

TAC Section 60.3(c), the Commission may address compliance history and repeat violator issues in enforcement decisions through both the penalty assessment and technical requirements. Agency rules require consideration of compliance history classification when assessing an administrative penalty and enhancement of an administrative penalty assessed on a repeat violator. The September 2002 Penalty Policy takes compliance history into account by adjusting the penalty amount after a base penalty multiplied by the number of events is established for all violations included in the enforcement action. A percentage adjustment for each compliance history component (*See* TWC Section 5.753 and 30 TAC Section 60.1(c)) will result in either a downward or upward adjustment for the site under enforcement. When a respondent is designated a repeat violator (under 30 TAC Section 60.2(d)) at the site which is under enforcement, then the recommended penalty will be enhanced by 25 percent.

The remaining issues are described below for consideration by the Commission. Issues are listed in the order of the draft revised penalty policy text.

Question 1 The Executive Director interprets both the current and the proposed draft revised penalty policies to allow the Commission latitude to handle a single release as separate violations based on the speciation of the pollutants. Under what circumstances should the Executive Director recommend a penalty that takes into account pollutant speciation?

Option 1: The Executive Director recommends that the penalty policy provide flexibility to speciate a release into separate violations taking into account the nature and gravity of the alleged violation on a case-by-case basis.

Pros: This option allows use of multiple factors and data, thereby deterring future non-compliance.

Cons: This option expands discretion based on technical judgment for individual case decisions.

Option 2: Revise the penalty policy to include specific circumstances when the Executive Director should consider speciating a release into separate violations.

Pros: This option formally documents when speciation will be considered.

Cons: This option may limit the discretion to address case specific information in this component of the penalty calculation.

Question 2 If a respondent is deemed culpable for a violation, should they be eligible for a "demonstrated good faith" penalty adjustment?

Option 1: The Executive Director recommends allowing a good faith adjustment on violations where the respondent has been deemed culpable.

Pros: Encourages compliance and allows the Executive Director discretion to recognize and reward compliance, if appropriate.

Cons: Rewards respondents who "should have known better." Some stakeholders felt good faith reductions should be limited to cases where all violations have been corrected and the violators were not culpable.

Option 2: Do not allow a good faith adjustment on violations where the respondent has been deemed culpable.

Pros: Monetary acknowledgement of culpability sends a message that operating outside regulations is not acceptable to the agency. Some stakeholders felt that, since compliance is an obligation, a culpable respondent's effort to comply should not be rewarded.

Cons: The good faith adjustment is intended to acknowledge the timeliness and/or quality of a respondent's efforts in achieving compliance. If a violation could have been anticipated or avoided, it may be counter intuitive to allow for the good faith adjustment.

Question 3 At the March 29, 2006 Agenda, the Commission directed the Executive Director to allow penalty reductions for good faith efforts to comply when compliance has been achieved for some, but not necessarily all of the violations in an order. To further clarify Commission intent: Should the Executive Director recommend a demonstrated good faith adjustment for partial compliance with a single violation? If so, under what conditions? For example, a good faith adjustment might be warranted when the respondent must seek a permit to achieve compliance and has taken all the possible steps within the order processing timeframe.

Option 1: The Executive Director recommends allowing a demonstrated good faith adjustment for partial compliance by political subdivisions.

Pros: Consensus from the small business and local government stakeholders that partial compliance should be recognized. Recognizes the respondent's efforts to return to compliance.

Cons: Good faith reductions should be limited to cases where all violations have been corrected and the violators were not culpable.

Option 2: Allow a demonstrated good faith adjustment for partial compliance for a violation requiring significant capital improvements.

Pros: Recognizes the respondent's efforts to return to compliance.

Cons: Good faith reductions should be limited to cases where all violations have been corrected and the violators were not culpable.

Question 4 At the September 7, 2007 Work Session, the Commission directed the Executive Director to escalate penalties for compliance history using only issued orders, with no ceiling other than the statutory maximums. To further clarify Commission intent: Should the Executive Director recommend compliance history adjustments based on individual components of a respondent's compliance history?

Option 1: The Executive Director recommends that penalties be adjusted using individual compliance history components, including the respondent's classification and "repeat violator" status and the number of administrative orders, court orders, and environmentally related criminal convictions issued for activities at the site in the prior five-year period.

Pros: This option, while alleviating concerns regarding double counting Notices of Violation, still provides a measure of the respondent's past performance.

Cons: Some consider this double counting since violations in orders are already components of the compliance history classification.

Option 2: Escalate the penalty using only the respondent's person classification and repeat violator status.

Pros: Alleviates concerns regarding double counting compliance history in the penalty calculation.

Cons: Provides very little penalty variation to reflect past compliance since the majority of sites are in the average classification category.

Question 5 At the September 7, 2007 Work Session, the Commission recommended that, in considering the economic benefit adjustment, the Executive Director be provided flexibility for consideration of political subdivisions and nonprofit organizations. To further clarify Commission intent: Should the Executive Director recommend a penalty that recovers economic benefit from political subdivisions and nonprofit organizations? If so, at what size?

Option 1: The Executive Director recommends that economic benefit not be recovered from small political subdivisions and nonprofit organizations.

Pros: Allows political subdivisions and nonprofits to focus funds on achieving compliance instead of penalties. Alleviates some concerns voiced by small municipalities with limited assets.

Cons: Some consider this inequitable and encouraging non-compliance until a violation is observed. Environmental groups have expressed a desire for the full economic benefit to be recovered.

Option 2: Recover economic benefit from political subdivisions and nonprofit organizations.

Pros: Consistent treatment of all respondents.

Cons: Does not address concerns voiced by small municipalities to consider mitigating factors such as population and customers served.

Option 3: Do not recover economic benefit from political subdivisions and nonprofit organizations.

Pros: Consistent treatment of all respondents.

Cons: Some consider this inequitable and encouraging non-compliance until a violation is observed. Environmental groups have expressed a desire for the full economic benefit to be recovered.

Question 6 Should the Executive Director allow on-going businesses to receive a financial review based on a claim of inability to pay?

Option 1: No. The Executive Director recommends allowing on-going businesses extended payment plans only.

Pros: Some consider that any business with an on-going source of revenue should be able to pay a penalty comparable to what would be assessed a more profitable business.

Cons: Could result in an increased number of default orders and cases with prolonged negotiations instead of expedited settlement.

Option 2: Yes. Allow based on a review of financial position to respondents whose recommended penalty exceeds the established threshold.

Pros: Results in settlement of some cases that might otherwise not settle.

Cons: Can be seen as reducing the deterrent effect of penalties.

Question 7 Should the Executive Director conduct an updated financial review for respondents who pass inability to pay criteria prior to Agenda when the case experienced a prolonged delay beyond the control of the respondent?

Option 1: The Executive Director recommends conducting an updated financial review for cases where the review was completed more than one year before the Agenda.

Pros: Allows the Commission to have current financial information while focusing resources on cases where the respondent may have experienced a substantial change in financial capability.

Cons: When the updated financial review results in a higher recommended penalty, the probability of a case becoming a default order increases because respondents are not inclined to settle a second time at a higher penalty.

Option 2: Do not conduct an updated financial review for settled cases.

Pros: Avoids re-opening a settlement negotiation.

Cons: Reduces potential penalty collected from respondents who have improved their financial conditions after settlement.

Option 3: Conduct an updated financial review upon Commissioner request.

Pros: Allows the Commission to focus limited financial review resources.

Cons: When the updated financial review results in a higher recommended penalty, the probability of a case becoming a default order increases because respondents are not inclined to settle a second time at a higher penalty.

Question 8 Should the Executive Director allow respondents with legal representation to obtain financial review for an inability to pay deferral?

Option 1: Yes. The Executive Director recommends allowing financial review for all House Bill 147-eligible utilities, including those with legal representation, and other respondents represented by an attorney serving in a *pro bono* capacity.

Pros: Could result in expedited settlement instead of prolonged negotiations or default orders for some cases.

Cons: Perception that respondents capable of attaining representation by an attorney should be able to pay a penalty comparable to what would be assessed on other respondents with the same violations.

Option 2: No. Do not allow financial review for respondents with legal representation.

Pros: Focuses financial review resources on a limited number of cases.

Cons: This option increases the likelihood of the case resulting in a default order for those respondents who believe they cannot afford payment. Respondents could contend that limited resources should not impede access to legal representation.

Question 9 What, if any, limits would the Commission like to see on payment plans?

Option 1: The Executive Director recommends allowing payment plans as long as needed to pay a penalty, with minimum payments of \$100/month, for respondents who meet financial review criteria.

Pros: Could result in expedited settlement instead of prolonged negotiations or default orders for some cases.

Cons: Increased demand for financial review resources and indefinite tracking of orders for compliance.

Option 2: Retain a limit on the length of payment plans, with the duration (number of months) to be set by the Commission through the revised penalty policy.

Pros: Focuses financial review resources on cases eligible for penalty deferral.

Cons: Results in prolonged negotiations instead of expedited settlement.

Question 10 At the September 7, 2007 Work Session, the Commission directed the Executive Director to propose some aspects of the penalty policy for inclusion in rule, while others would remain as policy and guidance. To further clarify Commission intent: Which aspects of the penalty policy would the Commission like to see in rule?

Option 1: The Executive Director recommends including the framework of the penalty process in rule, as reflected in Attachment B.

Pros: This option responds to stakeholder input requesting a rule while maintaining the flexibility to adjust details of the policy without additional rulemaking.

Cons: This option requires rulemaking to changes those penalty policy provisions included in rule.

Option 2: Develop a proposed rule that covers topics not included in Attachment B, as directed by the Commission.

Pros: This option responds to stakeholder input requesting a rule.

Cons: This option requires rulemaking to changes those penalty policy provisions included in rule.

Question 11 When should the Commission undertake rulemaking?

Option 1: The Executive Director recommends beginning rulemaking as soon as the revised policy is adopted by the Commission.

Pros: This option effectuates Enforcement Process Review recommendation.

Cons: This option reduces flexibility for the Commission to adjust the parts of the policy that would be included in the rule as any changes would require additional rulemaking.

Option 2: Pilot the revised penalty policy for one year before committing the revised policy elements to rule.

Pros: The pilot process allows the Commission to see the results of the policy revision before formalizing any aspect of that policy in rule.

Cons: This option delays implementation of an Enforcement Process Review recommendation.

Question 12 At the September 7, 2007 Work Session, the Commission directed the Executive Director to revoke delivery certificates for petroleum storage tank operators with default orders. In addition, the Executive Director is proceeding with rulemaking to revoke dry cleaner registrations when there is a default order. Also, the Litigation Division researched the commission's authority to revoke TCEQ authorizations, including occupational licenses, across media.

Generally speaking, the agency has authority to revoke authorizations in default situations. The Executive Director began including revocation language in enforcement petitions beginning February 1, 2008 for waste (MSW, IHW), air quality, water quality (wastewater), and occupational licenses. The Executive Director did not include revocation language in enforcement petitions for water rights and public water system violations because of the broader policy implications in these situations.

To further develop the Commission's intent: Under what circumstances should the Executive Director recommend revocation of a license or authorization?

Option 1: The Executive Director recommends continuing to use the agency's revocation authority under TWC Section 7.302 and 7.303 to deter noncompliance to the greatest extent possible.

Pros: This option could result in lower rates of noncompliance in certain sectors.

Cons: This option can be seen as imposing a punishment that is not in keeping with or commensurate to the violation.

Option 2: Limit use of the agency's revocation authority to deter noncompliance to occupational licenses under TWC Section 7.303.

Pros: This option can be seen as imposing a punishment that is commensurate to the situation for individual accountability.

Cons: Some will view that imposition of restrictions on doing business should be limited to only the most serious violations.

Texas Commission on Environmental Quality
May 9, 2008 Work Session Materials
Attachment A: Draft Penalty Policy

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I. Introduction

This document describes the policy of the Texas Commission on Environmental Quality (TCEQ) regarding the computation and assessment of administrative penalties. Enforcement actions may result from serious or unresolved violations discovered during an investigation, or from information that concerns violations and is discovered during meetings related to permits. An investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, and may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. This document does not address when an enforcement action is initiated, but rather how TCEQ staff will evaluate violations for the purpose of recommending administrative penalties to the commission.

This policy describes how a *base penalty* will be calculated for each violation beginning at the daily statutory maximum allowed.

First, the statutory maximum will be adjusted taking into consideration the nature, circumstances, extent, and gravity of the violation using either a standard or non-standard base penalty and then by applying adjustments based upon the duration of the violation.

Next, a *total calculated penalty* will be determined by taking into account penalty adjustment factors allowed by the statutes, such as, the degree of culpability, demonstrated good faith efforts to comply, compliance history, economic benefit, other factors as justice may require, and an amount necessary to deter future violations. The total calculated penalty will be the sum of all of the base penalties plus/minus any penalty adjustment factors.

Finally, a *recommended assessed penalty* will be determined by comparing the total calculated penalty to the statutory maximums and minimums, and making adjustments as appropriate. This policy also describes when deferrals of assessed penalties may be utilized. The Executive Director may exercise discretion to recommend a penalty other than prescribed by this policy as circumstances warrant.

II. Statutory Authorizations

II. A. Statutorily Authorized Penalty Amounts

The commission has the authority to assess administrative penalties under statutes located in the Texas Water Code (TWC) and the Texas Health & Safety Code (THSC). These statutes include: TWC Chapters 7, 11, 12, 13, and 16; and THSC Chapters 341, 366, 369, 371, and 401. These statutes also set forth the maximum and minimum penalty amounts that may be assessed per violation (see Appendix 1).

II. B. Factors the Agency Considers for Administrative Penalties

The agency is required by statute to also consider various factors when determining the amount of an administrative penalty. These factors include, but are not limited to, the following:

- the nature, circumstances, extent, duration and gravity of the violation;
- the impact of the violation on environmental and human receptors;
- the history and extent of previous violations;
- the degree of culpability;
- demonstrated good faith efforts to comply;
- the economic benefit gained;
- the amount necessary to deter future violations; and
- other factors as justice may require.

The specific factors the agency must consider are located in the following statutory cites:

- TEX. WATER CODE §§7.053, 7.0525 and 13.4151 and
- TEX. HEALTH & SAFETY CODE §§11.0842 341.049, and 401.384.

III. Determining the Base Penalty Amount

Standard base penalties will be used to calculate the penalty for all violations except in the following situations:

- where an actual discharge or emission has occurred and/or environmental or human health effects have been documented; and/or
- where regulatory authorization has not been obtained, with the exception of registrations and certificates related to dry cleaning and delivery certificates related to petroleum storage tanks; and/or
- where there has been an impairment of a water right.

Standard base penalties are pre-determined penalty amounts based upon a percentage of the statutory maximum (See Appendix 1). The percentage is determined based upon the source determination (major/minor).

Base penalties for violations of the exceptions noted in the first paragraph of this section (non-standard penalties) will be calculated individually based upon the source determination and the degree of harm or impact or deviation from the program requirement.

If a particular violation does not fall within the standard penalty categories or within one of the exceptions above, the penalty will be calculated on a case-by-case basis.

III. A. Determining Major/Minor Sources

For either penalty calculation method, the Agency will determine whether the size and/or impact of the operation is "major" or "minor." Where the US Environmental Protection Agency (EPA) has designated major facilities from minor facilities, the agency will utilize that distinction designation. The major/minor designations for each program area are listed in Appendix 2.

III. B. Standard Base Penalties

The standard base penalty for each alleged violation will be determined using the following methodology. The agency will evaluate each violation subject to this section and place each violation into one of the following categories, as appropriate. Once categorized, a standard base penalty for each violation in this section will be calculated by multiplying the statutory maximum by the percentage shown below in subparagraphs (1) through (15).

- (1) Falsification-Falsifying data or other information to deceive the agency or the public.
 - (A) Major source: the standard penalty is 100% of the statutory maximum; or
 - (B) Minor source: the standard penalty is 100% of the statutory maximum.

- (2) Order Noncompliance-Failure to comply with a Commission order.
 - (A) Major source: the standard penalty is 100% of the statutory maximum; or
 - (B) Minor source: the standard penalty is 100% of the statutory maximum.

- (3) Rock Crusher or Concrete Plants-Failure to obtain a permit pursuant to TEX. HEALTH & SAFETY CODE §382.0518 prior to operating a rock crusher or a concrete plant that performs wet batching, dry batching, or central mixing.
 - (A) Major source: the standard penalty is 100% of the statutory maximum; or
 - (B) Minor source: the standard penalty is 100% of the statutory maximum.

- (4) Water Rights-Breaking, tampering with, or mutilating any seal or other device used to enforce orders of the commission, executive director, court, or watermaster.
 - (A) Major source: the standard penalty is 100 % of the statutory maximum; or
 - (B) Minor source: the standard penalty is 100 % of the statutory maximum.

- (5) Security/Emergency Preparedness-Failure to plan for or implement procedures to respond to fires, releases, emergencies, natural disasters, terrorist attacks, or other catastrophes.
 - (A) Major source: the standard penalty is 50% of the statutory maximum; or
 - (B) Minor source: the standard penalty is 25% of the statutory maximum.

- (6) Construction, Capacity, and Design Requirements-Failure to meet capacity, construction and design requirements.
 - (A) Major source: the standard penalty is 50% of the statutory maximum; or
 - (B) Minor source: the standard penalty is 25% of the statutory maximum.

- (7) Closure Activities and Site Assessment Activities-Failure to perform closure activities or site assessments.
 - (A) Major source: the standard penalty is 50% of the statutory maximum; or
 - (B) Minor source: the standard penalty is 25% of the statutory maximum.

- (8) Operations and Maintenance-Failure to follow required operating procedures and methods that protect human health and the environment from pollution exposure. Failure to conduct general preventative maintenance/housekeeping.

- (A) Major source: the standard penalty is 50% of the statutory maximum; or
- (B) Minor source: the standard penalty is 25% of the statutory maximum.

(9) Quality Control/Analyses-Failure to follow required procedures and testing that ensure a safe product for employees, the public, and the environment.

- (A) Major source: the standard penalty is 50 % of the statutory maximum; or
- (B) Minor source: the standard penalty is 25 % of the statutory maximum.

(10) Financial Assurance-Failure to secure required financial assurance

- (A) Major source: the standard penalty is 25 % of the statutory maximum; or
- (B) Minor source: the standard penalty is 10 % of the statutory maximum.

(11) Authorization/Registration-Failure to obtain any of the following authorizations:

- Registration to distribute, sell, or purchase perchloroethylene dry cleaning solvent;
- A valid, current Dry Cleaning Registration;
- A valid, current petroleum storage tank Delivery Certificate.

- (A) Major source: the standard penalty is 25% of the statutory maximum; or
- (B) Minor source: the standard penalty is 10% of the statutory maximum.

(12) Reporting, Compliance Certifications, and Notifications-Failure to develop or submit accurate plans or reports, deed recordation, notice of registration for solid waste activities, petroleum storage tank certifications, Title V certifications, and notifications to the agency.

- (A) Major source: the standard penalty is 25% of the statutory maximum; or
- (B) Minor source: the standard penalty is 10% of the statutory maximum.

(13) Manifests, Shipping Papers and Trip Tickets-Failure to use and maintain manifests, shipping papers or trip tickets as required.

- (A) Major source: the standard penalty is 25 % of the statutory maximum; or
- (B) Minor source: the standard penalty is 10% of the statutory maximum.

(14) Records-Failure to produce or maintain any plans required by permit, rule, or statute or failure to maintain records or failure to have complete and accurate records available on site.

- (A) Major source: the standard penalty is 25% of the statutory maximum; or
- (B) Minor source: the standard penalty is 10% of the statutory maximum.

(15) Labeling/Placarding/Signage-Failure to label or properly label equipment, units, containers, tanks, and other equipment that is subject to labeling requirements.

- (A) Major source: the standard penalty is 25% of the statutory maximum; or
- (B) Minor source: the standard penalty is 10% of the statutory maximum.

III. C. Non-standard Penalties

III. C. i. Calculating the Base Penalty for an Actual Discharge or Emission or for Documented Environmental or Human Health Effects

In determining the base penalty for an actual discharge or emission or for documented environmental or human health effects, the agency will consider the actual release of contaminants or pollutants (release) to the environment and the hazard or potential hazard created to the health or safety of the public and environmental receptors. The agency will consider the impact of the violation on air quality in the region, on receiving streams and underground water reservoirs, in-stream uses, water quality, aquatic and wildlife habitat, beneficial freshwater inflows to bays and estuaries, and affected persons.

The agency will evaluate each alleged violation to determine whether a release has occurred and/or whether there have been documented environmental or human health effects.

When calculating penalties for significant emissions events, specification of that event may be an appropriate means to ensure the penalty is of an amount adequate to address the violation and provide a deterrent effect. Specification will be evaluated on a case by case basis, and may include specification to the criteria-pollutant level or to the individual constituent level. The Executive Director may also opt to only break out a portion of specific constituents. For example, when a permit has a separate limit for a specific chemical, or when a chemical was emitted that is found on the Air Pollutant Watch List; it may be necessary to isolate that specific violation.

If the agency determines that a release has occurred, and/or there have been documented environmental or human health effects, the base penalty for each release will be calculated based upon the size and/or impact of the source and the level of harm by multiplying the percentage shown below by the statutory maximum for the program violated as found in Appendix 1.

(1) Major source:

- (A) Major harm: base penalty is 100% of the statutory maximum;
- (B) Moderate harm: base penalty is 50% of the statutory maximum; or
- (C) Minor harm: base penalty is 25% of the statutory maximum.

(2) Minor source:

- (A) Major harm: base penalty is 50% of the statutory maximum;
- (B) Moderate harm: base penalty is 25% of the statutory maximum; or
- (C) Minor harm: base penalty is 10% of the statutory maximum.

The terms major harm, moderate harm, and minor harm have the following meanings when used in this section:

- (1) Major harm: Human health or the environment has been exposed to contaminants which exceed levels that are protective of human health or environmental receptors as a result of the violation or there is documented evidence of fish kills or of citizens or workers injured or seeking medical treatment as a result of the violation;

(2) Moderate harm: Human health or the environment has been exposed to significant amounts of contaminants which do not exceed levels that are protective of human health or environmental receptors as a result of the violation or there is documented evidence of stressed vegetation as a result of the violation; and

(3) Minor harm: Human health or the environment has been exposed to insignificant amounts of contaminants which do not exceed levels that are protective of human health or environmental receptors as a result of the violation and there is no documented evidence of environmental or human health effects.

Distinguishing Major Harm from Moderate or Minor Harm

For the release of pollutants to be considered major, the pollutant must be present in concentrations that exceed levels that are protective of human health or environmental receptors, and/or the pollutant must be present in significant amounts as defined in this guidance document.

Exposure to significant or insignificant amounts of contaminants is defined in terms of the degree of impact on affected resources.

If there is sampling data available and corresponding regulatory standards are applicable, an assessment of the impact should be based, at least in part, on such data and corresponding standards.

In the absence of such data and/or standards, the degree of impact should be evaluated in terms of the observed and documented effects the release has on the resource. Where both data and observed effects are available, both should be given due consideration in assessing impact. For releases where neither data nor direct observation are available, the degree of impact must be evaluated in light of scientific knowledge of the expected effects of such a release and best engineering judgment.¹

Definitions²

An affected resource includes human health, economic activity, normal use or enjoyment of property and/or other environmental resources (e.g., air quality, public or privately-owned water or land) that have been adversely impacted by a pollutant release.

¹ For example, VOC emissions are known to contribute to ozone formation, but cause no observable immediate impacts. A spill of liquid mercury may not contaminate soil or water, but is presumed to partially vaporize into the ambient air, where it may be harmful if inhaled.

² These definitions do not directly address pollutant concentrations or protective levels. As noted in the section Distinguishing Major Harm from Moderate or Minor Harm, if a release of a significant amount of pollutants causes pollutant concentration(s) to exceed levels that are protective of human health or environmental receptors, the release falls into the major harm category.

A release of a significant amount of pollutants is a release of pollutants in types or quantities that results in a loss of most or all of the quantity and/or quality of the affected resource(s).

A release of an insignificant amount of pollutants is a release of pollutants in types or quantities that results in little or no loss of the quantity and/or quality of the affected resource(s).

Assessing Whether a Release Amount Is Significant or Insignificant

Consider the release and the affected resource in light of the questions below.

This is not a checklist or decision tree. The individual questions are not weighted, and must be considered as a whole.

(1) The Released Pollutant

Questions to Ask	Factors to Consider
What was released?	Consider the available information about the substance's toxicity or other qualities that could adversely impact the affected resource. The greater the released material's toxicity, the more likely that a release will be a "significant amount."
How much was released?	Was the substance released in a quantity sufficient to cause the adverse effects associated with it? The larger the quantity released, the more likely that the release will be a "significant amount."

(2) The Affected Resource

Questions to Ask	Factors to Consider
What was the affected resource?	Consider the definition of an affected resource. Was human health or economic activity adversely impacted? If so, what and how? Were normal use or enjoyment of property and/or environmental resources adversely impacted? If so, what and how?
How adversely was the affected resource impacted?	Consider the sensitivity, value and/or usability of the affected resource, and any data or scientific knowledge that assesses the actual or expected impact of the release. The more sensitive, valuable and/or usable the resource, the more likely that a release that impacts the resource will be considered a "significant amount."

The following table summarizes the criteria for Major, Moderate, and Minor harm.

Harm	significant amounts of pollutants	exceeds levels that are protective or documented human health effects or fish kills
Major	Yes	Yes
Moderate	Yes	No
Minor	No	No

III. C. ii. Calculating the Base Penalty Where Regulatory Authorization Has Not Been Obtained by the Respondent

If the agency determines that a violation has occurred because a respondent failed to obtain a permit, license, or authorizing registration, the base penalty will be calculated based upon the size and impact of the source and the type of authorization by multiplying the percentage shown below by the statutory maximum for the program violated as found in Appendix 1.

- (1) Operating or constructing without permit authorization:
 - (A) Major source: 25% of the statutory maximum; or
 - (B) Minor source: 10% of the statutory maximum.

- (2) Operating or constructing without an authorizing registration:
 - (A) Major source: 25% of the statutory maximum; or
 - (B) Minor source: 10% of the statutory maximum.

- (3) Operating a site or performing a regulated activity without the required license:

- (A) Offering services without the appropriate license but not performing the regulated activity: 10% of the statutory maximum;
 - (B) Offering services without the appropriate license and also performing the regulated activity: 25% of the statutory maximum; or
 - (C) Operating a site/facility without the appropriate license: 25% of the statutory maximum.
- (4) Initiating construction activities over the Edwards Aquifer recharge and/or contributing zones without obtaining authorization:³
- (A) Major source: 10% of the statutory maximum; or
 - (B) Minor source: 5% of the statutory maximum.

III. C. iii. Calculating the Base Penalty for Impairment of a Water Right

If the agency determines that an impairment of water rights has occurred, the base penalty for the impairment will be calculated based upon the size of the source and the level of harm.

- (1) Major source:
 - (A) Major harm: base penalty is 100% of the statutory maximum;
 - (B) Moderate harm: base penalty is 50% of the statutory maximum; or
 - (C) Minor harm: base penalty is 25% of the statutory maximum.
- (2) Minor source:
 - (A) Major harm: base penalty is 50% of the statutory maximum;
 - (B) Moderate harm: base penalty is 25% of the statutory maximum; or
 - (C) Minor harm: base penalty is 10% of the statutory maximum.

The terms major harm, moderate harm, and minor harm have the following meanings when used in this section:

- (1) Major harm: unauthorized diversion, taking, or storage of state water or an unauthorized change in flood elevation of a stream that deprives others of water, detrimentally affects aquatic life, or results in a safety hazard, property damage, or economic loss;
- (2) Moderate harm: unauthorized diversion, taking, or storage of a significant amount of state water or a significant unauthorized change in flood elevation of a stream which does not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss; and
- (3) Minor harm: unauthorized diversion, taking, or storage of an insignificant amount of state water or an insignificant unauthorized change in flood elevation of a stream which

³ The number of events will be applied on a daily basis.

does not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.

III. D. Other Base Penalty

If a violation does not fall under the standard or non-standard penalty categories, the agency will determine the percentage to apply to the statutory maximum on a case-by-case basis.

III. E. Determining the Number of Events

The number of events for all base penalties will be based on case specific information.

For the purposes of this section, one month equals one calendar month, one quarter equals three calendar months. Any part of a day equals a "day;" any part of a month equals a "month;" any part of a quarter equals a "quarter."

The duration of events will be calculated from the initial date of documented noncompliance and extend until the date the respondent returned to compliance or the date of screening if the respondent is not yet in compliance by that date, whichever is earliest.

The duration of events may be revised, as appropriate, to reflect extended noncompliance if a case is referred to the State Office of Administrative Hearings, and every six months thereafter until the evidentiary hearing is conducted.

The agency may determine that it is appropriate to assess the number of events at an amount other than the amounts prescribed below in order to make the assessment commensurate with the specific facts applicable to the violation.

The number of events for base penalties will be dependent on the number of times the violation is observed, the specific requirement violated, the degree of non-compliance, the duration of the violation, and other case specific information.

For an actual discharge or emission or for documented environmental or human health effects and for impairment of a water right, the number of events will be determined as follows:

- (1) Major harm: up to daily events;
- (2) Moderate harm: up to monthly events; or
- (3) Minor harm: up to quarterly events.

For other violations, the number of events will be determined based on the requirement violated in the authorization, rule or statute.

The following exceptions apply due to statutory limitations and/or current practice:

- The number of events for operating a dry cleaning facility or drop station without registering with the TCEQ will be calculated using daily events.
- TEX. WATER CODE §7.052(b), relating to operating a rock crusher or a concrete plant that performs wet batching, dry batching, or central mixing, that is required to obtain a permit

under Section 382.0518, Health and Safety Code, and that is operating without the required permit, requires that the statutory limit of \$10,000 will be assessed for every day of the unauthorized activity.

- Financial assurance violations will be calculated as discrete events for each unit (tank, landfill, etc.) that requires financial assurance and for each year of noncompliance. Each compartment of a compartmental tank will be considered to be an individual unit. *Note: petroleum storage tank financial assurance requirements have a statutory minimum requirement that may not be less than the annual cost of maintaining the minimum insurance coverage required for each tank. This must be taken into consideration in the statutory limit adjustments discussed later in this policy.*
- If the violation involves initiating construction activities over the Edwards Aquifer recharge and/or contributing zones without obtaining authorization, the penalty events will be calculated on a daily basis.

III. F. Calculating the Total Base Penalty

The total base penalty for each violation will be calculated as the standard or non-standard base penalty multiplied by the number of events. The total base penalty for each violation will then be summed to compute the total base penalty for the case.

IV. Penalty Adjustment Factors

Each violation will be evaluated separately for the degree of culpability and good faith efforts penalty adjustment factors. These calculated adjustment factors for all violations will be summed and added to the Total Base Penalty, along with the other penalty adjustment factors described below.

The economic benefit costs will be calculated on an individual violation basis, however, the economic benefit adjustment will be determined based upon a sum of all the economic benefits calculated for all violations.

The Total Base Penalty will also be adjusted for the extent of previous violations (compliance history), other factors as justice may require, and an amount necessary to deter future violations, if warranted.

IV. A. Culpability

When applied, an adjustment for culpability will increase the base penalty for a violation by 25%. In assessing culpability, the agency will determine whether the alleged violation could have been reasonably anticipated and avoided.

Culpability will be assessed for the five year period prior to the date of the investigation documenting the current violations and applied on either:

- (1) a site specific basis; or
- (2) on a multi-site basis, for mobile units and individuals who are required to be registered, certified, or licensed by the agency prior to performing certain regulated activities for which violations have been alleged.

Staff will determine whether documentation that indicates culpability exists (e.g., contractor notes; agency letters including NOVs for the same violation at the same unit and which is not associated to the current enforcement action; respondent notes; investigations not associated to the current enforcement action).

IV. B. Demonstrated Good Faith

Adjustments for good faith efforts will decrease the base penalty of individual violations.

An adjustment for good faith effort:

- (1) will be 30% of the base penalty proposed for an individual violation when the agency determines that a violation was corrected prior to the issuance of the notice of violation (NOV) or notice of enforcement (NOE), whichever occurs first; or
- (2) will be 15% of the base penalty proposed for an individual violation when the agency determines that a violation was corrected:
 - (A) after the issuance of the NOE; and
 - (B) prior to the date of an initial settlement offer or the filing of an Executive Director's Preliminary Report and Petition (EDPRP), whichever occurs first.

An adjustment for good faith efforts will not be included in a default order.

IV. C. Compliance History

The compliance history adjustment for all violations will be calculated based on the site's compliance history for the five year period preceding the date of initiating an enforcement action with an initial settlement offer or the filing date of EDPRP, whichever occurs first, as follows:

- (1) the total base penalty will be increased by 25% when an alleged violator is designated a "repeat violator" as defined in 30 TEX. ADMIN. CODE Chapter 60;
- (2) the total base penalty will be increased by 30% for each final administrative order;
- (3) the total base penalty will be increased by 35% for each final court order;
- (4) the total base penalty will be increased by 50% for any environmentally related criminal convictions related to the respondent or site;
- (5) the total base penalty will be increased or decreased, as indicated below, based upon the respondent's person classification as defined in 30 TEX. ADMIN. CODE §60.2(f):
 - (A) Poor Performer – increased by 10%
 - (B) High Performer – decreased by 20%

Compliance history reductions will not be included in default orders.

IV. D. Economic Benefit

For purposes of this policy, economic benefit is defined as a monetary gain derived from a failure to comply with any TCEQ regulation or State statute. Economic benefit may include, but is not limited to, any or all of the following: (1) the return a respondent may earn by delaying the capital costs of purchasing and installing pollution control equipment; (2) the return a respondent may earn by delaying a one-time expenditure; and (3) the return a respondent may earn by avoiding the costs of compliance. If it is demonstrated that an inadvertent or unintentional

monetary loss has occurred as a result of a violation then the Executive Director may recommend that the amount of the loss be subtracted from the economic benefit calculation.

To estimate the economic benefit gained, staff will consider the following: capital expenditures, one-time nondepreciable expenditures, periodic costs, and interest gained. Each of these categories will be evaluated to determine if the benefits gained were avoided or delayed costs.

Capital expenditures will include all depreciable investment outlays necessary to achieve compliance with the environmental regulation or permit. Depreciable capital investments are usually made for things that wear out, such as buildings, equipment, or other long-lived assets. Typical environmental capital investments include groundwater monitoring wells, stack scrubbers, and wastewater treatment systems.

One-time nondepreciable expenditures include costs the respondent should have made earlier (to prevent the violations) which need only be made once and are not depreciable (i.e., do not wear out). Such an expenditure could be purchasing land, setting up a record-keeping system, removing illegal discharges of dredged and fill material, disposing of soil from a hazardous waste site, or providing initial training to employees.

Periodic costs are recurring costs associated with operating and maintaining the required pollution control equipment.

IV. D. i. Avoided Costs

Avoided costs are expenses that a respondent would have incurred if the facility had complied with environmental regulations on time, *and which can never be made up*. Unlike delayed costs, which are only postponed, these expenditures are avoided altogether because the expenditures for those "lost" years can't be made up once the time has passed. Typical avoided costs are for *recurring* expenses such as labor, raw materials, power and other utilities, lease payments, and sampling, inspections or reporting. One-time avoided costs are also possible.

If it is determined that a respondent has gained an economic benefit by avoiding a cost of compliance then the full amount of the economic benefit gained from that avoided cost will be added to the total base penalty.

IV. D. ii. Delayed Costs

Benefits from delayed costs potentially arise when a respondent delays expenditures necessary to achieve compliance. The benefit occurs because respondents have the opportunity to invest their funds in projects other than those required to comply with environmental regulations.

Delayed costs may include capital investments in pollution control equipment, costs to remove unpermitted dredged or fill material and restore wetlands, or one-time expenditures required to comply with environmental regulations (e.g., the cost of *setting up* a sampling, inspection or reporting system, or land purchases).

If it is determined that a respondent has gained an economic benefit by delaying a cost of compliance then the estimated delayed costs for all violations will be summed and if they are equal to or exceed \$7,500 then the full amount of the delayed costs will be added to the total base penalty. If the estimated delayed costs are less than \$7,500 there will be no adjustment for economic benefit for delayed costs.

IV. E. Other Factors as Justice May Require

When applied, an adjustment for other factors that justice may require will increase or decrease the total base penalty.

- (1) The following factors may be utilized to decrease the total base penalty in order to encourage pollution prevention:
 - (A) the total base penalty may be decreased by 15% for sites with a verified platinum environmental management system in place for one year or more;
 - (B) the total base penalty may be decreased by 10% for sites with a verified gold environmental management system in place for one year or more;
 - (C) the total base penalty may be decreased by 5% for sites with a verified silver environmental management system in place for one year or more;
 - (D) the total base penalty may be decreased by 10% for sites with documented participation in a voluntary site assessment visit with subsequent certification as a Compliance Commitment partner (C2 certification) following the visit; and
 - (E) the total base penalty may be decreased by 15% for voluntary and proactive participation in the Environmental Monitoring and Response System (EMRS) through documented evidence of voluntary participation, response, corrective action, and timely submittal of reports to the TCEQ on the cause of the emissions or discharge problem and the solution that was undertaken.

Pollution prevention reductions may not be included in default orders.

- (2) The agency may also adjust a proposed penalty amount, on a case-by-case basis, upon a consideration of factors unique to the situation, including, but not limited to:
 - (A) the nature, circumstances, extent, duration, and gravity of the violation;
 - (B) the regionalization efforts of the respondent;
 - (C) whether the respondent voluntarily notified the agency of the violation(s) prior to the agency discovering the violation; or
 - (D) whether the respondent is a small political subdivision or nonprofit organization.

(3) The agency may increase the calculated penalty in order to ensure that the penalty amount is sufficient to deter future violations.

V. Total Calculated Penalty and Recommended Assessed Penalty

The total calculated penalty is the total base penalty plus any statutory adjustment factors.

The total calculated penalty will be checked against the minimum and maximum penalty amounts allowed by statute per violation per day in order to ensure that the penalty does not fall outside the statutory requirements.

VI. Deferrals

The agency may offer a deferral to the recommended assessed penalty as an incentive to expeditious resolution (resolution prior to the need for involving Litigation) of a pending enforcement matter. When applied, the deferral will reduce the assessed penalty by 20%.

Additionally, a deferral of all or part of the penalty may also be offered to certain utility facilities, as defined in TEX. WATER CODE §7.034.

A deferral will be applied to the assessed penalty except when:

- (1) the violation(s) are being resolved with an order that includes findings of fact and conclusions of law;
- (2) the violation(s) are being resolved through a non-expedited enforcement action or the respondent does not settle within the time frame prescribed by a settlement offer in an expedited enforcement action;
- (3) the respondent is deemed culpable as defined in this policy;
- (4) the respondent is a poor performer and/or repeat violator;
- (5) the type of order being issued is a default order.

If the total calculated penalty must be reduced in order to meet the statutory maximum then a deferral of the assessed penalty may be offered at a reduced percentage at the discretion of the Executive Director.

VII. Financial Inability to Pay and Payment Schedules

If a respondent receiving an order with penalties does not have an attorney representing them, they have the opportunity to establish that a lesser penalty amount or payment schedule is justified under the party's financial circumstances. Operating businesses will not be considered for a penalty reduction, but may be reviewed for eligibility for a payment schedule.

House Bill 147, as enacted by the 80th Legislature, amended the Texas Water Code to add § 7.034 regarding deferral of penalty for certain utilities and districts. Section 7.034(b) states that "the commission may allow a municipally owned utility, a water supply or sewer service corporation, or a district, to defer the payment of all or part of an administrative penalty on the condition that the entity complies with all provisions for corrective action in a commission order to address the violation." For these types of respondents, there is no minimum \$3,600 penalty amount or 1% annual gross revenue limit, and the entity may have an attorney representing them if they are working pro bono or as a full time employee of the entity, to qualify for financial inability to pay review.

VIII. Supplemental Environmental Projects

A Supplemental Environmental Project (SEP) is a means by which penalties for environmental violations may be directed toward environmentally beneficial projects. Through a SEP, a respondent in an enforcement matter can choose to invest penalty dollars in improving the environment, rather than paying some or all of the penalty to the Agency. TCEQ publication GI-352, *Supplemental Environmental Projects (SEPs) Putting Fines to Work Closer to Home* describes eligibility, criteria for project acceptability, the basic types of possible projects, reporting requirements, and how the proposal process works.

IX. Joint and Several Liability

With regard to administrative penalty assessment, joint and several liability is analyzed on a case-by-case basis under several general authority provisions: TEX. WATER CODE §§5.102 (General Powers), 7.002 (Enforcement Authority), 7.051 (Administrative Penalty) and 7.053 (Penalty Factors). The Agency may impose joint and several liability for different respondents responsible for the same violation, where there is a relationship among respondents, such as a familial or business relationship. For example joint and several liability may be assessed for: (1) family members who own a facility and (2) business partners of a facility.

Joint and several liability will not be assessed where the respondents have committed separate, distinct violations. For instance, joint and several liability will not be assessed for the generator, transporter, and landowner in a case where unauthorized hazardous waste is disposed. Under joint and several liability, one penalty for a violation is imposed, and every person responsible for the violation is liable for full payment of the penalty, although the liability is extinguished for all parties when the full penalty amount is paid.

Appendix 1 – Statutorily Authorized Penalties

Program	Statute/ Chapter	Administrative penalties, per violation per day (except as otherwise noted)	Civil penalties, per violation per day
Air Quality	TWC/7	\$0-10,000	\$50-25,000
Dam Safety	TWC/12	N/A	\$0-5,000
Dry Cleaners	TWC/7	For violations of Tex. Health & Safety Code §374.252 [except as indicated below] not more than \$5,000 – total, not per day; For violations of Tex. Health & Safety Code §374.252(a)(3) not more than \$10,000 – total, not per day. Failure to pay fees & failure to register - \$50 per day	\$50-25,000
Edwards Aquifer	TWC/7	\$0-10,000	\$50-25,000
Industrial and Hazardous Waste	TWC/7	\$0-10,000	\$50-25,000
Land over MSW Landfills	TWC/7	\$0-10,000	\$50-25,000
Levees	TWC/11 & 16	\$0-1,000	N/A
Medical Waste	TWC/7	\$0-10,000	\$50-25,000
Municipal Solid Waste	TWC/7	\$0-10,000	\$50-25,000
Occupational Licenses or Certification	TWC/7	\$0-2,500	\$50-5,000
On-Site Sewage Disposal	TWC/7	\$0-2,500	\$50-5,000

Program	Statute/ Chapter	Administrative penalties, per violation per day (except as otherwise noted)	Civil penalties, per violation per day
On-Site Sewage Disposal Maintained by the Owner of a Single-Family Residence Located in a County of at Least 40,000	THSC/366	\$0-100 – total, not per day	\$50-25,000
On-Site Sewage Disposal Maintenance Company	THSC/366	1 st violation - \$100 Subsequent violations - \$500 3 rd violation – license revocation	\$50-5,000
Petroleum Storage Tank	TWC/7	\$0-10,000	\$50-25,000
Petroleum Storage Tank Financial Assurance Requirements	TWC/26	Maximum Penalty: \$10,000 Minimum Penalty: May not be less than the annual cost of maintaining the minimum insurance coverage required for each tank.	Maximum Penalty: \$25,000 Minimum Penalty: May not be less than the annual cost of maintaining the minimum insurance coverage required for each tank.
Plastic Containers	THSC/369	N/A	\$0-500 per violation, not per day
Public Water Supply	TH&SC/341	\$50-1,000	\$50-1,000
Public Water Utilities	TWC/13	0-\$500	\$100-5,000
Quarries in Water Quality Protection Areas	TWC/26	Responsible Parties - Not less than \$2,500 and not more than \$25,000 (for discharges) Person – Not less than \$100 (for any other violation)	\$50-25,000
Radioactive Medical Waste	THSC/401	\$0-10,000	\$100-25,000
Radioactive Substances (Disposal)	THSC/401	\$0-10,000	\$100-25,000

Program	Statute/ Chapter	Administrative penalties, per violation per day (except as otherwise noted)	Civil penalties, per violation per day
Rock Crusher Operation or a Concrete Plant that performs Wet or Dry Batching or Central Mixing and Operates Without a Permit	TWC/7	\$10,000	\$50-25,000
Subsurface Excavation	TWC/7	\$0-10,000	\$50-25,000
Toxic Chemical Release Reporting	TWC/7	\$0-10,000	\$50-25,000
Underground Injection Control	TWC/27 & 7	\$0-10,000	\$50-25,000
Underground Water	TWC/7	\$0-10,000	\$50-25,000
Used Oil	TWC/7	\$0-2,500	\$50-5,000
Used Oil Filter	TH&SC/371, TWC/7	\$0-2,500	\$100-500
Waste Tires	TWC/7	\$0-10,000	\$50-25,000
Water Quality	TWC/7	\$0-10,000	\$50-25,000
Water Rights	TWC/11	\$0-1,000 for each day in violation of a rule or order adopted under TWC §16.2363 \$0-5,000 (all other violations) Watermaster Field Citations defined by rule – see 30 TEX. ADMIN. CODE §304.34(d)	\$0-5,000
Water Saving Performance Standards	TWC/7	\$0-2,500	\$50-5,000

Appendix 2 – Major/Minor Source Definitions

(1) Air

(A) Major:

(i) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(I) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA), §112(b) (Hazardous Air Pollutants);

(II) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(III) any quantity less than those identified in clause (I) or (II) of this subparagraph established by the EPA through rulemaking.

(ii) For radionuclides regulated under FCAA, §112, the term "major source" shall have the meaning specified by the EPA by rule.

(iii) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(I) coal cleaning plants (with thermal dryers);

(II) kraft pulp mills;

(III) portland cement plants;

(IV) primary zinc smelters;

(V) iron and steel mills;

(VI) primary aluminum ore reduction plants;

(VII) primary copper smelters;

(VIII) municipal incinerators capable of charging more than 250 tons of refuse per day;

(IX) hydrofluoric, sulfuric, or nitric acid plants;

(X) petroleum refineries;

(XI) lime plants;

(XII) phosphate rock processing plants;

(XIII) coke oven batteries;

(XIV) sulfur recovery plants;

(XV) carbon black plants (furnace process);

(XVI) primary lead smelters;

(XVII) fuel conversion plant;

(XVIII) sintering plants;

(XIX) secondary metal production plants;

(XX) chemical process plants;

(XXI) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;
(XXII) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(XXIII) taconite ore processing plants;
(XXIV) glass fiber processing plants;
(XXV) charcoal production plants;
(XXVI) fossil-fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or
(XXVII) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(iv) Any site, except those exempted under FCAA, §182(f) (NO_x Requirements), that, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

- (I) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NO_x) in any ozone nonattainment area classified as "marginal or moderate";
- (II) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";
- (III) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";
- (IV) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";
- (V) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";
- (VI) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";
- (VII) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";
- (VIII) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and
- (IX) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(v) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (iv) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (iii) of this paragraph.

(vi) Any temporary source which is located at a site for less than six months shall not affect the determination of major for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(vii) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (i) of this paragraph.

(viii) For purposes of this policy, the respondent's site is considered major if any source at the site is major, even if the violation(s) is not for that source.

(B) Minor: Defined as any non-major source.

(2) Dams

(A) Major: A dam that could result in loss of life if it failed (classified as high or significant hazard)

(B) Minor: A dam that would not result in loss of life if it failed (classified as low hazard).

(3) Dry Cleaners

(A) Major:

- Dry cleaning facilities that use perchloroethylene as the dry cleaning solvent;
- Dry cleaning facilities that have been ranked and prioritized for the Dry Cleaner Remediation Program (DCRP) and at which remediation has not been completed.

(B) Minor:

- Dry cleaning facilities that do not use perchloroethylene as the dry cleaning solvent;
- Dry cleaning facilities that have not been ranked and prioritized for the DCRP or have been ranked but remediation has been completed;
- All dry cleaning drop stations.

(4) Edwards Aquifer

(A) Major: A construction project disturbing 5 acres or greater.

(B) Minor: A construction project disturbing less than 5 acres.

(5) Industrial and Hazardous Waste

(A) Major:

- Large quantity generators and hazardous waste disposal and land treatment facilities. Large quantity generators are defined by the EPA as facilities that generate 1,000 kg (approximately 2,200 pounds) or more of hazardous waste per month or 1 kg (approximately 2.2 pounds) or more of acutely hazardous waste per month.

- Any commercial industrial facility, meaning any facility that receives industrial non-hazardous or hazardous solid waste from off-site sources.
- Generators of 10,000 kg or more of Class 1 non-hazardous waste per month.

(B) Minor:

- A generator of less than 1,000 kg of hazardous waste or less than 1 kg of acutely hazardous waste per month and who does not dispose of hazardous waste or operate a hazardous waste land treatment unit.
- Generators of less than 10,000 kg of Class 1 non-hazardous waste and generators of any amount of Class 2 or Class 3 industrial non-hazardous waste.

(6) Municipal Solid Waste

(A) MSW Facilities (Note: Type VIII facilities are listed separately in paragraph 12 below):

(i) Major: The following types of municipal solid waste facilities (as defined in 30 TEX. ADMIN. CODE §330.5) except landfills classified as types IAE and IVAE and that are not operating under or satisfying the condition of a permit by rule:

- Type I – standard MSW landfills
- Type IV – brush, construction, or demolition waste, and/or rubbish
- Type V – solid waste processing facilities
- Type VI - a facility using a new or unproven method of managing or utilizing MSW, including resource and energy recovery projects for processes that are not currently in use in Texas
- Type VII - a facility for the land management of sludge and/or similar wastes
- Type IX - an energy, material, gas recovery for beneficial use, or landfill mining facility located within or adjacent to a closed disposal facility, an inactive portion of a disposal facility, or an active disposal facility, used for extracting materials for energy and material recovery or for gas recovery for beneficial use.

(ii) Minor: Municipal solid waste landfills of types IAE and IVAE or any solid waste facility that is operating under and satisfying the conditions of a permit by rule.

(B) Unauthorized solid waste treatment, storage, processing or disposal

(i) Major: treatment, storage, processing or disposal of 1,000 cubic yards or more of municipal solid waste.

(ii) Minor: treatment, storage, processing or disposal of less than 1,000 cubic yards of municipal solid waste.

(C) Medical Waste

(i) Major:

- Generators of more than 50 pounds of medical waste per month.
- Storage, treatment, and disposal facilities including mobile treaters of medical waste but excluding medical waste collection stations.

(ii) Minor:

- Generators of 50 pounds or less of medical waste per month.
- Medical waste transporters.
- Medical waste collection stations.

(7) Occupational Licensing – Not classified.

(8) On-site Sewage Facilities

- (A) Major: Facilities with a wastewater usage rate of greater than 500 gallons per day.
- (B) Minor: Facilities with a wastewater usage rate of less than or equal to 500 gallons per day.

(9) Petroleum Storage Tanks

- (A) Major: An underground or above-ground storage tank facility that has a monthly throughput of 50,000 gallons or more.
- (B) Minor: An underground or above-ground storage tank facility that has a monthly throughput of less than 50,000 gallons.

(10) Public Water Supply

(A) Major:

- A public water system serving 3,300 or more people.
- A retail public water utility serving 1,100 connections or more.
- Bottlers of drinking water with a total production capacity of 10,000 gallons per day or greater.

(B) Minor:

- A public water system serving less than 3,300 people.
- A retail public utility serving less than 1,100 connections. In addition, non-retail public water supply entities will be classified as minor unless specific circumstances exist that would cause them to be classified as majors.
- Bottlers of drinking water with a total production capacity of less than 10,000 gallons per day.

(11) Radioactive Waste: All facilities will be considered majors.

(12) Scrap Tires

(A) Major: A facility with 1,000 or greater tires stored on the ground or 4,000 or greater stored in trailers.

(B) Minor: A facility with less than 1,000 tires stored on the ground or less than 4,000 stored in trailers.

(13) Storm Water: Construction

(A) Major: A construction project disturbing 5 acres or greater.

(B) Minor: A construction project disturbing less than 5 acres.

(14) Storm Water: Industrial

(A) Major: A site with an individual permit that is classified as major by EPA through a rating system that looks at the constituents being discharged and the receiving stream.

(B) Minor: All other individually permitted industrial storm water sites not designated as majors and all industrial storm water sites with general permit authorization.

(15) Storm Water: Municipal Separate Storm Sewer Systems (MS4s)

(A) Major: Phase I MS4s (a large or medium MS4 which serves or is located in an incorporated place or county with a population of 100,000 or greater (based on the U.S. Census))

(B) Minor: Phase II MS4s (a small MS4 located in an urbanized area (UA), as defined by the Bureau of the Census or located outside of a UA and are brought into the program on a case-by-case basis by the TCEQ)

(16) Underground Injection Control: All Class I and Class III facilities will be considered majors. Class IV and V facilities will be determined on a site-specific evaluation. Note: Class II facilities are not regulated by the TCEQ.

(17) Used Oil: All will be classified as minor facilities.

(18) Used Oil Filters: All will be classified as minor facilities.

(19) Water Quality

(A) Major:

(i) Municipal wastewater treatment facilities with individual NPDES/TPDES permits that are operating at a phase with a permitted daily average flow of 1 million gallons per day or greater.

(ii) Industrial wastewater treatment facilities with individual NPDES/TPDES permits that are classified as major by EPA through a rating system that looks at the constituents being discharged and the receiving stream.

(iii) Satellite wastewater collection systems serving populations of 25,000 or more.

(iv) Approved pretreatment programs that are tied to a wastewater tracking plant that is classified as major.

(B) Minor:

(i) Municipal wastewater treatment facilities with individual NPDES/TPDES permits that are operating at a phase with a permitted daily average flow less than 1 million gallons per day.

(ii) Industrial wastewater treatment facilities that are not classified as major by EPA, as described above.

(iii) Municipal or industrial wastewater treatment facilities authorized by general permits or by Texas land application permits.

(iv) All CAFO related wastewater treatment facilities.

(v) Land application of domestic septage, Class B sewage sludge, Class A sewage sludge, water treatment plant sludge, and all Texas land application permits and general permits.

(vi) Satellite wastewater collection systems serving populations less than 25,000.

(vii) Approved pretreatment programs that are tied to a wastewater tracking plant that is classified as minor and significant industrial users discharging to POTWs without approved pretreatment programs.

(20) Water Rights

(A) Major: A water right of greater than 5,000 acre-feet, whether diversion, impoundment, or a combination thereof.

(B) Minor: A water right of less than or equal to 5,000 acre-feet, whether diversion, impoundment, or a combination thereof.

(21) Other. If a source is not listed in paragraphs (1)-(20) above, the agency will determine if the source is major or minor on a case-by-case basis.

Texas Commission on Environmental Quality
May 9, 2008 Work Session Materials
Attachment B: "Strawman" Draft Penalty Rule

CHAPTER 70: ENFORCEMENT
SUBCHAPTER A: ENFORCEMENT GENERALLY

§70.9. Installment Payment and Deferral of Administrative Penalty.

(c) The executive director may recommend that all or a portion of the penalty be deferred.

(d) Circumstances in which the executive director may recommend deferral of a penalty include:

(1) expedited settlement of an enforcement action;

(2) an enforcement action relating to certain utility or district facilities as defined in TWC §7.034;

(3) an enforcement action in which a respondent demonstrates that a lesser penalty is justified under §70.8 of this title (relating to Financial Inability to Pay; Amount Necessary to Obtain Compliance); or

(4) an enforcement action in which a respondent performs all required corrective action.

(e) The executive director may recommend deferral of all or part of a full penalty when the respondent is a certain utility or district as defined in TWC §7.034 and that entity complies with all provisions for corrective action to address the violation.

(f) The executive director may not recommend deferral of a penalty if:

(1) the order includes findings of fact and conclusions of law;

(2) the type of order being issued is a default order, as described in §70.106 of this title (relating to Default Order);

(3) the respondent has been deemed culpable, as described in §70.204 of this

title (relating to Culpability):

(4) the respondent is a poor performer and/or repeat violator as defined in §60.2

of this title (relating to Classification); or

(5) the executive director determines that a deferral is not warranted.

(g) If a respondent fails to comply with any term or condition of an order, a respondent shall be required to pay at minimum that portion of the deferred penalty for which corrective action has not been performed.

§70.12. Supplemental Environmental Projects.

(a) The executive director may recommend that a respondent be allowed to offset a portion of an assessed penalty by performing or funding a Supplemental Environmental Project (SEP) in accordance with TWC §7.067. Any offset for a SEP is subject to final commission approval.

(b) In determining whether to recommend allowing performance or funding of a SEP, the executive director may consider:

(1) the type of SEP proposed;

(2) a respondent's timeliness and thoroughness in providing requested information;

(3) past history of performance or funding of a SEP; and

(4) any other factors the executive director may consider appropriate in the circumstances.

CHAPTER 70: ENFORCEMENT

SUBCHAPTER D: ASSESSMENT OF PENALTIES

§70.201. Purpose and Applicability.

(a) This chapter delineates what factors are considered and how statutory requirements are applied in determining the amount of an administrative penalty. The purpose of an administrative penalty is to deter noncompliance with the commission's rules and to recover any economic benefit resulting from the non-compliance. The commission may also establish policies to further delineate the specific procedures for calculating administrative penalties. Specific statutory requirements are located in Texas Water Code (TWC), Chapters 5, 7, 11, 12, 13, and 16; and the Texas Health and Safety Code, Chapters 341, 366, 369, 371, and 401.

(b) This chapter does not define what is or is not a violation.

(c) This chapter applies to all persons, as defined in §3.2 of this title (relating to Definitions), under the jurisdiction of the commission.

(d) This chapter applies to administrative penalties in an enforcement action, as defined in §3.2 of this title (relating to Definitions), initiated after the effective date of this subchapter.

(e) Nothing in this chapter shall constrain the commission from issuing an enforcement order pursuant to TWC §7.051 that assesses an administrative penalty that is different from a penalty proposed by the executive director based on fact specific circumstances.

§70.202. Definitions.

The following words and terms, when used in this chapter, will have the following meanings, unless the context clearly indicates otherwise.

(1) Base penalty--The penalty calculated for each violation beginning at the daily statutory maximum and adjusted by taking into consideration the duration, nature, circumstances, extent, gravity and impact of the violation.

(2) Recommended penalty--The penalty calculated to deter future violations for

violation(s) of the TWC or Texas Health and Safety Code (THSC) beginning at the base penalty and adjusted by taking into account culpability, demonstrated good faith efforts to comply, compliance history, economic benefit, and other factors as justice may require.

(3) Respondent--A person against whom the executive director is seeking an enforcement order as defined by §70.2 of this title (relating to Definitions).

(4) Statutory maximum--The maximum administrative penalty that can be assessed by the commission for a violation of a statute or regulation.

§70.203. Penalty Assessment.

(a) The executive director may recommend the assessment of a penalty as part of an enforcement action.

(b) A base penalty shall be calculated for each violation.

(c) Beginning with the base penalty, the recommended penalty will be adjusted taking into consideration statutorily required factors as described in this subchapter.

§70.204. Culpability.

(a) Culpability shall be assessed for the five year period prior to the date of initiating an enforcement action with an initial settlement offer or the filing of an EDPR, whichever occurs first, documenting the current violations and applied on either:

(1) a site specific basis; or

(2) on a multi-site basis, for mobile units and individuals who are required to be registered, certified, or licensed by the agency prior to performing certain regulated activities for which violations have been alleged.

(b) When applied, an adjustment for culpability shall increase the penalty.

(c) When adjusting a penalty for culpability, the executive director shall consider whether the alleged violation was attributable to mechanical or electrical failures and could have been reasonably anticipated and avoided.

(d) The executive director shall determine whether documentation indicating culpability

exists (e.g., contractor notes; agency letters describing the same violation at the same unit; respondent notes; investigations not associated to the current enforcement action).

§70.205. Good Faith Effort to Comply.

(a) When applied, an adjustment for good faith efforts shall decrease the penalty.

(b) When adjusting a penalty for good faith, the executive director shall consider actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons.

(c) An adjustment for good faith may not be included in a proposed default order.

§70.206. Compliance History.

(a) When applied, an adjustment for compliance history may increase or decrease the penalty.

(b) When adjusting a penalty for compliance history, the executive director shall consider:

(1) the classification as assigned under 60.2(f) of a respondent and whether the respondent has been designated a repeat violator under 60.2(d) of this title; and

(2) the number of administrative or court orders and environmentally related criminal convictions issued for activities at the site, as defined in §60.2 (a) of this title in the five-year period preceding the date of initiating an enforcement action with an initial settlement offer or the filing date of an EDPR, whichever occurs first.

(c) An adjustment for compliance history which results in a reduction of recommended penalty may not be included in a proposed default order.

§70.207. Economic Benefit.

(a) Economic benefit is a monetary gain derived from a failure to comply with any regulation or statute. Economic benefit may include any or all of the following:

(1) the return a respondent may earn by delaying the capital costs of purchasing and installing pollution control equipment;

(2) the return a respondent may earn by delaying a one-time expenditure; or

(3) the return a respondent may earn by avoiding the costs of compliance.

(b) When applied, an adjustment for economic benefit shall increase the penalty.

(c) When adjusting a penalty for economic benefit, the executive director shall consider if the respondent gained an economic benefit from avoided or delayed costs including delayed capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained.

(d) When adjusting a penalty for economic benefit, the executive director shall consider whether a respondent is a small government or nonprofit organization as defined by the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 et seq.

(e) If it is demonstrated that an inadvertent or unintentional monetary loss has occurred as a result of a violation, the executive director may recommend that the amount of the loss be subtracted when adjusting a penalty for economic benefit.

§70.208. Other Factors as Justice May Require.

(a) When applied, this adjustment may increase or decrease the penalty.

(b) When adjusting a penalty based on other factors as justice may require, the executive director shall consider:

(1) whether a respondent has used a verified environmental management system for environmental compliance, as defined in Chapter 90 of this title (relating to Innovative Programs) in place for one year or more;

(2) whether a respondent has participated in the Environmental Monitoring and Response System or a voluntary site assessment with subsequent certification;

(3) the nature, circumstances, extent, duration, and gravity of the violation;

(4) the regionalization efforts of a respondent;

(5) whether a respondent voluntarily notified the executive director of the violation(s) including notifications sent to the executive director pursuant to the Texas Environmental, Health and Safety Audit Privilege Act, *Tex Rev. Civ. Stat. Ann. Art*

4447cc(Vernon's); and

(6) whether a respondent is a small government or nonprofit organization as defined by the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 et seq.

(c) The executive director may increase the recommended penalty by an amount necessary to deter future violations.

§70.209. Joint and Several Liability.

(a) Joint and several liability shall be considered on a case-by-case basis when assessing a penalty against multiple respondents.

(b) The executive director may impose joint and several liability for different respondents responsible for the same violation, when there is a relationship or nexus among the respondents, such as family or business.

(c) Joint and several liability may not be assessed where the respondents have committed separate, distinct violations.