Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1010

The Texas Education Agency adopts an amendment to §61.1010, concerning additional state aid for school districts that contract to partner to operate a district campus. The amendment is adopted without changes to the proposed text as published in the March 11, 2022 issue of the *Texas Register* (47 TexReg 1164) and will not be republished. The adopted amendment reflects changes by House Bill (HB) 1525, 87th Texas Legislature, Regular Session, 2021, which allows resource campuses to receive additional funding under Texas Education Code (TEC), §48.252.

REASONED JUSTIFICATION: Section 61.1010 provides an additional entitlement through the Foundation School Program for school districts that enter contracts to partner to operate a district campus under TEC, §11.174 and §11.157(b).

HB 1525, 87th Texas Legislature, Regular Session, 2021, amended TEC, §48.252(a), to expand the entitlement to a school district that operates a resource campus as provided by new TEC, §29.934(c). A designated resource campus qualifies for funding for each year the campus maintains approval to operate as a resource campus. To align with HB 1525, the adopted amendment to §61.1010 adds language throughout the rule referencing resource campuses and adds a definition for resource campus in subsection (b)(3).

Further, HB 1525 repealed advanced career and technology funding while preserving the P-TECH and New Tech Network funding under TEC, §48.106, Career and Technology Education Allotment. Therefore, the adopted amendment to subsection (e)(1) updates the allotment name and statutory reference. Also, the Fast Growth Allotment under TEC, §48.111, is added as an excluded allotment in new subsection (e)(6) because the allotment is no longer applicable on the campus level.

The adopted amendment also updates the statutory reference related to the School Safety Allotment to reflect the recodification of TEC, §42.168 to §48.115.

Finally, technical edits are made throughout the rule for consistency.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began March 11, 2022, and ended April 11, 2022. No public comments were received.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §48.252, as amended by House Bill (HB) 1525, 87th Texas Legislature, Regular Session, 2021, which authorizes the commissioner of education to adopt rules necessary for the implementation of an entitlement for school districts that enter into a contract to operate a district campus under TEC, §11.174 or §11.157(b), or school districts that operate a resource campus under TEC, §29.934; and TEC, §29.934, added by HB 1525, 87th Texas Legislature, Regular Session, 2021, which authorizes the commissioner to adopt rules related to resource campuses.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §48.252, as amended by House Bill (HB) 1525, 87th Texas Legislature, Regular Session, 2021; and §29.934, added by HB 1525, 87th Texas Legislature, Regular Session, 2021.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 1, 2022.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1032

The Texas Education Agency adopts an amendment to §61.1032, concerning instructional facilities allotment. The amendment is adopted without changes to the proposed text as published in the February 4, 2022 issue of the *Texas Register* (47 TexReg 446) and will not be republished. The adopted amendment implements House Bill (HB) 3, 86th Texas Legislature, 2019, by reflecting the use of current year property values in calculations and updating cross references to statute. The adopted amendment also clarifies the term "state information depository."

REASONED JUSTIFICATION: The adopted amendment to 19 TAC §61.1032 exercises the commissioner's authority to adopt rules to implement the Instructional Facilities Allotment program under Texas Education Code (TEC), Chapter 46, Subchapter A, which provides assistance to school districts in making debt

service payments on qualifying bond or lease-purchase agreements. Bond or lease-purchase proceeds must be used for the construction or renovation of an instructional facility.

HB 3, 86th Texas Legislature, 2019, recodified TEC, Chapter 41, to Chapter 49 and Chapter 42 to Chapter 48. The adopted amendment to §61.1032 reflects updated statutory references required by the recodification. HB 3 also required utilizing current year property values in calculations instead of prior year property values. The adopted amendment also updates those references. In addition, the adopted amendment clarifies the term "state information depository." Specifically, the following changes were made.

The adopted amendment eliminates references in subsections (a), (b), and (t) to state information repository and replaces them with state information depository for consistency. The Municipal Advisory Council defines itself as the state information depository.

Subsection (h)(2) describes the data source used for prioritization of awards. In alignment with changes made by HB 3, the subsection was modified to indicate that property values under TEC, §48.269, shall be used instead of values from the preceding tax year. In addition, subsection (h)(6) was modified to indicate property values certified by the comptroller for the current year under TEC, §48.256, will be used for final calculations of assistance instead of preceding year values.

Subsection (j)(4) and (5) were updated to reflect the recodification by HB 3 from TEC, Chapter 42, to Chapter 48. The reference in (j)(4) was changed from TEC, §42.257, to §48.271.

Subsections (o), (p), and (q) were updated to reflect the recodification by HB 3 from TEC, Chapter 42, to Chapter 48. The references in subsection (p) were changed from TEC, §42.302, to §48.202 and TEC, §42.303, to §48.203.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began February 4, 2022, and ended March 7, 2022. No public comments were received.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §46.002, which permits the commissioner of education to adopt rules for the implementation of the TEC, Chapter 46, Subchapter A; TEC, §46.003, which provides for an allotment of state funds to certain school districts to pay the principal and interest on eligible bonds issued to construct, acquire, renovate, or improve an instructional facility; TEC, §46.004, which permits a district to receive assistance in connection with a lease-purchase agreement concerning an instructional facility; TEC, §46.005, which provides for certain limits on the amount of state and local funds that a district may be awarded under TEC, §46.003; TEC, §46.006, which defines the process for allocating funding for new projects if the amount appropriated is less than the amount of money to which school districts applying for state assistance are entitled for that year; TEC, §46.007, which outlines the requirements for refunding bonds to be eligible for state assistance; TEC, §46.009, which provides for the amounts and timing of payments of state assistance to school districts; TEC, §46.013, which clarifies that school districts are not eligible for state assistance under TEC, Chapter 46, Subchapter A, for any taxes for which a district receives assistance under TEC, Chapter 48, Subchapter E; and TEC, §46.061, which permits the commissioner of education to adopt rules governing state assistance for refinancing school district debt. The commissioner may allocate state assistance for a refinancing to TEC, Chapter 46, Subchapter A.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§46.002-46.007, 46.009, 46.013, and 46.061.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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19 TAC §61.1035

The Texas Education Agency adopts an amendment to §61.1035, concerning school facilities. The amendment is adopted without changes to the proposed text as published in the February 4, 2022 issue of the *Texas Register* (47 TexReg 452) and will not be republished. The adopted amendment implements House Bill (HB) 3, 86th Texas Legislature, 2019, by reflecting the use of current year property values in calculations and updating cross references to statute.

REASONED JUSTIFICATION: The adopted amendment to 19 TAC §61.1035 exercises the commissioner's authority to adopt rules to implement the Existing Debt Allotment program under Texas Education Code (TEC), Chapter 46, Subchapter B, which assists certain school districts with state support for the payment of principal and interest on eligible bonds.

HB 3, 86th Texas Legislature, 2019, recodified TEC, Chapter 41, to Chapter 49 and Chapter 42 to Chapter 48. The adopted amendment to §61.1035 reflects updated statutory references required by the recodification. HB 3 also requires utilizing current year property values in calculations instead of prior year property values. The adopted amendment reflects those changes to statute. Specifically, the following changes were made.

Subsection (e)(1) was updated to reflect that estimates of current year property values under TEC, §48.269, will be used for preliminary payment of state assistance calculations instead of preceding year values.

Subsection (e)(2) was updated to reflect that current year property values defined by TEC, §48.256, will be used for near final determination of payment of state assistance rather than prior year values. In addition, the reference to TEC, §42.2521, was updated to reference TEC, §48.258.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began February 4, 2022, and ended March 7, 2022. No public comments were received.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §46.031, which permits the commissioner of education to adopt rules necessary for the implementation of TEC, Chapter 46, Subchapter B; TEC, §46.032, which provides for an allotment of state funds to certain school districts to assist with the payments of principal and interest on eligible bonds; TEC, §46.033, which specifies which bonds may be eligible for state assistance; TEC, §46.034, which provides

for certain limits on state assistance; TEC, §46.035, which addresses the timing of payments of state assistance to school districts; TEC, §46.036, which clarifies that open-enrollment charter schools are not eligible for state assistance under TEC, Chapter 46, Subchapter B; TEC, §46.037, which clarifies that school districts are not eligible for state assistance under TEC, Chapter 46, Subchapter B, for any taxes for which a district receives assistance under TEC, Chapter 48, Subchapter E; and TEC, §46.061, which authorizes the commissioner to provide by rule for the payment of state assistance under the TEC, Chapter 46, to refinance school district debt.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code (TEC), §§46.031-46.037 and 46.061.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 101. ASSESSMENT

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF THE ACADEMIC CONTENT AREAS TESTING PROGRAM

DIVISION 1. IMPLEMENTATION OF ASSESSMENT INSTRUMENTS

19 TAC §§101.3011, 101.3012, 101.3014

The Texas Education Agency (TEA) adopts amendments to §§101.3011, 101.3012, and 101.3014, concerning implementation of assessment instruments in the academic content areas testing program. The amendments are adopted without changes to the proposed text as published in the March 18, 2022 issue of the *Texas Register* (47 TexReg 1364). The rules will not be republished. The adopted amendments align the rules with House Bill (HB) 4545, 87th Texas Legislature, Regular Session, 2021, which eliminated requirements associated with the Student Success Initiative (SSI), including the parental notification and reporting requirements, and the postsecondary readiness assessments required in Texas Education Code (TEC), §39.0238.

REASONED JUSTIFICATION: With changes to the TEC introduced by HB 4545, 87th Texas Legislature, Regular Session, 2021, TEA determined that conforming amendments to its assessment rules needed to be made.

Section 101.3011, Implementation and Administration of Academic Content Area Assessment Instruments, cites the specific testing requirements for different groups of students. The postsecondary readiness assessments that were required in TEC, §39.0238, were eliminated by HB 4545 and, thus, have been removed from the rule. The language of subsection (a)(4) has been amended to clarify that assessments not required to be administered to a student could not be used to deny a student promotion.

Section 101.3012, Parent Notification, outlines parental notification requirements for graduation and grade advancement assessments. As the SSI grade advancement requirements were eliminated by HB 4545, subsection (b) of the rule has been removed.

Section 101.3014, Scoring and Reporting, indicates the scoring and reporting requirements for certain assessments. Subsection (d) of the rule has been removed, as it states the reporting requirements for SSI grade advancement assessments. Subsection (e), relettered as new subsection (d), has been amended to clarify the start date for the scoring timeline based on the move away from paper assessments under TEC, §39.023.

Finally, technical edits related to statutory references have been made to ensure consistency across administrative rules

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began March 18, 2022, and ended April 18, 2022. Following is a summary of the public comment received and the agency response.

Comment: The Texas School Alliance (TSA) expressed concern about the proposed amendment to §101.3014, Scoring and Reporting. TSA indicated that the 21-day period for score reports would have unintended consequences and recommended a 10-day period.

Response: The agency disagrees with this comment. The 21-day period is the time allowed by TEC, §39.023(h). Nonetheless, the agency will continue to produce score results as soon as possible after the assessments are administered.

STATUTORY AUTHORITY. The amendments are adopted under House Bill (HB) 4545, 87th Texas Legislature, Regular Session, 2021, which repealed Texas Education Code (TEC), §28.0211(d), which required districts to notify the student's parent or guardian of the student's failure to perform satisfactorily on the assessment, the accelerated instruction program to which the student is assigned, and the possibility that the student might be retained at the same grade level for the next school year; TEC, §28.0211(o) and (p), which provide that accelerated students in Grades 5 and 8 are not required to take their grade-level assessment and may not be denied promotion based on their performance on an assessment not required to be administered to the student; TEC, §39.023(a), (a-2), (b), (c), and (l), which specify the required testing for students in Grades 3-8, accelerated students, students who are significantly cognitively disabled, students enrolled in high school courses, and students whose primary language is Spanish, respectively; TEC, §39.023(c-5), which requires a student's performance on an assessment be included in the student's academic achievement record. Subsection (h) requires the agency to return assessment results to districts within 21 days; TEC, §39.02315, which requires separate reporting of assessment results for out-of-state transfer students; TEC, §39.025(a), (f), and (g), which specify the testing requirements to earn a high school diploma, as well as the required notice of these requirements; TEC, §39.030, which specifies the confidentiality and reporting requirements associated with assessment results; and The Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, §1111(b)(2)(C), which allows

states to exempt Grade 8 students from their grade-level assessment and instead take and use a score from the state's end-of-course assessment for accountability purposes as long as a more advanced assessment is taken to fulfill accountability requirements in high school.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§28.0211, as amended by House Bill 4545, 87th Texas Legislature, Regular Session, 2021, 39.023, 39.02315, 39.025, and 39.030; and the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, §1111(b)(2)(C).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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CHAPTER 103. HEALTH AND SAFETY
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SAFE SCHOOLS

19 TAC §103.1209

The Texas Education Agency (TEA) adopts an amendment to §103.1209, concerning mandatory school drills. The amendment is adopted with changes to the proposed text as published in the February 4, 2022 issue of the *Texas Register* (47 TexReg 454) and will be republished. The adopted amendment implements Senate Bill (SB) 168, 87th Texas Legislature, Regular Session, 2021, which required the adoption of rules for best practices for conducting emergency school drills and exercises, including definitions for relevant terms.

REASONED JUSTIFICATION: Texas Education Code (TEC), Chapter 37, Subchapter D, addresses the protection of school buildings and grounds. Specifically, TEC, §37.114, addresses mandatory school drills. SB 168, 87th Texas Legislature, Regular Session, 2021, amended TEC, §37.114, to require that the commissioner of education, in consultation with the Texas School Safety Center and the state fire marshal, adopt rules for best practices related to emergency drills and exercises, including definitions for relevant terms. The adopted amendment to §103.1209 implements SB 168 by expanding definitions and establishing best practices.

Subsection (a) was amended to stipulate that drills do not include persons acting as active aggressors or other simulated threats.

Subsection (b) was amended to include additional definitions for drills and exercises and modify existing definitions. In addition, clarification was added that the definitions do not apply to an active threat exercise, which is defined in TEC, §37.1141, and any associated rules.

Technical changes were made in subsection (c) to conform the names of the drills listed in subsection (c)(1)-(5) with their definitions in subsection (b). In addition, subsection (c)(6) was modified to address the required frequency for fire evacuation drills, including for school districts without a local fire marshal.

New subsection (d) was updated to provide best practices for conducting drills and exercises.

Based on public comment, subsection (d)(3)(E) was amended at adoption to clarify that drills and exercises must be age and developmentally appropriate.

In addition, non-substantive technical edits were made at adoption to the definition of "full-scale exercise" in subsection (b)(6).

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began February 4, 2022, and ended March 7, 2022. Following is a summary of the public comments received and the corresponding agency responses.

Comment: Sandy Hook Promise, Children's Defense Fund of Texas, Hogg Foundation for Mental Health, Texas-American Federation of Teachers (Texas AFT), Texas Gun Sense, and a school administrator raised concerns about the anxiety, trauma, and negative impact on the mental health of students participating in simulation exercises and recommended amending the definitions of operation-based exercise, full-scale exercise, and functional exercise to explicitly prohibit student participation.

Response: The agency disagrees with the recommendation and provides the following clarification. The terms provide a description of each drill or exercise type and are aligned with the Texas School Safety Center's guidance on drills and exercises.

Comment: The Texas Association of School Boards (TASB) recommended changing the definitions of exercise, full-scale exercise, functional exercise, tabletop exercise, and workshop exercise to match the Homeland Security Exercise Evaluations Program and Federal Emergency Management Agency definitions.

Response: The agency disagrees with the recommendation and provides the following clarification. The terms provide a description of each drill or exercise type and are aligned with the Texas School Safety Center's guidance on drills and exercises. Aligning with one entity for guidance eliminates conflicting information and an undue burden on local education agencies (LEAs).

Comment: The Texas State Teacher's Association (TSTA), Sandy Hook Promise, Intercultural Development Research Association, Texas Coalition for Healthy Minds, and Children's Defense Fund of Texas raised concerns about the anxiety, fear, and psychological trauma that active aggressor simulations induce in children and recommended students be explicitly prohibited from participation in active shooter simulations, active aggressor simulations, and other exercises that include simulated threats.

Response: The agency provides the following clarification. The best practices for designing and conducting drills and exercises are recommendations of what LEAs should do to protect the physical and psychological safety of students, staff, and other members of the school community while designing and conducting drills and exercises. Best practices are not requirements but provide guidance in conducting the mandatory drills specified in §103.1209(c). Active threat exercises are addressed in proposed new §103.1211 and, therefore, fall outside the scope of this proposed rulemaking.

Comment: Intercultural Development Research Association and TSTA recommended that drill and exercise design elements be amended to include required mental health professional

involvement before, during, and after drills and exercises are conducted.

Response: The agency provides the following clarification. The best practices for designing and conducting drills and exercises are recommendations of what LEAs should do to protect the physical and psychological safety of students, staff, and other members of the school community while designing and conducting drills and exercises. Mental health professionals are recommended stakeholders in designing and conducting drills and exercises.

Comment: Texas Center for Healthy Minds, Hogg Foundation for Mental Health, and Texas AFT recommended that active aggressor simulations only be conducted when students are not present on campus.

Response: This comment is outside the scope of this proposed rulemaking. Active threat exercises are addressed in proposed new §103.1211.

Comment: Sandy Hook Promise and Texas AFT recommended that if student participation in active aggressor exercises is not explicitly prohibited, parents and guardians must be provided with control over their student's exposure to active aggressor simulations by opting their student into participation in the exercise.

Response: This comment is outside the scope of this proposed rulemaking. Active threat exercises are addressed in proposed new §103.1211.

Comment: Texas AFT, TSTA, Intercultural Development Research Association, and Sandy Hook Promise recommended that best practices include a requirement for schools to designate a reasonable amount of time for postvention services following a drill or exercise.

Response: The agency provides the following clarification. The best practices for designing and conducting drills and exercises are recommendations of what LEAs should do to protect the physical and psychological safety of students, staff, and other members of the school community while designing and conducting drills and exercises. Mental health professionals are recommended stakeholders who provide input into the design of drills and exercises, including postvention services to account for the psychological safety of participants.

Comment: A public school administrator recommended amending the definitions so that there is not a distinction between evacuation drill and fire evacuation drill and that the definitions of lockdown drill and secure drill include a statement about not assigning staff to secure school grounds, which could place their lives in jeopardy.

Response: The agency disagrees with the recommendation and provides the following clarification. The terms provide a description of each drill or exercise type and are aligned with the terms used in the Texas School Safety Center's guidance on drills and exercises.

Comment: The Texas Public Charter School Association (TPCSA) recommended adding clarity to definitions for secure, shelter for severe weather, shelter for hazmat, fire evacuation, and evacuation to reduce confusion among school district staff and local fire marshals.

Response: The agency disagrees with the recommendation and provides the following clarification. The terms provide a description of each drill or exercise type and are aligned with the terms used in the Texas School Safety Center's guidance on drills and exercises.

Comment: Intercultural Development Research Association and TSTA recommended data from drills and exercises be reviewed annually and used to update future content.

Response: The agency provides the following clarification. Section 103.1209(d)(3)(D) includes the best practice of planning for post-drill or after-action review of each drill and exercise that an LEA could use to identify opportunities to address in future drills and exercises.

Comment: Sandy Hook Promise recommended requiring students to participate in an evidence-based violence prevention program and receive training in recognizing signs of potential danger.

Response: This comment is outside the scope of this proposed rulemaking.

Comment: Intercultural Development Research Association recommended including best practices to promote a positive school climate and expand programs for student safety.

Response: This comment is outside the scope of this proposed rulemaking.

Comment: The Hogg Foundation for Mental Health recommended requiring input from stakeholders in the design of drills and exercises. The Association of Texas Professional Educators (ATPE), TASB, and an individual recommended amending the stakeholder list to explicitly identify teachers and principals in addition to school staff, include city and community emergency management personnel in addition to first responders, and include campus safe and supportive schools program team members as stakeholders.

Response: The agency provides the following clarification. The best practices for designing and conducting drills and exercises are recommendations of what LEAs should do to protect the physical and psychological safety of students, staff, and other members of the school community while designing and conducting drills and exercises. The list of recommended stakeholders is not an exhaustive list, and an LEA can include additional members.

Comment: A public school administrator and an individual recommended removing the advance notice recommendation from drills that do not include active aggressor simulations so that the response of staff and students is tested.

Response: The agency disagrees with the recommendation and provides the following clarification. Advance notification is an important best-practice that reduces the potential for inducing trauma and anxiety in staff, students, and other participants of the drill or exercise.

Comment: Child Defense Fund of Texas recommended the addition of a requirement to provide an explicit disclosure of the details of an active shooter exercise.

Response: This comment is outside the scope of this proposed rulemaking.

Comment: TASB recommended removing first responders and families from the stakeholders providing input in the design of drills and exercises because their membership is included in the School Safety and Security Committee.

Response: The agency disagrees with the recommendation and provides the following clarification. First responders and families are critical stakeholders in designing and conducting drills and exercises due to the direct impact that drills and exercises may have on them.

Comment: An individual raised a concern that specifying that drills do not include persons role playing as active aggressors has a negative impact on campus preparedness. The commenter stated that this stipulation may also be interpreted to preclude campuses from other types of simulations being used in drills. The commenter recommended changing the rule language so it only applies to drills involving students as participants.

Response: The agency disagrees with the recommendation and provides the following clarification. Drills test a single specific operation. Adding an active aggressor to a drill adds an additional element, which results in multiple operations being tested.

Comment: TPCSA recommended that best practices not be included in the rule but rather that best practices, guidance, and reporting requirements be provided by the Texas School Safety Center and no other entity.

Response: The agency disagrees with the recommendation and provides the following clarification. TEC, §37.114, requires the commissioner, in consultation with the Texas School Safety Center and the state fire marshal, to adopt rules providing for best practices for conducting mandatory drills and exercises.

Comment: ATPE recommended amending the rule to specify that only parents and guardians must receive advance notification.

Response: The agency disagrees with the recommendation and provides the following clarification. Advance notification should be provided to all members of the school community that may be impacted by the drill or exercise, including students, staff, parents, and guardians.

Comment: ATPE recommended adding "age and developmentally" to clarify the term "appropriate" as a design element of drills and exercises.

Response: The agency agrees and has modified subsection (d)(3)(E) at adoption to reflect the change.

Comment: ATPE recommended including the execution of post-drill trauma-informed care for students to the design elements.

Response: The agency provides the following clarification. Mental health professionals are recommended stakeholders who provide input into the design of drills and exercises, including postvention services that may involve trauma-informed care to account for the psychological safety of participants.

Comment: An individual raised concern that proposing that LEAs should comply with their local fire marshal regulations and recommendations may put an undue burden on the LEA. The commenter recommended that fire marshal recommendations be removed from the rule.

Response: The agency disagrees with the recommendation and provides the following clarification. Local fire marshals are best suited to provide requirements and recommendations that meet the needs of their specific communities. A recommendation by the local fire marshal is a suggested course of action that protects lives and school property.

Comment: An individual recommended amending the definition of full-scale exercise so that all public safety agencies can activate or operate the emergency operation center.

Response: The agency disagrees with the recommendation and provides the following clarification. The terms provide a description of each drill or exercise type and are aligned with the terms used in the Texas School Safety Center's guidance on drills and exercises.

Comment: TPCSA recommended that participation in non-mandatory drills and exercises by non-school entities be required only to the extent possible or practicable.

Response: This comment is outside the scope of this proposed rulemaking.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §37.114, as amended by Senate Bill 168, 87th Texas Legislature, Regular Session, 2021, which requires the commissioner of education, in consultation with the state fire marshal and Texas School Safety Center, to adopt rules providing best practices for conducting emergency drills and exercises, including definitions for relevant terms, and designating the number and type of mandatory school drills to be conducted each semester of the school year, not to exceed a total of eight drills.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §37.114, as amended by Senate Bill 168, 87th Texas Legislature, Regular Session, 2021.

§103.1209. Mandatory School Drills.

(a) Requirement. Each school district and open-enrollment charter school shall conduct emergency safety drills in accordance with Texas Education Code (TEC), §37.114. Drills do not include persons role playing as active aggressors or other simulated threats.

(b) Definitions and related terms. The following words and terms related to drills and exercises, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. These definitions do not apply to an active threat exercise, which is defined in TEC, §37.1141, and associated rules, if any.

(1) Active aggressor--An individual actively engaged in killing or attempting to kill people in a confined and populated area.

(2) Drill--A set of procedures that test a single, specific operation or function. Drills do not include persons role playing as active aggressors or other simulated threats. Drill examples include evacuating for a fire or locking down from an internal threat.

(3) Evacuation drill--A response action schools take to quickly move students and staff from one place to another. The primary objective of an evacuation is to ensure that all staff, students, and visitors can quickly move away from the threat. Evacuation examples include a bomb threat or internal gas leak.

(4) Exercise--An instrument to train for, assess, practice, and improve performance in mitigation, prevention, preparedness, response, and recovery in a risk-free environment. While drills and exercises may overlap in some aspects, discussion-based and operation-based exercises are often more in depth and multi-faceted.

(5) Fire evacuation drill--A method of practicing how a building would be vacated in the event of a fire. The purpose of fire drills in buildings is to ensure that everyone knows how to exit safely as quickly as possible.

(6) Full-scale exercise--Typically the most complex and resource-intensive type of exercise. It involves multiple agencies, orga-

nizations, and jurisdictions and validates many facets of preparedness. This exercise often includes many players operating under cooperative systems such as the Incident Command System (ICS) or Unified Command. Resources and staff are mobilized as needed. All actions are taken as if the emergency is real. A full-scale exercise is the most time-consuming activity in the exercise continuum and is a multiagency, multijurisdictional effort in which all resources are deployed. A full-scale exercise tests collaborations among the agencies and participants, public information systems, communication systems, and equipment. An Emergency Operations Center is established by either law enforcement or fire services, and the ICS is activated. Because of all the logistics and resources needed for a full-scale exercise, it often takes a year to plan and is not held often. Usually, a school district is not the organizer of such an exercise, but the district or school would play a critical role in both function and potential facility use.

(7) Functional exercise--Designed to validate and evaluate capabilities, multiple functions and/or sub-functions, or interdependent groups of functions. A functional exercise is typically focused on exercising plans, policies, procedures, and staff members involved in management, direction, command, and control functions. It allows participants to practice their specific roles or functions in an emergency. This type of exercise is conducted in a realistic, real-time simulated environment and often includes simulators (individuals who assist with the facilitation of the exercise) and follows a master scenario events list that dictates additional information, occurrences, or activities that affect the exercise scenario.

(8) Lockdown drill--A response action schools take to secure interior portions of school buildings and grounds during incidents that pose an immediate threat of violence inside the school. The primary objective is to quickly ensure all school students, staff, and visitors are secured away from immediate danger.

(9) Secure drill--A response action schools take to secure the perimeter of school buildings and grounds during incidents that pose a threat or hazard outside of the school building. This type of drill uses the security of the physical facility to act as protection to deny entry.

(10) Seminar exercise--A discussion-based exercise designed to orient participants to new or updated plans, policies, or procedures through informal discussions. Seminar exercises are often used to impart new information and formulate new ideas.

(11) Shelter-in-place for hazardous materials (hazmat) drill--A response action schools take to quickly move students, staff, and visitors indoors, perhaps for an extended period of time, because it is safer inside the building than outside. Affected individuals may be required to move to rooms without windows or to rooms that can be sealed. Examples of a shelter-in-place for hazmat drill include train derailment with chemical release or smoke from a nearby fire.

(12) Shelter for severe weather drill--A response action schools take to quickly move students, staff, and visitors indoors, perhaps for an extended period of time, because it is safer inside the building than outside. For severe weather, depending on the type and/or threat level (watch versus warning), affected individuals may be required to move to rooms without windows on the lowest floor possible or to a weather shelter.

(13) Tabletop exercise--A small group discussion that walks through a scenario and the courses of action a school will need to take before, during, and after an emergency to lessen the impact on the school community. Participants problem-solve together through a detailed discussion of roles, responsibilities, and anticipated courses of action. A tabletop exercise leverages a defined scenario to direct discussion and may need an experienced facilitator depending on the complexity and objectives of the exercise.

(14) Workshop exercise--A type of discussion-based exercise focused on increased participant interaction and achieving or building a product (e.g., plans or policies). A workshop exercise is typically used to test new ideas, processes, or procedures; train groups in coordinated activities; and obtain consensus. A workshop exercise often uses breakout sessions to explore parts of an issue with smaller groups.

(c) Frequency. TEC, §37.114(2), requires the commissioner of education to designate the number of mandatory school drills to be conducted each semester of the school year, not to exceed eight drills each semester and sixteen drills for the entire school year. Neither this rule, nor the law, precludes a school district or an open-enrollment charter school from conducting more drills as deemed necessary and appropriate by the district or charter school. Following is the required minimum frequency of drills by type.

(1) Secure drill--One per school year.

(2) Lockdown drill--Two per school year (once per semester).

(3) Evacuation drill--One per school year.

(4) Shelter-in-place for hazmat drill--One per school year.

(5) Shelter for severe weather drill--One per school year.

(6) Fire evacuation drill--School districts and open-enrollment charter schools should consult with their local fire marshal and comply with their local fire marshal's requirements and recommendations. If a district does not have a local fire marshal, it shall conduct four per school year (two per semester).

(d) Best practices for conducting drills and exercises. This subsection highlights best practices for conducting drills and exercises. For more information about best practices, refer to Texas School Safety Center guidance.

(1) Drills and exercises should be designed and conducted in accordance with guidance and best practice resources provided by the Texas School Safety Center.

(2) Drill and exercise design should include purpose, goals, and objectives that are stated in plans for each type of drill. Purpose, goals, and objectives should be developed with input from all sectors of the school community. Input in planning should be sought from multiple stakeholder perspectives for each type of drill and exercise, including from:

(A) the district School Safety and Security Committee;

(B) first responders;

(C) mental and behavioral health professionals;

(D) students and families; and

(E) staff, including non-traditional teachers, coaches, trade instructors, custodians, and food service workers.

(3) Drill and exercise design elements should include:

(A) physical and psychological safety for all participants;

(B) planning in a trauma-informed manner to maximize learning and to minimize potential trauma for students and staff;

(C) providing advance notification of drills and exercises;

(D) planning for post-drill or after-action reviews of each drill and exercise; and

(E) ensuring drills and exercises are age and developmentally appropriate with the understanding that more complex drills and exercises will require a hierarchy of learning to achieve or obtain more advanced goals or objectives.

(4) Exercises tend to be more complex than drills and should be conducted in accordance with guidance and resources provided by the Texas School Safety Center. It is imperative that districts conduct exercises that match their experience and capabilities. It is usually best to start with discussion-based exercises and work up to operation-based exercises over time. Discussion-based exercises include seminar exercises, tabletop exercises, and workshop exercises. Operation-based exercises include functional exercises and full-scale exercises. Exercises can be used for:

(A) testing and validating policies, plans, procedures, training, equipment, and interagency agreements;

(B) clarifying and training personnel in roles and responsibilities;

(C) improving interagency coordination and communications;

(D) identifying gaps in resources;

(E) improving individual performance; and

(F) identifying opportunities for improvement.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 6, 2022.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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19 TAC §103.1211

The Texas Education Agency (TEA) adopts new §103.1211, concerning active threat exercises. The new section is adopted with changes to the proposed text as published in the March 25, 2022 issue of the *Texas Register* (47 TexReg 1581) and will be republished. The adopted new rule implements Senate Bill (SB) 168, 87th Texas Legislature, Regular Session, 2021, which mandated the adoption of procedures that a school district must complete prior to conducting an active threat exercise.

REASONED JUSTIFICATION: Texas Education Code (TEC), Chapter 37, Subchapter D, addresses the protection of school buildings and grounds. To this subchapter, SB 168, 87th Texas Legislature, Regular Session, 2021, added TEC, §37.1141, which provides mandatory procedures that a school district must complete prior to conducting an active threat exercise. Adopted new §103.1211 implements the statute by establishing requirements related to adequate notice and the content of an active threat exercise.

Adopted new subsection (a) requires school districts and open-enrollment charter schools to follow mandatory procedures for conducting active threat exercises. This requirement will ensure that districts and open-enrollment charter schools promote physical and psychological safety of students and staff before, during, and after an active threat exercise.

Based on public comment, subsection (a) was amended at adoption to define an active threat exercise.

Adopted new subsection (b) specifies what school districts and open-enrollment charter schools must do prior to conducting active threat exercises. The requirements include adequate notice of the exercise, an announcement signaling the start of the exercise, and certain elements to be addressed in the content of the exercise.

Based on public comment, subsection (b)(1)(C) was added at adoption to require that notice be provided to parents in the parents' native language to the greatest extent practicable.

Based on public comment, subsection (b)(3)(B)(iii) was amended at adoption to include providing access to mental health supports before, as well as during and after, the exercise.

Adopted new subsection (c) specifies the statutory requirement that data regarding the efficacy and impact of an active threat exercise be collected and submitted to the Texas School Safety Center.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began March 25, 2022, and ended April 25, 2022. Following is a summary of the public comments received and the corresponding agency responses.

Comment: Sandy Hook Promise, Hogg Foundation for Mental Health, and Texas-American Federation of Teachers (Texas AFT) advocated for a ban on student participation in active threat exercises.

Response: The agency disagrees but clarifies that local education agencies (LEAs) are not required to conduct active threat exercises. If an LEA elects to conduct an active threat exercise, the exercise shall be designed and executed in a manner that accounts for the physical and psychological safety of all participants and that is developmentally appropriate for all participants.

Comment: Texas AFT and two school district employees asked for a clear definition of what constitutes an active threat exercise.

Response: The agency agrees and has amended §103.1211(a) at adoption to include a clear definition of an active threat exercise.

Comment: The Association of Texas Professional Educators (ATPE) requested that notice of the exercise is linguistically accessible to parents.

Response: The agency agrees and has added §103.1211(b)(1)(C) at adoption to require that notice be provided to the parents of students participating in the exercise in the parents' native language to the greatest extent practicable.

Comment: ATPE requested amending subsection (b)(3)(B)(iii) to read, "student access to mental health supports before, during, and after the exercise."

Response: The agency agrees and has amended subsection (b)(3)(B)(iii) at adoption to include the word "before."

Comment: ATPE and a school district employee expressed concern that the adequate notice requirements could be exploited

by bad actors and create safety issues for the school and the community.

Response: The agency disagrees and clarifies that the notification requirement ensures that participants, parents of student participants, and other individuals impacted by the exercise are prepared for the exercise.

Comment: Sandy Hook Promise requested that students be required to receive evidence-based violence prevention trainings.

Response: This comment is outside the scope of this proposed rulemaking.

Comment: The Hogg Foundation for Mental Health, ATPE, and Texas Association of School Psychologists recommended explicitly identifying mental health professionals, special education teachers, and bilingual teachers as required stakeholders in the design of the exercise.

Response: The agency disagrees but clarifies that TEC, §37.1141(a)(5)(B), specifies members of the team that develop the content of the exercise, which include school mental health professionals and teachers.

Comment: The Hogg Foundation for Mental Health and ATPE recommended that special populations be amended to include students with mental health concerns and students with sensitivity to light or sound.

Response: The agency disagrees but clarifies that the term "special populations" is defined as students with particular needs who benefit from specialized programs, including dyslexia, English learner support, gifted and talented education, highly mobile and at-risk programs, Section 504 accommodations, and special education programs.

Comment: A school district employee commented that exercises that are conducted only with law enforcement, selected school staff, and other public safety professionals should not be allowed with the listed reporting requirements.

Response: This comment is outside the scope of this proposed rulemaking.

Comment: A Texas educator expressed concern that the required training would negatively impact the schedule during staff development.

Response: This comment is outside the scope of this proposed rulemaking.

Comment: Texas AFT commented that best practices for drills and exercises do not include sensorial simulations that mimic an actual incident.

Response: The agency disagrees and clarifies that the subject of this rule proposal is active threat exercises, which are defined as exercises that include a simulated active aggressor.

Comment: ATPE recommended that the audible announcement be provided to students in the language that meets their language needs.

Response: The agency disagrees and clarifies that the needs of all students, including linguistic needs, should be considered during the design and execution of the exercise.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §37.1141, as added by Senate Bill (SB) 168, 87th Texas Legislature, Regular Session, 2021, which allows the commissioner of education to adopt rules regarding active threat exercises; and TEC, §12.104(b), as amended by SB 168, 87th Texas Legislature, Regular Session, 2021, which makes the provisions of TEC, §37.1141, applicable to open-enrollment charter schools.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §37.1141 and §12.104(b).

§§103.1211. Active Threat Exercises.

(a) Each local educational agency (LEA), which includes school districts and open-enrollment charter schools, that elects to conduct an active threat exercise, defined as any exercise that includes a simulated active aggressor or an active shooter simulation, shall do so in accordance with Texas Education Code (TEC), §37.1141, and this section.

(1) LEAs are not required to conduct active threat exercises.

(2) LEAs may consider using a tabletop exercise as defined in §103.1209 of this title (relating to Mandatory School Drills) to achieve the purpose, goals, and objectives of the exercise rather than using a functional or full-scale active threat exercise.

(3) LEAs may consider conducting an active threat exercise during a non-instructional time when nonparticipants are not present in the facility.

(b) Prior to conducting an active threat exercise, an LEA must:

(1) provide adequate notice of the exercise directly to individuals participating in the exercise, parents of students participating in the exercise, and all other individuals impacted by the exercise. Adequate notice of the active threat exercise shall also be posted through multiple distribution networks, including, but not limited to, the LEA's website and social media platforms.

(A) To be considered adequate notice, notice shall be provided and posted at least two weeks prior to the exercise.

(B) The notice shall include the following required elements specified in TEC, §37.1141(a)(1):

(i) the date on which the exercise will occur;

(ii) the content, form, and tone of the exercise; and

(iii) whether the exercise will include a live simulation that mimics or appears to be an actual shooting incident;

(C) The notice shall be provided to parents in the parents' native language to the greatest extent practicable.

(2) make an audible announcement over the campus public address system immediately prior to the commencement of the exercise to signal the start of the exercise to the participants, noting that it is only an exercise and not a real emergency. The announcement must contain the elements specified in TEC, §37.1141(a)(2); and

(3) ensure that the content of the exercise, which includes planning and execution of the exercise, addresses the following elements:

(A) input from multiple stakeholder perspectives in the design of the exercise;

(B) the physical and psychological safety of all participants before, during, and after the exercise, including:

(i) planning in a trauma-informed manner to minimize potential trauma for students, staff, and other participants;

(ii) the development and communication of a predetermined method for participants to withdraw from the exercise before or during the exercise; and

(iii) access to mental health supports before, during, and after the exercise; and

(C) the developmental appropriateness of the exercise, which includes a comprehensive perspective that supports the cognitive and emotional well-being of each individual and considers the impact that prior trauma, grief, and crisis experiences have had on a participant's development prior to the exercise. Developmental appropriateness considerations include the needs of special populations, including students with disabilities and emergent bilingual students.

(c) In accordance with TEC, §37.1141(c), data regarding the efficacy and impact of an active threat exercise shall be collected and submitted to the Texas School Safety Center (TxSSC) using the methods developed by the TxSSC.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 30. TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

CHAPTER 681. PROFESSIONAL COUNSELORS

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §681.6

The Texas Behavioral Health Executive Council adopts the repeal of §681.6, relating to Minutes. The repeal of §681.6 is adopted without changes to the proposed text as published in the December 10, 2021, issue of the *Texas Register* (46 TexReg 8309) and will not be republished.

Reasoned Justification.

The repeal of this rule is necessary since recordings of entire meetings of the Texas State Board of Examiners of Professional Counselors will be posted on a publicly accessible website; therefore this rule is no longer necessary.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The repeal of the rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts the repeal of this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §503.2015 of the Tex. Occ. Code the Texas State Board of Examiners of Professional Counselors previously voted and, by a majority, approved the repeal of this rule to the Executive Council. The rule is specifically authorized by §503.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts the repeal of this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed the repeal of this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 503 and 507 of the Texas Occupations Code and may adopt the repeal of this rule.

Lastly, the Executive Council adopts the repeal of this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Professional Counselors
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For further information, please call: (512) 305-7706

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SUBCHAPTER D. SCHEDULE OF SANCTIONS

22 TAC §681.205

The Texas Behavioral Health Executive Council adopts amended §681.205, relating to Schedule of Sanctions. Section 681.205 is adopted with changes to the proposed text as published in the December 10, 2021, issue of the *Texas Register* (46 TexReg 8310) and will be republished. The changes made to the adopted version of the schedule of sanctions are non-substantive, and merely condense the format of the schedule to make it shorter and easier to use. These non-substantive changes are made by the Council pursuant to its authority found in 22 TAC §881.20.

Reasoned Justification.

The amendment is necessary to match other corresponding rule amendments made or proposed that are referenced in this rule. Substantively this schedule of sanctions is not changing, none of the sanctions are proposed to be changed. But the duplicative language that mirrors the language in each rule is being repealed as it is unnecessary and must be changed each time a corresponding rule is changed. Additionally, §681.91(l) has been deleted from this schedule since it was previously amended.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code, which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §503.2015 of the Tex. Occ. Code, the Texas State Board of Examiners of Professional Counselors previously voted and, by a majority, approved to propose the adoption this rule to the Executive Council. The rule is specifically authorized by §503.2015 of the Tex. Occ. Code, which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 503 and 507 of the Texas Occupations Code and may adopt this rule.

Lastly, the Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§681.205. Schedule of Sanctions.

The following standard sanctions shall apply to violations of the Act and these rules.
Figure: 22 TAC §681.205

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Professional Counselors
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For further information, please call: (512) 305-7706

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 60. COMPLIANCE HISTORY

30 TAC §60.4

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §60.4.

New §60.4 will be adopted *with changes* to the proposed text as published in the December 31, 2021, issue of the *Texas Register* (46 TexReg 9183), and, therefore, the rule will be republished.

Background and Summary of the Factual Basis for the Adopted Rule

Several large emergency incidents at industrial facilities in the past few years have caused significant impacts to public health and the environment, which resulted in scrutiny of the compliance histories of the regulated entities involved in these incidents. The commission determined it is appropriate for the executive director to have the ability to make a designation to and reclassify a site's compliance history classification under Chapter 60 in a manner different than the rules currently allow. The commission adopts new §60.4. This section will provide a process for the executive director to initially designate a site's compliance history classification as "under review" and then later re-

classify it to "suspended" if the executive director determines that exigent circumstances exist due to a significant emergency event at the site, such as a major explosion or fire, that causes significant community disruption and substantial commitment of emergency response resources by federal or state governmental authorities. Exigent circumstances must include those that significantly impact the surrounding or local community; result in significant emergency response efforts by federal or state governmental authorities to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency; and result in one or more certain urgent consequences. The occurrence of such an emergency event requires immediate, significant response by the agency but currently does not impact the site's compliance history classification until it results in a compliance history component, as identified in §60.1(c), which is considered during an annual classification. The purpose of this adopted new §60.4 is to communicate to the regulated entity and the public that a review of such a site's performance is underway, provide a more immediate and accurate measure of a site's performance in light of such an event, and make compliance history a more effective tool to provide oversight and ensure regulatory consistency.

For those sites subject to Chapter 60, the agency currently recalculates compliance history scores annually based on information from the previous five years and classifies sites as unsatisfactory, satisfactory, or high performers, or as unclassified if there is no compliance information about the site. Because compliance history scores are calculated on an annual basis, the impact of an emergency event with exigent circumstances on a site's compliance history will likely be delayed until any components related to the event are finalized and considered in an annual calculation, which may not happen for many months or years following the event. Therefore, the site's current classification may not accurately measure a site's performance in light of a significant emergency event at the site. To ensure the agency's compliance history program and dependent agency processes promote regulatory consistency through prompt recognition of such an event, the commission adopts new §60.4. This rule will authorize the executive director to make a designation to and reclassify the compliance history classification for a site where an emergency event has created exigent circumstances.

Section Discussion

§60.4, Site Classification Changes Due to Exigent Circumstances

The commission adopts new §60.4(a), concerning Site Classification Under Review, to establish that the executive director may designate a site's current compliance history classification as "under review" if the executive director determines that exigent circumstances exist due to an event at the site. For circumstances to be "exigent," they must meet specified criteria as identified in three categories. For the executive director to move forward with the designation prescribed in this rulemaking adoption, the event must meet all three elements of exigent circumstances.

First, the circumstances must result in significant disruption to one or more local communities of people. Whether community disruption is "significant" is intended to be determined on a case-by-case basis by looking at the event's impacts on the surrounding community. The extent of an event's impacts can depend on contextual factors. For example, communities vary in size and resources, and an event occurring in one community may not provide a significant disruption whereas a similar event may do so in another community.

Second, the circumstances must cause significant commitment of emergency response resources by a federal or state governmental authority to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency.

Third, for circumstances to be "exigent," they must have resulted in the occurrence of at least one of the conditions listed in adopted subsection (a)(3)(A) - (C) or one of the conditions listed in adopted subsection (a)(3)(D)(i) - (iv). Each of the listed conditions is a potential result of the type of significant event the commission determined must be urgently accounted for in a site's compliance history classification. For the purposes of adopted subsection (a)(3)(D)(iv), "injury or death of a person directly attributable to the release" is intended to capture injuries or death that are directly caused by the actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency. It is not intended to encompass injuries or death that are caused indirectly by any such event, such as an injury sustained by an individual slipping in a parking lot during an evacuation.

If all three of these elements are determined to be met, the executive director has 90 days from the start date of the exigent circumstances to designate the site's classification as "under review," and any such designation is effective immediately. The executive director will issue written notice of the "under review" designation to the site's owner and operator, as readily identifiable through agency records. The "under review" designation shall thereafter expire on the 91st day after the date of the executive director's written notice of the designation unless the executive director beforehand initiates the process to reclassify the site to "suspended." Upon the initiation of the process to reclassify, the executive director will issue a Notice of Decision to Reclassify as adopted under subsection (b).

The commission adopts new §60.4(b), concerning Notice of Decision to Reclassify, to establish that the executive director may decide to reclassify a site's compliance history classification to "suspended." In making the decision, the executive director will consider available information including facts as to whether the event in question was caused through any fault of the site's owner or operator. If the initiation of the process to reclassify has been made by the executive director, a decision to reclassify to "suspended" must be made no sooner than 30 days and no later than 90 days after the site's classification is designated as "under review." The commission has determined that providing a time limit for the executive director's authority to make such a decision provides a measure of regulatory certainty. This subsection will also clarify that the site will not actually be reclassified until the effective date identified in adopted subsection (f), which will depend on whether the site's owner or operator files a motion for the commission to review the executive director's decision to reclassify.

The commission adopts new §60.4(c), concerning Evaluation of Permit Applications, to prohibit the agency from taking action to issue, renew, amend, or modify a permit specific to a site for which the executive director has issued a Notice of Decision to Reclassify until the agency has evaluated the permitting action in light of the significant event that caused or resulted in the exigent circumstances. The purpose of the required evaluation of pending permit applications is not to pause, prolong, or stop permitting actions that are appropriate in light of the event. For the purpose

of this subsection, a "permit specific to a site" includes authorizations through standard permits, individual permits, or other authorizations that require affirmative action by the agency and that, if issued, will authorize regulated activities at the site where the event occurred. The evaluation under adopted §60.4(c) will not be required for other authorizations if the authorizations are claimed by regulated entities without the need for permit application review by the TCEQ--*e.g.*, certain general permits and permits by rule (PBRs). The purpose of this permit application evaluation is to ensure the site's adopted permitting actions are appropriate in light of the event. Until the permit application evaluation is complete, the agency will not take final action on the permit application. The evaluation will enable the agency to address concerns from the event by: (1) approving the permit; (2) approving the permit with changes to address conditions that caused or resulted from the event; or (3) denying the permit. As stated in adopted new §60.4(c) and (g)(1), this evaluation process applies to the processing of any permit applications for the site that are pending with the TCEQ at the time of the executive director's Notice of Decision to Reclassify, and it applies to the processing of any such applications that become pending unless and until the executive director's decision is withdrawn or set aside, or until a resulting "suspended" reclassification ends under adopted, new §60.4(h).

The commission adopts new §60.4(d), concerning Demonstration that Reclassification Not Warranted, to establish that the site's owner or operator will have the opportunity to demonstrate to the executive director that reclassification of the site to suspended is not warranted. The commission recognizes that the site's owner or operator may have additional information relevant to the executive director's decision to reclassify. The demonstration is not intended to be a formal procedure or a prerequisite to filing a motion for commission review, but rather to allow the site's owner or operator an opportunity to provide additional information to the executive director. The executive director's decision to reclassify the site will be withdrawn if the executive director determines that reclassification is not warranted. If that happens, a written notice of the determination will be provided to the site's owner and operator, as readily identifiable through agency records. The commission has made small modifications to certain punctuation in §60.4(d), to correct inconsistencies with similar punctuation in other subsections of the rule.

The commission adopts new §60.4(e), concerning Motion for Commission Review of the Executive Director's Decision, to provide a process for appealing the executive director's decision to reclassify a site's compliance history to suspended. Any motion for commission review under this adopted subsection will be subject to the procedural requirements set forth in the subsection, including procedures for filing the motion, contents of the motion, disposition of the motion by commission action, disposition of the motion absent commission action, and provisions setting forth the effect of the reclassification during the pendency of any judicial review of the decision. The commission has also modified §60.4(e)(6)(B) to identify that, in a specific scenario, a motion for commission review will be overruled by operation of law on the 181st date after the date the executive director sends the written Notice of Decision to Reclassify under §60.4(b). This modification is being made to address an inconsistency between §60.4(e)(2) and (e)(6)(B) as proposed.

The commission adopts new §60.4(f), concerning Effective Date of Reclassification. Adopted new §60.4(f)(1) and (2) will set forth the dates upon which the executive director's decision to reclassify a site will become final and, therefore, when the reclassification will become effective. For purposes of judicial review, the agency action to reclassify a site's compliance history will be final and appealable on the effective date as adopted in new §60.4(f).

The commission adopts new §60.4(g), concerning Effects of Reclassification, to identify the effects of a site reclassification to suspended once the reclassification becomes effective. Under adopted, new §60.4(g)(1), the agency will continue to evaluate a site's permitting applications in accordance with subsection (c) for the duration of the reclassification. Under adopted §60.4(g)(2), the site will also be treated as an unsatisfactory performer as identified in §60.3, Use of Compliance History, except that the owner or operator of a reclassified site may attempt demonstration to the executive director that authorizations otherwise prohibited by §60.3(a)(3)(A)(i) and (ii) would still be appropriate. Upon this demonstration, the executive director will consider information presented by the site's owner or operator, together with any other information known by the agency, and the executive director may allow for such authorizations to be made or kept available. The commission does not intend for a site's reclassification to suspended, by itself, to change the underlying compliance history numerical points associated with the site.

The commission adopts new §60.4(h), concerning Duration of Reclassification, to establish that any reclassification of a site to suspended will be effective for at least one year from the effective date of reclassification and thereafter until the earlier of three conditions. Under adopted §60.4(h)(1), the site reclassification will end if the executive director decides that the reclassification is no longer warranted. The executive director's decision will be based on whether the exigent circumstances have been resolved, the cause of the event has been identified, and corrective actions have been implemented so as to appropriately reduce or eliminate the likelihood that the same or a similar event will reoccur. The commission intends for this decision to be in the sole discretion of the executive director. The commission intends this adopted subsection to be an additional incentive for the site's owner or operator to resolve and address the significant event as expeditiously as possible. Under adopted new §60.4(h)(2), the site reclassification will end when an enforcement action arising from the event either: (1) has resolved and resulted in a component in the site's compliance history that is accounted for in an annual classification; or (2) is neither pending nor anticipated to be brought by or on behalf of the agency. Alternatively, under adopted new §60.4(h)(3), the site reclassification will end three years after the effective date of the reclassification if the reclassification does not previously end by satisfying the conditions of subsection (h)(1) or (2). Once a suspended reclassification ends under the adopted rule, the site will be assigned a classification according to its site rating under existing §60.2, Classification.

Adopted new §60.4 will apply to events beginning on or after the effective date of the rule.

Final Regulatory Impact Determination

The commission reviewed the rulemaking adoption in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and it determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because the rulemaking adoption does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from exposure and that may adversely affect in a material way the

economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The commission determined the adopted new §60.4 does not fall under the definition of a major environmental rule because the specific intent of the rule is to promote and ensure regulatory consistency in agency processes by creating a mechanism to designate site compliance history classifications as "under review" and by creating a new compliance history classification. The new designation and classification are appropriate for sites where an event occurred that causes or results in exigent circumstances, as described in the adopted, new §60.4; and if the executive director decides to designate a site classification as "under review" and reclassify it to "suspended," it ensures agency processes such as permitting actions are appropriately accounting for the event. The purpose of adopted new §60.4 is to provide a more immediate and accurate measure of a site's performance in light of such an event and to make compliance history a more effective tool to provide oversight and ensure regulatory consistency. By ensuring regulatory consistency, the TCEQ's compliance history program better effectuates its statutory purpose under Texas Water Code, §5.753 and §5.754.

Additionally, the commission determined the adopted, new §60.4 is not a major environmental rule because it is not expected to adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission intends that designating a site's compliance history classification as "under review" and reclassifying it under the adopted new §60.4 will be a regulatory tool that is used sparingly and reserved as a response to rare and impactful events. Accordingly, any exercise by the executive director of the authority in the adopted new §60.4 is not expected to affect many regulated entities in the state. Furthermore, any directly attributable costs to regulated entities whose site is subject to a Notice of Decision to Reclassify under this rule will depend on the results of the agency's evaluation of any applications for permits specific to the site. Any such costs may also depend on whether the applicant is prevented from obtaining an authorization. For these foregoing reasons, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the rulemaking adoption and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the rulemaking adoption is to provide a more immediate and accurate measure of a site's performance in light of certain events and to make compliance history a more effective tool to provide oversight and ensure regulatory consistency as required by Texas Water Code, §5.753. The rulemaking adoption does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking adoption does not meet the definition of a taking under Texas Government Code, §2007.002(5), and therefore will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that the adoption is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq*., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the rulemaking adoption in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the adopted new §60.4 to be consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rulemaking include: 31 TAC §501.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); 31 TAC §501.12(2), to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; 31 TAC §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; 31 TAC §501.12(5), to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; 31 TAC §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; 31 TAC §501.12(7), to make agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and 31 TAC §501.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed the adopted new §60.4 for consistency with applicable goals of the CMP and determined that it is consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the adopted rulemaking include: 31 TAC §501.19, Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; 31 TAC §501.20, Prevention, Response, and Remediation of Oil Spills; 31 TAC §501.21, Discharge of Municipal and Industrial Wastewater to Coastal Waters; 31 TAC §501.22, Nonpoint Source (NPS) Water Pollution; 31 TAC §501.23, Development in Critical Areas; 31 TAC §501.25, Dredging and Dredged Material Disposal and Placement; 31 TAC §501.28, Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and 31 TAC §501.32, Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Department of State Health Services regarding wastewater discharges that could significantly adversely affect oyster reefs. This rulemaking does not relax the existing requirements that

state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable to: areas with the potential to develop agricultural or silvicultural NPS water quality problems; on-site disposal systems; underground storage tanks; or Texas Pollutant Discharge Elimination System permits for stormwater discharges. This rulemaking does not relax the standards related to dredging; the discharge, disposal, and placement of dredge material; compensatory mitigation; and authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements.

Promulgation and enforcement of this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rule is consistent with these CMP goals and policies and because it does not create or have a direct or significant adverse effect on any coastal natural resource areas.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

The commission determined that the adopted new §60.4 could impact sites subject to the Federal Operating Permits Program, but only if the executive director decides that a site's compliance history classification should be reclassified to "suspended" and the agency is scheduled to act on an application for a new or renewed federal operating permit for the site prior to the noticed reclassification being set aside or otherwise ended.

Public Comment

The commission offered a virtual public hearing on January 27, 2022. The comment period closed on February 1, 2022. The commission received comments from Air Alliance Houston (AAH), the Texas Association of Manufacturers (TAM), the Texas Chemical Council (TCC), the Texas Industry Project (TIP), Texas Molecular Holdings LLC (TMH), and the Texas Oil and Gas Association (TXOGA). AAH generally applauds the TCEQ for undertaking this rulemaking but urges the TCEQ to make certain changes to §60.4 as proposed. TAM, TCC, and TXOGA provided their comments in a joint submittal, and they appreciate the need for the rulemaking but recommend changes to the rule as proposed. TIP and TMH also recommend changes to the rule as proposed.

Response to Comments

Preamble

Comment 1

Recognizing that the TCEQ stated in the preamble for §60.4's proposal that a site's current compliance history classification may not accurately measure a site's performance in light of a significant emergency event, AAH states it is unclear how or if such events would be reflected in the site's "long-term" compliance classification.

Response 1

The commission appreciates the need to ensure significant events are accounted for in a site's compliance history. Adopted new §60.4 ensures such events can be promptly recognized under the compliance history program. Additionally, any compliance history component resulting from such an event will still be factored into the site's calculated scoring and classification, as described by §60.1 and §60.2. For example, an event may prompt investigation and enforcement processes by the Office of Compliance and Enforcement, which may conclude with the issuance of a final enforcement order or court judgment. Such an order or judgment is a compliance history component, as identified by §60.1(c)(1), and any violations they contain will be scored and affect the site's "long-term" compliance history scoring and classification as outlined in §60.2. If the agency had reclassified the site to suspended under adopted new §60.4, that reclassification will not impact the traditional scoring and classification under existing §60.2, and the suspended reclassification will end once the order or judgment is accounted for as a compliance history component. No change has been made to the rule in response to this comment.

Comment 2

TIP recognizes that the TCEQ stated in the preamble for §60.4's proposal that the rule "would apply to events beginning or after the effective date of the rule," but TIP recommends an express provision to this effect be added to the rule itself.

Response 2

The commission declines to follow this comment's recommendation for including in the rule an express provision to this effect. Including such a provision is not necessary to effectuate the commission's intent to apply adopted new §60.4 to prospective events beginning on or after its effective date. The commission appreciates that including such a provision in the rule itself would only be relevant for events occurring near the time of the rule's effective date, but the provision's relevance would decrease as time passes. As stated in the preamble for this rule adoption, new §60.4 will apply to events beginning on or after the effective date of the rule. No change has been made to the rule in response to this comment.

General

Comment 3

AAH commented that it applauds the TCEQ for agreeing to undertake the subject rulemaking, but it asserts that concrete and immediate reforms are needed for the TCEQ's compliance systems that center on environmental justice, that they must be a core priority for the agency, and that they must be fully resourced in the months and years to come.

Response 3

The commission appreciates this comment and AAH's support for adopted new §60.4. The commission notes that the scope of this rulemaking is limited to the mechanisms in §60.4 and the function that it will serve--to enable designating a site's classification as under review when there has been a significant event and possibly reclassifying it to suspended if warranted and necessary. The remainder of AAH's comment speaks to issues that are outside of this rulemaking's scope and accordingly are not addressed here. No change has been made to the rule in response to this comment.

Comment 4

AAH requests that the TCEQ issue guidance documents to clarify requirements and expectations as they relate to the adopted new §60.4.

Response 4

The commission appreciates that there may be a future need to develop and publish guidance that clarify aspects of adopted new §60.4 and its implementation, but doing so at this time would be premature. Instead, the commission offers explanation and clarification of adopted new §60.4 through this publishing of the rule's preamble and responses to comments. No change has been made to the rule in response to this comment.

Comment 5

AAH describes several large emergency incidents at industrial facilities in the past few years to have caused significant impacts to public health and the environment, with communities of color and lower-income families bearing a disproportionate burden.

Response 5

The commission appreciates this comment and its expressed concern. The commission intends that adopted new §60.4 and its mechanisms will help ensure that the compliance history program enables appropriate designation and reclassification of compliance history classifications for sites where significant events occur. Applying §60.4 to such scenarios will entail assessing whether exigent circumstances exist due to an event at the site, which must include significant community disruption. Whether a community is significantly disrupted by an event will be determined on a case-by-case basis. No change to the rule has been made in response to this comment.

Comment 6

AAH claims that industrial facilities responsible for several large emergency incidents in recent history have faced minimal scrutiny from the agency, and that the emergency incidents have largely been considered a cost of doing business. By means of examples, AAH refers to the compliance history scores and classifications for several sites regulated by the TCEQ, all of which being sources of or related to recent emergency incidents, and AAH complains that such scores and classifications are too low or lenient in light of the events. AAH is concerned that the emergency events will have no bearing on the review of pending permitting applications for the sites.

Response 6

The commission appreciates the need for violations associated to significant events to be accounted for in a site's compliance history score and classification. Prior to adopted new §60.4, such violations are reflected in scores and classifications but not until they result in a compliance history component that is accounted for in the annual rating and classification process described by existing §60.2. This process may take many months or even years to conclude, especially if the facts, law, or regulations relevant to the violations are disputed through contested case hearings or civil litigation. To remedy this temporal gap, the commission proposed and now adopts new §60.4, which authorizes compliance history classifications for sites to be designated as under review immediately following the occurrence of a significant event that results in exigent circumstances. This rulemaking also includes a process that requires the agency to evaluate site-specific permitting applications in light of the event and whether the permit should be granted, amended, or modified. No change has been made to the rule in response to this comment.

Comment 7

TIP seeks clarification about the written notices identified in §60.4, as proposed, which are to be provided to the site's owner and/or operator. Specifically, TIP asks whether the notice will be mailed or electronic.

Response 7

Adopted new §60.4 contemplates notices to be issued to site owners and operators at various stages of the processes for designation and reclassification of a site's compliance history classification. The commission appreciates that the notices will be issued during or immediately following significant events, wherein there is likely to be urgency for both issuance and successful delivery. For this reason, the commission agrees that the executive director should issue such notices to the site's owner and operator, as readily identifiable through agency records. The commission intends for these notices to be sent via physical and electronic mail, if contact information for doing so is readily known in agency records.

If the executive director is unable to issue notice to a site's owner and operator via electronic mail because the addresses for doing so are not readily identifiable, the lack of electronic notice shall not have consequence to subsequent action taken under adopted new §60.4. Similarly, the executive director's obligation under §60.4 to provide notice to the relevant site's owner and operator only requires notice be issued insofar as addresses for doing so are readily identifiable--there shall be no consequence to subsequent action taken under adopted new §60.4 if the issued notice is not actually and successfully delivered to the site's owner and operator.

Accordingly, the commission has modified language in subsections (a), (b), and (d) to require notices be sent to both the site's owner and operator, using addresses readily identifiable through agency records.

Comment 8

TAM, TCC, TIP, TMH, and TXOGA recommend that the TCEQ clarify §60.4 to exclude from consideration extreme weather events, such as those that may result in a rule suspension under Texas Government Code, Chapter 418 or those that are met with enforcement discretion by the TCEQ. TAM, TCC, TIP, and TXOGA argue that regulated entities should have the opportunity to demonstrate that any event or exigent circumstances at issue arose because of a natural disaster, extreme weather or catastrophic event, or other circumstances that were unavoidable. TIP also suggests that §60.4 be included in any list of rules placed in suspension in the event that a future disaster is declared. TMH references the possibility of a facility being evacuated due to a hurricane or other natural disaster, and/or a release of pollutants, contaminants, or other regulated materials occurring due to a utility like natural gas or electricity becoming unavailable.

Response 8

The commission declines to make any changes to the rule in response to this comment. Whether a site's classification is eligible for designation as under review, or whether the executive director should be authorized to issue a Notice of Decision to Reclassify should not necessarily be determined by whether the significant event or resulting exigent circumstances were par-

tially caused by or related to extreme weather events or other catastrophes. Circumstances beyond reasonable control such as a natural disaster will be considered on a case-by-case basis together with other factors set forth in §60.4. Furthermore, adopted new §60.4 enables the executive director to issue a Notice of Decision to Reclassify if there is not sufficient information known about the event and exigent circumstances to confirm that agency regulatory processes such as permitting and investigations should proceed normally. The commission encourages the regulated community to provide context and information to executive director staff that explains how or why a significant event should be attributed to unavoidable causes alone--or to any fault of the site's owner or operator--because such information will be relevant as to whether mechanisms under §60.4 should apply or proceed.

Regarding the concern about hurricanes prompting evacuations, and the implication that such scenarios should not trigger an under review designation, the commission appreciates that evacuations are relevant to adopted new §60.4 only if they are caused by an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency. Evacuations due to hurricanes would not satisfy the criterion in subsection §60.4(a)(3)(D)(i) unless they were also caused and necessitated by an actual, unauthorized release of such pollutants, contaminants, or other materials. The commission also appreciates that a site's compliance history classification may not be designated as under review because of an evacuation alone; the site's event must have also resulted in significant community disruption and an emergency response by a federal or state governmental authority to address a release.

Insofar as the request that §60.4 be on a list of rules that will be suspended in the event of a future disaster declaration, the commission is not able to provide a response at this time, prior to the occurrence of any future disaster declaration or evaluation of authority and response to occur that would not prevent, hinder, or delay necessary action in coping with the disaster, as would be relevant under Texas Government Code, Chapter 418.

Comment 9

TAM, TCC, TIP, TMH, and TXOGA recommend that, before any initial under review designation occurs, regulated entities have an opportunity to provide information to the executive director about an emergency event and any resulting exigent circumstances, such as information that attributes the event or exigent circumstances to a natural disaster.

Response 9

The commission welcomes and encourages regulated entities to provide context and information to executive director staff that explains how or why a significant event should be attributed to unavoidable causes alone, because such information will be relevant as to whether mechanisms under §60.4 should apply. This would be true prior and subsequent to any under review designation and any Notice of Decision to Reclassify. Subsection §60.4(d) states that, at any time prior to filing a motion for commission review under §60.4(e), a site's owner or operator may demonstrate to the executive director that reclassification is not warranted. The commission intends §60.4 to encourage such demonstrations be made at any time prior to the filing of a motion for commission review, which includes periods during and immediately following an event, potentially prior to an under review designation.

The commission declines to modify §60.4 in a fashion that would procedurally delay under review designations until after a site's owner or operator would have the opportunity to make a demonstration. The executive director must be able to immediately designate a site's compliance history classification as under review immediately upon an event at the site that results in exigent circumstances. Being able to do so immediately allows for the executive director to put agency staff and the public on notice that a qualifying significant event has occurred at the site, warranting review. Furthermore, the executive director's authority to immediately designate a site's classification as under review is appropriate because regulatory consequences under adopted new §60.4 do not begin until after the process has escalated and a Notice of Decision to Reclassify is issued under subsection §60.4(b).

Accordingly, no change to the rule has been made in response to this comment.

Comment 10

TAM, TCC, and TXOGA recommend that the TCEQ consider, as an alternative to the mechanisms in §60.4, that the traditional compliance history scoring and classification system in existing §60.2 be made available outside the annual process and as needed for a large magnitude event. They argue that this would avoid creating an entirely new process that places burdens of application entirely on the executive director.

Response 10

The commission appreciates this comment and agrees that there is generally a benefit to adapting existing, familiar regulatory structures and processes to address new needs when possible. However, utilizing the traditional compliance history scoring and classification system in existing §60.2 is not an option to address the need met by adopted new §60.4. The traditional scoring and classification system referenced in this comment depends on the existence of compliance history components, as listed in existing §60.1(c). If such a component resulting from an event and exigent circumstances is a final enforcement order or court judgment, the component may not exist for many months or years after the event and exigent circumstances, leaving the relevant site's compliance history unaffected in the interim. Adopted new §60.4 creates a mechanism that closes this temporal gap by allowing compliance history classifications to be designated as under review immediately upon certain conditions listed in subsection §60.4(a), and it allows for escalating reclassification processes if warranted.

The commission also appreciates this comment's concern for how adopted new §60.4 allocates its responsibilities, but the commission notes that it does not place its burdens exclusively on the executive director. To the contrary, the review of pending permit applications as required by subsection §60.4(c) requires the agency overall to take certain actions, site owners or operators may make certain demonstrations to the executive director under subsection §60.4(d) and file motions for commission review of the executive director's decision under subsection §60.4(e), and the commission may act on any such motion under subsections §60.4(e)(5) and (e)(6).

No change to the rule has been made in response to this comment.

§60.4(a). Site Reclassification Under Review

Comment 11

TIP supports §60.4(a)'s mechanism of authorizing the executive director to designate a site's compliance history classification as under review upon determining that exigent circumstances exist due to an event at the site. TIP supports how any such designation would be effective immediately and for a period of 90 days, because it allows the executive director to address the site's classification contemporaneously with the event, thereby informing the public that the classification is being evaluated. TIP also comments that designating a site's classification as under review ensures that the TCEQ and the relevant regulated entity are appropriately focused on incident response and investigation during the critical period immediately following an event.

Response 11

The commission appreciates this comment and does not make any change to the rule in response to it.

Comment 12

AAH proposes that §60.4(a) be revised to allow for the executive director to designate a site's compliance history classification as under review even when only one of the exigent circumstances conditions listed §60.4(a) occurs, as opposed to the proposed §60.4's requirement that conditions satisfy three predicates as listed in §60.4(a)(1)-(3). AAH explains that requiring all three to be met "creates an unreasonable burden" for starting the under review designation process. AAH questions whether the lack of emergency response efforts by a federal or state authority makes a significant, repeated community disruption any less meaningful for the purpose of compliance history reclassification.

Response 12

The commission appreciates the concern in this comment for communities that are significantly and repeatedly disrupted by significant events, and it appreciates the input that there would be value in enabling the executive director to designate site compliance history classifications as under review under less stringent criteria. However, the commission also appreciates that the mechanisms for designation and reclassification in adopted new §60.4 are not the only tools for the agency to respond to significant events and address actions within its jurisdiction that impact local communities. Independent of the processes in adopted new §60.4, the agency retains its existing enforcement authority that enables investigative and enforcement actions into such matters, through which the executive director may seek orders or judgments imposing corrective action or injunctive relief. Furthermore, when such final enforcement orders or judgments become effective and result in a compliance history component under existing §60.1(c), the violations contained therein will be factored into the relevant site's compliance history score and classification under existing §60.2.

The commission intends for the compliance history classification processes in adopted new §60.4 to be reserved for the rare situations in which the predicates of subparagraphs §60.4(a)(1)-(3) are satisfied and justify action under the rule. No change to the rule has been made in response to this comment.

Comment 13

TAM, TCC, and TXOGA commented that they strongly support §60.4's process of an under review designation occurring prior to and as a prerequisite to any reclassification to suspended. They believe it would be inappropriate for the agency to conclude that a significant emergency event was the result of non-compliance with an agency rule or permit without the under review period first taking place.

Response 13

The commission appreciates this comment. Parties that receive a Notice of Decision to Reclassify may appeal such decision by filing a motion for commission review of the executive director's decision under adopted §60.4(e). This provides sufficient opportunity for review before a commission decision. Parties may also seek judicial review of any final agency action. No change to the rule has been made in response to this comment.

Comment 14

TAM, TCC, TIP, and TXOGA commented that §60.4(a), as proposed, should be amended to place a temporal limit on the executive director's authority to designate a site's compliance history classification as under review. TIP recommends that the executive director's authority to make such designation be limited to occurring within 60 days of the event resulting in exigent circumstances, arguing that the designation should be in the "aftermath" of the event. TAM, TCC, and TXOGA similarly propose a "long-stop period" of 180 days after the event to make such a designation, stating that it would afford reasonable opportunity to the executive director for making such a decision and designation.

Response 14

The commission interprets this comment through the lens of creating more regulatory certainty by creating a time limit for the executive director to designate a site's compliance history classification as under review. The commission appreciates the value in a proposal like this, so it has modified §60.4(a) to impose a time limit for the executive director to designate a site's classification as under review. However, the commission has determined that it would be appropriate to set the time limit relative to the onset of exigent circumstances instead of the event from which they resulted. For example, exigent circumstances under §60.4(a)(1)-(3) may arise suddenly because of a long-occurring but unidentified event, like a slow release of waste that is eventually impactful. As adopted by the commission, §60.4(a) will require any under review designation of a site's compliance history classification to occur no later than 90 days from the start of the exigent circumstances.

Comment 15

AAH requests clear guidance about what constitutes significant community disruption, and how cumulative impacts, equity, and environmental justice will play a role in the analysis of whether a relevant emergency event has caused significant community disruption. AAH also requests there be "active stakeholder input" about how communities are impacted by such emergency events.

Response 15

The commission responds to this comment in part by confirming that determining whether a site's event has resulted in significant community disruption will be done on a case-by-case basis, taking into account information that is provided to and known by the executive director, which meets the elements set forth in §60.4(a). The commission recognizes that some communities may be susceptible to significant disruption, and such susceptibility may prove to characterize circumstances resulting from an event as more exigent. The commission also responds to this comment by recognizing that communities may be significantly disrupted in different ways, depending on the specific contexts.

The commission appreciates the public's interest in appropriately participating in the processes included in adopted new §60.4. First, the commission does intend for adopted new §60.4 to enable the agency's compliance history program to publicly provide a more immediate and accurate measure of a site's performance in light of an impactful, significant event. Second, the commission encourages the public to provide its relevant perspective and information to executive director staff and the commission so that agency decision-making and reviews are better informed. To this end, the commission recognizes that the public may offer information to the agency through complaints to local, regional agency offices, the contact information for which is available on the agency's public website. The commission also recognizes that the public may offer information to the commission by filing public comments on any motion for commission review of the executive director's decision, filed by the relevant site's owner or operator pursuant to subsection §60.4(e). Third, the commission recognizes that documents submitted to or generated by the agency for purposes related to application of §60.4 may be publicly available pursuant to the Public Information Act, unless the documents are excepted under the act from disclosure requirements by virtue of confidentiality or privilege.

The commission does reiterate the need for adopted new §60.4 to enable the executive director to take immediate or otherwise urgent action to designate a site's compliance history classification as under review and to escalate and proceed with reclassification if necessary. The commission believes the above-described methods for public participation in applying adopted new §60.4 are the most appropriate so as to simultaneously enable expedient action by the agency. Accordingly, no changes have been made to the rule in response to this comment.

Comment 16

TAM, TCC, and TXOGA recommend that §60.4(a) be modified to define what type of event may qualify as causing exigent circumstances that are relevant or operative under the rule. They reference language from the preamble published with the TCEQ's proposal for the rule, pointing to "a significant emergency event at the site, such as a major explosion or fire that causes major community disruption." They recommend this definition be incorporated into §60.4(a) to define "event," or using it to replace the phrase "significant community disruption" as proposed for §60.4(a)(1),

Response 16

The commission responds to this comment by explaining that the focus of the inquiry and decision-making under subsection §60.4(a) will be not on the event at the site but on whether and how it resulted in significant community disruption, emergency response by a federal or state governmental authority to address an actual, unauthorized release, and other urgent consequences as listed in subsection §60.4(a)(3). Focusing the inquiry and determination on the exigent circumstances instead of the event from which they resulted ensures that events of different natures that are similarly, sufficiently, and critically impactful are considered in an appropriate fashion. Accordingly, no changes have been made to the rule in response to this comment.

Comment 17

TIP proposes to qualify the criterion in §60.4(a)(1), concerning "significant community disruption" to require that the disruption be to a "surrounding" community.

Response 17

The commission appreciates this comment and proposal, and the commission confirms that its intent for evaluating whether there is "significant community disruption" will be a matter of assessing impacts to local, surrounding communities. That being said, the commission declines to expressly incorporate "surrounding" into §60.4(a)(1), because the term "surrounding" is implied within the term community itself. No changes have been made in response to this comment.

Comment 18

TIP proposes to provide additional definition to qualify operative "significant community disruption" in §60.4(a)(1) to be when it is "a direct result of a catastrophic emergency event at the site with a significant environmental impact, such as a major fire or explosion."

Response 18

The commission responds to this comment by confirming that the broad language of "significant community disruption" in subparagraph §60.4(a)(1) is intended to allow for consideration of community disruptions in a broad variety of contexts, with determinations being made on a case-by-case basis. The commission declines to incorporate the additional definition and qualifications as proposed in this comment, because doing so may unintentionally limit whether community disruptions can be considered as resulting from the site's event. First, the qualifier may limit application if the disruption is removed from the event by distance or time but nevertheless causally connected to the event. Second, the qualifier may restrict the executive director from acting on the authority in adopted new §60.4 in situations where the onsite event is not a catastrophic emergency but the resulting circumstances prove to be impactful and exigent, where the exigent circumstances are documented and known but not whether they have resulted in "environmental impact," and where the event results in exigent circumstances but is somehow qualitatively different than a major fire or explosion. No changes have been made to the rule in response to this comment.

Comment 19

TAM, TCC, and TXOGA recommend the TCEQ change language in §60.4(a)(2) as proposed, so that the federal or state authority must be "engaged in an active emergency" for the emergency response at issue in that subsection to be operative under the rule.

Response 19

The commission responds to this comment by confirming that the broad language in subsection §60.4(a)(2), concerning "emergency response by a federal or state authority to address an actual, unauthorized release" sufficiently implies an immediate and active emergency response. Accordingly, no changes have been made to the rule in response to this comment.

Comment 20

TIP proposes that §60.4(a)(2) be amended to require the relevant emergency response to be "immediately" following the event's release of pollutants, contaminants, or other materials regulated by the agency, and that the rule explicitly require the responding federal or state authority to be "governmental."

Response 20

The commission responds to this comment by confirming that the broad language in §60.4(a)(2) sufficiently implies an immediate and active emergency response. However, the commis-

sion does recognize and agree that emergency response efforts as described in subsection §60.4(a)(2) would always be by governmental actors, which does include contractors or other parties acting on behalf of the federal or state government. The commission also recognizes that subsection §60.4(a)(3)(A) uses similar language but specifically identifies "federal or state governmental authority," so the commission has modified subsection §60.4(a)(2) to require the emergency response at issue be by a "federal or state governmental authority."

Comment 21

TAM, TCC, and TXOGA recommend that language in §60.4(3)(D)(i) concerning evacuations be qualified to exclude evacuations from the sites where the emergency events occur, arguing that sites experiencing emergency events will often conduct partial or complete evacuations out of an abundance of caution. TIP also recommends that operative evacuations be limited to "off-site" places of employment or other locations, offering schools as an example.

Response 21

The commission appreciates the concern that subsection §60.4(a)(3)(D)(i) could be triggered by a partial or complete evacuation of a regulated site performed out of an abundance of caution, and it recognizes a qualitative distinction between any such evacuation and any evacuation of off-site persons. Accordingly, the commission has modified §60.4(a)(3)(D)(i) to qualify relevant evacuations to be of off-site persons. The commission's modification does not add any examples for off-site locations, such as schools, because such addition is not substantively necessary.

Comment 22

TAM, TCC, and TXOGA also recommend that language in §60.4(a)(3)(D)(i) concerning evacuations be qualified to require relevant evacuations be of a substantial number of persons, arguing that minimal evacuations in remote or less populated areas not be considered.

Response 22

The commission has determined that qualifying relevant evacuations more than what is proposed and for off-site locations may unintentionally restrict the executive director from acting under subsection §60.4(a) when warranted by specific contexts and exigent circumstances. Instead of qualifying the types of evacuations that may be relevant under subsection §60.4(a)(3)(D)(i), the commission determined that it would be better to gauge the evacuation's impact by considering it together with whether a community was significantly disrupted and emergency response efforts by the federal or state governmental authority were needed. Accordingly, no changes to the rule were made in response to this comment.

Comment 23

Several commenters are concerned about the inclusion of "shelters in place" as an operative condition in subsection §60.4(a)(3)(D)(ii). TAM, TCC, and TXOGA contend that directives to shelter in place are often a precautionary measure in minor incidents, and using their occurrence as a criterion to define exigent circumstances could effectively discourage regulated entities from issuing them when there is only a potential risk of exposure to a community because of a minor incident.

Response 23

The commission appreciates this comment's concern about subsection §60.4(a)(3)(D)(ii) using sheltering in place as a potential criterion to determine the occurrence of exigent circumstances due to an event at a site. Directives to shelter in place can be issued by site owners or operators as described in the comment, often as a safety precaution, instead of in response to an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency. The commission appreciates that the regulated community is concerned that directing persons to shelter in place as a safety precaution could inadvertently trigger the executive director to designate a site's compliance history classification as under review.

However, the commission also recognizes that sheltering in place, be it by directive or otherwise, can occur in response to an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency, and the occurrence of any sheltering in place may be an indication of the scope of an event's community disruption and the danger that any release has imposed upon the environment and nearby persons. Accordingly, the commission has determined that sheltering in place should remain as a potential criterion to define exigent circumstances under subsection §60.4(a)(3), with the condition that it was in fact caused in whole or in part by an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency. The commission notes that for conditions to qualify as exigent, the onsite event at issue must have also resulted in significant community impact and emergency response by federal or state governmental authority to address the release. The occurrence of any sheltering in place may very well inform whether any community was significantly disrupted, but the commission does not intend for that to necessarily be the case.

Comment 24

TAM, TCC, and TXOGA request that, if sheltering in place remains a relevant criterion to define exigent circumstances, in subsection §60.4(a)(3)(D)(ii) as proposed, that sheltering in place be qualified to require a minimum timeframe (***e.g.***, lasting more than 12 hours) and that sheltering in place at places of employment be restricted to exclude the sites where the emergency events occurred. TIP similarly recommends that the relevant sheltering in place be limited to those occurring for more than 24 hours and at off-site locations.

Response 24

The commission refers to its response to Comment 23 to explain why it determined that sheltering in place should remain a potential criterion to define exigent circumstances, as proposed and herein adopted for subsection §60.4(a)(3)(D)(ii). Furthermore, the commission has considered whether to modify this subsection to qualify relevant sheltering in place to be limited to those occurring for more than a certain number of hours or at offsite locations. After due consideration, the commission has determined that placing a minimum time limit as a qualifier for this criterion would be problematic because it may restrict or prevent the executive director from designating a site's compliance history classification as under review if its event, amongst other results, causes a sheltering in place of persons that is brief but highly impactful for those affected. By means of example, an event causing a brief sheltering in place in a highly populated area in the middle of the day could prove to be more impactful and disruptive than one causing a sheltering place at a less populated area or in the middle of the night.

Instead of temporally qualifying which sheltering in place should be relevant for the purposes of subsection §60.4(a)(3)(D)(ii), the commission confirms that the criterion must be caused in whole or in part by an actual, unauthorized release and considered together with whether the event also resulted in significant community disruption and emergency response as required.

However, and upon review of the concern expressed in this comment, the commission has determined that it would be appropriate to modify §60.4(a)(3)(D)(ii) to qualify relevant sheltering-in-place to be of off-site persons. Such sheltering-in-place off-site is qualitatively different than those that occur onsite without significant community impact. Accordingly, §60.4(a)(3)(D)(ii) is modified to limit relevant sheltering-in-place to be off-site of the location where the event in question occurred.

Comment 25

TMH commented that it is concerned with §60.4(a)(3)(D)(ii) using sheltering in place as a potential criterion to define exigent circumstances, stating that regulated entities sometimes issue such directives when a separate, neighboring facility provides notification of an event that is "currently contained to the facility but has the potential to impact others outside the facility." To prevent a site's classification from being designated as under review, when the site is nearby but otherwise unrelated to an emergency event, TMH recommends subsection §60.4(a)(3)(D)(ii) be clarified to qualify relevant sheltering in place to those "recommended by the event facility, incident command, or local authorities."

Response 25

As stated in responses to previous comments, the commission determined sheltering in place, caused in whole or in part by an actual, unauthorized release, is a relevant and appropriate criterion to potentially determine whether circumstances resulting from an event are exigent. Additionally, the commission notes that the executive director's authority under subsection §60.4(a) to designate a site's compliance history classification as under review is limited to doing so for sites where the events at issue occurred. The exigent circumstances resulting from the onsite event may have occurred at offsite locations, but the event must have occurred at the site for which the executive director places the classification under review. No changes were made to the rule in response to this comment.

Comment 26

TIP recommends that subsection §60.4(a)(3)(D)(ii) be modified to qualify relevant sheltering in place and be limited to those for which a federal, state, or local governmental authority issues a mandatory order.

Response 26

The commission declines to make the change requested in this comment. For the reasons stated in responses to previous comments, the commission recognizes and appreciates that sheltering in place is often directed or advised as a safety precaution instead of in response to actual, unauthorized releases of contaminants, pollutants, or other materials regulated by the agency. The commission also understands that directives or advice to shelter in place may be issued by regulated entities or governmental bodies. After consideration of these issues and how the criterion in subsection §60.4(a)(3)(D)(ii) should be stated, the commission determined it best to broadly look to whether the sheltering in place occurred in response to an active unauthorized release of pollutants, contaminants, or other materials regulated by the commission, rather than how any directive or advice to do so was issued and by whom. This approach would not restrict the executive director's authority when needed to designate a site's compliance history classification as under review in situations where people are sheltering in place but directives have not been issued. Accordingly, no changes to the rule were made in response to this comment.

Comment 27

TAM, TCC, and TXOGA recommend the TCEQ consider modifying §60.4(a)(3)(D)(iii) so that relevant traffic hazards and interference with normal use of navigable waterways, railways, or roads be limited to those that are "significant."

Response 27

The commission has considered whether to incorporate a qualification as proposed into the criterion for subsection §60.4(a)(3)(D)(iii), but the commission has determined that the significance under this subsection of any traffic hazards or interference with normal use of navigable waterways, railways, or roads is already a factor in determining whether the site event's resulting circumstances caused significant community impact. Furthermore, phrasing of this subsection is aligned with language in existing TCEQ rule, Section 101.5, Traffic Hazard. Accordingly, no change has been made to the rule in response to this comment.

Comment 28

TIP requests that subsection §60.4(a)(3)(D)(iii) be modified to temporally qualify relevant traffic hazards or interferences with normal uses of navigable waterways, railways, or roads to only those that last for more than 72 hours.

Response 28

For reasons similar to those in its response to Comment 27, the commission declines to incorporate the changes proposed in this comment. The commission intends that it would be appropriate for the executive director to designate a site's compliance history classification as under review if an event at the site results in significant community disruption, emergency response by federal or state governmental authority to address a release, and caused a traffic hazard or interference with the normal use of a navigable waterway, railway, or road. The commission's determination would not change if the traffic hazard or interference were for 72 hours or less so long as the circumstances resulting from the onsite event still meet the other criteria in subsections §60.4(a)(1) and (2). Accordingly, no change to the rule has been made in response to this comment.

Comment 29

TAM, TCC, TIP, and TXOGA recommend that the TCEQ amend subsection §60.4(a)(3)(D)(iv) as proposed to define "injury" beyond simply being directly attributable to the subject event's release of pollutants, contaminants, or other materials regulated by the TCEQ. They recommend the TCEQ consider incorporating terminology from the Occupational Health & Safety Administration (OSHA) for reportable injuries, which would restrict injuries relevant to subsection §60.4(a)(3)(D)(iv) to those that result in in-patient hospitalization, amputation, or loss of an eye. TIP similarly comments that §60.4(a)(3)(D)(iv)'s "injury" be narrowed so that only those that are "serious" would qualify.

Response 29

The commission appreciates the suggestion in this comment to qualify which injuries directly attributable to a release of pollutants, contaminants, or other materials regulated by the agency would be relevant for the purpose of potentially defining exigent circumstances under subsection §60.4(a). After due consideration, the commission has decided it would be best to gauge this criterion not with an additional qualifier as proposed but instead in combination with the other factors in subsections §60.4(a)(1) and (2) that define whether circumstances resulting from an on-site event rise to the level of being exigent and operative under the rule. This approach keeps the inquiry of whether circumstances are exigent based on factors relating to significant community impact and disruption and on the need for a federal or state governmental authority to perform emergency response to address an active unauthorized release of a pollutant, contaminant, or other material regulated by the commission. The commission has decided including an additional qualifier may also unintentionally place the commission in a circumstance of weighing or judging serious individual injuries. A general qualifier of significance is already an element of consideration which will appropriately guide the commissions considerations. Accordingly, no changes to the rule have been made in response to this comment.

§60.4(b). Notice of Decision to Reclassify

Comment 30

TAM, TCC, and TXOGA comment that subsection §60.4(b) as proposed does not offer sufficient opportunity for regulated entities to meet with the executive director and provide information to show that reclassifying a site to suspended is not warranted. They recognize that subsection §60.4(d) as proposed does afford such an opportunity to meet with the executive director, but they interpret it to only provide the opportunity after the executive director has issued a Notice of Decision to Reclassify. They request §60.4(b) be amended to allow for such a meeting upon the designation of a site's compliance history classification as under review.

Response 30

The commission appreciates this comment, but it notes that subsection §60.4(d) states that, at any time prior to filing a motion for commission review under §60.4(e), a site's owner or operator may demonstrate to the executive director that reclassification is not warranted. The commission intends §60.4 to encourage such demonstrations be made at any time prior to the filing of a motion for commission review, which includes periods during and immediately following an event, potentially prior to an under review designation. No changes to the rule have been made in response to this comment.

Comment 31

TIP recommends that, when deciding whether to issue a Notice of Decision to Reclassify a site to suspended, subsection §60.4(b) should require the executive director to consider two factors beyond the criteria that qualified the site's classification to have been placed under review. First, TIP recommends the executive director to consider whether there is or was "an actual and sustained impact to human health and the environment." Second, TIP recommends the executive director consider whether there is or was a "continued use of significant federal resources to respond to the event, such as an incident command system." TIP argues that consideration of these factors would better distinguish contexts that warrant designating a site's classification as under review from those that additionally warrant further action under the rule.

Response 31

The commission understands and appreciates the interest to distinguish contexts that warrant designating a site's compliance history classification as under review from those that justify issuing a Notice of Decision to Reclassify and possibly result in reclassifying the site at issue as suspended. However, and instead of placing additional criteria into subsection §60.4(b) that would categorically distinguish between those two contexts, the commission intends for new, adopted §60.4 to authorize the executive director to issue a Notice of Decision to Reclassify if information known or discovered since an under review designation reflects that reclassification and its consequences are appropriate and needed. The commission recognizes that information about the cause of the site event that resulted in exigent circumstances may not be known during or immediately following the event, but it may be discovered or understood in the weeks or months that follow. As such information becomes known, including whether the event in question was caused through any fault of the site's owner or operator, the executive director will have better insight as to whether the event and its exigent circumstances were so significant and impactful that issuance of a Notice of Decision to Reclassify is appropriate and warranted.

The commission's decision to not place additional criteria in subsection 60.4(b) is further justified by recognizing that issuance of a Notice of Decision to Reclassify may be appropriate and needed if the cause of the site's event remains unidentified or unresolved, thereby posing a danger or recurrence even if the initial phases of the subject event, community disruption, and emergency response have ended.

For these reasons as stated, no changes have been made to the rule in response to this comment.

Comment 32

TIP requests modification of subsection §60.4(b), and ostensibly language in §60.4(a), so that the period for the executive director to decide whether to issue a Notice of Decision to Reclassify, after having designated the current classification as under review, would not begin until 90 days after the designation. This would be as opposed to the period as stated in proposed subsections §60.4(a) and (b), which begins 30 days after the designation and lasts until the 90th day after the designation. TIP contends that forcing a decision by the executive director prior to 90 days after the initial designation would prevent the TCEQ and the regulated entity from focusing attention on the event itself.

Response 32

The commission agrees with this comment insofar as recognizing the importance of the TCEQ and regulated entities focusing attention on site events that result in exigent circumstances and on the needed and appropriate responses to such events. However, the commission also recognizes that a principal goal for this rulemaking is to authorize and enable the executive director to designate a site's compliance history classification as under review immediately upon or after the occurrence of an event that results in exigent circumstances. Affording to the executive director the authority to make such designation immediately creates a tool in the compliance history program that provides a better and more accurate measure of such sites' performance in light of significant events, and it makes the compliance history program a more effective tool to provide oversight and en-

sure regulatory consistency. The commission notes that the processes required in subsection §60.4(c), regarding review of permitting applications, is a principal way that the agency will ensure that its own processes are appropriately accounting for the event at issue.

Balancing these interests, the commission has determined that it is appropriate for subsections §60.4(a) and (b) to enable immediate designations of compliance history site classifications as under review and then allow for issuance of any Notice of Decision to Reclassify to occur no sooner than 30 days and not later than 90 days after the under review designation. No changes to the rule have been made in response to this comment.

Comment 33

TMH similarly commented that the proposed period for the executive director to decide whether to issue a Notice of Decision to Reclassify, *i.e.*, 30 to 90 days after designating a site's classification as under review, would be insufficient. TMH argues that the root cause of any emergency event should be considered when deciding whether to issue a Notice of Decision to Reclassify, that scientific, root cause analyses will likely take more than 90 days to conclude, and that action under subsection §60.4(b) should not occur before the emergency event's root cause is known.

Response 33

The commission responds to this comment in part by referring to the information in its response to Comment 32. Additionally, the commission appreciates the commenter's perspective that root cause analyses should be considered prior to issuance of any Notice of Decision to Reclassify and potential reclassification to suspended. However, and as the comment describes, root cause analyses may take more than 90 days to conclude, and delaying the issuance of any Notice of Decision to Reclassify beyond 90 days after an under review designation would be counterproductive to a principal goal for this rulemaking: providing a more immediate measure of a site's performance, thereby making compliance history a more effective tool to provide oversight and ensure regulatory consistency. The commission recognizes that the information in a root cause analysis may be relevant to the review of the decision to reclassify, and to any showing under subsection §60.4(h)(1)(B) that a suspended reclassification should end, so the commission urges such information to be shared with the executive director when it is available.

For these reasons, no change to the rule has been made in response to this comment.

Comment 34

TMH believes that any decision about whether to issue a Notice of Decision to Reclassify a site should be made by providing consideration to factors beyond the subject emergency event and resulting exigent circumstances. For example, TMH contends careful consideration should be provided to the site's existing compliance history, the circumstances that lead to the event, the frequency of inspections by the TCEQ, and if there have been other events at the site. TMH contends that for this decision, sites with better compliance history scores or "exemplary performance" should be viewed more favorably than those with worse scores.

Response 34

The commission recognizes that regulated entities are interested and motivated to maintain favorable compliance history scores and classifications. This rulemaking is expressly focused on the exigent circumstances resulting from a significant event, and how the significance, urgency, and impact of those exigent circumstances independently demand treating the relevant site's compliance history classification in a manner differently than currently allowed under the compliance history program. The commission appreciates that when determining whether to issue a Notice of Decision to Reclassify, subsection §60.4(b) does require consideration of any available information concerning whether the event in question was caused through any fault of the site's owner or operator; such consideration may be informed by information known that had garnered a favorable site compliance history score or classification.

No changes to the rule have been made in response to this comment.

§60.4(c). Evaluation of Permit Applications

Comment 35

AAH proposes that, if the executive director has issued a Notice of Decision to Reclassify a site's compliance history, §60.4(c) be modified to exclude the option for the Commission to outright approve a permit for a site. AAH contends the only options should be to approve the permit with changes or deny the application, on the basis that an unauthorized emission event should require evaluation of the incident and recommendations for improving safety using the best available technology.

Response 35

The commission appreciates the concern expressed in this comment, and subsection §60.4(c) as proposed and adopted does allow for the agency to approve the permit in question, approve it with changes, or deny the permit, depending on the results of evaluating the permit application in light of the significant event in question. The commission recognizes that reviewing a permit application in light of the event in question may very well demonstrate that the permit should not be issued or should only be issued with additional requirements included. The commission also recognizes that the operations sought in the permit may prove to be unrelated to the event or its causes, and that there are contexts in which the most protective actions moving forward require the issuance of the permit under consideration. Whether and how a permit issuance would be appropriate or legally required after evaluating the application in light of the event will depend on the specific context of the event and the operations that would be authorized by the permit.

No changes were made to the rule in response to this comment.

Comment 36

TAM, TCC, TIP, and TXOGA express concerns about subsection §60.4(c)'s restriction on the agency taking action to issue, renew, amend, or modify a permit specific to a site for which the executive director has issued a Notice of Decision to Reclassify. They contend that this restriction exceeds the TCEQ's statutory authority under Tex. Water Code, Chapter 5, even though the restriction is qualified to apply only until the agency has reviewed the application for such permitting action in light of the event that resulted in exigent circumstances, and only if the agency is not otherwise legally obligated to act. As an alternative to this restriction, TAM, TCC, and TXOGA recommend subsection §60.4(c) be modified to impose an affirmative obligation on the agency to consider the exigent circumstance that caused the Notice of Decision to Reclassify or resulting suspended classification. Similarly, TIP recommends the procedural prohibition on taking ac-

tion be replaced with a simpler obligation on the agency to evaluate the application in light of the emergency event.

Response 36

The commission has considered the concerns and arguments contained in this comment, but the commission disagrees that it would exceed its statutory authority by promulgating and implementing a rule with the processes and requirements in subsection §60.4(c). To the contrary, the Texas Water Code requires the commission to consider the compliance history of a regulated entity when taking action on a permit application subject to the compliance history program, and it requires the commission to issue rules that ensure compliance history is used for permitting decisions. *See* Tex. Water Code §5.754(e)(1) and (i). The commission is also charged with developing standards for evaluating and using compliance history in a way that ensures regulatory consistency, including standards that establish a system of classifications. Tex. Water Code §5.753(a) and 5.754(a). Through the issuance of adopted new §60.4, the commission better effectuates the statutory purpose of its compliance history program by ensuring its classifications can provide a more immediate and accurate measure of a site's performance in light of an event, and by making compliance history a more effective tool to provide oversight and ensure regulatory consistency for sites where such events occur.

Additionally, the commission's substantive permitting authorities require considering whether there is any indication or concern that issuing a permit would contravene or interfere with the commission's statutory charges to safeguard the environment and the public's health and property. *See, e.g.*, Tex. Health & Safety Code §361.002, §361.011, §382.002, and §382.0518(b)(2); and Tex. Water Code §26.011 and §26.027. The commission has determined that such statutory charges authorize it to require review of the application in light of the event before the agency takes action to issue, renew, amend, or modify a permit specific to the site. The commission does not intend for this procedural requirement in subsection §60.4(c) to necessarily delay the agency taking action on any pending permitting application. The purpose is to ensure that the operations that would be authorized by the permit are appropriate in light of the event, and the procedure in §60.4(c) helps ensure the agency will be better positioned to consider all relevant factors.

The commission also disagrees with this comment's recommendation that paragraph §60.4(c) include an obligation for the agency to review a permitting application in light of the event without a procedural requirement for doing so prior to taking action. Procedurally requiring a review of the application in light of the event, and imposing a qualified prohibition for taking action on the application prior to doing so, ensures the agency will be better positioned to evaluate whether the event presents any indication or concern that continued operations at the site would endanger the environment or the public's health or property.

For these reasons, no changes have been made to the rule in response to this comment.

Comment 37

TIP recommends that any additional review of a pending permit application, under subsection §60.4(c), be limited to those applications that would authorize operations with a direct link or nexus to the subject emergency event by media or related pollution control equipment process.

Response 37

The commission appreciates that the reviewing obligations in subsection §60.4(c) will be identifiably relevant for applications that would authorize operations with a direct link to the subject event, be it through related media or pollution control equipment processes. The commission also recognizes that the relevancy and association may not be readily identifiable prior to reviewing the application in light of the event, or prior to the event or exigent circumstances resolving, or prior to investigations into the matter being underway or complete. The commission intends for the review required by subsection §60.4(c) to confirm or reveal whether there is any association between the event and the operations sought to be authorized. For these reasons, no change to the rule was made in response to this comment.

Comment 38

TIP is concerned that subsection §60.4(c) could function as an impediment to permitting efforts unrelated to the emergency event or resulting exigent circumstances, hindering appropriate response and recovery efforts. TIP suggests that, rather than focusing on permitting actions, the TCEQ could respond to such an emergency event by imposing consequences related to compliance and enforcement.

Response 38

As stated in the preamble to this rule's proposal, "he purpose of the required evaluation of pending permit applications is not to pause, prolong, or stop permitting actions that are appropriate in light of the event." The purpose is to ensure that the operations that would be authorized by the permit are appropriate in light of the event, and the procedure in subsection §60.4(c) helps ensure the agency will be better positioned to consider all relevant factors. Furthermore, the commission does not intend for the procedure in subsection §60.4(c) to create problematic obstacles for issuing permits appropriate and necessary to address or respond to the event or its resulting exigent circumstances. Lastly, the commission confirms that any site reclassified to suspended, for the duration of the reclassification, shall be treated as an unsatisfactory performer for the purposes of existing §60.3, which includes additional and unannounced investigations as well as any additional oversight necessary to improve environmental compliance.

Accordingly, no change to the rule was made in response to this comment.

§60.4(d). Demonstration that Reclassification Not Warranted

Comment 39

AAH agrees that regulated entities should have the opportunity to demonstrate to the executive director that reclassification is not warranted, but AAH comments that such submitted information and the executive director's subsequent decision must be shared with the public. AAH requests that this process encourage public engagement and that information shared by the regulated entities should be shared with affected communities.

Response 39

The commission agrees that public information received or generated by the TCEQ, unless excepted from disclosure requirements under the Public Information Act by virtue of confidentiality or privilege, should be made available to the public. To that end, members of the public are welcome to submit Public Information Act requests for such information, including any notices issued by the executive director to site owners or operators, and the TCEQ will respond to and comply with such requests as re-

quired and according to the procedures in the Public Information Act.

Separately, the public may participate in different ways with the mechanisms within adopted new §60.4. For example, the public is welcome to provide its information and perspective about significant events or emergency circumstances that are potentially exigent. Any motion for commission review of a Notice of Decision to Reclassify, filed pursuant to subsection §60.4(e), shall be a viewable and public document and one for which the public may file comment and perspective. Lastly, the commission or general counsel may schedule the motion for consideration at a commission meeting, which would be open to the public.

No changes to the rule were made in response to this comment.

§60.4(e). Motion for Commission Review of the Executive Director's Decision.

Comment 40

TIP recognizes that an owner or operator of a site for which the executive director has issued a Notice of Decision to Reclassify has the option to file a motion for the commission to review the decision, but TIP requests modifying subsection §60.4(e) as proposed so as to disallow the Commission from overturning the motion by operation of law. TIP requests the Commission be required to take action on any such motion.

Response 40

The commission has considered the request in this comment but decided not to amend subsection §60.4(e) as proposed. When a site owner or operator files a motion for commission review of the executive director's decision, pursuant to subsection §60.4(e), the motion may be considered and acted upon at a public meeting, or it may be considered but allowed to be overturned by operation of law. The commission has determined that this is an appropriate structure to allow for but not require action at a commission meeting, and one for which there is precedent in similar processes. This established structure also helps avoid complications that could occur in the unlikely event that the commission were unable to take action to deny a motion at a properly scheduled commission meeting.

No changes were made to the rule in response to this comment.

§60.4(g). Effects of Reclassification

Comment 41

AAH requests clarification as to the effect of being "treated as an unsatisfactory performer" if a Site's compliance history is reclassified to suspended. AAH is concerned that a site reclassified to suspended could still seek permits and continue operating.

Response 41

In response to this comment, the commission refers to the consequences listed in existing §60.3 for being classified as an unsatisfactory performer. As categorized in §60.3, these consequences pertain to permitting, investigations, enforcement, and participation in innovative programs. Sites that are reclassified to suspended under adopted new §60.4 will be subject to these requirements and considerations applicable to unsatisfactory performers for the duration of their suspended status. However, and as stated in adopted new §60.4(g)(2), authorizations otherwise prohibited by §60.3(a)(3)(A)(i) and (ii) may be made or kept available for a reclassified site if its owner or operator makes a sufficient demonstration that it would be appropriate for responsible operation and response to the event and exigent circumstances. The commission intends that the executive director will hold the discretion to determine whether such a demonstration is sufficient. No changes to the rule were made in response to this comment.

Comment 42

AAH proposes that TCEQ implements requirements for an increased frequency of regular inspections of sites that "begin the process of reclassification" and continuing until the suspended reclassification ends. AAH similarly proposes TCEQ consider mandating an increased frequency of third-party inspections, such as for leak detection and repair ("LDAR"), nondestructive testing, and other, similar, relevant services. AAH contends such increased inspection scrutiny will better ensure compliance and make disastrous incidents less likely to occur.

Response 42

The commission has considered this comment and notes that sites reclassified to suspended, because they will be treated as unsatisfactory performers for the purposes of existing §60.3, will be subject to increased and unannounced investigations and generally additional oversight necessary to improve environmental compliance. The commission also appreciates that the TCEQ's regulatory response to violations of statutes, rules, permits, and orders within its enforcement jurisdiction continues to include enforcement authority, as described in Chapter 7 of the Texas Water Code. Enforcement authority continues to include the ability to pursue civil court remedies including injunctive relief, through temporary restraining orders and, after notice and hearing, a temporary or permanent injunction. The commission has determined that it would not be necessary to modify subsection §60.4(g) as requested to achieve its goals or effectuate the purpose of this rulemaking. Accordingly, no change to the rule has been made in response to this comment.

Comment 43

Speaking to the proposed consequences of a site being reclassified to suspended, "TIP objects to the regulatory construct of 'treated as unsatisfactory,'" arguing that it is overly broad and should recognize the status or classification of the site prior to the emergency event's occurrence. Further, TIP contends that an "unsatisfactory" classification should be reserved for those sites that accrued enough compliance history points to garner a score of 55 points or more, as per the current rating and classification system governed by §60.2 and authorized by Texas Water Code §5.754(c). TIP also comments that a subject emergency event may result from causes independent of the owner or operator's compliance-related activities, which are at the heart of the current rating and classification system. For these reasons, TIP recommends the sites should not simply "be treated as an unsatisfactory performer;" TIP recommends the TCEQ instead utilize its existing authorities to increase investigations, perform unannounced investigations, and establish other, additional oversight.

Response 43

The commission appreciates the concern expressed in this comment and recognizes that the standards enacted by the TCEQ in the current compliance history program do reserve unsatisfactory classifications for sites that accrue enough compliance history points to result in a score of 55 points or more. Through adoption of new §60.4, and its mechanisms that include treating sites reclassified to suspended as unsatisfactory performers under existing §60.3, the commission is creating a new compli-

ance history standard and classification that promotes regulatory consistency through quick action for significant events that already and otherwise demand urgent agency responses. The commission has also determined that even though a suspended reclassification will not impact the site's underlying compliance history score, it is appropriate to utilize the pre-existing consequences listed in §60.3 for unsatisfactory performers and, with the qualification contained in adopted new §60.4(g)(2), subject sites reclassified to suspended to the same consequences. Imposing such consequences on sites reclassified to suspended is appropriate because of the acute significance, impact, and danger brought about by the event. The commission does intend that imposing such consequences on a site because of a reclassification to suspended will be rarely needed and reserved for sites with events resulting in significant community disruption that experience rare, extreme emergencies.

Comment 44

TIP requests that, for any sites "treated as unsatisfactory" under subsection §60.4(g) as proposed, the TCEQ clarify the "interplay" of §60.4(c) and (g), and existing §60.3(a)(3)(A), relating to the prohibition on sites classified as unsatisfactory performers from obtaining and/or maintaining TCEQ permit authorizations issued under Chapters 116 or 205 of the TCEQ's rules. TIP expresses concern that a site may be ineligible for issuance of a flexible permit under Chapter 116 or a general permit under Chapter 205 if it is reclassified to suspended. TIP urges the TCEQ to not let §60.4(g) mandate denial or suspension of such permit applications.

Response 44

The commission recognizes the concern in this comment that sites reclassified to suspended may be subject to a suite of permitting restrictions for the duration of the reclassification. This would include continued permit review requirements under subsection §60.4(c) to ensure any pending permitting action is appropriate in light of the event, restrictions on the ability to obtain or renew a flexible permit under Chapter 116 or authorization to discharge under a general permit issued under Chapter 205 of the TCEQ's rules, or the maintenance of any such discharge authorization that had been issued through Chapter 205. The commission has determined that these and others listed in existing §60.3(a) are appropriate permitting restrictions for sites that experience significant events resulting in significant community disruption. The commission does recognize that these permitting restrictions are substantial, but they are likely warranted and justified to ensure the TCEQ satisfies its statutory charges to protect the environment and human health and property. The commission also intends that the benefit to escaping these permitting restrictions be an incentive for site owners or operators to diligently and thoroughly resolve the exigent circumstances, identify the cause of their precipitating event, and implement corrective actions that reduce or eliminate the likelihood of recurrence.

The commission has determined, however, that there may be contexts in which it is appropriate for a site's responsible operation and response to the event and exigent circumstances to include authorization to discharge under general permits issued pursuant to Chapter 205, or to enable continued, changing operations to the extent authorized through a flexible permit issued under Chapter 116. To address this contingency, the commission has modified §60.4(g)(2) to allow the owner or operator of any site reclassified to suspended to demonstrate to the executive director that such authorizations should be made or kept available. Upon this demonstration, the executive director will consider any information presented by the site's owner or operator, together with other information known by the agency, and the executive director may allow for the authorizations at issue to be available. The commission intends that the executive director will hold the discretion to determine whether such a demonstration is sufficient to justify the authorizations being made or kept available.

§60.4(h). Duration of Reclassification

Comment 45

TAM, TCC, and TXOGA propose that the one-year minimum duration of any suspended reclassification be struck from subsection §60.4(h), arguing that removing the minimum period would incentivize regulated entities to "move as quickly as they can to address the issues," ostensibly enabling the reclassification to end under §60.4(h)(1) or (2). TIP also proposes to remove the proposed minimum one-year duration for any suspended reclassification.

Response 45

The commission appreciates the proposal in this comment and the argument it offers, but the commission has determined that the minimum one year duration for any suspended reclassification must be in place to serve as a deterrent to causing, suffering, or allowing any significant event so impactful that it results in exigent circumstances. The commission intends for the consequences of any reclassification to themselves be necessarily impactful. No change to the rule was made in response to this comment.

Comment 46

TIP proposes several more changes to §60.4(h) as proposed. First, TIP recommends consolidating proposed paragraphs §60.4(h)(1) and (h)(2) with the following criteria to end a reclassification: "Unless the executive director removes the determination sooner, a final exigent circumstances determination at a site would end when an enforcement action arising from the event (if any) has been resolved and has resulted in a component that is accounted for in the site's compliance history." Second, TIP proposes to change the temporal limit of any suspended reclassification from 3 years after the effective date of reclassification, as stated in proposed §60.4(h)(3), to 2 years from the date of the exigent circumstances determination, ostensibly referring to the date when the executive director had designated the site's existing classification as under review.

Response 46

The commission appreciates the suggestions in this comment but disagrees with its proposals.

Subsection §60.4(h)(1) as proposed and herein adopted has a specific structure and criteria through which the executive director may determine that a reclassification to suspended is no longer warranted. Whereas the portion of the comment relevant to this issue speaks simply of the executive director removing the reclassification sooner, the commission prefers the structure in subsection §60.4(h)(1) as proposed because it focuses that inquiry on whether the exigent circumstances and precipitating cause have been resolved, identified, and remedied.

Second, subsection §60.4(h)(2) as proposed and herein adopted contemplates and addresses a scenario where a site reclassification to suspended must end if an enforcement case arising from the event at issue is neither pending nor anticipated by the

executive director. The substitute language offered in the comment does not account for this contingency, but the commission believes it has value and should be included so as to require the reclassification to end if an enforcement case has not been initiated and is not anticipated.

Finally, subsection §60.4(h)(3) as proposed and herein adopted would provide a backstop temporal limit for any reclassification to suspended, such that it would end three years after the effective date of the reclassification. The commission has determined that this is an appropriate maximum duration for any reclassification to suspended, appreciating that the entire period of actions under adopted new §60.4 may encompass approximately but fewer than four years starting with the site's classification being designated as under review and ending with the maximum time limit for any suspended reclassification. This period is comparable but shorter than the standard 5-year period utilized by other functions in the compliance history program. The commission has determined that a shorter maximum period for any reclassification to suspended, especially as proposed in this comment, may be so short that site owners and operators are not effectively impacted by the restrictive consequences intended for sites reclassified to suspended.

No changes to the rule were made in response to this comment.

Statutory Authority

The new rule is adopted under the authority of Texas Water Code (TWC) §5.753, concerning Standards for Evaluating and Using Compliance History, and TWC, §5.754, concerning Classification and Use of Compliance History, which authorize rulemaking to establish compliance history standards, call upon the compliance history program to ensure consistency and authorize the commission to utilize a minimum of three classifications. These provisions do not restrict the application of such classifications to be at specific intervals. Additional authority exists under TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The adopted new rule implements TWC, §§5.102, 5.103, 5.753, and 5.754.

§60.4. Site Classification Changes Due to Exigent Circumstances.

(a) Site Classification Under Review. Regardless of any other section of Chapter 60 of this title (relating to Compliance History), the executive director may designate a site's current compliance history classification as "under review" if the executive director determines that exigent circumstances exist due to an event at the site. The executive director shall make any such designation no later than 90 days after exigent circumstances begin. The designation as "under review" is effective immediately and written notice will be issued to the site's owner and operator, as readily identifiable through agency records. Unless a Notice of Decision to Reclassify is issued under subsection (b) of this section, the designation shall expire on the 91st day after the date of the written notice of designation. For the purpose of this section, exigent circumstances must include:

(1) Significant community disruption;

(2) Emergency response by a federal or state governmental authority to address an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency; and

(3) The event must have resulted in one or more of the following:

(A) the issuance of an emergency order by a federal or state governmental authority;

(B) the issuance of a temporary restraining order or temporary injunction at the request of the state, related to compliance with "applicable legal requirements" under the jurisdiction of the commission, as defined by §60.1(c)(1) of this title (relating to Compliance History);

(C) the use of significant federal or state resources, such as the activation of an incident command system; or

(D) an actual, unauthorized release of pollutants, contaminants, or other materials regulated by the agency, which causes:

(i) the evacuation of off-site persons from homes, places of employment, or other locations;

(ii) the sheltering in place by off-site persons in homes, places of employment, or other locations;

(iii) the creation of a traffic hazard or interference with normal use of a navigable waterway, railway, or road; or

(iv) injury or death of a person directly attributable to the release.

(b) Notice of Decision to Reclassify. The executive director may then decide to reclassify a site's compliance history to "suspended." The executive director will consider any available information concerning whether the event in question was caused through any fault of the site's owner or operator. The executive director may make such a decision no sooner than 30 days and no later than 90 days after a site's classification is designated as "under review," and the executive director shall send written notice to the site's owner and operator, as readily identifiable through agency records, of the decision to reclassify the site's compliance history to suspended. The noticed reclassification shall not become final until the effective date under subsection (f) of this section.

(c) Evaluation of Permit Applications. To the extent any permit applications are pending for authorizations at the site, upon the executive director's written Notice of Decision to Reclassify a site's compliance history to "suspended" and until the agency has evaluated the pending permit application in light of the event, unless legally obligated otherwise or the decision is withdrawn or set aside, the agency shall not take action to issue, renew, amend, or modify a permit specific to the site. Based on the evaluation, the agency may:

(1) approve the permit;

(2) approve the permit with changes, which may include additional protective measures to address conditions that caused or resulted from the event; or

(3) deny the permit.

(d) Demonstration that Reclassification Not Warranted. At any time prior to filing a motion for commission review of the executive director's Notice of Decision to Reclassify, the site's owner or operator may demonstrate to the executive director that reclassification is not warranted. If the executive director determines that reclassification is not warranted, the executive director shall withdraw the decision to reclassify the site's compliance history to suspended by providing written notice to the site's owner and operator, as readily identifiable through agency records.

(e) Motion for Commission Review of the Executive Director's Decision. The executive director's decision to reclassify a site's

compliance history to suspended under this section may be appealed to the commission only by persons who own or operate the site, and pursuant to the following procedures:

(1) A motion for commission review of the executive director's decision shall be filed with the Chief Clerk not later than 90 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(2) The commission or the general counsel may, by written order, extend the period of time for taking action on the motion so long as the period for taking action is not extended beyond 180 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(3) The motion shall provide the name, address, and daytime telephone number of the person filing the motion, and a brief explanation of the person's owner or operator status as it relates to the site being reclassified.

(4) The motion shall state the grounds for the appeal and the specific relief sought. The appeal must also include all documentation and argument in support of the motion.

(5) At the request of the general counsel or a commissioner, the motion for review of the executive director's decision to reclassify will be scheduled for consideration during a commission meeting. At the commission meeting, the commission may act on the motion by affirming or setting aside the executive director's decision to reclassify in whole or in part. A Commission Order for its action under this paragraph shall not contain conclusions of law.

(6) If the commission does not act on the motion under paragraph (5) of this subsection, then the motion will be addressed as follows:

(A) Unless an extension of time is granted, if a motion for review of the executive director's decision to reclassify is not acted on by the commission within 115 days after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section, the motion is overruled by operation of law; or

(B) In the event of an extension, the motion is overruled by operation of law on the date fixed by the order granting the extension, or in the absence of a fixed date, on the 181st day after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section.

(7) During the pendency of any judicial review of the reclassification to suspended, the reclassification shall remain for the purpose of this rule.

(f) Effective Date of Reclassification.

(1) If no timely motion for commission review is filed pursuant to subsection (e) of this section, the site's compliance history shall be reclassified to suspended on the 91st day after the date the executive director sends the written Notice of Decision to Reclassify under subsection (b) of this section; or

(2) If a timely motion for commission review is filed pursuant to subsection (e) of this section, the site's compliance history shall be reclassified to suspended on the date a commission order affirming the executive director's decision to reclassify is signed or, in the absence of such an order, on the date the motion is overruled by operation of law.

(g) Effects of Reclassification. While a site's compliance history is reclassified to suspended under this section:

(1) The agency shall continue to evaluate applications for permits specific to the site under subsection (c) of this section; and

(2) The site shall be treated as an unsatisfactory performer for the purposes of §60.3 of this title (relating to Use of Compliance History), except that the owner or operator of a reclassified site may demonstrate to the executive director that authorizations under §60.3(a)(3)(A)(i) and (ii) would still be appropriate. Upon such a demonstration, the executive director may decide to allow for such authorizations regardless of the prohibitions in §60.3(a)(3)(A)(i) and (ii).

(h) Duration of Reclassification. A site's compliance history reclassification under this rule to suspended shall remain for at least one year after the effective date of reclassification, and then until the earliest of:

(1) the executive director provides written notice of the determination that the reclassification is no longer warranted, after the executive director decides that:

(A) the exigent circumstances have been resolved; and

(B) the cause of the event has been identified and corrective actions have been implemented that appropriately reduce or eliminate the likelihood that the same or a similar event will reoccur;

(2) an enforcement action arising from the event has been resolved and resulted in a component that is accounted for in the site's compliance history, or such enforcement case is neither pending nor anticipated by the executive director; or

(3) three years after the effective date of reclassification.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 3, 2022.

TRD-202202111
Gitanjali Yadav
Deputy Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: June 23, 2022
Proposal publication date: December 31, 2021
For further information, please call: (512) 239-2029

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

SUBCHAPTER K. MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3. DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD AND NON-ROAD VEHICLES

30 TAC §114.622

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts §114.622.

Amended §114.622 will be adopted *without changes* to the proposed text as published in the January 28, 2022, issue of the *Texas Register* (47 TexReg 249); therefore, the rule will not be republished.

The amendments to §114.622 will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Adopted Rule

The Texas Emissions Reduction Plan (TERP) was established under Texas Health and Safety Code (THSC), Chapter 386, by Senate Bill 5, during the 77th Texas Legislature, 2001. The TERP was created to provide financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment, with the Diesel Emissions Reduction Incentive Program (DERIP) established under THSC, Chapter 386, Subchapter C as the primary incentive program.

House Bill (HB) 4472, 87th Texas Legislature, 2021, amended THSC, Chapter 386, Subchapter C to provide that the commission may not set the minimum percentage of annual hours of operation required for TERP-funded marine vessels or engines as less than 55%.

The rulemaking adoption will revise §114.622 to implement HB 4472 and align with existing statute.

Section Discussion

§114.622, Incentive Program Requirements

The commission adopts §114.622, creating a new subsection (c), establishing that proposed projects involving marine vessels or engines must be operated in the intercoastal waterways or bays adjacent to a nonattainment area or affected county of this state for not less than 55% over the lifetime of the project to implement HB 4472. Also, the commission adopts subsequent subsections to align with the new subsection (c).

Final Regulatory Impact Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amendments to §114.622 are adopted in accordance with HB 4472, which amended THSC, Chapter 386, Subchapter C. The rulemaking adoption revises eligibility criteria for a voluntary grant program. Because the rulemaking adoption places no involuntary requirements on the regulated community, the rulemaking adoption would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. In addition, none of these amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the rulemaking adoption does not meet any of the applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general authority of the commission. This rulemaking does not exceed a standard set by federal law. Additionally, this rulemaking does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the rulemaking adoption and performed an analysis of whether the rulemaking adoption constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply.

Under Texas Government Code, §2007.002(5), taking means: (A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Promulgation and enforcement of the rulemaking adoption will be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with the amendments to THSC, Chapter 386 as a result of HB 4472. The rulemaking adoption will revise a voluntary program and only affect motor vehicles that are not considered to be private real property. The rulemaking adoption does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the rulemaking adoption would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found that it is identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that the goals and policies of the Texas Coastal Management Program be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with the CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The commission offered a public hearing on February 18, 2022. The comment period closed on February 28, 2022. The commission received no comments.

Response to Comments

The commission received no comments.

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, Chapter 386, which establishes the Texas Emissions Reduction Plan.

The amendments are adopted as part of the implementation of THSC, Chapter 386, Subchapter C, as amended by House Bill 4472, 87th Texas Legislature, 2021.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 3, 2022.

TRD-202202110
Charmaine Backens
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: June 23, 2022
Proposal publication date: January 28, 2022
For further information, please call: (512) 239-2678

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

CHAPTER 380. RULES FOR STATE-OPERATED PROGRAMS AND FACILITIES

SUBCHAPTER E. BEHAVIOR MANAGEMENT AND YOUTH DISCIPLINE

DIVISION 1. BEHAVIOR MANAGEMENT

The Texas Juvenile Justice Department (TJJD) adopts the repeal of §380.9501 and 380.9502, concerning TJJD's behavior management system. TJJD simultaneously adopts a new §380.9502, concerning Behavior Management System Overview, without changes to the proposed text as published in the April 1, 2022, issue of the *Texas Register* (47 TexReg 1674). The repeals and the new rule will not be republished

SUMMARY OF CHANGES

The repeal of §380.9501, concerning Behavior Management System Overview, allows for certain content from the rule to be consolidated into the new §380.9502.

The repeal of §380.9502, concerning Positive Reinforcement and Privilege System, allows for a revised rule to be published in its place.

The new §380.9502, concerning Behavior Management System Overview, consolidates portions of the repealed §380.9501 and §380.9502. The new §380.9502 also: 1) explains the basic principles and requirements of TJJD's system for positive reinforcement, engagement, and disciplinary consequences; 2) focuses on engagement strategies rather than intervention strategies; and 3) no longer includes the requirement for staff to provide and document daily feedback on ratings of youth performance on certain expectations.

PUBLIC COMMENTS

TJJD did not receive any public comments on the proposed rulemaking action.

37 TAC §380.9501, §380.9502

STATUTORY AUTHORITY

The repealed sections are adopted under Section 242.003, Human Resources Code, which requires TJJD to adopt rules appropriate to the proper accomplishment of TJJD's functions and to adopt rules for governing TJJD schools, facilities, and programs.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 31, 2022.

TRD-202202079
Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
Effective date: June 20, 2022
Proposal publication date: April 1, 2022
For further information, please call: (512) 490-7278

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37 TAC §380.9502

The new §380.9502 is adopted under Section 242.003, Human Resources Code, which requires TJJD to adopt rules appropriate

to the proper accomplishment of TJJD's functions and to adopt rules for governing TJJD schools, facilities, and programs.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 31, 2022.

TRD-202202080

Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
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