

Arlington Penalty Rule Stakeholder's Meeting
North Central Texas Council of Governments, 616 Six Flags Dr.

December 1, 2005

2:00 pm thru 6:00 pm

Meeting Summary -

Includes Both Verbal and Written Comments Provided During the Meeting

I. Welcome and Introductions

Jody Henneke, TCEQ Office of Public Assistance, opened the meeting by introducing TCEQ staff: John Steib, Deputy Director, Office of Compliance and Enforcement; John Sadlier, Director of the Enforcement Division; Anna Brulloths, Office of Compliance and Enforcement; Anne Dobbs and Mary Jennings, Special Assistants to the Director of the Enforcement Division; Tracy Gross, Assistant General Counsel; Melinda Houlihan, Small Business & Local Government Assistance, Austin; John Gillen, Office of Public Assistance; Frank Espino, Regional Director, Region 4 - Dallas/Fort Worth; Judy Kluge and Cheryl Thompson, Enforcement Coordinators, Region 4 - Dallas/Fort Worth; and Tasha Burns, Compliance Assistance Specialist, Region 4 - Dallas/Fort Worth.

The following introductory remarks were made by Jody Henneke: This is a continuation of the enforcement review process that has been ongoing for the past 2 years. As part of this process, the Commissioners asked staff to conduct a series of stakeholder meetings and get input on the current enforcement penalty policy and five or six components included in the handouts, which is why we are here today. Comments may also be submitted in writing through December 19, 2005. Following the meetings, Anne Dobbs will post meeting summaries and a list of attendees on the web site as well as summaries of any written comments received after the meetings.

II. Scope of the Proposed Rule

John Sadlier explained that the Commissioners directed that the Executive Director obtain stakeholder input regarding the current penalty policy. The Commission is contemplating several revisions to its current policy and may adopt the revised policy as a rule. Items that will be reviewed in this process include, but are not limited to, the definition of small business and small local governments, in what manner the Commission will address economic benefit, compliance history, good faith efforts to comply, and other factors as justice may require. This rule making will specify how these factors will be considered in the penalty calculation. The rule may include standard penalties; examples are included in the handout material. This rule making will not address which violations will be referred for enforcement. Staff does not contemplate that the Administrative Penalty Rule will directly address supplemental environmental projects or field citations, however, the rule will likely reference these projects.

John Steib explained that we have three very dedicated Commissioners who want to be sure that we provide every opportunity that we can to hear what stakeholders have to say. At the conclusion of these six stakeholder meetings, we will be briefing the Executive Director and Commissioners on the comments we have received and will then receive direction on how to move forward. Mr.

Sadlier indicated that we assume that the Commission will request that staff draft a proposed rule. At this point in time, we are uncertain as to how the Commission will move forward with the proposal and whether or not there will be additional stakeholder meetings or hearings.

III. Procedural Ground Rules

Stakeholders were asked to step up to the microphone and provide comments on the current penalty policy and/or any of the background materials provided. Attendees were told that their comments would be summarized, posted on the Agency's website, and shared with the Commissioners. No final decisions have been made on any aspects of the rule making at this time.

IV. Opportunity for Comments on the Major Elements of the Proposed Rule or Related Issues

The following comments were received from stakeholders:

Economic Benefit

First time violations should not have an economic benefit penalty for small businesses. For the majority of these businesses, the cost of compliance in itself has a substantial economic impact and should suffice.

Small Business/Small Local Governments

- The employee component of the definition for small businesses should be 100 employees or fewer with no income associated with the definition due to the complexity of determining financial assessments for small businesses across the spectrum.
- The rule should not provide for a standard downward adjustment of a penalty for a small business. It should provide for a deferral of penalties in lieu of a standard downward adjustment.
- The rule should allow entities under enforcement and facing a penalty to defer 100% of the penalty with the agreement that an investment will be made in the entity's operations to achieve compliance.
- The rule should allow for longer compliance deadlines for small businesses on a case-by-case basis.
- There should be a way for small businesses to work off penalties so that they do not have to come up with a large amount of money at one time.
- Small businesses and governments are different than big businesses in people and knowledge resources and money. TCEQ needs to recognize these limitations.
- In the small business advisory committees there does not appear to be a consensus on how to define a small business based upon financial considerations. If there does have to be a financial consideration it should be set at no less than \$15 million gross sales.
- If a financial consideration is used it should be based upon cost of goods sold, for example, gross revenues minus cost of goods sold, then gross profit would be determined from that. If that were used, then a gross profit of \$1 - 2 million could be used.
- Calculated penalties should not be different between small and large businesses, but, the penalty for small businesses, who are first time violators, should be used to get them into compliance rather than paid to the State. This would keep them in business and work to get

them compliant, rather than force them into bankruptcy. After given this chance to get compliant and then they continue to be non-compliant several times, then after the third chance, they should just be treated the same as all violators and should not be treated differently.

- If a small business self reports a violation then they should be provided compliance assistance rather penalized.

Good Faith Efforts to Comply

- Since smaller companies have limited economic and human resources, the rule should provide for good faith reductions when some, but not all, violations are corrected. This will encourage early compliance from respondents.
- The rule should prohibit the application of a good faith reduction for respondents that are deemed culpable.
- The rule should prohibit a good faith reduction in Default Orders.

Culpability

- The rule should provide for a penalty reduction in cases where the violations were documented during a self-inspection and voluntarily self-reported. This would provide an incentive to respondents.
- An entity should be considered culpable if it has been previously issued an NOV, NOE, or Commission Order. An exception would be if the company is permitted or registered; otherwise there will be a disincentive to permit or register.

Standard Penalties

- Standard penalties should be established and this will help make the enforcement penalty process more transparent. There should be a list or matrix developed that is published to clearly outline the violations and associated penalties. Stating that they will be percentages of the statutory maximum is confusing.
- Industry needs to know what the penalty will be. The current policy is confusing and hard to understand, particularly for small businesses. They need to know what to expect so that they understand the consequences of non-compliance - standardized penalties would be good.

Other Issues

- For purposes of determining a repeat violator, a Department of Defense or Texas National Guard installation, along with its annexes, facilities, training ranges and adjoining land, should be considered a governmental subdivision or agency as described in 30 TAC §3.2(25). However, the compliance history of one military installation should not count against the compliance history of a separate installation.
- The following definition should be added to the definition of person in 30 TAC §3.2(25): Each military installation shall be defined as a separate person for purposes of determining repeat violator status under rule 30 TAC §60.2(d).
- A definition of “military installation” should be added to 30 TAC Chapter 3: A Department

- of Defense or Texas National Guard installation to include its annexes, facilities, training ranges and adjoining lands under the direct responsibility of a single local commander.
- Each military installation is commanded by separate and distinct military commanders who maintain separate operating budgets for their respective installations. The purpose of enhancing penalties for corporations and other organizations with multiple locations and operations does not have the same deterrent effect for military installations. Encouraging measures to enhance compliance on a military installation is best accomplished by giving an installation commander control over his individual compliance history, rather than penalizing him for violations beyond his control.
 - TCEQ should not penalize for self reported data. Self reported data (DMRs) are currently counted as if the violations have been included in a final order when they are really just self reported violations - that is objectionable. If you get hit for self reporting you are basically getting hit for doing what you are supposed to be doing (self report) when there are so many others that are not.

V. Closing Remarks

Attendees were told that the TCEQ staff would be here to take comments until 6:00 pm. They were also told that they were welcome to come talk to staff “off the record” but if they wanted to provide comments on the penalty policy and upcoming rule, then we would ask them to speak “for the record” and would turn the microphone and recorder back on.