

Summary of Proposed Changes to the Commission's Penalty Policy

Penalty Deferral Criteria - As a result of HB 2694 (82nd Legislature, 2011), which required the Commission to adopt a general enforcement policy that describes the Commission's approach to enforcement, 30 TEX. ADMIN. CODE ch. 70 was amended and became effective on August 30, 2012. During this rule-making process, the Commission discussed whether or not to include the penalty deferral criteria information in the rule or in the Policy. The Commission noted that the penalty deferral criteria information needed to be documented in one of these places, but did not give preference to which method should be used. After these discussions and two stakeholder meetings during the rule-making process, the Executive Director opted to include the deferral criteria information in the next revision to the Policy.

Compliance History - HB 2694 also required the Commission to make certain changes to the compliance history program, which were implemented through rule-making to 30 TEX. ADMIN. CODE ch. 60 (effective July 19, 2012). One of the changes included a revision to the performer classification system. Specifically, the term "average performer" was changed to "satisfactory performer" and the term "poor performer" was changed to "unsatisfactory performer." The current Policy still references the old nomenclature and there are also several references to the compliance history rule citations that need to be updated.

Aggregate Production Operations - HB 571 (82nd Legislature, 2011) added Chapter 28A to the Texas Water Code, relating to the regulation of certain aggregate production operations (APOs). Specifically, TEX. WATER CODE § 28A.102 sets out certain penalty requirements for APOs that fail to register in accordance with TEX. WATER CODE ch. 28A. This statutory requirement is not currently in the Policy.

Water Rights - HB 2615 (83rd Legislature, 2013) amended Section 11.031 of the TEX. WATER CODE, relating to the annual submittal of water use information by water rights holders. Specifically, the amount of penalties liable against a water rights holder for failure to submit the annual report was revised (TEX. WATER CODE § 11.031(b)). This statutory requirement is not currently in the Policy.

Reorganization - The Penalty Calculation Worksheet (PCW) is the tool used to calculate administrative penalties. The PCW is formatted in a specific order to ensure that

penalties are calculated in accordance with the Policy; however, the two documents are not currently aligned with one another in sequence. This potentially makes it more difficult for users and the public when referencing the Policy to determine how specific subtotals are calculated. Because of the complexity of the PCW document, it is deemed more efficient to make slight organizational changes to the Policy in order to ensure the methods for calculating each Subtotal, Final Subtotal, and application of other adjustments are clearly labeled and organized to correspond with the sequence of calculations in the PCW.

Implementation - The implementation language will need to be revised to reflect which version of the Policy should be applied.

Major/Minor Sources

Concentrated Animal Feeding Operations (CAFOs) - Currently, the Policy categorizes major or minor CAFO sources by referencing the Environmental Protection Agency's (EPA) industrial wastewater classification policy for major or minor sources. EPA's policy is largely based on an industrial point scale classification system, which takes into account the permitted discharge flow and the pollutant loading ratio for CAFO facilities that are allowed to discharge. However, CAFO permits issued under the Texas Pollutant Discharge Elimination System program do not provide for permitted discharge flows and actual discharges from these facilities are prohibited. As a result, historically the Enforcement Division has classified CAFOs as minor sources for penalty purposes. Recommend making this clarification in the Policy.

Municipal Solid Waste (MSW) – Currently, the Policy categorizes MSW landfills that accept more than 20 tons of municipal solid waste disposed of daily, based on an annual average, as major sources and those that accept less than 20 tons as minor sources, excluding those landfills that accept exactly 20 tons. Recommend defining these as minor sources.

Petroleum Storage Tank (PST) – Currently, the Policy categorizes PST systems that have a monthly throughput of more than 50,000 gallons as major sources and those that have a monthly throughput of less than 50,000 gallons as minor sources, excluding those PST systems that have a monthly throughput of exactly 50,000 gallons. Recommend defining these as minor sources.

Other Edits for Clarification – Other minor edits to update information and improve clarity are being recommended.