

## Attachment A

### Texas Commission on Environmental Quality Enforcement Chronology January 16, 2004

When this agency was formed as the TNRCC, an Environmental Task Force was appointed to address enforcement issues for the new agency. The issues included in their recommendations were:

- Develop agency-wide enforcement guidelines.
- Develop agency-wide penalty policy.
- Develop agency-wide policy for use of compliance history in penalty calculations.
- Develop an agency-wide small business enforcement policy.
- Develop a policy for use of alternative dispute resolution.
- Develop consistent guidelines for the enforcement referral process.
- Standardize the referral format.
- Develop consistent policy on payment of administrative penalties for agreed orders (pre- vs post agenda).
- Develop a field citation/expedited enforcement program.
- Coordination with small business advocate, technical assistance program on enforcement and outreach initiatives.
- Develop consistent enforcement terminology.
- Evaluate new (1995) legislation and develop policy as appropriate.
- Evaluate SEP and pollution prevention and develop policy as appropriate.

**In 1993**, there were seven separate enforcement programs: air, water quality, petroleum storage tanks, municipal solid waste, industrial solid waste, occupational license, and public water supply. Each program area had a penalty policy and general enforcement process. Additionally, the air program had a small business minor source policy and a no-penalty policy.

**In 1995**, the TNRCC consolidated the enforcement function into a single division. In parallel, the Office of Legal Services formed the Litigation Division to work with the Enforcement Division on cases that do not settle through the expedited process, cases that are not processed as expedited cases and cases that are referred to the Office of the Attorney General.

**In January 1995**, the 74<sup>th</sup> Legislature convened and adopted the following bills into law:

- **HB 2473**, relating to audits to determine compliance with certain laws, rules and regulations; providing penalties. The Texas Environmental, Health, and Safety Audit Privilege Act; established provisions for immunity from enforcement for self-reported violations discovered in environmental audits. Statutes affected: VATS art. 4447c.
- **SB 1660**, relating to agreed orders of the TNRCC. Established the legal basis for "1660"

orders; provided that the agency is not required to make findings of fact and conclusions of law in an agreed order, except to establish jurisdiction. Statutes affected: currently Tex. Water Code ch. 7.

- **HB 1644**, relating to the improper disposal of medical waste; providing criminal penalties. Established criminal penalties for illegal transport or disposal of medical waste. Statutes affected: Tex. Water Code ch. 7.
- **SB 1683**, relating to the collection, management, and recycling of used oil and used oil filters; providing criminal penalties. Made a number of statutory changes to make state law consistent with federal law for the purpose of delegation of federal used oil authority, including provisions for criminal penalties. Statutes affected: Tex. Health & Safety Code ch. 361.

**On February 9, 1996** the Commission began to review the enforcement process. The Commission:

- Directed the staff to expand the small business minor source policy to other media and to combine the policy with the no-penalty policy.
- Expressed their general approval for amnesty for new and significant programs; however, after the amnesty, the small business and minor source policy should not apply.
- Directed staff to use 12 months as routine for penalty payment plans, extending the time for extenuating circumstances.
- Directed the staff not to use deferrals for repeated violations.

**On March 21, 1996** the Commission considered issues related to calculation of administrative penalties:

- Flexibility in penalty calculation and endorsed the matrix approach.
- Accounting for the size of a facility and ability to pay after the base penalty is developed.
- Treating administrative penalties alike when feasible and to focus on the entity's conduct first and foremost.
- Consideration of "good faith efforts" from the point when an entity both knows there is a violation and takes action.
- Limiting the period of negotiation and keep penalties and corrective action separate
- Continuing the use of 30% deferral for prompt settlement.
- Influence of compliance history on the decision of how to deal with the offense.

**On August 29, 1996** staff presented new proposed policies to the Commission. The Commission instructed the staff to:

- Publish the proposed penalty policy for comments.
- Begin using the revised small business minor source policy effective September 1, 1996 and publish for public comment.
- Begin using the notice of violation policy on October 1, 1996.
- Share the policies with EPA.

- Begin using the criteria for use of findings orders policy September 1, 1996.

**In 1997**, the Enforcement Initiation Criteria (EIC) guidance document was developed as an agency-wide effort to promote consistency and to prioritize how violations are addressed through either formal enforcement or a Notice of Violation (“NOV”).

- The EIC is primarily utilized and maintained by the Field Operations Division with extensive review by the Enforcement Division Director and Litigation Division Director during revision periods.
- The EIC allows for exercise of judgment in situations that are not appropriately addressed through a strict interpretation of the EIC.

**In January 1997**, the 75<sup>th</sup> Legislature convened and adopted the following bills into law:

- **HB 1367**, relating to reporting by the Texas Natural Resource Conservation Commission (TNRCC) and the attorney general on environmental enforcement actions. Required the agency to submit, no later than December 1<sup>st</sup> of each year, a report of enforcement activities to the Governor, Lt. Governor and Speaker. Statutes affected: Tex. Water Code § 5.126.
- **HB 3459**, relating to environmental and health and safety audits; providing a penalty. Amended provisions of the audit privilege act passed the previous session, including excepting criminal violations from privilege and immunity and maintaining the applicability of "whistle-blower" provisions of state and federal law. Statutes affected: VATS art. 4447c.
- **SB 1876**, relating to the consolidation of the enforcement and emergency powers of the Texas Natural Resource Conservation Commission; providing criminal, civil, and administrative penalties. Consolidated enforcement authority from various chapters into a new Chapter 7 of the Water Code. Established in one chapter the commission's enforcement authority, specific provisions for corrective action orders and injunctions, administrative and civil penalties, criminal offenses and penalties, affirmative defenses, revocation and suspension of permits, and suits brought by other parties. Established the two-tiered system for determining penalties and the criteria of nature, circumstances, extent and gravity of violation; impact to the environment and affected persons; history of violations, culpability, good faith, economic benefit, amount required to deter future violation, and other matters justice may require. Statutes affected: Tex. Water Code chapters 5 and 7.
- **SB 1**, relating to the development and management of the water resources of the state; providing penalties. Comprehensive revision to Texas water law that also established new penalty provisions violations of water rights and related orders, rules related to levee construction and maintenance and dam safety violations. Authorized a watermaster to issue field citations based on water right violations. Statutes affected: Primarily Tex. Water Code ch. 5.

**On February 12, 1997** the Commission considered additional revisions to the proposed enforcement policies directing the staff to:

- Continue implementing the small business minor source policy and review after one year.
- With minor changes, begin implementing the penalty policy April 1, 1997 and review the policy after one year.
- Effective immediately, reduce the early settlement deferral to 20% and ensure this is a one time offer that expires after a set date and is not for repeated violations. Established the settlement period for expedited cases at 60 days (from the date of the agency's letter ) to accept the offer, sign the order and send a check.

**In June 1997**, TCEQ Internal Audit conducted an audit of the Organization of the Field Operations Division: Enhancing Support to the Regions and Overall Communication

**On March 24, 1997** the Commission reviewed the proposed enforcement policies directing the staff to:

- With minor changes regarding culpability, use the penalty policy for cases screened on or after April 1, 1997.
- Provide a thorough explanation when "Other Factors as Justice May Require" is used.
- Provide an extension of the 60 day process for supplemental environmental projects and financial ability to pay review.

**On May 29, 1997** the Commission decided to delay implementation of the new penalty policy and instructed staff to use the original program penalty policies.

**On August 21, 1997** the Commission considered the proposed penalty policy and determined that:

- Staff should clarify the difference between major and minor sources.
- Federal adjudicated orders will be treated the same as state findings orders.
- Compliance history will be reviewed as multi-media for a five year period.
- Staff should begin using the penalty policy October 1, 1997.

**On October 2, 1997** the Commission rescinded the small business minor source no-penalty policy.

**In August 1998**, the State Auditor's Office (SAO) and TCEQ Internal Audit in a joint project, conducted a review of Agency Compliance & Enforcement.

**On October 8, 1998** the Commission considered the enforcement policies and determined that:

- Staff should review what constitutes a significant violation and rewrite the criteria for use of findings orders policy to give staff flexibility in its application across all media.
- 100% remittance is a significant deterrence and decided to make the supplemental

- environmental policy less restrictive so more communities can benefit.
- Directed staff to make the penalty reduction ratio in supplemental environmental projects tied directly to the environmental benefit the project brings to the community.
- Staff should look at ways to help small business comply allowing an entity an opportunity to come into compliance. In addition, small businesses participating in the site visit program will be exempt from scheduled inspections for a year provided the non-compliances are satisfactorily corrected, documented and maintained.
- Staff should develop a pamphlet that describes the enforcement process and the consequences of ignoring agency correspondence.
- Revisions to the penalty policy should become effective January 1, 1999.

**In January 1999**, the 76<sup>th</sup> Legislature convened and adopted the following bills into law:

- **HB 1654**, relating to criminal offense of Tex. Health & Safety Code ch. 366. Makes an offense of a rule adopted under Tex. Health & Safety Code ch. 366, or an order or resolution adopted by an authorized agent a class C misdemeanor.
- **HB 2619**, relating to the collection and management of used oil filters; providing civil and administrative penalties. Amended various provisions of the used oil program, including reduction of certain penalties. Statutes affected: Tex. Health & Safety Code §§ 371.101 - 371.110.
- **HB 2815**, relating to the petroleum storage tank program; providing a penalty. Established the annual self-certification program for tank owners and enforcement provisions for owners failing to provide certification. Statutes affected: Tex. Water Code chs. 7 and 26.
- **SB 828**, relating to supplemental environmental projects undertaken in lieu of certain penalties. Authorized the agency to approve SEPs located partially or wholly in Mexico if the project benefits Texas. Statutes affected: Tex. Water Code § 7.067.

**On April 1, 1999**, EPA and TCEQ joined in signing a Multi-Media/Multi Year Enforcement Memorandum of Understanding. The MOU sets forth the roles and responsibilities for the TCEQ implementing its enforcement of its delegated federal programs.

**On March 10, 2000** the Commission considered a revised penalty policy and criteria for use of findings orders. The Commission instructed the staff to publish the policies for public comment.

**On June 15, 2000**, EPA (Region VI) and TCEQ signed a Joint Enforcement Cooperation Protocol. The protocol addresses the coordination of joint enforcement activities.

**In January 2001**, TCEQ Internal Audit conducted an audit of the Supplemental Environmental Project Program.

**In January 2001**, the 77<sup>th</sup> Legislature convened and adopted the following bills into law:

- **HB 2912**, (Sunset Bill) relating to the continuation and functions of the Texas Natural

Resource Conservation Commission. Agency Sunset bill which established the current compliance history provisions and authorized initiation of enforcement based on citizen-collected evidence. Statutes affected: primarily Tex. Water Code ch. 5.

- **SB 687**, relating to criminal penalties for the intentional or knowing discharge of waste or pollutants. Clarifies provision that a knowing or intentional unauthorized discharge includes point source discharges; increases the penalty for intentional discharge violations consistent with other authority. Statutes affected: Tex. Water Code § 7.145.
- **SB 1123**, relating to the enforcement and collection of taxes, fees, and other revenue; providing criminal penalties. Authorizes a criminal penalty for failing to allow an agency employee to measure or sample an underground storage tank. Statutes affected: Tex. Tax Code §153.403.
- **SB 1174**, relating to the punishment for the offense of criminal mischief involving a public water supply. Makes impairment or interruption of a public water supply a third-degree felony. Statutes affected: Tex. Penal Code § 28.03.
- **SB 1390**, relating to the penalties for operating certain facilities without obtaining a permit under the Texas Clean Air Act. Requires the Commission to issue an emergency shut-down order and assess a \$10,000 per day penalty for any concrete plant or rock crusher found operating without a required permit. Statutes affected: Tex. Water Code §§ 5.5145 and 7.052(b).
- **HB 1311**, relating to occupational licenses and registrations issued by the Texas Natural Resource Conservation Commission. Clarified and standardized certain enforcement provisions related to occupational licensing. Statutes affected: Tex. Water Code chs. 7, 26, 34, 37, and Tex. Health and Safety Code chapters 341, 361 and 366.
- **SB 324**, relating to fees charged for underground injection wells. Requires TCEQ to deny a UIC permit if the agency concludes the applicant's compliance history is unacceptable. Statutes affected: Tex. Water Code §§ 27.014 and 27.051.

**In January 2002**, TCEQ Internal Audit conducted an audit of the Region Initiated Order (RIO) Program.

**On January 18, 2002**, the Commission considered and adopted a revised criteria for use of findings orders. Revised criteria included:

- Changing the criteria for emission or discharge of contaminants to the environment from “discharges or emissions which exceed permitted limits by a certain percentage” to “discharges or emissions in which human or environmental receptors are exposed to pollutants which exceed levels that are protective”.
- Adding an additional criteria of “unauthorized emissions which are excessive emissions events”.
- Adding criteria for repeat violators who are individuals required to be registered, certified, or licensed by the agency.
- Changing the word “entity” to “respondent”.

**On August 23, 2002**, the Commission considered and adopted a revised penalty policy to be

effective September 1, 2002. Revisions included:

- Changing compliance history to be consistent with HB 2912 and 30TAC ch 60
- Adding the \$10,000 for each day of continuing operation for rock crushers and concrete batch plants
- Removed culpability from “economic benefit” and “good faith effort”

**In January 2003**, the 78<sup>th</sup> Legislature convened and adopted the following bill into law:

- SB 1265, relating to criminal enforcement reviews. Before referring a violation for criminal enforcement against an entity that is related to an activity for which the entity has been issued a permit or other authorization by the Commission, a peace officer must submit to the Commission a brief summary of the facts and circumstances regarding the alleged violation. The Commission must review the matter and determine whether administrative, civil, or criminal enforcement is appropriate. Statutes affected: Tex. Water Code ch.7.20.

**In August 2003**, TCEQ Internal Audit conducted an audit of the PST Self Certification Program.

**In September 2003**, TCEQ Internal Audit conducted an audit of the Fee Collections process.

**In December 2003**, the SAO published and Audit Report on The Texas Commission on Environmental Quality's Enforcement and Permitting Functions for Selected Programs.

### **Federal Enforcement Initiatives**

The purpose of these initiatives was/is to target investigation and enforcement resources to achieve maximum benefits in the areas of both compliance with environmental regulations and control of emissions and discharges. These initiatives affected the TCEQ's enforcement programs to the extent the initiatives required allocation of OCE resources to support and/or participate in the activities. EPA has implemented a number of targeted federal enforcement initiatives over the last ten years which included:

- Border Warehouse investigations
- Sewer System Overflows enforcement
- Small wastewater treatment facilities in Houston
- Reviewing and developing new MACTs
- Refineries and petrochemical plants
- Foundries
- Prevention of Significant Deterioration
- Storage Tanks (part Kb compliance)
- CAFOs
- Auto salvage yards

- Metal platers
- Border initiative in Juarez (all media related issues)
- Federal facilities
- Episodic releases
- Leak detection and repair programs
- Stack testing
- Oversight of delegated programs

More recently, EPA has implemented the “Smart Enforcement” initiative where EPA has revised its approach to Federal initiatives to begin asking the states and EPA regions to identify the types of sources on which to focus investigation and enforcement efforts to get the best compliance outcome. Additionally, EPA has revised their compliance monitoring strategy for delegated programs to ensure that full compliance evaluations are conducted on a routine basis but also to recognize that targeted investigations have a role.

### **Federal Enforcement Statutes**

#### **Clean Air Act:**

42 U.S.C. §§ 7413 (Federal Enforcement), 7477 (PSD), and 7651m (Acid Deposition Control).

#### **Clean Water Act (in Federal Water Pollution Control Act):**

33 U.S.C. § 1319

#### **Solid Waste Disposal Act:**

42 U.S.C. § 6928 (Hazardous Waste Management); 6991e (USTs); 6992d (Medical Waste)

#### **Safe Drinking Water Act:**

42 U.S.C. § 300f