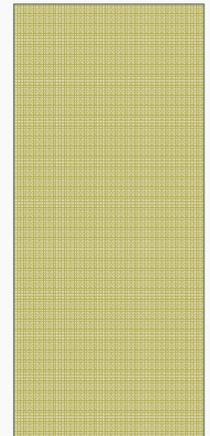


# PROPOSED TCEQ RULES WILL PARDON POLLUTERS

BY  
DR. MATTHEW TEJADA - AIR ALLIANCE OF HOUSTON  
DR. CYRUS REED - LONE STAR SIERRA CLUB  
PATRICIA GONZALES - PASADENA CITIZEN AND TOP MEMBER



# 6 FLAWED PROPOSALS

## **These proposed rules:**

1. Change the ranking system to make 6,000 polluters with poor records average
2. Allow the TCEQ Executive Director to pardon polluters by adjusting their repeat violator classification without any criteria or review
3. Make it very difficult for any “complex site” with many “complexity points” to ever be punished for or even be considered a repeat violator
4. Give polluters overly generous discounts for participating in environmental management and other pollution prevention programs
5. Make complexity points a fundamental part of the compliance history formula, making it very difficult for large, complex facilities to ever get an “unsatisfactory” rating
5. 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

# PURPOSE OF THESE RULES

- The purpose of compliance history is to offer both positive and negative incentives to facilities in order to encourage their focus on better compliance with existing rules and permits. These rules as currently proposed bend over backwards to protect industry from a poor rating and negative incentives. In so doing, the proposed rules fail to achieve their ultimate purpose – incentivizing protection of public health and the environment.
- This, in effect, completely counteracts the purpose of compliance history and would mean that the program remains as meaningless as it has been since its creation.
- In a **separate** rulemaking, TCEQ is proposing overly generous “regulatory” flexibility incentives that are easy to qualify for, meaning as a package these proposed rules make it easy to earn incentives but hard to ever be punished.

# THE NEW RANKING SYSTEM BUMPS 6,000 CURRENT POOR PERFORMERS INTO THE AVERAGE CATEGORY

- If adopted more than 70% of the 200,000 rated facilities would have a “satisfactory” compliance history and the number of those with an “unsatisfactory” compliance history would shrink from 5% to less than 3%
- These rules are increasing the trigger level at which unsatisfactory performance occurs from 45 points to 55 points. By arbitrarily bumping these levels up, the TCEQ is striking at the very purpose of this program and dooming it to be just as inconsequential for the next decade as it has been for the previous.
- The TCEQ has some flexibility in setting the trigger for an unsatisfactory rating. These proposed rules allow someone with more than 50 compliance history points to be satisfactory – that’s an awfully weak message to send.
- We urge the TCEQ to reduce the trigger point back to 45. If this program is actually going to perform its function, then we must reward those that are truly doing good and offer real incentives for poor performers to improve operational performance.

**ALLOWS THE EXECUTIVE DIRECTOR TO PARDON  
POLLUTERS BY ADJUSTING THEIR REPEAT  
VIOLATIONS WITHOUT ANY CRITERIA OR APPEAL**

- On page 62- Repeat violator exemption. 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
- There are no criteria to be considered by the executive director in adjusting the repeat violator classification. As written, this is just a blanket and completely non-transparent clemency provision with no right of appeal by the public. This section is ripe for abuse.

**NO SPECIFICATION OF AN EMISSION OF “SAME ENVIRONMENTAL MEDIA” AND HOW SUCH CAN BE USED TO ENHANCE PENALTIES FOR REPEAT VIOLATORS**

- (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
- We suggest defining the words “same environmental media” in the repeat violator section on page 56. This would possibly give the polluter an excuse by saying 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 volatilized benzene, and thus would not qualify as a repeat violation.

## **POLLUTERS GIVEN DISCOUNTS THAT ARE TOO BIG FOR PARTICIPATING IN ENVIRONMENTAL MANAGEMENT AND OTHER POLLUTION PREVENTION PROGRAMS**

- The discounts for participating in environmental management and other pollution prevention programs run by TCEQ have been raised from 10% today to 25%. Under the proposal, the ranking could be discounted by up to 25% for participation in three pollution prevention programs plus having an environmental management plan for more than a year, regardless of whether or not these programs are successful or have led to actual environmental improvements.

## NEXT TO IMPOSSIBLE FOR ANY “COMPLEX SITE” WITH MANY “COMPLEXITY POINTS” TO EVER BE CONSIDERED A REPEAT VIOLATOR

- 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, 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.
- Similarly, TCEQ proposes adding complexity points into the denominator of the compliance history formula, making it extremely difficult for any complex site to ever receive an “unsatisfactory” rating
- 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 needs to be lowered,
  - the number of complexity points needs to be raised for facility categories which are all complex, or
  - the values given complexity points need to be lowered

## **PROPOSED NEW CHAPTER 90 MAKES IT VERY EASY TO QUALIFY FOR REGULATORY INCENTIVES**

- While new Chapter 60 makes it too hard to ever get slapped for having poor compliance, new Chapter 90 makes it too easy to qualify for new regulatory flexibility and other incentives;
- There is no provision in the proposed rules that would not allow an entity with an unsatisfactory compliance record to participate in an innovative program and receive regulatory “flexibility;”
- Gives executive director ability to consider any “factor” in providing incentives
- Requires a very low application fee of \$250 for a “Regulatory Flexibility Order.”
- Only requires a review of an Environmental Management System that received incentives once every three years;

# RECOMMENDATIONS

- Reduce the number of complexity points both for formula and repeat offender;
- Lower the threshold for “unsatisfactory” back to 45;
- Take away or better define ability of executive director to determine what factors to consider in granting regulatory flexibility and who is a “repeat offender;”
- Lower compliance history discounts or at least require actual demonstrated improvements for participation in voluntary programs;
- Require more frequent review of Environmental Management Systems and assess performance.