further revisions are required to accomplish it in full.

i. § 60.2(f) – Repeat Violator Criteria

Better Brazoria applauds the Commission's removal of the "separate occasion" requirement and revision to evaluate each violation separately regardless of whether they are included in the same enforcement proceeding. This change more accurately reflects facility compliance; however, changes must still be made so that violations are more appropriately reflected in an entity's compliance rating.

If repeat violator criteria is still, however, based on the "same nature and same environmental media" then a facility may be able to accumulate many minor violations across a variety of media before being penalized. Rule Project No. 2024-043-060-CE, Proposal Preamble at 5-6. Only counting violations of the same nature and media will not paint an accurate portrait of compliance history for two reasons.

First, it may unfairly and accidentally discount violations at a complex facility. A more complex facility may have permits across several media that they are capable of violating. So, the violations need to also be assessed by entity. For example, if the same entity violates its stormwater discharge permit, its air permit, and its waste permit—if these violations are all not imputed into the Repeat Violator classification because they are across different media, the facility may not be categorized as a repeat violator, despite having repeat violations.

Second, multiple violations across a variety of environmental media permits may indicate broader non-compliance or a systemic compliance problem at a facility. As a result, only counting the same violations across the same media (despite now incorporating levels of violation: minor, moderate, and severe) fails to weigh violations across media, which are likely indicative of broader non-compliance or systemic issues. This also is true for a less complex facility. For example, an aggregate operation fails to comply with stormwater permit and also fails to register for the applicable PBR or Standard Permit. While a general stormwater permit and a PBR or Standard Permit may seem minor in nature, the public health consequences are more serious. Aggregate operations are often times in communities, so here the aggregate that could contain harmful chemicals may create contaminated runoff that flows to people's yards or homes. That contaminated run-off combined with harmful particulate matter releases will adversely affect a nearby resident's health. Commenters advocate for the repeat violator status to also incorporate and assess habitual violations across multi-media where it shows a systemic problem.

ii. Repeat Violator Status must also assess notices of violation and other evidence of noncompliance.

Better Brazoria encourages TCEQ to include notices of violation in any assessment of repeat violator status as well as violations assessed by authorities, other than TCEQ, if those are submitted for review to TCEQ. In the past, TCEQ justified not including notices of violation into compliance history calculation because it incentivized industry to come into compliance. The recent Sunset Report found that the TCEQ "struggles to strike an appropriate balance between incentivizing compliance and taking enforcement action." Sunset Report at 29. To strike that balance, TCEQ must incorporate other components into its compliance history calculation.

TCEQ should revise § 60.1(c) Compliance History Components to add the following components: (1) notices of violations; and (2) violations assessed with entities that have co-jurisdiction. Currently, the criteria for this evaluation excludes other compliance-related agency-issued notices that should be imputed into a facility's status. If a facility is habitually issued notices of violation for noncompliance—these notices should also be assessed when designating repeat violator status. Disregarding habitual notices of violation or violations from other authorities submitted to TCEQ eliminates valuable information that would provide a more complete picture of whether a facility was able to comply with permit terms and applicable regulations. For example, a concrete batch

plant located at 3315 Carr Street recently had a permit up for renewal. During this permit renewal, another enforcement authority, Harris County Attorney's Office, and members of the public, submitted evidence of over 60 assessed violations for a two-year period. TCEQ had jurisdiction to enforce the majority of these violations.[1] But, by not evaluating 60 violations of regulations and permit terms that TCEQ enforces, TCEQ ignored systemic noncompliance at the 3315 Carr Street Plant. If the compliance history rating system was working effectively, these 60 violations would be evaluated and guard against a permit renewal. Or, the violations would force the permit to be renewed with conditions to incentivize compliance. Accordingly, to get an accurate compliance rating, other components like notices of violation must also be included and where verified violations from authorities with co-jurisdiction are submitted to TCEQ, these must be reviewed and incorporated into a compliance history rating.

iii. Repeat Violator Points should be increased depending on the region's level of attainment and/or an impaired waterway designation.

Because there are varying levels of Clean Air Act area Nonattainment[2]: marginal, moderate, serious and severe—air program violations should be weighted to reflect the region's overall air quality as designated by its attainment/nonattainment level. A violation in a more poorly rated nonattainment region should result in a violation worth more points to disincentivize further violation. Likewise for releases into impaired waterways.[3] If proper weight is not given to violations in a nonattainment area or to an impaired waterway, then a facility that releases into either of these areas may not have appropriate consequences. This may lead to less frequent oversight and/or inaccurate compliance history classification. This could also unfairly benefit industrial facilities in nonattainment areas or with permission to discharge into impaired waterways by not sufficiently escalating their violations by increased points, thus allowing that facility to avoid stricter regulatory oversight.

iv. § 60.2(e) Complexity Formula

While complexity may be a more accurate measurement criterion to evaluate facilities over the North American Industry Classification System (NAICS), Better Brazoria believes that improper weight is still given to facility complexity and can artificially inflate a facility's compliance rating. The rigid point system may underestimate the complexity of certain facilities. The formula assigns points primarily based on permit types and size metrics. These points, however, are inflexible, and may not fully reflect the dynamic operations or environmental and public health risks posed by

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[1] Harris County District Court 11th Judicial District Cause No. 2024-01367, Second Amended Complaint (Dec. 10, 2024) at 12; *see also* Progressive Fifth Ward Community Association's Public Comments submitted on Standard Permit Registration No. 116476 (Oct. 14, 2023) at 4-12.

[2] The Federal Clean Air Act requires that the U.S. Environmental Protection Agency designate areas as being in attainment or in nonattainment with National Ambient Air Quality Standards for criteria pollutants. Nonattainment areas include areas that are violating National Ambient Air Quality Standards and other nearby areas with sources of emissions that contribute to those violations. *See generally* 42 U.S.C.A. § 7410.

[3] Impaired Waterway refers to a water body or segment that does not meet its applicable water quality standards as set forth by TCEQ. This designation is made when credible data indicates that the waterway is not meeting the standards for various parameters, which can include nutrient levels and other pollutants. *See* Procedures to Implement the Texas Surface Water Quality Standards RG-194 prepared by TCEQ Water Quality Division (June 2010) at 190.

certain types of facilities. For example, a facility with one high-risk permit—like hazardous waste disposal—could end up ranked lower in complexity than a less risky facility with multiple lower-point permits. So more complex facilities with less permits may avoid a more accurate rating. Complexity should reflect environmental and public health risks. Facility complexity should add weight to violations—not forgiveness.

Complexity points can also increase the denominator in the Facility/Site Rating formula, so these points may be used to artificially inflate a compliance score so that it's more positive than it should be. To avoid this result, repeat violation points need to be increased to offset any artificial inflation for a complex facility. Or, in the alternative, repeat violation points should have more weight if they are for a complex facility with greater environmental and public health risks. This is necessary because a complex facility may pose more risk to a local community by conducting inherently riskier operations. Facility complexity scores should equate with the potential risk a facility poses. Otherwise, a complex facility with minor infractions is not garnering the facility designation it needs for the public and the permitting authority to understand the risk or apply special conditions, or other additions, to permits that will protect the local community.

Figure 1: Compliance History Rating Formula[4]

$$\left[\frac{\text{(Violation Points) + (Chronic Excessive Emission Event Points) + (Repeat Violator Points) - (Self Audit Points)}}{\text{(Number of investigations x 0.1) + (Complexity Points)}}\right] \times \text{(Voluntary Program Points) } \textit{(if applicable)}$$

For example, a complex, but dangerous facility could incur 75 minor violations within a five-year period before reaching the repeat violator threshold. Rule Project No. 2024-043-060-CE, Proposal Preamble at 6. Additionally, this methodology may result in catastrophic consequences. In TPC, the penalty only came after the community dealt with an avoidable disaster. The explosion at the TPC Group, LLC's Port Neches' Plant was an avoidable disaster—preceding this disaster, the facility had over eighty reported emissions events before its flagrant operations culminated in the November 2019 disaster.[5]

It is also critical that no matter if the violations are minor, moderate, or severe—patterns of non-compliance must have consequences.

E. Unclassified Ratings should prompt activities to accurately rate the facility.

According to the Sunset Report 89.23% of facilities carry a compliance history rating of "Unclassified." And, per the rules, an "Unclassified" designation means there is inadequate information which is "defined as no compliance information." Rule Project No. 2024-043-060-CE, Proposal Preamble at 29; *see also* § 60.2(b) (defining Inadequate Information). The rules

[4] Sunset Advisory Commission: Staff Report with Final Results (May 2022) at Appendix E, 83.
[5] LSLA Comments on Proposed Consent Decree in *United States of America v. TPC Group, LLC*, Civil Action No. 24-00187, D.J. Ref. No. 90-5-2-1-12550(Jun, 30, 2024) at 7; *see also* referenced emission events at TCEQ Emissions Event Inventory, TPC Port Neches Operations (last visited June 11, 2024), https://www2.tceq.texas.gov/oce/eer/index.cfm.

additionally allow the ED to "conduct an investigation to develop a compliance history." *Id.* According to the recent public meeting on these compliance rule revisions, TCEQ investigations are a positive component of compliance history ratings. This is also evident when reviewing the formula to reach a compliance history rating because the investigations are included in the denominator. *See* § 60.2(e) (Complexity Formula).

Where a facility carries an unclassified designation, Commenters request additional rule revisions. First, that compliance history ratings designated as Unclassified include a notation on the compliance history worksheet explaining this means there is no compliance history. By including this notation, a member of the public can better comment and understand the designation for a facility that may have a permit up for comment. It is relevant for the public to know that an unevaluated facility—one with no compliance history—is seeking a permit or a permit renewal. Second, if a facility with an unclassified rating is up for a permit renewal, then a compliance review must be completed. If that review returns violations—then that investigation cannot be used as a positive component of that facility's compliance rating for a previously unclassified facility.

F. Data must be independently verified.

Better Brazoria additionally comments that one overarching flaw with the compliance system, generally, is that facilities are able to self-report. Self-reporting is akin to self-regulating, and that removes the power from the agency tasked with enforcing the environmental laws which protect public health. Any provision of the compliance rating system that relies on self-reporting must also include independent verification. All facilities who submit data must be subject to auditing and independent data verification.

III. CONCLUSION

Better Brazoria appreciates the opportunity to provide these comments and appreciates TCEQ has made improvements to the compliance history rules. Better Brazoria is hopeful that the TCEQ will continue improving the compliance history and rating regulations.

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