

Immediate Reclassification of Site Compliance History After Catastrophic Incident Now Permitted

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Following a catastrophic event that significantly impacts the public or environment, the Texas Council on Environmental Quality (TCEQ) can now reclassify a site's compliance history, subjecting sites to increased scrutiny and penalties regardless of prior satisfactory compliance. The rulemaking, which became effective on June 23, 2022, allows the Executive Director of the TCEQ to immediately designate a site's compliance history classification as "under review" in the wake of an emergency event, and as "suspended" 30 and 90 days thereafter. The "suspended" designation is permitted under broad "exigent circumstances," which include things like significant impacts to the environment or community, response by emergency personnel, or other "urgent or grave" conditions.

A "suspended" designation effectively classifies the site as an "unsatisfactory performer" with TCEQ and must remain in place for a minimum of one year. "Unsatisfactory performer" sites can be subject to unannounced investigations by TCEQ, higher penalties in enforcement actions, increased TCEQ oversight and investigations to improve the facility's environmental compliance, and even denial of certain permits or permit renewal. Absent a catastrophic event, TCEQ bases a site's compliance history on the preceding five years, updated on an annual basis.

Under this new rule, what TCEQ considers significant community or environment impact, or urgent or grave conditions, will be decided on a case-by-case basis and therefore potentially leaves sites and their owners and operators open to this reclassification following almost any catastrophic event. The short timeframe of reclassification will add additional scrutiny and pressure to sites that may already be balancing conflicting interests of regulators and others in the wake of a large-scale disaster.

According to TCEQ, this departure from prior rulemaking was prompted by "several large emergency incidents at industrial facilities in the past few years" that "have caused significant impacts to public health and the environment, which have resulted in scrutiny of the compliance histories of the regulated entities involved in these incidents."