Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners' Work Session **Date:** July 5, 2011

Thru: John Sadlier, Deputy Director, Office of Compliance and Enforcement

From: Bryan Sinclair, Director, Enforcement Division

Subject: Implementation of HB 2694 - Revision of the Commission's Penalty Policy

Issue Consideration of Sunset Implementation regarding revisions to the Commission's Penalty Policy

Background and Current Practices

HB 2694 of the 82nd Legislature requires the Commission to revise its Penalty Policy to increase statutorily authorized penalties and to cap the penalty enhancement attributable to compliance history at 100% of the base penalty for any individual violation.

The Executive Director is seeking approval to revise the Commission's Penalty Policy as required by HB 2694 and to include previous Commission changes to the Policy as follows:

Over the past several years, the Commission has publically revised certain elements of its Penalty Policy that have yet to be physically incorporated into the Policy. Pursuant to Commission directive, penalty enhancement and reductions related to good faith efforts to comply are calculated on a per violation basis. These changes were made pursuant to Commission directive on 3/29/2006 and 5/9/2008. Additionally, administrative penalties recover avoided costs of compliance (i.e., "economic benefit"), from all respondents with the exception of political subdivisions and non-profit organizations. These changes were made pursuant to Commission directive on 9/7/2007 and 5/9/2008.

Question 1: Does the Commission wish to incorporate into the Penalty Policy the past directives regarding penalty enhancements and reductions relative to good faith efforts to comply and economic benefit as described above?

Question 2: HB 2694 caps the enhancement attributable to compliance history at 100% of the base penalty for any individual violation. This change is not statutorily effective until 9/1/2012. Does the Commission wish to maintain its current penalty calculation methodology (i.e., utilize the pre-HB 2694 caps) until 9/1/2012 such that the increase in the statutory penalty caps does not have a disproportional effect on the penalty calculation? In the alternative, does the Commission wish to apply the statutory provision related to the enhancement attributable to compliance history on 9/1/2011 and include this change in its Penalty Policy?

Question 3: Notwithstanding the change to the enhancement attributable to compliance history, the increase in statutorily penalties may result in penalty recommendations for small businesses, nonprofits, and local governments that are viewed by the respondents as unduly punitive. Higher average penalties relevant to small businesses, nonprofits, and local governments may result in a significant increase in claims of inability to pay, result an increase in litigation, and/or an increase in the number of default orders. Does the Commission wish to limit the increase in penalty amounts for minor facilities?

Option 1: Apply the increased statutory penalties with no changes to the current Environmental/Property and Human Health and Programmatic Penalty Matrices as depicted below?

Environmental/Property and Human Health Matrix

	Major Harm	Moderate Harm	Minor Harm
	Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
Actual Release	100%/50%	50%/25%	25%/10%
Potential Release	50%/25%	25%/10%	10%/5%

Programmatic Penalty Matrices

Major	Moderate	Minor
Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
25%/10%	10%/5%	1%/1%

Option 2: Apply the increased statutory penalties and revise the matrix percentages to reduce the effect on minor facilities. Proposed changes to the matrices only affect minor facilities. These changes may be appropriate because 1) lower penalties may be sufficient to deter future noncompliance; and 2) the majority of minor facilities will not benefit from the cap placed on the penalty enhancement attributable to compliance history by HB 2694.

Environmental/Property and Human Health Matrix

	Major Harm	Moderate Harm	Minor Harm
	Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
Actual Release	100%/~~50%~~ 35%	50%/~~25%~~ 17.5%	25%/~~10~~ 7%
Potential Release	50%/~~25~~ 15%	25%/~~10~~ 6%	10%/~~5%~~ 3%

Programmatic Penalty Matrices

Major	Moderate	Minor
Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
25%/ ~~10%~~ 6%	10%/ ~~5%~~ 3%	1%/1%

Option 3: Delete the "Actual Release" row from the Environment/Property and Human Health Matrix and calculate penalties for actual discharges and/or emissions events on a case by case basis utilizing the statutory caps defined in HB 2694. Penalties for other violations would be calculated using the values in the matrices depicted below (these are the same percentages as listed in Option No. 2).

Environmental/Property and Human Health Matrix

	Major Harm	Moderate Harm	Minor Harm
	Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
~~Actual Release~~	~~100%/50%~~	~~50%/25%~~	~~25%/10%~~
Potential Release	50%/~~25~~ 15%	25%/~~10~~ 6%	10%/~~5%~~ 3%

Programmatic Penalty Matrices

Major	Moderate	Minor
Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
25%/ ~~10%~~ 6%	10%/ ~~5%~~ 3%	1%/1%

AN ACT

relating to the continuation and functions of the Texas Commission on Environmental Quality and abolishing the On-site Wastewater Treatment Research Council.

SECTION 4.05. Section 5.754, Water Code, is amended by amending Subsections (a), (b), (c), (d), (e), (g), and (h) and adding Subsection (e-1) to read as follows:

(e-1) The amount of the penalty enhancement or escalation attributed to compliance history may not exceed 100 percent of the base penalty for an individual violation as determined by the commission's penalty policy.

SECTION 4.09. Subchapter A, Chapter 7, Water Code, is amended by adding Section 7.006 to read as follows:

Sec. 7.006. ENFORCEMENT POLICIES. (a) The commission by rule shall adopt a general enforcement policy that describes the commission's approach to enforcement.

(b) The commission shall assess, update, and publicly adopt specific enforcement policies regularly, including policies regarding the calculation of penalties and deterrence to prevent the economic benefit of noncompliance.

(c) The commission shall make the policies available to the public, including by posting the policies on the commission's Internet website.

SECTION 4.10. Sections 7.052(a) and (c), Water Code, are amended to read as follows:

(a) The amount of the penalty for a violation of Chapter 37 of this code, Chapter 366, 371, or 372, Health and Safety Code, or Chapter 1903, Occupations Code, may not exceed $5,000 [~~$2,500~~] a day for each violation.

(c) The amount of the penalty for all other violations within the jurisdiction of the commission to enforce may not exceed $25,000 [~~$10,000~~] a day for each violation.

SECTION 4.12. Section 13.4151(a), Water Code, is amended to read as follows:

(a) If a person, affiliated interest, or entity subject to the jurisdiction of the commission violates this chapter or a rule or order adopted under this chapter, the commission may assess a penalty against that person, affiliated interest, or entity as provided by this section. The penalty may be in an amount not to exceed $5,000 [~~$500~~] a day. Each day a violation continues may be considered a separate violation.

SECTION 4.31. (a) Not later than September 1, 2012, the Texas Commission on Environmental Quality by rule shall establish the method for evaluating compliance history as

required by Section 5.753(a), Water Code, as amended by this article. Until the commission adopts that method, the commission shall continue in effect its current standard for evaluating compliance history.

(b) The changes in law made by Sections 7.052 and 13.4151, Water Code, as amended by this article, apply only to a violation that occurs on or after the effective date of this Act. For purposes of this section, a violation occurs before the effective date of this Act if any element of the violation occurs before that date. A violation that occurs before the effective date of this Act is covered by the law in effect on the date the violation occurred, and the former law is continued in effect for that purpose.

ARTICLE 11. EFFECTIVE DATE

SECTION 11.01. This Act takes effect September 1, 2011.

September 2002
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Penalty Policy of the Texas Commission on Environmental Quality

Enforcement Division

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recycled paper

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Penalty Policy of the Texas Commission on Environmental Quality

Prepared by
Enforcement Division

RG-253
September 2002

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Texas Commission on Environmental Quality
Penalty Policy

Second Revision, Effective September 1, 2002

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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 gained from 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 are to evaluate violations for the purpose of recommending administrative penalties to the commission.

This policy includes a description of how violations are evaluated in terms of harm and severity and how any proposed penalties are determined. It includes a discussion of what adjustments may be made to the base penalty amount after the review of case-specific information and information concerning the respondent.

Statutory Authorizations

The commission has the authority to assess administrative penalties under a number of 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 and 371. These statutes provide the commission with the authority to assess penalties and set forth the factors that the commission must consider in determining the amount of penalty to assess (see chart below)

Statutorily Authorized Penalties

Program	Statute/Chapter	Administrative penalties, per violation per day	Civil penalties, per violation per day
Air Quality	TWC/7	$0-10,000	$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
Medical Waste	TWC/7	$0-10,000	$50-25,000
Municipal Solid Waste	TWC/7	$0-10,000	$50-25,000
Petroleum Storage Tank	TWC/7	$0-10,000	$50-25,000
Radioactive Substances	TWC/7	$0-10,000	$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/7	$0-10,000	$50-25,000
Underground Water	TWC/7	$0-10,000	$50-25,000
Waste Tires	TWC/7	$0-10,000	$50-25,000
Water Quality	TWC/7	$0-10,000	$50-25,000
All Occupational Licenses	TWC/7	$0-2,500	$50-5,000
On-Site Sewage Disposal	TWC/7	$0-2,500	$50-5,000
Used Oil	TWC/7	$0-2,500	$50-5,000
Used Oil Filter	TH&SC/371, TWC/7	$0-2,500	$100-500
Water Saving Performance Standards	TWC/7	$0-2,500	$50-5,000
Weather Modification	TWC/7	$0-2,500	$50-5,000
Water Rights	TWC/11	$0-5,000	$0-5,000
Dam Safety	TWC/12	N/A	$0-5,000
Public Water Utilities	TWC/13	0-$500	$100-5,000
Levees	TWC/16	$0-1,000	$0-1,000
Public Water Supply	TH&SC/341	$50-1,000	$50-1,000

Computing the Base Penalty Amount

Violations will be broken into two types--those that harm or have the potential to harm the environment and/or human health and those that are related to documentation. Because of this differentiation, the TCEQ will have two separate penalty matrices -- the Environmental/Property and Human Health Penalty Matrix and the Programmatic Penalty Matrix.

In the Environmental/Property and Human Health Penalty Matrix, the base penalty amount for violations is developed by first examining two factors: release and harm (damage). Release means the emission or discharge of pollutants into the environment or a public drinking water system; the unauthorized diversion, taking or storage of state water; or the unauthorized change of a flood elevation of a stream. A violation will be evaluated to determine whether there has been a release and will be categorized as either an actual release or a potential release. Actual is defined as "existing in fact or reality; not merely potential." Potential is defined as "existing in possibility; capable of development into actuality."

The second factor to assess is the degree of harm (damage) that has affected or could have affected human health, property associated with a water right or construction of a levee and/or environmental receptors. These two factors are incorporated into a penalty matrix from which the base penalty is determined.

The commission will also evaluate the appropriate penalty based upon the size of the respondent's site. Where the EPA has designated "major" facilities/sources from "minor" facilities/sources, the agency will utilize that distinction for the respondent's sites. The definitions used for each program area are described below. Individuals and operators are considered minor respondents unless otherwise noted. Anything not explicitly covered in this section will be determined on a case-by-case basis.

Major/Minor Sources

Air

Major:

1. Any stationary facility that is a source of non-hazardous air pollutants which directly emits, or has the potential to emit, 100 tons per year or more of any air pollutant except in some non-attainment areas. In serious ozone nonattainment counties the threshold is 50 tons per year for volatile organic compounds (VOC) and nitrogen oxides (NOx). In severe ozone nonattainment counties the threshold is 25 tons per year for VOC and NOx.

2. For the hazardous air pollutants listed in the Federal Clean Air Act, a source that emits or has the potential to emit 10 tons per year or more of a single pollutant or 25 tons per year or more of any combination of pollutants.

3. For purposes of the penalty 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.

Minor: Defined as any non-major source.

Edwards Aquifer

Major: A construction project disturbing 5 acres or greater.

Minor: A construction project disturbing less than 5 acres.

Industrial and Hazardous Waste

Major: A generator of more than 12,000 kg of hazardous waste on an annual basis. Commercial industrial facilities are majors.

Minor: A generator of 12,000 kg or less of hazardous waste on an annual basis.

Levees

Major: Levee or other improvement constructed in the 100 year floodway designed for flood protection for a 100 year flood or greater.

Minor: Levee or other improvement constructed in the 100 year floodway designed for flood protection for less than a 100 year flood.

Municipal Solid Waste

Major: A municipal solid waste landfill accepting more than 20 tons of municipal solid waste disposed of daily, based on an annual average.

Minor: A municipal solid waste landfill accepting less than 20 tons of municipal solid waste disposed of daily, based on an annual average.

Petroleum Storage Tank

Major: An underground storage tank facility that has a monthly throughput of more than 50,000 gallons.

Minor: An underground storage tank facility that has a monthly throughput of less than 50,000 gallons.

Public Water Supply

Major: A retail public utility serving more than 1,100 total connections.

Minor: A retail public utility serving 1,100 or fewer total 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.

Radioactive Waste

All facilities will be considered majors.

Underground Injection Control

All Class I and Class III facilities will be considered majors. Class V facilities will be determined on a site-specific evaluation.

Waste Tires

Major: A facility with greater than 500 tires.

Minor: A facility with less than or equal to 500 tires.

Water Quality (including Concentrated Animal Feeding Operations (CAFO))

Major: Municipal facilities with a daily average flow of 1 million gallons per day or greater are considered major facilities. Industrial/CAFO facilities are classified as major or minor facilities using a point scale used by EPA Region 6. The TCEQ Water Quality Division uses EPA Region 6's classification schedule to determine if a facility is defined as major or minor. All water quality permittees are designated as major or minor.

Minor: Municipal facilities with a daily average flow less than 1 million gallons per day. Industrial/CAFO facilities are classified upon permitting as major or minor as described above.

Water Rights

Major: A water right of greater than 5,000 acre-feet.

Minor: A water right of less than or equal to 5,000 acre-feet.

Environmental/Property and Human Health Matrix

	Major Harm	Moderate Harm	Minor Harm
	Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
Actual release	100% / 50%	50% / 25%	25% / 10%
Potential release	50% / 25%	25% / 10%	10% / 5%

Harm is categorized as major, moderate, or minor. Definitions for each category of harm are provided below.

Categories of Harm

	Actual Release	**Potential Release**
Major Harm	Human health or the environment has been exposed to pollutants which **exceed** levels that are protective of human health or environmental receptors as a result of the violation. Unauthorized diversion, taking, or storage of state water or an unauthorized change in flood elevation of a stream which deprives others of water, severely affects aquatic life, or results in a safety hazard, property damage, or economic loss.	Human health or the environment will or could be exposed to pollutants which **would exceed** levels that are protective of human health or environmental receptors as a result of the violation. Potential for unauthorized diversion, taking, or storage of state water or an unauthorized change in flood elevation of a stream which would deprive others of water, severely affect aquatic life or result in a safety hazard, property damage, or economic loss.
Moderate Harm	Human health or the environment has been exposed to **significant** amounts of pollutants which **do not exceed** levels that are protective of human health or environmental receptors as a result of the violation. 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.	Human health or the environment will or could be exposed to **significant** amounts of pollutants which **would not exceed** levels that are protective of human health or environmental receptors as a result of the violation. Potential for unauthorized diversion, taking, or storage of a significant amount of state water or a significant unauthorized change in flood elevation of a stream which would not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.
Minor Harm	Human health or the environment has been exposed to **insignificant** amounts of pollutants which **do not exceed** levels that are protective of human health or environmental receptors as a result of the violation. Unauthorized diversion, taking, or storage of an insignificant amount of state water or an insignificant 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.	Human health or the environment will or could be exposed to **insignificant** amounts of pollutants which **would not exceed** levels that are protective of human health or environmental receptors as a result of the violation. Potential for unauthorized diversion, taking, or storage of an insignificant amount of state water or an insignificant unauthorized change in flood elevation of a stream which would not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.

The following discussion is to assist in the practical application of the Environmental, Property and Human Health Penalty Matrix. Release of "significant" and "insignificant" amounts of pollutants is defined in terms of the degree of impact on affected resources.

Assessment of Impact on Affected Resources

If sampling data are 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.[1]

Definitions[2]

- An affected resource is 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.

- 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.

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[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.

(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."

Distinguishing Major Harm from Moderate or Minor Harm

For the release (or potential 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 the pollutant must be present in significant amounts as defined in this guidance document.

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

Harm	significant amounts of pollutants*	exceeds levels that are protective
Major	Yes	Yes
Moderate	Yes	No
Minor	No	No

* "significant amount" as defined in the definitions

In the **Programmatic Penalty Matrix**, violations will be categorized as major, moderate, or minor, based upon the degree of noncompliance. Programmatic violations include, for example, a failure to submit reports, a failure to maintain records, or a failure to obtain a permit or other authorization.

Programmatic Penalty Matrix

Major	Moderate	Minor
Major/Minor Respondent	**Major/Minor Respondent**	**Major/Minor Respondent**
25% / 10%	10% / 5%	1% / 1%

In the context of the penalty matrix, programmatic major means that all or almost all (greater than 70 percent) of a rule or permit requirement is not met, programmatic moderate means that much (30 to 70 percent) of a rule or permit requirement is not met, and programmatic minor means that most, but not all (at least 70 percent), of a rule or permit requirement is met. One exception to the use of this matrix is that the falsification of records will be assessed at 100 percent of the statutory maximum penalty.

Calculation: Each violation included in the enforcement action will be evaluated and categorized as actual release, potential release, or programmatic and then as major, moderate, or minor. The appropriate percentage (see the matrices above) will be multiplied by the highest penalty amount allowed by the applicable statute (see discussion in "Statutory Authorizations") to determine the penalty amount for each specific violation. The total of all the violation penalty calculations will be the base penalty amount.

Exception regarding rock crushers and concrete batch plants: TEX. WATER CODE § 5.5145(b) states, "The amount of the penalty for operating a rock crusher or a concrete batch 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 is $10,000. Each day that a continuing violation occurs is a separate violation." Under these circumstances, the required statutory limit of $10,000 will be utilized for every day of the unauthorized activity.

Determining the Number of Violation Events

The number of violation events that will be assessed a penalty depends on the number of times the violation is observed, the specific requirement violated, the duration of the violation, and other case information.

Certain violations will typically be considered discrete events. For these violations, one penalty event will be assessed for every documented observation. Discrete violations are situations that are observed and documented during an investigation - a discrete interval in time. These violations involve practices or actions that do not occur continuously. If they recur, they do so in individual instances that are separate in time. Examples of violations that would be discrete events are the failure to submit annual reports, the failure to collect or report monitoring data, the failure to perform a hazardous waste determination where required, and the failure to show a certificate of self-certification prior to accepting a fuel drop. For discretely occurring violations, one penalty event will be assessed for every documented observation of the noncompliance (for example, for each sample analysis documenting a violation).

Other violations are considered to be continuing. These violations are not constrained by documented observations of the noncompliance. Examples of violations that would be considered to be continuing are the exceeding of permitted discharge or emission limits, groundwater contamination, unauthorized discharges/releases, endangerment, the commingling of good and bad water in a public water supply, operating without a required permit, and other such violations. For continuing violations, the number of

events will be linked to the level of impact of the violation by considering the violation as if it recurred with the frequency shown in the chart below.

Continuing Violations

	Harm or Severity	Number of Events
Actual Releases	Major	Up to daily
	Moderate	Up to monthly
	Minor	Up to quarterly
Potential Releases	Major	Up to monthly
	Moderate	Up to quarterly
	Minor	Single event
Programmatic	Major	Up to daily
	Moderate	Up to quarterly
	Minor	Single event

The duration of events concerning continuous violations, for the purposes of preparing an enforcement action, may begin with the initial date of noncompliance with a requirement, rule, or permit and extend up to the time that the enforcement documents are prepared.

In practice, continuous violations will be assessed beginning with the documented date of noncompliance (i.e., sample results, record review) or the date that the respondent "should have known," whichever is appropriate, as the beginning point. The respondent is always considered knowledgeable of permit conditions.

The date the respondent returned to compliance or the enforcement screening date, whichever is appropriate, will be the endpoint for the assessed events. Utilizing this date will assure that no one will be impacted by the order in which cases are prioritized within the agency.

The duration of events will be revised, as appropriate, to reflect extended noncompliance when cases fail to settle expeditiously and/or prior to referral to the State Office of Administrative Hearings. Note: Discrete violations are not revised because they are considered single events.

To determine the number of events, divide the appropriate time frame into the duration of the violation. For this determination, any part of a day equals a "day;" any part of a month equals a "month;" any part of a quarter equals a "quarter." For example an actual minor that is assessed as a quarterly event will have 5 quarters for a violation that continued for 13 months.

Calculation: Multiply the base penalty amount by the number of penalty events determined for the violation being considered. Do this step for each violation included in the enforcement action. Total the base penalty amounts to obtain subtotal 1.

Evaluating Adjustments to the Penalty Amount

Any adjustments to the penalty amounts will be made after a base penalty multiplied by the number of events is established for all violations included in the enforcement action. Adjustments to the penalty amount may be made based upon the following factors relating to the respondent:

- compliance history
- repeat violator
- culpability
- good-faith effort to comply
- economic benefit gained through noncompliance
- compliance history classification
- other factors as justice may require

Compliance History

Staff will develop a compliance history on the respondent utilizing the format found in 30 TEX. ADMIN. CODE § 60.1, no matter what program area is under consideration in the enforcement action. Based upon the compliance history, staff will determine the penalty enhancement for the site, mobile unit, or individual who is required to be registered, certified, or licensed by TCEQ prior to performing certain activities, by evaluating the number of each of the components, and totaling the percentage adjustments. If the total is less than zero, then the penalty enhancement will default to zero. The percentage adjustment for each type of component is specified in the following table:

Compliance History Enhancement For the Site Under Enforcement

Component	Percentage Adjustment	Plus or minus Adjustment?
Written NOVs with same or similar violations as those in the current enforcement action	5% for each NOV	plus
Other written NOVs	2% for each NOV	plus
Any agreed final enforcement orders containing a denial of liability	20% for each order	plus
Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	25% for each order	plus
Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government	30% for each court judgment and consent decree	plus

Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	35% for each court judgment and consent decree	plus
Any criminal convictions of this state or the federal government	50% for each count	plus
Final enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states	N/A	N/A
Chronic excessive emissions events	25% for each event	plus
Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995	1% for each audit	minus
Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995	2% for each audit for which violations are disclosed	minus
Environmental management systems in place for one year or more	10%	minus
Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	10%	minus
Participation in a voluntary pollution reduction program	5%	minus
Early compliance with, or offer of a product that meets future state or federal government environmental requirements	5%	minus

Calculation: Multiply subtotal 1 by the total percentage adjustment to obtain subtotal 2.

Repeat Violator

When a respondent is designated as a repeat violator at the site which is under enforcement, then the recommended administrative penalty for the case will be enhanced by 25 percent. Repeat violator designation will be determined according to 30 TEX. ADMIN. CODE § 60.2(d).

Calculation: Multiply subtotal 1 by 25 percent or 0 percent to obtain subtotal 3.

Culpability

In assessing culpability, staff will determine whether the respondent could have reasonably anticipated and avoided the violation(s). This determination will be made on a site-specific basis and will examine a five-year history (the five-year period preceding the date of initiating an enforcement action with an initial settlement

offer or the filing date of an Executive Director's Preliminary Report (EDPR), whichever occurs first). Culpability will be determined for mobile units, and for individuals for those who are required to be registered, certified, or licensed by TCEQ prior to performing certain activities, rather than a site-specific basis. Staff will determine whether documentation that indicates culpability exists (e.g., contractor notes; agency letters; respondent notes; investigations at other locations [for mobile units and for individuals who are required to be registered, certified, or licensed by TCEQ prior to performing certain activities]).

If culpability exists, then 25 percent will be added to the penalty amount; otherwise, nothing will be added to the penalty amount.

Note: Other forms of culpability, such as notices of violation (NOVs) and orders, are included in compliance history.

Calculation: Multiply subtotal 1 by 25 percent or 0 percent as appropriate to obtain subtotal 4.

Good-Faith Effort to Comply

In assessing good-faith efforts to comply, staff will consider the respondent's efforts to return the site to complete compliance with all applicable rules and regulations cited in the enforcement action. Thus, any reduction will be applied to all violations and events. The analysis of good-faith efforts involves two factors: the timeliness of the respondent's action(s) and the quality of that action(s). Accordingly, the respondent will be given credit for timeliness, quality, or both.

Timeliness is defined by the point when the respondent completed action to correct the violations. The following are the two scenarios that will be considered:

- Corrective actions are completed before there is an executive director's preliminary report (EDPR) or an initial settlement offer, but the actions are completed after the issuance of an NOV.
- Corrective actions are completed as soon as violations are identified and before the issuance of an NOV.

Quality is defined as the degree to which the respondent took action. The two categories of quality are extraordinary and ordinary. Extraordinary is defined as action taken by the respondent which goes beyond what would be expected under the rules. Ordinary is defined as action taken by the respondent to correct the violations as expected under the rules. Good-faith effort will not be considered for cases involving only discrete violations as defined by this policy.

The following matrix describes how much of a reduction will be given for good-faith efforts. The maximum reduction is 50 percent. Good faith efforts will only be considered if the respondent has achieved compliance with applicable rules and regulations cited in the enforcement action.

Percentage Reductions for Timeliness

Quality of Action	Action Before NOV	Action Between NOV & EDPR/Settlement Offer
Extraordinary	50%	25%
Ordinary	25%	10%

Calculation: Multiply subtotal 1 by the appropriate good-faith percentage reduction to obtain subtotal 5.

Economic Benefit

Economic benefit is defined as monetary gain derived from a failure to comply with TCEQ rules or regulations. Economic benefit may include any or all of the following: (1) the return a respondent can earn by delaying the capital costs of pollution control equipment; (2) the return a respondent can earn by delaying a one-time expenditure; and (3) the return a respondent can earn by avoiding periodic costs.

To determine whether a respondent has gained an economic benefit (during the alleged violation period), staff must evaluate the following issues for each violation:

1. Did the respondent avoid or delay capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
2. Did the respondent gain any interest by avoiding or delaying capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
3. Did the respondent gain an economic advantage over its competitors?
4. Did the respondent avoid or delay disposal, maintenance, and/or operating costs?
5. Did the respondent receive increased revenue due to noncompliance?
6. Did the respondent avoid the purchase of financial assurance for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?

If the answer is "yes" to any of the above questions, then staff will estimate the overall economic benefit gained. Only capital expenditures, one-time nondepreciable expenditures, periodic costs, and interest gained will be evaluated in the calculation of economic benefit.

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 delayed 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.

Once the economic benefit has been estimated and totaled for all violations included in the enforcement actions, it should be compared to the following criteria, and the penalty amount will be increased accordingly. The economic adjustment factor will be capped so the adjustment amount does not exceed the economic benefit gained.

Economic Benefit Matrix

% Adjustment	Dollar Range of Benefit
None	Less than $15,000
50%	Equal to or greater than $15,000

Calculation: Determine the estimate of the economic benefit of each violation included in the enforcement action, add all the economic benefit totals, then determine the range that the estimate fits for each violation, and multiply the associated percentage, based upon culpability, by the base penalty amount to obtain subtotal 6.

Compliance History Classification

The administrative penalty will be modified, based upon the classification of the person who is the respondent in the enforcement action, as specified in the following matrix. Compliance history classification of the respondent will be determined according to 30 TEX. ADMIN. CODE § 60.2(f).

Compliance History Classification Adjustment

Respondent's Classification	Percentage Adjustment
High Performer	- 10%
Average Performer	0% (no adjustment)
Poor Performer	+ 10%

Calculation: Multiply subtotal 1 times the appropriate percentage to obtain subtotal 7.

A final subtotal is determined by adding subtotal 1, subtotal 2, subtotal 3, subtotal 4, and subtotal 6, subtracting subtotal 5, and adding or subtracting, as appropriate, subtotal 7.

Other Factors That Justice May Require

The staff may recommend adjustment of the penalty amount, on a case-by-case basis, upon a consideration of factors unique to the situation. This adjustment may result in an increase or decrease of the penalty amount.

A downward adjustment due to "other factors that justice may require" may be appropriate when, for example, the TCEQ is notified of the violation(s) by the respondent. If the notification is not required by statute, permit, or rule, staff may recommend a downward adjustment.

A downward adjustment due to "other factors that justice may require" may be appropriate when, for example, a respondent has purchased a noncompliant water or wastewater facility as part of regionalization of service. Normally, respondents inherit the compliance history of purchased facilities but there may be circumstances where the resulting penalty does not reflect the efforts of the new provider and staff may recommend a downward adjustment.

An upward adjustment due to "other factors that justice may require" may be appropriate when, for example, a respondent who owns a station that conducts state inspections issued a motor vehicle inspection certificate for a motor vehicle without conducting all emission tests. If it is determined that the failure to conduct required emission testing was intentional, staff may recommend an upward adjustment.

Calculation: Multiply the final subtotal by the recommended percentage to obtain the final penalty amount.

Adjusted Total Penalty Amount Recommendation

The final penalty amount will be checked against the minimum and maximum penalty amounts allowed by statute per violation per day in order to obtain the final assessed penalty.