

**WHITE
MARQUEZ
SOWARD**

MARKED WORK SESSION AGENDA

Monday, November 15, 2004

Texas Commission on Environmental Quality

9:30 a.m.

Room 201S, Building E
12100 Park 35 Circle

1. **Consideration of issues relating to agency compliance and enforcement policies and practices.** Glenn Shankle, Executive Director, Tracy Gross, Office of General Counsel, Tom Weber, Chief Engineer's Office, and Matt Baker, Air Permits Division, presented this issue. Additional staff participating in discussions were, John Steib, Deputy Director, Office of Compliance and Enforcement, Paul Sarahan, Litigation Division Director, Ann McGinley, Enforcement Division Director, Lydia Gonzalez-Gromatzky Deputy Director, Office of Legal Services, Jennifer Sidnell, Director Field Operations Division, Israel Anderson, Director Small Business and Environmental Assistance Division, Grace Montgomery Faulkner, Deputy Director Administrative Services. The following items were discussed:
 - Issue No. **Enforcement Initiation Criteria (EIC)** 1A How to prioritize investigations
 - Issue No.1B **EIC** Prioritization Strategies
 - Issue No.1C **EIC** How to seek management input for investigation priorities
 - Issue No.2 **EIC** Devote resources to identify and investigate unauthorized facilities
 - Issue No.4A **EIC** Periodic review and changes to criteria for enforcement initiation
 - Issue No.4B **EIC** Should compliance reviews outside of Field Operations be addressed in the EIC
 - Issue No.5 **EIC** Should small businesses and small local governments have separate EICs
 - Issue No. 6A-6B **EIC** Fact-finding meetings and formal appeal processes
 - Issue No.6C **EIC** Formal appeals for notice of enforcement letters
 - Issue No.7 **EIC** Use of verbal notice of violation (NOV) by Field Operations investigators
 - Issue No.8 **EIC** Formal adoption of a NOV policy
 - Issue No.9A **EIC** Need for a Notice of Enforcement category
 - Issue No.9B **EIC** Better ways to communicate case referrals to Enforcement Division
 - Issue No.3 **EIC** Complaint and on-demand activity prioritizations
 - Issue No.1 **Complaint Procedures (Comp)** Recommended changes to draft *Guidance Document for Field Operations Investigation of Complaints*
 - Issue No.2 **Comp** Recommended changes to draft Nuisance Oder Protocol Review Team report
 - Issue No.3 **Comp** Proposed improvements to complaints receipt and processing
 - Issue No.4 **Comp** Citizen Collected Evidence
 - Issue No.5 **Comp** Capital resources to develop online complaint database for public access
 - Issue No.1 **Enforcement Process (EP)** How to revise time lines to streamline enforcement process
 - Issue No. 3 **EP** Streamline or simplify financial inability to pay determinations
 - Issue No. 5 **EP** Increase or reallocate resources to target investigative/enforcement activities
 - Issue No. 6 **EP** Better trained investigative and enforcement staff
 - Issue No. 1 **Communications (Comm)** Sharing of information with public and regulated community
 - Issue No. 2 **Comm** Incorporate enhanced internal communication tools to improve the process
 - Issue No. 3A-3B **Comm** Public education for filing complaints and citizen collected evidence
 - Issue No. 4 **Comm** Best ways to educate public and regulated community on enforcement process

- Issue No. 5 **Comm** Best ways to educate public and regulated community on use of compliance history

The following individuals registered to speak on this issue:

Luke Metzger, representing Texas Public Interest Research Group
Mark Shelton, representing himself
J. R. Coolidge, representing Ft. Worth Small Business and Local Government Assistance Advisory Committee

No vote was taken on the above items. Staff will return on December 6 to resume discussions on these issues and others in the Enforcement Review.

Action: No action taken.

2. **Consideration of the Biennial Report to the 79th Legislature, FY 2003-FY 2004.** Andy Saentz, Agency Communications Director presented this issue from the backup materials.

Action taken: Approve the Biennial Report to the 79th Legislature for FY 2003-2004. WM: All agree.

3. **Planning for the next Commissioners' Work Session.** This issue was not discussed.

4. **Closed Session:** No closed session convened.

- a. **Docket No. 1998-1154-EXE.** The Commission will meet in closed session to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of the Commission's Executive Director, as permitted by Section 551.074 of the Texas Open Meetings Act, Chapter 551 of the Government Code. The Commission may also meet in open session to take action on this matter as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.
- b. **Docket No. 1999-0024-EXE.** The Commission will conduct a closed meeting to receive legal advice and will discuss pending or contemplated litigation, settlement offers, and/or the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of specific commission employees, as permitted by Sections 551.071 and 551.074, the Open Meetings Act, codified as Chapter 551 of the Government Code. The Commission may also meet in open session to take action on a legal or personnel matter considered in the closed meeting as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.
- c. **Docket No. 1999-0025-EXE.** The Commission will conduct a closed session to discuss their duties, roles, and responsibilities as commissioners of the TCEQ pursuant to section 551.074 of the open meetings act, codified as chapter 551 of the government code. The Commission may also meet in open session to take action on this matter as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.

Consideration of issues relating to agency compliance and enforcement policies and practices.

ATTACHMENT 1

Table Listing the Order for Presenting Recommendations at the Commissioners' Work Sessions

In the table beginning on the following page:

1. Column 1 refers to the subcommittee that analyzed the issue, with abbreviations for each subcommittee, as follows:
 2. EP - Enforcement Process/Agency Coordination Subcommittee
 3. Pen - Penalty Policy Subcommittee
 4. Coll - Collections/Financial Inability to Pay Subcommittee
 5. Ord - Ordering Provisions Subcommittee
 6. SEP - Supplemental Environmental Projects Subcommittee
 7. Comm - Enforcement Process - Communications Subcommittee
 8. Comp - Complaint Procedures Subcommittee
 9. EIC - Enforcement Initiation Criteria/Investigation Prioritization/NOVs/NOEs Subcommittee
10. Column 2 identifies the Key Issue number as identified in the *Enforcement Process Review Draft Final Report*, August 20, 2004.
11. Column 3 identifies the page number where detailed information relating to the Key Issue is found as identified in the *Enforcement Process Review Draft Final Report*, August 20, 2004.
12. Column 4 is a brief description of the Key Issue question(s) that was analyzed during the review.
13. Column 5 is a brief summary of the principal recommendation(s) that resulted from the agency review.
14. Column 6 identifies the most significant requirement that may be required in order to revise and implement the recommendation. *Note:* other implementation may be necessary as well, as described in the draft final report.

Order for Presenting Recommendations
at the Commissioners' Work Sessions (Revised for November 15, 2004)

Com- mit- tee	Issue No.	Page	Issue	Recommendation	Implementation
EIC	1 A	157	How should Field Operations prioritize investigations?	Investigation priorities should primarily be based on risk to human health and the environment. The agency should focus its investigative efforts on those sources that pose the greatest threat to the public and the environment. The risk-based approach should also consider performance and commitments.	Policy, guidance, or process change
EIC	1 B	158	Should prioritization be based upon risks to human health and the environment, past performance of the facility, EPA and LBB output requirements, or a combination of strategies?	Prioritization should be based on a combination of strategies. A screening approach using three criteria - risk, performance, and commitment (LBB and EPA commitments) - should be used to determine investigation priorities. The initial screen of the potential universe to be inspected should be conducted based on risk.	Policy, guidance, or process change
EIC	1 C	160	Does the Field Operations Division need to seek management input from other parts of the TCEQ on investigation priorities and initiatives? If so, how?	Yes. The agency should use a process to solicit input annually from across the agency on how to best utilize FOD resources to accomplish the agency mission. The workplan should be directed by agency leadership in consultation with LBB and EPA commitments.	Policy, guidance, or process change

EIC	2	161	Should the agency devote resources to the identification and investigation of unauthorized facilities?	Yes. The Field Operations Division, in conjunction with the Compliance Plan Team, should identify sectors to target on an annual basis. The sector(s) identified should be based on factors including size of the sector, potential risk to the environment, and the possible rate of non-compliance. The level of effort Field Operations Division devotes to the identification and investigation of unauthorized facilities should be determined with input from the Commissioners and Executive Management.	Policy, guidance, or process change
EIC	4 A	163	Do the criteria for enforcement initiation need to be changed? If so, should the scope of revisions consider consistency, review of the categories, and whether the guidance should be formalized?	Yes. The enforcement initiation criteria should be reviewed and changed, if appropriate, at least on an annual basis. The scope of the periodic review should include consistency and appropriateness of categories. The EIC should continue as a guidance document, but with approval by the commission.	Policy, guidance, or process change
EIC	4 B	164	Should compliance reviews outside of Field Operations be addressed in the Enforcement Initiation Criteria (EIC)?	Yes. The EIC should be an agency-wide document that encompasses all enforcement efforts of the agency. A cross agency team should be established to oversee development and maintenance of the document. The team should be composed of TCEQ staff who represent all major functional areas.	Policy, guidance, or process change
EIC	5	166	Should there be separate Enforcement Initiation Criteria (EIC) for small businesses and small local governments?	No. Any relief for small entities should occur in the penalty policy phase of enforcement.	No change recommended

EIC	6 A - 6 B	167	Should there be an opportunity for post-investigation/pre-enforcement fact-finding meetings in the TCEQ Regional Offices? Should there be a formal appeal process for Field Operations determinations on the question of case referral to the Enforcement Division?	Yes, there should be an opportunity for post-investigation/pre-enforcement fact-finding meetings in the TCEQ Regional Offices. This process should be formalized as agency guidance. A definitive time frame for appeal should be established. The alleged violator should be informed of the opportunity to appeal and how to appeal during the exit interview.	Policy, guidance, or process change
EIC	6 C	168	Should there be a formal appeals process for notice of enforcement (NOE) letters?	There should not be a formal appeal process since the NOE currently can be appealed anytime during the enforcement process. However, NOE letter should clarify this opportunity and include an Enforcement Division point of contact.	Policy, guidance, or process change
EIC	7	168	Should the use of verbal NOV's by Field Operations investigators be continued?	No. Use of verbal NOV's should be discontinued.	Policy, guidance, or process change
EIC	8	170	Should the NOV policy be formally adopted by the TCEQ?	Yes. Commissioners should consider adoption of policy statement(s) on NOV procedures. Then, as needed, staff can develop guidance implementing the commission policy.	Policy, guidance, or process change
EIC	9 A	170	Is there a need for the category of NOE?	Yes. All entities being referred for enforcement should continue to be sent an NOE. The agency should establish a time frame for notice once the decision to refer is made.	No change recommended
EIC	9 B	171	Are there better ways to communicate the referral of a case to the Enforcement Division?	Yes. Although the NOE is an effective means of notifying regulated entities that the matter is referred for enforcement, modifications could strengthen the communication. The NOE should clarify that the matter may be appealed during the enforcement process and should include an Enforcement Division point of contact.	Policy, guidance, or process change

EIC	3	162	What priority should complaints and on-demand activities have within Field Operation's Annual Work Plan?	The Compliance Plan Team should determine the priority and level of effort for complaints and on-demand activities when developing the annual workplan. The workplan should allow the flexibility to respond to high-priority on-demand activities. The workplan should ensure that there are no disincentives to effectively answering on-demand requests including complaints.	Policy, guidance, or process change
Comp	1	244	What recommendations for change, if any, are needed to the draft <i>Guidance Document for Field Operations Investigation of Complaints</i> to ensure timely response and adequate follow through?	The recently revised guidance document should be implemented. The agency should continue to accept anonymous complaints. TCEQ should implement several enhancements for investigator complaint training. The ability to provide complaint handling and response training to the public upon request is effective in expanding the public's knowledge of changes in complaint procedures. FOD should periodically review other states' protocols to ensure that TCEQ's protocol is current.	Policy, guidance, or process change
Comp	2	262	What recommendations for change, if any, are needed to the draft Nuisance Odor Protocol Review Team report?	Implement the protocol; the agency should provide odor protocol training to the public. The Nuisance Odor Protocol and FIDO Chart should be posted on the external Web along with a brochure explaining the process for nuisance odor determinations. FOD should periodically review evolving technologies and other state protocols to determine their potential for use by TCEQ.	Policy, guidance, or process change

Comp	3	297	How can the TCEQ process for receiving complaints be improved, including accessibility 24-hours via telephone and agency website?	-The agency homepage and the Field Operations homepage should have a direct link to the Environmental Complaint page; -The Environmental Complaint page should provide links to the Environmental Violations Hot Line and 24-Hour Spill Reporting numbers, including an explanation of each with information on how calls are handled after hours; -Active links should be maintained to the online form to file a complaint, contact information for each region office, Citizen Collected Evidence information, the Water Utilities consumer assistance, and to the Nuisance Odor Protocol.	Policy, guidance, or process change
Comp	4	302	What, if any, recommendations for change are needed to the citizen collected evidence (CCE) rules and guidance?	No change is recommended to the rule or current CCE protocols or procedures. The TCEQ should continue to provide training for individuals and citizen/industry groups, and self-instructional training using materials available at regional offices.	No change recommended
Comp	5	303	What capital resources would be needed to develop an online complaint database that will allow public access to complaint information?	Providing online access to the incident/complaint data in CCEDS may involve requesting about \$50,000 in capital resources for the FY06-07 biennium from the 2005 Legislature.	Policy, guidance, or process change

EP	1	209	How can the current enforcement time lines be revised to streamline the existing enforcement process?	<p>Enforcement time lines could be reduced by a total of 125 days by a combination of the following:</p> <ul style="list-style-type: none"> -Assign cases to an Enforcement Coordinator within 7 days after the Enforcement Action Referral -Require that all draft orders and penalty calculations worksheets be mailed no longer than 60 calendar days after the date that the case is assigned; -If the case is referred directly to the Litigation Division, then it should be forwarded within 60 days of screening; -If the respondent declares an intent not to settle an expedited enforcement action, the case should be referred to the Litigation immediately; -Limit extensions of the settlement deadline to 90 calendar days; -Set agreed orders on agenda within 70 days; -Change notice of service requirements. 	Policy, guidance, or process change
EP	3	225	How can the financial inability to pay process be streamlined or simplified?	<p>Enforce a 30-day deadline, running from the respondent's receipt of the draft order, to submit documentation supporting a financial inability to pay. Remove the reference to financial inability to pay in the initial communication to the respondent.</p>	Chapter 70 rule amendment
EP	5	229	How can TCEQ increase or reallocate resources to target investigative/enforcement activities?	<p>The number of investigative or enforcement staff should not be increased until the full effect of implementing changes from this review is evaluated. If recommendations on compressed settlement time lines are implemented, additional cases may be referred to Litigation and additional staff may be needed in that division. In the interim, consider other steps such as media-specific coordinators, training and mentoring programs to increase the efficiency of existing staff.</p>	Policy, guidance, or process change

EP	6	231	How can the TCEQ achieve better trained investigative and enforcement staff?	<ul style="list-style-type: none"> -Use distance learning methods; -Align the Environmental Investigator (EI) Career Ladder with the Enforcement Coordinator and Natural Resource Specialist tracks to encourage equitable and cross-division staff development opportunities; -Recognize senior agency staff serving as mentors and technical specialists; -Add CCEDS training capacity and enhance CCEDS to allow secure remote access to the system to allow staff to utilize the system 24 hours a day from any location; -Continue core program and cross-media training; -Offer advanced environmental technical training at the training academy 	Policy, guidance, or process change
Comm	1	234	How can the TCEQ better share enforcement-related information with the public and the regulated community?	Enhance TCEQ enforcement information on the public web site; update and expand outreach materials on enforcement; expand outreach at the local level.	Policy, guidance, or process change
Comm	2	236	How can the TCEQ incorporate enhanced internal communication tools to improve effectiveness and consistency of the enforcement process?	<ul style="list-style-type: none"> -Develop and post a step by step description of the enforcement process. -Expand the data available on the public site and provide additional data on the T-Net for staff viewing. -Instruct staff attorneys to contact the investigator and the enforcement coordinator prior to filing the EDPRP. -Evaluate matrix management of enforcement and litigation staff to include no more than two locations per case. -Set up training and regular reinforcement of what information is available and where. -Expand use of video conferencing. 	Policy, guidance, or process change

Comm	3 A - 3 B	237	How can the TCEQ better educate the public on filing a complaint or reporting environmental problems? How can the TCEQ educate the public on citizen collected evidence?	Revise the TCEQ public Web site to provide easier access to information on agency complaint procedures. More extensively publicize the agency Web site as an avenue for complaints, and in other venues publicize TCEQ complaint handling procedures.	Policy, guidance, or process change
Comm	4	240	What is the best way to educate the public and regulated community on the enforcement process?	Request proposals on a statewide agency public awareness campaign to better educate the public on what the TCEQ does and ways it improves and maintains the environment.	Policy, guidance, or process change
Comm	5	242	What is the best way to educate the public and regulated community on the use of compliance history?	-Design an easily explained rating system. -Rework Web and enforcement materials to relate compliance history to the rest of the enforcement process. -Publish lists of poor and high performers. -Visibly use ratings in enforcement and permit actions.	Policy, guidance, or process change
Pen	4	95	Are the penalties assessed effective in deterring violations?	Yes, but the deterrent effect of the Penalty Policy could be improved by establishing a purpose statement to the Penalty Policy articulating the goal of deterrence and by measuring the level of deterrence achieved by enforcement program improvements.	Establish policy and promulgate into new rule
Pen	1 B - 1 E	88	Should TCEQ continue to use specific components of a compliance history in calculating a penalty?	No. The Penalty Policy can be simplified by eliminating the Compliance History Worksheet from page 2 of the Penalty Calculation Worksheet and replacing it with a penalty adjustment based on the overall compliance history classification of the respondent would remain. This recommendation address many concerns of "double-dipping" in the use of compliance history.	Revise calculation methods and promulgate into new rule

Pen	2	89	Should all or part of the economic benefit resulting from noncompliance be included in the penalty before adjustment for other factors as justice may require? If so, what is an equitable method to calculate economic benefit?	Staff agrees all or part of the economic benefit should be included in a penalty. Several alternative ways to treat economic benefit when preparing a penalty are described in detail in the report.	
Pen	3	92	Should small entities be allowed a downward adjustment of a base penalty?	Yes. Allow a 15% reduction so long as violation did not cause actual major environmental harm and entity does not have a poor compliance history; define entities considered as “small” in rule.	Promulgate selected policies into a new rule
Pen	8	102	Should a partial good faith adjustment in a penalty calculation be allowed based on completion of some but not all required corrective actions?	Yes, allow a 20% reduction if compliance is achieved after the NOV/NOE and a 30% reduction if achieved before the NOV/NOE. Repeat or culpable violators would not be provided a good faith adjustment.	Promulgate selected policies into a new rule
Pen	7 C	100	Does the penalty policy equitably account for and make a distinction between harm to the environment and a “paperwork” violation?	Simplify the penalty policy by eliminating the “potential release” component from the existing base penalty matrix. Make upward adjustments to the percentage of a base penalty calculations for all levels of harm and for both major and minor respondents.	Promulgate selected policies into a new rule
Pen	9	104	Should deferrals continue to be offered for expedited settlements or when an upward adjustment for culpability is included?	No, eliminate deferrals. They do not speed up the existing process. Maintain the existing policy of no deferrals for a culpable violator.	Policy change
Pen	10	104	In a penalty calculation included in a default order against a respondent, should penalties be increased?	Yes, additional penalties should be included in a default order when a respondent does not reply to a petition and when the respondent replies to a petition requesting a hearing but does not show up to the hearing.	Promulgate selected policies into a new rule

EP	1	209	How can the current enforcement time lines be revised to streamline the existing enforcement process? (recommendation addresses part of issue)	Increase the proposed penalty by 25% if a respondent fails to settle within 30 days of receiving the draft order	Promulgate selected policies into a new rule
Pen	12	107	Should the Penalty Policy make special provisions for PST certification and fuel distribution violations, including guidance on whether and to what extent both the owner and operator are responsible?	No. No special provisions for PST violations should be included, but formalize current commission practice and policy on the imposition of joint and several liability for different respondents responsible for the same violation.	Formalize current policy into a new rule
Pen	6	99	Should investment in pollution prevention technology be used as a factor in calculating penalties for violations or economic benefit while operating in noncompliant status?	Currently, no consideration is given to investment in pollution control equipment not mandatory under an agency requirement. No change from this policy is recommended.	No change recommended
Pen	11	107	Should TCEQ decline to pursue a penalty in enforcement cases where agency resources could be better applied elsewhere, for example in cases with a <i>de minimis</i> fine?	The agency should continue to pursue issuance of orders with no penalties and only corrective actions. A mandatory minimum penalty, although small, may be required in certain cases.	No change recommended
SEP	1	141	Should TCEQ continue the SEP program?	Yes, SEPs should continue to be offered to offset enforcement penalties.	No change recommended

EP	4	228	How could the SEP process be streamlined and or simplified?	-Limit extensions for inclusion of Supplemental Environmental Projects to cases where an agreement concerning the amount of the administrative penalty to be paid by the respondent is reached within 30 calendar days after receipt of the draft order by the respondent. -Expand the pre-approved list of SEPs. -Provide SEP information to the respondent during the investigation exit briefing. -If final agreement concerning an SEP is not reached within 90 days after the date of the extension letter then the enforcement case should be referred to LD for processing and the proposed penalty would increase by 25%.	Policy, guidance, or process change
SEP	2 - 3	141 - 144			
SEP	4 A	145	Does a SEP need to benefit the environmental media (air quality, water quality, etc.) affected by the violations? If not, what should be allowed ?	Yes, preferably. Direct benefit SEP projects within the affected community for the same environmental media associated with the violation should be allowed a 1:1 penalty offset. Projects relating to a different media or that with an indirect benefit should still be allowed, but only with a greater offset ratio.	Policy, guidance, or process change
SEP	4 B	145	Should the SEP be performed exclusively in the community where the violation occurred? If not, are there other location restrictions that should apply?	Same recommendation as preceding row. Also, guidance should be revised to reconsider "county" as the definition of a "community".	Policy, guidance, or process change
SEP	5 A	147	Do the public and regulated entities understand how SEPs are used in TCEQ enforcement?	Yes, there is some understanding of the concept of SEPs. However, the level of understanding varies between large companies, small businesses, local governments, community groups, and individuals. We need to better publicize and distribute information regarding SEPs, especially with the benefits and cost.	Policy, guidance, or process change

SEP	5 B	147	Are there ways to better inform the public and regulated entities of SEP outcomes?	Yes. TCEQ should require publicizing the results and distributing a report once a SEP has been completed.	Policy, guidance, or process change
SEP	5 C	147	Should selection of SEPs consider citizen, community, agency, or regulated entity priorities? If so, how?	Yes. Regional and management input on SEPs and priorities should be institutionalized. Commission consideration and designation of proposed SEP projects can provide an opportunity for local input.	Policy, guidance, or process change
SEP	6 A	149	How can we quantify the environmental benefit from a SEP?	At proposal of each SEP, the respondent should be required to estimate the environmental benefits expected from the project. The SEP staff should consider this information in determining whether the benefit is sufficient to merit the inclusion of the SEP in an enforcement order.	Policy, guidance, or process change
SEP	6 B	149	Should quantifying benefit be included as part of a reporting requirement? If so, how can TCEQ verify the benefit?	Yes. As part of each SEP completion report, the respondent should be required to quantify the environmental benefit actually achieved, and provide the documentation to support these facts. To verify the benefit claimed, the SEP program should include a verification checklist in its risk assessment procedures.	Policy, guidance, or process change
SEP	6 C	149	Is TCEQ's current oversight of SEPs achieving the desired results?	Yes, but the current system could be improved by providing a mechanism for quantifying and verifying the environmental benefit obtained from SEPs.	Policy, guidance, or process change

SEP	7 A - 7 B	151	Should TCEQ have a classification system for non-direct or mixed benefit projects? If so, what should be appropriate ratios for such SEPs? Should restrictions limit SEPs to only direct benefit?	<ul style="list-style-type: none"> -The ratios of three direct benefit project types should remain unchanged and projects consistent with the Proposition 2 pre-approved list that reduce/prevent pollution should be added. -Some indirect projects should be allowed with less favorable ratios, while others should be prohibited or curtailed. -Standard ratios should be established for certain types of indirect benefit. -Some indirect project types need to be modified so that the results can be quantified (or else not approved). 	Policy, guidance, or process change
SEP	8 A - 8 C	155	What percentage of the penalty should be eligible for offset by a SEP? Should SEP requirements or restrictions be different based on the environmental impact of a violation? What restrictions should there be for SEPs?	<ul style="list-style-type: none"> -Existing policy of 100% offset of penalty for local governments should be continued if the SEP has a direct environmental benefit, otherwise up to a 50% offset should be allowed. -A business should be allowed up to a 100% offset if it is a small business and the SEP has a direct environmental benefit, otherwise up to a 50% offset should be allowed. -Allow local governments whether or not currently in enforcement to benefit from a SEP to address compliance issues. -No on-site SEPs should be allowed. -For indirect benefit SEPs, tie the percentage of offset to the ratio so that a project with a 2:1 ratio allows a 50% offset or a project with a 3:1 ratio allows a 33% offset. -Anyone who does not comply with the technical requirements of their SEP agreement is not eligible for future participation in the program. 	Policy, guidance, or process change

Ord	1 A	124	Should additional and clearer information be required of a respondent to demonstrate that compliance with an order has been achieved prior to closing out the order?	Yes. TCEQ should continue to require the respondent to certify compliance, but the standard technical requirements should include the type of documentation needed for each type of certification.	Policy, guidance, or process change
Ord	1 B	125	Should small business or small local government be given different consideration from larger entities in the documentation required to close out an order?	Yes, on a limited basis. Ordering provisions should allow small entities a longer time frame to implement corrective action, depending on the type of violation. However, the corrective action should be the same for all violators and a. If the small entity is a repeat violator or if there is an imminent threat to the environment, there should be no special consideration.	Policy, guidance, or process change
Ord	1 C	126	Are there cases where additional monitoring, either by the respondent or the agency, should be required to demonstrate compliance prior to order close-out?	Yes. A decision matrix should be used to determine the additional monitoring needed based on compliance history, type of violation, potential harm to the environment, significant citizen complaints or previous submission of a false certification. Additional monitoring requirements should be specified in the order.	Policy, guidance, or process change
Ord	1 D	127	What are the consequences of false compliance certifications and does the agency know the frequency of occurrence? Could agency data systems be used to track and provide reports showing when violations previously assumed resolved are not actually resolved?	TCEQ should audit certifications to determine whether they are achieving compliance. The Enforcement Division should work with criminal investigators to prosecute those who knowingly submit false certifications.	Policy, guidance, or process change

Ord	2 A	128	Should orders contain additional standard provisions that communicate to the respondent the consequences of failure to comply with the provisions of the order?	Yes. A provision directly preceding the signature block should be placed in all enforcement orders that outlines the consequences of not complying with the Corrective Action provisions of the order.	Policy, guidance, or process change
Ord	3 A	131	What improvements can be made in the internal coordination between the Enforcement Division and other areas of the agency during order development?	Establish liaisons from all divisions and programs to regularly discuss orders under development. These liaisons should evaluate standard conditions and processing procedures, as well as conferring on specific cases as needed to ensure comprehensive requirements which do not conflict with permit requirements or time frames.	Policy, guidance, or process change
Ord	3 B	132	Is there a unique coordination role for SBLGA with a respondent and the Enforcement Division during the development of an order?	Continue existing practices by SBLGA staff to assist violator after an NOV is issued; no additional special roles are recommended.	No change recommended
Ord	3 C	133	Where permit applications and enforcement actions for the same entity are occurring at the same time, should special provisions be included in the permit to address frequent noncompliance and vice-versa.	This issue is addressed under recommendations for the use of compliance history.	No change recommended
Ord	4 A	134	Do ordering provisions adequately communicate to the respondent and other interested parties what is necessary to achieve compliance? If not, what improvements can be made?	Yes. But this communication could be improved by including specific compliance criteria beyond the certification of compliance in the ordering provisions and simplify ordering provision language.	Policy, guidance, or process change

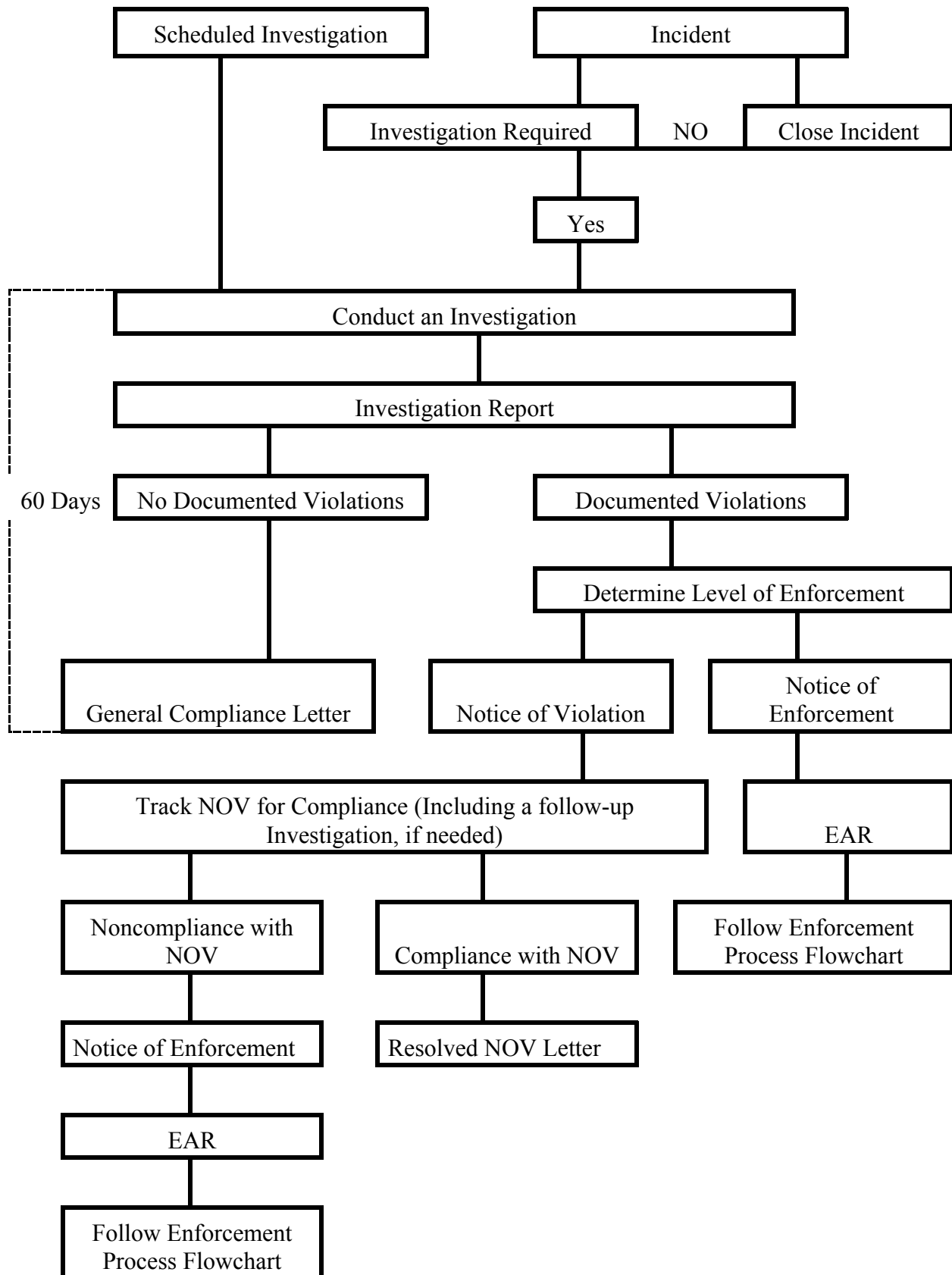
Ord	4 B	135	Are there situations where additional monitoring and/or other restrictions, other than to correct a specific violation, should be required?	No. However, specific violations may require additional monitoring as recommended to address Ordering Provision Key Issue 1 C.	No change recommended
Ord	4 C	135	Should small business or small local government be given different consideration from larger entities in development of ordering provisions?	Yes, on a limited basis, especially where large capital expenditures are involved.	Policy, guidance, or process change
Ord	5 A	136	Should ordering provisions differ for repeat violators to include more specific requirements, additional monitoring, or other restrictions?	Yes. A multi-media agency team should develop guidelines for issues including evaluation and review of previously issued Orders for effective monitoring, testing, and other compliance assurance requirements. These guidelines should be mandatory for any Repeat Violator.	Policy, guidance, or process change
Ord	5 B	137	Should ordering provisions be used to require self-examination or assessment of root causes of violations?	Yes. Orders should require Repeat Violators to do root cause evaluations to address the principal/major reason for the violation and prevention of future violations. Guidance should address the use of independent or third parties for the root cause analysis.	Policy, guidance, or process change
Ord	5 C	138	Should repeat violators be required to demonstrate a financial ability to operate in compliance and to fulfill all technical requirements of the order via audit, bond, or performance assessment?	Yes. Recommendation 2 suggests that repeat violators provide financial assurance, such as a performance bond. The bond would fall due and collected by TCEQ if compliance is not achieved	Potential Statutory change
Coll	1 A	173	Should an entity be allowed to acquire, amend, or renew a permit while in default of a penalty?	No, suspend processing and do not issue new, amended, or renewal permits/registrations/certifications/licenses to an entity or person owing a delinquent fee or penalty. If fees and penalties are not all paid within a prescribed time period, the application for permit would be returned.	Policy, guidance, or process change

Coll	1 B	173	Should a current permit be revoked if the entity owes fees or penalties to the agency?	Yes, the agency should initiate revocation of a permit as a last resort. The sequence to follow would be 1) letters and phone calls informing customer of the process of collection leading to potential revocation; 2) referral to collection agency for specified period of time; all cases greater than \$2,500 will be sent to OAG for collection; and 3) initiation of revocation.	Policy, guidance, or process change
Coll	2	188	Are current resources sufficient to more aggressively collect delinquent fees and penalties? If not, what resources are needed for the TCEQ to more quickly collect unpaid fees and penalties?	No. The TCEQ needs the assistance of outside resources to collect the delinquent accounts or determine that they are uncollectible. TCEQ should refer delinquent accounts over \$2,500 to the Attorney General after two demand letters and should contract with a collection agency to collect amounts under \$2,500.	Policy, guidance, or process change
Coll	3 A	192	How can the agency address inability to pay issues of small businesses?	The agency should use an initial screen of 1% of annual gross revenue for operating businesses. If this amount does not completely pay the assessed penalty, a more thorough analysis to include the respondent's assets is needed. Non-operating businesses should undergo a similar analysis of assets. The minimum payment for an operating business should be \$100, with a maximum payment time of 36 months. Non-operating businesses should be screened based on assets, and the maximum payment time should be 12 months.	Policy, guidance, or process change
Coll	3 B	198	How can the agency address inability to pay issues of small local governments?	Use EPA's MUNIPAY system to determine whether governments are financially able to pay a penalty.	Policy, guidance, or process change
Coll	4	204	Should a policy be established providing criteria for payment plans?	Yes. The criteria should include a maximum payment term of 36 months, along with eligibility criteria and a minimum payment of \$100.	Policy, guidance, or process change

Coll	5	206	Would the assessment of interest charges on payment plans or delinquent penalties encourage payment or result in fewer requests for payment plans?	A finance charge should be assessed with a payment plan, with a rate that increases with the length of the payment plan to discourage using the agency as a lender. The revenue accounting system would have to be upgraded substantially to treat these accounts more like loans. Interest should also be assessed on delinquent penalties.	Potential Statutory change
Coll	6	208	Would tools such as the ability to levy bank accounts or garnish wages be helpful in collecting delinquent accounts?	No. Other alternatives such as interest charges, payment plans, use of a collection agency, and withholding permits for unpaid penalties and fees would be more efficient for collecting delinquent accounts. If these alternatives do not decrease delinquencies we should revisit these options.	No change recommended

Attachment 2

ATTACHMENT 2 Field Operations Division Investigation Flow Chart



Attachment 3

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**ENFORCEMENT INITIATION CRITERIA (EIC)
FOR AIR, WATER AND WASTE VIOLATIONS**

Revised September 3, 2003
Revision No. 09

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ACRONYMS

AFO	ANIMAL FEEDING OPERATION
BACT	BEST AVAILABLE CONTROL TECHNOLOGY
BMP	BEST MANAGEMENT PRACTICES
CA	COMPLIANCE AGREEMENT
CAAA	CLEAN AIR ACT AMENDMENTS
CAFO	CONCENTRATED ANIMAL FEEDING OPERATION
CCN	CERTIFICATE OF CONVENIENCE AND NECESSITY
CFR	CODE OF FEDERAL REGULATIONS
EAR	ENFORCEMENT ACTION REFERRAL
EIC	ENFORCEMENT INITIATION CRITERIA
EPA	U.S. ENVIRONMENTAL PROTECTION AGENCY
GUI	GROUND WATER UNDER THE INFLUENCE OF SURFACE WATER
HPV	HIGH PRIORITY VIOLATOR
IHW	INDUSTRIAL AND HAZARDOUS WASTE
IU	INDUSTRIAL USER
LAER	LOWEST ACHIEVABLE EMISSION RATE
MACT	MAXIMUM AVAILABLE CONTROL TECHNOLOGY
MCL	MAXIMUM CONTAMINANT LEVEL
MEH	MANDATORY ENFORCEMENT HEARING
MOU	MEMORANDUM OF UNDERSTANDING
MSW	MUNICIPAL SOLID WASTE
NESHAP	NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS
NOE	NOTICE OF ENFORCEMENT
NOI	NOTICE OF INTENT
NOV	NOTICE OF VIOLATION
NPDES	NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
NSPS	NEW SOURCE PERFORMANCE STANDARDS
NSR	NEW SOURCE REVIEW
OSSF	ON-SITE SEWAGE FACILITY
PCS	PERMIT COMPLIANCE SYSTEM
POTW	PUBLICLY OWNED TREATMENT WORKS
PPP	POLLUTION PREVENTION PLAN
PSD	PREVENTION OF SIGNIFICANT DETERIORATION
PST	PETROLEUM STORAGE TANK
PWS	PUBLIC WATER SUPPLY
QNCR	QUARTERLY NONCOMPLIANCE REPORT
RCRA	RESOURCE CONSERVATION AND RECOVERY ACT
SIP	STATE IMPLEMENTATION PLAN
SIU	SIGNIFICANT INDUSTRIAL USER
SNC	SIGNIFICANT NON-COMPLIER
SS	SOLICIT SCHEDULE
SV	SIGNIFICANT VIOLATOR
SWP3	STORMWATER POLLUTION PREVENTION PLAN
TAC	TEXAS ADMINISTRATIVE CODE
TD	TCEQ-ESTABLISHED DEADLINE
TCEQ	TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
TPDES	TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM
TSSWCB	TEXAS STATE SOIL AND WATER CONSERVATION BOARD
UST	UNDERGROUND STORAGE TANK
WMP	WASTE MANAGEMENT PLAN

DEFINITIONS

As Required: Pertaining to a requirement specified by statute, order, rule, permit, registration or other authorization

Clerical Violation: A violation of a provision of a statute, order, rule, permit, registration or other authorization that is procedural or administrative in nature, such as submittal of reports or maintaining records

Existing Requirements: Requirements in effect at the time the enforcement initiation criteria is being applied

Force Majeure: An act of God, war, strike, riot or other catastrophe

Formal Enforcement Action: An action taken by TCEQ to obtain a legally binding obligation for an entity to achieve and/or maintain compliance; includes a Bilateral Compliance Agreement (functions as a contract), Commission Order, referral to the Attorney General for civil litigation, criminal prosecution, or referral to EPA for a federally enforceable enforcement action

Initiation of Formal Enforcement Action: Taking action to start the process for consideration of a Bilateral Compliance Agreement (functions as a contract), Commission Order, referral to the Attorney General for civil litigation, criminal prosecution, or referral to EPA for a federally enforceable enforcement action

Monitoring: Any activity performed which observes or measures a discharge/release/emission to the environment or production requirements for a PWS system, or observes or measures one or more components of a facility which may cause such discharge/release/emission or is necessary for maintaining PWS production requirements; includes quantifying or characterizing through measuring, sampling, testing or visual observation

Non-clerical Violation: A violation of a provision of a statute, order, rule, permit, registration or other authorization which has the purpose and effect to limit, reduce, control, or prohibit a discharge/release/emission of one or more contaminants into the environment or to maintain production requirements for a PWS system, or which requires measurement or monitoring of a discharge/release/emission or production requirements for a PWS system

Noncompliant Discharge or Emission: Discharge or emission from an authorized location to an authorized receiving point which fails to meet required limits or standards; authorized means as allowed by statute, order, rule, permit, registration or other authorization

Nuisance Dumping : Unauthorized disposal or burning of nonhazardous municipal solid waste where the only economic gain is avoiding the cost of disposing at a landfill; does not include cash-for-trash operations

Records: Electronic or written documentation of required information

Unauthorized Discharge, Release, or Emission: Violation in which the responsible party does not have authorization by statute, order, rule, permit, registration or other authorization to make a discharge, release, or emission (regardless of quality or quantity) from a given location and/or to a particular receiving location

GENERAL INSTRUCTIONS

USE OF THE EIC: The procedures set out in this criteria are intended only for staff guidance. They are not intended, and cannot be relied on, to create any rights, substantive or procedural, on the part of any person or entity. The TCEQ reserves the right to modify these procedures at any time without public notice.

In order to promote consistency in handling air, water and waste violations, the criteria specified in this document will be used for initiating formal enforcement action. If a violation is attributable to *force majeure* (see definition), initiation of formal enforcement action will not be required. Decisions about whether *force majeure* is applicable will be made by the section level manager for the staff who is considering initiation of formal enforcement action.

FORMAT: Violations have been divided into three categories.

Category A violations require automatic initiation of formal enforcement action when discovered.

Category B violations require initiation of formal enforcement action if the violation is not corrected by an established deadline or if the violation is present at two consecutive investigations within the most recent 5-year period.

Formal enforcement action may or may not be initiated for **Category C violations** if the entity receives written or verbal notification for the same violation 3 times within the most recent 5-year period, including the notification for the current violation. Decisions about whether formal enforcement action will be initiated for a third time Category C violation will be made by the section level manager for the staff who is considering the enforcement action. In addition to the categorization of the violations, it is important to note that some criteria have specific exclusions written into them which change the required enforcement action for the excluded violation(s).

VIOLATIONS TO BE INCLUDED IN THE ENFORCEMENT ACTION: If there are multiple violations and any one or more of the violations requires initiation of formal enforcement, all of the violations, except those that have been resolved through verbal notification (Category B and C ONLY), will be included in the enforcement action. This means that any violation that was included in a written NOV or NOE as an outstanding violation at any time in the process must be included in the enforcement action referral (EAR) **even if** the violation has been corrected by the time the EAR is written.

A violation that causes the initiation of formal enforcement will always be included in the enforcement action. If a repeat Category B violation is corrected prior to the NOE, that violation must still be included in the enforcement action. This means that verbal notification shall not be given for a repeat Category B violation. Other new Category B and C violations that are resolved through verbal notification will not be included in the enforcement action.

The only violations which should be listed in the violation portion of the EAR (Section 3) are those for which penalties will be assessed. Violations that have been resolved through verbal notification may be put in the additional discussion section of the EAR for information purposes.

COORDINATION OF REGIONAL AND CENTRAL OFFICE ACTION: If the region is initiating an enforcement action and the violations consist of both those that are exclusively or primarily handled by the central office program division **and** violations that are primarily handled by the region, all of the violations should be included in the enforcement action if possible. Conversely, if a central office program division is initiating an enforcement action, the program division should include any current region-documented violations in the action.

VARIANCE REQUESTS: A particular situation may warrant a deviation from the procedures outlined in this document (e.g., a compliance time frame longer than 6 months for a Category B violation, automatic initiation of formal enforcement for a Category B or C violation, exclusion from automatic initiation of formal enforcement for a Category A violation, etc.). In these instances, a deviation from this guidance document is acceptable if a written request is first submitted to the Enforcement Liaisons (MC 174), at which time they will provide their recommendation in an effort to promote state-wide consistency. Then, the request will be forwarded on to the Regional Director ("RD"), and final written approval/denial will be granted by the RD. The request should include the investigation type and date; detailed descriptions of all the violations, including rule cites, dates, and category; current compliance due date; previous or active enforcement actions; reasons to support a deviation from the EIC procedures; and a true statement to the effect that no environmental impact or harm to public health will result from granting the exception. The request and approval should be documented in the file.

****Local Programs:** EIC variance requests should be made by local program management and forwarded to the appropriate TCEQ Regional Director through the Local Program Liaison of that regional office. The TCEQ Regional Director will provide approval or denial for all local program EIC variance requests**

DSMOA: Compliance at facilities that are under the jurisdiction of the Department of Defense and State Memorandum of Agreement (DSMOA) program should be achieved through the dispute resolution process as defined in Section IV of the DSMOA (facilities with executed Federal Facility Agreements under CERCLA Section 120).

CATEGORY A VIOLATIONS

CATEGORY A: Category A violations require automatic initiation of formal enforcement action when discovered. The verbal notification procedures under the Commission's NOV Policy do not apply to Category A violations.

* **NOTE:** An asterisk (*) indicates the determination will be made exclusively or primarily by the central office. Items without an asterisk are screening criteria primarily used by regional offices or criteria used by both regional and central office staff.

VIOLATIONS (apply to all programs as applicable):

- A1. Failure to comply with any provision of a CA, Commission Order or Court Order, with the exception that if a requirement has been completed but was not done on time, Enforcement Division Section Manager discretion may be used to decide whether or not initiation of formal enforcement action is warranted for the late completion
- A2.a For a responsible party that has had a permit at another site under existing requirements, or has received written notification that a permit will be required if operating changes occur which require a permit: **Operating without a permit when a permit is required** (See B.4b for a responsible party that has never had a permit at another site under existing requirements)
- A2.b Facility/operation operating with an expired permit when a permit is required
- A2.c Facility/operation operating without a permit amendment or major modification for a substantive requirement when a permit amendment is required
- A2d Operating, without a permit, a rock crusher or a concrete plant that performs wet batching, dry batching, or central mixing and is required to obtain a permit under TEX. HEALTH & SAFETY CODE § 382.0518
- A3. Individual performing a regulated activity without a required license, certification, or other authorization, excluding a Designated Representative (DR) in the OSSF program [see Category B19.i.(3)]
- A4. Violation for which corrective action will take longer than six (6) months to complete, except for the following violations:
- An unauthorized discharge from a wastewater collection system which is the result of infiltration/inflow and is not a Category A6 violation [see Category B19.a.(1)]
 - Inadequate or no waste control facilities for a TCEQ-regulated AFO operating by rule provided a Category A6 or Category A10 violation has not been noted [see Category B19.b.(9)]
 - Documented ground water contamination, soil contamination, violation of the lower explosive limit for methane gas at a landfill, or methane gas migration at a closed landfill being addressed within the scope of the Voluntary Cleanup Program or through actions in compliance with a Commission rule, permit, or compliance plan, provided a Category A6 or Category A10 violation has not been noted [see Category B11]
 - For a responsible party that has never had a permit at another site under existing requirements: Operating without a permit when a permit is required, provided a Category A6, A8 or A10 violation has not been noted [see Category B.4.b]
 - Failure by a community water system to meet a minimum water system capacity requirement [see Category B19.c.(9)]
 - Impounding state water without proper authorization when water is available for appropriation [see Category B19.h.(4)]
 - Category C violations
- A5. Disposing of, shipping or transporting any solid waste, recyclable material, or a regulated substance at or to an unauthorized facility or site
- A6. Unauthorized or noncompliant discharge, release or emission which results in a documented effect on human health or safety or a documented serious impact to the environment
- A7. Upon becoming aware of the violation, failure to immediately abate and contain a reportable spill/discharge and provide notification, as defined in 30 TAC Chapter 327, or a PST release which results in a documented effect on human health or safety or a documented serious impact to the environment
- A8. HPV, SNC or SV violations for which TCEQ has agreed with EPA to take formal enforcement action upon discovery of the violation (see Attachment A for specific criteria)
- A9a. Documented falsification of data, documents or reports
- A9b. Denying TCEQ staff right of entry to a TCEQ-regulated entity for investigative purposes, in violation of TEX. WATER CODE § 26.014 and/or TEX. HEALTH & SAFETY CODE § 361.032. **Consult with the Litigation Division Director for legal assistance.**
- A10. Violation(s) not otherwise listed in Category A in which exposure of contaminants to the air, water or land (a) is affecting or has affected human health and safety or is causing or has caused a serious impact to the environment, or (b) will affect human health and safety or will cause a serious impact to the environment unless immediate actions are taken
- A11. Program specific violations as listed below. These are violations which either meet the general definition in Category A10 or have been determined to be critical to program integrity. Any other program specific violations not on this list must meet the definition in Category A10 to be handled as a Category A violation

a. Water Quality Program (excluding TCEQ-regulated AFOs)

- (1) Any unauthorized discharge by a sludge/septage transporter, excluding a minor leak
- (2) For a major or non-major with a state-only water quality (WQ) permit: Self-monitored or self-reported effluent violations which meet established TCEQ MEH criteria

Note: Central office is responsible for MEH determinations for facilities that discharge to surface water and regions are responsible for MEH determinations for land disposal facilities
- (3)* For a non-major facility whose self-reported data are being tracked in the federal PCS database: Self-reported effluent violations which meet established EPA referral criteria or TCEQ impaired segment referral criteria

Note: These non-majors are 92-500 minors with TPDES or NPDES permits, other minors with TPDES permits, and facilities with a general permit for the TPDES/NPDES program, excluding CAFOs, industrial multi-sector storm water general permittees and construction storm water general permittees
- (4)* For a major facility: Self-reported effluent violations which meet established EPA referral criteria or TCEQ impaired segment referral criteria
- (5) Improper operation and maintenance of a wastewater treatment plant which results in serious stream degradation due to substantial accumulation of solids in the receiving stream
- (6) Improper operation and maintenance of a wastewater treatment plant which results in the discharge of substantial toxic or organic loading to the receiving stream
- (7) Failure to obtain approval of an Edwards Aquifer protection plan prior to initiating construction

b. Permitted AFOs

- (1) Failure of a permitted AFO to construct waste control facilities according to an approved WMP

c. TSSWCB-regulated AFOs

- (1) Inadequate or no waste control facilities for an AFO that is referred to TCEQ by the TSSWCB for enforcement action

d. Public Water Supply

- (1) Failure to obtain approval for plans and specifications for a surface water treatment plant
- (2) Failure to provide minimum required surface water treatment as specified in 30 TAC §290.42
- (3) Failure to provide disinfection equipment to maintain the required minimum disinfection residual
- (4) Failure to issue a boil water notice
- (5) Second occurrence of low pressure (<20 psi) or outage for the same cause
- (6)* Failure to provide required treatment for a spring or GUI after 18 months of notification from the Commission
- (7)* Violation of any primary chemical MCL
- (8)* Exceeding the short term acceptable risk level for a given chemical/radiological contaminant other than lead (Phase 2 and 5)
- (9)* Failure to monitor/report the results of any regulated chemical/radiological contaminant other than lead for 2 consecutive compliance periods
- (10)* Failure to submit lead and copper samples for any two consecutive 6-month sample periods
- (11)* Failure to submit lead and copper water quality parameter results for any two consecutive 6-month sample periods
- (12)* Failure to conduct corrosion control study 6 months after due date
- (13)* Failure to conduct bacteriological monitoring for any 6 months in a 12 month period
- (14) Greater than 50% deficiency of Supply Requirements as defined in 30 TAC § 290.45
- (15) Failure to provide immediate, written notification to the Commission of system reactivation--as defined in 30 TAC § 290.38

e. Industrial and Hazardous Waste

- (1) Failure to have adequate secondary containment for hazardous waste tank systems
- (2) Failure to properly close a solid waste management unit
- (3) Failure to implement required procedures in a response plan during an emergency

- (4) Proven dilution of any restricted waste or the residual from treatment of any restricted waste as a substitute for treatment that is not excluded by the land disposal restriction requirements in 40 CFR Part 268
 - (5) Failure to remove land disposal restricted wastes within the time frame specified in a permit or the land disposal restriction requirements in 40 CFR Part 268
 - (6) Documented failure of the Automatic Waste Feed Cut-off System (AWFCO) for a Boiler and Industrial Furnace (BIF) or incinerator
 - (7) Failure to determine and certify required operating limits during a compliance test or trial burn
 - (8) Failure to comply with BIF operating parameters set by permit, compliance test, or certification of compliance
- f. Underground Injection Control
- (1) Documented disposal of an unauthorized waste into an injection well
 - (2) Operation of an injection well which fails mechanical integrity test
- g. Municipal Solid Waste
- (1) Failure to maintain a Type VIII-R waste tire storage facility so that all areas can be reached by fire fighting equipment and/or fire fighting personnel
 - (2) Failure to maintain adequate fire fighting equipment on-site as required at a Type VIII-R waste tire storage facility
 - (3) Violation of any used oil prohibition specified in 40 CFR Part 279.12 and 30 TAC §324.4
 - (4) Failure to treat medical waste by an approved method
- h. Petroleum Storage Tanks
- (1) Failure to investigate a suspected release
 - (2) Failure to have Stage I vapor recovery equipment installed when required
 - (3) Failure to have Stage II vapor recovery equipment when required
 - (4) Failure to provide financial assurance
 - (5) Failure to provide corrosion protection
 - (6) Failure to provide release detection
 - (7) Failure to provide spill and overfill protection
 - (8) Failure to submit UST Registration and Self-Certification form (initial and/or renewal) in accordance with 30 TAC § 334.8 [Except for late certifications, submitted prior to an investigation, which should be handled as Category B19.f.(4)]
 - (9) Failure to possess a valid Self-Certification Certificate prior to receiving fuel
 - (10) Failure of a “common carrier,” as defined in 30 TAC § 334.2, to observe that the owner or operator has a valid, current delivery certificate issued by the Agency covering the UST System, prior to depositing any regulated substance into that UST System [30 TAC § 334.5(b)(1)(A)]
- i. Air
- (1) A release of vinyl chloride of 100 lbs or more per incident
 - (2) Any violation of 30 TAC §114.1, Maintenance and Operation of Air Pollution Control Systems or Devices Used to Control Emissions from Motor Vehicles, on a post-1979 vehicle for which any of the following major tampering actions has been confirmed:
 - (A) Catalytic converter is missing;
 - (B) Air injection system components (except the belt) are missing, or the pump is inoperable;
 - (C) Exhaust gas re-circulation valve is missing or made inoperable (excluding disconnected or missing vacuum lines); and/or
 - (D) Evaporative control system is missing (this includes two or more missing vacuum/vapor lines but not lines which are disconnected)
 - (3) Any violation of vehicle emissions inspection requirements specified in 30 TAC § 114.50(d)(2) which is referred to TCEQ by the Department of Public Safety for enforcement
 - (4) Any violation of El Paso County oxygenated fuels requirements specified in 30 TAC §114.100
 - (5) Any violation of El Paso County Reid vapor pressure requirements specified in 30 TAC §115.252

- (6) A significant deviation from a permit
 - (7) Submitting a Title V deviation report or compliance certification 60 days after it was ***DUE***. (which *is not* the compliance period end date)
 Note: Deviation reports or compliance certifications submitted within 30 days of the required submittal due date should be handled as Category B3.
 Note: If a deviation report was submitted without information that was previously submitted in another report to the TCEQ, (e.g., an emission event or NSPS report), then that incomplete deviation report violation is a B3.
 - (8) *Complete* failure to report an emissions event (as in an upset, or unscheduled maintenance, start-up, or shut-down activity that results in the unauthorized emissions of air contaminants from an emissions point), as required by TAC § 101.201(a)(2), or (3), (b) or (e). The underlying emissions event itself are also included in the enforcement action.
 - (9) Emission limit/standard violation determined to be associated with an excessive emissions event under 30 TAC Ch. 101 Subchapter F
- j. Water Rights
- (1) Reported or documented use of state water in excess of authorized amounts during times of water shortage
 - (2) Breaking, tampering with, or mutilating any seal or other device used to enforce orders of the Commission, Executive Director, Court or Watermaster
 - (3) Impounding state water without a permit when no water is available for appropriation
- k. On-site Sewage Facilities
- (1) An installer installing an un-permitted OSSF system
 - (2) Failure to obtain approval of planning materials for a subdivision or a development utilizing OSSF systems prior to subdividing the property
 - (3) Any violation of the activities prohibited as a permitting authority within that permitting authority's area of jurisdiction, as defined in 30 TAC § 285.50(g)(1) through (5)
- l. Approved Pretreatment Programs - TPDES POTW as the Control Authority
- (1) Failure to enforce as required by the approved pretreatment program against a discharge to a POTW which results in interference with the treatment process or sludge quality or pass through of pollutants that causes a Category A6 or Category A10 violation
 - (2) Failure to enforce as required by the approved pretreatment program against an industrial user that does not meet a compliance schedule for categorical standards within 90 days of the required due date
 - (3) Complete failure to investigate instances of noncompliance by dischargers to a POTW
- m. Significant IUs Discharging to TPDES POTWs without Approved Pretreatment Programs - TCEQ as the Control Authority
- (1) Discharge to a POTW which results in interference with the treatment process or sludge quality or pass through of pollutants that causes a Category A6 or Category A10 violation
 - (2) Failure to meet a compliance schedule for categorical standards within 90 days of the required due date
- n. Beneficial use of non-industrial wastewater sludge
- (1)* Application of sludge which does not meet class B pathogen reduction requirements, to a registered beneficial use site
 - (2) Application of sludge which does not meet class B vector attraction reduction requirements, to a registered beneficial use site
- o. Sludge Surface Disposal Sites
- (1) Disposal of sludge which does not meet pathogen reduction requirements
 - (2) Disposal of sludge which does not meet vector attraction reduction requirement
 - (3) Failure to maintain setback requirements required for metals concentrations
- p. Landscape Irrigation
- (1)* License, certification, or registration holder authorizes or allows use of their license, seal or rubber stamp to anyone else to act as licensed, certified, or registered operator

ATTACHMENT A

CATEGORY A VIOLATIONS FOR WHICH TCEQ HAS AGREED WITH EPA TO TAKE FORMAL ENFORCEMENT ACTION

The following violations are SNC or SV violations for which TCEQ has agreed with EPA to take formal enforcement action upon discovery of the violation (Category A8).

a. Public Water Supply

- (1) Surface water treatment rule (filtered systems)
 - (A) 4 or more treatment technique violations in any 12 consecutive months
 - (B) A combination of 6 violations including treatment technique violations and major monitoring/reporting violations in any 12 consecutive months
 - (C) 10 or more combined monitoring or treatment technique violations in any 12 consecutive months
- (2) Total coliform rule systems on monthly monitoring
 - (A) 4 or more combined monthly MCL or major repeat monitoring/reporting violations in any 12 consecutive months
 - (B) 6 or more combined MCL or major repeat or major routine monitoring/reporting violations in any 12 consecutive months

Note: Cases will be referred after 4 combined MCL or major repeat or major routine monitoring/reporting violations in any 12 consecutive months in order to meet the time frame for issuance of an Order.
 - (C) 10 or more combined MCL or monitoring/reporting violations (major or minor) in any 12 consecutive months
 - (D) One acute MCL and any other coliform MCL or repeat monitoring violations in any 12 consecutive months
- (3) Chemical/radiological violations (other than lead)
 - (A) Exceeding the unreasonable risk to health level for a given contaminant (15 mg/l for nitrates)
 - (B) Exceeding the 10^{-4} risk level for carcinogens
 - (C) Exceeding the MCL but not the unreasonable risk to health level for a period of greater than 7 years
 - (D) Two or more major monitoring violations consecutively if the monitoring period is less than annual (nitrates)
 - (E) One major monitoring violation if the monitoring period is annual or greater
- (4) Lead and copper
 - (A) For initial monitoring, a system that does not correct a violation within:
 - (i) 3 months for large systems;
 - (ii) 6 months for medium systems; or
 - (iii) 12 months for small systems.
 - (B) Systems with optimal corrosion control treatment installation violation and a 90th percentile lead concentration ≥ 30 ug/l
 - (C) Systems with source water treatment violations and a 90th percentile lead concentration ≥ 30 ug/l
 - (D) Systems with public education violations and a 90th percentile lead concentration ≥ 30 ug/l
- (5) Violation of a state formal enforcement action

b. Industrial and Hazardous Waste

- (1) RCRA facilities which have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements

Note: Chronic or recalcitrant violators and substantial deviations are addressed by the application of the criteria in this document.

c. Air

Note: The High Priority Violation (HPV) criteria should be applied to violations discovered on or after September 1, 1999. A source only needs to have one HPV to be placed on the HPVL (High Priority Violation List); therefore, it is not necessary to determine if every violation at a particular facility qualifies as an HPV.

(1) High Priority Violations - General Criteria

- (A) Failure to obtain a PSD permit (and/or to install BACT), an NSR permit (and/or to install LAER or obtain offsets) and/or a permit for a major modification of either
- (B) Violation of an air toxics requirement (i.e., NESHAP, MACT) that either results in excess emissions or violates operating parameter restrictions
- (C) Violation by a synthetic minor of an emission limit or permit condition that affects the source's PSD, NSR or Title V status (i.e., failure to comply with permit restrictions that limit the source's potential emissions below the appropriate thresholds; refers only to pollutants for which the source is a synthetic minor; not necessary for a source's actual emissions to exceed the NSR/PSD/Title V thresholds)
- (D) Violation of any substantive term of any local, state or federal order, consent decree or administrative order
- (E) Substantial violation of the source's Title V certification obligations (e.g., failure to submit a certification)
- (F) Substantial violation of the source's obligation to submit a Title V permit application (i.e., failure to submit a permit application within 60 days of the applicable deadline)
- (G) Violations that involve testing, monitoring, record keeping or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits
- (H) Violation of an allowable emission limit detected during a reference method stack test
- (I) Clean Air Act (CAA) violations by chronic or recalcitrant violators

Note: Chronic or recalcitrant violators are addressed by the application of the criteria in this document.
- (J) Substantial violation of Clean Air Act Section 112(r) requirements (for permitting authorities that are not implementing agencies under Section 112(r) program, limited to source's failure to submit Section 112(r) risk management plan)

(2) High Priority Violation - Matrix Criteria - See Table 1.1

- (A) Violation of allowable emissions limitations
 - (i) Reference method stack testing, or
 - (ii) Coatings analysis, fuel samples or other process material sampling
- (B) Violation of parameter emissions limitations
 - (i) Continuous/periodic parameter monitoring
- (C) Violation of applicable standards (non-opacity)
 - (i) Continuous emissions monitoring (where the CEM is certified under federal performance specifications)
- (D) Violation of applicable standards (opacity)

(3) High Priority Violation - Discretionary: Violation of regulations not taken into account by the HPV policy that warrant high enforcement priority (This should be a mutual agreement between TCEQ and EPA.)

TABLE 1.1

VIOLATION	METHOD OF DETECTION	STANDARD	SUPPLEMENTAL SIGNIFICANT THRESHOLD ¹	% IN EXCESS OF REFERENCE LIMIT/PARAMETER		% OF TIME IN EXCESS OF REFERENCE LIMIT
Violation of Allowable Emissions Limitations	Stack Testing	Any applicable requirement		Any violation of the applicable standard		N/A
	Coatings analysis, fuel samples, other process materials sampling or raw/process materials usage reports	Any applicable requirement	CO 23 lb/hr NOx 9 lb/hr SO2 9 lb/hr VOC 9 lb/hr PM 6 lb/hr PM10 3 lb/hr	>15% of the applicable emission limitation or the supplemental significant threshold (whichever is more stringent)		N/A
Violation of parameter limits where the parameter is a direct surrogate for an emissions limitation	Continuous/Periodic Parameter Monitoring (includes indicators of control device performance)	Any applicable requirement		>5% of the applicable parameter limit	FO R	>3% of the operating time during the reporting period
					O R	any exceedance of the parameter limit for >50% of the operating time during the reporting period ³
Violation of applicable non-opacity standard	Continuous Emissions Monitoring (where the CEM is certified under federal performance specifications)	≤24 hour averaging period (for example, one hour or three hour blocks)	CO 23 lb/hr NOx 9 lb/hr SO2 9 lb/hr VOC 9 lb/hr	15% of the applicable standard or, the supplemental significant threshold, (whichever is more stringent)	FO R	>5% of the operating time during the reporting period ^{4 6}
					O R	any exceedance of the reference limit for >50% of the operating time during the reporting period ³
	Continuous Emissions Monitoring (where the CEM is certified under federal performance specifications)	> 24 hour averaging period		Any violation of the applicable standard		N/A
Violation of applicable opacity standard	Continuous Opacity Monitoring	0-20% opacity >20% opacity		>5% opacity over the limit >10% opacity over the limit	FO R	>5% of the operating time during the reporting period ^{4 6}
	Method 9 VE Readings	0-20% opacity		>50% over limit	AND	Any violation of SIP/NSPS limits ⁵
		>20% opacity		>25% over limit		

Table Footnotes:

- Supplemental Significant Threshold is based on PSD significant levels. The significant threshold value is the lb/hr emission rate at 8760 hours which would result in PSD review.
- Based on the applicable averaging period (e.g. 6-minute block averages).
- For the first reporting period. If exceedances occur for more than 25 % of the operating time during the first reporting period evaluated, and if such exceedances continue during the subsequent consecutive reporting period, the exceedances will be considered high priority violations for both reporting periods if the percent of time in excess exceeds 25% of the operating time during the second reporting period.
- For the first reporting period. If exceedances occur for more than 3% of the operating time during the first reporting period evaluated, and if such exceedances continue during the subsequent consecutive reporting period, the exceedances will be considered high priority violations for both reporting periods if the percent of time in excess exceeds 3% of the operating time during the second reporting period.
- Unless the state or local agency concludes that 1) the cause of the violation has been corrected within 30 days and the source has returned to compliance, or 2) the source was in compliance with an applicable mass limit at the time the Method 9 visual reading was taken.
- This would not include any federally approved exempt period (e.g., startup/shutdown/malfunction 40 CFR 60.11), since these would not be violations.

d. TPDES (Applies as SNC criteria for major facilities only)

- (1)* Effluent violations of monthly average limits for a major (for pollutants listed in Appendix A of the EPA's General Design for SNC Redefinition Enhancement revised December 16, 1996)
- (A) Technical review criteria violations
 - (i) 40% exceedance of a monthly average effluent limit for a specific conventional pollutant (listed in Appendix A - Part 1) at a given discharge point for any two or more months during the two consecutive quarter review period, or
 - (ii) 20% exceedance of a monthly average effluent limit for a specific toxic pollutant (listed in Appendix A - Part 2) at a given discharge point for any two or more months during the two consecutive quarter review period
 - (B) Chronic violations
 - (i) Violations of any monthly average effluent limit at a given pipe for a specific conventional or toxic pollutant (listed in Appendix A - Parts 1 and 2) by any amount for any four or more month during the two consecutive quarter review period
- (2)* Effluent violations of non-monthly average limits for a major (for pollutants listed in Appendix A of the EPA's General Design for SNC Redefinition Enhancement revised December 16, 1996)
- (A) Technical review criteria violations and chronic violations for non-monthly average effluent limits are the same as for monthly average effluent limits as described in provision d.(1) above. However, the following caveat also applies:

When a pollutant has both a monthly average and a non-monthly average effluent limit, a facility is only considered to be in SNC for the non-monthly average effluent limit if the monthly average is also violated to some degree (but less than SNC).

Note: Non-monthly average SNC applies to all maximum and most average (other than monthly) statistical base codes (see Appendix B of the EPA's General Design for SNC Redefinition Enhancement revised December 16, 1996)
- (3) Other effluent violations
- (A) Effluent violation that causes or has the potential to cause a water quality or human health problem

Note: These types of violations are addressed by the application of the criteria in this document
- (4) Non-effluent violations
- (A) Unauthorized bypass, un-permitted discharge, or pass through of pollutants which causes or has the potential to cause a water quality problem (e.g. fish kill, oil sheen) or health problems (e.g. beach closing, fish ban, or other restrictions of beneficial uses)

Note: These types of violations are addressed by the application of the criteria in this document
 - (B) Failure by a POTW to implement or enforce an approved pretreatment program

Note: These types of violations are addressed by the application of the criteria in this document.
- (5) Permit schedule violations
- (A) Failure to start construction, end construction, or attain final compliance within 90 days of the scheduled date
 - (B) Pretreatment schedule milestone missed by 90 days or more
- Note: Formal enforcement is not required for these violations if the violation can be resolved within 90 days of appearing on a selective Quarterly Noncompliance Report (QNCR) or within 90 days of an NOV being sent to the regulated entity for a pretreatment schedule milestone violation not tracked on the selective QNCR
- (6)* Permit reporting violations
- (A) Discharge monitoring report, POTW pretreatment performance report (annual report), or compliance schedule final report of progress (i.e. whether final compliance has been attained) that is not submitted at all or is submitted 30 or more days late
- Note: Formal enforcement is not required for these violations if the violation can be resolved within 90 days of appearing on a selective QNCR.
- (7) Enforcement Order violations
- (A) Judicial Order
 - (i) Any violation of a Judicial Order
 - (B) Administrative Order

- (i) Violation of an effluent limit (or other water quality/health impact) established in an Administrative Order; however, when an Administrative Order limit is as stringent as an applicable permit limit, the facility is considered in SNC only if the permit effluent SNC criteria, set out in numbers d.(1) through (3) above, are met
- (ii) Unauthorized bypass, un-permitted discharge or pass-through of pollutants which causes or has the potential to cause a water quality problem or human health problem
- (iii) Schedule or reporting violation listed in numbers d.(5) and (6)
- (iv) Violation of a narrative requirement or any other violation of concern to the director

e. Underground Injection Control (UIC)

For the UIC program, significant noncompliance means:

- (1) For an owner/operator of a Class I well, violations as described in 40 CFR § 144.8(a) and on EPA Form 7520-4. Minor infractions (e.g., late paperwork, absence of wellhead signs) do not necessarily mean significant noncompliance, unless there is a pattern of repeated, late reporting.
- (2) The following violations by Class I UIC well owners and/or operators include, but are not limited to:
 - (A) Contamination of an underground source of drinking water (“USDW”);
 - (B) Injection of unauthorized fluid(s);
 - (C) Injection into unauthorized zones;
 - (D) Failure to cease injection after loss of mechanical integrity detected;
 - (E) Failure to comply with corrective action requirements;
 - (F) Failure to operate automatic shutdown system;
 - (G) Failure to operate automatic warning system;
 - (H) Unauthorized plugging and abandonment;
 - (I) Violation of Formal Order;
 - (J) Knowing submission of false information;
 - (K) Violations involving loss of mechanical integrity;
 - (L) Violations of maximum injection pressure;
 - (M) Failure to install and/or operate injection pressure and annulus pressure monitoring systems or other monitoring systems, required by permit or rule;
 - (N) Failure to maintain required annulus pressure; and
 - (O) Failure to submit monthly, quarterly, or other reports when original monitoring data have not been obtained and/or retained
- (3) For an owner/operator of a Class II, III, or V well, any unauthorized emplacement of fluids (where formal authorization is required)
- (4) For an owner/operator of a Class II, III or V well, operation without mechanical integrity that causes the movement of fluid outside the authorized zone of injection if such movement may have the potential for endangering an USDW judged according to the following criteria:
 - (A) The characteristics of the fluid release;
 - (B) The quantity of fluid released; and
 - (C) The relationship of the point of release to any USDW. Potential endangerment exists in cases where the release occurs above or into an USDW; or the release occurs below an USDW, but the hydrogeology is such that fluids may be forced upward into the USDW.
- (5) For an owner/operator of a Class II, III or V well, operation at an injection pressure that exceeds the permitted or authorized injection pressure and causes the movement of fluid outside the authorized zone of injection if such movement may have the potential for endangering a USDW. Potential danger exists if:
 - (A) Pressure in the tubingless well exceeds the mechanical integrity test pressure of the casing; or
 - (B) Pressure exceeds the fracture pressure of the confining zone and the zone immediately above the confining zone is an USDW

- (6) For an owner/operator of a Class II, III, V well, failure to properly plug and abandon an injection well in any manner other than what is authorized;
- (7) For an owner/operator of a Class II, III, or V well, any violation of a formal enforcement action, including an administrative or judicial order, consent agreement, judgment, or equivalent State action;
- (8) For an owner/operator of a Class II, III, or V well, the knowing submission or use of any false information in a permit application, periodic report, or special request for information about a well; and
- (9) For an owner/operator of a Class II, III, or V well, any other violation that the Director considers significant.

CATEGORY B VIOLATIONS

CATEGORY B: For Category B violations, the entity will first be given an opportunity to come into compliance within a specified time frame, unless the violation is otherwise designated as a higher priority violation in Category A.

* **NOTE:** An asterisk (*) indicates the determination will be made exclusively or primarily by the central office. Items without an asterisk are screening criteria primarily used by regional offices or criteria used by both regional and central office staff.

COMPLIANCE TIME FRAME: The recommended time frames to correct Category B violations after notification are shown in parentheses after the violation. Where a specific time frame is not designated, the following codes are used:

- TD = TCEQ-established deadline on a case-by-case basis
- SS = Solicit schedule from entity

Time frames for corrective action which are listed for Category B violations should be measured from the date of notification of the violation, unless otherwise noted. The time frame specified is the recommended maximum time that should routinely be given to resolve the violation. A shorter time frame may be imposed on a case-by-case basis if there is a need for quicker action in order to maximize protection of human health and safety or the environment. TCEQ regional staff will apply the verbal notification procedures if the violation qualifies for corrective action through verbal notification under the Commission's NOV Policy.

EXTENSION OF TIME: An extension of time may be granted, but the total time to achieve compliance (including any extra time given for an extension) may not exceed 6 months. This 6 month time frame is in accordance with the requirements of Category A4. An exception to this is allowed if the violation is one of the exclusions specified in Category A4 or if management determines that the situation warrants a compliance time frame longer than 6 months. Refer to the EIC Variance process on page 5 of this document for extensions beyond six months.

Category B violation scenarios that warrant formal enforcement:

1. A Category B violation was documented during two consecutive investigations within the most recent 5-year period ("repeated"), unless otherwise noted (e.g., B19.a.9). When segmented investigations (not multimedia) are conducted, only consider consecutively reviewed compliance requirements (cross-over in scope from one investigation to another) when determining if a B violation has been repeated consecutively;
3. For the PST program, repeat Category B violations will warrant initiation of formal enforcement only if the responsible party is the same owner/operator at the same physical location;
4. A customer did not correct a B violation within the established time frame given in an NOV;
5. A Category B violation has escalated to a Category A violation; and/or
6. A customer fails to respond to an NOV after reasonable effort was made to contact the customer for information on compliance progress and no or an inadequate response is received.

Category B violation scenarios that DO NOT warrant formal enforcement:

- 1) When it has been determined that an entity is compliant with the Ordering Provision for a Category B violation, the subsequent discovery of that same category B violation will be considered the first occurrence in terms of accruing a consecutively-repeated violation; or
- 2) The second consecutive occurrence for a violation can only be counted as a repeat if the second investigation occurs after the compliance due date given in an NOV.

VIOLATIONS (apply to all programs as applicable):

- B1. Complete failure to conduct required monitoring or testing, including self-inspections where applicable (begin correct procedures within 15 days; if not possible to do within 15 days, begin correct procedures at next required event)
- B2. Complete failure to conduct waste analyses and/or waste characterization of a waste stream, including but not limited to, hazardous waste determinations and screening procedures for halogens (rebuttable presumption) (60 days)
- B3. Complete failure to submit or maintain required data, documents, notifications, plans or reports, except Self-Certifications for PST as described in A11.h.8 and Emission Event reports as described in A11.i.8. Refer to A11.i.7 for use of this category for Title V deviation reporting violations. (begin correct procedures within 30 days; if not possible to do within 30 days, begin correct procedures at the next required event; if delinquent material can be produced, submit within 30 days)
- B4. Facility/operation operating without required permit by rule authorization (TD or SS; substantive corrective measures must be initiated within 30 days)
- B5. For a responsible party that has never had a permit at another site under existing requirements: Operating without a permit when a permit is required, provided a Category A6, A8 or A10 violation has not been noted (submit permit application within 60 days and comply with any time frames for submittal of additional information, if required, to process the application; schedule longer than 6 months for obtaining the permit is allowed by the exclusion in Category A4)
- B6. Facility/operation operating without a required registration or notice of intent (submit registration application or notice of intent within 30 days and comply with any time frames for submittal of additional information, if required, to process the application)
- B7.* Facility/operation operating without a required CCN (submit a CCN application within 30 days and comply with any time frames for submittal of additional information, if required, to process the application)
- B8. Facility/operation allowing an unauthorized individual or an individual with an inadequate level of license, certification or other authorization to perform a regulated activity at the facility/operation (employ an individual with required license, certification or other authorization within 30 days)
- B9. Facility/operation operated by an individual with an inadequate level of license, certification or other authorization (TD or SS)
- B10. Construction without authorization or notification, where applicable (cease construction upon notification by TCEQ and refrain from further construction until such time as required authorization is received and/or required notification is provided)

- B11. Documented ground water contamination, soil contamination, violation of the lower explosive limit for methane gas at a landfill, or methane gas migration at a closed landfill where corrective action can be completed within 6 months or less provided a Category A6 or Category A10 violation has not been noted (TD or SS)
- B12. Failure to continue to address documented ground water contamination, soil contamination, violation of the lower explosive limit for methane gas at a landfill, or methane gas migration at a closed landfill within the scope of the Voluntary Cleanup Program or through actions in compliance with a Commission rule, permit, or compliance plan (TD or SS; schedule longer than 6 months is allowed by the exclusion in Category A4)
- B13. Region-documented violation of an emission or discharge quality or quantity limit noted during a record review or on-site investigation conducted by the region or based on sample data collected by the region, **excluding**: (a) a violation of a secondary drinking water standard [handle as Category C7], (b) a violation based on self-monitored or self-reported effluent data from a water quality facility [handle as Category B19.a.(9)], and/or (c) a violation of a pH, chlorine residual, or dissolved oxygen limit for a domestic wastewater treatment plant based on region sample data [handle as Category C7] (TD or SS)

Note: if the only region-documented violation is a secondary drinking water standard, then refer the violation to the Enforcement Division's Section III for development of a CA.

- B14. Unauthorized discharge, release or emission where corrective action will take less than 6 months to complete and the violation is not a Category A6 or an unauthorized discharge from a wastewater collection system [see Category B19.a.(2)] (TD or SS)
- B15. Failure to secure a facility, area or site when required (30 days)
- B16. Failure to construct or provide monitoring system(s) as required (TD or SS)
- B17. Failure to provide noncompliance notification as required (begin correct procedures at the next required event)
- B18. Violation not otherwise listed in Category B or Category A in which exposure of contaminants to the air, water or land is not known to have affected human health and safety or caused a serious impact to the environment but has the potential to cause such impacts if left unaddressed (TD or SS)
- B19. Program-specific violations listed below:

a. Water Quality (excluding TCEQ-regulated AFOs)

- (1) Unauthorized discharge from a wastewater collection system which is the result of infiltration/inflow where corrective action will take longer than 6 months to complete and the violation is not a Category A6 violation (TD or SS; schedule longer than 6 months is allowed by the exclusion in Category A4)
- (2) Unauthorized discharges from a wastewater collection system due to continuing maintenance-related problems or unauthorized discharges occurring at the same location and for the same cause where corrective action will take less than 6 months to complete and the violation is not a Category A6 violation, excluding an unauthorized discharge caused by factors beyond the reasonable control of the regulated entity. (TD or SS)

Examples:

- Frequent manhole overflows at multiple locations or at the same location caused by grease blockages
- Repeated lift station failures at multiple locations or at the same location caused by poor maintenance

Note: Beyond reasonable control refers to an occurrence which the regulated entity cannot prevent (e.g., severe weather damage, some types of vandalism, some types of line blockage, equipment failure). Problems caused by human error or maintenance-related problems (e.g. routine equipment failure) are not considered beyond the reasonable control of the regulated entity.

- (3) Failure to submit a summary letter describing plans for a domestic wastewater treatment system when required (60 days)
- (4) Failure to dispose of sludge in accordance with the required method (30 days)
- (5) Failure to provide adequate runoff control measures for accumulated wastewater sludge (14 days)
- (6) Failure to comply with required wastewater irrigation application rate (TD or SS)
- (7) Failure to implement water protection measures required by an approved water pollution abatement plan for construction activity over the Edwards Aquifer (14 days)
- (8) Failure to implement maintenance and corrective action on a permanent storm water structure (14 days)
- (9) Region-documented self-monitored or self-reported effluent violations noted during a record review or on-site investigation conducted by the region, provided the violations do not meet MEH criteria for a land disposal facility or a Category A6 or Category A10 violation has not been noted.

Note: For these Category B violations, three written notifications within a 5-year period for violations of the same parameter will be required before formal enforcement action may be initiated. Formal enforcement action will be discretionary at the time of the third notification.

b. TCEQ-regulated AFOs

- (1) Failure to de-water pond to accommodate a 25-year/24-hour rainfall event (21 days, weather permitting)
- (2) Failure to maintain a visible, permanent pond marker (14 days)

- (3) Failure to properly dispose of pond solids and all other solid waste materials (30 days)
- (4) Failure to maintain applicable buffer zones (30 days)
- (5) Failure to provide tailwater control when required (30 days)
- (6) Failure to disc applied waste into soil within 48 hours when required (48 hours, weather permitting)
- (7) Failure to develop an adequate PPP when required (60 days)
- (8) Failure to provide adequate runoff control measures for waste storage piles (14 days)
- (9) Inadequate or no waste control facilities for a TCEQ-regulated AFO operating by rule where a Category A6 or Category A10 violation has not been noted (TD or SS; schedule may exceed 6 months as allowed by the exclusion in Category A4)

c. Public Water Supply

- (1) Failure to obtain approval for plans and specifications and/or well completion data for a new ground water system (60 days)
- (2) Incomplete treatment at a surface water treatment plant due to malfunctioning or non-functioning equipment (60 days)
- (3) Water distribution system cross connections (30 days)
- (4) Well located closer than allowable distance to a cited hazard (e.g., drain field), unless the entity has not been able to resolve the violation after making reasonable efforts and there is no apparent risk to public health and safety due to the lack of compliance (TD or SS)
- (5) Low pressure (<20 psi) or outage (30 days; a 15 day extension may be granted if satisfactory progress is being made)
- (6) Failure to maintain the required minimum disinfection residual when disinfection equipment is available (24 hours)
- (7) Failure to repair leaks (14 days)
- (8) Failure to obtain customer service agreements for new customers or an adopted plumbing ordinance (120 days)
- (9) Failure by a community water system to meet a minimum water system capacity requirement, except for those purchased water systems which do not meet the 0.6 gallon per minute per connection requirement, which will be handled as Category C.7.
Note: Failure by a non-community water system to meet a minimum water system capacity requirement should be handled as a Category C5 violation] (TD or SS; schedule longer than 6 months is allowed by the exclusion in Category A4)
- (10)* Violation of the trihalomethane MCL (120 days)
- (11) Failure to have the appropriate backflow prevention device where one is required

d. Industrial and Hazardous Waste

- (1) Failure to meet accumulation time requirements (30 days)
- (2) Failure to properly maintain a closed solid waste management unit (TD or SS)
- (3) Storing waste for more than 10 days at a transfer facility (10 days from verbal notification)

e. Municipal Solid Waste

- (1) Accepting an unauthorized waste at a MSW landfill (30 days)
- (2) Filling over permitted contours at a MSW landfill (TD or SS)
- (3) Placing waste outside of the permitted boundary at a MSW landfill (TD or SS)
- (4) Placing waste in an area not designated or approved for waste disposal within the boundary of a MSW landfill (7 days from verbal notification)
- (5) Failure to apply daily cover at a MSW landfill (24 hours from verbal notification)
- (6) Failure to provide intermediate cover at a MSW landfill (7 days from verbal notification)
- (7) Failure to provide final cover at a MSW landfill (30 days)
- (8) Failure to provide adequate compaction at a MSW landfill (60 days)
- (9) Unauthorized disposal or burning of nonhazardous municipal solid waste where the only economic gain is avoiding the cost of disposing at a landfill (i.e., nuisance dumping) (TD or SS)
- (10) Failure to provide adequate secondary containment for the storage of used oil and/or used oil filters (TD or SS)

- (11) Failure to maintain design requirements for a Type VIII-R waste tire storage facility (30 days)
- (12) Failure to split, quarter or shred scrap tires at a Type VIII-R waste tire storage facility within 90 days from delivery (30 days)
- (13) Failure to comply with vehicle requirements relating to sanitation for transporters of medical waste (14 days from verbal notification)
- (14) Failure to maintain leachate at 12 inches or less (30 days)
- (15) Failure to demonstrate accumulated material is potentially recyclable and economically feasibly recycled, and/or failure to meet applicable time frames and percentages of recycling activities at recycling facilities.

f. Petroleum Storage Tanks

- (1) Failure to perform the temporary or permanent removal of an UST unless the tank is empty [an empty tank should be handled as a Category C6 violation unless it qualifies as a Category A6 or Category A10] (30 days)
- (2) Failure to comply with any general prohibition requirement for an UST specified in 30 TAC §334.5 and 30 TAC §334.12 (30 days)
- (3) Failure to comply with any technical standard requirement for an UST specified in 30 TAC Chapter 334, Subchapter C, except for, release detection, spill and overflow prevention and corrosion protection (See category A11 h), and failure of an empty system to comply with corrosion protection requirements which is a Category C6 violation (30 days). UST systems lacking the upgrade requirements in 30 TAC § 334.47(b) and improperly removed from service prior to the implementation schedule specified in 30 TAC § 334.44(b) shall be handled as B.19(f)(1).
- (4) Late submittal of UST Registration and Self-Certification form, initial and/or renewal, submitted prior to an investigation

g. Air

- (1) Non-clerical air violation not otherwise listed in Category A (TD or SS; substantive corrective measures must be initiated within 30 days)

h. Water Rights

- (1) Refusing to allow, or interfering with the investigation of any land, natural water course, natural waterway, artificial waterway, impoundment, return flow point, or diversion facility by an agent or employee of the Commission or Executive Director that would assist the Commission in the discharge of its duties (7 days from verbal notification)
- (2) Failure to provide a measuring device as required (TD or SS)
- (3) Failure to provide an outlet as required (TD or SS)
- (4) Impounding state water without proper authorization when water is available for appropriation (submit a short term or permanent water right permit application within 60 days and comply with time frames for submittal of additional information, if required, to process the application; schedule longer than 6 months for obtaining the permit is allowed by the exclusion in Category A4 provided compliance is maintained during the permit approval process)
- (5) Diverting, using, or making a dedicated release of state water without proper authorization
- (6) Reported or documented use of state water in excess of authorized amounts
- (7) Failure to report, on an annual basis, the authorized use of state water

i. On-site Sewage Facilities

- (1) Failure to install an OSSF system which meets required standards provided a Category A6 or Category A10 violation has not been noted (30 days)
- (2) Failure to operate one or more OSSF systems cumulatively at less than 5,000 gallons of sewage per day on one piece of property (TD or SS)
- (3) A Designated Representative (DR) operating without certification (attend training course and pass exam at next offering regardless of location)
- (4) Abandoning the construction, installation, repair, modification, or alteration of an OSSF system (30 days)
- (5) Failure to perform maintenance on an OSSF by a valid licensed maintenance company as described by rule or contract.

j. Approved Pretreatment Programs - TPDES POTW as the Control Authority

- (1) Failure to enforce as required by the approved pretreatment program against an IU using dilution as a substitute for pretreatment (initiate required enforcement action within 30 days and monitor/enforce until the problem is resolved)
- (2) Failure to enforce as required by the approved pretreatment program against a discharge to a POTW which results in interference with the treatment process or sludge quality or pass through of pollutants that does not cause a Category A6 or Category A10 violation (initiate required enforcement action within 30 days and monitor/enforce until the problem is resolved)

- (3) Failure to comply up to 90 days beyond the required due date with a pretreatment schedule milestone specified in the permit for the TPDES program (comply within 90 days of the required due date)
- (4) Complete failure to implement any of the following requirements:
 - (A) Issue/reissue SIU mechanisms as required by the approved pretreatment program (30 days)
 - (B) Sample/inspect SIUs as required by the approved pretreatment program (begin correct procedures within 15 days; if not possible to do within 15 days, begin correct procedures at next required event)
 - (C) Establish and enforce SIU self-monitoring and reporting requirements (30 days)
 - (D) Enforce pretreatment categorical standards and local limits as required by the approved pretreatment program (initiate required enforcement action within 30 days and monitor/enforce until the problem is resolved)
 - (E) Publish list of significant IUs in significant noncompliance with pretreatment standards or requirements (30 days or at next required event)
 - (F) Maintain and update IU inventory (60 days)

k. Significant IUs Discharging to TPDES POTWs without Approved Pretreatment Programs - TCEQ as the Control Authority

- (1) Using dilution as a substitute for pretreatment (TD or SS)
- (2) Discharge to a POTW which results in interference with the treatment process or sludge quality or pass through of pollutants that does not cause a Category A6 or Category A10 violation (TD or SS)
- (3) Failure to meet a compliance schedule for categorical standards up to 90 days beyond the required due date (comply within 90 days of the required due date)
- (4) Technical review criteria violations (TD or SS)
 - (A) 40% exceedance of an average limit or daily maximum limit for BOD, TSS, fats, or oil and grease for 33% or more of all measurements taken during a six month period for a specific pollutant limit
 - (B) 20% exceedance of an average limit or daily maximum limit for all other pollutants except pH for 33% or more of all measurements taken during a six month period for a specific pollutant limit
- (5) Chronic violations (TD or SS)
 - (A) Violations of an average limit or daily maximum limit for any pollutant by any amount for 66% of the measurements taken during a six month period for a specific pollutant limit

l. Beneficial use of non-industrial wastewater sludge

- (1) Application of sludge to saturated or frozen ground or during rainstorms
- (2) Application of sludge in excess of annual application rate
- (3) Failure to maintain setback requirements for Class B applications
- (4) Failure to apply sludge evenly to the surface of land

m. Surface Disposal Sites

- (1) Disposal of sludge which does not meet pathogen reduction requirements
- (2) Disposal of sludge which does not meet vector attraction reduction requirement
- (3) Failure to maintain setback requirements required for metals concentrations

n. Landscape Irrigation

- (1) Failure to design, install, maintain, repair, and/or service an irrigation system in a manner that promotes water conservation.
- (2) Failure to space irrigation heads according to the manufacturer's maximum recommended head-spacing
- (3) Heads do not meet the minimum head pressure required by the manufacturer
- (4) Heads are not spaced according to the manufacturer's recommendation for the average nighttime wind speed
- (5) Failure to provide a minimum precipitation rate according to the zone for a particular area as provided by the "Minimum Precipitation Rate for Landscape Systems by Zone" in 30 TAC § 344.1

- (6) Failure to install irrigation piping so that it meets the minimum standards for depth of coverage
- (7) Failure to install water conservation devices according to the manufacturer's recommendation.
- (8) A licensed irrigator designing a system that requires the use of any component part that exceeds the manufacturer's performance limitations for the part.
- (9)* False, misleading or deceptive practices relating to bidding, advertising or fees
- (10)* Failure to provide and/or honor a warranty

o. Storm Water Multi-Sector General Permit

- (1) Failure to conduct the annual comprehensive site compliance evaluation
- (2) Complete failure to conduct annual effluent limitation (heavy metals) sampling (Begin correct procedures at next eligible rainfall event)
- (3) Failure to develop/implement a SWP3 (TD or SS)
- (4) Failure to comply with a no exposure exclusion (TD or SS)

p. Small Construction Activities-Storm Water Construction General Permit

- (1) Failure to make the SWP3 readily available or available on-site (24 hours from verbal notification)
- (2) Failure to post the signed copy of the construction site notice at the construction site (24 hours from verbal notification)
- (3) Failure to submit a signed and certified construction site notice to the operator of any MS4 receiving the discharge 2 days prior to construction (24 hours from verbal notification)

q. Large Construction Activities-Storm Water Construction General Permit

- (1) Failure to make the SWP3 readily available or available on-site (24 hours from verbal notification)
- (2) Failure to develop and implement the SWP3 prior to beginning construction (14 days from verbal notification)
- (3) Failure to submit a NOI to TCEQ at least 2 days prior to or if done electronically, at least 24 hours prior to starting construction (7 days from verbal notification)
- (4) Failure to post the NOI or the construction site notice (24 hours from verbal notification)
- (5) If sediment is escaping the site, failure to remove accumulations of sediment often enough to minimize further negative effects and prior to the next rain event (when feasible) (TD or SS)
- (6) Where sedimentation basins are not feasible, failure to install minimum controls such as silt fences, vegetative buffer strips, or equivalent sediment controls for all down slope boundaries at the site (TD or SS)
- (7) Failure to maintain BMPs in an effective operating condition (7 days from verbal notification)
- (8) Complete failure to conduct inspections of controls (Begin correct procedures according to the time frame specified in SWP3)

CATEGORY C VIOLATIONS

CATEGORY C: A Category C violation is a noncompliance not otherwise designated as a higher priority violation in Category A or Category B.

COMPLIANCE TIME FRAME: The time to come into compliance for a Category C violation will either be a TCEQ established deadline determined on a case-by-case basis or a schedule provided by the entity.

REPEAT CATEGORY C VIOLATIONS: Formal enforcement action may be initiated if the entity receives written and/or verbal notification 3 times within the most recent 5-year period for the same Category C violation, including the notification for the current violation (e.g., chronic repeated). Initiation of formal enforcement action may occur at the time of the third notification at the discretion of the section level manager for the staff who is considering the enforcement action.

VIOLATIONS (apply to all programs as applicable):

- C1. Partial or inadequate implementation of monitoring/testing requirements, including self-inspections where applicable (TD or SS)
- C2. Partial or inadequate implementation of waste analysis and/or waste characterization requirements, including but not limited to, hazardous waste determinations and screening procedures for halogens [rebuttable presumption] (TD or SS)
- C3. Partial or inadequate submittal or maintenance of required data, documents, notifications, plans or reports (TD or SS)

Examples:

- Not providing records in a timely manner when records are required to be readily available for review during an investigation
- Late submittal of required information
- Incorrect calculation of data
- Not having required signature(s) on records
- Failure to modify a declaration of intent in advance of a desired change as required
- Failure to submit planning report (30 TAC 291.93(3))

- C4. Inadequate operation and maintenance (TD or SS)

Examples:

- Windblown waste at a MSW not picked up in a timely manner so as to become a nuisance
- Water mains at a PWS facility not flushed adequately
- Not cleaning sludge out of chlorine contact chamber at a wastewater treatment plant
- Broken clarifier rake at a wastewater treatment plant
- Using slightly torn filter bags for the collection of baghouse dust
- Clogged water sprays used for dust suppression
- Stormwater Sediment not removed from sediment traps/sedimentation ponds before design capacity is reduced by 50%

- C5. Failure to establish sanitary control easements on drinking water wells, unless an exception has been approved by the program division (submit a compliance schedule within 30 days; the responsible party should be required to collect raw water samples until the easement is established or an exception is granted; if raw water samples indicate contamination, further enforcement action should be evaluated)
- C6. For an UST which meets the definition of an empty system as specified in 30 TAC §334.54(d): Failure to comply with the technical standard requirements for corrosion protection (TD or SS)
- C7. Violations not otherwise listed in Category A or Category B (TD or SS)
- C8. Failure by an owner either to perform maintenance or to obtain a maintenance contract on an OSSF

Revised September 3, 2003

Attachment 4

ATTACHMENT 4

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 (NO_x). In severe ozone nonattainment counties the threshold is 25 tons per year for VOC and NO_x.
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

Definitions²

- 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.

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 & EDP/ 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.

Attachment 5

ATTACHMENT 5
Recommendations for Revisions to the Existing Penalty Policy

	Existing Policy	Recommended Policy	Notes
Pen 5 pg 98	Written policy has been adopted and revised through approval by the Commission during open meetings	Promulgate penalty policy in rule, and supplement with guidance, maintaining enough flexibility for commissioner discretion.	
Pen 4 pg 95	Current penalty policy is considered, in and of itself, to result in deterrence.	The deterrent effect of the penalty policy could be improved by establishing a purpose statement to the Penalty Policy articulating the goal of deterrence and by measuring the level of deterrence achieved by enforcement program improvements.	
Related to: Pen 2, pg 89 & Pen 7B, pg 100	Administrative penalties are authorized by statutes governing each program; most programs can assess penalties of up to \$10,000/day/violation; some programs have lower caps.	TCEQ will not seek authority to equalize penalties across all program areas.	

Pen 7B pg 100	Calculate base penalties differentiating between major and minor sources	Continue to differentiate between majors/minors. However, during rule making, ensure definitions of major and minor sources are consistent with those definitions in permitting requirements.	See also the proposal for addressing violations by a small entity, below
7C pg 100	Calculate base penalties using matrix differentiating between violations that resulted in actual vs potential releases	Eliminate potential release category from matrix; Develop standard penalties that are not adjusted upward and downward for most potential release violations.	
7C pg 100	For actual release violations, a base penalty for major respondents is set at 100, 50, or 25% for major, moderate, or minor harm, respectively.	For actual release violations, raise a base penalty for major respondents to 75 or 50% for moderate or minor harm, respectively.	Percentage refers to the percentage of the statutory penalty cap, established program-by-program.
7C pg 100	For actual release violations, a base penalty for minor respondents is set at 50, 25, or 10% for major, moderate, or minor harm, respectively.	For actual release violations, raise a base penalty for minor respondents to 75, 50, or 20% for major, moderate, or minor harm, respectively.	

<p>Pen 3 pg 92</p>	<p>No express policy for adjustment of a penalty based upon a category of being a small business or small local government</p>	<p>A small entity's penalty would be adjusted downward by 15% so long as the violation did not cause actual environmental harm nor could the respondent be classified as a poor performer. Adjustment higher or lower than 15% would be afforded through discretion of the Commission</p>	<p>Entities qualifying for a penalty adjustment would be defined in the penalty policy as a small business, small municipal government, or small county</p>
<p>Pen 7A pg 100</p>	<p>For programmatic violations, set a base penalty varying between 25 and 1%, depending on the degree of deviation from a requirement with some differentiation between major and minor respondents.</p>	<p>Develop standard penalties that are not adjusted upward and downward for most potential release and programmatic violations.</p>	<p>Continue to adjust penalties upward or downward due to site-specific circumstances relating to failure to obtain authorization/permit.</p>
<p>Related to Pen 2 pg 89</p>	<p>Policy sets guidelines for handling "continuing" violations and uses a matrix to link the number of events to a level of impact that results from the violation</p>	<p>No change recommended</p>	<p>See also economic benefit discussion, below</p>

<p>Pen 1B - E</p> <p>pg 88</p>	<p>Base penalties are adjusted upward based upon review of up to 8 specific compliance history rule components/ subcomponents.</p> <p>Base penalties are adjusted downward based upon review of up to 6 specific compliance history rule components/ subcomponents.</p> <p>Base penalties are also adjusted upward or downward by 10% based upon a high or poor classification.</p>	<p>Simplify adjustments by eliminating the Compliance History Worksheet (from page 2 of the Penalty Calculation Worksheet). Use only the penalty adjustment based on the overall compliance history classification of the respondent.</p>	
<p>N/A</p>	<p>Base penalties are adjusted upward (only) by 25% if respondent is a repeat violator as defined in compliance history rules.</p>	<p>No change recommended</p>	<p>Compliance History Definition & Components Subcommittee is recommending revisions to definition of repeat violator.</p>
<p>N/A</p>	<p>Base penalties are adjusted upward (only) by 25% if respondent is deemed “culpable”.</p>	<p>No change recommended</p>	

<p>Pen 8 pg 102</p>	<p>Base penalties are adjusted downward by 50% to 10% based on completion of all actions necessary to correct all violations. Range of reduction is based on degree of effort and timeliness.</p>	<p>Allow a 30 to 20% downward adjustment, calculated separately for each violation that is corrected. Allow the higher deduction for violations resolved prior to issuing NOV/NOE.</p>	<p>No downward adjustments would be allowed in cases involving culpability, repeat violators, and when there is no capital outlay involved in compliance with the requirement.</p>
<p>Pen 2 pg 89</p>	<p>Base penalties are adjusted upward by 50% when an economic benefit is determined to exceed \$15,000. Three scenarios are evaluated:</p> <ul style="list-style-type: none"> • the one time cost and interest a respondent earns while delaying a capital cost • the return a respondent earns by delaying a one-time expenditure • a savings by avoiding the cost of complying with some one-time or periodic requirement. 	<p>Subcommittee recommends several alternative approaches to assess higher penalties when the determination of economic benefit is made:</p> <ul style="list-style-type: none"> • recover full economic benefit rather than adjusting a base penalty • remove the \$15,000 criteria found in the existing policy • add discretion in policy to review profits or to use BEN model to address complex or significant violations • differentiate between how large or small entities are handled • simplify calculations by eliminating the estimation of depreciation of value 	<p>To implement policies that recover the full economic benefit (such as an add on penalty, rather than an adjustment of a base penalty), it may be necessary to increase the number of events that a continuing violation is cited, in order to achieve the desired result while staying within a statutory penalty cap.</p> <p>If an economic benefit penalty was mitigated due to expenditures that brought respondent back into compliance, these costs could sometimes dwarf any penalty amount.</p>

N/A	After all adjustments, the calculated penalty may be adjusted either upward or downward due to other factors that justice may require.	No recommended change	
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<p>Pen 2</p> <p>pg 89</p>	<p>A 20% deferral of a penalty is allowed for 1660 styled orders only, where a respondent:</p> <p>Has not received a previous NOV or NOE for similar violations, including the instant case, in the past 5 years;</p> <p>Has not submitted compliance plans for prior violations noted in the same program; and</p> <p>Has not been assessed with documentation of culpability.</p> <p>Additionally, the 20% deferral is withdrawn if settlement is not achieved during the expedited process, and the case is referred to LD.</p>	<p>Eliminate deferrals. They do not speed up the existing process. Maintain the existing policy of no deferrals for a culpable violator.</p>	
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<p>Pen 10 pg 104</p>	<p>There is no policy to enhance a penalty when a respondent does not reply to a petition or when a respondent does not show up at a hearing.</p>	<p>Additional penalties should be included in a default order when a respondent does not reply to a petition and when the respondent replies to a petition requesting a hearing but does not show up to the hearing.</p>	
<p>EP 1 pg 209</p>	<p>The current commission practice on penalty enhancement is to update the PCW when referring the case to LD if the violations are continuing. Additionally, if a deferral was originally offered during the expedited process, that deferral is withdrawn (a 20% enhancement to the original settlement offer).</p>	<p>Increase the proposed penalty by 25% if a respondent fails to settle within 30 days of receiving the draft order.</p>	
<p>Pen 12 pg 107</p>	<p>It is current commission practice and policy to impose joint and several liability for different respondents responsible for the same violation.</p>	<p>This policy should not be revised, but should be formalized and possible exceptions described.</p>	

<p>Pen 6 pg 99</p>	<p>Currently, no consideration is given to investment in pollution control equipment not mandatory under an agency requirement.</p>	<p>No change from this policy is recommended.</p>	
<p>Pen 11 pg 107</p>	<p>TCEQ pursues a penalty in enforcement cases where expended agency resources may exceed penalty amounts collected, for example in cases with a <i>de minimis</i> fine.</p>	<p>No recommended change. The agency should continue to pursue issuance of orders with no penalties and only corrective actions. A mandatory minimum penalty, although small, may be required in certain cases.</p>	
	<p>The current policy is to update the PCW prior to a SOAH evidentiary hearing (similar to updating the PCW when initially referring a case to LD) when the violations are continuing.</p>	<p>No change recommended.</p>	

**Consideration of the Biennial Report to the 79th Legislature, FY
2003-FY 2004.**

From the Commission

The TCEQ is a large, complex agency. What we do, and how we do it, involves and affects every resident of the state. As TCEQ commissioners, we approach our jobs with the fundamental tenet that we are the humble servants of the people of Texas. This belief influences every decision we make, and points us toward continually striving to improve how we perform our critical mission.

Consistent with that belief, we have undertaken a number of initiatives that will impact planning and operations for years to come. These steps will literally change how we do business and will help ensure that our programs are effective, efficient, just, and responsive to the needs of all Texans.

One initiative will improve how we collect and use vital information on environmental conditions. The Environmental Monitoring and Response System (EMRS) will detect and react to air and water pollution on a real-time basis. Through a pilot project, the agency is testing a system near the Houston Ship Channel that notifies industry as soon as troublesome air patterns appear. Industry then can react before serious pollution forms. A parallel pilot project with water pollution near Waco is under way, too. Our ultimate goal is to deploy a permanent system that will allow us to more rapidly convert data to knowledge and action, as well as put information in the hands of the public.

In another culture change, we have looked internally at our enforcement process in a top-down, comprehensive review. We scrutinized everything—from how we initiate enforcement to use of compliance history. As a result, the commission will implement meaningful changes to ensure that the enforcement process is swift, fair, and effective.

In addition, the TCEQ is dealing with major regulatory challenges. New, more stringent air quality pollution standards must be met in some urban areas, starting in 2007. Tougher drinking water standards could affect several hundred water suppliers. Work is under way to rewrite rules governing municipal solid waste landfills. And the agency will begin the process of licensing a proposed low-level radioactive waste disposal facility.

Meanwhile, there is good news to report. El Paso has monitored compliance for three different air pollutants that once posed problems, and Texas has been declared in compliance of the federal standard for "fine" particulate matter, or PM2.5.

We are excited at finding new opportunities. Every year, we continue to enhance existing public-private partnerships and to create new ones. In doing so, we can achieve better efficiencies with existing resources. By making better use of existing technology and knowledge, we can further environmental protection. The TCEQ looks forward to the many challenges that lie ahead.

Kathleen Hartnett White, Chairman

R.B. "Ralph" Marquez, Commissioner

Larry R. Soward, Commissioner

Planning for the next Commissioners' Work Session.

NATIONAL COMMENTS LOG

SUBM TO	DATE	SHORT TITLE	TNRCC COMMENTS	DIV PREPARING	DIV CONTACT
EPA	9/20/2004	2005 Exchange Network Guidance	<p>Our proposed comments fall into two broad categories, flexibility in grant proposals for electronic discharge monitoring reports, or e-DMRs, and eligibility criteria for receiving a grant.</p> <p>The comments on proposal flexibility focus on EPA's stated intention to prevent e-DMR proposals from including functionality to submit e-DMRs to the Permit Compliance System (PCS) or use the current submission format, the Interim Data Exchange Format (IDEF). While this language is not within the draft guidance, the EPA indicated during the September 9 meeting that such language would be included in a revised draft. The EPA intends to produce an errata document which includes this restriction, but that document was not available in time for the preparation of these comments. The eligibility criteria comments focus on the definition of an operational Network Node, which does not consider reporting time lines and may impact our eligibility to apply for a grant. The most significant concern with the draft guidance is the intention to prevent submissions to PCS or the use of IDEF. At least one state, Michigan, already flows e-DMRs to PCS in the IDEF format. The modernized PCS, called the Integrated Compliance Information System (ICIS), is not scheduled to accept uploads of e-DMRs until the Fall of 2007. Which is a year later than what they told us last year. The proposed guidance language would prevent an e-DMR system from going on-line until at least the Fall of 2007. That assumes ICIS will meet that Fall 2007 target date, which is unlikely given the history of that project.</p>	Office of Administrative Services	Gregg Nudd

SUBM TO	DATE	SHORT TITLE	TNRCC COMMENTS	DIV PREPARING	DIV CONTACT
EPA	9/30/2004	Stage II Vapor Recovery Systems Issues Paper	<p>Phase-out of Stage II systems once widespread use is determined. Simply ceasing to investigate gasoline dispensing facilities (GDFs) with Stage II would have a negative effect as numerous vacuum-assist systems would remain in service without maintenance or oversight.</p> <p>Actual in-use efficiency (IUE) for ORVR systems. The EPA issue paper notes an ORVR efficiency of 98% without referencing any studies undertaken to determine the actual IUE.</p> <p>Will EPA mandate ORVR compatibility for states choosing to continue Stage II after widespread use? If so, how does EPA recommend states determine ORVR compatibility of current systems outside of CARB's EVR certification program?</p> <p>The issues paper notes that the Houston-Galveston area of Texas has a vacuum-assist system percentage of 64%. The actual percentage is approximately 92%.</p> <p>If the proposed widespread use definition is adopted, would the EPA provide guidelines on the accurate determination of in-use efficiency for existing Stage II systems?</p> <p>Will guidance on exemptions for facilities dispensing 100% of fuel to ORVR-equipped vehicles (rental car facilities and car dealerships) be forthcoming?</p> <p>From a modeling standpoint, definition "b" would be the easiest, and the most realistic way to determine widespread use.</p> <p>Any widespread use definition requiring data on percent of gasoline dispensed would be very difficult to implement.</p> <p>TCEQ agrees with the EPA regarding the need for new emission factors. Currently, only Stage I and Stage II factors allow for local input (others are generic). It may be more beneficial to also allow local inputs for such things as liquid temperature and Reid vapor pressure.</p>	Environmental Planning and Implementation	Ashley Forbes
EPA	10/5/2004	Nitrogen Oxides Exemption Guidance for the Proposed Rule to Implement the 8-hour Ozone National Ambient Air Quality Standard	<p>Alternatives to photochemical modeling to support an exemption should not be eliminated. More specific guidance needs to be provided regarding the standards and criteria on what an area can become exempt from, and under what conditions. Guidance needs to be provided on how frequent and how extensive additional support will need to be to maintain an exemption.</p>	Environmental Law	Laura Pfefferle

SUBM TO	DATE	SHORT TITLE	TNRCC COMMENTS	DIV PREPARING	DIV CONTACT
EPA	10/29/2004	Test Procedures for Testing Highway and Nonroad Engines and Omnibus Technical Amendments; Proposed Rule	<p>Provide support and encouragement for EPA's continued efforts to consolidate testing requirements and procedures for nonroad and highway engines.</p> <p>Provide support for EPA's effort to certify low-power engines in locomotives.</p>	Technical Analysis	Scott Carpenter

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Last Update: November 2, 2004

Scheduled on: December 17

<u>Short Title of Issue</u>	<u>Lead Office & Staff</u>	<u>Date Issue Referred</u>
EMRS	OCE/Steib	8/16/04
Rule Petition/CCN	OPRR/Doug Holcomb	

Scheduled on: Standing Items

<u>Short Title of Issue</u>	<u>Lead Office & Staff</u>	<u>Date Issue Referred</u>
State and Federal legislation potentially affecting the TCEQ and other issues related to actions taken by the Texas Legislature	IGR/Lenny Olsen	1/1/2004
Enforcement Report	OCE/Anne Dobbs	1/1/2004
SIP Activities	OEPA	1/1/2004
Planning for next work session	Commissioners' Executive Assistants	1/1/2004
Public Comment Session	Public Participation	10/24/03

Scheduled on: To be determined

<u>Short Title of Issue</u>	<u>Lead Office & Staff</u>	<u>Date Issue Referred</u>
Permit back log and time lines	OPRR	12/1/03

Tentative Dates for August 2004 - August 2005
Commissioners' Work Sessions
Last Update: 11/2/04

DATE OF WORK SESSION	TIME OF WORK SESSION	FILE AGENDA WITH POLICY AND REGULATORY DEVELOPMENT OFFICE by NOON (effective 11/02/04)	EXECUTIVE SUMMARY DEADLINE by noon unless otherwise stated (effective 9/7/04)
November 1	9:30 am - 12:00 n	October 22	October 22
November 15	9:30 am - 12:00 n	November 5	November 5
December 17	9:30 am - 12:00 n	December 8	December 8
January 14	9:30 am - 12:00 n	January 5	January 5
February 11	9:30 am - 12:00 n	February 2	February 2
March 11	9:30 am - 12:00 n	March 2	March 2
April 15	9:30 am - 12:00 n	April 6	April 6
May 13	9:30 am - 12:00 n	May 4	May 4

NOTE: These dates are subject to change. Some backup deadline dates were moved up a day or two due to holidays.

Closed Session:

- a. Docket No. 1998-1154-EXE. The Commission will meet in closed session to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of the Commission's Executive Director, as permitted by Section 551.074 of the Texas Open Meetings Act, Chapter 551 of the Government Code. The Commission may also meet in open session to take action on this matter as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.**

- b. Docket No. 1999-0024-EXE. The Commission will conduct a closed meeting to receive legal advice and will discuss pending or contemplated litigation, settlement offers, and/or the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of specific commission employees, as permitted by Sections 551.071 and 551.074, the Open Meetings Act, codified as Chapter 551 of the Government Code. The Commission may also meet in open session to take action on a legal or personnel matter considered in the closed meeting as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.**

- c. Docket No. 1999-0025-EXE. The Commission will conduct a closed session to discuss their duties, roles, and responsibilities as commissioners of the TCEQ pursuant to section 551.074 of the open meetings act, codified as chapter 551 of the government code. The Commission may also meet in open session to take action on this matter as required by Section 551.102 of the Texas Open Meetings Act, Chapter 551 of the Government Code.**