

## TCEQ "Compliance History" Rule Change to Affect Regulated Facilities in Texas

By: **Tim Wilkins and Ashlie W. Alaman**

June 29, 2012

At the direction of the Texas Legislature, the Texas Commission on Environmental Quality (TCEQ) has for the last decade provided "compliance history" regulations that generate a score for each regulated facility in the state based generally on the number and severity of violations the facilities have faced through environmental enforcement actions. TCEQ uses these scores as a public "report card" for regulated entities, as well as in decisions regarding the issuance, renewal, amendment, modification, denial, suspension or revocation of permits, enforcement, the use of announced inspections, and participation in innovative or voluntary programs.

In response to the Sunset Advisory Commission's criticisms of the existing compliance history scoring program and at the Legislature's direction, TCEQ adopted a rule on June 27, 2012 modifying the components and formula for compliance history calculations. TCEQ, which oversees regulatory compliance for 280,000 entities, had previously used an identical objective formula for all entities across all areas. This change marks the first material change to the compliance history program since its creation in 2002.

Although much of the compliance history rule stayed the same, several substantial changes were made that will greatly affect how owners and operators' compliance history scores and classifications are determined. These include:

**The Compliance Time Frame.** The compliance history rule "looks back" at a facility's five year history of inspections and enforcement actions in calculating its compliance history score. While the new rule still uses a five-year lookback for many enforcement actions including agreed orders, it only counts notices of violation (NOVs) occurring in the past year. The effect of this change will be to improve the compliance history score of facilities that have two- to five-year-old NOVs on their record.

**Other States.** Although the new rule provides that violations of environmental laws of other states will not be considered in calculating compliance history scores, enforcement orders, court judgments, consent decrees, and criminal convictions relating to compliance with Environmental Protection Agency

rules will continue to be factored in to a facility's score, provided that they are readily available to TCEQ. Since TCEQ compliance history scores are generated only for facilities located in Texas, the "other states" issue does not seem to be a particularly meaningful change.

**The Site Classifications.** One of the most substantial changes to the compliance history program is the development of industry groups. Instead of the former universal pool of facilities, sites will now be divided into groupings based on the North American Industry Classification System (NAICS) codes in order to better facilitate the comparison of similarly situated regulated entities within the same industry. Although this grouping will not affect how any individual facility's compliance history score is calculated, rulemakings mandating an expanded use of the codes, including use as a formal ranking or a stratified scoring formula, or use to classify point ranges based on the groupings, could occur in the future.

Another substantial change to how sites are classified - and how they are scored - is with the implementation of complexity points. Complexity points continue to be based on a site's participation in certain specific TCEQ programs (i.e., authorizations); its size, which is calculated using its facility identification numbers, the number of water quality external outfalls and the number of active hazardous waste management units; and location in a nonattainment area. The changes made to this portion of the rule include expansion of the factors used in calculating "program participation" points and size. The new rule includes several more programs; points will now be assigned for having a Title V operating permit, standard air permits, an Edwards Aquifer authorization, industrial hazardous waste registrations, radioactive waste storage or processing licenses, petroleum storage tank registrations, etc. Additionally, the new rule assigns three points to sites that are considered small entities, such as a city with a population of less than 5,000 or a small business which employs less than 100 full-time workers, and considers the number of storage tanks when calculating complexity points based on size. Each of these changes have the effect of increasing a site's total complexity points, causing like-kind violations to less negatively impact a highly "complex" facility's compliance history score than they would a less "complex" facility's score.

TCEQ also made several changes that strengthen how it defines and handles repeat violators. TCEQ will include in the calculation of a repeat violator's score all NOV's received within the last five years, rather than the last year only. And, although TCEQ will still consider size and complexity in deciding whether a facility is a repeat violator, the number of overall sites owned or operated is no longer included among the criteria for repeat violator classification. In addition to changing how many violations will lead to a repeat violator classification for facilities with different levels of complexity, the new rule is now clear that

TCEQ can only consider violations of the same nature, within the same media in deciding that a regulated entity is a "repeat violator." Under the new rule, a site which has had major violations documented on two occasions and which has less than 15 complexity points will be deemed a repeat offender; as well, all sites with major violations documented on at least three occasions will be classified as repeat violators, regardless of complexity points. Overall, the weight given to repeat violator status didn't change, still adding 500 points to the numerator of the compliance history formula, but the changes as adopted appear to increase the chances that an entity will be classified as a repeat violator.

**The Person Classifications.** As opposed to a simple averaging of a company's individual facility scores to generate a "person" compliance history score, a company's score will be calculated by adding the complexity weighted site ratings of all of the sites it owns or operates in the state of Texas. Each site with which a company is affiliated 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; the amounts will be added together to determine the person's compliance history rating.

**The Formula.** Two substantial changes were made to the compliance history scale and to the formula. First, the scoring scale was changed for satisfactory performers to be a calculated score between 0.10 and 55 points and for an unsatisfactory performer to be a score calculated at more than 55 points; this is a 10 point increase from the 45-point level at which unsatisfactory performance occurred under the previous rule. Second, with respect to the formula itself, TCEQ now provides that the number of points assigned for resolved violations will be reduced based on achievement of compliance with all ordering provisions; if an entity is compliant with all ordering provisions and has resolved all violations, the points attributable to that order will be reduced 25% for year three, 50% for year four, and 75% for year five, reducing the score-damaging effects of older violations that have been resolved through agreed order and corrected.

**Right of Review and Appeal.** Recognizing the harm that can be caused by erroneous scores, the new rule provides a never before offered quality assurance/quality control review period prior to the release of the scores on September 1. An owner or operator can review its pending score and classification by submitting a request to TCEQ by August 15 each year. Additionally, in conjunction with the changes to the classification score thresholds and the definition of repeat violator, the parameters for appeal of a classification changed; in addition to unsatisfactory persons having the right to appeal, the new rule

provides those classified as repeat violators and those classified as satisfactory with a score of 45 or more with the right to appeal.

**Timing.** Owners and operators concerned about the effect the changes will have on their compliance history scores and classifications should be mindful of timing and consider that the version of the compliance history rule used will depend on when the application for action (permitting, enforcement or otherwise) is received; compliance history ratings generated under the previous version of the rule will remain in effect for any applicable actions until the new rule formally takes effect on September 1, 2012.

**Elimination of "Average by Default."** Owners and operators that have previously been classified as "average by default" should be aware that the new rule will classify them as "unclassified" in an attempt to remove the implication that the absence of any compliance information means that they generally comply with environmental regulations.

## Conclusion

These changes will result in significant movement of regulated facilities in Texas both up and down the compliance history scale. Given the potentially important consequences of these reclassifications, we encourage companies to review their compliance histories through the prism of the new regulation in an effort to identify early any errors or concerns in how they are likely to be scored. We further encourage owners and operators of Texas facilities to take advantage of the right to review and comment on TCEQ's proposed re-scores prior to their publication in September.

Bracewell & Giuliani LLP makes this information available for educational purposes. This information does not offer specific legal advice or create an attorney-client relationship with the firm. Do not use this information as a substitute for specific legal advice. Attorney advertising.