

**DECEMBER 2, 2021**

For more information,  
contact:

Suzanne Wilson  
+1 512 457 2070  
[swilson@kslaw.com](mailto:swilson@kslaw.com)

Brian Stansbury  
+1 202 626 9118  
+ 713 276 7358  
[bstansbury@kslaw.com](mailto:bstansbury@kslaw.com)

Joe Eisert  
+1 202 626 5522  
[jeisert@kslaw.com](mailto:jeisert@kslaw.com)

Arlene Hennessey  
+1 713 276 7391  
[ahennessey@kslaw.com](mailto:ahennessey@kslaw.com)

Marcella Burke  
+1 713 751 3261  
+1 202 626 9261  
[mburke@kslaw.com](mailto:mburke@kslaw.com)

Jim Vines  
+1 404 572 4822  
[jvines@kslaw.com](mailto:jvines@kslaw.com)

Cynthia Stroman  
+1 202 626 2381  
+1 713 276 7364  
[cstroman@kslaw.com](mailto:cstroman@kslaw.com)

**King & Spalding**

Austin  
500 W. 2nd Street  
Suite 1800  
Austin, Texas 78701  
Tel: +1 512 457 2000

## Major TCEQ Rulemaking Impacts Industrial Companies in Texas

On November 23, 2021, Texas Commission on Environmental Quality (TCEQ) Director of the Office of Compliance requested that TCEQ approve a proposed rulemaking intended to respond to a series of industrial events occurring over the last few years in Texas. Due to public concern and legislative interest, TCEQ proposes to authorize designation and reclassification of compliance history to address what TCEQ deems are poor operating practices that have “grave consequences” to the communities surrounding industrial facilities. This is arguably the most significant TCEQ rulemaking in two decades and would impact a wide variety of industrial companies that have catastrophic events at their facilities. Specifically, a facility’s annual compliance history score, which is currently based on a five-year data set, could be based on a single emergency event that results in exigent circumstances. As a result, a facility can be designated “unsatisfactory” based on a single event and will be subject to the permitting and operational limitations that accompany that designation.

### SUMMARY OF THE PROPOSAL:

The proposal would revise Chapter 60, Compliance History, by adding a new section 30 TAC §60.4. According to the [TCEQ Interoffice Memorandum](#), the new section 30 TAC §60.4 “would provide a process for the executive director to designate a site’s compliance history classification as ‘under review,’ and to reclassify it to ‘suspended’ if the executive director determines that exigent circumstances exist due to an event at a site, such as a major explosion or fire, that significantly impacts the surrounding community and environment, causes emergency response efforts by federal or state authorities to address pollutants, contaminants, or other materials regulated by the agency, and results in certain urgent or grave consequences.”

If a facility is “suspended” under the new rule, it would have the same status as a facility with an “unsatisfactory” rating under the current rule. Under the new rule, this “unsatisfactory” status can last for a least one year and up to three years.



For “unsatisfactory performers” or “repeat violators,” per 30 TAC §60.3, Use of Compliance History, the agency shall:

- (A) (i) deny or suspend a person's authority relating to that site to discharge under a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges); and (ii) deny a permit relating to that site for, or renewal of, a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).
- (B) If a site is classified as an unsatisfactory performer, upon application for a permit, permit renewal, modification, or amendment relating to that site, the agency may take the following actions, including: (i) deny or amend a solid waste management facility permit; (ii) deny an original or renewal solid waste management facility permit; or (iii) hold a hearing on an air permit amendment, modification, or renewal, and, as a result of the hearing, deny, amend, or modify the permit.
- (C) If a site is classified as an unsatisfactory performer or repeat violator and the agency determines that a person's compliance history raises an issue regarding the person's ability to comply with a material term of its hazardous waste management facility permit, then the agency shall provide an opportunity to request a contested case hearing for applications meeting the criteria in §305.65(9) of this title (relating to Renewal).
- (D) Upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.
- (E) The commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This includes violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

#### **RULEMAKING SCHEDULE KEY DATES:**

- Open Meeting for Proposed Rule: December 15, 2021
- Virtual Public Meeting: January 27, 2022
- Close of 30-day Comment Period: February 1, 2022
- Anticipated Adoption Date: June 1, 2022

King & Spalding attorneys will be attending the Open Meeting and participating in the comment period. For more information about this proposed rulemaking process, please reach out to any of the attorneys listed.



---

**ABOUT KING & SPALDING**

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	RIYADH	TOKYO
ATLANTA	CHICAGO	GENEVA	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
AUSTIN	DENVER	HOUSTON	NORTHERN VIRGINIA	SILICON VALLEY	
BRUSSELS	DUBAI	LONDON	PARIS	SINGAPORE	

---