

SOAH DOCKET NO. 582-12-3294
TCEQ DOCKET NO. 2011-0667-MWD-E

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER**

v.

**WEST HOUSTON AIRPORT
CORPORATION,
RESPONDENT**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S BRIEF AND EXCEPTIONS
IN RESPONSE TO THE PROPOSAL FOR DECISION AND PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE RICHARD R. WILFONG (ALJ) AND
HONORABLE COMMISSIONERS:

The Executive Director (ED), after reviewing the Administrative Law Judge's (ALJ's) Proposal for Decision (PFD) and proposed order (Proposed Order), respectfully files this brief and exceptions for the Commissioners' and the ALJ's consideration.

In this case, the ED alleges seven water quality violations against West Houston Airport Corporation (Respondent or West Houston Airport). At the evidentiary hearing in this case, the ED provided evidence that the seven alleged violations occurred. The ED also provided a recommended penalty calculated in accordance with the TCEQ Penalty Policy (Penalty Policy)¹ as consistently applied, and in consideration of the statutory factors in TEX. WATER CODE § 7.053. The ED respectfully requests that the final order in this case include a decision that the seven violations occurred and assessing the ED's recommended penalty of \$125,750.

¹ References to the Penalty Policy are to the version effective September 1, 2002, unless otherwise specified.

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I. Summary²

In this case, the ED alleges seven water quality violations against the Respondent, who previously owned and operated a permitted wastewater treatment plant (the Facility). Some of the violations date back to 2004³ and continued until the end of 2011, when the Respondent ultimately connected to the City of Houston's (City's) wastewater treatment facilities. In the PFD, the ALJ found that the ED proved the alleged seven violations and proved the recommended penalty of \$125,750 is in accordance with consistent application of the Penalty Policy. However, the ALJ recommends that the ED's recommended penalty be reduced by \$101,250 for a total penalty of \$24,500. The ED respectfully does not agree with the ALJ's proposed penalty and instead requests assessment of the ED's calculation of \$125,750.

The ED's recommended penalty is in accordance with consistent application of the Penalty Policy, in consideration of all of the statutory factors in section 7.053 of the Water Code. In contrast, the penalty in the Proposed Order contains a reduction of \$101,250 from the ED's penalty calculation. The amount \$101,250 is equal to the entire Compliance History enhancement (CH enhancement) in this case.⁴ The ED does not agree that the penalty be reduced by the CH enhancement, thereby negating the consideration of Compliance History.

The ED also does not agree that there are other factors warranting a \$101,250 reduction in the penalty. The size of the Respondent's wastewater treatment plant (WWTP) and the impact to the environment in this case are already considered in the calculation of the penalty recommended by the ED, so an additional reduction is not warranted. In fact, ED staff conservatively calculated the penalty in this case, resulting in a lower penalty.

The ED does support regionalization and did support it in this case. For example, ED staff approved three requests for extensions of corrective action deadlines to allow the Respondent more time to either connect to a regional system or otherwise remedy the violations. However, the ED does not support using efforts towards regionalization as a basis for failing to take action to remedy violations, and consequently, does not support a reduction in the penalty for such efforts.

² The ED's exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [page] (description if necessary). The reference to page numbers is a reference to the stamped number in the bottom center of each page, beginning with "00".

³ See, e.g., PFD at 5; Tr. at 203-219.

⁴ ED 18 at 1; ED 19 at 1.

If the ALJ and Commission ultimately do decide to reduce the penalty to offset the CH enhancement in this case, the ED is not adverse to a penalty of \$89,650 which would be consistent with (1) the current penalty policy which has a 100% Compliance History enhancement cap, and (2) the legislative intent that Compliance History be considered when assessing penalties.⁵ In order to calculate a penalty consistent with the current penalty policy Compliance History cap of 100%, the penalty amount would be the Total Base Penalty (\$45,000)⁶ less the Good Faith Efforts reduction (\$350)⁷ plus an additional amount of \$45,000 (100% of the Total Base Penalty), or \$89,650. To accomplish this using the ED's penalty calculation, the "Other Factors As Justice May Require" (Other Factors) adjustment would be \$56,250 (the CH enhancement of \$101,250⁸ less the Total Base Penalty of \$45,000) instead of the \$20,150⁹ Others Factor reduction to offset Compliance History in the ED's calculation.

If the ALJ and Commission ultimately do decide to adjust the penalty to offset the entire amount of the CH enhancement, which the ED is not at all suggesting, then the ED believes there is a miscalculation regarding the proposed penalty of \$24,500, and the correct penalty amount would be \$44,650. In order to provide a 100% offset of the Compliance History, the penalty would be the Total Base Penalty of \$45,000 less the Good Faith Efforts reduction of \$350 for a total of \$44,650 instead of \$24,500 currently in the Proposed Order. The difference in amounts is due to the ED's recommended Others Factor adjustment which is \$20,150.¹⁰ However, the ED's Other Factors adjustment is also to offset the CH enhancement.¹¹ The \$24,500 in the Proposed Order includes the ED's Other Factors reduction of \$20,150 plus an additional reduction of the entire amount of the CH enhancement, or \$101,250, for a total reduction of \$121,400. Since the ALJ proposes a reduction in the penalty of the entire CH enhancement amount, the ED's Other Factors reduction to offset the CH enhancement is no longer applicable. To accomplish this using the current penalty calculation, the "Other Factors As Justice May Require" (Other Factors) adjustment would be \$101,250 (the CH enhancement) instead of the ED's Other Factors enhancement.

⁵ TCEQ Penalty Policy (effective Sept. 1, 2011); TEX. WATER CODE § 7.053.

⁶ ED 18 at 1; ED 19 at 1.

⁷ ED 18 at 1.

⁸ ED 18 at 1; ED 19 at 1.

⁹ ED 18 at 1; Tr. at 389.

¹⁰ ED 18 at 1.

¹¹ Tr. at 389.

Below is a breakdown and comparison of the penalty amounts discussed in this case.

Penalty Component Description	ED's recommended penalty in accordance with Penalty Policy	Penalty with 100% CH enhancement cap	Proposed Order	Adjusted Proposed Order amount (without additional ED recommended Other Factors reduction)
Violation 1 Base Penalty	\$ 1,000	\$ 1,000	\$ 1,000	\$ 1,000
Violation 2 Base Penalty	\$ 500	\$ 500	\$ 500	\$ 500
Violation 3 Base Penalty	\$ 2,000	\$ 2,000	\$ 2,000	\$ 2,000
Violation 4 Base Penalty	\$ 8,000	\$ 8,000	\$ 8,000	\$ 8,000
Violation 5 Base Penalty	\$ 25,000	\$ 25,000	\$ 25,000	\$ 25,000
Violation 6 Base Penalty	\$ 6,000	\$ 6,000	\$ 6,000	\$ 6,000
Violation 7 Base Penalty	\$ 2,500	\$ 2,500	\$ 2,500	\$ 2,500
Total Base Penalty	\$ 45,000	\$ 45,000	\$ 45,000	\$ 45,000
Compliance History Adjustment	\$ 101,250	\$ 101,250	\$ 101,250	\$ 101,250
Good Faith Efforts Adjustment	(\$ 350)	(\$ 350)	(\$ 350)	(\$ 350)
Other Factors as Justice Requires (to offset Compliance History Adjustment)	(\$ 20,150)	(\$56,250)	(\$ 121,400)	(\$101,250)
Total	\$ 125,750	\$ 89,650	\$ 24,500	\$ 44,650

II. The ED recommends a penalty consistent with the TCEQ Penalty Policy, which includes the recommended Compliance History enhancement in this case.

The ED's recommended penalty is in accordance with consistent application of the Penalty Policy, in consideration of all of the statutory factors in section 7.053 of the Water Code.¹² The Penalty Policy is clear about how Compliance History enhancements are to be calculated.¹³ It is merely a mathematical calculation. The components are added and the

¹² Tr. 273-281, 333-334.

¹³ ED 20 at 0016-0017.

appropriate percentages are applied.¹⁴ Compliance history adjustments are calculated consistently for all respondents. The calculation is broken down on page two of each of the Penalty Calculation Worksheets.¹⁵ The Respondent's Compliance History contains 41 similar Notices of Violation at 5% for a total of 205%; and one prior order with denial of liability at 25%. This makes the total 225%.¹⁶ To the extent the CH Enhancement is high, it is due to the Respondent's multiple chronic past unaddressed violations.

III. The ED respectfully disagrees that a reduction in the ED's recommended penalty by \$101,250 is appropriate in this case.

The ALJ recommends reducing the ED's recommended penalty by \$101,250 which is equal to the CH Enhancement in this case. In the PFD, the ALJ discusses the following reasons for such a reduction:

1. The CH enhancement is excessive and unreasonable;
2. The small size of the Respondent's WWTP and the limited impact of the Respondent's WWTP on the environment;
3. The Respondent did not cause delays in obtaining approval to connect to the regional WWTP; and
4. The ED's recommended penalty is the largest TCEQ staff-member Ryan Byer, who tracks order corrective actions, could recall; and
5. The Respondent's efforts toward regionalization.¹⁷

The ED respectfully does not agree with the ALJ's consideration of these factors, and also believes there are other factors to consider as well.

A. The ED does not agree with negating the Compliance History enhancement.

For the reasons discussed above in the Compliance History section of this brief¹⁸, the ED does not agree with a reduction which in effect nullifies the CH enhancement and consequently, any impact on the penalty due to the Respondent's Compliance History. Compliance history is one of the statutory factors the Commission considers in assessing a penalty, pursuant to TEX.

¹⁴ ED 20 at 0016-17.

¹⁵ ED 18 at 2, ED 19 at 2.

¹⁶ ED 21.

¹⁷ PFD at 19-20.

¹⁸ See Section II. above.

WATER CODE § 7.053. The Respondent's Compliance History over a five year period includes components warranting the proposed enhancement, including 41 prior notices of violation and one prior agreed order. According to the Penalty Policy, a CH Enhancement of 225% of the Total Base Penalty, or \$101,250, is appropriate in this case. It is inconsistent with the Penalty Policy and prior Commission practice to completely negate the impact of the Respondent's Compliance History.

Additionally, the ED already proposes a reduction of \$20,150 to offset the CH Enhancement as "Other Factors as Justice Requires" (Other Factors).¹⁹ The ED consistently recommends offsets for the types of violations²⁰ in this case to reduce the impact of a Compliance History upward adjustment to the penalty.

B. The size of the Respondent's WWTP and the impact to the environment is already considered in the ED's penalty recommendation.

In the PFD, the ALJ indicates that the uniquely small size of the Facility and the minimal impact on the environment from Facility discharges warrants consideration of a reduction in the penalty. The size of the Facility and impact to the environment has already been considered in application of the Penalty Policy to the violations in this case. Additionally, the size of the Facility is not unique; there are many small WWTPs in the Houston area similar to the Respondent.

The size of the facility has already been considered in application of the Penalty Policy. The Facility's classification as a "Minor" source results in lower penalties across the board as compared to "Major" sources.²¹ Environmental impact is also considered within the Penalty Policy.²² In fact, when possible, the ED took efforts to keep the penalty conservative yet within the parameters of the Penalty Policy.²³ The Respondent was given a downward adjustment to the penalty for the effluent violations and the sludge discharge violation. Regarding the effluent violations, the Respondent's effluent violations for ten months were assessed as "Moderate" on the Environmental, Property and Human Health Matrix even though it is the ED's practice to assess effluent violations that high as "Major". The sludge discharge violation was assessed as

¹⁹ ED 18 at 1; Tr. at 389.

²⁰ The recommended offsets are for the effluent violations in this case and the violation for failure to report effluent violations that deviate from the permit limits by over 40%. (See ED 18 at 1, 7, 11, and 13.)

²¹ ED 18 at 1; ED 19 at 1; ED 20 at 10 and 14 (Penalty Policy).

²² According to the Penalty Policy, violations that cause a release or a potential release to the environment are assessed a penalty based on the harm or potential harm to the environment through the use of the Environmental, Property and Human Health Matrix. ED 20 at 7-14.

²³ See, e.g., Tr. at 333-334.

“Moderate” on the Environmental Matrix even though it is the ED’s practice to assess discharges with in *E. coli* lab results over 2060 as “Major” and the sample results from the Respondent’s discharge contained an *E. coli* level of 16,000 colonies per 100 milliliters.²⁴ These assessments resulted in a lower penalty calculation. The classification of “Moderate” on the Environmental Matrix means that the pollutants associated with the violation **do not** exceed protective levels.²⁵ The ED is not claiming in this case that the Respondent’s releases exceeded protective levels. The ED’s recommended penalty is based on violations that do not exceed protective levels.

Contrary to the Respondent’s representations in this case, the Respondent’s Facility is not uniquely small. While the Facility is a small wastewater treatment plant, there are numerous small wastewater treatment plants in the Houston area alone, and they have a significant impact to receiving streams in the region.²⁶ In fact, due to the numerous small WWTPs in the Houston area, the greater Houston area contains half the WWTPs in the state. The ED recommends that the penalty in this case be calculated consistently with other similarly situated WWTPs.

The PFD contains a discussion regarding the violations’ limited impact on a potentially impacted downstream resource, Buffalo Bayou. Yet, there are other affected resources such as the receiving stream and other downstream resources between the facility and Buffalo Bayou. The receiving stream is a Harris County Flood Control District ditch.²⁷ It has aquatic vegetation and animal life and runs near residences.²⁸ The ditch is a tributary to South Mayde Creek and travels through Cullen Park, Houston Texas.²⁹ Ultimately South Mayde Creek flows into Buffalo Bayou. While Buffalo Bayou is one affected resource, it is not the only one. The receiving stream is a ditch with different characteristics than that of Buffalo Bayou. It has low flow, relying mainly on stormwater, with no additional discharges mentioned at the hearing. Because the receiving stream is much smaller than Buffalo Bayou and has low flow, a discharge will have a greater impact to the receiving stream than a discharge to Buffalo Bayou.

C. The recommended penalty in this case is not uniquely large.

In the PFD, the ALJ appears to have the impression that the ED’s recommended penalty in this case is uniquely high. While it may be true that one TCEQ staff witness who tracks corrective ordering provisions (not penalties) could not immediately recall a larger penalty when

²⁴ Tr. at 328-334; ED 19 at 0003.

²⁵ ED 20 at 0011.

²⁶ Tr. at 241-245.

²⁷ See, e.g., 151; ED 1 at 0001.

²⁸ See, e.g., 151; ED 1 at 0001; ED 11 at 0011.

²⁹ ED 11 at 0011.

asked by the Respondent's attorney, the recommended penalty in this case is not uniquely high. The Commission has assessed both higher penalties and comparable penalties to the ED's recommended penalty in this case.³⁰ The penalty was calculated in accordance with the Penalty Policy and consistently with how the policy is applied in all enforcement cases.³¹ In fact, the TCEQ Enforcement Division took efforts to keep the penalty low resulting in a conservative penalty calculation.

This case involves violations of a prior Agreed Order³², which causes higher penalties; the duration of a violation of a prior order is from the prior order date to the date the case was screened by the Enforcement Division.³³ Chronic violations that occur repeatedly lead to higher Compliance History enhancements. The ED is not recommending a higher penalty than one calculated in accordance with consistent application of the Penalty Policy—no higher and no lower.

The ED used his discretion to keep the penalty as low as possible, yet in accordance with the Penalty Policy. To the extent the penalty is considered high, it is due to the persistent effluent violations, the number and duration of all the violations, and the Respondent's failure to comply with a prior Agreed Order coupled with the fact that violations of a prior order incur higher penalties. To the extent the penalty is high, it is appropriate to the situation.

D. The ED did support regionalization in this case; the ED does not support WWTPs remaining in violation while they attempt to connect to a regional facility.

Throughout this case, the Respondent claims that the penalty should be reduced in support of its efforts toward regionalization. The ED does support regionalization and the record is clear that the ED supported regionalization in this case, including giving the Respondent three deadline extensions to comply with the Agreed Order. Even though the third extension was granted, TCEQ staff had concerns about the continuing effluent limit violations due to their direct impact to the environment.³⁴ While TCEQ staff supports regionalization,

³⁰ See, e.g., TCEQ Order, Docket No. 2010-1527-IWD-E (\$242,900); TCEQ Order, Docket No. 2008-1953-MWD-E (\$208,475); TCEQ Order, Docket No. 2010-1767-MWD-E (\$132,302); TCEQ Order, Docket No. 2009-0164-MWD-E (\$102,000); TCEQ Docket No. 2011-0552-MWD-E (\$98,350); TCEQ Order, Docket No. 2010-0713-IWD-E (\$91,135); and TCEQ Order, Docket No. 2012-0050-IWD-E (\$91,125).

³¹ The Respondent relies on the testimony of Ryan Byer to claim the penalty is exorbitant. While Ryan Byer could not recall a higher penalty, he also stated he does not work on penalties, so has very little familiarity with them. In contrast, Jorge Ibarra testified that the penalty was calculated according to consistent application of the Penalty Policy.

³² "Agreed Order" refers to TCEQ Agreed Order, Docket No. 2007-1726-MWD-E, which is exhibit ED 2.

³³ ED 20 at 0015.

³⁴ Tr. at 30-31; ED 12 at 0040; Tr. at 249-251.

TCEQ staff is not aware of any regulation that allows a regulated entity to violate rules and regulations while pursuing regionalization.³⁵

The ED does not support WWTPs deciding not to address violations while trying to find a regional plant to absorb it.³⁶ The Respondent does not represent a struggling WWTP which lacks the resources to comply with regulations. On the contrary, the Respondent's WWTP was part of a larger business enterprise. The Respondent's President, Woody Lesikar, acknowledged that the Respondent had the economic resources to remedy the violations.³⁷ Despite being able to remedy the violations, the Respondent chose not to address the effluent violations claiming it did not make "economic sense".³⁸ There is no evidence in the record that the Respondent took any action, other than efforts to connect to the City, to remedy the continuing environmental violations in this case.³⁹ Consequently, the ED does not support the Respondent failing to remedy violations and failing to comply with the prior Agreed Order despite having the resources to do so. Efforts taken to connect to the City do not negate the violations. Nor do such efforts eliminate the Respondent's legal responsibility to take other actions to comply with environmental regulations.

Notably, the Penalty Policy states as an example for an Other Factors reduction, "a respondent who purchased a noncompliant wastewater facility as part of regionalization of service."⁴⁰ In this case, that would be the City, not the Respondent, who is the noncompliant wastewater facility. The Penalty Policy does not state that the noncompliant wastewater facility should get a downward adjustment. Yet, that is precisely what the Respondent is asking for in this case. Trying and waiting to be absorbed by a regional system is not an excuse for ignoring outstanding violations and Agreed Order provisions even though getting out of the wastewater business does eliminate need for further corrective actions. There have been other cases in which respondents have gotten out of the regulated business to address violations, and the Respondent has shown no prior case, and the ED's counsel is not aware of one, in which an Other Factors reduction has been given in these instances.

The PFD discusses that the delays in connecting to the City were not due to the Respondent. Yet, there is inherent uncertainty with the complicated process of connecting to the City, and it necessarily requires the cooperation of a third party not within the Respondent's

³⁵ Tr. at 247-249.

³⁶ See Tr. at 184-185.

³⁷ Tr. at 486-487.

³⁸ ED 11 at 1.

³⁹ The ED acknowledges the Respondent came into compliance with the programmatic, or record keeping violations.

⁴⁰ ED 20 at 0021.

control. While connecting to a regional WWTP is inherently uncertain and outside of a respondent's control, the Respondent's ability to specifically address the violations in this case to achieve compliance was within the Respondent's control.

E. There are additional considerations that weigh against the reduction recommended by the ALJ.

There are other factors in this case that weigh against an additional reduction in the penalty. The violations in this case represent chronic record-keeping, plant maintenance and effluent violations that have lasted for years beyond the time-frame of the violations this case.⁴¹ The Respondent has a history of compliance issues regarding maintenance, effluent violations and record-keeping.⁴² While the Respondent did eventually come into compliance with some of the violations in this case, it took extended periods of time and much effort spent by TCEQ staff.⁴³

In addition to being chronic, the effluent violations in this case are significantly higher than the Respondent's permit limits, and the violations in this case involve multiple limits violated at the same time. For example, the effluent violations in this case represent multiple violations of permit limits regarding TSS, C-BOD and NH₃-N.⁴⁴ In November 2009, the Respondent exceeded permit limits by more than 40% in C-BOD and NH₃-N⁴⁵ and in December 2009, the Respondent exceeded permit limits by more than 40% in C-BOD, TSS, and NH₃-N.⁴⁶ Considerations such as toxicity and concentration of the pollutants are also a factor.

This is not a typical small WWTP with minimal resources with which to maintain compliance with regulations. The Respondent is a sophisticated party and the WWTP was part of a bigger business enterprise that was growing. The Respondent did not need to rebuild the entire plant to address violations and comply with the Agreed Order provisions. The Respondent did not need to rebuild the plant to address effluent violations.⁴⁷ Respondent admits it had the financial resources to remedy the violations in this case and comply with the

⁴¹ For example, failing to accurately submit DMR reports by using zeros in loading calculations (violation 2) was an issue in 2007 investigation, a violation in the prior Agreed Order and even though the Respondent agreed to stop, it was still doing this at the time of the 2010 investigation and again in January 2011. See, e.g., Tr. at 122-124; 175-176. Regarding violation 3 – submitting written notifications after 40% over limit—this violation was noted in the 2007 investigation, a violation in the 2009 prior Agreed Order, noted in the 2010 investigation and the Respondent still not doing the notification in the 2011 investigation. See, e.g., Tr. at 128-129.

⁴² See, e.g. Tr. at 245- 247.

⁴³ Tr. at 80-197; Tr. at 241-269; and Tr. at 203-219.

⁴⁴ ED A at 3 (A chart in the ED's petition comparing effluent violations to permit limits).

⁴⁵ ED 12 0014-0018; ED 39.

⁴⁶ *Id.*

⁴⁷ See, e.g., Tr. at 136.

Agreed Order provisions.⁴⁸ A reduction in the penalty seems counterintuitive in a situation in which the Respondent acknowledges that it failed to take corrective actions to remedy the violations because it did not make “economic sense” and further stated in a letter that if it had to pay more penalties for failing to comply with the Agreed Order, then “so be it”.⁴⁹

In this case, the Respondent suggests that the only factors the Commission should consider are the size of the Facility and that the Respondent connected to the City of Houston. The ED recommends that all factors be considered as implemented in the Penalty Policy.

IV. If the ALJ and Commission determine that a reduction in the penalty is warranted, the ED suggests any reduction in the penalty be limited to be consistent with the current Compliance History cap of 100% .

If the ALJ and Commission determine that a reduction in the penalty is warranted, the ED is not adverse to a reduction in the penalty so that the penalty would be \$89,650. This would be consistent with the current TCEQ Penalty Policy effective September 1, 2011, and the legislative intent in TEX. WATER CODE § 7.053 that Compliance History be a factor considered in assessing penalties.

As part of a comprehensive evaluation of Compliance History and other enforcement issues of the TCEQ, the Legislature recently capped Compliance History enhancements at 100%. This was part of a comprehensive change to Compliance History after the TCEQ went through Sunset review. For example, statutory limits for violations went up as well. In response, the Commission revised the TCEQ Penalty Policy effective September 1, 2011, for violations occurring after the effective date. The penalty in this case, like many other penalties, was calculated prior to the legislative change, and thus before the statutory cap.

Notably, by providing a statutory cap of 100%, the Legislature did not eliminate Compliance History enhancements. Additionally, TEX. WATER CODE § 7.053 states that Compliance History is a factor to consider when assessing a penalty. While the ED maintains the current penalty calculation is appropriate in this case, the ED suggests that a Compliance History enhancement of 100% of the violation base penalty would be more appropriate than no enhancement since it is consistent with the September 2011 revision to the Penalty Policy and the legislative intent to consider Compliance History when assessing penalties.

⁴⁸ Tr. at 486-487.

⁴⁹ ED 11; Tr. 35-36.

V. A penalty in this case with a reduction to offset the Compliance History enhancement would be \$44,650 as opposed to \$24,500.

In the PFD, the ALJ states that the proposed Compliance History enhancement of \$101,250 should not be assessed and proposes a penalty of \$24,500.⁵⁰ However, a penalty after eliminating the impact of the Compliance History enhancement would be \$44,650 instead of \$24,500. After eliminating the CH enhancement, the penalty would be the Total Base Penalty⁵¹ less the Good Faith Efforts reduction. The Total Base Penalty (\$45,000) less the Good Faith Efforts reduction (\$350) equals \$44,650, and not \$24,500. It appears the ALJ also deducted the Other Factors reduction recommended by the ED of \$20,150.⁵² However, the ED's Other Factors reduction of \$20,150 is recommended in order to offset the CH enhancement of \$101,250.⁵³ Consequently, if there is a reduction equal to 100% of the CH Enhancement, then the ED recommended Other Factors reduction is not applicable, and it would not make sense to further reduce the penalty by an additional \$20,150. Thus, the penalty with a reduction to offset the CH Enhancement in this case is \$44,650, instead of \$24,500. A chart comparing the penalty calculations discussed in this brief is in the Summary section above.

VI. Specific exceptions to the Proposed Order

The ED submits the following exceptions to the Proposed Order.

A. Finding of Fact No. 3.

The ED respectfully recommends a phrase be stricken as indicated below:

Under the terms of the Permit, Respondent was allowed to discharge wastewater effluent at a daily average rate not to exceed 0.002 million gallons per day (MGD) under an Interim phase and 0.015 MGD under the Final phase, ~~making this one of the smallest, if not the smallest, wastewater treatment plant in the state.~~

The ED makes this recommendation due to lack of sufficient evidence in the record coupled with the fact that this phrase and finding is not necessary for the Commission to have in an order to support whatever penalty the Commission ultimately decides. The ED does concede that the Respondent's WWTP was small. The ED believes it is unclear in the record that the Respondent's WWTP was one of the smallest. While TCEQ Investigator Mary Hopkins testified

⁵⁰ See, e.g., PFD at 1, 19-20.

⁵¹ ED 18 at 1; ED 19 at 1.

⁵² ED 18 at 1.

⁵³ Tr. at 389; PFD at 17.

that the Respondent's WWTP "may" be the smallest she investigated⁵⁴, that is not the equivalent to the smallest in the state. Ms. Barbara Sullivan, Ms. Hopkins' supervisor, testified that there are many small WWTPs in the Houston area. Additionally, the witnesses were asked this question on cross by the Respondent's counsel, they had to answer based on memory, and did not have an opportunity to do a search of TCEQ records on this issue.

B. Findings of Fact Nos. 10 and 11.

The ED respectfully recommends that these two Findings of Fact be removed. These Findings of Fact currently state:

10. There was no evidence of any significant harm to the environment or human health that resulted from any of Respondent's effluent violations.
11. The discharges from the Facility caused little or no harm to the affected resources associated with the Facility.

These statements seem to be an analysis of the facts instead of factual statements. These considerations are already encompassed in the Penalty Policy. Additionally, the only affected resource discussed by the ALJ is Buffalo Bayou; there are other affected resources such as the receiving stream, which was a ditch with wildlife and vegetation. Further, it is not unusual for a single violation or single respondent to cause insignificant harm and little or no harm to affected resources. It is a concern that if these statements are in the order, prospective respondents to which these statement apply will attempt to use this as a precedent and expect a penalty significantly less than provided for by the Penalty Policy.

C. Finding of Fact No. 22.

The ED respectfully recommends that this Finding of Fact be removed or the following underlined portion be added:

22. It is the policy of this state, pursuant to Water Code § 26.003, to encourage and make use of regional wastewater treatment systems rather than small, individual wastewater treatment facilities, such as the Respondent's Facility, and to use all reasonable methods to accomplish this policy. Consistent with Water Code § 26.003, TCEQ staff supported Respondent's efforts to connect to the City. For example, TCEQ staff approved the Respondent's three requests for extension of the deadlines for corrective actions in the Agreed Order to allow additional time for the Respondent to connect to the City or otherwise comply with the Agreed

⁵⁴ Tr. at 144-145 (the ALJ's reference to the record in the PFD at 20).

Order.

D. Finding of Fact No. 26.

The ED respectfully recommends that this Finding of Fact be removed or the underlined words added:

26. The ED recommended an administrative penalty of \$125,750.00 which was calculated in accordance with the TCEQ Penalty Policy (effective September 1, 2002).

The current Finding of Fact in the Proposed Order seems to be one party's perspective in this case as opposed to a finding of fact. The ED's attorney is unfamiliar with having the party's penalty requests and recommendations in the order. If this finding is not removed from the Proposed Order, the ED requests the additional words above be included.

E. Conclusion of Law No. 10.

For the reasons discussed in the sections above, the ED respectfully requests that this penalty provision be changed as indicated below:

10. Based on consideration of the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, a penalty of one hundred twenty-five thousand seven hundred fifty dollars (\$125,750.00) ~~\$24,500~~ is justified and should be assessed against Respondent.

F. Ordering Provision No. 1.

The ED respectfully requests that Ordering Provision No. 1 be revised to add the underlined word as indicated below:

1. Respondent is assessed an administrative penalty in the amount of \$24,500 for violation of the above noted statutes and rules. Respondent shall pay the administrative penalty within 30 days after the effective date of this Order. The payment of the administrative penalty listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: West Houston Airport Corporation; TCEQ Docket No. 2011-0667-MWD-E" to:

The added sentence is commonly inserted in this paragraph in Commission orders. It is a standard provision in agreed orders and default orders.

VI. Prayer

The ED respectfully requests that the ALJ and Commissioners consider the ED's exception above, and that an order be issued determining the seven alleged violations occurred, and recommending a penalty of \$125,750.

Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar
Executive Director

Caroline M. Sweeney, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by  

Jennifer Cook
State Bar of Texas No. 00789233
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (Fax)
jennifer.cook@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2013, the foregoing document was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day the foregoing document was served as indicated:

Via Electronic Filing

The Honorable Administrative Law Judge Richard R. Wilfong
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649
512-322-2061

Via Facsimile and Electronic Mail

Ms. Mary Carter
Blackburn Carter, P.C.
4709 Austin Street
Houston, Texas 77004
Fax: 713-524-5165
mcarter@blackburncarter.com
Attorney for Respondent

Via Facsimile

Lawrence Dunbar
Dunbar Harder, PLLC
1 Riverway, Suite 1800
Houston, Texas 77056
Fax: 713-782-5544

Via Electronic Mail

Mr. Blas Coy, Jr., Attorney
Office of Public Interest Counsel, MC-103
Texas Commission on Environmental Quality

 

Jennifer Cook

