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# Much Ado about Something: TCEQ Proposes Changes to Penalty Policy and Compliance History Rule in Response to Recent Industrial Incidents

By Patrick J. Larkin, Maram T. Salaheldin / Oct 12, 2020

Last month, we discussed the [uncertainty many businesses face as they navigate environmental compliance and enforcement issues arising due to the COVID-19 pandemic](#). We noted that the change and upheaval of 2020 for environmental, health, and safety (EHS) compliance professionals is likely to continue into 2021. Consistent with that theme, the Texas Commission on Environmental Quality (TCEQ) has proposed to revise and strengthen its Penalty Policy and has announced its intent to similarly revise its Compliance History Rule. These proposals suggest that in 2021 and beyond, Texas businesses may see increased enforcement and penalty amounts.

Affected stakeholders should consider commenting on the proposed Policy and Rule changes and, more directly, should consider [conducting self-audits](#) under the [Texas EHS Audit Privilege Act](#) or the [EPA Audit Policy](#) to reduce or eliminate penalty exposure from noncompliance at their facilities. The public comment period for the proposed revisions to the Penalty Policy remains open until October 30, 2020, and the public comment period for the revisions to the Compliance History Rule is anticipated to run from January 1, 2021, to February 3, 2021. Clark Hill's Environment, Energy, and Natural Resources (EENR) team will discuss opportunities and pitfalls under the Texas Audit Act and EPA Audit Policy in an [upcoming webinar](#) this Thursday, October 15th.

## “Intended to Promote Deterrence to Future Noncompliance”

Industrial accidents, such as the 2017 Arkema explosion of organic peroxides after Hurricane Harvey and the 2019 Intercontinental Terminals Company fire that blazed for three days, have been a major driver behind the proposed changes to both the Penalty Policy and the Compliance History Rule. The TCEQ [proposal](#) notes that its Penalty Policy has not been amended since April 1, 2014, and in the intervening years, “recent incidents have caused significant impacts to the public and the environment demanding accountability within the bounds of TCEQ authority.”

If the changes to the Penalty Policy are adopted as proposed, regulated entities can expect:

- Revised Petroleum Storage Tank major and minor source threshold (from >50,000 gallons to >100,000 gallons);
- Increased percentages in the Environmental/Property and Human Health Matrix and the Programmatic Penalty Matrix;
- Additional flexibility in determining the number of violation events;
- An upward adjustment for air emission events in counties with a population of 75,000 or greater; and
- Removal of the 20% deferral provided for expedited enforcement for matters that have two or more prior administrative penalty orders, as set out in Texas Water Code (TWC) Section 7.105.

Collectively, these changes may mean significant increases in future penalty amounts, and with TCEQ's explicit statement of the intent of these changes being “to promote deterrence to future noncompliance”, businesses should anticipate increased enforcement activity. The summary of the proposed changes and the proposed revised Policy can be found in [this memorandum](#).

Similarly, proposed revisions to the Compliance History Rule “would allow the executive director to change a site's compliance history classification to a new classification if that site has caused, suffered, allowed, or permitted the creation of exigent circumstances, such as a major explosion or fire that impacts the surrounding community and environment.”

## Keeping One Eye on the Horizon

Businesses wishing to submit comments on the Penalty Policy changes may do so [before the October 30, 2020 deadline](#). Perhaps more importantly, businesses should keep one eye on the horizon and begin planning for the anticipated changes, both to the Penalty Policy and to the Compliance History Rule. This may be a strategic time for facilities to consider conducting a self-audit under either the Texas Audit Act or EPA's Audit Policy and take advantage of the incentives they offer for self-disclosure, correction, and prevention of violations.

Clark Hill's EENR attorneys develop options and execute strategies for achieving environmental compliance. If you have any questions about your Texas operations, please contact [Patrick J. Larkin](#), [Ashley T. Kisner](#), and [Tobias Smith](#), and be sure to register for the [upcoming EENR webinar](#) this Thursday, October 15th, for further insights on self-audit/self-disclosure options nationwide.