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Texas Pardons Pollution (Again!)

The Texas Commission for Environmental Quality’s (TCEQ) Compliance History program has never worked and new rules proposed by the state’s environmental agency could cause thousands of previously categorized “poor” performers to be bumped up to “average” without having removed an ounce of pollution from our air and water.

Texas law requires that TCEQ consider a facility’s past compliance when making decisions regarding permits, inspections or penalties for violations. “The TCEQ has for over a decade attempted to use an incentive structure – the Compliance History program – to reward good behavior at the thousands of facilities it regulates around the state, from your local gas station to the refinery that produces that gas,” said Matthew Tejada, Executive Director of the Air Alliance of Houston. “A facility’s Compliance History score affects every bit of its business with the TCEQ.”

Late Wednesday, TCEQ released a report of the previous year’s Compliance History database using the new calculations they are proposing in the rules. “Our analysis of the data shows that 5% of the over 250,000 facilities regulated by TCEQ are currently classified as having a “poor” compliance history, and that would drop to 3% using the new calculations,” said Tom “Smitty” Smith, Director of the Texas office of Public Citizen. “Texas had an excellent opportunity to fix the Compliance History program during the recent Sunset Commission review of the TCEQ. Unfortunately, most of the statutory changes to the program appear to have only further cemented its faults in place and given an even bigger free pass to some of the state’s worst performers. As written, these new 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. 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.”

A public hearing on these rules is scheduled at the TCEQ on Tuesday, March 6th. Texans need to let the TCEQ know that they want a system that works to protect their health and environment and not give big polluters yet another free pass.

“One, and possibly the only, major improvement was that the Compliance History scores are now separated by industry type. Before, the TCEQ put every facility into one big hopper, meaning that your local gas station was being compared to a big refinery,” said Cyrus Reed of the Lone Star Chapter of Sierra Club.

“While that one change was a step in the right direction, it will fall far short of the reforms needed to actually deliver the intent of the Compliance History program – rewarding good actors for their good behavior and offering incentives to poor performers to clean up their acts,” continued Reed. “The problem with the existing structure is that basically every facility comes out average. You don’t have to be a policy genius to know that incentives don’t work if everyone stays in the middle.”

This current problem is made worse because the Texas Legislature saw fit to drastically limit the compliance information that state staff can use to generate Compliance History scores. The law now bars the TCEQ from looking at more than one year’s worth of notices of violation, one of the most common types of compliance information.

“This is a near debilitating limitation,” said Tejada. “However, it could still be possible for the agency to craft a program which effectively separates the good from the average from the poor performers.”

“Unfortunately, in its rulemaking, the TCEQ has introduced even more limitations which will only further serve to keep every facility average. These changes include lowering the score by which a performer falls into the poor category, giving the TCEQ Executive Director extraordinary authority to change a facility’s classification, and handing out bonus points for ill-defined and unregulated voluntary measures that a facility can implement.”

Chris Young of the Texas Organizing Project said, “If the Compliance History program reforms go forward as currently written, nothing will change, which is a shame. Compliance History is a good idea that has never been executed effectively. We are missing out on two major opportunities by continuing to pretend that all facilities in this state are average.”

“First, we miss a chance to implement the type of regulation that a lot of people in our state prefer.”

“For those of us living along the fenceline of the polluters, it doesn’t improve our air, our water or our health to have TCEQ grade these industries on the curve,” said from Patricia Gonzalez, a member of the Texas organizing Project and Pasadena, TX resident, a highly polluted part of the state.

“In addition to this rule, rules for another section of the regulatory code that are coming up will makes it too easy to qualify for new regulatory flexibility and other incentives,” said Reed. “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, and gives the executive director ability to consider any factor in providing incentives. With a very low application fee of \$250 for a **Regulatory Flexibility Order** and

requiring only a review of an Environmental Management System that received incentives once every three years, this provision reduces even further any teeth that the compliance history score might have in reducing pollution in the state.”

Reed concludes, “Finally and most importantly, we miss a huge opportunity to try to clean up the air and water around our state in a business friendly manner. At a time when the challenge of grappling with an increasing array of environmental and health threats to our state and population gets harder every day, we cannot afford to let such opportunities pass us by. We urge the TCEQ to reconsider its Compliance History rules, and deliver a program to the people of the state of Texas that works.”