

Below is an Electronic Version of an Out-of-Print Publication

You can scroll to view or print this publication here, or you can borrow a paper copy from the Texas State Library, 512/463-5455. You can also view a copy at the TCEQ Library, 512/239-0020, or borrow one through your branch library using interlibrary loan.

The TCEQ's current print publications are listed in our catalog at <http://www.tceq.texas.gov/publications/>.



January 2005
CTF-013

Enforcement Process Review Final Report

Enforcement Process Review Committee

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Enforcement Process Review Final Report

Prepared by
Enforcement Process Review Committee

CTF-013
January 2005



Kathleen Hartnett White, *Chairman*
R. B. “Ralph” Marquez, *Commissioner*
Larry R. Soward, *Commissioner*

Glenn Shankle, *Executive Director*

Authorization to use or reproduce any original material contained in this publication—that is, not obtained from other sources—is freely granted. The commission would appreciate acknowledgment.

Copies of this publication are available for public use through the Texas State Library, other state depository libraries, and the TCEQ Library, in compliance with state depository law. For more information on TCEQ publications, call 512/239-0028 or visit our Web site at:

www.tceq.state.tx.us/publications

Published and distributed
by the
Texas Commission on Environmental Quality
PO Box 13087
Austin TX 78711-3087

The TCEQ is an equal opportunity/affirmative action employer. The agency does not allow discrimination on the basis of race, color, religion, national origin, sex, disability, age, sexual orientation or veteran status. In compliance with the Americans with Disabilities Act, this document may be requested in alternate formats by contacting the TCEQ at 512/239-0028, Fax 239-4488, or 1-800-RELAY-TX (TDD), or by writing P.O. Box 13087, Austin, TX 78711-3087.

Table of Contents

- Executive Summary 1
 - Background 1
 - Significant Recommendations 1

- Factors Affecting Implementation 8

- Attachment 1: Key Issues Tables 9
 - Compliance History Components/Definitions 10
 - Compliance History Classification 37
 - Compliance History Use 70
 - Penalty Policy 88
 - Ordering Provisions 124
 - Supplemental Environmental Projects (SEPs) 141
 - EIC/Investigation Prioritization/NOVs/NOEs 157
 - Collections/Financial Inability to Pay 173
 - Enforcement Process/Agency Coordination 209
 - Enforcement Process - Communications 234
 - Complaint Procedures 244

- Attachment 2: Summary of Public Input 306

Executive Summary

Background

In December, 2003, the TCEQ announced a comprehensive review of its enforcement functions to ensure that the agency is enforcing environmental laws fairly, effectively, and swiftly.

In the course of the review, the agency solicited public comment through a mail and web survey, along with hearings in Houston, Harlingen, Dallas-Ft. Worth and Midland. A steering committee established by the executive director, along with chairs of three major committees and a number of subcommittees, reviewed the comments and identified key issues raised in the comments. These issues were then published on the web site for additional comment.

The steering committee identified seven criteria for the evaluation of issues:

- Improvement of the enforcement process
- Clarity, transparency, and simplicity
- Consistency across regions and programs;
- Impact on small business;
- Maximizing compliance through deterrence and incentives;
- Maximizing benefit to the environment in the agency's enforcement policies; and
- Timeliness, efficiency, and effectiveness.

Three broad categories of issues were identified:

- compliance history
- the enforcement process
- penalties and corrective action

These issues were further subdivided into a number of key issues, which were assigned to subcommittees for research, analysis and recommendation. The subcommittee recommendations were collected and reviewed by the chairs of the three major issues, who in some cases recommended changes. The report of the chairs was then evaluated by the full steering committee, and any changes that were deemed necessary were made. The current document represents the recommendation of the steering committee to the commissioners.

Significant Recommendations

All of the recommendations are included in Attachment 1 of this report. The attachment summarizes the analyses and recommendations proposed by the subcommittees to address each key issue identified. In each instance, a primary recommendation is identified, and the basis of the recommendation is discussed. In some cases, alternative recommendations and analyses are also included. Depending upon the recommendation, implementation may require anything from an operational change up to a statutory change followed by a rule process and policy and operational changes.

The most significant changes proposed are also summarized in Table 1. Collectively, these significant recommendations would result in important improvements to the enforcement program.

Focus on Environmental Harm

Several recommendations would sharpen the agency's focus on preventing and reducing risk to human health and the environment. Implementation of these recommendations would assign a higher priority and additional agency inspection and enforcement resources to those violations causing harm or that have the potential to cause harm. For instance, inspections would be scheduled based primarily on a facility's potential risk to the environment. Because unauthorized facilities are less likely to install the controls needed to protect the environment, field resources would also be reserved every year to address sectors that have high levels of unauthorized operations. To ensure proper enforcement against environmental problems detected through citizen complaints, the agency would implement a new complaints manual and a nuisance odor protocol. Base penalties for violations that caused actual environmental harm would be increased. Finally, an entity's compliance history score would be based more on the frequency of violations causing environmental harm. Penalties would also be enhanced when a violator does not respond to enforcement notices.

Strengthen the TCEQ Enforcement Program

Several recommendations would make the enforcement program stronger by making the process faster and more predictable. By eliminating individual assessments for minor violations, the use of standard penalties would shorten timelines and allow a shift of resources to serious violations. The use of standard and minimum penalties would also make outcomes more predictable, which enhances deterrence. Eliminating deferrals and enhancing penalty amounts for cases that do not settle quickly could encourage speedier resolution of cases and address violations more quickly.

Other recommendations would more firmly tie violations to appropriate consequences. For example, ensuring that penalties reduce the economic benefit of non-compliance would take away an important incentive for non-compliance. In order to ensure that penalties are paid promptly, interest charges would be assessed on overdue penalties, and the agency would adopt new procedures to collect delinquent fees and penalties. These procedures would include the use of a collection agency, additional referrals to the Attorney General for collection, and the return of permit applications if the applicant has past due fees and penalties. A poor compliance record should also limit an entity's opportunity to obtain new authorizations. For example, if an applicant has a poor compliance record, the agency would either return the application up front, or add conditions designed to ensure compliance.

Streamline the Enforcement Process

Much of the public comment focused on how long the enforcement process takes. The subcommittees looked at ways to shorten the existing process and considered options for a

fast-track process for certain enforcement cases. Changing and enforcing the current “expedited” timeline could reduce the average length of the enforcement process by as much as 125 days.

The process could also be streamlined by simplifying the penalty policy and establishing standard penalties would expedite the calculation of penalties and the issuance of orders. Setting firm deadlines for submitting SEP proposals and documentation of financial inability to pay that are much earlier in the process would ensure earlier review and reduce delay. A greater variety of pre-approved SEP projects and the use of tools such as thresholds and EPA software for financial inability to pay reviews should further speed the process. In addition, a field citation program in which the regional offices would assess fines directly could allow immediate resolution of some violations. These improvements should also increase deterrence by shortening the time period between when the violation occurs and when the agency takes enforcement action.

Simplify and Clarify the Process

Many of the public comments indicated that the current enforcement process is too complicated and hard to understand. Based on these comments and guidance from the Steering Committee, we recommend that two key areas would be simplified: the calculation of compliance history ratings and the assessment of penalties. First, compliance history would be based on having violations that have harmed or are likely to harm the environment rather than on a complicated mathematical formula.

The committee recommends several changes to the penalty policy to make it simpler and more accessible. First, we recommend that the commission adopt the penalty policy in rules so that it can be easily found by all citizens. The rule process will also allow all interested parties to provide input on the priorities contained in the document. In order to make the calculation of penalties more understandable, the TCEQ would eliminate the penalty matrix and replace it with common categories of violations. Potential harm and paperwork violations would be addressed primarily with standard penalties. To eliminate double-counting and make the process simpler, the TCEQ would no longer consider compliance history components in calculating a penalty. Instead, staff would simply use an entity’s compliance history rating to determine whether a penalty should be increased or decreased.

Recommendations Relating to Small Entities

An estimated two out of three enforcement cases now brought by the TCEQ address either a small business or a small local government. One of the committee’s criteria for evaluating issues was how small local governments and businesses are affected. This evaluation led to a recommendation to change the penalty policy to allow for penalty reductions of 15% to small entities. So that monies can be applied toward correcting problems, the committee also recommends that there be an opportunity for small local governments to defer penalties. If the

environment would not be affected, small entities could also receive additional time to come into compliance. Finally, the committee recommends that the commission adopt a consistent definition of “small” for purposes of enforcement.

The committee recommends no changes in the criteria for referral for formal enforcement to address small entities, or to the requirements for corrective action. SEPs with a 100% offset of a penalty would continue to be available to small cities and local governments.

Resource and Training Needs

The review identified several changes that would improve the effectiveness of agency enforcement staff. There may be a need for additional employees in the Litigation Division, and in the administration of both the SEP and financial inability to pay programs, but enforcement and investigative resources were found to be adequate at this time. However, the committee recommends reviewing the allocation of enforcement and investigative resources after the recommendations have been implemented to determine whether some shift in staffing is needed to address enforcement priorities. In addition, development of media-specific expertise in enforcement and a formal mentor program in Field Operations and Enforcement could make the programs more effective. Providing additional technical training to investigators, enforcement staff, and attorneys would also improve the effectiveness of enforcement staff. Finally, training more agency staff in CCEDs applications and providing more specialized access to enforcement information would improve the agency’s use of compliance history information and enforcement data.

Access to Enforcement Information and Public Outreach

The committee also recommends several changes to provide better public access to agency enforcement information and a clearer understanding of enforcement goals and procedures. The public web site access for reporting environmental complaints should be more informative and accessible, especially from the home page. The web site should also include enforcement process information, including case status information and access to Commission-issued orders, along with a clear, step-by-step description of the process. These pages should also include links to other enforcement-related topics such as compliance history, SEPs, and investigation and complaint information. The enhanced web site would provide a more complete look at the enforcement process and would allow the public access to site-specific enforcement information. Additional information would be added to the public web site on compliance history and complaint information such as the nuisance odor protocol and enhanced citizen-collected evidence information. Enforcement outreach materials would be reviewed and updated for a larger audience including citizens, and there would be more focus on agency outreach efforts at the regional level. Finally, a targeted public campaign would be implemented to encourage public awareness and reporting of violations that harm the environment. These recommendations would improve the public’s perception of the enforcement process by making it more open and easier to understand.

**Table 1:
Significant Recommendations from the Enforcement Review**

1. Risk based approach to investigation priorities incorporating agency wide input (pg 157)	2. Strategy to identify and inspect unauthorized facilities (pg 161)
3. Agency wide effort to maintain an up to date EIC document (pg 164)	4. Implement the draft guidance document for investigations of complaints; implement the draft nuisance protocol (pgs 244, 262)
5. Modify the agency's web site to make complaint reporting easier (pgs 237, 297)	6. Reduce the timeframe to move cases through the enforcement process (reducing it by as much as 125 days for expedited process) (pg 209)
7. Establish firm deadlines for submittal of financial inability and SEP documentation (pgs 225, 228)	8. Develop a limited field citation program (pg 220)
9. Enhance enforcement staff qualifications and specialization (pgs 229, 231)	10. Simplify the overall penalty calculation methods by using only the compliance history classification, and eliminate use of specific compliance history components (pg 88)
11. Eliminate the \$15,000 threshold for economic benefit enhancement and recover economic benefit of noncompliance up to statutory caps, rather than adjusting the base penalty (pg 89)	12. Establish downward penalty adjustments available to some defined small entities, reducing the penalty by 15% and allowing Commission discretion to consider further adjustments (pg 92)
13. Adopt the penalty policy by agency rule (pg 98)	14. Simplify penalty policy by eliminating "potential release" from the matrix and increasing the base penalty percentages for actual releases (pg 100)
15. Implement the use of standard penalty amounts for specific violations (especially common violations and violations with only potential harm) (pg 100)	16. Eliminate use of penalty deferrals; increase penalties if settlement is not reached during expedited process (pgs 104, 209)

**Table 1:
Significant Recommendations from the Enforcement Review**

17. Develop and approve lists of designated SEP projects (pg 143)	18. Encourage preferred (direct benefit, same media, community-based) SEP projects with higher offsets and use lower offsets for other projects (pgs 145, 151)
19. Expand the opportunity for a 100% penalty offset for direct benefit SEP projects to include small businesses (pg 155)	20. Develop additional monitoring, root cause assessment, and financial assurance as ordering provisions for repeat violators (pg 136)
21. Self reported violations should be counted as a violation and as an inspection in the compliance history formula once captured in an NOV/NOE (pg 11)	22. Site complexity should not be a component in determining facility compliance history (pg 35)
23. Revise the compliance history formula, especially revisions to the formula to better reflect actual performance (pg 37)	24. Use the final compliance history classification system for all entities, including small business and local government (pg 56)
25. Provide a compliance history appeals process to all entities regardless of classification (pg 57)	26. Continue existing practice for use of compliance history in permitting and enforcement decision making, including shutdowns and permit revocation (pgs 70, 71, 78)
27. Existing system of providing incentives based on compliance history should be reviewed and expanded (pg 82)	28. Fees should be increased or lowered based on compliance history (pg 85)
29. Hold all permit applications if the applicant owes the agency more than \$200 in delinquent fees or penalties. The holding period will not be included in backlog calculations. Permits will be returned if fees or penalties are not paid within a specified period of time (pg 173)	30. More aggressively collect delinquent fees and penalties through the use of the Attorney General and a collection agency (pg 188)

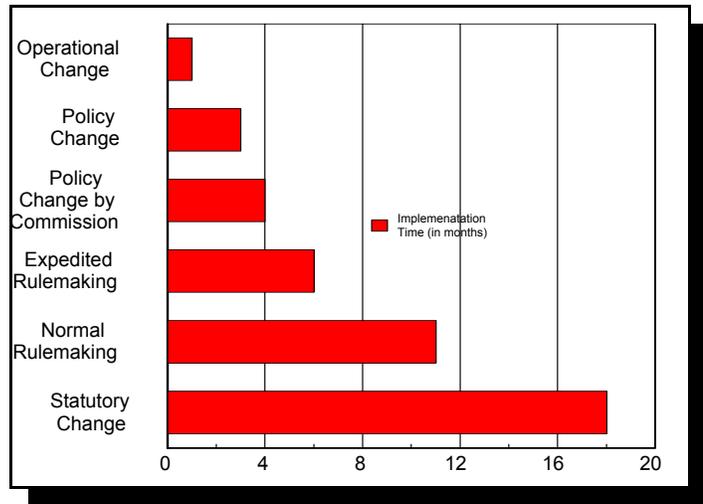
**Table 1:
Significant Recommendations from the Enforcement Review**

<p>31. Establish an initial screen of 1% of annual revenue for small businesses to determine financial inability to pay a penalty; conduct a more thorough analysis only if 1% of annual revenue does not pay the entire penalty (pg 192)</p>	<p>32. For small local governments, use MUNIPAY formula developed by EPA to determine financial inability to pay penalties (pg 198)</p>
<p>33. Seek legislative approval to assess interest charges on penalty payment plans and delinquent penalties (pg 206)</p>	<p>34. Enhance and expand the TCEQ public Web site and T-Net to provide access to enforcement and compliance history information for internal and external use (pg 234)</p>
<p>35. Request proposals for a statewide public awareness campaign to better inform the public about the agency's roles and ways in which the agency maintains and improves the environment (pg 240)</p>	

Factors Affecting Implementation

Implementation Time Line

Statutory changes generally are not finally adopted until June following a session, when the governor signs or does not veto approved legislation. If, as is commonly the case, rulemaking is required, at least another six months should be allotted for the adoption of rules. Therefore, elements requiring a statutory change would likely be implemented in December, 2005.



A change to existing rules normally require around a year to complete, including time for drafting and review, the procedures required under the Administrative Procedures Act, and

optional stakeholder comment opportunities. This process can be expedited so that a rule change could be made in approximately six months. Depending on the level of additional public participation desired, and the extent of comments received during the Administrative Procedures Act comment period, this time could be shorter or longer.

The time needed to implement changes requiring policy and guidance development will vary according to the magnitude of development needed and the level of formality and public participation desired. In the case of recommendations made in this document the level of time needed will also vary according to how fully developed the recommendation is. For instance, the recommendation to implement the already-drafted nuisance odor protocol could be implemented immediately. Similarly, guidance for the Office of Permitting, Remediation and Registration on holding permits where the applicant has failed to pay a penalty or fee could be quickly drafted implemented. Other recommended guidance projects, such as the need for additional incentives for high performers could require several months. Similarly, guidance or policy areas that merit determinations by the commission will require additional time, particularly if they are to be heard at an agenda. Therefore, recommendations which require policy or guidance development should be assumed to require between one and six months, depending on the project.

Operational changes may require as little as a month to implement, or as long as several months. As is the case for changes to policies and guidance, the length of time required for operational changes will depend on the complexity of the change, the extent to which the needed change has been fully articulated in the recommendation and the formality needed in making the change.

Attachment 1

Key Issue Tables

Compliance History Components/Definitions	
Issue No.	1
Key Issue	<p><u>The nature of notices of violation considered in compliance history:</u></p> <p>A) Should compliance history be based on notice of enforcement (NOE) instead of notice of violation (NOV)?</p> <p>B) Should all NOV's be included as components, including resolved NOV's and verbal NOV's?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment, Steering Committee Input</p>
Other Subcommittees Reviewing Issue	Compliance Evaluation and Response
Recommendation	<p>All NOV's and NOE's should be considered as components of compliance history, regardless of whether they are resolved or not. Verbal NOV's would not be included.</p> <p><u>30 TAC § 60.1(c)(7) and TWC § 5.753(d) would need to be revised to incorporate NOE's.</u></p> <p><u>Pros:</u> Incorporates those violations which require automatic enforcement action and are only reflected in NOE's into compliance history.</p> <p><u>Cons:</u> Violations contained in unresolved or multiple NOV's which result in an NOE could potentially be counted three times in compliance history (NOV, NOE, Agreed Order). This should be addressed in the revisions to the compliance history classification process.</p> <p><u>Basis:</u> Violations which result in the issuance of an NOE are deemed more significant in nature and demonstrate the severity of the situation.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories utilizing all NOV's and NOE's while incorporating the recommended revised policies, rules, and procedures • 30 TAC § 60.1(c)(7) and TWC § 5.753(d) would need to be revised • Rulemaking takes approximately six to nine months; assuming initiation in the Fall of 2004, the rule could be adopted by May 2005 • Allocation of additional agency staff may be required to revise rule; hold stakeholder meetings, etc. • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a company's compliance history • This recommendation will potentially impact other agency offices and/or contractors for implementation
Other Alternatives	None.

Compliance History Components/Definitions	
Issue No.	1
Key Issue	<p><u>The nature of notices of violation considered in compliance history:</u></p> <p>C) Should self-reported violations be included as a component?</p> <p>D) Should discharge monitoring reports (DMRs) be included in compliance history? If so, should there be consideration to not include DMRs for non-profit facilities?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment, Steering Committee Input</p>
Other Subcommittees Reviewing Issue	Compliance Evaluation and Response
Recommendation	<p>A self-reported violation should be included as a component of compliance history once it is captured in the form of an agency-issued NOV/NOE, except for violations qualified for immunity under the Texas Audit Privilege Act. Violations disclosed in a report required to be submitted by the regulated community to the TCEQ or EPA by a regulatory rule or statute should not be defined as a "NOV" for compliance history purposes, or become a component of compliance history, until the TCEQ or EPA takes action upon the report pursuant to the relevant Strategic Plan. For example, violations self-reported on DMR or Title V reports would not be included in a person's or site's compliance history until acted upon by the TCEQ or the EPA.</p> <p>Similarly, investigations, if included as a component of compliance history, should be limited to action taken by the TCEQ to investigate a complaint or potential violation pursuant to the Strategic Plan. Reports required to be submitted to the TCEQ by the regulated community pursuant to regulatory rule or statute should not be defined as an "investigation" and included as a component of compliance history.</p> <p>Non-profit facilities should not be treated differently than for profit facilities with regard to the inclusion of self-reported violations in compliance history because there is no difference between the impact a non-profit facility's violation has on human health and/or the environment and the impact a for profit facility's violation has.</p>

	<p><u>Only agency policy changes would be required.</u></p> <p><u>Pros:</u> Provides a complete picture of a company's environmental record; reduces the number of NOVs that are currently counted towards compliance history since these violations would be incorporated into an agency-issued NOV/NOE; would also eliminate the necessity to make adjustments to penalties.</p> <p><u>Cons:</u> This could negatively impact a non-profit facility's compliance history and result in an upward adjustment in penalties calculated in a formal enforcement action.</p>
	<p><u>Basis:</u> Currently, self-reported violations submitted on monthly DMRs are considered as NOVs for all types of facilities. If these violations result in an enforcement action, an adjustment has to be made to the penalty so the NOVs don't overly impact the penalty amount.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories using self-reported violations with the recommended revised polices, rules, and procedures • Revision to agency policy would be required • Revising agency policy takes approximately three months; assuming initiation in the Fall of 2004, the policy could be implemented by January 2005 • Allocation of additional agency staff will not be required • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a company's compliance history • This recommendation will potentially impact other agency offices and/or contractors for implementation
Other Alternatives	None.
Notes	Self-reported violations should be handled differently with regard to penalty policy issues.

Compliance History Components/Definitions	
Issue No.	1
Key Issue	<p><u>The nature of notices of violation considered in compliance history:</u></p> <p>E) Should there be a threshold for violations/NOVs before they are counted in compliance history?</p>
	<p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment, Steering Committee Input</p>

Other Subcommittees Reviewing Issue	Compliance Evaluation and Response
Recommendation	<p>There should not be a threshold established for violations/NOVs.</p> <p><u>No policy or regulation changes are required.</u></p> <p><u>Pros:</u> All violations, regardless of their nature, would be considered in a company's compliance history, providing a complete picture of a company's environmental record.</p> <p><u>Cons:</u> All violations would be included in compliance history, regardless of the severity of the situation.</p>
	<p><u>Basis:</u> Some discretion for determining if a violation exists is already built in during the inspection phase. In addition, a type of "threshold" currently exists with the classification of violations included in compliance histories (i.e. the violations are classified as either major, moderate, or minor and are, accordingly, scored differently).</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories implementing the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Include a threshold for violations/NOVs for compliance history.
Notes	This is more of a classification issue and would best be addressed in the classification committee.

Compliance History Components/Definitions	
Issue No.	1
Key Issue	<p><u>The nature of notices of violation considered in compliance history:</u></p> <p>F) Should new or one-time violations be included in compliance history?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment, Steering Committee Input</p>

Other Subcommittees Reviewing Issue	Compliance Evaluation and Response
Recommendation	<p>New and one-time violations should count as components of compliance history.</p> <p><u>No policy or regulation changes are required.</u></p> <p><u>Pros:</u> These violations indicate a company's ability to comply with environmental regulations.</p> <p><u>Cons:</u> All violations would count towards compliance history with no exceptions.</p> <p><u>Basis:</u> These violations set the basis for determining repeat violations.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories based on policies, rules, and procedures currently in place • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	<p>Do not count new or one-time violations as a component of compliance history.</p> <p><u>Pros:</u> Improves the compliance history rating for the site.</p> <p><u>Cons:</u> The new or one-time violation could be significant in nature with actual or potential impact to human health or the environment. In addition, a determination would have to be made regarding the point in time in which the compliance history period begins again (i.e. one “free” violation every five years).</p>

Compliance History Components/Definitions	
Issue No.	1
Key Issue	<p><u>The nature of notices of violation considered in compliance history:</u></p> <p>G) Should there be a mechanism to remove NOVs that have been issued by mistake because of insufficient or incorrect information?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment, Steering Committee Input</p>
Other Subcommittees Reviewing Issue	Compliance Evaluation and Response

Recommendation	A mechanism for removing invalid violations should and does exist.
	<u>No policy or regulation changes are required.</u>
	<u>Pros:</u> Removing NOV's issued in error would provide a more complete and accurate portrayal of a company's environmental record and would prevent enhancements associated with incorrect information being applied to penalties. <u>Cons:</u> None
	<u>Basis:</u> 30 TAC ch. 60 and TWC § 5.753 currently allow for this process to take place. Violations can be withdrawn through the appeals process and from the Consolidated Compliance and Enforcement Database System (CCEDS) which is the source compliance histories are compiled from.
	<u>Implementation Impacts:</u>
	<ul style="list-style-type: none"> • Proceed developing compliance histories using the policies, rules, and procedures currently in place • Additional allocation of funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	None.

Compliance History Components/Definitions	
Issue No.	1
Key Issue	<u>The nature of notices of violation considered in compliance history:</u> H) Should alleged violations and administrative errors be included in compliance history?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment, Steering Committee Input
Other Subcommittees Reviewing Issue	Compliance Evaluation and Response

Recommendation	Alleged violations and administrative violations <u>contained</u> in NOV, NOEs, and 1660-styled orders should be included in compliance history.
	<u>No policy or regulation changes are required.</u>
	<u>Pros:</u> These types of violations reflect a company's performance in maintaining compliance with environmental regulations. <u>Cons:</u> Alleged violations and administrative violations can be denied by a company and do not carry the same weight as an admission (i.e. findings of fact)
	<u>Basis:</u> The majority of violations issued by the agency are alleged and are currently included in compliance histories as components.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • Proceed developing compliance histories using the policies, rules, and procedures currently in place • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Only include violations based on valid and legitimate information and proven offenses.

Compliance History Components/Definitions	
Issue No.	2
Key Issue	<u>Definition of investigations by the TCEQ for compliance history purposes:</u> A) Should site assessments, file and record reviews, and compliance investigations be included in compliance history? D) If all enforcement actions are considered, should their associated inspections and record reviews be counted? If yes, would this include e-mail and phone inspections?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, EIC

Recommendation	Site assessments, file and record reviews, and compliance investigations should be included in compliance history assessment. Information exchanged through email and phone conferences should be included in a final investigation/record review reports. These would not count as separate investigations.
	<u>No policy or regulation changes are required.</u>
	<u>Pros:</u> This is consistent with the current process for compiling compliance histories. <u>Cons:</u> A company could be rated more favorably due to the inclusion of these components.
	<u>Basis:</u> Including investigations provides a complete perspective of activity at a company's site.
	<u>Implementation Impacts:</u>
	<ul style="list-style-type: none"> • Proceed developing compliance histories using the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Only include certain types of inspections, for example, compliance investigations and not file or record reviews since these do not involve site visits.

Compliance History Components/Definitions	
Issue No.	2
Key Issue	<u>Definition of investigations by the TCEQ for compliance history purposes:</u> B) Should DMRs count as an inspection?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, EIC

Recommendation	<p>This is partially covered under recommendations for Key Issue A-1(D) where self-reported violations would be included in compliance history if they result in the issuance of an NOV. DMRs should only be included as an inspection of compliance history if they are captured in the form of an agency conducted record/file review or investigation.</p> <p><u>Only agency policy changes would be required.</u></p> <p><u>Pros:</u> Including DMRs in agency conducted file reviews/investigations would be consistent with the review of other types of required reports and records. In addition, DMRs and other reports submitted by companies are not true investigations as there is no involvement on the agency's part.</p> <p><u>Cons:</u> This would reduce the number of investigations (denominator in calculation) in a compliance history, resulting in a higher site score. This would also create a negative impact on small businesses.</p> <p><u>Basis:</u> DMRs are currently considered as individual investigations in compliance history which positively impacts a company's rating.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories using self-reported violations with the recommended revised polices, rules, and procedures • Revision to agency policy would be required • Revising agency policy takes approximately three months; assuming initiation in the Fall of 2004, the policy could be implemented by January 2005 • Allocation of additional agency staff will not be required • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a company's compliance history • This recommendation will potentially impact other agency offices and/or contractors for implementation
Other Alternatives	Continue to count the submission of these reports as individual investigations.
Notes	See Attachment B-Strategic Protocol.

Compliance History Components/Definitions	
Issue No.	2
Key Issue	<p><u>Definition of investigations by the TCEQ for compliance history purposes:</u></p> <p>C) Are investigations being defined in a fair and consistent manner?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>

Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, EIC
Recommendation	<p>Investigations are not defined in a consistent manner because an "investigation" is used differently in the compliance history context than it is defined by the regional office strategic protocol. The Agency's Regional Offices observe a strategic protocol that specifically defines what constitutes an "investigation".</p> <p>Recommendation is to promote consistency by re-defining the compliance history definition of "investigation" so that it mirrors the definition of "investigation" set forth in the strategic protocol used by the regional offices.</p> <p>1) No policy or regulation changes would be required with regard to the definition and application of investigations at the regional level.</p> <p>2) Only agency policy changes would be required to change the definition of investigations with respect to compliance history to mirror the definition used in the Regional Office Strategic Protocol.</p> <p><u>Pros:</u> (1) Establishes consistency the definition of investigation used by the regional offices and used in the compilation of a person or site's compliance history. (2) Re-defining investigation in compliance history to denote only agency initiated investigations would provide consistency with other types of investigations.</p> <p><u>Cons:</u> Defining "investigation" for Compliance History purposes in a manner that is consistent with the Regional Office's strategic protocol may result in fewer Agency actions being defined as an "investigation"; therefore, under the current mathematical formula, it may reduce the number of investigations in the denominator of a site or person's compliance history calculation thereby resulting in a higher score and a poorer rating.</p> <hr/> <p><u>Basis:</u> Strategic protocol for investigations.</p> <hr/> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories using the definition of "investigation" contained in the Regional Office Strategic Protocol while incorporating the recommended revised polices, rules, and procedures • Revision to agency policy would be required • Revising agency policy takes approximately three months; assuming initiation in the Fall of 2004, the policy could be implemented by January 2005 • Allocation of additional agency staff will not be required • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a company's compliance history • This recommendation will potentially impact other agency offices and/or contractors for implementation

Other Alternatives	<p>1) Change the definition of investigation in the agency's strategic protocol to reflect the definition used in the Compliance History context.</p> <p>2) Continue to allow investigations to be defined inconsistently.</p>
---------------------------	--

Compliance History Components/Definitions	
Issue No.	3
Key Issue	<p><u>Definition and use of "person" and/or "site" for compliance history purposes:</u></p> <p>A) Should compliance history only be based on a person and not the specific site, vice versa, or both?</p> <p>C) Should compliance history only be based on the current person/operator and not previous persons/operators?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	<p>Compliance history should be compiled for both a person (defined as an owner) and a site. It should reflect the environmental record of the current owner and not previous persons or operators.</p> <p>30 TAC § 3.2 (Definitions) and 30 TAC § 60.2(a) (Classifications) would need to be amended to define "Person" as an owner.</p> <p><u>Pros:</u> Provides a more accurate perspective of the current owner's environmental history.</p> <p><u>Cons:</u> Does not provide a complete record of the history at that site for the previous five years.</p> <p><u>Basis:</u> A current owner of a facility should not be held liable for actions taken by previous owner for a specific site.</p>

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories for current owners and their respective sites while incorporating the recommended revised policies, rules, and procedures • 30 TAC § 3.2 (Definitions) and 30 TAC § 60.2(a) (Classifications) would need to be amended • Rulemaking takes approximately six to nine months; assuming initiation in the Fall of 2004, the rule could be adopted by May 2005 • Allocation of additional agency staff will not be required • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a company's compliance history • This recommendation will potentially impact other agency offices and/or contractors for implementation
Other Alternatives	Continue to operate under current policy and regulations. Also compile a separate compliance history for the previous owner of a site.
Notes	This conflicts with the Classification Subcommittee recommendation that compliance history should only be based on a site and not include person.

Compliance History Components/Definitions	
Issue No.	3
Key Issue	<p><u>Definition and use of "person" and/or "site" for compliance history purposes:</u></p> <p>B) Should compliance history only be based on the operator of a specific site?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	<p>A compliance history should not only be compiled for the operator of a specific site; it should be compiled for the owner and the site itself. In this case, owner and operator are the same. Please see note below.</p> <p><u>30 TAC § 3.2 (Definitions) and 30 TAC § 60.2(a) (Classifications) would need to be amended to define "operator" as an owner.</u></p> <p><u>Pros:</u> The owner should be accountable for environmental compliance at the site. <u>Cons:</u> The site's owner may not have knowledge of day-to-day activities at the site like the operator would.</p> <p><u>Basis:</u> The owner of a facility is legally responsible and has liability for previous actions occurring at the site upon purchase.</p>

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories for current owners and their respective sites while identifying owner as operator; incorporate the recommended revised policies, rules, and procedures • 30 TAC § 3.2 (Definitions) and 30 TAC § 60.2(a) (Classifications) would need to be amended • Rulemaking takes approximately six to nine months; assuming initiation in the Fall of 2004, the rule could be adopted by May 2005 • Allocation of additional agency staff will not be required • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a company's compliance history • This recommendation will potentially impact other agency offices and/or contractors for implementation
Other Alternatives	Develop a history based on the operator since the operator has direct knowledge of and the ability to affect day-to-day activities.
Notes	This recommendation would not be consistent if the agency determines to only classify sites. In addition, an option would be to develop three ratings; for the owner, operator, and site.

Compliance History Components/Definitions	
Issue No.	3
Key Issue	<p><u>Definition and use of "person" and/or "site" for compliance history purposes:</u></p> <p>D) Should compliance history include the history of parent companies, subsidiaries, and/or sister companies?</p>
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy

Recommendation	<p>The compliance history should not include histories of parent companies, subsidiaries, and related companies.</p> <p><u>No policy or regulation changes are required.</u></p> <p><u>Pros:</u> This would allow a site to be rated on its own merit and not that of other related companies. In addition, the integrity of data compiled on other related facilities cannot be assured. Resources would be strained if the histories of the other facilities had to be compiled (i.e. ExxonMobil would require extensive research and time in order to develop a history for each station, plant, etc. owned by its parent company in the U.S.)</p> <p><u>Cons:</u> Would prevent the agency from being apprized of a recurring pattern of noncompliance of a particular parent company (i.e. a company's environmental record outside of Texas would not be considered).</p>
	<p><u>Basis:</u> National and international companies do not necessarily affect the daily activities of their subsidiaries. The compliance history of one facility may not reflect the history for all facilities operating under the same parent company nor other sister companies. In addition, reviewing all related companies would require significant staff resources.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories based on person and site only, using the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	<ol style="list-style-type: none"> 1. Consider histories of related companies on a case-by-case basis. 2. Always consider histories of related companies.

Compliance History Components/Definitions	
Issue No.	3
Key Issue	<p><u>Definition and use of "person" and/or "site" for compliance history purposes:</u></p> <p>E) Should compliance history be established for co-permittees together? If so, should the TCEQ take into consideration their divided responsibilities?</p>
	<p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy

Recommendation	<p>A compliance history should not be established for co-permittees together if there is legally a way to distinguish each entity separately. A history for each person permitted would be compiled. If a legal separation could not be established or determined, a combined history for both would be developed.</p> <p><u>30 TAC ch. 60 and compliance history policy would need to be amended.</u></p> <p><u>Pros:</u> Each entity would be held liable only for activities occurring at their respective sites.</p> <p><u>Cons:</u> One entity may have operational control over another entity's site in which case both permeates should be included on one history.</p> <p><u>Basis:</u> It would be consistent with the development of histories for individual owners of other sites.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories based on each permittee of a site, incorporating the recommended revised policies, rules, and procedures • 30 TAC § 3.2 (Definitions) and 30 TAC § 60.2(a) (Classifications) would need to be amended to define "co-permittee" <p>Rulemaking takes approximately six to nine months; assuming initiation in the Fall of 2004, the rule could be adopted by May 2005</p> <ul style="list-style-type: none"> • Allocation of additional agency staff will not be required • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a co-permittee's compliance history • This recommendation will potentially impact other agency offices and/or contractors for implementation
Other Alternatives	<p>Consider an all inclusive history for co-permittees on a case-by-case basis. This could, however, allow for two entities with a bad compliance history to construct a new facility with few consequences simply through forming a partnership.</p>

Compliance History Components/Definitions	
Issue No.	3
Key Issue	<p><u>Definition and use of "person" and/or "site" for compliance history purposes:</u></p> <p>F) How should a site be defined, including whether the site is currently in operation and no longer has a permit?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	<p>Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy</p>

Recommendation	"Site" is and should continue to be defined as stated in 30 TAC § 60.2. Consideration should not be given to whether the site is currently in operation and/or no longer has a permit. No policy or regulation changes are required. <u>Pros:</u> Allows portable facilities to continue having their own history compiled for each location their units have been stationed. In addition, even if a site is no longer in operation a history would continue to be maintained for the person or owner. <u>Cons:</u> Continuing to compile a history on a site which is no longer in operation would negatively impact the current person/owner rating.
	<u>Basis:</u> Whether a site is currently operating and/or has a permit does not impact its history over the previous 5-year period.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • Proceed developing compliance histories using the current definition of "site" while incorporating the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
	Other Alternatives
	Do not consider the history of a site if equipment is no longer in operation.

Compliance History Components/Definitions	
Issue No.	4
Key Issue	<u>Consideration of positive components:</u> A) Should the TCEQ refocus components on compliance and not on non-compliance?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy

Recommendation	TCEQ should continue to focus on a company's history of non-compliance. There are other criteria in the compilation of compliance history that allow for factoring in positive elements.
	<u>No policy or regulation changes are required.</u>
	<u>Pros:</u> Demonstrates a company's ability to comply with environmental regulations. <u>Cons:</u> Only focuses on instances of noncompliance instead of all instances of compliance.
	<u>Basis:</u> A compliance history is an environmental record based on the performance of an entity.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • Proceed developing compliance histories based on non-compliance using the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	None

Compliance History Components/Definitions	
Issue No.	4
Key Issue	<u>Consideration of positive components:</u> B) Should positive components be included in calculating compliance history? If so, should the TCEQ consider attempts to comply, compliance, over-compliance, supplemental environmental projects, voluntary programs, or continuous improvement?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy

Recommendation	Limited positive components such as over-compliance, voluntary programs, and continuous improvements (i.e. approved Environmental Management Systems) should be included in the compilation of a compliance history. However, attempts to comply, compliance, and supplemental environmental projects ("SEPs") should not be considered.
	No policy or regulation changes are required.
	<u>Pros:</u> Provides an incentive for a company to improve its compliance rating; provides a balanced perspective of site activities. <u>Cons:</u> It would prevent a company from receiving credit for correcting violations that are required by rule or statute.
	<u>Basis:</u> Positive components reflect a company's willingness to improve the environment while minimizing its impact on it.
	<u>Implementation Impacts:</u>
	<ul style="list-style-type: none"> • Proceed developing compliance histories using limited positive components and the recommended revised policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Don't include positive components in compliance history.
Notes	Investigations also count as positive components since they improve a company's rating.

Compliance History Components/Definitions	
Issue No.	5
Key Issue	<u>Types of enforcement actions considered in compliance history:</u> A) Should only final enforcement actions be included in compliance history? B) Should all civil, administrative, and criminal actions brought by the TCEQ or other government entities be included in compliance history, including those by the permitted entity that occur outside of Texas? If so, should findings and 1660 orders be included? C) Should all consent orders and agreements count as components in compliance history?
	<u>Basis:</u> Staff Input and Review of Current Rule; Public Comment

Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, EIC, Penalty Policy
Recommendation	<p>All final enforcement actions, including consent orders, agreements, civil, administrative (1660-styled orders and Findings orders which include findings of fact and conclusions of law), and criminal actions brought by the TCEQ and other Texas government entities (assuming their data is consistent and reliable), should count as components in compliance history. Actions occurring outside of the state should not be considered.</p> <p>30 TAC § 60.1(c)(3) and TWC § 5.753(b)(3) would need to be repealed.</p> <p><u>Pros:</u> Including all final enforcement actions would provide a complete picture of a company's ability to comply with state/federal environmental rules and regulations. Omitting actions occurring outside of the state would provide for consistency in the application of compliance history rules. Since each state may define orders and agreements differently, including terms and conditions contained in these agreements/orders, the potential for conflict with the application of Texas' compliance history rules/definitions could exist. In addition, it would be difficult to determine if the information supplied by other states is consistent, reliable, or even available.</p> <p><u>Cons:</u> Excluding actions initiated by other state agencies outside of Texas would prevent the agency from determining a company's true environmental record.</p> <p><u>Basis:</u> Currently, all state-issued enforcement orders and agreements are considered part of a company's compliance history. Although actions taken by other states are included, when available, these are not factored into the calculation for a site's rating.</p>

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories using enforcement actions brought by the TCEQ and other Texas government entities, incorporating the recommended revised policies, rules, and procedures • 30 TAC § 60.1(c)(3) and TWC § 5.753(b)(3) would need to be repealed to remove the reference of violations in other states • Statutory changes generally are not finally adopted until June following the regular legislative session, when the governor signs or does not veto approved legislation. Since rulemaking will be required as well, an additional six to nine months should be allotted for the adoption of the rule • Revise current compliance history policy to incorporate the removal of this component • Allocation of additional agency staff will not be required • Revising agency policy will take approximately three months • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • No additional impact to a company's compliance history since this component is currently not considered in a site's rating; it is supplied for informational purposes only • This recommendation will impact other agency offices and/or contractors for implementation
Other Alternatives	Only include specific types of enforcement actions (i.e. civil and administrative; only Findings orders and judgments; no criminal actions). Continue including actions from other states.

Compliance History Components/Definitions	
Issue No.	6
Key Issue	<p><u>Nature and quality of the data used to evaluate compliance history:</u></p> <p>Does the TCEQ's record keeping system maintain accurate and complete historical and current records to effectively determine each component of a compliance history?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, EIC, Penalty Policy

<p>Recommendation</p>	<p>TCEQ's current record keeping system does not completely reflect all of a company's compliance history related information. Records containing documentation, both electronic and paper, need to be audited to ensure accuracy. Also, recommend incorporating this issue into the Compliance History Classification Committee's Key Issue 7(A) - Data accuracy and retention.</p> <p><u>Potential for policy changes.</u></p> <p><u>Pros:</u> Auditing TCEQ records would ensure consistency of a company's historical activity.</p> <p><u>Cons:</u> Agency resources may be limited in completing this ongoing project, therefore, companies would continue to be held accountable for inaccurate or incomplete information. For compliance history purposes, insufficient records would be scored, accordingly.</p> <p><u>Basis:</u> There is currently a protocol for entering data into the Consolidated Compliance and Enforcement Database System (CCEDS). State and agency standards for records retention also exist. In addition, 30 TAC ch. 60 and TWC § 5.753 allow a company to contest inaccurate information contained in a compliance history.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories using TCEQ's current record keeping system while incorporating the recommended revised policies, rules, and procedures • Potential revision to agency policy • Revising agency policy takes approximately three months; assuming initiation in the Fall of 2004, the policy could be implemented by January 2005 • Allocation of additional agency staff may be required • Potential allocation of additional funds to modify CCEDS, Central Registry, and the criteria used to run compliance history reports • Potential impact to a company's compliance history depending on additional information discovered through auditing of records • This recommendation will potentially impact other agency offices and/or contractors for implementation
<p>Other Alternatives</p>	<p>Outsource the agency's record keeping system.</p>

Compliance History Components/Definitions	
Issue No.	7
Key Issue	<p><u>Other issues related to compliance history components/definitions:</u></p> <p>A) Should a person's or facility's compliance history be based only upon activities or violations that involve direct, immediate or impending effects to human health and the environment? (Not paper violations)</p>
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	<p>Compliance history should include both physical effects to human health/environment, as well as, clerical/paper type violations.</p> <p>No policy or regulation changes are required.</p> <p><u>Pros:</u> Provides a more accurate perspective of a company's environmental history with respect to compliance with all regulations.</p> <p><u>Cons:</u> May not be able to quantify an immediate or impending impact to the environment based on paperwork violations.</p>
	<p><u>Basis:</u> Paper violations (i.e. records, reports, etc.) may demonstrate a pattern of equipment failures and noncompliance.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories which include both violations involving physical effects to human health/environment and are clerical in nature while incorporating the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	<p>Only include activities/violations which have a physical impact on the environment.</p> <p>Only include Category A violations contained in the Enforcement Initiation Criteria.</p> <p>Only include violations based on the risk they pose on the environment.</p>
Notes	<p>Example of physical effect of a violation would include unauthorized emissions or discharges to the environment.</p> <p>Example of paper type violation would include failure to keep required records on site.</p>

Compliance History Components/Definitions	
Issue No.	7
Key Issue	<p><u>Other issues related to compliance history components/definitions:</u></p> <p>B) Should a person's or facility's intent in committing a violation be a component in the computation of a person's or facility's compliance history?</p>
	<p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	<p>A person's or facility's intent in committing a violation would be difficult to establish. A component currently exists for facilities that meet the "repeat violator" definition. Recommend continue compiling compliance history utilizing repeat violator definition.</p> <p>No policy or regulation changes are required.</p> <p><u>Pros:</u> Including a person/facility's "intent" in committing a violation in the form of "repeat violator" would distinguish those respondents which have recurring problems from others who are able to come into and stay in compliance with environmental regulations.</p> <p><u>Cons:</u> A person/facility (i.e. small business) may not have the resources to fix an ongoing violation which would result in the "repeat violator" classification.</p>
	<p><u>Basis:</u> Including repeat violators into compliance history assists in establishing a pattern of noncompliance and, thus, allows the agency to investigate a respondent's activities more thoroughly. In addition, the agency has historically used "strict liability" as its basis for developing enforcement actions.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance based on repeat violator definition while incorporating the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Define "intent" and include as a separate component of compliance history.
Notes	Recommend the Classification subcommittee incorporate this issue.

Compliance History Components/Definitions	
Issue No.	7
Key Issue	<p><u>Other issues related to compliance history components/definitions:</u></p> <p>C) Should a violation which is the result of an Act of God count towards a person's or facility's compliance history?</p>
	<p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	<p>A violation which is the result of an Act of God currently is not and should not count towards a compliance history.</p> <p><u>No policy or regulation changes are required.</u></p> <p><u>Pros:</u> Prevents a company from being held liable for conditions beyond their control.</p> <p><u>Cons:</u> None</p>
	<p><u>Basis:</u> Compliance history should be based on activities for which a company is directly involved in and physically liable for.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories using the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	None.
Notes	Act of God is not currently defined.

Compliance History Components/Definitions	
Issue No.	7
Key Issue	<p><u>Other issues related to compliance history components/definitions:</u></p> <p>D) Should a person's or facility's compliance history summary include a brief narrative of their violations, enforcement orders, and any outstanding enforcement issues?</p>
	<p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	<p>A brief narrative of a facility's violations, etc. should not be included in compliance history.</p> <p>No policy or regulation changes are required.</p> <p><u>Pros:</u> A company's environmental record is already contained in the compliance history; a narrative would be somewhat redundant and would be resource intensive to produce. In addition, it would be difficult to ensure consistency across the agency.</p> <p><u>Cons:</u> Would potentially require more research on an inquirer's part to review all of the information contained in the history; a brief narrative would be more accessible to the public.</p>
	<p><u>Basis:</u> Detailed information regarding NOVs, orders, and other issues are contained in a facility's compliance file is available for review in Central Records. In addition, this approach (developing a narrative) has been taken in the past and was not utilized.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories based on the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Include a brief narrative as part of the compliance history.

Compliance History Components/Definitions	
Issue No.	7
Key Issue	<u>Other issues related to compliance history components/definitions:</u> E) Should any past violations attributed to a facility or person be included in a person's or facility's compliance history?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment
Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	Recommend continuing the compliance history review period to be 5 years prior to the initiation of an agency action (i.e. permit, enforcement). No policy or regulation changes are required.
	<u>Pros:</u> Ensures consistency and integrity of data contained in the agency's records and databases. A five year period provides an adequate perspective of a company's ability to comply with environmental regulations. <u>Cons:</u> Would not allow for violations occurring over a protracted period of time to be reviewed or considered.
	<u>Basis:</u> A specific review period needs to be established for compliance history to ensure current violations are being adequately addressed.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • Proceed developing compliance histories using the 5 year period while incorporating the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Establish another time frame (i.e. 3 years) for compiling compliance history.

Compliance History Components/Definitions	
Issue No.	7
Key Issue	<u>Other issues related to compliance history components/definitions:</u> F) Should a site's complexity be a factor or should the number of components/opportunities to violate be a component in determining compliance history?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment

Other Subcommittees Reviewing Issue	Compliance History Classification, Compliance History Use, Enforcement Process, Penalty Policy
Recommendation	<p>No. A site's complexity is not required to be considered by the compliance history statutes. It is difficult to establish and utilize as a component of compliance history. However, the compliance history classification formula does consider number of inspections at a site, which in some cases may be related to a facility's size and complexity (e.g., under PPG agreements, federal major sources in the air program are required to be inspected on a specific schedule.)</p> <p>No policy or regulation changes are required.</p> <p><u>Pros:</u> Would prevent the necessity for more resources to make a "complexity" determination for each site; would also prevent inconsistencies in the interpretation of "complex" within the different programs of the agency.</p> <p><u>Cons:</u> Would not reflect the amount of resources a company expends in maintaining compliance with environmental regulations which impact its specific type of industry or number of emission/discharge points.</p> <hr/> <p><u>Basis:</u> A site's complexity or number of components does not necessarily reflect its ability to comply with environmental regulations.</p> <hr/> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Proceed developing compliance histories using the recommended policies, rules, and procedures • Allocation of additional funds or agency staff will not be required • No revisions are required to the compliance history policy, rules, or statutes currently in place for this key issue • Implementation can occur immediately • No additional impact to companies or other agency offices
Other Alternatives	Define what is "complex" and include as a component.
Notes	Recommend the Classification subcommittee incorporate this issue.

Compliance History Classification	
Issue No.	1
Key Issue	<p>Overall Approach To Compliance History Classification</p> <p>A) Should the TCEQ develop a more focused, risk-based compliance history classification process that puts greater weight on violations that harm human health and the environment?</p> <p>B) Does the formula measure environmental performance?</p> <p>C) Is there a threshold number of inspections that should occur before an entity has a classification other than “default?”</p> <p>D) Should more recent compliance activities weigh more heavily than older compliance activities?</p> <p>E) How often should the classification be recalculated?</p> <p>F) Does the current compliance history process create incentives for entities to delay resolution of enforcement actions?</p> <p>G) Does the present classification system adequately capture the complexity and size of sites?</p> <p>H) How many compliance history classifications are appropriate?</p> <p>I) Should compliance histories be program specific and/or based on size and type of facility?</p> <p>J) Should there be more opportunities for the exercise of discretion in the classification process?</p> <p>K) Should other factors be included in classification, such as financial conditions, cooperativeness, efforts to comply, trends of compliance, or modernization?</p> <p><u>Basis:</u> Staff Comment/Rule Review; Stakeholder Surveys</p>
Other Subcommittees Reviewing Issue	Components, EIC, Penalty Policy

Recommendation

The following recommendations are intended to address Issues A-K above. The present classification system can be improved. Improving the means by which we classify entities can be accomplished within the framework of the present statute; and it is recommended this be achieved with targeted, meaningful changes to the present formula. This can also be achieved through an alternative approach, one idea for which is presented below. In relation to the major issues raised by external and internal commenters, the subcommittee finds the following:

The classification system should be changed to more effectively measure environmental performance.

- The means by which entities are classified should focus on violations that harm human health and the environment and demonstrate disregard for environmental regulations; and, with respect to “high” performers, on actions that go above and beyond compliance. This approach should obviate the need to consider weighing compliance activities.
-
- The “poor” performer classification should at least in part be based on whether the entity has certain serious violations. For example, certain criminal convictions or violations such as those involving falsification of records might be among those resulting in an automatic poor classification.
-
- “Poor” performers should be given the opportunity to review their data for accuracy before it is released.
- The subcommittee recommends that the present classifications of “high,” “average,” “average-by-default,” and “poor” be changed to, “**high,**” “**satisfactory,**” “**poor,**” and “**unclassified.**” These changes would address widely held concerns expressed about “average” and “average-by-default.” The latter, in particular, would more accurately reflect that we do not have enough information to determine performance
-
- There should not be a threshold of inspections before an entity is classified anything other than default.
- The present system does adequately capture complexity, however, this can be remedied through revisions on how inspections are counted and included in the classification formula.
- The present automated system for determining classifications should continue to be utilized under any approach taken.
- The agency should still perform an annual mass classification.
- No evidence was found that the present classification system itself encourages delay of resolution of enforcement.
- The present multi-media approach should be retained. Although not specifically addressed by the statute, the statute does seem to contemplate a holistic review. This issue is discussed at greater length below in “**Other Alternatives.**”

	<p>Option 1: Make targeted, meaningful changes to the present formula. This option would be based upon the belief that a formula is an appropriate method for classifying entities. Retaining the formula has its benefits, namely that systems have already been put in place to literally push a button and classify more than 200,000 entities. Greater detail on specific changes to the formula are covered in the discussion of “Key Issue 2.”</p>
	<p><u>Basis:</u> The state statute provides flexibility on how to implement the classifications system, and a pilot project led by program experts would assist with identifying issues associated with changing the present formula. This recommendation was developed in response to external inputs that the present system is too complicated, a single mathematical formula is inappropriate given the diversity and number of Texas businesses, and environmental results are not measured.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • A rulemaking in 30 TAC Chapter 60 would be required. The estimated timeframe for a Tier 3 rulemaking of this scope would be nine months to one-year (i.e. adopt rules in Summer 2005). • Data related to compliance with Federal NOV, Orders, Decrees, and Compliance Agreements may not be readily available in electronic format and may require resources to obtain. • CCEDS programming will be required to include federal data, automatically identify selected Category A violations for poor performer determinations, evaluate compliance components in determining a high performer, and change existing windows used by SBEA to incorporate voluntary actions taken beyond compliance. Costs for changes may range from \$3,500-\$35,000, depending on the scope of the change. • User testing will be required to ensure changes to the rule will be properly reflected in the automated process. • Given the timing of rule adoption (assuming a start date of October, rules could be adopted by July), it is likely that classifications will have to be done manually for the first year while CCEDs is updated. • LBB Measures pertaining to permitting timeframes may be impacted if the option discussed in “Alternatives” below relating to re-running the classifications is implemented. • Modifications, perhaps to STEERS, would be necessary to allow “poor” entities to review their data.

Implications of an alternative to the formula:

- May reduce the number of “high” performers
- May increase or decrease the number of “poor” performers--a preliminary assessment of the subcommittee’s concept was inconclusive on this point--continued ground-truthing would be necessary under the proposed pilot project
- Any approach tied to the EIC could be influenced by future changes to the EIC
- The construction of a database to track those applying for, and ultimately being granted High Performer status is required
- Resources will be needed to review demonstrations that entities are going beyond compliance
- Keeping EPA and federal information in consideration when classifying “high” performers (see discussion in Attachment) would give a more complete picture of compliance, enable the agency to avoid classifying as “high” someone that has federal compliance issues of which we are unaware, and ensure compliance with state and federal laws;

Pros of an alternative:

- Results in a more valid system because the measurement tool would produce results that track more closely with what compliance history is trying to measure
- Creates a bright line for performance, making clear to both external interests and agency staff who is a “poor” or “high” performer
- Major violations identified for classifications not substantially different from present rules
- Could be made more equitable to small business and local governments

Cons of an alternative:

- Extensive work has been done on the present data system to utilize the formula. Any major modifications would cost money--an estimate cannot be provided at this time.

<p>Other Alternatives</p>	<p>Option 2: Develop, through the initiation of a pilot project, an alternative that would replace the present formula with standards of performance—i.e., define what it means to be a “poor,” “satisfactory,” and “high” performer.” The subcommittee developed one possible concept for defining performance utilizing the EIC. A pilot project would ensure that many relevant issues, costs, and ramifications associated with such a change are anticipated, identified, and vetted. See Attachment for details on the subcommittee’s concept.</p> <p>Re-Running Classifications. Consideration should be given to re-running the classification when there is a pending activity that requires consideration of classifications during the following year. This would provide an opportunity for the most recent compliance data to be considered. However, this would have resource implications. The timing of performing the re-classification, as well as the timing and availability of appeals, would also need to be considered.</p> <p>Three-Year Compliance Period. A three-year compliance period, as opposed to five, could be considered. This may address any concerns about older data and the ability of entities to improve their classifications more quickly.</p> <p>Consideration of Category B and C Violations in the EIC. In developing an revised approach, the pilot project should address revising the impact some violations have on classification that would result in a “poor” classification, including other “A” violations and certain “B” and “C” violations.</p>
	<p>Media-Specific Classifications. The pilot project could also explore the possibility of doing classifications on a media-specific basis, as opposed to the current multi-media approach. The subcommittee’s analysis of this issue follows. Texas Water Code, §5.754, does not appear to specifically require that a classification be multi-media. Nor does it require or expressly authorize media-specific classifications. The only connection we could make between the statute and a media-specific classification requirement (or authorization) is by reading repeat violator to mean someone who commits the exact same offense more than once. The bill analysis for HB 2912 sheds no light on whether classifications may be media-specific. So, we conclude that there may be some flexibility. Legislative intent/our interpretation of legislative intent should be further explored. Although there is no specific directive to create multi-media classifications, it seems that in establishing "a set of standards for the classification of a person's compliance history," TCEQ is to look at an entity's operations overall. In the original compliance history rulemaking, staff seem to have considered the need for uniformity of process, taking into account the various program areas: "<u>The commission's further objective is to create a uniform standard of evaluating and utilizing compliance histories and classifications, recognizing that the commission has a large regulated universe with vast ranges in the types of programs regulated, the size of owners and operators, the size and/or complexity of sites, and the amount of regulatory oversight (investigations) of the program.</u>" (Adoption Preamble for 30 TAC Sections 60.2 and 60.3, 27 TexReg 7824, August 23, 2002).</p>

Notes	<ol style="list-style-type: none"><li data-bbox="443 153 1430 241">1. The House Committee on Environmental Regulation is evaluating compliance history under an interim charge<li data-bbox="443 241 1430 310">2. Still need to make a determination if site complexity should be a factor of determining a classification..
--------------	---

Attachment: Alternative (Option No. 2) Approach for Compliance History Classifications

As an alternative to the present classifications formula, an approach can be developed that would focus more on the most significant activities at a site. For “poor” performance, focus could be placed upon the most serious violations that result in a impact on human health and the environment. High performance could be clearly defined as going above and beyond compliance. This discussion focuses on how poor performers and high performers could be clearly defined.

Poor Performer

- What is a poor performer?

The subcommittee determined that there are two characteristics of “poor” performers:

1. A poor performer engages in activities that pose a risk to human health and the environment, and
2. A poor performer “demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations.” TEX. WATER CODE § 5.754(I).

- What action or inaction automatically makes an entity a poor performer?

This approach proposes that entities automatically become poor performers when certain action (or inaction) is taken. In this example, all of the actions (or inactions) but one are based upon the Category A Violations listed in the Enforcement Initiation Criteria (EIC).

- What terms need to be defined in the discussion of poor performer classification?

As part of the review process, the group determined that definition is needed for the term “person.”

Person

Person is not defined in Subchapter Q, nor is it defined in Texas Water Code, Chapters 5 or 7.

- Possible definition for “person:” Person means an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity. (definition based on Texas Health and Safety Code, §§ 361.003(23) and 382.003(10) and 30 TAC §3.2(25))

EIC Violations Automatically Creating Poor Performer Classification

EIC Category A Violation	Action	Frequency
A1	Failure to comply with any provision of a compliance agreement, 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 (captures EIC A2-A5).	• Once

EIC Category A Violation	Action	Frequency
A6	Unauthorized or noncompliant discharge, release or emission <i>in any media</i> which results in a documented effect on human health or safety or a documented serious impact to the environment.	• More than once during the compliance period
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.	• Once
A9a	Documented falsification of data, documents or reports	• Once
A9b	Denying TCEQ staff right of entry to a TCEQ-regulated entity for investigative purposes, in violation of Texas Water Code, §26.014 and/or Texas Health and Safety Code, §361.032.	• More than once during the compliance period
A10	<i>Responsible party refusing to take immediate action for 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.</i>	• Once
Non-EIC	Criminal (felony) conviction of any environmental rule or regulation.	• Once

Automation Issues Associated with the Above Approach

- The system may be able to discern **A1** Violations by looking at the violation (i.e. any violation that includes as a citation an ordering provision). Or, assuming that the EIC stays similar, the information could be retrieved based on the EIC code included in the violation window. One issue with this approach is, however, that we believe currently the only thing being entered into the system is whether the violation is Category A, B, or C (and not “subcategories”). If this is the case, in order catch past violations, the system would have to be updated, and this is not an easy fix - it would probably require file reviews, and also would require the contractor to go back and add to Approved Investigations. An alternative could be to start “from today.”
- For **A6** Violations, the agency may be able to retrieve using the EIC code in the violation window, assuming the EIC remains similar and the EIC Category code field is fully utilized.
- For **A 7, A9a, A9b, and A10** Violations, we could use the EIC/Category Code.
- Criminal (felony) conviction(s) of any environmental rule or regulation may be able to be pulled via the Resolution Detail.

High Performer

To be classified as a “High Performer” a site must have **both**:

- an excellent record in terms of compliance; **and**
- demonstrated a commitment to making Texas a cleaner place.

Following the annual mass classification, those entities satisfying the compliance component of the high performer classification noted below would be notified. A list of Beyond Compliance Components should be sent with an explanation of the TCEQ's High Performer classification, the actions necessary to achieve the classification, and the benefits associated with receiving this classification. This is a proactive approach by the TCEQ and should encourage additional entities to notify the agency of qualified activities that have positive impacts to human health and the environment in Texas.

Compliance Component

To be considered a “High Performer.” the site would need to meet the following conditions:

- has not received an NOE from TCEQ in the last three years;
- has not exceeded the compliance due date for a state or federal NOV in the last three years, or is in compliance with the schedules and terms of any active state or federal order, decree, or compliance agreement (including remediation or clean-up activities);
- has not incurred a judgement in the last three years as the result of referral to the Texas or U.S. Attorney General; and
- has not been convicted of willfully and knowingly committing an environmental crime in the past three years.

Beyond Compliance Component

For its “beyond compliance” demonstration, the regulated entity could select from a list of voluntary actions to improve environmental performance. The voluntary actions must include:

- measured and reported performance achievement;
- performance goals that go beyond compliance or “outside compliance” (achievement in important categories not captured by regulatory programs); and
- significant performance goals that are set relative to the potential impact of the facility.

Beyond compliance voluntary actions may include:

- Reductions in Energy Use
- Reductions in Water Use
- Reductions in Materials Use
- Reductions in Air Emissions
- Reductions in Waste Generation
- Reductions in Water Discharges
- Reductions in Accidental Releases
- Environmental Management System implementation
- Public Education Programs
- Stakeholder Communication (goals and achievements should be communicated to stakeholders such as: neighbors, business partners, supply chain partners, community organizations, etc.)
- Community Involvement (input from the community is used to set goals on important environmental issues)
- Sustainability Performance (environmental performance in areas not currently regulated, such as product performance, supply chain performance, transportation, purchasing, etc.)

Example “Beyond Compliance” Actions

Category	Indicator	Units
Stage: Upstream		
Material procurement	Recycled content	Pounds, tons
	Hazardous/toxic components (total or specific)	Pounds, tons
Suppliers' environmental performance	Any relevant indicators from the Inputs or Nonproduct Outputs stages	As specified for the particular indicator
Stage: Inputs		
Material use	Materials used (total or specific)	Pounds, tons
	Hazardous materials used (total or specific)	Pounds, tons
	Ozone depleting substances used	CFC-11 equivalent tons
	Total packaging materials used	Pounds, tons
Water use	Total water used	Gallons
Energy use	Total (nontransportation) energy use by fuel	kWh/MWh or Btu/MMBtu
	Transportation energy use (total or specific)	kWh/MWh, gallons, cubic feet
Land use	Land conservation	Square feet, acres
Stage: Nonproduct Outputs		
Air emissions	Total GHGs	Tons of carbon equivalent
	VOCs (total or specific)	Pounds, tons
	Nox	Pounds, tons
	Sox	Pounds, tons
	PM10	Pounds, tons
	CO	Pounds, tons
	Air toxics (total or specific)	Pounds, tons
	Odor	European odour unit
	Radiation	Curies, Becquerels
	Dust	Pounds, tons
Discharges to water	COD	Pounds, tons
	BOD	Pounds, tons
	Toxics (total or specific)	Pounds, tons
	Total suspended solids	Pounds, tons
	Nutrients (total or specific)	Pounds, tons of total N or P
	Sediment from runoff	Pounds, tons
	Pathogens (total or specific)	MPN/ml, CFU/ml
Waste	Nonhazardous waste generation	Pounds, tons
	Hazardous waste generation,	Pounds, tons
Noise	Noise	dBA
Vibration	Vibration	Inches per second
Stage: Downstream		
Products	Expected lifetime energy use (total or specific)	kWh/MWh or Btu/MMBtu
	Expected lifetime water use (total or specific)	Gallons
	Expected lifetime waste from product use	Pounds, tons
	Waste to air, water, land	Pounds, tons

Compliance History Classification	
Issue No.	2
Key Issue	<p>Compliance History Classification Formula</p> <p>A) Is the compliance history formula too complicated?</p> <p>B) Is a High performer status too difficult to achieve?</p> <p>C) Is a mathematical formula the appropriate mechanism for classifying compliance history?</p> <p>D) Even if something is a component based on its date, should it automatically be included in the classification formula?</p> <p>E) Should the classification process be based on the total number of violations over a period of time?</p> <p>F) Are the different violations weighted appropriately in the classification process?</p> <p><u>Basis:</u> Staff Comment/Rule Review; Stakeholder Surveys</p>
Other Subcommittees Reviewing Issue	Components
Recommendation	<p>The subcommittee finds the following:</p> <ul style="list-style-type: none"> • The formula is complicated and could more effectively measure environmental performance • The formula could be made more equitable • “High” classification should be based upon going above-and-beyond compliance • A mathematical formula is not the only way to implement the statute, however it is recommended that the current formula with revisions be retained. • Not all the required components of compliance history have to be included in the formula Careful consideration should be given to focusing on components that reflect the greatest impacts on human health and the environment, and to ensure against double-counting • The definition and use of record reviews requires further evaluation

	<p>Option 1:</p> <p>Make the following modifications to the present formula/rule:</p> <ul style="list-style-type: none"> • Limit “major” violations to those with a direct impact on human health and the environment, or a demonstrated disregard for the regulatory process. For example, base the definition on the major violations identified in “Key Issue #1, Option 2.” The subcommittee also discussed whether implementation of this approach should also include a rule change to move “operating without a required authorization” to the list of “moderate” violations. Such violations are issues for small businesses and small local governments, and further consideration should be given to these issues. • If the number of investigations is one or zero, and the numerator is a value other than zero, the denominator should automatically be two (2). This would ensure that sites with only one investigation have a denominator of two and would prevent them from being rated poor on the basis of one violation. • Remove EPA violations from the formula. This would address the inability to balance EPA “bad points” with an accurate number of EPA investigations, and could address variations between how TCEQ and EPA enforce. EPA violations would still be a component of compliance history, just not included in the formula. • Assign points for violations in an NOV only up until they are included in an order, at which time point values for the violation would only be in the order. This should address double-counting concerns raised by stakeholders. • Remove Discharge Monitoring Reports (DMRs) and other self-reporting violations and/or reports from the formula until they are codified in an NOV/NOE. This will level the playing field among the different types of facilities. As noted above, other components currently considered record reviews should be evaluated.
	<p>Option 2: Develop an alternative to the formula. See Option #2 under “Key Issue #1.”</p>
	<p><u>Basis:</u> Option 1: Stakeholder and staff comments. Option 2: See Option #2 under “Key Issue #1.”</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • A Tier 3 rulemaking to Chapter 60 would be required. Assuming initiation in the Fall of 2004, the rule could be adopted by May 2005. • CCEDS programming and user testing would be required. • LBB measures should not be impacted.

	<p><u>Implications:</u></p> <ul style="list-style-type: none"> • May reduce or increase the current number of high and poor performers • Will address many inequities for small businesses and local governments • Ground-truthing of changes are necessary <p><u>Pros:</u></p> <ul style="list-style-type: none"> • Makes the formula more consistent for all industries • Modifying the definition of “major” violation would focus the formula on impact-related violations • Reduces inequities (e.g. removal of DMRs, addresses small business/local government issues • Addresses the issue of a site being classified as “poor” on the basis of one inspection <p><u>Cons:</u></p> <ul style="list-style-type: none"> • Does not necessarily ‘simplify’ the classification system.
Other Alternatives	The TCEQ should closely evaluate how all violations count in the classification system and consider revising some values based on environmental impact.
Notes	The House Committee on Environmental Regulation is evaluating compliance history under an interim charge.

Ground Truthing of Option 1

Facility No.	Current Site Rating	Current Classification	Repeat Violator? (current status)	Rating under Option 2	Classification under Option 2	Comments
47	0	High	No	0	High	only 1 investigation
48	0	High	No	-0.868	High	removed DMRs; only audit points in numerator
49	0	High	No	-1.5	High	only audit points in numerator
50	0	High	No	na	Unclassified	removed DMRs
51	0	High	No	0	High	only 1 investigation
52	0.02	High	No	0.2	Satisfactory	removed DMRs
53	0.04	High	No	0.5	Satisfactory	removed DMRs
54	0.04	High	No	0.1	Satisfactory	removed DMRs
55	0.05	High	No	0.05	High	
56	0.06	High	No	na	Unclassified	removed DMRs
57	0.07	High	No	1.5	Satisfactory	removed DMRs
58	0.09	High	No	na	Unclassified	removed DMRs
59	0.09	High	No	1.5	Satisfactory	removed DMRs
60	0.07	High	No	0	High	only 1 investigation, removed DMRs
61	0.09	High	No	na	Unclassified	removed DMRs
62	0.8	Average	No	1	Satisfactory	removed DMRs
63	3.11	Average	No	75	Poor	removed DMRs
64	0.34	Average	No	na	Unclassified	removed DMRs
65	36	Average	No	45	Satisfactory	removed default inv. point

Facility No.	Current Site Rating	Current Classification	Repeat Violator? (current status)	Rating under Option 2	Classification under Option 2	Comments
66	40	Average	Yes	1	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies
67	40	Average	No	22.5	Satisfactory	viol. for no permit downgraded to mod.
68	43.15	Average	No	43.61	Satisfactory	removed default inv. point, criminal conviction remains
69	45	Average	No	67.5	Poor	removed default inv. point
70	0.96	Average	No	7.5	Satisfactory	removed DMRs
71	0.18	Average	No	1.5	Satisfactory	removed DMRs
72	30	Average	No	0	High	Federal order removed, 1 inv.
73	30	Average	No	45	Satisfactory	removed default inv. point
74	30	Average	No	0	High	Federal order removed, 1 inv.
75	32.79	Average	No	35.31	Satisfactory	
76	33.25	Average	No	30	Satisfactory	
77	45.83	Poor	No	53.4	Poor	
78	47.15	Poor	Yes	5.92	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies
79	47.27	Poor	Yes	1.2	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies
80	48	Poor	No	60	Poor	
81	57.25	Poor	No	76.3	Poor	
82	57.78	Poor	Yes	3	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies

Facility No.	Current Site Rating	Current Classification	Repeat Violator? (current status)	Rating under Option 2	Classification under Option 2	Comments
83	59.11	Poor	Yes	3	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies
84	60	Poor	No	na	Unclassified	Federal order removed, no inv.
85	60	Poor	No	30	Satisfactory	default 2 used in denominator
86	60	Poor	No	75	Poor	
87	65	Poor	No	63	Poor	
88	66.1	Poor	Yes	15.67	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies
89	67.5	Poor	No	67.5	Poor	
90	80	Poor	No	80	Poor	
91	80	Poor	No	60	Poor	
92	80	Poor	No	75	Poor	
93	103.3	Poor	Yes	21.6	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies
94	104	Poor	Yes	3	Satisfactory	viol. for no permit downgraded to mod., repeat viol. no longer applies
95	110	Poor	No	87.5	Poor	
96	111	Poor	No	101.2	Poor	
97	100	Poor	No	na	Unclassified	Federal order removed, no inv.
98	135	Poor	No	166.66	Poor	viol. for no permit downgraded to mod., removed default inv. point

Results of Evaluation Under Option 1

	High	Satisfactory	Poor	Unclassified
15 Current "High" sites	6	5	0	4
15 Current "Average" sites	2	10	2	1
38 Current "Poor" sites	1	8	26	3
Total	9	23	28	8

Of the 68 sites evaluated under Option 2:

11.8% became unclassified due to no history (where history previously existed in the form of violations cited in Federal orders, and DMRs counted as self-reported NOV's and record reviews)

Of the 15 sites currently classified as High:

- 40% remained High.
- 33.3% changed to another classification.
- 26.7% became unclassified due to no history.

Of the 15 sites currently classified as Average:

- 66.6% remained Average.
- 26.7% changed to another classification.
- 6.7% became unclassified due to no history.

Of the 38 sites currently classified as Poor:

- 68.4% remained Poor.
- 23.7% changed to another classification.
- 7.9% became unclassified due to no history.

11 of the sites evaluated are currently "Repeat Violators"

10 of *these* are currently classified as Poor.

7 of the 10 Poores changed to "Satisfactory" when evaluating the violation of operating without proper authorization as Moderate instead of Major; therefore not creating a "repeat violator" scenario.

Ground Truthing of Option 2

Facility No.	Current CH site rating	Comments
1	0	no issued orders
2	NA	no issued orders
3	NA	1660 order approved by Commission prior to 2/1/02 for cat. B violations. 2 Pending Court Orders for failure to comply with 2 previous orders.
4	0	one proposed order for cat. B violation (no
5	0	no issued orders
6	0.05	no issued orders
7	5.57	1660 order approved by Commission prior to
8	NA	no issued orders
9	0	no issued orders
10	22.5	one order with cat. B violation
11	15.95	one order with cat. B violations only- a court order is pending for failure to comply with
12	1.6	no issued orders, 1 proposed, 2 pending
13	2.45	1 proposed order, cat Bs onlycat A-not listed
14	NA	no issued orders (Central Registry problems)
15	NA	no issued orders (Central Registry problems)
16	0	no issued orders
17	NA	no issued orders (Central Registry problems)
18	0.28	no issued orders (Central Registry problems)
19	0.28	1 proposed order
20	0.14	no issued orders
21	0	no issued orders
22	0	no issued orders
23	0	no issued orders
24	0	no issued orders
25	0	no issued orders
26	0.06	no issued orders
27	0	1660 order, cat. B only
28	1.8	no issued orders
29	0	no issued orders
30	3.01	no issued orders
31	0.25	no issued orders
32	0.56	no issued orders

Facility No.	Current CH site rating	Comments
33	0	no issued orders
34	0	no issued orders
35	NA	no issued orders
36	NA	no issued orders
37	80.82	1 pending order/ 2 cat As--none from table,
38	133.5	no issued orders
39	3.01	average by default, no issued orders
40	3.01	average by default, no issued orders
41	6.15	1 pending order/10 cat Bs & 7 cat Cs, order
42	112.5	one order with cat. B violations only
43	0	proposed 1660 referred to LD; requested to be
44	0	no orders
45	NA	pending order with cat. A,B and C viols. but no
46	0	no orders
Note: of the 46 sites evaluated, none determined to be poor performer under Option 1.		

Compliance History Classification	
Issue No.	3
Key Issue	<p>Small Businesses and Local Government in Compliance History Classification</p> <p>A) Should small businesses and local governments be treated differently?</p> <p>B) Should there be a separate classification system for small businesses and local governments?</p>
	<u>Basis:</u> Staff Comment; Stakeholder Surveys, Steering Committee Input
Other Subcommittees Reviewing Issue	Components
Recommendation	<p>The present system does place burdens on small businesses and small local governments. However, small businesses and local governments should neither be treated differently nor subject to a separate classification system. To do either would further complicate the process for classifying entities.</p> <p>Consequently, the subcommittee finds that either Option presented in “Key Issues 1 and 2” would go far in addressing many concerns for small business and local governments. The recommendations under those Key Issues were developed with an eye toward addressing small business and local government concerns.</p> <p>As noted in the discussion of “Key Issue 2,” consideration should be given to whether “operating without required authorization” should continue to be a major violation. This is a common violation among small businesses and local governments and can result from the difficulties these entities encounter in navigating the myriad regulatory requirements to which they may be subject.</p> <p>In addition, under “Key Issue 5 (Repeat Violator),” consideration should be given to impacts to small businesses and local governments.</p>
	<u>Basis:</u> See discussions under “ Key Issues 1 and 2 ”
	<u>Implementation Impacts:</u> N/A
Other Alternatives	None

Compliance History Classification	
Issue No.	4
Key Issue	<p>Compliance History Appeals</p> <p>A) Should the TCEQ bear the burden of proof?</p> <p>B) Should the timing of appeal submittals be reconsidered? (have to know when it is posted, etc.)</p> <p>C) Should appeals be limited, for instance by rating or ability to show change of classification?</p> <p>D) Does the appeal process currently limit interested stakeholder involvement in the process?</p> <p><u>Basis:</u> These issues were raised in enforcement review process customer surveys and in letters submitted by regulated entities, the general public and TCEQ staff.</p>
Other Subcommittees Reviewing Issue	None
Recommendation	<p>To address Issues A-D, the subcommittee finds the following:</p> <ul style="list-style-type: none"> • The current appeals rule is appropriate for the processing of appeals and should only be changed to eliminate the 30 point prerequisite to appeal, and should only be further changed if the point system is altered by changes to the mathematical formula. • The TCEQ should not bear the burden of proof in a classification appeal. • The deadlines set out in the appeals rule are appropriate. • Appeals should not be limited by rating, but the appeals process should be available only to those who can demonstrate that if the specific relief sought is granted <u>a change in classification will occur</u>. • The appeals process limits interested stakeholder involvement only to the extent that a classification may be appealed only if a site is classified as average and has a point total of 30 points or more. The point total requirement should be eliminated. • As long as the appeals rule language remains the same, with only the 30 point requirement eliminated, the appeals rule should be moved to 30 TAC § 60.2 and deleted from 30 TAC §60.3(e) and (f). This way the appeals process is set out under classifications only, and this is appropriate because only classification determinations – not use determinations – are appealable. <p>Option 1: Wholesale reinvention of the current appeals process is not necessary for the reasons set forth below. However, the requirement that an entity must be average and have a rating of 30 points or more in order to appeal its classification should be removed. This alteration would require a minor rule change.</p> <p><u>Basis:</u></p> <ul style="list-style-type: none"> • Generally, the person challenging a decision is responsible for showing why a decision should be changed. <i>See</i> 30 TAC §80.17 (burden of proof is on the moving party and is by a preponderance of the evidence).

Recommendation

- The 45-day time period in which to appeal a compliance history classification is reasonable and should not change. Rules governing challenges to most (if not all) other agency decisions allow less than 45 days to challenge the decision: Motions to Overturn an Executive Director decision must be filed within 23 days from the date the agency mails notice of the decision (30 TAC §50.139(c)); Motions for Rehearing must be filed within 23 days of receipt of written notice of the decision (30 TAC §50.119(b)) and Requests for Reconsideration or Request for Contested Case Hearing must be filed within 30 days of the Chief Clerk mailing notice of the Executive Director’s Decision and Response to Comments (30 TAC §55.201). Also, judicial review of a commission decision must be sought within 30 days of final commission action (Texas Water Code, §5.351).
- Persons interested in appealing classifications must monitor two dates: (1) the date on which the classification decision is made, and (2) the deadline by which an appeal must be filed. If the agency continues the annual mass classification procedures, all entities will be classified annually, a potential appellant need only be mindful of one date because all regulated entities are classified on the same date. 30 TAC §60.2(a). Given the usual appeal deadlines of 23 and 30 days, 45 days is an adequate timeframe in which to file an appeal.
- The current appeals process limits interested stakeholder involvement to the extent a classification may only be appealed if a person or site is classified as “average” and has a point total of 30 points or more. The rule also prohibits appeals from “average” performers seeking to be reclassified as “high” performers. 30 TAC §60.3(e). If resources can be found to support a broader appeals scheme, appeal eligibility should not be limited by rating (which means that challenges to “high” performer classifications should also be allowed).
- The appeals rule currently requires that an appellant be able to demonstrate that if the specific relief sought is granted a change in classification will occur. 30 TAC § 60.3(e)(2). This requirement is reasonable given that the purpose of appealing a classification is to change it.

Implementation Impacts:

- Rulemaking to move appeals as previously noted.
- Appeals guidance would need to be updated.

Implications:

- Rulemaking to open up the appeals process for other classifications. This could increase workload on staff.

Pros:

- No need for regulated entities and public to learn requirements of a new appeals process
- If the past fiscal year’s number of appeals (97) is any indication of the number of appeals to be expected in the future, the workload associated with the number of appeals received is heavy but should remain manageable without increasing resources

Cons:

- Possibility that some interested persons are left out of the process because they miss the window of time in which appeals must be filed

	<p>Option 2: Changes may be needed to reflect which classifications may be appealed if the agency decides to alter the mathematical formula/point system.</p> <p><u>Basis:</u></p> <ul style="list-style-type: none"> • Most of the Basis explanation provided for Option 1 applies for Option 2, except for the information related to point totals. Under 30 TAC §60.3 a person or site classification may be appealed only if the person or site is classified as either a poor performer or average performer with 30 points or more. So, if point calculation is changed the point total required for appeals may also need to change. <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Rulemaking to move appeals as previously noted. • Appeals guidance would need to be updated. <p><u>Implications:</u></p> <ul style="list-style-type: none"> • The universe of classifications that may be appealed may increase or decrease depending upon how the mathematical formula and resulting point totals are changed. <p><u>Pros:</u></p> <ul style="list-style-type: none"> • A broader range of appeals could benefit regulated entities and the public because either group would have more opportunities to appeal classifications and have the classifications made better or worse. • Depending on how the formula is changed, appeals of high classifications may be allowed. <p><u>Cons:</u></p> <ul style="list-style-type: none"> • A narrower range of appeals could harm regulated entities and the public because either group would have fewer opportunities to appeal classifications and have the classifications made better or worse. • A broader range of appeals could require the agency to devote more personnel and financial resources to processing appeals requests. • Regulated entities and public would need to become familiar with a new appeals process. • Would require a rulemaking to alter language related to point totals and classification required to satisfy appeals requirements.
<p>Other Alternatives</p>	<p>None identified.</p>

<p>Notes</p>	<ul style="list-style-type: none"> • In FY 2003 we received 97 appeals (between 10/7/03 and 11/24/03). • During the rulemaking the agency during decided against allowing appeals of high classifications due to the anticipated strain on agency resources. • If we alter the formula/point system, we will need to reevaluate how we decide which classifications may be appealed. We will need to consider whether/how the point values will change. • Note that a discrepancy exists between Texas Water Code § 5.754 which requires classification of a person, and 30 TAC § 60.2 which requires classification of each <i>site</i> and person. • The Sunset report did not specifically address the idea of classifying regulated entities, and it is completely silent on the idea of an appeals process. The report did, however, seem to encourage the comparison of regulated entities' performance: "While the agency maintains compliance history information for individual entities, it does not have a system for judging compliance collectively, and thus, cannot compare their performance." Sunset Report, Issue 2, p. 25. • The statute is completely silent on the issue of an appeals process. The statute does, unlike the Sunset Report, require that the agency set up a classification mechanism to compare levels of performance: high, average and low performers. TEXAS WATER CODE § 5.754(b). • The appeals rule changed substantially from proposal to adoption. At proposal, the agency set out a fairly brief and general appeals rule allowing appeals of both classification and use. Ultimately, formal and informal appeals processes were adopted to cover both major changes to classifications 30 TAC § 60.3(e) and corrections to classifications 30 TAC § 60.3(f).
---------------------	---

Compliance History Classification	
Issue No.	5
Key Issue	<p>Repeat Violators</p> <p>A) How should repeat violators be classified and treated?</p> <p>B) Is there currently inconsistency in what constitutes a repeat violation (same or similar)?</p> <p>C) Should repeat violations be limited to repeat of the exact same violation (same rule cite, same media, etc.)? or perhaps limited to another major violation in the same media?</p> <p>D) Would it be more appropriate to require that at least one (or more?) of the major violations be included in an enforcement action as opposed to an NOV?</p> <p>E) Should repeat violators be denied permits outright?</p> <p>F) Does the current "definition" of repeat violator contain a "size penalty?"</p> <hr/> <p><u>Basis:</u> External Comments:</p>
Other Subcommittees Reviewing Issue	Use, Penalty Policy

Recommendation

In relation to the major issues raised by external and internal commenters, the subcommittee finds the following:

- The violations termed as major within 30 TAC Chapter 60.2(c)(1) should be changed to reflect those violations that harm human health, the environment, or that demonstrate disregard for environmental regulations.
- A system is in place that allows entities and TCEQ to rebut allegations and potentially remove them from NOVs. With this, major violations contained within NOVs should be considered in the definition of Repeat Violator.
- The current methodology for considering the number and complexity of facilities owned or operated by the person, as required by Statute, should be continued.
- The requirement that major violations must be documented on separate occasions should be continued.
- The major violations should not be a repeat of the exact same violation or within the same media given the potential serious nature of the proposed major violations.
- Consideration should be given to impacts to small businesses that have not been aware of the need to obtain authorizations from the TCEQ. Entities that have one or more authorizations, or have been notified by the TCEQ of the need for one or more authorizations, should not be given consideration with regards to Repeat Violator status.

The present definition of Repeat Violator can be improved. Improving the means by which we define Repeat Violators can be accomplished within the framework of the present statute. Improvement can be achieved through targeted, meaningful changes to the present definition, or through an alternative approach. The subcommittee has identified the following two specific options. The scope of Option 1 is within the present statute.

Option 1: Instead of defining Repeat Violator as a component of a formula, establish a frequency with consideration to number, size and complexity, in which an entity is a Repeat Violator. The Classification Subgroup recommends the term “Repeat Violator” be utilized in conjunction with the table labeled “EIC Violations Automatically Creating Poor Performer Classification” found within **“Key Issue #1.”** A separate table could be constructed that takes into consideration size and complexity components similar to the current Chapter 60 rule language (60.2(d)(2, 3, and 4). Entities that are more complex could be allowed to violate the same violation at a higher frequency before being designated at a Repeat Violator.

These issues could be fully defined and evaluated under the pilot project approach discussed under **“Key Issue #1.”**

Implementation Impacts:

- Rulemaking to Chapter 60.

	<p>Implications:</p> <ul style="list-style-type: none"> • Additional ground-truthing is necessary to determine the number and quality of entities meeting the definition of Repeat Violator. It will be necessary to perform a detailed analysis of the use and penalty policy to determine an appropriate response to Repeat Violators. Many answers remain unanswered at this point and further detailed analysis is recommended by this subcommittee. <p>Pros:</p> <ul style="list-style-type: none"> • Ties Repeat Violator to an established enforcement document <p>Cons:</p> <ul style="list-style-type: none"> • Potential difficulty deriving meaningful complexity and number factors • Paradigm shift that may be not be accepted by the public and regulated community • Entities that commit systemic violations are not necessarily defined as Repeat Violators
	<p>Option 2: Make targeted, meaningful changes to the present formula. Modify the definition of major violation as found in 30 TAC Chapter 60.2(c)(1) to ground it to impact related violations. In order to address the violations with a high potential to impact human health and the environment and as well as those demonstrating a disregard for environmental regulations, one approach could be to utilize the EIC (see discussion in “Key Issue #1”). In addition, 30 TAC §60.2(c)(1)(B) should be modified to accommodate entities that were unaware of the need to obtain authorization from the TCEQ. Once an entity has been notified of the requirement for an authorization, and fails to do so, that violation constitutes a major violation for compliance history purposes. For those entities that currently have one or more authorizations from the TCEQ and are found to have not obtained all necessary authorizations, such a violation constitutes a major violation for compliance history purposes.</p> <p>Implications:</p> <ul style="list-style-type: none"> • Additional ground-truthing is necessary to determine the number and quality of entities meeting the definition of Repeat Violator. <p>Pros:</p> <ul style="list-style-type: none"> • Is a focused modification to the existing system. • Does not require extensive modification to the existing rule <p>Cons:</p> <ul style="list-style-type: none"> • None identified

Other Alternatives	Amend the current definition found in 30 TAC 60.2(d)(1) to include systemic violations of the terms and conditions of TCEQ authorization(s). Violations should not be limited to the same violation; rather a pattern of behavior should dictate the use of the term repeat violator. The TCEQ should also have the ability to classify a person as a poor performer if the agency can demonstrate performance issues impacting human health and/or the environment as well as systemic inability, either through lack of resources or disregard for rules and regulations, to comply with the terms and provisions of a TCEQ authorization. The EIC’s definitions of certain A, B and C violation and a specific frequency based on an entities size and complexity should be incorporated in order to capture some measure of systemic violations.
---------------------------	--

Compliance History Classification	
Issue No.	6
Key Issue	Due Process Rights How are due process rights affected by the classification process? <u>Basis:</u> Stakeholder Surveys
Other Subcommittees Reviewing Issue	N/A
Recommendation	The subcommittee recommends that no changes be made.
	<u>Basis:</u> This issue arose during the rulemaking to implement the compliance history requirements and was addressed by an Attorney General Opinion. Further, a review of the original Sunset Advisory Commission report on this issue shows that an evaluation of past compliance performance was intended.
	<u>Implementation Impacts:</u>
Other Alternatives	Modify the compliance history rule so that consideration with regard to classification would only be given to those components that “occurred” on or after February 1, 2002; the remaining (older) components would still be listed in the compliance history report, but would not be factored into the classification. (This assumes that we would still include components based on the dates we currently utilize, such as the effective date of commission orders, and the approval date of investigations, rather than the “occurrence” date of any violations referenced in them.)

Compliance History Classification	
Issue No.	7
Key Issue	Data Accuracy and Retention A) Is the TCEQ’s data management adequate enough to ensure compliance information is complete, up to date, and accurate? B) What is the timing of data entry? Are all components available when the classification is determined? C) What processes are needed to ensure accuracy of classification before being posted and / or used?
	D) What supporting documentation should be included with each compliance history report? E) Should it be possible for a person to post its response to its classification(s) in some public forum? <u>Basis:</u> Staff Input and Review of Current Policy / Rule, Public Comments
Other Subcommittees Reviewing Issue	Communications (Item D, E)
Recommendation	The subcommittee believes that we should continue with current data management procedures and refine the procedures when application issues or data error issues are identified and reported to the agency data maintenance team. <ul style="list-style-type: none"> • Data accuracy and retention are addressed within current agency procedures. • Communications and training are key to effective database management, especially when data management / application procedures are changed or modified. Developing effective communications and training of our internal customers needs to be a top priority. • An application procedure needs to be established to prevent components from applying to all customer numbers (CNs) affiliated with the regulated entity (RN) when there is more than one customer associated with the RN. Enforcement has developed a work around using "other adjustments" window in CCEDS.

	<p><u>Basis:</u></p> <p>A. Large databases are always in a constant state of revision, maintenance and data clean-up. Within available resources, the agency has done and continues to do a great deal to ensure the data is accurate and up to date. The agency has a process to prioritize data management / maintenance issues. As application issues or data errors are identified, they are prioritized and corrected within available resources.</p> <p><u>Implementation Impact:</u></p> <ul style="list-style-type: none"> • \$150(K) is included in the 06/07 LAR for CCEDS quality assurance windows. • New windows identified may cost \$35(K) or more depending on the number of business rules impacted, minor maintenance costs \$3.5(K), while more complex maintenance projects may approximate \$18(K) each. • The current database maintenance contract runs through FY05 and includes two options years through FY07. • Additional training / travel dollars will be required if there are major systems modifications. • Changes to the databases will be prioritized and implemented as resources are made available, but there are limited maintenance resources. • Currently there is no known LBB or EPA impact. <p><u>Implications:</u></p> <ul style="list-style-type: none"> • Implementation expenditures for compliance history approximates \$1(M). • An agency data maintenance team prioritizes application and data issues within available resources. • There are procedures for correcting data errors, and for appealing the classification. There were 97 appeals received in FY04, and numerous data errors that were identified were corrected. • Periodic data sampling by third party will help to ensure the data complies with core data standards and standards established for each database.
	<p><u>Pros:</u></p> <ul style="list-style-type: none"> • There has been a high level of expenditures to implement current procedures. • There is currently a maintenance contract with two option years. • Procedures are in place to identify and prioritize program applications. • Procedures are in place for error correction and classification appeal. • Management is studying possible ways to implement an audit recommendation on sampling data in databases for data quality. <p><u>Cons:</u></p> <ul style="list-style-type: none"> • New classification procedures may require modifications to database applications which cost dollar resources and time. • Error correction and appeal procedures need to be better communicated to internal and external customers. • New applications and / or revision to an application will require better communications and training of internal customers.

B. Timing and data entry issues have been identified by management and are being worked as resources permit.

Implementation Impacts:

- New data requirements may require additional applications programming or window development and additional data input to the databases.
- If the EPA reporting data is not included in the formula, some workload reduction may be achieved.
- There is no known LBB impact.

Implications:

- The agency has five years worth of data on enforcement issues, but not for inspections.
- Reducing the compliance period to three years reduces the data gap.
- There are scheduling gaps for EPA data and water quality self reporting data
- Compliance history is suppose to include records reviews which need to be defined.

Pros:

- Management is aware of the data gap between enforcement and inspection.
- Implementation of Classification Issue 1, Option 1 or 2 or implementation of Classification Issue 2 will eliminate most of the timing and data gaps issues.

Cons:

- To continue with the current classification will require additional dollar resources and time to eliminate the data gaps.

C. Information contained in the database must meet data quality standards and is presumed correct. Periodic sampling of data in the databases improves data quality. The customer is the best source to identify errors.

Implementation Impact:

- Third party data quality sampling will require dollar resources if contracted, and contract project management will be time consuming.
- Providing the data to “poor performers will impact the timing of the posting.
- See STEERS alternative for projected resource impact.
- There is no known LBB or EPA impact.

Implications:

- Providing the information before it is posted to the public website is a resource intensive process.
- Errors identified by the “poor performers” will be corrected before posting.
- It is less resource intensive to only notify potential “poor performers”.
- Letter notification was given to the “poor performers” during the mass classification last year.
-

Pros:

- Best practices suggests making data available.
- The customer can best determine if the data is correct.
- The agency gained experience last year dealing with the mass classification and responding to customer questions on classification.

The agency has a procedure for correcting data errors identified.

	<p><u>Cons:</u></p> <ul style="list-style-type: none"> • It is a resource intensive process to inform the customers of their classification before the classification is placed on the public website. <p>See Alternative, using the State Environmental Reporting System (STEERS) to disseminate classification information to customers before posting to the public website.</p> <p>D. The agency has procedures for providing compliance history and only certified records are used in the process.</p> <p><u>Implementation Impact:</u></p> <ul style="list-style-type: none"> • Web space is a limiting factor that will require additional study. • There is no know LBB or EPA impact. <p><u>Implications:</u></p> <ul style="list-style-type: none"> • Only certified records are used in the compliance history report. • Website space limitations may prevent all the data from being displayed. <p><u>Pros:</u></p> <ul style="list-style-type: none"> • When records are requested, the ENF and FOD coordinate records requirements. <p><u>Cons:</u></p> <ul style="list-style-type: none"> • It is not cost effective to provide copies of all certified records each time a compliance history is requested. • Limited web space prevents all compliance history documentation from being displayed on the website. <p>E. Use of public forum was discussed during the rules-making process. The reason some type of public forum is not currently used is due to limited agency resources.</p>
	<p><u>Implementation Impact:</u></p> <ul style="list-style-type: none"> • See STEERS alternative for projected resource impact. • There is no know LBB or EPA impact. <p><u>Implications:</u></p> <ul style="list-style-type: none"> • Respondent claims would have to be reviewed. • Claims would have to be placed on the website, or attached to respondent records. • Reviewing and posting require additional time and resources. • Revision of the classification process may eliminate the classification fairness issue. <p><u>Pros:</u></p> <ul style="list-style-type: none"> • Respondents could make their claims known.

	<p><u>Cons:</u></p> <ul style="list-style-type: none"> • Additional dollar and time resources would be required. • Classification fairness should not be an issue if Classification Issue 1, Option 1 or Option 2 is adapted. <p>See Alternative, using the State Environmental Reporting System (STEERS) to allow customers to comment on their classification.</p>
<p>Other Alternatives</p>	<p>Use the State of Texas Environmental Reporting System (STEERS) to disseminate classification / compliance history information before it is placed on the public website.</p> <p><u>Implementation Impact:</u></p> <ul style="list-style-type: none"> • Based on the complexity of the program applications, the STEERS alternative will take significant time and dollar resources. There are already a number of high priorities projects being worked by the STEERS Team. • The estimated program applications costs could range from \$60-\$150(K). • Estimated completion date if Classification Issue #1, Options 1 is adapted, end of FY07. • Estimated completion date if Classification Issue #1, Option 2 is adapted, end of FY06. • There is no known LBB or EPA impact if this alternative is selected. <p><u>Implications:</u></p> <ul style="list-style-type: none"> • New program applications will require time / dollar resources. <p><u>Pros:</u></p> <ul style="list-style-type: none"> • May be the most expeditious method of providing the information before placing it on the public website. • May be the least resource intensive after initial program applications are developed. <p><u>Cons:</u></p> <ul style="list-style-type: none"> • Will require additional time and dollar resources to implement. • Mail out will still need to be conducted at least initially. • May not be the most effective way to reach small business customers. <p>Use the STEERS to provide customers the opportunity to respond to their classification / compliance history.</p>

	<p><u>Implications:</u></p> <ul style="list-style-type: none"> • New program applications will require time / dollar resources. <p><u>Pros:</u></p> <ul style="list-style-type: none"> • Provides a medium for customer response. <p><u>Cons:</u></p> <ul style="list-style-type: none"> • Will require additional time and dollar resources to implement. • Responses will still have to be reviewed and / or attached to files or records. • May not be the most effective way to reach small business. <p>Based on the complexity of the program applications, the STEERS alternative will take significant time and dollar resources. There are already a number of high priorities projects being worked by the STEERS Team.</p>
Notes	<p>To ensure efficient / effective use of information resources, the records retention schedule for some electronic data records needs to be addressed in the future.</p> <p>Based on the classification process or formula selected to determine classification, additional program applications and/or data windows will be required.</p> <p>Program applications or modification to data management procedures may impact the 06/07 LAR request for quality assurance windows for CCEDS.</p>

Compliance History Use Subcommittee	
Issue No.	1
Key Issue	<p><u>General use of Compliance History (including components and classification):</u></p> <p>A) Should compliance history be used in permit actions? If yes, which permitting actions?</p>
	<p><u>Basis:</u> The statute requires the TCEQ by rule to “use” compliance history classification in permit actions and specifies certain permits which can not be granted to poor performers. Staff input and review of current rule. Public comment.</p>
Other Subcommittees Reviewing Issue	None
Recommendation	<p>Yes, compliance history should continue to be used in permit actions. Those actions should be limited to permits which require notification to the agency and substantive review and approval or disapproval.</p>
	<p><u>Basis:</u> The statute mandates that the agency consider compliance history in permitting actions. In implementing the statute through rulemaking, the agency has limited the application of compliance history to those permitting actions which actually go through a substantive review and approval process by the agency. The rule also sets out those permit actions to which Chapter 60 does not apply. (§60.1(a)(4)) The subcommittee agrees that those limitations and exceptions should apply in compliance history use. Additional limitations and exceptions in §60.1(a)(4), however, should be considered to ensure consistency in use, environmental protection and best use of agency resources. The additional exceptions should take into account the current practice of the Air Permits Division described in Note 1 below.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Within 90 days or less, the Deputy Director of the Office of Permitting, Registration and Remediation should conduct a review of permit actions to ensure that all actions involving substantive review are actually receiving a compliance history review. • The review should also look at other actions which are not currently subject to a compliance history review to determine whether those actions should begin to involve a substantive review which would trigger a compliance history review. • The review could then result in rulemaking or change in practice if inconsistencies are identified.
Other Alternatives	<p>Subcommittee recommends a rule change to §60.1(a)(3) to refer to “permit” instead of “authorization”. This change would serve to clarify that the limitation in that subsection applies to all permits, not just a subset called “authorizations.</p>

Notes	<p><u>Note 1:</u> In its review, the subcommittee discovered that the Air Permits Division established a practice during implementation of this program that excluded certain permit actions from compliance history review. These include permits by rule and standard permits which require registration but do not require either notice or site approval. It is unclear how the current rule would apply to those actions. For clarity the subcommittee is recommending that this practice be specifically incorporated in the exceptions to the rule. The committee notes that the agency is currently in the process of reviewing the permits by rule to ensure protectiveness and establish the appropriate level of review for each.</p> <p><u>Note 2:</u> The subcommittee also recommends that the agency conduct a review of permit actions which currently do not require notice and approval to determine whether compliance history should be required to be used. For example the air program allows transfer of ownership without an approval process, therefore compliance history is not reviewed. See Key Issue 1C for additional discussion.</p>
--------------	--

Compliance History Use Subcommittee	
Issue No.	1
Key Issue	<p><u>General use of Compliance History (including components and classification):</u></p> <p>B) Should compliance history be used in compliance and enforcement actions and in prioritizing inspections?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	Ordering Provisions (Item B); Enforcement Initiation/Investigation Prioritization/NOV Policy/Agency Coordination (Item B)
Recommendation	Yes. Compliance history should continue to be used in compliance and enforcement actions and to prioritize inspections.

	<p><u>Basis:</u></p> <p>Texas Water Code § 5.754(e) directs the agency to use compliance history in permitting and enforcement decisions. The law is implemented at § 60.3(a) and c) respectively. The subcommittee concludes that the law and rule are clear and the agency should continue using compliance history in these actions.</p> <p>Texas Water Code § 5.754(g) requires that agency rules shall provide for additional oversight of poor performers. This law is implemented at § 60.3(c)(1) of the rule which provides that poor performers are subject to any oversight necessary to improve environmental compliance. The subcommittee concludes that, while classification of an entity as a poor performer may be the result of a case by case determination, once one is classified as a poor performer that person would be subject to the agency placing him on a prioritized schedule for inspections. The subcommittee finds that prioritizing inspections implements the statutory and rule intent to use agency resources in a way that best provides for environmental compliance.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • The Office of Compliance and Enforcement should continue to develop its prioritization strategy based on risk analysis (including consideration of compliance history), federal requirements, EIC subcommittee recommendations, and commission input. OCE should finalize its draft by August 31, 2004 to begin coordination within TCEQ and with EPA. Full implementation would be targeted to begin FY 06.
Other Alternatives	

Compliance History Use Subcommittee	
Issue No.	1
Key Issue	<p><u>General use of Compliance History (including components and classification):</u></p> <p>C) Are there other actions conducted by the TCEQ that should be influenced by compliance history?</p> <p><u>Basis:</u> Staff Input and Review of Current Rule, Public Comment</p>
Other Subcommittees Reviewing Issue	None
Recommendation	No. However, subcommittee review of program activities identified at least one type of action involving transfer of ownership as needing further review, before a recommendation could be made. See discussion below.

	<p><u>Basis:</u> Currently, the air and water quality programs allow transfers of ownership without a substantive review and approval process. As a result compliance history is not reviewed for purposes of the transfer of ownership. However, it appears that the waste program does review compliance history upon notice of transfer of ownership. Due this apparent inconsistency in practice and because there may be significant resource issues involved, the committee recommends that further study is needed to determine, among other matters, whether poor performers are actually purchasing existing facilities before recommending use of compliance history in every transfer of ownership action. The review, which could entail a screening of all transfers against the poor performer table, may show that there very few, if any, transfers of ownership to a poor performer.</p> <p>Pros - In the case of ownership transfer, use of compliance history when reviewing the transfer will ensure that transferees who are poor performers receive additional scrutiny. It would also ensure that ownership transfers are being reviewed in a consistent manner across the agency. However, the agency will need to address or consider what types of actions would be appropriate when a poor performer is involved in request for a transfer of ownership, i.e. denial, new permit conditions.</p> <p>Cons - Currently the air program processes thousands of transfers of ownership each year where compliance history is not reviewed prior to the transfer. Changing this procedure to require a compliance history check and approval for all programs would significantly increase the burden on agency resources.</p> <p>If a change is found to be warranted, a rule change would be necessary.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Within 90 days or less, the Deputy Director of the Office of Permitting, Registration and Remediation should conduct a review of actions which are not currently subject to a compliance history review to determine whether those actions should begin to involve a substantive review which would trigger a compliance history review. The review could then result in rulemaking or change in practice if inconsistencies are identified.
<p>Other Alternatives</p>	

<p align="center">Compliance History Use Subcommittee</p>	
<p>Issue No.</p>	<p align="center">1</p>
<p>Key Issue</p>	<p><u>General use of Compliance History (including components and classification):</u></p> <p>D)Should compliance history <u>use</u> take into account the fact that the respondent is a large business, small business or local government?</p> <hr/> <p><u>Basis:</u> Staff input, public comment, Steering Committee input</p>

Other Subcommittees Reviewing Issue	Classification, Enforcement Initiative Criteria, Penalty Policy, Ordering Provisions, Collections
Recommendation	No, compliance history use should not take into account the size of the entity. However, at the program development stage, in setting up the different uses of compliance history the agency should provide incentives and disincentives that will work for small and large businesses.
	<p><u>Basis:</u> The subcommittee does not find a basis, legal or otherwise, to recommend that the size of an entity be a factor in determining compliance history. The statute and the rule which implements the statute do not address the size of the respondent as it relates to compliance history. Texas Water Code §5.754(e) clearly states that the commission by rule shall provide for the use of compliance history classifications in commission decisions. It does not currently allow for use based on size. The rule discusses the use of compliance history in the agency functional areas of permitting, investigations, enforcement and participation in innovative programs but, like the law, also does not take into account the size of an entity.</p> <p>In order to best encourage compliance, however, the agency must take into account that small and large entities have different interests, different resources for compliance, and may pose different risks to the environment. To account for differing interests, the agency must ensure that there is a menu of incentives (e.g. payment plans, recognition, participation in programs) and disincentives (including penalties) that will impact compliance of a wide variety of entities.</p>
	<p><u>Implementation Impacts:</u></p> <p>None</p>
Other Alternatives	

Compliance History Use Subcommittee	
Issue No.	1
Key Issue	<p>General use of Compliance History (including components and classification):</p> <p>E) For the approved uses of compliance history, is the TCEQ applying the rule/statute consistently?</p> <p><u>Basis:</u> Staff input, public comment, Steering Committee input</p>
Other Subcommittees Reviewing Issue	None

Recommendation	In the subcommittee’s analysis of this issue, we found variance in the use of compliance history among the programs. We recommend that the agency conduct further review of the application of the rule across programs and develop a policy to ensure that compliance history is used in a fair and consistent manner.
	<p><u>Basis:</u> Staff initial review of program activities.</p> <p><u>Note 1:</u> In its review, the subcommittee discovered that the Air Permits Division established a practice during implementation of this program that excluded certain permit actions from compliance history review. These include permits by rule and standard permits which require registration but do not require either notice or site approval. It is unclear how the current rule would apply to those actions. The committee notes that the agency is currently in the process of reviewing the permits by rule to ensure protectiveness and establish the appropriate level of review for each. For clarity the subcommittee is recommending that this practice be specifically incorporated in the exceptions to the rule.</p> <p><u>Note 2:</u> The subcommittee also recommends that the agency conduct a review of permit actions which currently do not require notice and approval to determine whether compliance history should be required to be used. For example the air program allows transfer of ownership without an approval process, therefore compliance history is not reviewed. See the discussion at Key Issue 1C.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Within 90 days or less, the Deputy Director of the Office of Permitting, Registration and Remediation should conduct a review of permit actions to ensure that all actions involving substantive review are actually receiving a compliance history review. The review could then result in rulemaking or change in practice if inconsistencies are identified.
Other Alternatives	

Compliance History Use Subcommittee	
Issue No.	1
Key Issue	<p>General use of Compliance History (including components and classification):</p> <p>F) Should the agency contact regulated entities when the compliance history score is nearing the lowest classification?</p> <p><u>Basis:</u> Staff recommendation.</p>

Other Subcommittees Reviewing Issue	Communications
Recommendation	No.
	<u>Basis:</u> The agency currently provides public information regarding compliance classification which is available to regulated entities. In some programs, language has been included in notices of violation or other correspondence related to enforcement that the enforcement actions may change the classification. This language should be included for all programs because it would put the entity on notice that they should check their rating. Currently, updated information is made available to regulated entities upon request. Due to the information already easily available to these entities, further contact does not appear necessary and if implemented would require additional staff time and agency resources which we think is not warranted.
	<u>Implementation Impacts:</u> None
Other Alternatives	

Compliance History Use Subcommittee	
Issue No.	2
Key Issue	<p><u>Compliance history (including components and classification) and its relationship to permitting?</u></p> <p>A) Is compliance history adequately being used for imposing additional monitoring conditions, standardized permit conditions, or stronger compliance standards?</p> <p>B) Should compliance history be used for reopening of a permit for a repeat violator or poor performer?</p>
	<u>Basis:</u> Staff Input and Review of Current Policy/Rule, Public Comment
Other Subcommittees Reviewing Issue	None

<p>Recommendation</p>	<p>A) No, currently there is no uniform process on how to address compliance history through permit conditions. Compliance history should be used for adding additional permit conditions, where appropriate, that will aid the permittee in achieving compliance and improving environmental performance. Additional monitoring conditions, standardized permit conditions and stronger compliance standards should be placed on a poor performer that are directed at improving performance with specific performance outcomes in mind. The subcommittee recommends that the agency develop a review process that includes Field Operations Division, Permits Division, Legal and the Enforcement Division for poor performers to determine if a permit change can bring about improved environmental performance.</p> <p>The TCEQ should clarify permitting rules for all media to provide that the agency has discretion to add permit conditions upon the renewal of a permit for a poor performer or during a formal enforcement action.</p> <p>B) Compliance history alone should not be the basis for reopening a permit for a repeat violator or poor performer.</p>
	<p><u>Basis:</u></p> <p>A) Currently there is no process in place that utilizes compliance history as a trigger for imposing additional monitoring conditions, standardized permit conditions or stronger compliance standards. The enforcement process is generally the vehicle used to bring about corrective measures to bring facilities into compliance. If the agency could reopen a permit prior to the conclusion of an enforcement action or to address permit compliance elements that have proven unprotective or unenforceable it would be a benefit to human health and the environment. The ability to require the addition of environmental performance enhancing conditions in a permit such as additional monitoring requirements or other special conditions that can improve environmental operations and create an environmental benefit should be an option available to the agency.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Initiate review process that includes OCE, OPRR, and OLS to develop standardized factors that should be considered when reviewing a permit, amendment or renewal of a poor performer.

	<p>B) Compliance history should be one factor but not be the sole reason for reopening a permit. The agency should be able to reopen a permit for an entity in the lowest classification if there is a documented adverse impact on human health and/or the environment, or if a permit contains conditions that are not enforceable or in conflict.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • By September 30, 2004, OLS and OPRR should review all permitting programs to determine whether authority exists to reopen permits of poor performers to add permit conditions to improve compliance and environmental impact. • For those programs that do not have authority to reopen permits the TCEQ should request the necessary statutory changes in the 2005 or 2007 session.
Other Alternatives	
Notes	While reopening of permits should not be based upon compliance history alone, the agency should seek statutory authority to reopen permits as needed to ensure the protection of the environment.

Compliance History Use Subcommittee	
Issue No.	3
Key Issue	<p><u>Shutdowns and permit revocation based on compliance history (including components and classification):</u></p> <p>A) Can the TCEQ clearly define what is an unacceptable compliance history for purposes of deciding whether to issue or deny a pending permit application? If yes, for what type of permit actions should compliance history be use? (Note: This question is addressed by the recommendation in 1.A.) Should permit denial be mandatory or discretionary?</p> <p>B) Should compliance history be considered in the decision to revoke the authorization or permit of a regulated entity to operate? If so, can the TCEQ identify those criteria that would be used to initiate revocation? How should this be incorporated into the enforcement process?</p> <p>C) Should the TCEQ use compliance history to make a determination to shut down a facility?</p>
	<u>Basis:</u> Staff input and review of current rule, public comment, Steering Committee input

Other Subcommittees Reviewing Issue	Ordering Provisions
Recommendation	<p>A) Yes, the agency can clearly define the level of compliance history that should trigger the possible denial of a permit or authorization to operate. This consideration should be triggered when the applicant’s compliance history is rated “Poor.” Denial is currently mandatory if the violations “constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations.” This term should be interpreted to include at least the following scenarios: 1) the applicant is found to be a repeat violator and the repeated violations are major (repeat violations of an owner or operator should be considered regardless of whether the violations occur at the site for which the application is pending); 2) the violations include emissions or discharges that posed an eminent threat to public health or welfare; or 3) the application is for facilities that would authorize emissions or discharge of specific contaminants in an area identified as an area of concern for those contaminants. Other denials should be discretionary.</p>
	<p>B) Yes, the TCEQ should consider compliance history in the decision to revoke the authorization or permit of a regulated entity to operate. Violations that “constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations,” or violations that pose an eminent threat to human health or welfare should result in the revocation of the regulated entity’s authorization or permit to operate. The review of compliance history should be integrated into the agency’s enforcement process through a communication procedure between Field Operations Division, Permits Division Office of Legal, and the Enforcement Division for case-by-case determinations. The compliance history database should be supplemented by a system to identify currently ongoing investigations at the region for those entities that are at the lower end of an average classification. The compliance history alone should not be an automatic trigger to invoke revocation proceedings although it could be the sole basis for revocation once a proceeding is initiated. (as provided for by Water Code sections 7.302 - 7.303).</p> <p>C) Yes, action to shut down a facility should involve the enforcement process and the same considerations in the determination to revoke a regulated entity’s authorization or permit to operate as identified in recommendation B above.</p>

	<p><u>Basis:</u></p> <p>This is a key issue because the agency’s use of compliance history to revoke or deny a company’s authority to operate will provide a major incentive for the owners or operators of the company to do their best to remain in compliance. Also, the public perception, based on past history, appears to be that this is an empty threat.</p> <p><u>Implementation Impacts</u> None</p> <p>It is unclear why the rule mandates denial only for general permits under Chapter 205.</p> <p><u>Implementation Impacts</u></p> <ul style="list-style-type: none"> • OLS and OPRR should review the mandatory denials currently in the rule and determine whether they are appropriate and whether other mandatory denials are warranted. This review could result in a rule change.
<p>Other Alternatives</p>	

<p align="center">Compliance History Use Subcommittee</p>	
<p>Issue No.</p>	<p>4</p>
<p>Key Issue</p>	<p><u>Early use of compliance history (including components and classification) in the permitting process:</u></p> <p>A) Should compliance history be considered early in the permit process? If yes, should it be considered before administrative completeness review, before technical review, and/or before development of the draft permit?</p> <p>B) What implications to TCEQ and permit applicants would result from such a process?</p> <p><u>Basis:</u> Staff input and Review of Current Rule, Public Comment, Commissioner input</p>
<p>Other Subcommittees Reviewing Issue</p>	

<p>Recommendation</p>	<p>A) Yes, the compliance history classification should be identified and reviewed as part of the administrative review process when a permit application is received. Additionally, the compliance history should be updated prior to issuance/approval if more than six months has passed.</p> <p>B) If the violations included in a poor determination involve violations requiring mandatory denial, no further review should be necessary. If the compliance history is determined to be poor, but does not involve mandatory denial, the permitting division will initiate discussions with management regarding whether the permit should be denied prior to beginning technical review of the application. Early review and management discussion of the compliance history will prevent the wasting of agency resources in the review of the permit in some cases.</p> <p>If the violations do not result in denial, the permit reviewer will continue the review of the application while looking for opportunities to improve the testing, monitoring, recordkeeping, reporting, or other enforcement related aspects of the permit.</p> <p>The agency should not wait until the draft permit stage to begin a review of the compliance history because, at the draft permit stage, there is a public perception that the agency has reviewed the application and is going to issue the permit.</p>
	<p><u>Basis:</u> Early review of compliance history will result in saving agency resources for those applications that will be denied. Early review will result in permits that will better assist agency staff, the public, and permittees in determining compliance status and ensuring that the permitted facilities remain in compliance in the future.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> OPRR should develop a system to run compliance history at the time of administrative completeness review. The system should provide that any poor performer applications be flagged and raised to OPRR management so that the current inter-office review can happen earlier than the current practice.
<p>Other Alternatives</p>	

Compliance History Use Subcommittee	
Issue No.	5
Key Issue	<p><u>Basis for Award of Incentives:</u></p> <p>A) Should incentives be awarded based on a tiered system of performance?</p> <p>B) Should recent trends in compliance history be considered in granting incentives?</p>
	<u>Basis:</u> Staff input, Public Comment, Steering Committee Input
Other Subcommittees Reviewing Issue	None
Recommendation	<p>A) Yes. The agency currently has an existing system that provides tiered incentives based on level of performance. The agency should continue to build on this process and review, develop and implement new incentives that can be offered.</p> <p>B) Yes. Compliance trends over the previous three years should be considered in whether to grant an incentive.</p>

	<p><u>Basis:</u> A) Currently certain incentives are available for both high and average performers while other more substantial incentives are available only to high performers. The TCEQ has two types of incentives under the CLEAN TEXAS-CLEANER WORLD Program. These include “menu” or pre-approved incentives and “case-by-case” incentives. Menu incentives are those that the agency has already reviewed and approved for use. Case-by-case incentives can be requested at the time of application for one of the EMS Levels of Clean Texas.</p> <p>The statute and the rule clearly intend that incentives be used to achieve enhanced environmental performance. Within the rule, in the discussion of components, there are provisions that allow consideration to be given to types of environmental management systems used for compliance, any voluntary on-site assessments conducted by the ED under a special assistance program and participation in a voluntary pollution reduction program. The statute’s discussion of incentives is tied to the strategically directed regulatory structure (SDRS) which is to provide incentives for enhanced environmental performance. The statute says that the SDRS shall offer incentives based on: (1) a person’s compliance history classification; and (2) any voluntary measures undertaken by the person to improve environmental quality. All of this language clearly sets forth a system of incentives being offered based on compliance history ratings. An example is in the discussion of participation in innovative programs where it states that the agency shall prohibit a poor performer from participating in the regulatory flexibility program at that site. In addition, a poor performer is prohibited from receiving regulatory incentives under its EMS until its compliance history classification has improved to at least an average performer. The EMS rule which is linked to the CH rule in this area of incentives has to be considered in any discussion of incentives because they are both sub-sets of the SDRS rule.</p> <p><u>Implementation Impacts:</u> None</p>
	<p>B) In addition to considering the entire five year compliance history, the commission should give extra weight to compliance events occurring in the previous three years. This practice would be consistent with current programs such as CLEAN TEXAS-CLEANER WORLD which requires that a company not have any significant compliance event in the last three years. This would ensure that companies which have been faltering recently not be rewarded.</p> <p><u>Implementation Impacts:</u> None</p>
Other Alternatives	

Summary of Incentives for CLEAN TEXAS - CLEANER WORLD MEMBERS
Updated July 1, 2004

Incentives Approved by Agency Management and Implemented

Incentive	Advocate*	Partner*	Lone Star Leader*	National Leader*	National Leader w/ High CH**
Reduced fees for training: Reduced fees for TCEQ training.	x	x	x	x	x
Technical Assistance and Networking: Networking opportunities and technical assistance, including on-site visits.	x	x	x	x	x
Quarterly Newsletter: Information about upcoming training, program developments, and member successes.	x	x	x	x	x
Use of Logo and Annual Recognition: CLEAN TEXAS - CLEANER WORLD Logo available for use by members.	x	x	x	x	x
Custom Market Materials: Use of custom CLEAN TEXAS - CLEANER WORLD marketing materials, including on-site recognition.			x	x	x
Credit under Compliance History: Provides for a 10% credit for sites that have an agency approved EMS in place for one year (Chapter 60 TAC)			x	x	x
Exemption from Source Reduction and Waste Minimization Planning Requirements: Exemption from State pollution prevention planning requirements (30 TAC 335 Subchapter Q). Annual reporting must still be completed through the EMS process.			x	x	x
Single point of contact for innovative activities: Assistance with multi-media innovations and related issues			x	x	x
Stringency Evaluation: Stringency evaluations under air programs so that sites held to two similar standards (federal and state) will only be held to one.				x	x
Low Inspection Priority for EPA Inspections: Does not include complaints or sector initiatives				x	x
Reduced State Inspection Frequency: Case-by-case reduction in inspection frequency					x

*Advocate membership is for non-regulated entities; Partner memberships requires beyond compliance performance and community outreach; and Lone Star Leader and National Leader are the CERTIFIED EMS Levels. The National Leader Level is aligned with EPA's National Environmental Performance Track.

**Compliance History

Incentives Approved by Agency Management, Implementation in Progress

Incentive	Partner*	Lone Star Leader*	National Leader*	National Leader w/ High CH**
Extended Hazardous Waste Storage Time: This was adopted by EPA in April 2004 and will need adoption at the state level.			x	x
Reduce MACT reporting: This was adopted by EPA in April 2004 and will need adoption at the state level.			x	x
Additional notice for inspections: In development.				x

Incentives Approved by Agency Management, Implementation Planned

Incentive	Partner*	Lone Star Leader*	National Leader*	National Leader w/ High CH*
Reduced DMR Reporting: Reduced reporting and monitoring under the discharge monitoring report provisions of the Clean Water Act. This incentive will need federal approval to implement.			x	x
Alternative compliance options under Title V: Allow for alternative compliance options under Title V (if allowed by rule) without requiring the option to be identified up front. The equipment and/or operation would need to be authorized under the New Source Review (NSR) permit. This incentive will need federal approval to implement.			x	x

*Advocate memberships is for non-regulated entities; Partner memberships requires beyond compliance performance and community outreach; and Lone Star Leader and National Leader are the CERTIFIED EMS Levels. The National Leader Level is aligned with EPA’s National Environmental Performance Track.

**Compliance History

Compliance History Use Subcommittee	
Issue No.	6
Key Issue	<u>Use of compliance history in the calculation of agency fees:</u> A) Should there be higher fees for entities with poor compliance history? B) Should there be a fee decrease for high performers?
	<u>Basis:</u> Staff Input and Review of Current Rule, Public Comment

Other Subcommittees Reviewing Issue	none
Recommendation	<p>A) Yes, compliance history should be used in the calculation of agency fees for poor performers, especially those fees which are used to support agency programs such as inspection and emissions fees and certain permitting fees.</p> <p>B) Yes, there should also be a fee decrease for high performers. The amount of fees going to reward high compliance history should not exceed the amount of increased fees collected from entities with a low compliance history in order to maintain stability. Note that an alternative listed below would also be supported by the group and would recommend no fee decrease for high performers.</p> <p><u>Basis:</u></p> <p>Fees can be a powerful incentive to improve compliance history. Changing the fees would also better reflect the amount of resources the agency spends on entities with high and poor compliance histories. The group felt that it was important to include both increases and decreases in fees for several reasons including equity and avoiding the appearance of the agency having a vested interest in more poor performers.</p> <p>A very important factor in implementing this recommendation would be ensuring that the reformulation of fees does not impact the revenues needed for program support. The group has discussed (for annual fees) setting a specific percentage increase in fees for poor performers and then later redistributing the extra revenue proportionately as a rebate to high performers.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • A team should be initiated to include OPRR, OLS, and OAS to begin discussion on how to appropriately adjust fees. • Team should perform a fee-by-fee review to identify which fees the TCEQ has authority to change. • Team should make a recommendation to the Executive Director about which fees should be changed with consideration of budget and statutory limitations. These fee changes would necessitate rulemaking and possibly require statutory changes.

<p>Other Alternatives</p>	<p>If a rebate is not feasible another formulation option would be to carry over the extra balance collected from poor performers and subtract it from next year's bill. This would help ensure that the program doesn't lose revenue due to the reformulation. There may be some fiscal implications about carrying funding over to the next year that need to be addressed.</p> <p>Another alternative would be to use the extra fees collected from poor performers for agency programs aimed at improving compliance or supporting program activities. This would be in lieu of providing lowered fees for high performers.</p> <p>A third alternative would be to not use compliance history in the calculation of fees. In addition to the possibility for loss of revenue noted above, such a system would raise complex accounting and coordination issues. For instance, since fee calculations are done in the program areas, the division implementing the collection and recordkeeping would need to have access to several databases in order to determine who was eligible for fee increases or decreases. There would also be timing issues involving when information was added to the system, invoices generated, and other similar matters. In addition, approximately 80 per cent of agency funding is fee based. Revenue estimates would need to be made and the impact to agency revenues determined. While problems of this nature would not be impossible to overcome, they may be problematic and the ramifications should be investigated thoroughly if compliance history will be used in the calculation of fees.</p>
<p>Notes</p>	<p>There may be statutory and budgetary limitations on the ability to change every fee. A fee-by-fee review would be needed at implementation.</p>

Penalty Policy Subcommittee	
Issue Priority.	1
Key Issue	<p><u>Penalty Policy simplification:</u></p> <p>A) Can the current Penalty Policy be simplified, and if so, how and what are the costs and benefits of the simplification?</p> <p>B) Should the penalty calculation exclude all self-reported violations or deviations, as well as the notices of violation/enforcement covered in the current case? Should the penalty calculation include all notices of enforcement not preceded by a notice of a violation?</p> <p>C) Should the Penalty Policy continue to take into account the compliance history of the respondent and the compliance history of the site?</p> <p>D) Should the policy for penalty calculation adjustments be revised to account for investigations?</p> <p>E) Should notices of violation issued by another entity or an agency contractor be considered in the penalty policy?</p> <p><u>Basis:</u> Commissioner Input, Public Comment and Steering Committee Input</p>
Other Subcommittees Reviewing Issue	Compliance History Classification; Compliance History Use; Enforcement Initiation/Investigation Prioritization/NOV Policy
Recommendation	<p>In response to Key Issue A), the subcommittee determined that there are ways to simplify the penalty policy in ways that will not be costly but instead could reduce the burden on staff resources, as described below. Key Issues B) through E) all question the use of specific components of the current compliance history formula. In response it is recommended that TCEQ eliminate double-counting in the Penalty Policy by eliminating the Compliance History Worksheet from page 2 of the Penalty Calculation Worksheet. Only a penalty adjustment based on the overall compliance history classification of the respondent would remain. This partially addresses Sub Issues B, C, D and E.</p> <p>Further simplify the Penalty Policy by eliminating the potential and programmatic penalty matrices. Replace the matrices with common categories for violations across all major program areas and standardizing the penalties for the most common violations. Utilize a list of common categories of violations in guidance to provide flexibility. The subcommittee addresses this alternative in Key Issue No. 7 regarding mandatory minimum penalties.</p> <p><u>Implications:</u></p> <ul style="list-style-type: none"> • Simplification can erode adjustments built in to address specific policy purposes, such as those for small business or small local governments.

	<p><u>Basis:</u> This is supported by public comments to only count factors once. Eliminating most of page 2 of the Penalty Calculation Worksheet will ensure an act or omission of a respondent is counted only once in the overall enforcement process.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Simplifying the Penalty Policy can be accomplished through the process of promulgating the Penalty Policy in rule and incorporating the policies and changes approved by the commissioners at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.

Penalty Policy Subcommittee	
Issue Priority.	2
Key Issue	<p><u>Recovering economic benefit through administrative penalties:</u></p> <p>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?</p> <p><u>Basis:</u> Commissioner Input, Public Comment, Steering Committee Input, Staff Input and Review of Current Policy, State Auditor's Report.</p>
Other Subcommittees Reviewing Issue	

<p>Recommendation</p>	<p>Currently, the method used to develop economic benefit for delayed capital cost is:</p> <ul style="list-style-type: none"> • EB = Interest saved + Onetime cost • Interest saved = (Item cost / Years of depreciation) X Years Delayed X Annual percentage interest rate • Onetime cost = (Item cost / Years of depreciation) X Years delayed • EB is an upward penalty adjustment of the base penalty only when the calculated benefit exceeds \$15,000 <p>The following are recommendations regarding alternative ways to treat economic benefit in the Penalty Policy. Any combination can be selected:</p> <p><u>Enhanced consideration of economic benefit</u></p> <ul style="list-style-type: none"> • taking into account any cost of compliance in the calculation of economic benefit received, which in some cases dwarfs any penalty amount • recover economic benefit of noncompliance rather than a percentage of base penalty • remove the discussion of base penalty enhancement • re-word the penalty policy to define the types of benefit that will be evaluated and require the benefit to be an add-on to the penalty amount up to the statutory maximum • recover all or some part of the economic benefit (recovering “all” the economic benefit means recovering all that is permissible up to the statutory amount allowed for the penalty) <p><u>Eliminate thresholds</u></p> <ul style="list-style-type: none"> • remove the \$15,000 criteria related to when economic benefit applies to a case • recover economic benefit even if a penalty is mitigated due to inability to pay <p><u>Differentiate between size of a facility or magnitude of a violation</u></p> <ul style="list-style-type: none"> • add the discretion to look at profit and / or to use EPA’s BEN Model to calculate and estimate the economic benefit in complex and significant violations • recover all economic benefit only on cases with actual harm or egregious violations and recover something less than all economic benefit for other cases • recover economic benefit only when the respondent is determined to be a major facility as defined in the penalty policy • develop a separate economic benefit policy for local governments that may include factors such as the size, type of source being operated, major or minor source, etc. <p><u>Simplification</u></p> <ul style="list-style-type: none"> • eliminate the depreciation value which is a more difficult concept to apply in order to perform a simpler economic benefit calculation
	<p><u>Implications:</u></p> <ul style="list-style-type: none"> • higher rate of no-settlement due to the increase in penalty • more orders issued with payment plans (and potentially a higher percentage of cases with incomplete collections) • may be difficult to obtain financial information regarding how much economic benefit a respondent realized • may be resource intensive to determine economic benefit

	<p><u>Basis:</u> See attachment following Penalty Policy Issue 12. It compares economic benefit calculation in comparable states. The subcommittee considered the economic benefit policies of California, New York, New Jersey, Florida and the EPA. In general, the economic benefit analysis of other states is very similar to Texas, but the difference comes with what part of economic benefit should be collected. In some states all the benefit up to their statutory cap is collected according to state policy with some minor exceptions, but further review reveals that the policy is not consistently followed in the other states.</p> <p>Some public comments which also suggest that the agency should be collecting all of economic benefit.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • From the menu of choices or other sources, the commissioners would determine the appropriate policies regarding economic benefit. • Implementation can be accomplished through the process of promulgating the economic benefit policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
<p>Other Alternatives</p>	<p>Alternatives are presented in the main recommendation in a format much like a menu where any or all or a combination of alternatives can be chosen.</p>
<p>Notes</p>	<p>No data exists regarding how often economic benefit is actually applied in a case, but staff estimates probably in less than 10% of all cases because the economic benefit is either negotiated out of agreed orders or the amount does not exceed the \$15,000 minimum. In cases where economic benefit does exceed the \$15,000 minimum, the recovery is usually less than \$1,000 after deducting the \$15,000 minimum.</p>

Penalty Policy Subcommittee																
Issue Priority.	3															
Key Issue	<u>Penalty policy for small entities:</u> Should small business and small local governmental entities, as well as small nonprofit entities, be allowed a downward adjustment of a base penalty															
	<u>Basis:</u> Commissioner Input, Public Comment, Steering Committee Input, Staff Input and Review of Current Policy															
Other Subcommittees Reviewing Issue	Enforcement Initiation/Investigation Prioritization/NOV Policy															
Recommendation	Yes, it is recommended that TCEQ not create a completely separate Penalty Policy for small businesses and small local governments. However, it is recommended that a penalty adjustment be used as a component of the Penalty Policy to result in reduced penalties for small businesses and small local governments.															
	<p>However, a prohibition should exist so that a small business or small local government cannot receive a penalty reduction if they have caused actual major environmental harm or have a poor environmental record based on compliance history.</p> <p>Small businesses should be defined consistently with other subcommittees considering small business issues. It is recommended the definition include businesses with less than 100 total employees, independently owned and operated and generating annual revenues of less than \$1 million. Small local governments should be defined as either a city with less than 10,000 population or a county with less than 50,000.</p> <p>Recommend a penalty reduction component as follows:</p> <table style="margin-left: 40px;"> <tr> <td colspan="2"><u>Small Business:</u></td> </tr> <tr> <td>Annual Gross Revenues \$1 - \$999,999</td> <td style="text-align: right;">15%</td> </tr> <tr> <td colspan="2"><u>Small Local Municipal Government:</u></td> </tr> <tr> <td>Population 0 - 10,000</td> <td style="text-align: right;">15%</td> </tr> <tr> <td colspan="2"><u>Small Local County Government:</u></td> </tr> <tr> <td>Population 0 - 50,000</td> <td style="text-align: right;">15%</td> </tr> <tr> <td colspan="2"><u>Other Small Local Government:</u></td> </tr> <tr> <td>Located in a County with Population 0 - 50,000</td> <td style="text-align: right;">15%</td> </tr> </table> <p>Additionally, the implementation of this policy should include flexibility so that the Commission will have the discretion to adjust the 15% reduction either upward or downward based upon unique financial circumstances or the nature of the violation. For a small local government a penalty may be partially or completely deferred in exchange for a commitment to expend the money to address compliance issues.</p>	<u>Small Business:</u>		Annual Gross Revenues \$1 - \$999,999	15%	<u>Small Local Municipal Government:</u>		Population 0 - 10,000	15%	<u>Small Local County Government:</u>		Population 0 - 50,000	15%	<u>Other Small Local Government:</u>		Located in a County with Population 0 - 50,000
<u>Small Business:</u>																
Annual Gross Revenues \$1 - \$999,999	15%															
<u>Small Local Municipal Government:</u>																
Population 0 - 10,000	15%															
<u>Small Local County Government:</u>																
Population 0 - 50,000	15%															
<u>Other Small Local Government:</u>																
Located in a County with Population 0 - 50,000	15%															

	<p><u>Implications:</u></p> <ul style="list-style-type: none"> • penalty savings could be used for compliance costs • less repeat violations since poor compliance history may result in no penalty reduction • enforcement staff may need to review information provided by the respondent regarding annual revenues, population and local government wealth. <p><u>Basis:</u> Public comments generally support different penalties for small business, though the comments are less supportive of different penalties for small local governments.</p> <p>Counties and municipalities face unique constraints in complying with environmental requirements. For the following reasons, the subcommittee considered a larger penalty reduction for small local governments than for small businesses:</p> <ul style="list-style-type: none"> • public financing is typically more cumbersome than for private sector entities • municipal functions can trigger large environmental obligations, which may overwhelm county or municipal tax bases • some services provided by a county or municipality are essential and must often continue to operate (e.g. provision of water and sewer service).
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Implementation can be accomplished through the process of promulgating the small business and small local government policies in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.

<p>Other Alternatives</p>	<p>TCEQ could consider including in the definition of small governmental entity an entity less wealthy than state averages as measured by either median household income or poverty levels (one of the two).</p> <p>TCEQ could consider reducing penalties further for less wealthy small local governments.</p> <p>The subcommittee considered but rejected a recommendation for small businesses including:</p> <ul style="list-style-type: none"> • emission limits – difficult to set for all media (but would weigh environmental impact) • limit to only “not-for-profit” entities – would exclude water supply corporations • exclude publicly held entities – not necessarily a measure of size or revenues
<p>Notes</p>	<p>In FY 2003, small business, small city, small county, or small public water systems accounted for 641 commission orders issued while larger entities accounted for 351 commission orders. Of the 641 commission orders issued against smaller entities, small business alone accounted for 531. Therefore, any change to policy relating to small business and small local governments will affect approximately 65% of all orders issued.</p> <p>Numerous definitions of small business can be found in federal statute, state statute and state rule, and include number of employees from less than 100 to less than 250, independent ownership and operational control, for profit status, maximum revenue threshold of \$1 million to \$3 million, whether it is dominant in its field and whether it is a major source. Small local governments are identified by virtually all sources by population, many using 10,000 for small cities and 50,000 for small counties.</p> <p>Small business and small local governments generally have smaller penalties, so any percentage of reduced penalties will not be as significant in dollar amounts as compared to larger entities. Even with smaller penalty amounts in terms of dollars, the deterrent effect on the smaller entity is on par with a much larger dollar amount for a larger entity.</p> <p>Texas population data shows that 87% or 1,270 cities are under 10,000 in population, 2/3 of which are less than 3,300 in population. 199 of the 254 counties in Texas, or 78% have less than 50,000 in population. Every TCEQ region except for DFW, Houston and Harlingen had over 60% of their counties listed as rural.</p>

Penalty Policy Subcommittee	
Issue Priority.	4
Key Issue	<u>Deterrence through penalties:</u> Are the penalties assessed effective in deterring violations?
	<u>Basis:</u> Commissioner Input, Public Comment, Staff Input and Review of Current Policy.
Other Subcommittees Reviewing Issue	
Recommendation	<p>The enforcement process and system as a whole, not solely the Penalty Policy, must be working properly in order to serve as a deterrent. If the objectives of the overall enforcement review are met, the deterrence benefit will be increased. For this reason, recommendations regarding the Penalty Policy will not in themselves wholly address the deterrence issue.</p> <p>The Penalty Policy can be strengthened to improve the deterrence factor in the following ways:</p> <ul style="list-style-type: none"> • Add language to the Penalty Policy expressly discussing deterrence as a goal of enforcement. Example language from New York’s penalty policy (pages 2-3 (emphasis added)): The primary purpose of the policy is to articulate the [Commission’s policies for assessing and collecting penalties in a manner that will assist [the Commission] in efficiently and fairly <u>detering and punishing</u> violations and to provide the public with an understanding of [Commission] policy in this area. <u>This policy is intended to send a message to regulated entities that [the Commission] has the will and capability to obtain penalties which are sufficiently high to deter violations by individuals, companies, and public agencies.</u>” <p>Example language from Florida’s penalty policy (pages 2-3): In assessing penalties, the Commission “will not only look at the statutory authorizations and requirements, but also at the following: does enforcement result in the elimination of any economic benefit gained by the violator as a result of the violation: and beyond that, <u>does enforcement provide enough of a financial disincentive to discourage future violations not only from the violator but from others contemplating similar activities?</u>” “<u>The use of penalties is an enforcement tool that should be used in any case in which it is determined that penalties are needed to ensure that the responsible party and others similarly situated are deterred from future non-compliance.</u>”</p>

	<p>Additionally, the following recommendations address deterrence:</p> <ul style="list-style-type: none"> • pursuant to Key Issue 7, assess mandatory minimum penalty for each occurrence of significant non-compliance • for repeat violators, eliminate downward adjustments of the base penalty for good faith efforts to comply, compliance history or any other factor • track enforcement data to measure the level of deterrence achieved from future enforcement program improvements, using measures such as percentages of repeat violators or changes in particular types of violations
	<p><u>Basis:</u> Deterrence of future violations is a long-recognized goal of penalty assessment. Texas Water Code § 7.053(3)(E) expressly provides that in considering the amount of a penalty the commission shall consider the amount necessary to deter future violations. The need for compliance incentives in the enforcement process must be balanced with the need for deterrence through the assessment of effective penalties.</p> <p>The assessed penalty did not deter future violations by the same entity for 17% of the regulated entities that were issued orders in FY 1999. Data provided by the Enforcement Division shows that there were 829 regulated entities with orders issued in FY 1999. Of these 829, 269 received either NOEs or NOV's in the subsequent period of 2000 to present. This represents a 32% rate of recidivist violations.</p> <p>Including only NOEs in the calculation may be a better measure of recidivism. Of the 829 regulated entities with orders issued in FY 1999, 142 received either NOEs in the subsequent period 2000 to present. This is a 17% rate of recidivist violations.</p> <p><i>* This evaluation is likely conservative since it doesn't include any data prior to FY 1999. It also doesn't consider that entities that received an initial violation after 1999 may have had a subsequent violation and therefore be a recidivist violator.</i></p> <p>In addition, the FY 2003 Enforcement Report indicates that "Of the 992 Orders issued [in FY 2003] regarding 964 regulated entities, 172 (17.8%) of the regulated entities had previous enforcement."</p> <p>The assessed penalty did not deter future violations by the same entity for 17% of the regulated entities that were issued orders in FY 1999. On the flip side, 83% of the entities with violations in FY 1999 did not have an NOE during the subsequent period FY 2000 to date in FY 2004.</p>

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Including an express statement regarding the goal of deterrence can be accomplished during the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • In order to ensure the Penalty Policy is effective in deterring noncompliance, a detailed analysis should be included in the annual enforcement report describing factors to determine whether deterrence is achieved. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
<p>Notes</p>	<p>Fraud deterrence hinges on the “perception of detection” according to Joseph Wells - founder of the Association of Certified Fraud Examiners. People who believe that they will be caught are less likely to offend. Furthermore, Wells indicates that many experts believe that punishment is of little value in deterring crime because the possibilities of being punished are too remote in the mind of the potential perpetrator. Wells give the illustration that when someone is about to do wrong, the first thing that comes to their mind is “will I get caught?” not “what is the punishment if I do get caught?” If they answer yes to the first question, they are not likely to commit the offense. According to this argument, the punishment is moot as a deterrent regardless of how severe it is. With this logic, to deter wrongdoing, an enforcement system should focus on increasing the perception and reality of catching wrongdoers rather than solely on the penalty.</p> <hr/> <p>Elements of an effective enforcement system:</p> <ul style="list-style-type: none"> • strong proactive policies/laws and an awareness/education program • increased oversight, including analytical data reviews and surprise audits/inspections • adequate reporting programs - allow and encourage employees/citizens to report suspicious activity • consistently enforce policies/laws • after detection of wrongdoing, take all reasonable steps to appropriately respond to the offense and to prevent further similar offenses including punishment

Penalty Policy Subcommittee	
Issue Priority.	5
Key Issue	<p><u>Promulgation of Penalty Policy by rule:</u> Should the Penalty Policy be adopted as a rule in whole or in part, and supplemented with a single guidance document encompassing all internal guidance and internal memos?</p> <p><u>Basis:</u> Public Comment</p>
Other Subcommittees Reviewing Issue	
Recommendation	<p>Promulgate Penalty Policy in rule, and supplement with guidance, maintaining enough flexibility for commissioner discretion. This recommendation is closely related to Key Issue No. 7 relating to mandatory minimum penalties and Key Issue No. 12 relating to joint and several liability.</p> <p>Benefits:</p> <ul style="list-style-type: none"> • strength at a SOAH hearing on recommendation if Penalty Policy is in rule rather than policy • settles more non-contested cases because in following a rule, there is less room to negotiate • saves resources with less room to negotiate • more uniform recommendations and decisions • the rulemaking through the Administrative Procedures Act will provide a transparent, reasoned justification <p>Cons:</p> <ul style="list-style-type: none"> • inflexible • hard to change • takes discretion from ED and commissioners • very involved rulemaking which will take administrative resources <p><u>Basis:</u> When first developed the Penalty Policy was intended to function for a period of time and then be adopted in rulemaking with lessons learned from implementation. This was over 7 years ago.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required.
Other Alternatives	Do not promulgate penalty policy in rule, but rather only use it as a guide for settlement of agreed orders. For cases which are not settled, recommend the statutory maximum to the SOAH judge.

Notes	During the rulemaking process, special attention should be given to ensuring the definitions of “major” and “minor” sources in the Penalty Policy are consistent with those definitions in permitting requirements.
--------------	---

Penalty Policy Subcommittee	
Issue Priority.	6
Key Issue	<p><u>Consideration of a respondent’s pollution control investment:</u> Should investment in pollution prevention technology be used as a factor in calculating penalties for violations or economic benefit while operating in noncompliant status?</p> <p><u>Basis:</u> Steering Committee Input</p>
Other Subcommittees Reviewing Issue	
Recommendation	<p>Currently, no consideration is given to investment in pollution control equipment not mandatory under a regulatory requirement. The subcommittee does not recommend a change to current policy in regard to this issue.</p> <p><u>Implications:</u> Consideration of investment adds complexity, and also may lead to double-dipping if an entity receives a favorable tax credit for pollution control equipment and potentially the generation of offset credits.</p> <p><u>Implementation Impacts:</u> N/A</p>
Other Alternatives	The commissioners can accomplish the same results by utilizing general authority to set a penalty based on as justice may require.
Notes	This issue involves implementing controls in addition to those required after an NOE is issued for a violation. This has actually been an issue 3 times in the last 10 years that staff is aware.

Penalty Policy Subcommittee													
Issue Priority.	7												
Key Issue	<p><u>Mandatory minimum penalty for each occurrence of significant noncompliance:</u></p> <p>A) Should a mandatory minimum penalty be required for each occurrence of significant noncompliance?</p> <p>B) Should statutory administrative penalties be equalized across programs to provide for consistency, including lowering penalties for small entities?</p> <p>C) Does the penalty policy equitably account for and make a distinction between harm to the environment and a “paperwork” violation?</p> <p><u>Basis:</u> Commissioner Input, Public Comment, Steering Committee Input, Staff Input and Review of Current Policy</p>												
Other Subcommittees Reviewing Issue	Enforcement Process												
Recommendation	<p>Simplify the Penalty Policy by eliminating the “Potential Release” from the appropriate environmental / human health / property matrix, and calculate violations for “Potential Release” with common categories for violations across all major program areas, standardizing the penalties for the most common violations. Consistent with Key Issue No. 5 regarding a rulemaking for the Penalty Policy, utilize a list of common categories of violations in guidance to provide flexibility. The subcommittee references this recommendation in Key Issue No. 1 regarding simplification.</p> <p>The subcommittee has provided a recommended list intended to serve as guidance (see attachment following this key issue table) for penalties related to common violations, and the subcommittee recommends changing the environmental / human health / property matrix as follows:</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Harm Level:</th> <th style="text-align: center;">Major</th> <th style="text-align: center;">Moderate</th> <th style="text-align: center;">Minor</th> </tr> </thead> <tbody> <tr> <td style="text-align: left;">Respondent:</td> <td style="text-align: center;">Major/Minor</td> <td style="text-align: center;">Major/Minor</td> <td style="text-align: center;">Major/Minor</td> </tr> <tr> <td style="text-align: left;">Actual Release</td> <td style="text-align: center;">100% / 75%</td> <td style="text-align: center;">75% / 50%</td> <td style="text-align: center;">50% / 20%</td> </tr> </tbody> </table> <p><u>Pros:</u></p> <ul style="list-style-type: none"> • shorter, consistent, easier for stakeholders not familiar with the agency to understand their penalty • the list promulgated in guidance can address Sub Issues A (significant noncompliance), B (equalized penalties) and C (harm to the environment) <p><u>Cons:</u></p> <ul style="list-style-type: none"> • draconian, no flexibility, and changes precedence <p><u>Other:</u></p> <ul style="list-style-type: none"> • affects 60% to 70% of all cases, and may significantly lower penalties 	Harm Level:	Major	Moderate	Minor	Respondent:	Major/Minor	Major/Minor	Major/Minor	Actual Release	100% / 75%	75% / 50%	50% / 20%
Harm Level:	Major	Moderate	Minor										
Respondent:	Major/Minor	Major/Minor	Major/Minor										
Actual Release	100% / 75%	75% / 50%	50% / 20%										

	<p><u>Basis:</u> The answer to Sub Issue A is that current policy does require mandatory minimum penalties. However, the recommendations above further supports the concept of mandatory minimum penalties.</p> <p>The answers to Sub Issue B regarding equalized penalties and Sub Issue C regarding “paperwork” violations are both inherently “yes” in the recommendations made above.</p> <p>In raising the mandatory minimum penalties for significant noncompliance as an alternative recommendation above, deterrence is furthered and penalties are increased on larger violations with more impact.</p> <p>In developing the recommended guidance, staff researched the most common violations for major program areas and divided the violations into common categories and then assigned a standard penalty amount for each category as a percentage of the statutory limit for major and minor sources. Any documented violation falling within a proposed category would receive the penalty amount associated to that category. Examples of certain violations in air, water and waste media have been provided in the Standard Penalty Table attached after Penalty Policy Issue 12. This illustrates violations that would fall within each category. Where it is appropriate to include more than more than one count for a violation type, the type of count suggested is noted. It is recommended that the proposed penalty for each category is not factored against a unit of time, as respondents may be adversely affected depending on the date the investigator conducts the investigation or the enforcement screening date.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Implementation of mandatory minimum penalties can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
<p>Other Alternatives</p>	

Notes	The subcommittee reviewed the TxPIRG report issued in May 2004 entitled <i>Mandatory Minimum Penalties, An Effective Tool For Enforcement of Clean Water Laws</i> . The subcommittee concluded that even though the report does not mention Texas, the TCEQ in concept already agreed with the conclusions by creating mandatory minimum penalties in the current penalty policy in the penalty matrices for major harm.
--------------	--

Penalty Policy Subcommittee	
Issue Priority.	8
Key Issue	<p><u>Partial credit for corrective actions:</u> Should a partial good faith adjustment in a penalty calculation be allowed based on completion of some but not all required corrective actions?</p> <p><u>Basis:</u> Commissioner Input, Public Comment, Staff Input and Review of Current Policy.</p>
Other Subcommittees Reviewing Issue	
Recommendation	<p>It is recommended that TCEQ change the current Penalty Policy to allow credit for partial corrective actions. Under the current policy, no partial credit is given for good faith effort to comply unless all of the violations are completely resolved.</p> <p>For example, allow an entity with ten violations which corrects six violations prior to an NOE credit for the six corrected violations rather than no credit because all violations were not completely resolved. However, the act of ordering equipment to come into compliance would not be considered correcting a violation.</p> <p>Include a caveat to exclude partial good faith reductions in cases involving culpability, repeat violators and where no capital outlay is involved.</p> <p>This recommendation could be implemented by revisions to the Penalty calculation Worksheet (PCW). The current table on the summary page would be replaced with a new table used to evaluate each violation. If compliance has been achieved before the NOV/NOE is issued, the EC will recommend a 30% reduction on the violation. If compliance was achieved after the NOV/NOE, the EC will then recommend a 20% reduction.</p>

	<p>The Enforcement Coordinator would explain the type of corrective action that the respondent took and when the corrective action was taken. For example: “Respondent achieved compliance on <i>Date</i>. Specifically, the respondent has...”. Or: “Respondent has taken the necessary steps to come into compliance. Specifically, the respondent has...”. If the respondent is not in compliance and has taken no steps to do so, the EC will simply state: “There is no documentation that the respondent has taken steps to come into compliance.”</p> <p>This new method would not give good faith effort credit for one time violations without the opportunity to comply. Such violations include but are not limited to the installation of a system at a site where either the installer or the system was not permitted or authorized at the time or where fuel was delivered and deposited into a UST system with no delivery certificate at the time.</p>
	<p><u>Basis:</u> Advantages of Recommended Good Faith Effort Procedure:</p> <ul style="list-style-type: none"> • makes the calculation of GFE simpler for ECs • removes the ‘extraordinary’ and ‘ordinary’ Quality criteria. Instead, the EC will only determine if the respondent is either completely in compliance or has taken steps to do so • still gives credit based on timeliness, i.e Before NOV/NOE and after NOV/NOE • takes into consideration respondents who may not fully be in compliance but have addressed some of the identified violations
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Allowing partial credit for corrective actions can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
<p>Other Alternatives</p>	

Penalty Policy Subcommittee	
Issue Priority.	9
Key Issue	<u>Use of deferrals in case settlements:</u> A) Should deferrals continue to be offered and if so, in what situations? B) Are expedited settlements or an expedited deferral appropriate when the penalty calculation includes an upward adjustment due to culpability?
	<u>Basis:</u> Commissioner Input, Public Comment and State Auditor's Report.
Other Subcommittees Reviewing Issue	Enforcement Process
Recommendation	Eliminate granting penalty deferrals.
	<u>Basis:</u> Deferrals do not necessarily speed up settlement under current practice where a respondent has 60 days (after a proposed order is sent) to sign the order in exchange for a 20% deferral. This is a practice, but not addressed in the current Penalty Policy. Respondents take deferrals in about one-half of the cases in which deferrals are offered.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> Since deferrals are not written in the current Penalty Policy but rather are offered as a matter of agency practice, no implementation is required for eliminating deferrals.
Other Alternatives	Expressly provide in the Penalty Policy that deferrals are an option in every case, including those involving culpability. The current Penalty Policy only includes deferrals for first time offenders and precludes deferrals in situations involving culpability.
Notes	<p>The Enforcement Process Subcommittee is considering ways to shorten the time it takes for an enforcement action, and has related recommendations to provide monetary incentives in return for expedited agreement to the order and penalties.</p> <p>May slightly increase revenue to the state's General Revenue Fund.</p>

Penalty Policy Subcommittee	
Issue Priority.	10
Key Issue	<u>Penalties in default orders:</u> In a penalty calculation included in a default order against a respondent, should penalties be increased?
	<u>Basis:</u> Commissioner Input and Public Comment

Other Subcommittees Reviewing Issue	Enforcement Process
Recommendation	<p>Yes, additional penalties should be included in default orders. Additional penalties should be assessed in two circumstances:</p> <p>1) an instance of cases when a respondent does not reply to the enforcement petition (“no answer default orders”); and 2) an instance when the respondent answers the petition requesting a hearing but then does not show up when the preliminary or evidentiary hearing on the matter is convened by SOAH (“answer default orders”).</p> <p>Implications:</p> <ul style="list-style-type: none"> • encourages Attorney General to pursue higher penalties from higher default orders • knowledge of the policy change and renewed agency efforts to collect past due penalties may result in less default orders <p>To avoid recalculating a penalty prior to Agenda setting, and because of notice issues, it may be necessary to include in the petition a caveat that if the respondent fails to answer, then the penalty is automatically increased and entered as a default. . A similar warning could also be provided in correspondence associated with setting a hearing.</p> <p><u>Basis:</u> Currently, penalties in very few default orders are ever collected. Concerns have been raised regarding the expenditure of TCEQ and SOAH resources to provide the hearing opportunity to respondents who do not act in good faith or may seek to obstruct the process provided by the state. This recommendation provides further deterrence in the enforcement process.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Increasing penalties in default orders can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • Proposed orders mailed to respondents will need to be changed to account for a higher penalty in cases where a default is entered as opposed to when the respondent answers the Notice of Enforcement. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
Other Alternatives	

Notes	The Collections Subcommittee provides recommendations for use of collection agencies to collect delinquent fees and penalties owed to the State.
--------------	--

Penalty Policy Subcommittee	
Issue Priority.	11
Key Issue	<u>Cases with low penalty amounts:</u> Should TCEQ decline to pursue a penalty in enforcement cases where agency resources could be better applied elsewhere, for example in cases with a de minimis fine?
	<u>Basis:</u> Commissioner Input and Public Comment
Other Subcommittees Reviewing Issue	
Recommendation	It is recommended that existing policy remain in place and no changes are recommended.
	<u>Basis:</u> <ul style="list-style-type: none"> • mandatory minimum may be required in certain cases • the agency has in the past issued orders with no penalty, only corrective action, and currently has the discretion to do so under current policy and practice
	<u>Implementation Impacts:</u> N/A
Other Alternatives	

Penalty Policy Subcommittee	
Issue Priority.	12
Key Issue	<u>PST certification and fuel distribution violations:</u> Should the Penalty Policy make special provisions for petroleum storage tank (PST) certification and fuel distribution violations, including guidance on whether and to what extent both the owner and operator are responsible?
	<u>Basis:</u> Commissioner Input, Public Comment, Staff Input and Review of Current Policy.
Other Subcommittees Reviewing Issue	

<p>Recommendation</p>	<p>Clarify through rulemaking the current commission practice regarding the legal ability and current policy of imposing joint and several liability for different respondents responsible for the same violation. This recommendation is closely related to Key Issue No. 5 regarding promulgating the Penalty Policy in rule.</p> <p><u>Implications:</u></p> <ul style="list-style-type: none"> • provides clear direction to Administrative Law Judges and results in consistent PFDs • provides clear Commission policy to give respondents notice of the basis upon which agency decisions are made <hr/> <p><u>Basis:</u> Current commission practice is to utilize one penalty calculation worksheet for each violation and impose joint and several liability in cases where there is a relationship among respondents, such as a familial or business relationship. Under joint and several liability, one penalty for a violation is imposed, and every person responsible for the violation is liable for full payment of the penalty, although the liability is extinguished for all parties when the full penalty amount is paid.</p> <p>Recent PFDs have not always been consistent in whether the agency possesses the ability to impose joint and several liability, or alternatively, the PFD recommendations do not consistently impose joint and several liability.</p> <p>Joint and several liability is not addressed in either the penalty policy or in guidance. The Commissioners rely on practice, which is currently to impose joint and several liability based on authority from 7.051, Water Code, which allows an administrative penalty against a responsible “person.”</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Providing for more standard penalties for PST violations and clarifying joint and severable liability for respondents can be accomplished through the process of promulgating the Penalty Policy in rule at the conclusion of the enforcement review. • A rulemaking will include extensive stakeholder involvement and will involve staff resources. • No effect on LBB performance measures. • EPA concerns can be addressed during the public participation component of the rulemaking process. • Rulemaking can begin at the earliest at the conclusion of the agency enforcement review in November 2004 with proposal in January 2005 and adoption by July 1, 2005. • No statutory changes are required. • If the commissioners determine that promulgating the Penalty Policy in rule is not appropriate, then the Penalty Policy itself can be changed through commission direction during Work Session.
<p>Other Alternatives</p>	
<p>Notes</p>	<p>It is important to note that joint and several liability for administrative penalties and joint and several liability for corrective action are separate and distinct parts of some PFDs and enforcement actions.</p>

Penalty Policy Issue 2 Attachment A

State Penalty Policies - Comparison of Economic Benefit Components									
State	Delayed Capital Costs	Delayed One-Time Expenditures	Avoided Periodic Costs	Competitive Advantage	Interest	Profit	De Minimis Benefits	Compelling Public Interest	Litigation Practicalities
Texas	X	X	X	1	1		2	2	2
New York	X	X	X			X	X	X	X
New Jersey	X	X	X	X	X	X	3	3	3
Florida	X	X	X		X	X			
California	X	X	X	X	X ⁴		X		
EPA-BEN Model	X	X	X	X			X	X	X

Note: Non-bolded columns headers indicate benefits of settlement.

¹ Considered in determination of whether a respondent has gained an economic benefit.

² In Texas, may be included in “Other factors as justice may require.” In New Jersey, could be included in “Any other benefits resulting from the violation.”

³ May be considered as part of “any other factors relevant to economic benefit.”

⁴ California’s “Interest Factor”, also referred to as Interest Rate, allows the violator to benefit by:

(1) earning interest on the funds that should have been spent on compliance,

(2) increasing profits by investing the funds back into the business, and

(3) avoiding the expense of interest, if the business would have had to obtain a loan to pay the cost of compliance. The “interest factor” may be a consolidation of multiple interest rates where the interest rate changed during the period of violation.

Texas:

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 non-depreciable expenditure; and
- (3) the return a respondent can earn by avoiding periodic costs.

Benefits from *delayed costs* potentially arise when a violator delays expenditures necessary to achieve compliance. *Avoided costs* are expenses that a violator would have incurred if the facility had complied with environmental regulations on time, and which can never be made up. 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 these 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.

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

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. The current penalty policy does not expressly limit which factors may result in an increase or decrease.

New York:

The benefit component is an estimate of the economic benefit of delayed compliance, including the present value of avoided capital and operating costs and permanently avoided costs which would have been expended if compliance had occurred when required. The benefit component should also include any other economic benefits resulting from noncompliance, such as avoided liquidated damages under contracts and enhanced value of business or real property. In appropriate cases, the DEC may use the EPA computer program known as BEN to calculate and estimate the economic benefit of sophisticated and significant violations.

There are three cases where adjustments may be appropriate. The DEC in its discretion may refuse to consider these benefit component adjustments if the respondent does not supply sufficient and credible documentation of the relevant matter.

- 1) De Minimis Benefits - The commitment of significant DEC resources may not be warranted in cases where the magnitude of the benefit component is insignificant. In such matters, DEC enforcement staff has the professional discretion not to seek the benefit component of the penalty.
- 2) Compelling Public Interest - In the exercise of discretion, the DEC attorney, in consultation with Regional and/or Program Directors, may reduce or suspend payment of the benefit component of the penalty where the public interest would not be served by taking the penalty action to full adjudicatory hearing. In such cases, it may be necessary to settle the case for less than the benefit component. Such settlements may be appropriate in the following circumstances: removal of the economic benefit would result in plant closure, bankruptcy, or other extreme financial burdens, and there is public interest in allowing the firm to continue in business; in enforcement actions against not-for-profit public entities such as municipalities, the circumstances might include situations where assessment of the civil penalty threatens to disrupt continued provision of essential public services. In situations where a plant is likely to close anyway, or where there is a likelihood of continued harmful non-compliance, the full economic benefit should be recovered.
- 3) Litigation Practicalities - The exercise of prosecutorial discretion by the Department's professional staff is a critical component of this Policy and is to be applied in all cases to determine a proper resolution.

The ability to pay is also considered as one of the adjustments to gravity component of penalty determinations, as well "unique factors" or factors not anticipated in existing penalty guidance.

New Jersey:

For water quality and certain hazardous substances, economic benefit shall include:

1. The amount of savings realized from *avoided* capital or noncapital costs resulting from the violation;
2. The return earned or that may be earned on the amount of the *avoided* costs;
3. Any benefits accruing to the violator as a result of a *competitive market advantage* enjoyed by reason of the violation; and
4. Any other benefits resulting from the violation.

The Department shall consider the following factors in determining economic benefit:

- The amount of *capital* investments required, and whether they are one-time or recurring
- The amount of one-time *nondepreciable* expenditures;
- The amount of annual expenses;
- The useful life of capital;
- Applicable tax, inflation and discount rates;
- The amount of low *interest* financing, the low interest rate, and the corporate debt rate; and,
- Any other factors relevant to economic benefit.

If the total economic benefit was derived from more than one violation, the total economic benefit may be apportioned to an amount no greater than \$50,000 per violation. However, for the Air Enforcement Program, the Department may, in addition to any other civil administrative penalty assessed pursuant to this subchapter, include as a civil administrative penalty the economic benefit (in dollars) which the violator has realized as a result of not complying with or by delaying compliance with the requirements of the Act, or any rule, administrative order, operating certificate or permit issued pursuant thereto.

For Solid and Hazardous Waste Programs, the Department may, in addition to any other civil administrative penalty assessed pursuant to this subchapter, include as a civil administrative penalty the economic benefit (in dollars) which the violator has realized as a result of not complying with or by delaying compliance with the requirements of the Act, or any rule promulgated, any administrative order, permit, license or other operating authority issued, or any Part A permit application filed, pursuant to the Act. *If the total economic benefit was derived from more than one violation*, the total economic benefit may be apportioned among the violations from which it was derived so as to increase each civil administrative penalty assessment to an amount no greater than \$50,000 per violation.

Florida:

Florida distinguishes between *passive* and *active* economic benefits. Passive economic benefits usually consist of the money that was made or that could have been made by an alternate use of the money that should have been expended to bring the facility into compliance. Active economic benefits usually consist of any increase in profits or reduction in costs that are directly attributable to the activity conducted in violation of Department statutes or rules.

Florida uses the EPA Civil Penalty Policy approach historically (the Ben Model), as per the 1990 and now the revised 2003 Civil Penalty Policy. The lower limit for consideration was \$2,500 and now that is \$3000. Florida's Environmental Litigation Reform Act (ELRA), enacted in the 2001 legislative session, sets specific penalty amounts for certain violators covered under the Act when those violations are pursued with a Notice of Violation. Independent of ELRA, the Department has statutory authority to assess administrative penalties in Beaches and Coastal Systems, RCRA, UIC, asbestos cases and State Lands cases for up to \$10,000 per day. Penalty guidelines for these programs have been adopted by rule.

For non-ELRA cases, the statute provides that a penalty should be calculated in an amount sufficient to ensure future compliance. It is therefore the Department's policy to ensure future compliance by eliminating as much of the economic benefits of non-compliance as the statute will allow by adding the economic benefits of non-compliance, where appropriate and practical, to all civil penalty calculations.

Two other economic benefit considerations are 'ability to pay', which may be used to decrease the amount of penalties derived from the ERLA schedule, and 'other unique factors', which is intended to provide the District (i.e., Regional Office) with the flexibility to make adjustments in a particular case based upon unique circumstances that do not clearly fit within the other adjustment factors.

California:

The only California environmental law that specifically requires the recovery of economic benefit is in the Water Code:

"In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, *economic benefit or savings*, if any, from the violation, and other matters that justice may require. *At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.*

Also, California's Department of Toxic Substances Control, Hazardous Waste Management Program, has developed a guidance document entitled Guidelines for Calculating the Economic Benefit of Noncompliance. This document is based on regulations which require that "a violator should not benefit economically from noncompliance, either by avoiding or delaying costs or gaining a competitive advantage". Administrative penalties include the amount of any economic benefit gained or cost of compliance avoided by the violator as a result of noncompliance, up to the statutory maximum for each violation. Economic benefit includes, but is not limited to, avoided costs, increased profits or avoided interest. Economic benefit also includes the use of capital from delayed or avoided costs.

EPA-BEN Model :

This model identifies two types of economic benefit from noncompliance in determining the economic benefit component - benefit from delayed costs, and benefit from avoided costs. Since 1984, it has been Agency policy to use either the BEN computer model or “the rule of thumb” approach to calculate the economic benefit of noncompliance. The rule of thumb approach is a straightforward method to calculate economic savings from delayed and avoided compliance expenditures. Enforcement personnel may use the rule of thumb approach whenever the economic benefit penalty is not substantial (generally under \$10,000) and use of an expert financial witness may not be warranted.

For economic benefit penalties that are more substantial (generally more than \$10,000), enforcement personnel should use the BEN model to calculate noncompliance economic benefits. The primary purpose of the BEN model is to calculate economic savings for settlement purposes. The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including inputs that consist of optional data items and standard values already contained in the program.

This model indicates that for certain (RCRA) requirements, the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time). In the interest of simplifying and expediting an enforcement action, enforcement personnel may forego the inclusion of the benefit component, where it appears that the amount of the component is likely to be less than the applicable amount show in the chart below for all violations alleged in the complaint.

When the penalty is gravity-based and multi-day, total penalty is:	Economic benefits of noncompliance should be pursued if it totals:
\$30,000 or less	at least \$,3000
\$30,001 to \$499,999	at least 10% of the proposed penalty
\$50,000 or more	\$5,000 or more

Penalty Policy Issue 7 Attachment A

Standard Penalty Table

Category	Example violations
Falsification 100%	Falsification data or other information in order to deceive agency or public.
Registration, Reporting, Certifications, and Notification 10%	<p>Failure to submit required reports, deed recordation, certifications and notifications to the agency and others. Failure to register or accurately register equipment, sites, etc. as required by the agency.</p> <p>Air</p> <ul style="list-style-type: none"> Failure to submit Title V certification or emissions event notice Failure to submit deviation reports Failure to submit emissions inventory Failure to submit federal notice of compliance reports or compliance banking report not submitted Failure to submit sample results Failure to submit complete or inaccurate report Failure to report deviations on Title V certification Failure to provide all elements on emissions event report <p>Water</p> <ul style="list-style-type: none"> Failure to submit engineering and financial planning for 75/90 capacity Failure to report exceedances that are greater than 40% of permit limit Failure to submit required monthly, quarterly, and annual reports, accurate reports, or complete reports Failure to notify media when reporting a bypass Failure to submit discharge monitoring report (DMR), accurate DMR, or complete DMR Failure to correctly report flow and effluent parameters Failure to provide noncompliance report (oral or written) Failure to provide notification on alterations where no permit is required Failure to submit pollution prevention plan Failure to submit plans and specs and obtain approval prior to construction of a public water supply Failure to provide required public notification Failure to submit well completion data to public drinking water program Failure to obtain new maintenance contract for on-site sewage facilities (OSSF) Failure to submit site evaluation with planning materials in OSSF Failure to notify permitting authority of the date construction is to begin in OSSF Failure to request all required inspections in OSSF Failure to notify agency of any sensitive features encountered during construction in Edwards Aquifer Failure to obtain required registration Failure to submit Notice of Intent (NOI) Failure to correct inaccurate information on NOI Failure to renew pretreatment agreement Failure to obtain a certificate of convenience and necessity Failure to file an approved tariff with the agency Failure to file a sanitary control easement

Standard Penalty Table

	<p>Waste Failure to submit annual waste summaries. Failure to provide required notification of confirmation sampling events to region offices. Failure to provide notice to affected property owners for Affected Property Assessment Reports. Failure to provide construction notification of PSTs Failure to report required releases and spills to the agency. Failure to provide required written notification of Stage II system installation or testing. Failure to obtain an EPA ID number Failure to notify of one or more waste streams, waste management units or other incomplete or inaccurate information for the Notice of Registration Failure to register existing, new or removed PSTs. Failure to update changes or additional information to the PST registration Failure to fully and accurately complete the PST registration and self certification forms Failure to register used oil or tire recycling activities. Failure to submit required certification of compliance with order provisions. Failure to certify completion of closure or post closure care. Failure to have PST installation certifications. Failure to complete deed recordation or deed certification in county deed records for contaminated areas.</p>
<p>Record Keeping 10%</p>	<p>Failure to keep records or fail to have complete, accurate or available records on site.</p> <p>Air Failure to maintain calibration logs or monitoring logs Failure to include all components on master component list Failure to maintain non-reportable emissions events log Failure to record CEMs data, temperatures, feed rates, coating and solvent usage Failure to record opacity readings in daily flare log</p> <p>Water Failure to adequately maintain records (includes no records and incomplete records) Failure to provide records of DMRs during investigation Failure to maintain registrations and authorizations on-site or in required vehicles Failure to provide inventory of all industrial users Failure to maintain up-to-date map of the public water system</p> <p>Waste Failure to maintain an adequate operating record Failure to maintain records of inspections, manifests or ground water analysis or waste analysis. Failure to maintain records related to the PST systems such as inventory control, registration, installation records, testing records, maintenance and service records, site assessment records etc. Failure to maintain a copy of the CARB order, testing and maintenance records. Failure to maintain required records of the number of lead acid batteries purchased and accepted, returned etc. Failure to maintain required logs at scrap tire storage facilities. Failure to maintain required inspection records at MSW landfill.</p>
<p>Labeling 5%</p>	<p>Failure to label or or properly label equipment, units, containers, tanks etc.</p> <p>Air Failure to label Emission Points with EPN Failure to tag all LDAR components (valve, pump, etc.) in a unit</p>

Standard Penalty Table

	<p>Water Failure to mark and identify all pump trucks for sludge transporters Failure to label tanks in storm water program Failure to mark all discharge valves and ports for sludge transporters Failure to place authorization stickers on motor vehicles Failure to properly label chemical tanks Failure to properly identify pipes</p> <p>Waste Failure to label a less than 90 day container or tank with the words “hazardous waste” or without the beginning date of accumulation Failure to ensure that a tag, label or marking is applied to top of fill tube of each UST. Failure to post operating instruction on each dispenser equipped with a Stage II system.</p>
<p>Manifests Shipping Papers and Trip Tickets 10%</p>	<p>Failure to use or maintain manifests, shipping papers or trip tickets as required.</p> <p>Air N/A</p> <p>Water Failure to use trip tickets when transporting sludge waste Failure to adequately complete trip ticket for sludge transports</p> <p>Waste Failure to use or properly complete manifest or shipping papers, i.e. missing or incomplete information on manifests. Failure to return signed copies of manifest (for receiving facilities) Failure to maintain required manifests or shipping paper for waste shipments for remediation related activities. Failure to use and maintain bill of ladens for shipments of used oil filters and manifests for scrap tires.</p>
<p>Permit/Licensing 25%</p>	<p>Failure to apply for permit or license, renewal or amendment; operating without a permit or license</p> <p>Air Failure to operate with a permit when a permit is required Failure to renew expired permit when required Failure to obtain a permit amendment for plant modifications Failure to update Title V Permit when requirements change</p> <p>Water Failure to obtain a permit for a new facility Failure to renew expired permit and continued to operate Failure to obtain a permit amendment for a modification Failure to obtain a permit to discharge filter backwash water Failure to obtain authorization prior to beginning construction of an OSSF Failure to possess current OSSF installer license Failure to obtain documentation that owner or agent has permitting authority’s permission to construct OSSF Failure to submit Edwards Aquifer protection plan or contributing zone plan and receive ED approval Failure to obtain irrigator and/or installer license</p>

Standard Penalty Table

	<p>Waste Failure to obtain a permit or authorization prior to treatment or disposal of a hazardous waste on-site or extended or long term storage of hazardous waste. Failure to obtain a permit or other authorization for the acceptance of industrial and/or hazardous waste from off-site source. Failure to submit permit modifications to transfer hazardous waste permit to new owner at least 90 days prior to scheduled change. Failure to ship waste to a permitted or authorized facility.</p>
<p>Quality Control/Analyses 25%</p>	<p>Failure to follow required procedures and testing that ensure a safe product for employees, the public and the environment.</p> <p>Air Failure to conduct sampling on cooling towers or fuel gas Failure to perform required vehicle emissions test, stack test, performance test Failure to calibrate or test the calibration of an instrument Failure to monitor temperatures Failure to conduct opacity readings Failure to have a monitoring system in place to record emissions or provide data to calculate emissions Failure to calculate emissions</p> <p>Water Failure to test, inspect, stormwater sewer systems for non stormwater flows Failure to monitor flow, disinfectant residuals Failure to conduct quarterly visual monitoring of stormwater discharge Failure to collect samples Failure to use industry accepted standards to obtain adequate measurements Failure to calibrate flow-measuring device, pH meter, chlorine meter, etc. Failure to follow appropriate analytical procedures and monitoring plans</p> <p>Waste Failure to complete hazardous waste determination or waste classification. Failure to complete required analysis and classification for land disposal restrictions. Failure to follow ground water sampling and analysis plan. Failure to conduct required tank or line tightness testing Failure to conduct required testing of cathodic protection equipment Failure to complete adequate statistical inventory reconciliation (SIR) Failure to prepare a waste analysis plan. Failure to conduct proper or adequate analysis of ground water samples in accordance with ground water sampling and analysis plan. Failure to conduct integrity assessments for hazardous waste tanks.</p>
<p>General Preventative Maintenance/ Housekeeping 5%</p>	<p>Failure to maintain conditions generally required by permit or rule which if followed or completed could avoid or prevent more serious violations.</p> <p>Air Open containers, non-chemical spills</p> <p>Water Rusted catwalks Climbing vegetation on electric panel Debris and trash around stabilization pond</p>

Standard Penalty Table

	<p>Waste</p> <p>Failure to maintain drums of industrial non hazardous waste closed with lids or in good condition, ie. (rusting dented etc.)</p> <p>General Prohibition (30 TAC 335.4) conditions which are not actual releases.</p> <p>Failure to maintain adequate aisle space for industrial non hazardous waste drums</p> <p>Failure to maintain adequate freeboard in an industrial non hazardous waste surface impoundment.</p> <p>Failure to prevent erosion condition on a cover or slope for an industrial non hazardous waste landfill.</p>
<p>Operations and Maintenance 25%</p>	<p>Failure to follow required operating procedures and methods that protect human health and the environment from pollution exposure.</p> <p>Air</p> <p>Failure to maintain vehicle emission control devices or altering, bypassing vehicle emission control devices</p> <p>Failure to maintain car-seal valves</p> <p>Failure to repair tears in baghouse bags</p> <p>Failure to maintain electrical grounding</p> <p>Failure to meet stack height requirements</p> <p>Operating a flare without a pilot flame</p> <p>Exceeding limit rates for temperature, firing rate, pumping rate, usage rate, production limits, destruction efficiency</p> <p>Failure to comply with manufacturer specifications or permit specifications</p> <p>Failure to provide spare compressor</p>

Standard Penalty Table

	<p>Water</p> <p>Failure to properly cover bar screens</p> <p>Failure to provide self-contained breathing apparatus at treatment plant</p> <p>Failure to properly house chlorination facilities/ improper ventilation of chlorine facilities</p> <p>Failure provide backflow prevention device</p> <p>Failure to prevent livestock from grazing within lagoon system</p> <p>Failure to provide liftstation with alarm</p> <p>Failure to maintain 2-foot freeboard</p> <p>Failure to properly waste sludge from Imhoff tank</p> <p>Failure to properly maintain treatment units (clarifiers, chlorine contact chambers, sludge digesters, etc.)</p> <p>Failure to comply with design, construction, and/or maintenance requirements for clear wells, stand pipes, pressure tanks, elevated tanks, clarifiers, pumps, and other treatment units or appurtenances</p> <p>Inadequate water line size or placement</p> <p>Water plant being operated by unlicensed operator or operator with inadequate license</p> <p>Failure to plug abandoned wells</p> <p>Failure to provide adequate disinfection equipment or chemicals</p> <p>Failure to provide all-weather access road</p> <p>Failure to maintain adequate disinfectant residuals, turbidity levels</p> <p>Failure to complete customer service inspections</p> <p>Failure to maintain liner in lagoons at CAFO</p> <p>Failure to maintain manure stock piles at CAFO to prevent run-off</p> <p>Failure to provide facilities to prevent runoff of wastewater or stormwater at CAFO</p> <p>Failure to maintain sight gauges on sludge truck</p> <p>Failure to stop construction of an OSSF when planning material or soil conditions make compliance impossible</p> <p>Failure to meet minimum specifications of OSSF installation</p> <p>Failure to construct OSSF authorized for specific location in site evaluation</p> <p>Failure to maintain required separation distances in OSSF</p> <p>Failure to meet minimum standards for design and installation of irrigation systems</p> <p>Failure to comply with conditions of an Edwards Aquifer protection plan</p>
--	--

Standard Penalty Table

	<p>Waste</p> <p>Failure to ship hazardous waste off-site within 90 days or 180 days for a small quantity generator. Exceedance of storage time limit for universal waste rules, (generators, handlers etc.) Exceedance of time allowed to perform closure or to close. Exceeding the allowable volume or number of containers in a permitted hazardous waste container storage area. Failure to complete inspect hazardous waste facility for malfunctions, deterioration, operator errors and discharges. Failure to have an adequate inspection schedule with required information for hazardous waste facilities Failure to conduct inspection on hazardous waste units, ie. tanks, container storage areas, landfills, ground water systems, etc. Failure to take adequate precautions for ignitable, reactive or incompatible wastes Failure to maintain an adequate ground water monitoring system. Failure to follow closure plan or post closure care plan Failure to keep hazardous waste drums closed with lids, Failure to maintain containers of hazardous waste in good condition. Failure to maintain adequate freeboard for hazardous waste surface impoundment. Failure to perform investigation and confirmation steps in response to suspected release Failure to properly remove from service a PST Failure to make available a valid current delivery certificate Failure to conduct inventory control or to conduct proper or adequate inventory control Failure to ensure that release detection, corrosion protection and spill and overfill equipment is properly maintained and operated properly Failure to conduct required inspections on PST systems including cathodic protection equipment. Failure to maintain and properly operate Stage II components ie. torn or damaged nozzle boots, etc. Failure to conduct required inspections of the Stage II vapor recovery system. Failure to comply with training requirements for personnel involved with the Stage II systems. Failure to maintain required height and size requirements at scrap tire sites. Failure of a MSW landfill to follow closure and post closure care requirements. Failure to maintain proper cover requirements for MSW landfill. Failure to control windblown waste and litter. Failure to follow site operating plan. Failure to have an adequate personnel training program for hazardous waste sites.</p>
<p>Security/ Emergency Preparedness 25%</p>	<p>Failure to plan for fires, releases, emergencies, natural disasters, terrorist attacks, or other catastrophes by not using required contingency plans or other required planning documents.</p> <p>Air</p> <p>Failure to provide backup generator for major events or electrical failures Failure to provide emissions reduction plan</p> <p>Water</p> <p>Failure to provide lockable gates Failure to provide adequate intruder resistant fence Failure to provide backup generator for electrical failure</p>

Standard Penalty Table

	<p>Waste Failure to prepare an adequate contingency plan. Failure to have a 24 hour surveillance system which monitors and controls entry to the active portion the of the facility. Failure to have a fence or natural barrier which completely surrounds the active portion of the facility; Failure to have a means to control entry at all times through gates, or other entrances. Failure to have a sign with the legend “Danger Unauthorized Personnel Keep Out.” Failure to have required emergency equipment i.e., alarms, fire extinguishers, fire control equipment, decontamination equipment, water at adequate pressure and volume. Failure to have required aisle space. Failure to make arrangements with local authorities. Failure to have an emergency coordinator. Failure to prepare Fire Protection Plan for MSW landfill</p>
<p>Construction, Capacity and Design requirements 25%</p>	<p>Failure to meet capacity, construction, and design requirements.</p> <p>Air N/A</p> <p>Water Failure to provide adequate raw water pump capacity Failure to provide adequate water pressure throughout distribution system Failure to provide adequate treatment plant capacity</p> <p>Waste Failure to meet the design and construction requirement for landfills, drip pads, containment buildings, munitions and Explosive Storage, or tanks. Failure to have adequate secondary containment for hazardous waste tank. Failure to meet location standards for hazardous waste management units. Failure to install or construct required secondary containment for used oil handler facilities. Failure to install or properly construct required leachate collection and liners. Failure to meet location restrictions requirements for MSW landfill. Failure of MSW landfill to have required ground water monitoring system. Failure to install or properly install all components of a required Stage II system</p>
<p>Water Rights 25%</p>	<p>Violations that concern state water rights.</p> <p>Water Rights Diverting, taking, or storing water without a water right Diverting, taking, or storing water above the authorized amount Diverting above the authorized diversion rate Diverting water for a use not specified in the water right Diversion in excess of an authorization to divert, granted by a water master</p>

Financial Assurance and Penalty Payments 25%	Failure to provide required financial assurance or pay administrative penalties required by a prior order.
	Air Failure to pay administrative penalty from prior order.
	Water Failure to pay administrative penalty from prior order.
	Waste Failure to maintain financial assurance for closure or post closure for hazardous waste site. Failure to provide for financial assurance for sudden and not sudden liability for hazardous waste site. Failure to update closure and post-closure cost estimates for inflation or addition of new hazardous waste units. Failure to provide financial assurance for corrective action and for third party compensation for bodily injury or property damage caused by accidental releases for PSTs. Failure to provide required financial assurance for municipal waste sites including landfills, tire sites, and used oil sites and others.

Ordering Provisions Subcommittee	
Issue No.	1
Key Issue	<p><u>Closing out enforcement orders:</u></p> <p>A) 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?</p> <p>B) Should small business or small local government be given different consideration from larger entities in the documentation required to close out an order?</p> <p>C) Are there cases where additional monitoring, either by the respondent or the agency, should be required to demonstrate compliance prior to order close-out?</p> <p>D) 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?</p> <p><u>Basis:</u> Staff input and review of current practice.</p>
Other Committees Reviewing Issue	Enforcement Initiation/Investigation Prioritization/NOV Policy (Item C)
Recommendation	<p>A) Should additional or clearer information be required of a respondent to demonstrate that compliance with an order has been achieved prior to closing out the order?</p> <p><u>Recommendation:</u> Yes. We recommend that the practice of requiring the respondent to certify compliance be continued, but that the standard technical requirements (TRs) include the type of additional documentation needed for each type of certification. (Ex. If respondent must certify that on-site sewage system is inspected and maintained on a regular basis, certification must be accompanied by copy of maintenance contract with a licensed OSSF installer.)</p> <p><u>Pros:</u> 1) Requirement to provide additional documentation could prevent false certification; 2) additional documentation adds to the historical record and is available to the public; 3) the time needed for the enforcement process may be shortened if standard TRs for this situation were developed; 4) the continued use of certifications of compliance could help to preserve agency resources.</p> <p><u>Cons:</u> 1) Standardized TRs are less responsive to the specific situation; 2) additional documentation may be falsified as well as the certification of compliance; 3) the development of standard TRs for additional documentation would require TCEQ resources.</p>

Basis: Public comments indicate that the enforcement order is not always clear on the actions to be taken by the respondent. Several commentors recommended that definitive proof be provided to verify that compliance with the ordering provisions has been achieved.

Implementation Impacts:

- LBB measures would not be affected.
- **Initial agency resources needed:** Staff to review existing Technical Requirements (TRs), develop new language, and develop criteria to require additional documentation to be submitted with certificates of compliance.
- **On-going agency resources needed:** 1) Procedures to track compliance with the documentation requirements. 2) Time to develop enforcement orders which clearly state the documentation requirements. 3) Time to review and evaluate the documentation submitted. 4) Staff time to write customized TRs and documentation requirements for some violations.
- The regulated entity will incur more cost in meeting the requirements for additional documentation.
- A time frame for implementation will be established upon approval of the recommendation and consideration of other factors.

B) Should small business or small local government be given different consideration from larger entities in the documentation required to close out an order?

Recommendation: Yes, on a limited basis. We recommend that the ordering provisions 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 size violators. If the small entity is a repeat violator or if there is an imminent threat to the environment, there should be no special consideration.

Pros: 1) Small entities may not have the funds or manpower available to correct violations; 2) greater compliance may be achieved through a flexible approach for small entities.

Con: Environmental non-compliance has the same effect regardless of whether it is caused by a small or large entity.

Basis: Public comments were split on this issue. With the advice of Small Business and Local Government Assistance (SBLGA), subcommittee members concluded that special considerations should be given to small entities only if they do not present a significant environmental risk.

Implementation Impacts:

- **Initial agency resources needed:** In reviewing standard TRs as described at 1A above, an alternative TR should be developed for small businesses or local governments who are not repeat violators or when there is no imminent threat to the environment. The alternate TR should allow for a longer time frame, upon request and if deemed appropriate, to implement corrective action and submit documentation to TCEQ.
- **On-going agency resources needed:** Staff time to track compliance with the order for an extended time.
- There is no additional cost, impact on LBB measures or EPA coordination issues associated with this recommendation.
- SBLGA should be involved in development of the alternative standard TRs.

C) Are there cases where additional monitoring, either by the respondent or the agency, should be required to demonstrate compliance prior to order close-out?

Recommendation: Yes. We recommend that a decision matrix be developed 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. The monitoring may be performed by the respondent, a previously-agreed third party, or the TCEQ. (Ex.: TCEQ may require a public drinking water system to monitor pressure at certain points in its distribution system on a weekly basis as a result of enforcement action due to inadequate pressure.) Any additional monitoring requirements required by the enforcement order should be specified in the order.

Pros: 1) Additional monitoring may be needed in some cases to ensure protection of the environment; 2) monitoring by the respondent or 3rd party helps to preserve agency resources. Cons: 1) The selection of a 3rd party may add time to the enforcement process; 2) monitoring results may be falsified; 3) additional agency resources may be needed to evaluate the monitoring results; 4) may require rule making to implement.

Basis: In some cases, additional information is needed on an on-going basis to assure that the enforcement issue is resolved. The enforcement order should not be closed until that assurance is obtained through additional monitoring.

Implementation Impacts:

- LBB measures would not be affected.
- **Initial agency resources needed:** Staff time to develop the decision matrix for guidance in determining the additional monitoring needed to ensure compliance.
- **On-going agency resources needed:** 1) Procedures to track compliance with the additional monitoring requirements 2) Time to develop enforcement orders which clearly state the additional monitoring requirements, 3) Staff time in negotiating with the regulated entity if a 3rd party is to be used for monitoring. 4) Staff time to evaluate additional monitoring data.
- The regulated entity will incur more cost in meeting the requirements for additional monitoring.
- New rules may need to be developed or existing rules may need to be revised to ensure that additional monitoring requirements may be part of an enforcement action.

	<p>D) 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?</p> <p><u>Recommendation:</u> We recommend that the agency develop an audit mechanism to determine if certifications are effective in achieving environmental compliance. The review of compliance certifications may be based on the results of a statistical sample of agreed orders. We further recommend that the Enforcement Division establish a strong link with criminal investigators to ensure that action is taken to prosecute individuals who knowingly submit false certifications.</p> <p><u>Pros:</u> 1) The agency does not have a way of monitoring the effectiveness of compliance certifications without reviewing specific cases; 2) the agency does not have a consistent process for referring false certifiers for prosecution.</p> <p><u>Cons:</u> 1) The review of the effectiveness of compliance certifications would involve a records search and on-site inspections. This would require agency resources whether performed by agency staff or by a contractor; 2) pursuing criminal prosecution for false certifications would require additional staff time and resources.</p> <hr/> <p><u>Basis:</u> A representative of Enforcement Division stated that the use of compliance certifications have been effective. However, the subcommittee found that the new Comprehensive Compliance and Enforcement Data System (CCEDS) does not capture statistics on the number of certifications found to be false. The purpose of this recommendation is to develop a method of 1) estimating the effectiveness of certifications and 2) ensuring appropriate follow-up when a certification is found to be false.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • LBB measures would not be affected. • Initial agency resources needed: Cost of audit or review of specific cases to determine effectiveness of compliance certifications. • On-going agency resources needed: 1) Costs of on-going review of certifications based on findings of initial audit. 2) Increased resources to pursue escalated enforcement for false certifications.
<p>Other Alternatives</p>	<p>The subcommittee considered whether to discontinue the use of certifications of compliance. However, there is no definitive indication that the certification procedures are flawed or result in incomplete action by respondents. While on-site TCEQ verification that TRs have been met adds certainty, this would result in more agency resources needed for follow-up inspections.</p> <p>The subcommittee also considered the recommendation to add a feature to CCEDS to track information on compliance certifications requested, received, and validated. The subcommittee found that resolving this data gap in CCEDS would be costly and may be delayed due to other priorities.</p>

Notes	Small entities and repeat violators received special consideration in other issues addressed by this subcommittee. False certification is also addressed in Issue 2 regarding a plain- language warning in the order. The review of standard TRs is addressed in Issue 3 concerning intra-agency communication. The effect of false certification on compliance history was considered but determined to be under the purview of the Compliance History subcommittees.
--------------	--

Ordering Provisions Subcommittee	
Issue No.	2
Key Issue	<p><u>Consequences of Failing to Comply:</u></p> <p>A) Should orders contain additional standard provisions that communicate to the respondent the consequences of failure to comply with the provisions of the order?</p> <p>B) Should small business and small local government be given different consideration from larger entities in establishing additional standard provisions in an order?</p> <p><u>Basis:</u> Staff Input and Review of Current Practice</p>
Other Committees Reviewing Issue	None
Recommendation	<p>A) Should orders contain additional standard provisions that communicate to the respondent the consequences of failure to comply with the provisions of the order?</p> <p><u>Recommendation:</u> Yes, we recommend that a standard provision be placed in all enforcement orders to address possible consequences of not complying with the Corrective Action provisions of the order. The language would directly precede the Respondent’s signature block on the order. See Attachment A following this recommendation for an example.</p> <p><u>Pro:</u> 1) Plain language warnings in the order of the consequences of failure to comply makes the respondent personally responsible and accountable when signing the order; 2) the public is made more aware of the consequences of failure to comply with an order.</p> <p><u>Con:</u> 1) Respondent already knows about the consequences of failure to comply at this stage of the enforcement process; 2) additional language may not be a deterrent to some respondents who are not inclined to comply in the first place.</p> <p><u>Basis:</u> Based on staff input, the committee felt that an additional order provision would clearly and more fully spell out consequences of not complying with an order. This better ensures that respondents, as well as the general public are aware of those consequences.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • The Office of Legal Services has provided language to be inserted into the orders. Therefore, this recommendation could be implemented immediately. • There is no effect on LBB measures, EPA delegation or the need to change state statutes.

	<p>B) Should small business and small local government be given different consideration from larger entities in establishing additional language in an order? No, the subcommittee recommends that the additional language discussed in Key Issue 2A above be placed in all orders regardless of size.</p>
	<p><u>Basis:</u> Use of the recommended language may be more beneficial to small businesses and local governments to make them aware of consequences of not complying with Corrective Action provisions in situations where such entities may not be represented by legal counsel.</p>
<p>Other Alternatives</p>	<p>The alternative to using a new provision would be to maintain and rely upon existing standard language in orders.</p>

Ordering Provisions Issue 2 Attachment A

SIGNATURE PAGE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

For the Commission

I, the undersigned, have read and understand the attached Agreed Order. I am authorized to agree to the attached Agreed Order on behalf of the entity, if any, indicated below my signature, and I do agree to the terms and conditions specified therein.

Lydia González Gromatzky
Deputy Director
Office of Legal Services
Texas Commission on Environmental Quality

Date

I, the undersigned, have read and understand the attached Agreed Order. I am authorized to agree to the attached Agreed Order on behalf of the entity, if any, indicated below my signature, and I do agree to the terms and conditions specified therein.

I also understand that my failure to comply with the Ordering Provisions, if any, in this order and/or my failure to timely pay the penalty amount, may result in:

- 1. A negative impact on my compliance history;**
- 2. Greater scrutiny of any permit applications submitted by me;**
- 3. Referral of this case to the Attorney General's office for contempt, injunctive relief, additional penalties, and/or attorney fees, or to a collection agency;**
- 4. Increased penalties in any future enforcement actions against me;**
- 5. Automatic referral to the Attorney General's Office of any future enforcement actions against me; and**
- 6. TCEQ seeking other relief as authorized by law.**

In addition, any falsification of any compliance documents may result in criminal prosecution.

Signature

Date

Name (Printed or typed)
Authorized representative of
RESPONDENT'S FULL NAME

Title

Instructions: Send the original signed Signature Page and all pages of this Agreed Order with penalty payment to the Financial Administration Division, Revenues Section at the address in Section IV, Paragraph 1 of this Agreed Order.

Ordering Provisions Subcommittee	
Issue No.	3
Key Issue	<p><u>Internal Agency Coordination:</u></p> <p>A) What improvements can be made in the internal coordination between the Enforcement Division and other areas of the agency (permit divisions, Small Business and Environmental Assistance, Office of Legal Services, General Counsel, Chief Clerk) during order development?</p> <p>B) Should small business and small local government be given different consideration from large entities when determining the nature and degree of internal coordination on a specific order?</p> <p>C) 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?</p>
	<p><u>Basis:</u> The Ordering Provisions Subcommittee was asked to consider how a pending permit application might be affected by a pending enforcement order and vice-versa. Overall, effective coordination between areas involved in processing of enforcement orders or areas which could be impacted by those orders would improve the overall efficiency of the agency.</p> <p>Improved coordination would result in 1) more realistic ordering provisions where permit applications or amendments are involved and 2) more enforceable permit provisions.</p>
Other Subcommittees Reviewing Issue	
Recommendation	<p>A) What improvements can be made in the internal coordination between the Enforcement Division and other areas of the agency (OPRR, SBLGA, OLS, OGC, OCC) during order development?</p> <p><u>Recommendation:</u> Establish liaisons from all divisions and programs and maintain contact and communicate regularly on pending orders under development. These liaisons should discuss establishing “boiler-plate” conditions and processing procedures, as well as confer on specific cases as needed to ensure comprehensive requirements which do not conflict with permit requirements or time frames.</p> <p><u>Pro:</u> Would provide for more realistic ordering provisions when permitting processes are involved.</p> <p><u>Con:</u> Could add to time needed to draft order and would require the commitment of staff resources knowledgeable of other areas in the agency.</p>

Basis: The need to more effectively coordinate requirements of the agency is essential so that conflicting technical and time frame requirements are not included in compliance orders. Many examples exist where these conflicts have caused confusion, additional violations, or the perception of incompetence. Resources should be dedicated to ensure accurate, consistent and effective order conditions and permit requirements, allowing the agency to “speak with one voice”.

Implementation Impacts:

- More time will be necessary for coordination, however the time necessary for increased coordination should be built into any new timelines for the enforcement process such that LBB measures for number of enforcement actions taken is not adversely affected.
- Directors in OPRR, SBLGA, OLS, OGC, and OCC would need to appoint enforcement liaisons and establish procedures to hold the liaisons accountable for participation in this initiative.
- The Enforcement SOP would need to be revised to include the triggers where coordination is necessary and whether standard or unique coordination procedures would apply.
- A time frame for implementation will be established upon approval of the recommendation and consideration of other factors.

B) Is there a unique coordination role for SBLGA with a respondent and the Enforcement Division during the development of the order?

Recommendation: Coordination on violations and resolution of noncompliance should occur as much at the regional level as possible. While occasional assistance from SBLGA may be helpful at the order development stage, this is often a unique circumstance.

Pro: Consistent and timely interaction with SBLGA may help respondent understand how to respond to enforcement. A single point of contact with SBLGA would provide the most assurance to the respondent that the case is understood by TCEQ.

Con: By the time that the enforcement process comes to the ordering stage, it is often too late to influence the process by providing appropriate responses.

Basis: After a NOV is written, a regional SBLGA representative is sometimes involved to assist resolution. Involving SBLGA at the earliest stage of noncompliance produces the best results. At this level they are the most familiar with the issues and can assist in resolution in the most expedient ways. More and earlier contact is the best. At the stage of developing an order, nothing should be a surprise and in most cases, the best person from SBLGA to assist would be the same contact person as involved at the regional level.

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • No LBB measure would be affected. • There are no coordination issues with EPA. • SBLGA would need to ensure that local staff is available to assist a respondent throughout the Enforcement process • The Enforcement SOP would need to be revised to include the requirement to involve the local SBLGA staff if the respondent is a small business or local government. • There is no cost of implementation. • A time frame for implementation will be established upon approval of the recommendation and consideration of other factors. <p>C) 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?</p> <p><u>Recommendation:</u> No, however other recommendations made by the Compliance History Use Subcommittee would require additional monitoring provisions in a permit issued to a person with a poor compliance history rating.</p> <p><u>Pro:</u> It is more clear cut and similar to present day processes to address corrective actions in an enforcement order. As an alternative, it is noted that other subcommittees are developing recommendations to address how to use poor compliance history or failure to pay fees as a basis for permit denial, application return, or suspensions application processing.</p> <p><u>Con:</u> Withholding or changing permits based on pending enforcement actions would send a strong message to violators.</p> <p><u>Basis:</u> To develop customized provisions to address enforcement in a permit would add confusion and inconsistency to permitting reviews. However, it is recommended that Enforcement and Permitting Divisions of the Agency establish coordination procedures to confer on general processes and specific cases as discussed in Issue 3.A above.</p>
Other Alternatives	N/A
Notes	If any of these recommendations are implemented, the new procedures should be in the published guidance available to staff and to the public.

Ordering Provisions Subcommittee	
Issue No.	4
Key Issue	<p><u>Ordering Provision Language:</u></p> <p>A) 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?</p> <p>B) Are there situations where additional monitoring and/or other restrictions, other than to correct a specific violation, should be required?</p> <p>C) Should small business or small local government be given different consideration from larger entities in development of ordering provisions?</p> <p><u>Basis:</u> The content and clarity of actions required of a respondent are important for effective environmental protection and may assist in preventing future violations. Comments received from the public indicate that interested parties sometimes have difficulty in determining what exactly a respondent is required to do to become compliant and meet the terms of the agreed order. This perception is probably the result of “performance based” ordering provisions which give flexibility to the respondent in formulating a compliance plan that meets the intent of the rule or statute. While an Enforcement Coordinator (EC) may have an idea of what could meet the requirement and what would not, if not explicit in the ordering provisions, it may not be clear to the public and, in some cases, the respondent.</p>
Other Subcommittees Reviewing Issue	
Recommendation	<p>A) 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?</p> <p><u>Recommendation:</u> We recommend that: (1) in as much as possible, specific compliance criteria beyond the certification of compliance submitted by the respondent, be included in the ordering provisions. An example would be specifying what, at a minimum, must be included in a compliance plan, including time frames and technical information to ensure corrective action and future compliance. (2) Where appropriate, simplify ordering provision language. This issue and recommendation is also related to Key Issue 1-A)</p>

	<p><u>Basis:</u> Generally, it was found that most ordering provisions do an adequate job of communicating to the respondent and the public what is needed to achieve compliance with the order. However, it was also determined that some improvements can be made. The ordering provisions should be as specific as possible as to the criteria for compliance and the documentation to be submitted with the plan to achieve compliance. Specific ordering provisions will allow members of the public to more clearly understand what is required of a respondent. It will also allow the respondent to more clearly understand the level of documentation required to demonstrate compliance with an order.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • No LBB measure would be affected. • For each program, Enforcement Division staff would need to review the Technical Requirements (TRs) to ensure the requirements 1) are clearly written in plain English 2) communicate exactly the actions needed to comply 3) and specify the documentation that should be submitted to demonstrate compliance. Enforcement Division should coordinate with the program divisions, and Field Operations Division in this effort. • A time frame for implementation will be established upon approval of the recommendation and consideration of other factors.
	<p>B) Are there situations where additional monitoring and/or other restrictions, other than to correct a specific violation, should be required?</p> <p><u>Recommendation:</u> No. However, specific violations may require additional monitoring as recommended at Issue 1.C.</p>
	<p><u>Basis:</u> In specifying compliance criteria, it is not recommended that ordering provisions go beyond what is required by statute or rule in correcting violations, by policy of the TCEQ.</p>
	<p>C) Should small business or small local government be given different consideration from larger entities in development of ordering provisions?</p> <p><u>Recommendation:</u> Yes, on a limited basis, especially where large capital expenditures are involved. This sub issue was also addressed at Issue 1.B.</p>
	<p><u>Basis:</u> The only area where the committee felt that small businesses or small local governments should receive different provisions is in the area of compliance time frames for large capital expenditure projects. It was felt that it may take more time for these small entities to obtain the necessary funding. This issue was also addressed at Issue 1.B.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • In reviewing standard TRs as described at 4.A above, an alternative TR and criteria for its use should be developed for small businesses or local governments when large capital expenditures are required to come into compliance, and if special consideration is requested and deemed to be appropriate. • There is no additional cost, impact on LBB measures or EPA coordination issues associated with this recommendation. • SBLGA should be involved in development of the alternative standard TRs for small businesses or local governments.
<p>Other Alternatives</p>	<p>N/A</p>

Ordering Provisions Subcommittee	
Issue No.	5
Key Issue	<p><u>Additional ordering provisions for repeat violators (RVs):</u></p> <p>A) Should ordering provisions differ for repeat violators to include more specific requirements, additional monitoring, or other restrictions?</p> <p>B) Should ordering provisions be used to require self-examination or assessment of root causes of violations?</p> <p>C) 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?</p> <p><u>Basis:</u> Public Comment and Steering Committee Input</p>
Other Committees Reviewing Issue	Compliance History Use, Compliance History Classification, Collections
Recommendation	<p>A) Should ordering provisions differ for repeat violators to include more specific requirements, additional monitoring, or other restrictions?</p> <p><u>Recommendation:</u> Yes. It is recommended that a multi-media agency team develop general guidelines to address media- and facility-unique issues including evaluation and review of previously issued Orders for specific and effective monitoring, testing, and other compliance assurance requirements. These guidelines should be mandatory for any regulated entity designated as a Repeat Violator.</p> <p><u>Pros:</u> 1) Consistency with previously issued and future orders; 2) deterrent due to cost of monitoring or additional requirements; 3) deterrent of cost from additional oversight; 4) facilitates agency information and oversight of RV; 5) provides site-specific information which is available to the public to demonstrate compliance (transparency) ; 6) gives focused, specific criteria for more effective enforcement and enhances environmental protection.</p> <p><u>Cons:</u> 1) TCEQ resources to develop and establish criteria and guidelines; 2) TCEQ resources to track compliance with additional requirements; 3) industry resources to track compliance with additional requirements (may be significant for small businesses); 4) additional time to develop order.</p> <p><u>Basis:</u> RVs present a higher risk to the agency for non compliance and therefore more agency resources directed to these entities is justified. Additional requirements are also justified. The public is often very interested in the actions regarding repeat violators and additional requirements would add to the public record.</p>

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Initial agency resources needed: 1) Time dedicated by a multi-media team to evaluate previously-issued orders to determine effective monitoring and compliance-assurance requirements. 2) Staff time to develop general and specific guidelines which would address the additional monitoring requirements to be applied to repeat violators. • On-going agency resources needed: 1) Procedures to track compliance with the additional requirements. 2) Time to develop enforcement orders which clearly state the additional requirements. 3) Staff time to evaluate the monitoring and testing results submitted. Additional resources would likely be required to implement this recommendation in order not to adversely affect the overall processing timeline for enforcement orders. • The regulated entity will incur more cost in meeting the requirements for additional monitoring. • The multi-media team could be assembled immediately with guidelines due in 90 days.
	<p>B) Should ordering provisions be used to require self-examination or assessment of root causes of violations for Repeat Violators?</p> <p><u>Recommendation:</u> Yes. In the order, require all RV to include root cause evaluations which include addressing the principal/major reason why the violation occurred and prevention for future following guidance established by TCEQ based on EPA and other available regulatory guidance. The guidance should consider the use of independent or third parties for the root cause analysis.</p> <p><u>Pros:</u> 1) Timeliness to resolve recurring problems; 2) effective method to prevent future occurrences; 3) consistency by following any established methods/guidance; 4) awareness by industry regarding operations and compliance; 5) positive incentive to avoid this process by not having repeated violations; 6) provides a cross-check on the investigator's observations.</p> <p><u>Cons:</u> 1) TCEQ resources to develop and establish criteria and guidelines; 2) TCEQ resources to evaluate reasons/causes and assess if additional order requirements are needed; 3) industry resources to meet requirements (may be significant for small businesses); 4) additional time to develop order; 5) it is possible that some root cause analyses would be self-serving.</p>
	<p><u>Basis:</u> The root cause analysis may help to avoid situations where it is easier for the RV to pay the penalty than to permanently resolve the cause of the violation.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Initial agency resources needed: Staff time dedicated by a multi-media team to develop general and specific guidelines to address the additional requirement for a root-cause analysis by repeat violators. • On-going agency resources needed: 1) Procedures to track compliance with the requirement for a root-cause analysis and evaluation of the analyses submitted. 2) Time to develop enforcement orders which clearly state the requirement for a root-cause analysis. 3) Time to review submitted root-cause analyses and determine appropriate actions. Additional resources would be required to implement this recommendation in order not to adversely affect the overall processing timeline for enforcement orders.

	<ul style="list-style-type: none"> • The regulated entity will incur more cost in meeting the requirement for a root cause analysis. • The multi-media team could be assembled immediately with guidelines due in 90 days.
	<p>C) 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?</p> <p><u>Recommendation 1:</u> Yes, it is recommended that a multi-media agency team consider guidelines to address media- and facility-unique issues and establish some level of financial evaluation of RVs. The financial evaluation could address the financial ability of the RV to correct unresolved violations as well as a broader evaluation of the RV's ability to conduct its activities in compliance with applicable TCEQ regulations. The latter evaluation could be a component of a "root cause" analysis discussed in 5 (b) above. Considerations would include: the number and types of violations and orders; the scope of the financial evaluation (violation only or the ability to continuously operate in compliance with all rules); timing of the evaluation (prior to order development or as a requirement of an order); who should perform the evaluation (agency personnel or through an independent audit); and authority to require this information under current TCEQ rules and statutes.</p> <p><u>Pros:</u> 1) Would provide additional information to the agency to support decisions on a given order or possibly permit action, including potential revocation of authority to operate; 2) could speed up the enforcement process. TCEQ would know sooner if the respondent has the ability to comply. 3) Could result in avoiding many repeat violations if under-capitalized businesses are prevented from continuing activities they are unable to comply with.</p> <p><u>Cons:</u> 1) Would require additional agency efforts to further develop guidelines, perform the financial evaluations unless required through an independent audit, and review results of the financial evaluation.</p> <p><u>Basis:</u> The subcommittee met with the Financial Assurance Team of the Revenues Section in Financial Administration Division and reviewed programs where a financial evaluation was conducted at the time the permit or approval is issued. The subcommittee determined that financial evaluation is effective in screening for entities which are under-capitalized and do not have the means to comply with environmental regulations. The ideal time of the screening would be before issuing a permit. If that is not possible at this time, the screening should be done during the development of the enforcement order addressing the repeat violations.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Initial agency resources needed: Staff time dedicated by a multi-media team to develop guidelines for the financial evaluation of repeat violators. • On-going agency resources needed: 1) Time for staff to perform the financial evaluations or costs of an out-sourcing contract. 2) Additional time in the enforcement process to have the financial evaluation performed. Additional resources would likely be required to implement this recommendation in order not to adversely affect the overall processing timeline for enforcement orders. • The multi-media team could be assembled immediately with guidelines due in 90 days.

Recommendation 2: We recommend that a multi-media team review the issue of requiring repeat violators to provide actual financial assurance, e.g. performance bonds, letters of credit, insurance, etc., which could be collected by the agency if the order is defaulted on or as a condition for continued authorization to operate. The team would include staff from the Financial Assurance Team in Financial Administration Division and would request input from major surety companies operating in Texas.

The primary purpose of the financial assurance requirement would be to provide an incentive for complying with TCEQ orders. In the event the RV did not comply, the RV would be accountable to the surety company as well as to the TCEQ. The requirement for financial assurance could be waived under certain circumstances, such as inability to pay. Also, this would be presented as an alternative to revoking a permit. The respondent may prefer revocation of the permit in some cases.

Pro: 1) The requirement for a surety bond on the performance of the technical requirements would speed up and simplify the enforcement process. If the repeat violator does not get the surety bond, TCEQ can declare the RV in default of the order immediately. 2) If the RV does not comply with the Order and the performance bond were to be forfeited, the RV may face more serious consequences from the surety company than from the TCEQ. 3) The performance bond would be a cost to the repeat violator and would not require agency resources, except to review the instrument to make sure that it was suitable and to pursue collections if the RV fails to perform.

Con: 1) The extra cost of obtaining a performance bond could prevent the RV from using additional funds to achieve compliance; 2) more financial staff needed by TCEQ to review bond instruments and pursue collection upon nonperformance.

Basis: The Enforcement Steering Committee asked the Ordering Provisions Subcommittee to consider this question. Financial assurance is currently used in permitting programs as insurance for remedial activities or closures that would occur if a site were to be shut down. Recommendation 2 addresses another type of financial assurance in the form of performance bonds that would provide an additional incentive to repeat violators to correct violations. The performance bonds would be forfeited to the State only if the respondent fails to comply with the TCEQ enforcement order.

The RVs are high risk for performance of the corrective actions specified in the enforcement orders. In lieu of revoking the permits of RVs, which would be impractical in many cases, the RV would be required to post a performance bond in an amount to be determined by a multi-media agency committee. The schedule of bonding requirements would be included in published guidance.

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Initial agency resources needed: Staff time dedicated by a multi-media team to determine the feasibility of performance bonds as applied to enforcement orders and if feasible, to develop guidelines for their use. • If the requirement is feasible, rules and statutes may need to be revised to ensure that requirement can be implemented. • On-going agency resources needed if requirement is determined to be feasible: <ol style="list-style-type: none"> 1) Procedures to track compliance with the requirement to post performance bonds, and 2) procedures to determine that the bonds submitted are adequate. 3). If the respondent does not come into compliance, agency resources will be needed to pursue collection from the bonding company. 4) Additional time would be needed to develop enforcement orders which clearly state the performance bond requirement, although new order language should be standardized to the degree possible. Additional resources would likely be required to implement this recommendation in order not to adversely affect the overall processing timeline for enforcement orders. <ul style="list-style-type: none"> • The regulated entity will incur costs in obtaining performance bonds. There may also be audit and collateral costs to the regulated entity. • The multi-media team could be assembled immediately with guidelines due in 90 days.
<p>Other Alternatives</p>	<p>Recommendation 1: Emphasize and aggressively use existing authority in statute and rules to pursue shutdown of RV after some level of frequency and type of violations/Orders.</p> <p>Recommendation 2: The subcommittee considered the recommendation not to pursue the issue of financial assurance for the following reasons:</p> <ul style="list-style-type: none"> - In many cases, the ability of an entity to obtain financial assurance may be related to the financial ability of that entity to correct a violation and/or maintain overall compliance, however, it is unknown at this time whether issuing authorities, e.g. bond companies, insurance carriers, etc., would be willing to offer appropriate instruments in the enforcement arena. The ability of a respondent to correct a violation or operate in compliance may not be directly related to whether that respondent can acquire financial assurance. - Questions about what the agency would do with funds in the event of default on an order. If a respondent failed to install equipment necessary to meet an air quality standard and defaulted on the order, the agency would not likely use the financial assurance to install that equipment and/or operate the facility. - If the financial assurance was to be used by the agency to actually fund a corrective action, then significant detail would likely be necessary to explain what was being included in order for an issuing authority to provide the financial assurance.
<p>Notes</p>	<p>Note 1: One primary issue is the ability of surety companies to issue performance bonds for TCEQ enforcement orders. This would be the first question for the agency committee to consider. If the agency committee determines that financial assurance for RVs is feasible, it would be charged with setting the criteria and amounts of the bonds needed, similar to the schedule used in criminal cases to establish the amount of the bail for most cases.</p> <p>Note 2: The definition of “repeat violator” used in these recommendations defers to the definition used by the compliance history subcommittees.</p>

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	1
Key Issue	<u>Continuance of Supplemental Environmental Project (SEP) program:</u> Should TCEQ continue the SEP program? If so, should TCEQ encourage the use of SEPs or merely make them available without encouraging their use?
	<u>Basis:</u> Public Comment
Other Subcommittees Reviewing Issue	
Recommendation	The TCEQ should continue the SEP program. Public comments identify SEPs as an innovative alternative in resolving enforcement cases. Environmental projects not otherwise undertaken can be funded. Funds can be targeted to provide environmental benefits in the geographical location of enforcement offense. SEPs can focus funds towards environmental priorities. SEPs often “settle” the case.
	TCEQ should better communicate the SEP program’s objectives and the environmental benefits achieved by the program.
	<u>Basis:</u> Interest has been shown by legislators in the past; many like SEP projects and like to see them in their district.
	<u>Implementation Impacts:</u> Continuation of the SEP program itself will have no impact. But, better communication of the SEP program and some changes to the SEP Policy as recommended in Issues 2 - 7 will require implementation. After the Commission makes its decision in October, a small workgroup should be convened to revise the SEP policy and work on the communication issues. This group should include representatives from: Agency Communications, FOD, Enforcement, Legal, Small Business, Internal Audit, and OPA. An aggressive timeline of drafting the revisions within 30 days, and then 30 days for briefings is envisioned
Other Alternatives	Discontinue the SEP program. Public comment identifies a perception of lenient enforcement, not enough oversight, not enough public relations benefit, complicates enforcement process, not punitive, and no environmental benefit. No more SEPs might resolve these perceptions. Administrative penalties would go into General Revenue and not stay in community.

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	2
Key Issue	<u>Supplemental Environmental Projects (SEPs) discussions:</u> When should SEP discussions begin with the respondent during the enforcement process?
	<u>Basis:</u> Public Comment

Other Subcommittees Reviewing Issue	Enforcement Process, Communications
Recommendation	<p>SEP discussions should begin when enforcement is inevitable. The process should occur with discussions between the investigator and entity/person upon noting:</p> <ul style="list-style-type: none"> • any category A violations and where knowledge is present of other repeat violations as identified in the current Enforcement Initiation Criteria (EIC). • anytime High Priority Violations (HPV) are noted either by the region investigator from a file review or the enforcement coordinator as the result of an enforcement referral • a violation warrants development of any order requiring administrative penalties. <p>Detailed communications from the TCEQ Enforcement Division staff should occur at the time of order development. Additional follow up and further discussion could/should occur with the regulated entity by the Small Business Local and Government Assistance program staff where allowed.</p> <p>If implemented, staff in the Regional Office or in Litigation Division must be able to communicate the SEP process to the regulated entity. A publication and/or form that is geared towards a prospective SEP applicant should be developed. It would communicate deadlines for a decision on whether to pursue a SEP, perhaps within 60 days of the inspection date. The Communications Subcommittee should develop methods or means of conveying this information.</p> <p>The regulated entity should be given a cut off or expiration period whereas if they have not selected an SEP method or project, this option is no longer available.</p> <p><u>Pros:</u> Early intervention or sharing of the SEP process would allow the violator to make decision early on, and enforcement process would be smoother. Cut off would help process too.</p> <p><u>Cons:</u> More time consuming up front for staff. Cut off may also result in fewer SEPs being done.</p> <hr/> <p><u>Basis:</u> Public comment states that SEP information is sometime inconsistent and does not occur until late in the process, which causes delays. Early intervention or sharing of the SEP process would allow the violator to make decision early on, and enforcement process would be smoother. Cut off would eliminate late comers into the SEP process which drags enforcement out.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • The investigator (FOD), enforcement coordinator (Enforcement Division) and litigation attorney work plans will require some work load deviation due to enhanced SEP communication and documentation. • SEP follow up considerations will require manpower efforts from Small Business and Local Government Assistance program which may require work load adjustment. • TCEQ should communicate with both EPA and LBB due to the potential effects on completing work plans. • No costs anticipated or identified.

Other Alternatives	<p>Force offender into making an early decision. Penalty offset would be dependent on the timing of the request for a SEP and by the type of benefit of the SEP. A SEP would receive an offset of 1:1 for a request made early in the enforcement process. A request made at the end of the enforcement process would require an offset of more than 1:1 to reduce the chance of an entity delaying the process.</p> <p><u>Pros:</u> Early participation in the SEP program will reduce the time needed to resolve enforcement cases</p> <p><u>Cons:</u> Someone deciding late in the process will have to pay more than another entity with a similar case.</p>
Notes	<p>This recommendation should be harmonized with other recommendations relating to issuance of field citations.</p>

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	3
Key Issue	<p><u>Supplemental Environmental Projects (SEPs) process:</u> How can the process of developing and approving a SEP be more efficient?</p> <p><u>Basis:</u> Public Comment</p>
Other Subcommittees Reviewing Issue	Enforcement Process
Recommendation	<p>Efficiency can be gained by additional planning activities. SEP projects should be designated, listed by region, and advertised via the TCEQ internet site. Designated projects should relate to the overall enforcement program area such as air, water and waste projects associated with the violations. By identifying allowable SEP projects, the regulated community could have projects which have been authorized previously for enforcement deferral and thus eliminate the need for searching for projects or inventing new projects each time. Timing relative to project implementation would be expedited.</p>

	<p>In addition to designated projects, new projects should be allowed to be proposed by the regulated entity, but the regulated entity should be required to identify their project for TCEQ review within 60 days of known formal enforcement. In turn, this would allow a determination if the project benefits an environmental need. Regional inspectors should be utilized in discussing SEPs early in the process (as described in Key Issue 2).</p> <p>Enforcement and region staff should have some input to the proposed SEP projects. It is suggested that an internal panel be developed for review of new candidate projects for designation. Field Ops investigator committees (already in existence) can be utilized for SEP project development. Additional staff for the panel should represent other areas of the agency so that all agency priorities are brought forward.</p> <p>A process should be developed for candidate projects screened by the panel to be periodically presented to the E.D. and Commissioners for approval for project designation. Additional SEPs that come up in the interim could be tentatively approved by the E.D. until they are approved by the Commission.</p> <p>The SEP Program should look into the possibility of partnering and leveraging resources with other state agency funds such as those managed by Secretary of State, Office of Rural Community Affairs, or Texas Water Development Board.</p> <p><u>Pros:</u> A more expedited process appears to involve more staff resources up front, but allows the enforcement process to be more efficient. More environmental projects are accomplished with expedited process.</p> <p><u>Cons:</u> Less flexibility for SEP projects not on the list. Would require a temporary shift of effort in FOD committees.</p>
	<p><u>Basis:</u> Projects in an environmental media, associated with the violation are encouraged by the Texas Water Code, TCEQ guidance, and public input suggests this preference. Lists of approved projects hastens process. Involvement by enforcement, Regional staff, and others in project review would increase workload, but would improve efficiency of cases by getting the word out sooner. Only one FTE in Austin is currently dedicated to informing interested parties about SEPs.</p>

	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Enhance the current TCEQ SEP Web site that lists region-specific approved SEPs and add the capability to search SEPs by area or media. • A SEP review panel needs to be created which screens and reviews both current and newly identified SEPs, which in turn are presented to the ED and Commissioners for approval. • New SEPs identified by the regulated community would require review by a selected panel to identify and consider environmental need. Should this panel be configured from existing FOD program committees, provisional shift in efforts would need to be made. • If the effort results in work load impacts on field investigators and enforcement coordinators, TCEQ should communicate changes to EPA and LBB. • A communication team, including program staff and IGR staff, would need to be created to partner and leverage resources with other state agencies. In turn, the efforts and accomplishments of this team would communicate those agreements and overlap to committees within SEP development and implementation.
Other Alternatives	
Notes	There is some overlap with Issue 2 and Issue 8.

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	4
Key Issue	<p><u>Type and location of Supplemental Environmental Projects (SEPs):</u></p> <p>A) Does a SEP need to benefit the environmental media (air quality, water quality, etc.) affected by the violations? If not, what should be allowed ?</p> <p>B) Should the SEP be performed exclusively in the community where the violation occurred? If not, are there other location restrictions that should apply?</p>
	<u>Basis:</u> Public Comment
Other Subcommittees Reviewing Issue	Communications

<p>Recommendation</p>	<p>It is recommended that existing policies identifying project preferences be continued. 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. Other projects relating to a different environmental media or that has an indirect benefit should still be allowable, but would be allowed only with a greater offset ratio. See also Key Issue 2 which describes strategies to involve local priorities. See also Key Issue 8 describing other recommended offsets and restrictions.</p> <p><u>Pros:</u> addresses the majority of comments that SEP benefits are intangible. <u>Cons:</u> less flexibility than current system.</p> <p>It is further recommended that the environmental benefit and purpose of the SEP be routinely conveyed to the public. Also, TCEQ should better communicate that the projects are being monitored. TCEQ should consider other requirements, i.e. submittal of pictures to verify what work is done. The Communications subcommittee should develop methods of better conveying this information.</p> <p>The current definition of community is “county”. It is recommended that the SEP Guidance improve the definition of community, considering both urban and rural settings, to better ensure preferential offset ratios for SEP projects closer to the area where violations occurred. For instance, the definition might reflect a radius.</p> <p><u>Basis:</u> Location and proximity of project to community where violation occurred are important if the public is to see a benefit from SEPs. This may improve community perceptions of the punitive aspects of TCEQ enforcement.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • More outreach to public so they know violators are paying locally. May require more efforts from Agency Communications, Enforcement, Litigation, OPA, and SBEA to publicize information. • Outreach to public will need to be increased, limited travel budgets may hamper these initial efforts to publicize the “new enforcement” process.
<p>Other Alternatives</p>	<p><u>Alternative 1:</u> SEP projects could be allowed for any environmental media so long as it addresses an environmental priority. TCEQ must determine if a project addresses environmental priorities. Just because there is a local project that can be done or expanded does not make it an environmental priority. Only high priority environmental SEPs should be considered.</p> <p><u>Alternative 2:</u> Consideration would be given to media violated, if all priorities are relatively equal or not defined for a community.</p> <p><u>Pros:</u> Simplify the SEP process. <u>Cons:</u> Lack of public perception of benefit of SEP</p> <p><u>Alternative 3:</u> Only allow Direct Benefit SEPs. <u>Pros:</u> More benefit to the environment. <u>Cons:</u> Fewer SEP projects done.</p>
<p>Notes</p>	<p>TWC §7.067 states that the Commission should give preference to projects that benefit the community in which the alleged violation occurred.</p>

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	5
Key Issue	<p><u>Outreach and input on Supplemental Environmental Projects (SEPs):</u></p> <p>A) Do the public and regulated entities understand how SEPs are used in TCEQ enforcement?</p> <p>B) Are there ways to better inform the public and regulated entities of SEP outcomes?</p> <p>C) Should selection of SEPs consider citizen, community, agency, or regulated entity priorities? If so, how?</p> <p><u>Basis:</u> Public Comment</p>
Other Subcommittees Reviewing Issue	Communications
Recommendation	<p><u>Issue A</u> 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 gather more specific information at the beginning of the process regarding the environmental benefit of the project from the respondent. We need to better publicize and distribute information regarding SEPs, especially with the benefits and cost.</p> <p><u>Issue B</u> TCEQ should also require publicizing the results and distributing a report once a SEP has been completed.</p> <p><u>Issue C</u> Presently, Regional Directors are contacted by the SEP program to receive input from Region on an as needed basis. Experienced regional staff are knowledgeable experts on environmental problems in their area and should be contacted on a more regular basis. A process to institutionalize their input on SEPs and priorities is needed.</p> <p>There is no direct avenue for public input into development of a specific SEP. However, the enforcement process is subject to public comment and that is opportunity for input. Also, Commission consideration and designation of proposed SEP projects can be another opportunity (see issue 3).</p> <p><u>Pros:</u> Better understanding by all of the environmental benefits of a SEP and the actual cost of performing a SEP.</p> <p><u>Cons:</u> More staff resources required to develop “better” information.</p>

	<p><u>Basis:</u> Public comment states that there is not a clear understanding of the SEP program or the outcome of SEPs. Development of easy to understand documents that explain the SEP process will increase public awareness and understanding of the program. Requiring more information from regulated entities regarding specifics of a SEP and publicizing that information may result in greater public understanding of the program.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Additional staff resources may be needed to revise the information currently available and to develop new information. Additional staff resources may be necessary to review and monitor the information submitted. • Some method to publicize the results of SEPs and distribution of the results of completed SEPs should be developed. Workload of agency communication staff and program staff developing this information may be affected. • Incorporating input from regional staff into the development of a SEP ensures appropriate SEPs are developed but this may impact the workload of the region and SEP staff. • Providing for public input in the development of “pre-approved” SEPs may make the program more understandable and accepted. However, it would take some staff resources to develop an appropriate process and then maintain it.
<p>Other Alternatives</p>	<p>Promote development of third party SEPs within community organizations.</p> <p>Find a way to make outreach part of the agreed order.</p> <p><u>Pros:</u> Publicize the program in a cost effective proactive way. Get public input.</p> <p><u>Cons:</u> Potential delay in process because input requires more time and staff resources for public notice and responding to comments. Attempts to involve the public in other areas have not been successful, i.e. citizen collected evidence.</p>
<p>Notes</p>	<p>Although the team did develop some ideas regarding publicizing and distributing information regarding SEPs, the Communications Subcommittee should develop any outreach plans and materials.</p> <p>Some of our ideas for their consideration are:</p> <ol style="list-style-type: none"> 1. Make information available to local officials and other parties. How is this project helping the community ? 2. Establish a state map, by TCEQ regions, and by county; make it interactive on Web site with the ability to pull down projects available in each area. Legislative staff can be briefed on SEP’s in their area on occasion. 3. Add section about SEPs to agency’s annual enforcement report. 4. TCEQ can add more info on its Web site.

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	6
Key Issue	<p><u>Monitoring and evaluation of Supplemental Environmental Projects (SEPs):</u></p> <p>A) How can we quantify the environmental benefit from a SEP?</p> <p>B) Should quantifying benefit be included as part of a reporting requirement? If so, how can TCEQ verify the benefit?</p> <p>C) Is TCEQ’s current oversight of SEPs achieving the desired results?</p> <p><u>Basis:</u> Public Comment and State Auditor’s Report</p>
Other Subcommittees Reviewing Issue	
Recommendation	<p>Recommended improvements to address each issue include the following:</p> <p><u>Issue A:</u> As a standard part of each SEP proposal, the entity proposing to perform the project should be required to estimate the environmental benefits that are expected to result from the performance of the project. The SEP staff should review this information and take it into consideration in determining whether the benefit is sufficient to merit the inclusion of the SEP in an enforcement order.</p> <p><u>Issue B:</u> As a standard part of each SEP completion report, the entity performing the project should be required to quantify the environmental benefit obtained through the project, and provide any necessary documentation to support these facts. To verify the benefit claimed, the SEP program could include a verification checklist in its risk assessment procedures.</p> <p><u>Issue C:</u> The current system provides assurance that the projects are performed and that the costs are supported by appropriate documentation and fall within the SEP Policy requirements. The current system could be improved by providing a mechanism for quantifying and verifying the environmental benefit obtained from SEPs.</p> <p>Recent improvements include:</p> <ul style="list-style-type: none"> • All SEP tracking sheets have been updated using the current system • OLS has identified all fields that need to be added to the database • Data entry has improved and achieved consistency between the information maintained in the tracking sheet and that reflected in commission orders • OLS has developed a uniform reporting format (a Crystal Report to provide tracking capability and third-party tracking sheets using Legal Files) <p>Further efforts are on-going, including:</p> <ul style="list-style-type: none"> • Designing and adding fields to the data system • Determining how we can use Legal Files to attach SEP agreements to the database to make reviews of SEP cases more efficient

	<ul style="list-style-type: none"> Setting up additional Crystal Reports to provide the "Pending SEPs for Required Reporting" log that has been requested (OLS is on track to complete this item by 9/1/04) <p>Internal Audit confirmed that the SEP program requires standardized reporting time frames for 3rd party SEPs of every 90 days.</p>
	<p><u>Pros:</u> Addresses commenters concern that SEP benefits are not tangible enough and that SEPs are an easy way out for Respondents. Requiring quantification will assist the agency and the public in evaluating proposed SEPs and monitoring the benefit of completed SEPs</p> <p><u>Cons:</u> Will require additional work by SEP participants and 3rd party organizations that propose SEPs. These recommendations would be additional tasks and potentially more FTE's would need to be assigned to adequately address.</p> <p><u>Basis:</u> The Subcommittee reviewed public comments and the State Auditor's recent audit report. In addition, the Subcommittee worked with the SEP program to get their opinion on how best to quantify the environmental benefit of SEPs while considering the resources available to the program.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> SEP policy will need to be modified to require submission of estimates. SEP agreements and third-party agreements will need to be modified. SEP risk assessment procedures will need to be modified to include a verification checklist. Litigation may work with Internal Audit on procedures. The SEP program will need to develop a reporting format and coordinate with SBGLA, Pollution Prevention, and other parts of the agency to assist in developing prototype estimates of environmental benefits for various projects.
Other Alternatives	<p>Review of SEP projects should be done by Small Business and Local Government Assistance (SBGLA) where possible. If the regulated entity does not fit within SBGLA criteria, FOD staff should perform review. Should the SEP not be conducted in accordance to agreed upon terms, the regulated entity should be reported to the Enforcement Division. Entities conducting SEP projects in a timely and specific manner to agreed upon terms should be reviewed as above and reported as compliant with this portion of the enforcement ordering provisions.</p> <p><u>Pros:</u> Better oversight of projects, better utilization of SBLGA.</p> <p><u>Cons:</u> Could be a significant resource issue for SBLGA and FOD, (approx. 120 SEPs /yr).</p> <p>The SEP program could attempt to quantify environmental benefits of particular SEPs, either itself or through the use of outside resources.</p> <p><u>Pros:</u> Less reliance on those performing the projects</p> <p><u>Cons:</u> The information may not already exist. The SEP program has limited resources to conduct such a review and no resources to contract out those responsibilities.</p>
Notes	<p>The monitoring and evaluation of SEPs will be facilitated by implementation of Issue 3, designating SEPs. This will reduce or eliminate the need for the recommended reviews.</p>

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	7
Key Issue	<p><u>Supplemental Environmental Projects (SEPs) classification system:</u></p> <p style="padding-left: 40px;">A) Should TCEQ have a classification system for non-direct or mixed benefit projects? If so, what should be appropriate ratios for such SEPs?</p> <p style="padding-left: 40px;">B) Should restrictions limit SEPs to only direct benefit?</p> <p><u>Basis:</u> Public Comment and State Auditor’s Report</p>
Other Subcommittees Reviewing Issue	
Recommendation	<p>The benefit from an SEP, whether direct or indirect, should be verifiable and quantifiable.</p> <p><u>Issue A:</u> Yes, there should be a classification system. The following three direct benefit project types and their corresponding ratios should remain unchanged.</p> <ul style="list-style-type: none"> • Environmental restoration projects that go beyond repair to the enhancement of the environment in the vicinity of the violating facility. • Projects to fund public works for a neighboring municipality or county to benefit the environment in a way that is beyond ordinary compliance with the law. • Projects to clean up illegal municipal and industrial solid waste dumps.
	<p>We should consider adding the following to the list of project types that directly benefit the environment:</p> <ul style="list-style-type: none"> • Projects meeting Proposition 2 pre-approved list that reduce/prevent pollution . Entities cannot already be required to meet Prop 2 (so no tax break involved- state this in an Agreed Order). <p><u>Issue B:</u> Some indirect projects should be allowed with less favorable ratios. Also, some indirect projects should be prohibited or curtailed.</p> <p>Three currently used project types considered to have an indirect benefit component) include:</p> <ul style="list-style-type: none"> • Pollution prevention and/or reduction projects; • Technical assistance to other TCEQ-regulated entities faced with economic and/or technical hardships; • Environmental education and/or engineering assistance to members of the regulated community or the public.

These indirect project types need to be modified so that the results are quantifiable or eliminated as approvable projects.

Pollution prevention and/or reduction projects:

- Eliminate the pollution *prevention* projects since the benefit off-site or in a nearby community is difficult to quantify.
- However, keep the *reduction* projects and establish baselines in order to better track the amount of pollutants reduced. Following this issue table is a list of easily quantifiable projects supplied by SBEA/PPIA.
- Technical assistance to other TCEQ-regulated entities faced with economic and/or technical hardships:
- This type of SEP should be removed since there is no guarantee that the assistance will produce either equipment or techniques that serve to reduce or prevent pollution.

Environmental education and/or engineering assistance to members of the regulated community or the public:

- Eliminate the education and engineering assistance to the regulated community when it is difficult to quantify any benefit received from either effort.
- Use SEP monies to provide education for the public and environmental groups. Forge partnerships with environmental groups to augment TCEQ staff for monitoring trouble areas within the state. Education dollars are better spent on enhancing the awareness of the public with organized efforts developed through established pro-environment groups. Raising the public's environmental awareness is an indirect benefit that may lead to sustained direct benefits over time.

Ratios recommended for each of these project types follow:

- Consider rating pollution reduction projects at 2:1 normally; if the project has immediate benefits to the environment consider a ratio of 1:1.
- Consider rating all educational efforts to the public and environmental groups at 3:1.
- Mixed project (educational & direct benefit) ratio of 2:1
- Consider rating monitoring done by established environmental groups at 2:1.

Pros: Ability to easily quantify project benefits by using an established measuring tool.
Ability to generate meaningful information on project results for external customers.

Cons: Restrictions to certain types of projects could limit participation.

	<p><u>Implementation Impact:</u></p> <ul style="list-style-type: none"> • The SEP process will be streamlined by having fewer types of projects available. Having fewer types should remove some of the present ambiguity in the approval process. • Tools, mechanisms or instruments to quantify SEP benefits need to be developed. Most of the remaining project types will not be difficult or complex to measure effectively. • Staff time spent in quantifying project results should be reduced by having the proper measuring tool available. These amounts would be compared to the estimate originally provided by the respondent. • The SEP program should develop operating agreements with agency technical teams (e.g., Air, Water, Waste, Regional Offices) to provide assistance during project site reviews. Actual physical observation of projects is an essential element in the monitoring process for the SEPs. The SEP program will work with Internal Audit to refine its Risk Assessment procedures to address the issues raised by this Review and the recommendations coming from it. • During the approval process for revisions to the SEP Guidance (involving the ED/Commission), make a decision on the ratio for a specific project. This should include any justification for either a higher or lower ratio.
<p>Other Alternatives</p>	<p>Quantifying emission reductions (especially of mobile emissions), is difficult. Added mixed project ratio. Don't allow any SEPs that are less than a 1:1 ratio (direct benefit). Allow local governments under enforcement to accept SEP money in order to attain compliance.</p> <p><u>Pros:</u> Small governmental entities could receive assistance for compliance. Addresses commenters issues on non quantifiable SEPs.</p> <p><u>Cons:</u> May be viewed as restrictive and inflexible.</p>
<p>Notes</p>	<p>Force offender into making early decision. Penalty offset would be dependant on the timing of the request for a SEP and by the type of benefit of the SEP. A SEP would receive an offset of 1:1 for a request made early in the enforcement process. A request made at the end of the enforcement process would require an offset of more than 1:1 to reduce the chance of an entity delaying the process.</p> <p>Some overlap with Issues 4 and 8.</p>

Supplemental Environmental Projects Issue 7 Attachment A

Community Outreach/SEP projects with measurable environmental improvement

Pollution Prevention/ Material Use Reduction

•**Electronics take back program.** Collection of mercury-containing electronics - computers, cell phones, industrial monitoring equipment etc. Collect materials or waste from public, industrial neighbors.

Environmental Indicator:

Reduction of mercury released to the environment,
Reduction of solid waste/Increased recycling and reuse,
Reduction of toxic pollutants released to the environment

• **Energy efficiency retrofits.** Assist small businesses, regional governments, communities by installing energy efficient lighting, air conditioning; or installing renewable energy devices- solar, fuel cell, or wind units.

Environmental Indicators:

Air Quality improvements,
Reduced energy consumption .
Money saved

Environmental Education Programs

•**Teaching Environmental Science (TES).** Support the TES program- a two-week intensive college credit for educators.

Environmental Indicators:

Increased environmental literacy (measured in the number of teachers attending; number of students taught by the teachers);
Environmental projects implemented by teachers at their schools after taking a TES course

•**Targeted Customer-Supplier or Small Business workshops.** Support outcome based environment training on specific environmental issues. For instance, an energy efficiency program could include methods to measure the impact of changes that are implemented.

Environmental Indicator

Air quality improvements
Reduced energy consumption
Money saved

Product Stewardship / Innovative Technology

•**Implement a Product Stewardship/ Environmentally Preferred Purchasing Program at school /campus:** Assist a school or campus in purchasing environmentally friendly, energy efficient products or setting up a recycling / reuse program.

Environmental Indicators

- Air quality improvements
- Solid waste reductions
- Increased energy efficiency
- Decreased exposure to toxic materials
- Money saved

•**Implement a Product Stewardship Demonstration Program at school /campus:** Assist in funding and implementing an innovative technology at a school or campus, such as a wetlands water treatment system, use green building technologies.

Environmental Indicators

- Air quality improvements
- Solid waste reductions
- Increased energy efficiency
- Decreased exposure to toxins
- Money saved

Supplemental Environmental Projects (SEPs) Subcommittee	
Issue No.	8
Key Issue	<p><u>Offset amounts and restrictions for Supplemental Environmental Projects (SEPs):</u></p> <p style="padding-left: 40px;">A) What percentage of the penalty should be eligible for offset by a SEP?</p> <p style="padding-left: 40px;">B) Should SEP requirements or restrictions be different based on the environmental impact of a violation?</p> <p style="padding-left: 40px;">C) What restrictions should there be for SEPs?</p>
	<u>Basis:</u> Public Comment, Subcommittee Input and Review of Current Policy
Other Subcommittees Reviewing Issue	
Recommendation	<p>The following offsets and restrictions are recommended:</p> <ul style="list-style-type: none"> • The existing policy of allowing up to a 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 to have up to a 100% offset if the respondent is a small business and if the SEP has a direct environmental benefit, otherwise the existing policy of up to a 50% offset should be retained. • Allow local governments (whether or not currently in enforcement) to be a third party beneficiary from a SEP to address compliance issues; i.e., non-compliant public water supply (need new pressure tank). • No on-site SEPs should be allowed. • For indirect benefit SEPs, tie the percentage of offset to the ratio: i.e., 2:1 ratio=50% offset, 3:1 ratio=33% offset. For example, consider a case where a city is assessed a penalty of \$10,000 and allowed to conduct a SEP. If the city chooses an indirect benefit SEP with a 2:1 ratio and the city carries out a SEP with a cost of \$10,000, this would offset \$5000 of the penalty. The city would also pay a \$5000 penalty. • Anyone who does not comply with the technical requirements of their SEP agreement, is not eligible for future participation in the SEP program. <p><u>Pros:</u> Communities would see a correlation between a violation and a violator. Drives direct benefit SEPs which are more quantifiable and provide direct benefit to the environment while still providing the regulated entity the ability to choose the type of SEP they wish to participate in. Communities are not supportive of on-site SEP projects even when the benefit is quantifiable</p>

	<p><u>Cons:</u> Communities and groups that indirectly or infrequently have an impact on the environment would be excluded. . Fire departments and schools would be affected by this action. Lose the ability to do some projects that are environmentally beneficial. Decrease the number of SEPs.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Potentially more funding would be available to improve the environment with the additional offset and by allowing respondents to assist local governments in addressing compliance issues • Simplification of the SEP levels for offset and restrictions will increase efficiency of the SEP process • Auditing of an SEP is simplified with tighter restrictions
Other Alternatives	<p><u>Alternative 1.</u> No additional offset requirements regardless of situation</p> <p><u>Pro:</u> Simplifies the SEP process</p> <p><u>Cons:</u> Would make all enforcement actions equivalent regardless of impact on the environment Public does not support this type of SEP as can see no benefit to affected community.</p> <p><u>Alternative 2.</u> No restrictions on projects for SEPs.</p> <p><u>Pros:</u> Expands the number of eligible projects Simplifies SEP process</p> <p><u>Con:</u> No mechanism to ensure a project makes a difference in the community that was affected.</p> <p><u>Alternative 3:</u> Actual releases should require an SEP with more offset.</p> <p><u>Pro:</u> The greater the harm to the environment from the violation, the more severe the penalty</p> <p><u>Con:</u> Could reduce the number of violators choosing to perform SEPs</p>
Notes	<p>In this review, allowing small entities to offset their penalty by funding projects that would return a facility to compliance was considered. For instance, such a policy might be a tool to address a small city in financial hardship. But, TWC §7.067 currently prohibits such SEPs. It states “the Commission may not approve a project that is necessary to bring a respondent into compliance with environmental laws, that is necessary to remediate environmental harm caused by the respondent’s alleged violation, or that the respondent has already agreed to perform under a preexisting agreement with a governmental agency.”</p>

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	1
Key Issue	<u>Investigation Prioritization/Investigation Strategy:</u> A) How should Field Operations prioritize investigations?
	<u>Basis:</u> Public Input, Staff Input and Review of Current Policy
Other Subcommittees Reviewing Issue	Compliance History Use, Complaints
Recommendation	Investigation prioritization 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 [see 1(B)]. Pros: Appears to be consistent with concerns expressed by the public, is more logical when considering risk, and better utilizes staff resources. Cons: Requires more time and resources to develop prioritization process, historically compliant facilities may still be inspected based on risk, and public perception of high risk facilities may not coincide with agency’s analysis of risk.
	<u>Basis:</u> The investigation prioritization is currently based primarily on LBB and EPA commitments, priorities and strategies, which may not necessarily be based on TCEQ’s assessment of risk to human health and the environment.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • Prioritizing investigations based on risk to human health and the environment could conflict with EPA’s investigation priorities and strategies, and possibly LBB commitments. • This could require discussions, negotiations, and agreement with the EPA regarding investigation targeting strategy. • It may also require adjustment of LBB performance measures depending on types of facilities targeted. • This may require Executive Management involvement to facilitate resolution of differences and to unify the priorities of EPA and TCEQ.
Other Alternatives	Status quo (based on LBB and EPA commitments). Pros: No additional resources or process changes required. Cons: Negative public perception, outdated strategy, does not adequately address risk, and smaller facilities regardless of risk may not be inspected. Abbreviate inspection strategy so that as many facilities as possible are inspected regardless of risk. Pros: More facilities are “inspected”, and promotes greater visibility of agency in field to both regulated community and public. Cons: May miss significant violations, would require more travel time/expense, and may not fulfill EPA requirements.
Notes	Issues 1(A) and 1(B) are integrally linked and should be considered together.

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	1
Key Issue	<u>Investigation Prioritization/Investigation Strategy:</u> B) 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?
	<u>Basis:</u> Public Input, Staff Input and Review of Current Policy
Other Subcommittees Reviewing Issue	Compliance History Components, Compliance History Classifications, Compliance History Use, Complaints, Penalty Policy
Recommendation	Prioritization should be based on a combination of strategies. We recommend development of a screening approach using three criteria - risk, performance, and commitment (LBB and EPA commitments) - to determine investigation priorities. The initial screen of the potential universe to be inspected should be conducted based on risk. The Field Operations Division currently has a committee that is evaluating the investigation strategy. The following issues should be taken into consideration:
	Criterion I: Risk Based <i>Hazard:</i> Nature of pollutant (toxicity, persistence and quantity/volume) Multiple chemical effect High background levels <i>Probability/Exposure:</i> Location (attainment status, population density, exposure pathway and proximity to environmentally sensitive area) Cumulative effect Nature of business (complexity) Inspection frequency (interval)
	<i>Public Perception/Interest:</i> Focused interest (special initiative) including unauthorized facilities Customer service/need Criterion 2: Performance Based <i>High risk:</i> Good performer - less inspection/modified inspection from agency Poor performer - more attention/detailed inspection from agency (Dependent on outcome of classification, may need to also look at the lower tier of the average performers)

	<p>Criterion 3: Commitment (Bean) Based LBB commitments EPA mandates/priorities Need flexibility to adjust priorities of LBB and EPA when in conflict with resource needs for risk based and performance based priorities</p> <p>Pros: Appears to be consistent with concerns expressed by the public and the regulated community, is more logical when considering risk and performance, and better utilizes staff resources. Cons: Requires more time and resources to develop prioritization process, and public perception of high risk facilities may not coincide with agency’s analysis of risk. Executive management involvement may be necessary during the Compliance Planning process to facilitate resolution of differences to unify the priorities of EPA with TCEQ.</p> <p><u>Basis:</u> The recommendation addresses the facilities that pose the greatest risk to human health and the environment based on the nature of their operation or their past performance. It also satisfies EPA and LBB requirements.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Using a combination of strategies would require the development and implementation of screening criteria to determine investigation priorities. • FOD currently has a committee that is evaluating investigation strategies, and this committee needs to be tasked with the development of a screening criteria for determining risk-based investigation priorities. • This may require additional time and resources, and may require Executive Management involvement to facilitate resolution of differences between TCEQ and EPA commitments, priorities and strategies.
<p>Other Alternatives</p>	<p>Status quo (based on LBB and EPA commitments).</p> <p>Pros: No additional resources or process changes required. Cons: Negative public perception, outdated strategy, does not adequately address risk, and smaller facilities regardless of risk may not be inspected.</p> <p>Abbreviate inspection strategy so that as many facilities as possible are inspected regardless of risk.</p> <p>Pros: More facilities are “inspected” and greater visibility of agency in field to both regulated community and public. Cons: May miss significant violations, would require more travel time/expense, and may not fulfill EPA requirements.</p>
<p>Notes</p>	<p>Issues 1(A) and 1(B) are integrally linked and should be considered together.</p>

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	1
Key Issue	<u>Investigation Prioritization/Investigation Strategy:</u> C) Does the Field Operations Division need to seek management input from other parts of the TCEQ on investigation priorities and initiatives? If so, how?
	<u>Basis:</u> Public Input, Staff Input and Review of Current Policy
Other Subcommittees Reviewing Issue	Communications, Compliance History Use, Complaints, Ordering Provisions
Recommendation	Yes. The agency should develop and use an annual process to solicit input 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.
	Pros: The workplan reflects the priorities of the Commissioners and Executive Management, better agency coordination. Cons: More time and effort for those programs outside of OCE not previously involved in the process and may lengthen workplan development process.
	<u>Basis:</u> With competing priorities and limited resources, the agency needs a planned effort to focus its investigation resources on those areas deemed most critical. The agency currently has a Compliance Plan Team whose purpose could be expanded to perform this task. Developing a planned approach with input from all areas will allow us to more effectively accomplish agency goals.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • A team consisting of representatives from every TCEQ Office would need to be formed and tasked with developing and implementing a process for soliciting and compiling input from across the agency with regards to the annual investigation workplan. • This workplan needs to reflect the priorities, strategies, and initiatives of the Commissioners and Executive Management.
Other Alternatives	Status quo (Workplan primarily developed within FOD). Pros: Current staff involved are familiar with process and easier to change workplan since fewer programs involved. Cons: Not all program areas are involved in workplan development and OCE may not be aware of other needs/initiatives in agency.
Notes	The Compliance Plan Team should consist of representatives from, at a minimum, OPRR, OLS, OCE, OEPAA, CEO. We recommend that the team should be renamed to better reflect its function.

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	2
Key Issue	<p><u>Investigation prioritization addressing unauthorized facilities:</u></p> <p>Should the agency devote resources to the identification and investigation of unauthorized facilities?</p>
	<p><u>Basis:</u> Steering Committee Input and Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Components, Compliance History Classifications, Compliance History Use, Collections, Complaints, Ordering Provisions, Penalty Policy
Recommendation	<p>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 a number of 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 [see 1(C)].</p> <p>Pros: Addresses public/regulated community concerns (facilitates level playing field), agency focuses on higher risk facilities, may increase voluntary compliance for the targeted sector, increases public awareness, enhances public perception of the agency, and increases probability of facility compliance.</p> <p>Cons: Increased agency workload (including permitting, field operations, legal, enforcement, small business) and resources may need to be reallocated.</p>
	<p><u>Basis:</u> There is a higher potential for noncompliance (therefore increased risk) at unauthorized facilities. Field Operations has traditionally identified unauthorized facilities as a result of complaints. This recommendation provides a more proactive approach.</p> <p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Since unauthorized facilities have the potential for noncompliance there would be an increased workload on staff, especially in enforcement, permitting, legal, small business, and field operations. • These divisions would need to have a coordinated strategy to identify these facilities and to best utilize staff resources. Additional time may be required to address targeted industries' concerns.
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Since unauthorized facilities have the potential for noncompliance there would be an increased workload on staff, especially in enforcement, permitting, legal, small business, and field operations. • These divisions would need to have a coordinated strategy to identify these facilities and to best utilize staff resources. Additional time may be required to address targeted industries' concerns.
Other Alternatives	<p>Status quo (Complaint driven).</p> <p>Pros: No extra expenditure of staff resources.</p> <p>Cons: May not be identifying or investigating potentially high risk facilities.</p> <p>Increased random reconnaissance.</p> <p>Pros: Will likely identify some unauthorized facilities.</p> <p>Cons: Will expend more resources with less possibility of facility identification.</p>
Notes	Depending on the sector(s)/type of facilities targeted, there may be a need for outreach and/or a "grace" period for compliance.

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	3
Key Issue	<p><u>On demand activities:</u> What priority should complaints and on-demand activities have within Field Operation's Annual Work Plan?</p>
	<p>Basis: Subcommittee Input</p>
Other Subcommittees Reviewing Issue	<p>Compliance History Components, Compliance History Classifications, Compliance History Use, Complaints, Ordering Provisions, Communications</p>
Recommendation	<p>The Compliance Plan Team should determine the appropriate prioritization 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. Implementation of the workplan should ensure that dis-incentives do not exist to timely and effectively accomplish on-demand requests including complaints.</p> <p>Pros: Quick response to public concerns and program area needs, effort by inspectors correlates to performance plan, enhances perception of agency responsiveness, and the agency is made aware of non-compliance issues faster.</p> <p>Cons: Reactionary nature of these activities make it difficult to plan workload and resources, many of these investigations may divert resources from higher priority activities.</p>
	<p><u>Basis:</u> There is a need to respond in a timely manner to the concerns of the public and provide support to the program areas, and these activities are included in the current workplan process. Complaints are currently prioritized on an individual basis in each Region using the Complaint Prioritization Guidance. However, more emphasis has been placed on scheduled investigations in order to meet LBB and EPA commitments. We should recognize the consequences of failing to respond to complaints in a timely manner due to pressure to complete scheduled activities.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> This recommendation would result in an additional task for the existing Compliance Plan Team.
Other Alternatives	<p>Status quo (Focus on the "bean").</p> <p>Pros: Allows for scheduling of investigations based on workplan and perceived risk by the agency, and no process changes required.</p> <p>Cons: Focuses on the "bean" at the expense of responding to complaints and on-demand activities.</p> <p>Make complaints top priority over all other elements of the workplan.</p> <p>Pros: Would address public concerns about agency's responsiveness and may increase likelihood of validating complaint.</p> <p>Cons: Inability to plan, potential conflict with LBB and EPA commitments, may not result in inspection of high risk facilities, and would operate in a reactive mode.</p>

Notes	On-demand activities are investigations requested by program areas or the public that are not planned. These activities include citizen complaints, site reviews for permitting, emission events, emergency response (e.g., spills, natural disasters), and investigations to support legal action.
--------------	---

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	4
Key Issue	<p><u>Enforcement Initiation Criteria:</u></p> <p>A) 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?</p> <p>Basis: Public comment, Commissioner Input and Steering Committee Input</p>
Other Subcommittees Reviewing Issue	Compliance History Components, Compliance History Classifications, Penalty Policy
Recommendation	<p>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. The EIC should be an agency-wide document [see 4(B)].</p> <p>Pros: Commission approval provides transparency and periodic review allows proactive approach to legislative changes, new technology, and agency initiatives. Allows for cross-agency input.</p> <p>Cons: Would lengthen the process for completion of the guidance document.</p>
	<p><u>Basis:</u> Field Operations Division and the Enforcement Division currently review the EIC annually and have revised the current criteria nine times as a result of legislative changes, technological changes, and resource issues. An annual review would formalize the process.</p> <p>The current EIC is an FOD guidance document which is approved by OCE and OLS management, but is not formally approved by the commission. Review and approval by the commission will ensure that commission has the opportunity to provide direction on enforcement policy and initiatives.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • An EIC Steering Committee would need to be formed and meet on a regular basis to review and revise the criteria for enforcement. • The EIC would need to be approved by the commission. • In addition, other divisions which initiate enforcement actions should formalize their criteria, ensure that criteria are reviewed and revised on a regular basis, and included in the EIC.

Other Alternatives	<p>Annual review which includes formalized opportunity early in the process (prior to Commission consideration) for the public, including the regulated community, to petition for changes to the EIC.</p> <p>Pros: May promote better acceptance of the EIC and more opportunity for early input from general public.</p> <p>Cons: Suggestions may be self-serving and may not consider risk, would lengthen the process and would be more resource intensive.</p> <p>Eliminate the EIC and allow each region to determine the appropriate enforcement response.</p> <p>Pros: Shortens time-frame.</p> <p>Cons: Lack of inter- and intra-regional consistency in enforcement referral, regulated community uncertain of agency expectations and would not allow cross-agency input or Commission direction.</p>
Notes	<p>The EIC is a document that was developed and is maintained by Field Operations Division to insure consistency among regional staff . The document has been successful for its intended purpose, however it does not cover all enforcement actions in other parts of the agency.</p> <p>A minority of sub-committee members support the first alternative.</p>

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	4
Key Issue	<p><u>Enforcement Initiation Criteria:</u></p> <p>B) Should compliance reviews outside of Field Operations be addressed in the Enforcement Initiation Criteria (EIC)?</p> <p>Basis: Public comment, Commissioner Input and Steering Committee Input</p>
Other Subcommittees Reviewing Issue	Compliance History Classifications, Compliance History Use, Penalty Policy, Ordering Provisions, Collections, Communications

<p>Recommendation</p>	<p>Yes. The EIC should be an agency-wide document that encompasses all enforcement responses 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 are representative of all the agency’s major functional areas, including permitting, compliance/enforcement, small business/local government, monitoring/assessment, and planning.</p> <p>Pros: Making the EIC an agency-wide document increases the likelihood that enforcement initiation practices across the agency’s programs will be consistent. In addition, all enforcement initiation criteria will be in one document, making it easier for the public and regulated community to access.</p> <p>Cons: Increased resources may be required to coordinate and maintain an agency-wide document.</p> <hr/> <p><u>Basis:</u> The EIC is a document that was developed and is maintained by Field Operations Division to insure consistency among the regions concerning enforcement response to violations. While the EIC has achieved its intended purpose, it does not cover all enforcement actions in other parts of the agency. Other parts of the agency may not have established criteria for initiating enforcement actions, which may lead to inconsistency. Development of the EIC as an agency-wide document will ensure consistency and provide a forum for agency-wide discussion on the appropriate level of enforcement response in all programs. In establishing the EIC as an agency-wide document, we should ensure that the process does not become burdensome and require excessive resources.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Other divisions which initiate enforcement actions should formalize their criteria and ensure that they are reviewed and revised on a regular basis. • All enforcement initiation criteria should be incorporated into one document and formally approved by the commission. • This recommendation would require increased resources and coordination to develop and maintain the EIC document, but should result in more consistent enforcement actions across the agency’s programs.
<p>Other Alternatives</p>	<p>Status quo (The current EIC does not address enforcement response for all programs).</p> <p>Pros: Does not require any additional resources or coordination.</p> <p>Cons: Allows inconsistencies in process to continue, and is not comprehensive in scope.</p> <hr/> <p>Maintain the EIC as an FOD document and require other programs to develop their own enforcement initiation protocols.</p> <p>Pros: Does not require any additional coordination.</p> <p>Cons: Allows inconsistencies in process to continue, would require additional resources, would result in multiple documents for Commission approval if required, confusion to agency staff, regulated community and the public (everybody).</p>

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	5
Key Issue	<u>Enforcement initiation relating to small business and small local government:</u> Should there be separate Enforcement Initiation Criteria (EIC) for small businesses and small local governments?
	Basis: Public Comment, Commissioner Input and Compliance Advisory Panel Input
Other Subcommittees Reviewing Issue	Penalty Policy
Recommendation	No. There should not be a separate Enforcement Initiation Criteria (EIC) for small business and small local governments. Any relief for small entities should be considered in the penalty policy phase of enforcement. Pros: Provides for consistent application of the EIC. Cons: Impact of enforcement on small entity is proportionately greater than on larger entities and does not provide small entities with the opportunity to comply before initiation of formal enforcement.
	<u>Basis:</u> In order to achieve environmental protection, compliance must be achieved by all entities, regardless of size. Small entities can cause significant environmental impacts. An entity's eligibility may be difficult to verify during inspections. Also, conflicting definitions of "small business" exist in agency rules and statutes, which would make application of a separate EIC difficult.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> • Since no separate enforcement initiation criteria for small businesses and small local governments is recommended, there would be no implementation impact. • However, if relief through the penalty policy is provided, then additional resources needed to make those revisions may be necessary.
Other Alternatives	Modify the EIC to provide relief for small entities identified as operating without proper authorization from the agency (no permit). The relief could consist of giving a variance to small entities operating without authorization, possibly avoiding automatic enforcement. Pros: Allows small entities the opportunity to comply before initiation of formal enforcement, lessens workload in Enforcement and Legal Divisions and allows local government dollars to be spent for compliance rather than penalties. Cons: Inconsistent enforcement across the regulated community, does not encourage up-front compliance, may be perceived as reducing the necessity of having proper authorization.

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	6
Key Issue	<p><u>Appeal processes for violations:</u></p> <p>A) Should there be an opportunity for post-investigation/pre-enforcement fact-finding meetings in the TCEQ Regional Offices?</p> <p>B) Should there be a formal appeal process for Field Operations determinations (using the Enforcement Initiation Criteria) on the question of case referral to the Enforcement Division?</p> <p>Basis: Public Comment, Staff Input and Review of Current Policy.</p>
Other Subcommittees Reviewing Issue	None identified.
Recommendation	<p>(A) and (B) 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 timeframe for appeal should be established, i.e. 10 working days from the last date of inspection. The alleged violator should be informed of the opportunity to appeal and how to appeal during the exit interview. The 10 working day allowance for appeals may need to begin upon discovery of additional violations after the field investigation.</p> <p>Pros: Insures that everyone understands the process and provides a reasonable timeframe for resolution of issues prior to initiation of enforcement.</p> <p>Cons: None identified.</p> <p><u>Basis:</u> The opportunity to appeal violations and determinations based on the EIC is currently available, but is not widely known by all sectors of the regulated community.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Resources will be required to write the guidance. • This recommendation may result in an increase in the number of meetings between regional staff and facility personnel. • This could require additional staff time and resources, and a slight delay in the completion of the final investigation report.
Other Alternatives	<p>Status quo (Opportunity presently exists but not all regulated entities are aware of this).</p> <p>Pros: None identified</p> <p>Cons: Current process allows appeals at any time, which may result in inefficient utilization of staff resources.</p>

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	6
Key Issue	<u>Appeal processes for violations:</u> C) Should there be a formal appeals process for notice of enforcement (NOE) letters?
	Basis: Public Comment, Staff Input and Review of Current Policy.
Other Subcommittees Reviewing Issue	None identified.
Recommendation	No. The NOE currently can be appealed anytime during the enforcement process. The NOE letter should clarify this and include an Enforcement Division point of contact (POC). A formal process is not necessary. Pros: Requires very little change in current process, insures that everyone understands the process and provides an opportunity for clarification of issues prior to formal action. Cons: Enforcement Division POC may not necessarily be the case enforcement coordinator and may not yet be familiar with specifics of the case.
	Basis: There is not an identified process for appealing NOEs and some facilities are not aware of the opportunity to appeal.
	<u>Implementation Impacts:</u> • This recommendation would require staff time to modify the NOE letter.
Other Alternatives	Develop a formal NOE appeals process with defined timelines similar to the NOV appeals process. Pros: Process would be formalized to be consistent with NOV appeals policy. Cons: Unnecessarily lengthens process and may require more staff resources.

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	7
Key Issue	<u>Verbal notice of violation (NOV) policy:</u> Should the use of verbal NOVs be continued by Field Operations investigators?
	Basis: Public Comment, Staff Input and Review of Current Policy.
Other Subcommittees Reviewing Issue	Compliance History Use and Complaints

<p>Recommendation</p>	<p>No. Use of verbal NOV's should be discontinued.</p> <p>Pros: No additional agency resources would be required since verbal NOV's are currently documented and entered into CCEDS, no misconception about necessity to correct a violation, less confusion to the regulated community and agency staff and more objective enforcement.</p> <p>Cons: Citing minor, low impact/low risk violations may be seen as bureaucratic (nitpicky), may impact compliance history score unless compliance history formula is modified.</p> <hr/> <p><u>Basis:</u> Inconsistent application of the verbal NOV policy has resulted in confusion among the regulated community.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • This would require no additional agency resources since verbal NOV's are currently documented and entered into CCEDS. • This should result in less confusion among agency staff and the regulated community regarding the need to correct a violation. • There could be an impact on a facility's compliance history score under the present formula.
<p>Other Alternatives</p>	<p>Status quo (Present policy allows for verbal NOV's in certain circumstances).</p> <p>Pros: Regulated community appreciate the opportunity to achieve compliance without enforcement action or impact on compliance history.</p> <p>Cons: Violations are often ignored by facilities, perpetuates public perception that agency is not addressing all violations, and continued confusion among regulated community due to inconsistent application of the policy.</p> <p>Revise/clarify existing verbal NOV policy to include, but not be limited to, that a verbal NOV can be issued when the violation(s) falls into category C and is/are corrected before the investigator leaves the facility that day. The verbal NOV should be documented in a letter to the facility explaining the verbal NOV is an "area of concern" that was resolved during course of the investigation. The letter should also include an explanation that a repeat of the violation at next inspection will result in a written violation.</p> <p>Pros: Facility is given the opportunity to correct minor, low impact/low risk violations without impacting compliance history.</p> <p>Cons: Perpetuates public perception that agency is not addressing all violations.</p>
<p>Notes</p>	<p>If this recommendation is adopted, the Compliance History Classification subcommittee should consider the weight given to violations that previously would have been eligible for verbal NOV.</p>

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	8
Key Issue	<u>Notice of Violation (NOV) policy approval:</u> Should the NOV policy be formally adopted by the TCEQ?
	Basis: Staff Input and Review of Current Policy
Other Subcommittees Reviewing Issue	None identified.
Recommendation	Yes. Commissioners should consider adoption of policy statement(s) on NOV procedures. Then, as needed, staff can develop guidance implementing the commission policy.
	Pros: Gives clear direction from Commission and Executive Management to agency staff, public, and regulated community. Cons: Future changes in direction may require Commission action.
	<u>Basis:</u> Currently, only Verbal NOVs are addressed by Commission policy and there is a need to have a policy for all NOVs.
	<u>Implementation Impacts:</u> <ul style="list-style-type: none"> This would require formal adoption by the Commission.
Other Alternatives	No policy with respect to NOVs, which would require revocation of existing verbal NOV policy. Pros: Currently addressed in Field Operations SOP. Cons: Lack of formal direction from Commission and Executive Management.

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	9
Key Issue	<u>Notices of enforcement (NOE):</u>
	A) Is there a need for the category of NOE?
	Basis: Staff Input and Review of Current Policy
Other Subcommittees Reviewing Issue	Compliance History Components, Penalty Policy

Recommendation	<p>Yes. All entities being referred for enforcement should be sent an NOE. The agency should establish a timeframe for notice once decision for referral is made.</p> <p>Pros: Provides notification to the alleged violator that the matter has been referred for formal enforcement.</p> <p>Cons: Notification may not be timely in all program areas. NOEs are not counted in compliance history scoring.</p>
	<p><u>Basis:</u> The regulated entity should be informed in a letter from the region or referring program area when the matter is sent to enforcement. An NOE is necessary to draw a clear distinction from a Notice of Violation letter and to communicate that the matter is being escalated for an order and possible administrative penalties. Currently, not all program areas send an NOE when referring a case for enforcement. Timely notice to the regulated entity is very important in the process so that there are no surprises when they are contacted by Enforcement Division staff.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Since NOEs are presently being used, there would be no impact to the agency and all facilities being referred for enforcement would receive notification.
Other Alternatives	<p>Status quo (NOEs are currently issued in most programs when a violation is referred for formal enforcement).</p> <p>Pros: The present NOE process works effectively for the programs utilizing it, but needs to be expanded for all enforcement actions.</p> <p>Cons: Not all alleged violators receive NOEs when their cases are referred to enforcement.</p>

EIC/Investigation Prioritization/NOVs/NOEs	
Issue No.	9
Key Issue	<p><u>Notices of enforcement (NOE):</u></p> <p>B) Are there better ways to communicate the referral of a case to the Enforcement Division?</p>
	<p><u>Basis:</u> Staff Input and Review of Current Policy</p>
Other Subcommittees Reviewing Issue	<p>Compliance History Components, Penalty Policy</p>

Recommendation	<p>Yes. Although the NOE is an effective means of notifying regulated entities that the matter is referred for enforcement, modifications are recommended to 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 [see Issue 6C)].</p> <p>Pros: Better communication with regulated community and clarification of the enforcement process.</p> <p>Cons: By clearly communicating the opportunity to appeal an NOE, the number of appeals may increase which would result in an increased workload for agency staff.</p> <hr/> <p>Basis: The current NOE does not reference the opportunity to appeal. Minor modifications to the letter and providing a point of contact will help in this regard [see Issue 6(c)].</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • This recommendation would require staff time to modify the NOE letter.
Other Alternatives	<p>A phone call prior to sending the NOE.</p> <p>Pros: Increases communication, alerts entity of pending enforcement action and may encourage the alleged violator to begin or complete corrective action.</p> <p>Cons: Increased staff resources, could potentially lengthen process, inability to contact respondent.</p>
Notes	<p>The current NOE shell document was developed with the Office of Legal Services (OLS). Any changes to the document should be coordinated with OLS.</p>

Collections/Financial Inability to Pay Subcommittee	
Issue No.	1
Key Issue	<u>Fee & Penalty Collection:</u> A) Should an entity be allowed to acquire, amend, or renew a permit while in default of a penalty? B) Should a current permit be revoked if the entity owes fees and/or penalties to the agency?
	<u>Basis:</u> Steering Committee Input and Commissioner Input.
Other Subcommittees Reviewing Issue	Compliance History Use
Recommendation	<p>Do not issue new, amended, or renewal permits/registrations/certifications/licenses*, to an entity/person who owes delinquent penalties or fees.</p> <p>Withholding a Permit: Each employee responsible for administrative review of permit applications should check the financial report using Crystal Reports, and if an entity is delinquent, staff should send a letter notifying the applicant that the permit will not be issued unless the outstanding fees and/or penalties are paid. The subcommittee recommends a minimum delinquency of \$200 to invoke this process. Also, application forms and instructions can be revised to include a checkbox asking if all fees and/or penalties are paid. A permit application will not be considered administratively complete until delinquent accounts have been paid and the application will be held for a time period to allow the applicant to pay the fees and/or penalties. If fees and/or penalties are not paid within a certain amount of time (for example, within 30 days after notice), the permit application will be returned to the applicant.</p> <p>Permit Revocation: In addition, the agency should initiate revocation of a permit <i>only as a last resort</i> after all other efforts to collect have been exhausted. 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.</p> <p>* See the attached table for a specific list of what types of permits and registrations and reviews are recommended. (Attachment A) Water general permits should be amended to include a provision whereby in response to an NOI, the agency could indicate that authorization to operate was not granted until all outstanding fees and penalties were paid.</p>

Positive Implications:

1) Enhances Agency Collection Abilities - Since permit applicants most often desire new or continued authorizations from the agency, they may seek to resolve delinquent accounts quickly in order to avoid delay in the issuance of their permits.

2) Serves as a Deterrent for Nonpayment of Fees & Penalties - If a permit applicant knows the agency will delay issuance of a permit if accounts are outstanding, they may pay closer attention to agency invoices and demand letters.

3) Requires the Applicant to Resolve Outstanding Obligations with the Agency Before the Agency Grants New Authorizations - If a permit applicant has outstanding debts owed to the agency, then the agency should require that those matters be settled prior to the expenditure of additional staff resources on new business.

Negative Implications:

1) Permit Time Frames Will Increase - Currently the Commissioners and Executive Management are working with OPRR to ensure that permits are processed in the shortest possible time frames and in the most efficient manners. For each employee to review the customer's financial records, send letters and make phone calls, then it is highly likely that the time to process the permit will increase. In addition, any withholding of permits would increase the timeframe further. However, this can be resolved in part, if each permit that is withheld is coded differently in the database, then it can be reported separately and not included as a backlogged application.

2) Data Access - accurate and updated data access for all employees that process all applications across all programs would be needed, depending on the scope of this initiative. Currently OPRR is developing a process to provide Seagate Crystal Reports Access to staff in order to review customers' financial information maintained by OAS.

3) Permits Affected by Fees/Penalties Owed for Other Media - As proposed, a delinquent fee or penalty of \$200 or more would affect the issuance of a permit for an unrelated media. For example, a delinquent \$200 PST fee could affect the issuance of an air permit for new construction.

Basis: The agency processed in FY03 the following number of permits. In addition to these permits, the agency processes 1000s of new registrations, new and renewal certifications, as well as licenses each year.

Waste Permits

IHW 41

UIC 10

MSW 15

	<p>Water Quality Permits</p> <p>1) <u>Municipal/Domestic</u>:</p> <p>New 87 Major Amendment 77 Minor Amendment 28 Renewal 459 Emergency/Temporary Order 3 Renewal 11</p> <p>2) <u>Industrial</u>:</p> <p>New 25 Major Amendment 70 Minor Amendment 6 Renewal 157 Emergency/Temporary Order 1</p> <p>3) <u>MS4 (Multi-Sector Storm Sewer System)</u>:</p> <p>New 3</p> <p>4) <u>Sludge</u>:</p> <p>New 26 Minor Amendments 5</p> <p>5) <u>Agriculture</u>:</p> <p>New 36 Major Amendment 28 Renewal 111</p> <p>Water Supply Permits</p> <p>District Applications: 528 Utilities: 231</p> <p>Air Permits</p> <p>Total: 7339 PBRs: 3700 New: 210 Grandfathered permits: 360 Standard permit: 900</p>
	<p><u>Implementation Impacts:</u></p> <p><u>Processes:</u></p> <p>1) Access: OPRR has already developed a procedure for accessing the financial records of each regulated entity from Financial Administration Division's records. This procedure was developed by the Waste Permits Division under the direction of the Deputy in April through June, 2004. All divisions were provided the procedure and are in the process of acquiring access to Seagate for their staff. Divisions with access utilizing the reports are not all up and running yet.</p>

	<p>2) SOPs: Each division is responsible for developing their process and written SOP for addressing delinquent fees and penalties; however, the same basic process should be followed. The minimum to trigger staff action is \$200 delinquency. The delinquency will be added to the Notice of Deficiency letter. Before a permit is returned, management MUST be notified, and there are some cases in which a permit may not be returned. An example is a small local government who is financially unable to produce the fees before the permit is reviewed, but must provide drinking water or waste water services to the community. Registrations will be returned with a form letter.</p> <p>The agency should avoid getting into situations in which we are holding onto applications indefinitely, waiting for the check to arrive. Therefore, we recommend utilizing the NOD process, and if no response within specified time frame, return the application. Registrations and certifications should automatically be sent back to the customer with a standard letter notifying of the need to collect their outstanding balance.</p> <p>3) <u>Public Response</u>: The process will probably generate many phone calls and some complaints as it is implemented. However, the cost of sending mass mailouts to all of our customers to notify them up front would be extensive and time consuming and it potentially would not eliminate all complaints.</p> <p><u>LBB Measures</u>: No new performance measures will need to be created for this process. It will be part of the permit reviews and will be handled as one of many administrative requirements for an application to be considered complete.</p> <p><u>Costs</u>: The costs are due to the setup and the maintenance of the software. Resource costs for conducting the reviews were not included because the duties are added onto the work done by existing agency staff and no additional FTEs are needed.</p> <p>Seagate software licenses for OPRR staff = \$43,348. IR already has these licenses at the time that access was created. Thus, is not likely to be a new cost.</p> <p>IR Setup of OPRR access = \$1054 (2 staff, B12, 10 days)</p> <p>Maintenance for FY05: \$8,233</p> <p>Statutory or Rule Authority and Changes: No changes to statutes or rules are necessary in order to implement this procedure.</p>
<p>Other Alternatives</p>	

<p>Notes</p>	<p>TEX. WATER CODE §§ 7.302 and 7.303 allow the Commission to revoke or suspend a license, certificate, or registration issued by the Commission under:</p> <ol style="list-style-type: none"> 1. TEX. WATER CODE § 26.0301 (Sewage Treatment and Collection Facility Registration). 2. TEX. HEALTH & SAFETY CODE Ch. 37 (Occupational Licensing and Registration). 3. TEX. HEALTH & SAFETY CODE §361.0861 (Recycling and Recovery Registrations), § 361.092 (Energy, Material or Gas Recovery Registrations), § 361.112 (Storage, Transportation and Disposal of Used or Scrap Tires Registration). 4. TEX. HEALTH & SAFETY CODE Ch. 366 (On-Site Sewage Disposal Systems), Ch. 371 (Used Oil), or Ch. 401 (Radioactive Materials). 5. Under a rule adopted under any of those provisions. <p>After notice and hearing, the Commission may suspend or revoke a license, certificate, or registration the commission or a county has issued, place on probation a person whose license, certificate, or registration has been suspended, reprimand the holder of a license, certificate, or registration, or refuse to renew or reissue a license, certificate, or registration if the person is indebted to the state for a fee, payment of a penalty, or a tax imposed by a statute within the commission's jurisdiction or a rule adopted under such a statute. TEX. WATER CODE § 7.303(b)(6).</p> <p>TEX. WATER CODE § 5.552(a) gives the Executive Director authority to determine when an application is administratively complete. It could be argued that this provisions gives the ED authority to determine that an application is not administratively complete if an applicant has outstanding fees or penalties.</p> <p>TEX. WATER CODE § 26.027 provides that the commission may refuse to issue a permit when the commission finds that issuance of the permit would interfere with the purpose of chapter 26. TEX. WATER CODE §7.302 authorizes revocation or suspension of a permit or exemption for failure to pay penalties. That section suggests it is not appropriate for a person to have a permit if that person is delinquent in penalties. Therefore, it is arguable that the issuance of a permit to a person with delinquent penalties is not within the purpose of Chapter 26 of the Water Code.</p> <p>TH&S Code § 361.089 applies to municipal solid waste, industrial hazardous waste, hazardous waste, and industrial hazardous or hazardous UIC permits. Section 361.089(e) provides the commission the authority to deny an original or renewal permit if it is found, after notice and hearing, that the permit holder or applicant is indebted to the state for fees, payment of penalties, or taxes imposed by this title or by a rule of the commission. However, before denying a permit under this section, the commission must find that the permit holder or applicant is indebted to the state for fees, payment of penalties, or taxes imposed by this title or by a rule of the Commission.</p>
---------------------	--

Administrative Penalties (Attachment A - Collections Issue No. 1)

Authorization Type	Air	Water Supply	Water Quality	Waste
Individual Permits	Construction Permits - 1,3,4,5 Non attainment (NA) Permits - 1,3,4,5 Prevention of Significant Deterioration (PSD) Permits - 1,3,4,5 112(g) Hazardous Air Pollutants (HAPs) - 1,3,4,5 Voluntary Emission Reduction Permits (VERP) - 1,3,4,5 Electric Generating Facility (EGF) Permits - 1,3,4,5 Acid Rain Permits - 2,3,4 Existing Facilities Permits - 1,3,4,5 Multiple Plant Permits (MPP) - 1,3,4,5 Pipeline Facilities (PF) Permits - 1,3,4,5	Water Right Permits for new appropriations - 1,3,5 Water Right Permits for bed & banks - 1,3,5 Water Right Permits for interbasin transfers (IBTs) - 1,3,5 Water and Sewer Certificates of Convenience and Necessity - 1,3,5 Water District Creations - 1,3,5	General Authority for Individual Permits contained in §26.027 - Commission may Issue Permits and §26.040 - General Permits (pertaining to 30 TAC Subchapter B CAFOs) Texas Pollutant Discharge Elimination System (TPDES) Permits for industrial facilities - 1,3,5 TPDES Permits for municipal facilities - 1,3,5 TPDES Permits for sludge processing facilities - 1,3,5 TPDES Permits for Concentrated Animal Feeding Operations (CAFO) facilities - 1,3,5 TPDES Storm Water Permits for municipal separate storm sewer systems - 1,3,5 Texas Land Application Permits (TLAP) for industrial facilities - 1,3,5 TLAP Permits for municipal facilities - 1,3,5 CAFO Permits (State-only) - 1,3,5 Texas Pollutant Discharge Elimination System (TPDES) Permits for Storm Water from Industrial Facilities - 1,3,5 Sludge Beneficial Land Use Permits (State-only) - 1,3,5	Industrial Solid Waste Permits for treatment, storage and disposal - 1,3,5 Resource Conservation and Recovery Act Permits for hazardous waste treatment, storage and disposal - 1,3,5 Underground Injection Control (UIC) Permits for disposal in Class I wells - 1,3,5 UIC Permits for in-situ mining - 1,3,5 UIC Permits for sulfur mining by the Frasch process - 1,3,5 Radioactive Material Disposal License - 1,3,5 Municipal Solid Waste (MSW) Treatment, Storage and Disposal Permits. (Such as landfills, incinerators, large transfer stations, processing facilities, liquid waste processing facilities.) - 1,3,5 Permitted Compost Facilities (MSW) Chapter 332 (Permit required for operations that compost mixed municipal solid waste.) - 1,3,5

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
<p>General Permits</p> <p>General Permits are not included (code 6) because the program is new and there is no financial data acquired for these facilities. In addition, most of the program is contracted out to Texas State University.</p>			<p>General Authority for General Permits contained in §26.040 - General Permits</p> <p>Texas Pollutant Discharge Elimination System (TPDES) Discharges from Ready-Mixed Concrete Plants and/or Products Plants or Associated Facilities - 1</p> <p>TPDES Discharges from Petroleum Bulk Stations and Terminals - 1</p> <p>TPDES Discharge of Petroleum Fuel Substance Contaminated Waters - 1</p> <p>State-only authorization for Compost Operations in the Bosque and Leon Watersheds - 1</p> <p>TPDES Multi-Sector General Permits - Industrial Facilities - 1</p> <p>TPDES Permit for Storm Water Associated with Construction Activities - 1</p> <p>CAFO General Permit - 1</p> <p>Future General Permits Issued To Various Operations - 1</p>	

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
Registrations	Changes to Qualified Facilities (SB1126) - 6 - it is a self-implementing program, no TCEQ review is involved.		General Authority for Registrations contained in §26.027 - Commission may Issue Permits State-only Domestic Septage Beneficial Land Use - 1,3,5 except renewals (1,4,5) Water Treatment Plant Sludge Beneficial Land Use (State-only) - 1,4,5 Water Treatment Plant Sludge Disposal (State-only) - 1,4,5 Sludge Transporter s - 2	Type V Municipal Solid Waste (MSW) facilities that are registered (includes small transfer stations, some liquid waste processing facilities) - 2,3,4 Registered Compost Facilities (MSW) Chapter 332. (Registration compost operations handle materials such as municipal sewage sludge, or positively-sorted organic materials from the municipal solid waste.) - 2,3,4 Type IX MSW Gas Recovery Systems (for beneficial recovery of methane for energy) - 2,3,4 Medical Waste Transporters and On-Site Treaters - 2,3,4 Municipal Route Transporters/Stationary Compactors Ch. 330.32) - 2,3,4 Scrap Tire Facilities (Generators, Processors, Energy Recovery, Transporters, Land Reclamation Project Using Tires) - 2,3,4 Used Oil Handlers, Filter Handlers & Collection Centers (Ch 324 Sub A, Ch 328 Sub D) - 6 Underground and Aboveground Petroleum Storage Tanks (Ch 334) - 2,3,4 Dry Cleaners (to be Ch 337) - 2,3,4 Industrial Solid Waste and Municipal Hazardous Waste (Ch 335 Sub A) Generators, Transporters, Receivers - 6
General Operating Permits	Oil and Gas Facilities Bulk Fuel Terminals Landfills Site-Wide - 6 - no individual TCEQ review involved.			
Flexible Permits	1,3,4,5			
Site Operating Permits	2,3,4			

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
Standard Permits	Pollution Control Projects, Oil and Gas Facilities Municipal Solid Waste Concrete Batch Plants - 1,3,4,5 Electric Generating Units Temporary Rock Crushers Hot Mix Asphalt Plants Except for Concrete Batch Plants, code 6 - self implementing program, no TCEQ review or authorization.			
Major Amendments and Modifications to Permits	Construction Permit - 1,3,4,5 Non Attainment Permit - 1,3,4,5 Prevention of Significant Deterioration (PSD) Permit - 1,3,4,5 112(g) Hazardous Air Pollutants (HAPs) - 1,3,4,5 Voluntary Emission Reduction Permit (VERP) - 1,3,4,5 Electric Generating Facility (EGF) - 1,3,4,5 Existing Facilities - 1,3,4,5 Multiple Plant Permit - 1,3,4,5 Acid Rain Permits - 2,3,4	Water Right Permits for new appropriations - 1,3,5 Water Right Permits for bed & banks - 1,3,5 Water Right Permits for interbasin transfers - 1,3,5 Certificates of Convenience and Necessity amendments and transfers - 1,3,5 Additional powers for Water Districts - 1,3,5	General Authority for Individual Permits contained in §26.027 - Commission may Issue Permits and §26.040 - General Permits (pertaining to 30 TAC Subchapter B CAFOs) Texas Pollutant Discharge Elimination System (TPDES) Permit for Industrial Facilities - 1,3,5 TPDES Permit for Municipal Facilities - 1,3,5 TPDES Permit for Sludge Processing Facilities - 1,3,5 TPDES Permit for Concentrated Animal Feeding Operations (CAFO) Facilities - 1,3,5 TPDES Storm Water Permits for Municipal Separate Storm Sewer Systems - 1,3,5 Texas Land Application Permits (TLAP) for Industrial Facilities - 1,3,5 TLAP for Municipal Facilities - 1,3,5 CAFO Permit (State-only) - 1,3,5 Sludge Beneficial Land Use Permit (State-only) - 1,3,5	Industrial Solid Waste Permits for treatment, storage and disposal - 1,3,5 Resource Conservation and Recovery Act Permits for hazardous waste treatment, storage and disposal Underground Injection Control (UIC) Permits for disposal in Class I wells - 1,3,5 UIC Permits for in-situ mining - 1,3,5 UIC Permits for sulfur mining by the Frasch process - 1,3,5 Radioactive Material Disposal License - 1,3,5 Municipal Solid Waste (MSW) Treatment, Storage and Disposal Permits - 1,3,5 Permitted Compost Facilities (MSW) Chapter 332 - 1,3,5

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
Minor Amendments and Modifications to Permits	Construction Permits - 1,3,4,5 Non attainment Permits - 1,3,4,5 Prevention of Significant Deterioration (PSD) Permits - 1,3,4,5 112(g) Hazardous Air Pollutants (HAPs) Voluntary Emission Reduction Permits - 1,3,4,5 Electric Generating Facility Permits- 1,3,4,5 Existing Facilities - 1,3,4,5 Multiple Plant Permits - 1,3,4,5 Acid Rain Permits - 2,3,4	Water Right Permits of no greater impact than existing authorization under full utilization - 1,3,5 Water Right Permits for exempt interbasin transfers - 1,3,5	General Authority for Individual Permits contained in §26.027 - Commission may Issue Permits and §26.040 - General Permits (pertaining to 30 TAC Subchapter B CAFOs) Texas Pollutant Discharge Elimination System (TPDES) Permit for Industrial Facilities - 1,3,5 TPDES Permits for Municipal Facilities - 1,3,5 TPDES Permits for Sludge Processing Facilities - 1,3,5 TPDES Permits for Concentrated Animal Feeding Operations (CAFO) Facilities - 1,3,5 TPDES Storm Water Permits for Municipal Separate Storm Sewer Systems - 1,3,5 Texas Land Application Permits (TLAP) for Industrial Facilities - 1,3,5 TLAP for Municipal Facilities - 1,3,5 CAFO Permit (State-only) - 1,3,5 CAFO Permit (State-only) (continued) - repeated - same as previous - typo Sludge Beneficial Land Use Permit (State-only) - 1,3,5	Industrial Solid Waste Permits for treatment, storage and disposal - 2,3 Resource Conservation and Recovery Act Permits for hazardous waste treatment, storage and disposal - 2,3 Underground Injection Control (UIC) Permits for disposal in Class I wells - 2,3 UIC Permits for in-situ mining - 2,3 UIC Permits for sulfur mining by the Frasch process Radioactive Material Disposal License - 2,3 Municipal Solid Waste (MSW) Treatment, Storage and Disposal Permits. Permitted Compost Facilities (MSW) Chapter 332 - 2,3
Renewals	1,3,4,5		General Authority for Individual Permits contained in §26.027 - Commission may Issue Permits and §26.040 - General Permits (pertaining to 30 TAC Subchapter B CAFOs) Texas Pollutant Discharge Elimination System (TPDES) Permits for industrial facilities - 1,3,5 TPDES Permits for municipal facilities - 1,3,5 TPDES Permits for sludge processing facilities - 1,3,5	

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
			TPDES Permits for Concentrated Animal Feeding Operations (CAFO) facilities - 1,3,5 TPDES Permits for Concentrated Animal Feeding Operations (CAFO) facilities (continued) - repeat of previous item TPDES Storm Water Permits for municipal separate storm sewer systems - 1,3,5 Texas Land Application Permits (TLAP) for industrial facilities - 1,3,5 TLAP Permits for municipal facilities - 1,3,5 CAFO Permits (State-only) - 1,3,5 Texas Pollutant Discharge Elimination System (TPDES) Permits for Storm Water from Industrial Facilities - 1,3,5 Sludge Beneficial Land Use Permits (State-only) - 1,3,5	
Modifications to Registrations			General Authority for Registrations contained in §26.027 - Commission may Issue Permits Domestic Septage Beneficial Land Use (State-only) - 1,3,5 Water Treatment Plant Sludge Beneficial Land Use (State-only) - 1,4,5 Water Treatment Plant Sludge Disposal (State-only) - 1,4,5	<i>Some Municipal Solid Waste Registration modifications require notice under 30 TAC §305.70(g)(2) - 2,3</i>

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
Permits By Rule	<p>There are 124 Permit By Rules, 4 to be repealed. The following are just several examples:</p> <p>Rock Crushers; § 106.142 - 6 Bulk Mineral Handling; §106.144 - 6 Asphalt Silos; §106.150 - 6 Trench Burners; § 106.496 - 6 Surface Coating Facilities; §106.433 - 6</p> <p>* Self implementing, no agency review or authorization, except these which require site approvals:</p> <p>106.142 106.144 106.146 106.147 106.150 106.223 106.283 106.433 106.452 106.477</p>		<p>General Authority for Permits by Rule contained in §26.040 - General Permits (contained savings provision)</p> <p>Use of Reclaimed Water (State-only) - 4</p> <p>Boat Sewage Disposal (State-only) - 6</p> <p>Meat Processing (State-only) - 6</p> <p>Sand and Gravel Washing (State-only) - 6</p> <p>Discharges to Surface Waters from Treatment of Petroleum Substance Contaminated Waters (State-only) - 6</p> <p>Handling of Wastes from Commercial Facilities Engaged in Livestock Trailer Cleaning (State-only) 30 TAC 321 Subchapter N - 4</p> <p>Discharges from Aquaculture Production Facilities (State-only) 30 TAC 321 Subchapter O - 4</p> <p>*The PBRs assigned code 6 are self implementing, and do not require agency review or authorization.</p>	<p>Exclusion for Hazardous Waste permits for certain Publicly Owned Treatment Works permittees - 6</p> <p>Animal Crematories (Municipal Solid Waste) Chapter 330.4(z) - 6</p> <p>*These are code 6 because they are self implementing and do not require agency authorization or review.</p>

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
Amendments to Registrations			<p>General Authority for Registrations contained in §26.027 - Commission may Issue Permits</p> <p>Domestic Septage Beneficial Land Use(State-only) - 1,3,5</p> <p>Water Treatment Plant Sludge Beneficial Land Use (State-only) - 1,4,5</p> <p>Water Treatment Plant Sludge Disposal (State-only) - 1,4,5</p>	
<p>Notifications</p> <p>Notifications are coded 6 because they are self implementing, not authorizations and do not need agency review prior to operation.</p>	<p>Site Operating Permit (SOP) Operational Flexibility - 6</p> <p>SOP Off-Permit Changes - 6</p> <p>Change of Ownership - 6</p>		<p>(For Water Quality, a review of the information is conducted and approval sent to applicants, so notification may not be an accurate term-more an Authorization)</p> <p>General Authority for Chapter 210 Water Reuse contained in §26.0311 - Standards for Control of Greywater</p> <p>General Authority for Sludge Notifications contained in §26.027 - Commission may Issue Permits</p> <p>Chapter 210 Water Reuse - Industrial - 4</p> <p>Chapter 210 Water Reuse - Domestic - 4</p> <p>Class A Sewage Sludge Beneficial Use - 1</p>	<p>Municipal Solid Waste (MSW) Liquid Waste Transfer Stations - 6</p> <p>MSW Resource Recovery Facilities - 6</p> <p>Notification Level Compost Facilities (MSW) Chapter 332 - 6</p> <p>On-Site industrial solid waste management - 6</p> <p>Authorizations for Underground Injection Control Class V wells - 6</p> <p>Exclusions from hazardous and industrial waste permitting under 30 Texas Administrative Code §§ 335.2, 335.41, and 335.69 and 40 Code of Federal Regulations 261.4(e) and (f) - 6</p>
Deminimis Facilities	Deminimis Authority			
Emissions Banking Credits				

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
TCEQ Orders	Emergency Orders - 2,4,5	Water District Bonds - 1,3,5 Water District Revenue Notes - 1,3,5 Water District Standby Fees - 1,3,5 Water District Impact Fees - 1,3,5 Water District Dissolutions - 1,3,5 Emergency Order - 2,4	General Authority for Emergency and Temporary Orders contained in § 5.509. Temporary or Emergency Order Relating to Discharge of Waste or Pollutants General Authority for Authorization to Construct contained in §26.027 - Commission may Issue Permits Texas Pollutant Discharge Elimination System (TPDES) Permit Emergency Order - 1,5 TPDES Permit Temporary Order - 1,5 Emergency Order (State-only) - 1,5 Temporary Order (State-only) - 1,5 Authorization to Construct - 2,5	Post Closure Care Orders for interim status Resource Conservation and Recovery Act units, Corrective Action Management Units, and permitted units commingled plumes - 1,3,5 Emergency order for industrial waste facilities, hazardous waste facilities, Underground Injection Control (UIC) Class I wells and UIC Class III wells - 6 Temporary orders for industrial waste facilities, hazardous waste facilities, UIC Class I wells and UIC Class III wells - 2,3,5

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Authorization Type	Air	Water Supply	Water Quality	Waste
Others		<p>Water District Fire Plan - 1,3,5</p> <p>Water District Name Change - 1,3,5</p> <p>Water District Bankruptcy - 1,3,5</p> <p>Water District Appeal to the Commission of Decision of Board Regarding Facilities - 1,3,5</p> <p>Water District Appointment of Directors - 1,3,5</p> <p>Water District Reinstatement of Director - 1,3,5</p> <p>Water District Contract Tax Approval - 1,3,5</p>	<p>General Authority for Plans and Specifications Review and Approval contained in §26.034 - Approval of Disposal System Plans</p> <p>General Authority for 401 (Water Quality) Certifications contained in §5.120 - Conservation and Quality of Environment</p> <p>General Authority for Review and Approval of Closure Plans contained in §26.027 - Commission may Issue Permits</p> <p>30 TAC Chapter 317 Domestic Wastewater Treatment Plant Plans and Specifications review and approval - 6</p> <p>Closure Plans for Domestic Wastewater Treatment Plants review and approval (in conjunction with Remediation Division) - 4</p> <p>Water Quality Certification of Corps of Engineers 404 Dredge and Fill Permit - 6</p> <p>Water Quality Certification of Coast Guard Section 9 Permits - 6</p> <p>Water Quality Certification of Corps of Engineer Sponsored Federal Projects - 6</p>	

Reviewed for past due fees and penalties:

1. During Administrative Review - see procedures.
2. During Administrative & Tech Review for those applications w/combined review - see procedures.
3. Prior to transmittal to O.C.C. - see procedures.
4. Prior to final approval for those authorizations that do not go to O.C.C. prior to final approval - see procedures.
5. Upon publication of commission agenda, program areas will review posted items and inform management of potential issues at agenda.
6. No review for overdue fees & penalties will be conducted prior to authorization being issued.

Collections/Financial Inability to Pay Subcommittee	
Issue No.	2
Key Issue	Fee & Penalty Collection: 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?
	Basis: Steering Committee Input, State Auditor’s Report and Public Comment.
Other Subcommittees Reviewing Issue	Enforcement Process
Recommendation	<p>For the purposes of this response, agency resources are considered to include human, equipment, and systems. A review by the Office of Legal Services (OLS) and Financial Administration Division (FAD) conclude that resources are not sufficient to collect the accumulated number of old delinquent fee and penalty accounts.</p> <p>The TCEQ needs the assistance of outside resources to collect the delinquent accounts or determine that they are uncollectible. At the same time, the OLS and FAD have also determined that there are a number of improvements using internal resources that can be made to more quickly collect unpaid fees and penalties. The subcommittee reviewed the conclusions made in the OLS/FAD review and determined that they were appropriate and should be implemented.</p> <p>Implemented approaches using internal resources include:</p> <ol style="list-style-type: none"> 1. Revised collection processes and responsibilities in FAD’s Revenue Management Handbook which eliminated duplicative tasks, streamlined the collection process, established criteria for determining collectibility, incorporated any delinquent fees or penalties into pending enforcement actions, and increased the number of attorneys and revenue staff working on collection cases. 2. Established prompter identification and referral of cases over \$2,500 to the AG after 2 automated demand letters. 3. Established for the first time a billing interface between the Accounts Receivable system and CCEDS which will improve collections by automating billing, demand letters, and the placement of delinquent accounts on warrant hold. 4. Included functionality in the request for offer to upgrade the accounts receivable and billing system to incorporate a more automated compilation of collection history for the AG, OLS, or a collection agency to facilitate quicker referral for collection and better use of limited resources.

	<p><u>Proposed approaches using internal resources include:</u></p> <ul style="list-style-type: none"> • Initiate actions to revoke or suspend a permit or exemption if a permit holder is indebted to the TCEQ for fees, payment of penalties, or taxes imposed by the statutes or rules within the Commission’s jurisdiction. (Refer to Subcommittee Issue #1) • Recommend withholding and possible denial of permits to entities indebted to the TCEQ for fees, payment of penalties, or taxes imposed by the statutes or rules within the Commission’s jurisdiction. (Refer to Subcommittee Issue #1). <p><u>Proposed approaches using external resources include:</u></p> <ul style="list-style-type: none"> • Referral of cases over \$2,500 to the AG after 2 automated demand letters. • Contract with a collection agency to collect delinquent accounts that do not meet AG tolerances. <p><u>Basis:</u> Refer to the bottom of the last page of this issue.</p>
	<p><u>Implementation Impacts:</u> LBB performance measure, 03-01-02.03, Percent of Administrative Penalties Collected, would not change due to the hiring of a collection agency.</p> <p>It is anticipated that EPA would be in favor of any measures taken by the TCEQ to improve the collection rate for assessed administrative penalties.</p> <p>A Request for Offer for collection activities was posted on June 25, 2004. The current time line reflects that a contract with a collection agency would be executed in September 2004.</p> <p>A rider to appropriate to TCEQ funds necessary to pay a collection agent out of the funds collected by the collection agent has been presented to the Commission in the FY 2006-2007 Legislative Appropriation Request (LAR). Without the rider, TCEQ will be expending appropriated funds in order to collect funds which will not be appropriated to TCEQ, but will be placed in the Treasury to await future appropriations.</p> <p>To implement the other alternative proposed, a legislative change to the revenue source for PST program administration from the current registration fee per storage tank to assessment of a fee on the bulk delivery of gasoline would require changes to statute at Texas Water Code §§ 26.358, Collection, Use, and Disposition of Storage Tank Fees and Other Revenues, and 26.3574, Fee on Delivery of Certain Petroleum Products.</p>

<p>Other Alternatives</p>	<p>Legislative change to the revenue source for PST program administration from the current registration fee per storage tank to assessment of a fee on the bulk delivery of gasoline.</p> <p>Pros:</p> <ul style="list-style-type: none"> • Staff in the Revenue Section dedicated to billing and accounting related to PST registration fees could be focused on the clearing of old outstanding accounts; the collection of other accounts whose numbers would be more manageable internally; or reassignment to other areas. • Additionally, the bulk delivery fee would provide a more stable source of revenue with substantially less administrative cost as has been demonstrated in the collection of this fee to fund the Petroleum Storage Tank Remediation Fund. <p>Cons:</p> <ul style="list-style-type: none"> • The bulk delivery fee that funds the Petroleum Storage Tank Remediation Fund is scheduled to sunset at the end of fiscal year 2007. <p>Background: The administrative burden for billing and collecting this large volume (about 15,000 accounts), small dollar fee (\$50 per UST and \$25 per AST) includes the efforts of fee coordinators, cashiers, collection coordinators, and attorneys.</p> <ul style="list-style-type: none"> • 2 FTEs act as fee coordinators in the Revenue Section of Financial Administration for PST registration fees. • Cashiers processed 3,648 transactions related to PST registration fees in FY 03 representing about 6% of total transactions processed by the Cashier's Office in FY 03.
	<ul style="list-style-type: none"> • PST fees represent 40% of the total number of delinquent accounts for FY 2004, but only 7% of the total delinquent amounts outstanding for FY 2004 as of 5/17/04. This demonstrates the disproportionate effort that has to be directed toward collecting these fees. • PST fees represent 48% of delinquent accounts for all fiscal years and 28% of the total amount outstanding for all fiscal years as of 5/17/04. This demonstrates the historical difficulty in collecting these fees. • Tanks have historically been treated as a commodity, often sold and transferred which has resulted in \$1.6 million in accounts with undeliverable mail.
	<p>Basis: Large volume, small dollar fees require a greater proportion of effort throughout the process from preparing the billing, to accounting for payments, adjusting accounts, and multiple dunning letters and billing statements for unpaid accounts.</p>
<p>Notes</p>	<p>No legal issue involved. No legislative authority required.</p>

Basis for Primary Recommendation:

Type¹ (# count/\$ amount)	Eligible for Referral to OAG (New² and ≥\$2,500)	Eligible for Referral to Collection Agency (New and <\$2,500 & Old³)
Fees	8 \$395,084	10,976 \$6,558,612
Penalties	19 \$253,661	628 \$2,324,536
Total	27 \$648,745	11,424 \$8,883,148

1

Based on TCEQ Delinquent Accounts reports generated May 24 and 25, 2004; fees do not include delinquent dry cleaner (DCR) fees; amounts are rounded to the nearest dollar; reports exclude accounts flagged as Bankruptcy, AG, Litigation, Uncollectible, Federal, and State, which the TCEQ will handle internally.

2

For fees, “New” includes accounts that are less than 150 days past due as of 5/12/2004; for penalties, “New” includes accounts that are less than 150 days past due as of 5/25/2004.

3

For fees, “Old” includes accounts that are 150 days or more past due as of 5/12/2003; for penalties, “Old” includes accounts that are 150 days or more past due as of 5/25/2004.

Collections /Financial Inability to Pay Subcommittee

Issue No.	3
Key Issue	<p><u>Evaluation of inability to pay:</u> A) How can the agency address inability to pay issues of small businesses?</p> <p>Basis: Public Comment; Staff Input; and Review of Current Policy.</p>
Other Subcommittees Reviewing Issue	Enforcement Process; Ordering Provisions; Penalty Policy; EIC.
Recommendation	<p><u>Operating Business</u> Please refer to the flowchart for an illustration of the following proposed process. (See Attachment C). The proposed screening tool states that all operating businesses have the ability to pay an administrative penalty up to 1% of annual revenue without the need for financial analysis. Since payment plans up to 36 months are proposed to be allowed, the practical charge to annual revenue is 0.33% assuming consistent revenue for a 3 year period. If a business is unable to bring their operation into compliance and pay this percentage of their gross revenue over a 3 year period, then the subcommittee recommends that the proper forum to address the respondent’s “inability to pay” is through the Bankruptcy Court. Bankruptcy Court would consider all of the entity’s obligations and reorganize their debts over 5 years, including administrative penalties.</p> <p>A review of cases having undergone a financial analysis using existing criteria reflects that a company may be asset rich and revenue poor (see Attachment A). Therefore, if the initial screen of 1% of annual revenue does not completely pay the assessed penalty, a more thorough analysis to include the respondent’s assets is needed. The analysis determines whether liquid assets (cash, marketable securities, etc.), borrowing capacity, nonessential assets (the corporate lake house or luxury vehicle), or other factors indicate an ability to pay beyond 1% of annual revenue.</p> <p>The minimum payment plan for an operating business is proposed to be \$100 per month for a maximum of 36 months.</p> <p><u>Non-Operating Business</u> Non-operating businesses should undergo a similar analysis of assets. The minimum payment plan for non-operating businesses should be \$100 per month for a maximum of 12 months.</p>

Example 1: Operating Business; Penalty, \$10,000; Annual Revenue per 2003 Tax Return, \$500,000

- 1% of annual revenue = \$5,000
- Penalty (\$10,000) > 1% annual revenue (\$5,000)
- Analysis of assets performed to determine ability to pay \$5,000 difference between the penalty assessed and the 1% screen.
- If analysis of assets demonstrates full capacity to pay, penalty of \$10,000 payable up to 36 months.
- If analysis of assets demonstrates ability to pay \$7,500, penalty of \$7,500 payable up to 36 months.
- If analysis of assets demonstrates no additional ability to pay, penalty of \$5,000 payable up to 36 months.

Example 2: Operating Business; Penalty, \$10,000; Annual Revenue per 2003 Tax Return, \$2,000,000.

- 1% of annual revenue = \$20,000
- Penalty (\$10,000) < 1% of annual revenue (\$20,000)
- Full penalty of \$10,000 payable up to 36 months with no analysis required.

Factors Considered in Asset Analysis

- Liquid assets
- Cash flow
- Outstanding loans to officers and directors
- Assets not vital to business operations
- Extravagant entertainment expenses
- Level of compensation to corporate officers
- Ability to borrow
- Dividends
- Debts which pay off during the penalty repayment term

Please refer to Attachment A for examples of factors discovered during asset analysis which have resulted in a determination of ability to pay under existing criteria.

Please refer to Attachment B for an illustration applying the proposed screening tool to a sample of cases that underwent an ability to pay evaluation under existing criteria.

	<p><u>Basis:</u></p> <p>Positive Implications:</p> <ul style="list-style-type: none"> • Recognizes limitations of Financial staff to process increasingly larger volumes of cases and allows Financial staff to focus analytical resources on a manageable number of cases; • Recognizes that all operating businesses have the capacity to pay at least 1% of annual revenue for the most recent completed tax year. (Spread over a 36 month period is equivalent to 0.33%); • Streamlines enforcement processing time currently spent waiting for backlogged analyses; • Creates a standard easily determinable for a SOAH Judge in contested cases. <p>Negative Implications:</p> <ul style="list-style-type: none"> • Requires payment for up to 36 months; • 1% of annual revenue could be considered arbitrary and either too high or too low. • May require full payment by some businesses that are now found unable to pay based on factors other than 1% of revenue.
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • No increase in FTEs as a result of this recommendation. • Inability to Pay policy would need to be revised. • Total implementation time is estimated at 2-3 months.
<p>Other Alternatives</p>	<ol style="list-style-type: none"> 1. Where the total amount paid under a payment plan is less than the calculated penalty provide for a balloon payment (of the remaining calculated penalty balance) or revised analysis of financial inability to pay at the conclusion of the payment plan. 2. As an alternative to the subcommittee’s recommendation, TCEQ could use EPA Models, INDIPAY and ABEL, to determine ability to pay for an individual, corporation, or partnership. Financial Assurance staff have attempted to use these models with generally inconclusive results and do not recommend using them. Unlike the data inputs for MUNIPAY, which are primarily audited financial statements, the financial data provided by individuals and small businesses are unaudited, often disjointed and inaccurate, and come from a variety of sources. As a result, the data is not homogeneous and financial staff must analyze all of the data with a higher degree of specificity. Thus, use of these models may not represent as great of a time-savings for the enforcement process or use staff resources as efficiently as the primary recommendation.
<p>Notes</p>	<p>See Notes Section on Issue 5.</p>

Collections Issue No. 3A, Attachment A: Examples of Factors Discovered During Asset Analysis

Case Example	Penalty	Recommended Payment	Unique Aspects
1	\$6,000	\$6,000	3 luxury vehicles not disclosed
2	\$167,420	\$105,000	Combination of liquidity and borrowing ability
3	\$13,500	\$2,300	Reported losses; however, owner's salary was higher than industry standards
4	\$12,000	\$12,000	Recent purchase of investment property with \$25,000 down payment
5	\$8,750	\$8,750	Substantial funds in brokerage account
6	\$5,200	\$5,200	Assets (non-business related) available for liquidation
7	\$8,000	\$8,000	Failed to report \$100,000 Certificate of Deposit
8	\$8,500	\$8,500	Assumed company was able to improve cash flow substantially by consolidating and refinancing existing equipment loans
9	\$10,625	\$2,500	Sale of non-exempt asset
10	\$16,875	\$16,875	Reported losses but made substantial reductions in notes payable to shareholders
11	\$3,000	\$3,000	PWS - ability to pay was based on ability to sell non-exempt personal assets
12	\$21,875	\$15,600	Loan payments of \$1300/mo ending soon - so savings could be applied to penalty
13	\$3,438	\$3,438	Considered that debt could be restructured, loans paying off in near future, sale of recreational vehicle
14	\$7,600	\$7,600	Reported losses however made substantial payments to shareholders

Collections Issue No. 3A - Attachment B: Application of Proposed Screening Tool to Sample of Previously Reviewed Cases

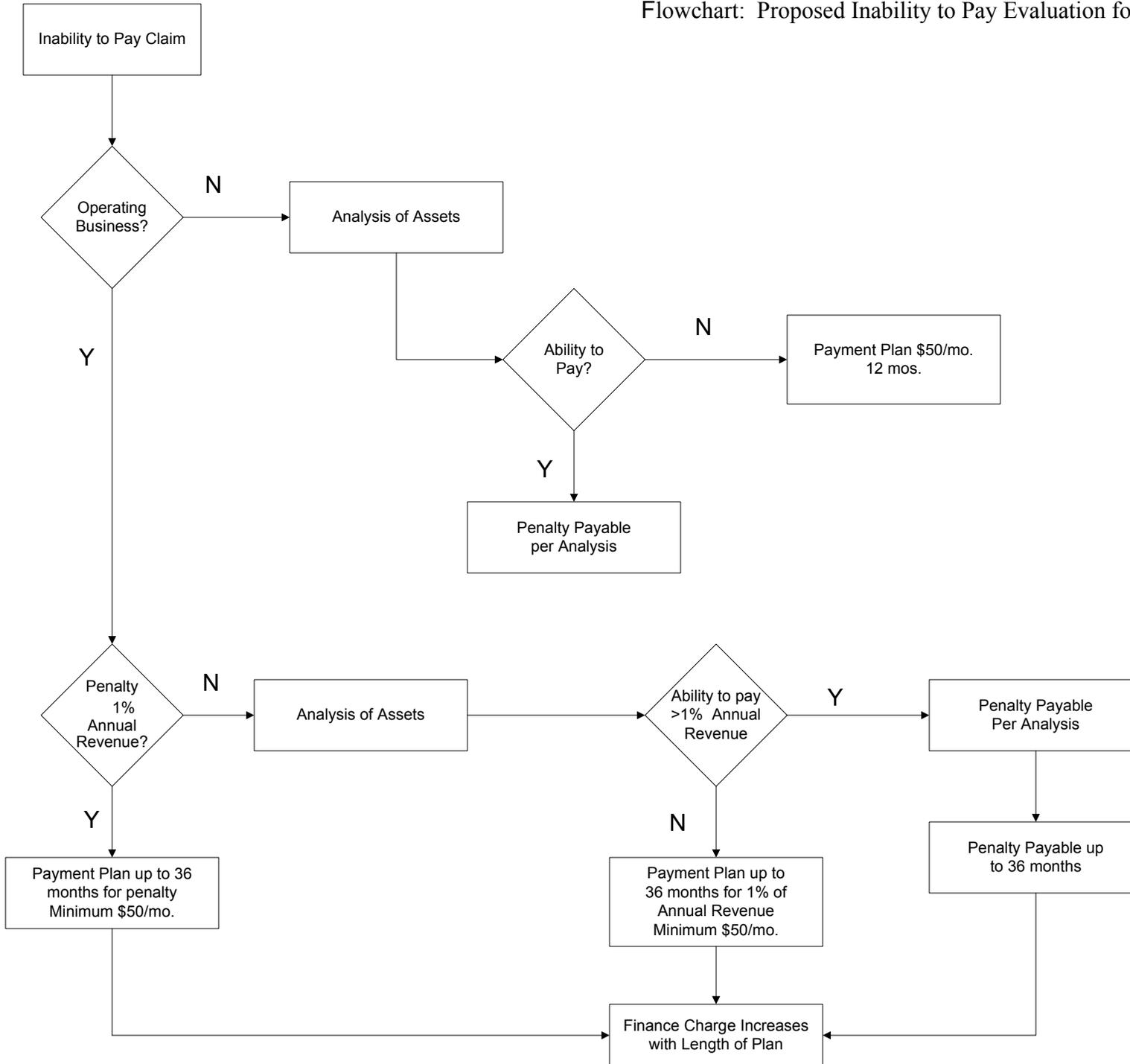
Case Example	Program	Penalty	Revenues	Penalty as % of Revenues	Full Penalty Payable over 36 mos.	1% of Annual Revenues over 36 mos.	Result of Analysis Using Existing Criteria	Reason for “Able” Determination
15	PST	\$27,600	\$2,696,000	1%	\$766	\$749	A	Adequate cash flow
16	PST	\$7,272	\$2,133,200	.3%	\$202	\$593	A	Cash Flow & Ability to Borrow
17	PST	\$3,200	\$1,008,500	.3%	\$89	\$280	A	Adequate cash flow
18	PST	\$14,038	\$ 28,950	48%	\$397	\$ 8	U	
19	MWD	\$33,170	\$204,800	16%	\$921	\$57	U	
20	MLM	\$2,625	\$ 9,722	27%	\$73	\$3	U	
21	MSW	\$10,000	\$43,026	23%	\$277	\$12	U	
22	AIR	\$300,000	\$396,500	76%	\$8,333	\$110	U	Sold business
23	IHW	\$45,675	\$574,000	8%	\$1,269	\$159	P \$27,900	Existing liquidity plus cash flow
24	PWS	\$3,100	\$334,800	.9%	\$86	\$93	A	Assets & Cash Flow
25	MSW	\$25,000	\$68,400	37%	\$694	\$19	P \$8000	

A = review found respondent able to pay entire penalty

U = review found respondent able to unable to pay the penalty. Payment reduced to a minimal amount (in the past has been \$50 per month)

P = review found respondent able to pay only the indicated amount

Flowchart: Proposed Inability to Pay Evaluation for Small Business



Collections /Financial Inability to Pay Subcommittee	
Issue No.	3
Key Issue	<p><u>Evaluation of inability to pay:</u> B) How can the agency address inability to pay issues of small local governments?</p> <p><u>Basis:</u> Public Comment; Staff Input; and Review of Current Policy</p>
Other Subcommittees Reviewing Issue	Enforcement Process, Ordering Provisions, EIC, and Penalty Policy
Recommendation	<p><u>Eligibility for Applying for Inability to Pay:</u> Any other communities or governmental organizations may apply for inability to pay using the MUNIPAY formula from EPA.</p> <p>The MUNIPAY 2000 system is designed to assist the user in executing financial analyses of municipalities held liable for environmental penalties or Superfund contributions. MUNIPAY is a free, downloadable program from the EPA. A User’s Manual is also available in a pdf. format free of charge.</p> <p>MUNIPAY uses a municipality's current financial data to evaluate its ability to pay environmental expenditures, including compliance costs, penalties, and Superfund cost contributions, either by using currently available funds or by taking on additional debt. MUNIPAY also uses U.S. Census Data to perform a demographic analysis, which is intended to provide a better understanding of long-term changes in the community's resource base.</p> <p>The MUNIPAY Model evaluates the economic and financial condition of municipalities. This includes cities, towns, and villages of any size, and even independent and publicly owned utilities (e.g., regional wastewater treatment plants). Other local and regional governmental jurisdictions may also be amenable to a MUNIPAY analysis. The model provides a consistent and theoretically sound framework for evaluating municipal affordability cases. MUNIPAY performs two separate sets of analyses: a demographic comparison, and an affordability calculation.</p> <p>Despite MUNIPAY’s ability to provide a point estimate of the municipality’s level of affordable expenditures, municipal affordability cases still require the user’s best professional judgment. MUNIPAY does contain default values for certain parameters such as the maximum incremental tax burden from the environmental expenditures, but the user must still decide whether those default values are appropriate for the particular case. The model can help with these judgments, but final determination of the municipality’s affordability ultimately is a decision only the enforcement professional can make.</p>
	<p><u>Basis:</u></p> <ol style="list-style-type: none"> 1. Feedback from local governments. 2. Public comment focused on providing an easier financial inability to pay process for small local governments. 3. Staff spends an inordinate amount of time analyzing the financial ability of local governments due to the complexity of these analyses.

	<p><u>Implementation Impacts:</u> No increase in FTEs as a result of this recommendation. Inability to Pay policy would need to be revised. Total implementation time is estimated at 3-4 months. IT requirements may be needed to support MUNIPAY.</p>
<p>Other Alternatives</p>	<p>1) Waive the noncompliance penalties for the small local governments noted below which are least able to make penalty payments. Each of these communities would get a maximum of one waiver, regardless of the media, every five years assuming they still meet the EDAP and/or poverty criteria listed below. Any subsequent requests for inability to pay consideration, during the five year period, would be run using MUNIPAY.</p> <p>Automatic Eligibility for Inability to Pay: The communities in Texas that are at the poverty level would automatically be eligible for inability to pay the first time through enforcement. There are currently 69 communities meeting this criteria. This means the median income is at or below \$20,000. These are considered impoverished according to Census Bureau data. (See Attachment A)</p> <p>The counties in Texas would be those that are designated as EDAP (next to the border or counties with a per-capita income 25 percent less than the state average and unemployment rates 25 percent greater than the state average) or have 15% or greater of the population at or below the poverty level of \$20,000. This is currently 71 counties. (See Attachment B)</p> <p>2) Set percentage of the tax roll-back rate as the criteria for inability to pay. As an example, if the tax rate was \$1.00 per \$100, the roll back rate would be \$1.08. Set the inability to pay at 80% of \$.08 (the difference between the current tax rate and the roll back rate) or \$.06.</p> <p>3) Extended payout periods in lieu of inability to pay.</p> <p>4) An alternative that could be used in addition to Poverty Level/EDAP automatic eligibility and MUNIPAY is the assessment of a minimum amount per household. Historically, the financial capacity of a local government has often translated into the ability of the local government to raise taxes or raise utility rates. This recognizes that any penalty assessed against a local government is a pass-through to the citizens of the community. A reasonably affordable measure that could be applied as a minimum assessment per household is \$1.00 per household per month for 36 months. \$1.00 is the approximate cost of an inexpensive loaf of bread.</p>

	<p>This alternative would work in tandem with the Poverty Level/EDAP automatic eligibility and MUNIPAY as follows:</p> <ol style="list-style-type: none"> 1. If a local government is designated as Poverty Level/EDAP and their one-time automatic eligibility has not been used, no additional review is applied. The entire penalty is deferred. 2. If not Poverty Level/EDAP or one-time eligibility has been used, the number of households in the local government is multiplied by \$1.00 to determine the minimum monthly penalty payment for 36 months. This calculation sets the minimum penalty amount payable. 3. If the \$1.00 per household per month minimum does not fully pay the penalty, MUNIPAY is used to determine ability to pay. The penalty payable is the greater of the results from #2 or the results from MUNIPAY. <p>Example: City of 100 households; Penalty assessed \$10,000</p> <ul style="list-style-type: none"> • If city was poverty level designated and one-time eligibility had not been used, entire penalty is deferred. No further steps required. • City is not poverty level designated or one-time eligibility already used. The following calculation establishes the minimum penalty amount payable: $100 \text{ households} \times \\$1.00/\text{household} \times 36 = \\$3,600$ <p>Minimum penalty amount payable, \$3,600 < \$10,000, assessed penalty. Run MUNIPAY.</p> • MUNIPAY indicates ability to pay \$5,000. Penalty payable is \$5,000 (the greater of \$5,000 and \$3,600); or • MUNIPAY indicates ability to pay \$2,000. Penalty payable is \$3,600 (the greater of \$3,600 and \$2,000).
Notes	<p>Tex. Water Code § 7.053 requires the Commission to consider different issues when assessing a penalty. These include the amt. necessary to deter future acts, good faith of the respondent, “other factors that justice may require,” history of previous violations, and culpability. It may be sufficient that the Commission make a general determination that, in considering these factors, a poverty level community with no prior violations and no culpability would justify no assessment of a penalty. While it could be argued that legislative authority is not required, it may be appropriate for the Commission’s decision on this to be included in 30 TAC §70.8 regarding Financial Inability to Pay.</p>

COLLECTIONS ISSUE 3B, ATTACHMENT A: INABILITY TO PAY FOR CITIES

Information from US Census Bureau (1999/2000)

The following incorporated communities in Texas are considered impoverished communities (median income at or below \$20,000 per year): (69 out of 1200 communities surveyed) 5% of the incorporated communities are at or below the poverty level of \$20,000.

<u>Community</u>	<u>County</u>
Ackerly	Dawson/Martin
Adrian	Oldham
Agua Dulce	Neuces
Alba	Wood
Alton	Hidalgo
Amherst	Lamb
Anderson (Town of)	Grimes
Angus	Navarro
Annona	Red River
Aquilla	Hill
Asherton	Dimmitt
Austwell	Refugio
Balmorhea	Reeves
Barstow	Ward
Bayside	Refugio
Bayview	Cameron
Bellevue	Clay
Benjamin	Knox
Big Wells	Dimmitt
Bonney	Brazoria
Broadus	St. Augustine
Carrizo Springs	Dimmitt
Clint	El Paso
Crosbyton	Crosby
Dickens	Dickens
Earth	Lamb
Estelline	Hall
Freer	Duval
Garrison	Nacogdoches
Goldsmith	Ector
Granjeno	Hidalgo
Hart	Castro
Hico	Hamilton
Indian Lake (Town of)	Cameron
Iraan	Pecos
Jayton	Kent
Kress	Swisher
La Costa	Medina
La Grulla	Starr
Leona	Leon

ATTACHMENT A: INABILITY TO PAY FOR CITIES

Page 2

Lipan	Hood
Lockney	Floyd
Lometa	Lampasas
Lorenzo	Floyd
Los Indios	Cameron
Los Ybanez	Dawson
Marquez	Leon
Meadow	Terry
Nazareth	Castro
Opdyke West	Hockley
Pearsall	Frio
Pecos	Reeves
Poteet	Atascosa
Putnam	Callahan
Rangerville	Cameron
Roaring Springs	Motley
Rocky Mound	Camp
Roscoe	Nolan
San Perlita	Willacy
Santa Clara	Marion
Smyer	Hockley
Spofford	Kinney
Springlake	Lamb
Spur	Dickens
Talco	Titus
Toyah	Reeves
Turkey	Hall
Van Horn	Culberson
Whiteface	Cochran

Collections/Financial Inability to Pay Subcommittee	
Issue No.	4
Key Issue	<u>Payment Plans</u> : Should a policy be established providing criteria for payment plans?
	<u>Basis</u> : Public Comment and Commissioner Input.
Other Subcommittees Reviewing Issue	None.
Recommendation	<p>The workgroup consensus is that a policy should be established that provides criteria for payment plans (including length, who should get them, and minimum payment amounts).</p> <p><u>Recommended Maximum Length of Payment Term: 36 months.</u> In extraordinary circumstances where the 36 month plan is inadequate, TCEQ could consider extending the payment term to no more than 60 months if a cost/benefit analysis supports that term length. (The 5 year maximum is based on typical record keeping standards for businesses and since debts reorganized under Chapter 11 or Chapter 13 of the Bankruptcy Code use a 5 year plan.)</p> <p><u>Eligibility for Payment Plans:</u> The workgroup believes that criteria should be established for who should be eligible for payment plans. Possibilities (from 30 TAC §70.9) include any person(s), firm, or business, upon approval by the Commission, be allowed to make installment payments of an administrative penalty, and qualifying small businesses upon written request subject to criteria by number of employees and/or net annual receipts. An increasing interest rate charge (if allowed to charge interest) for longer payment plans and above market rates were also discussed as ways to ensure that by statute (see Issue 5) respondents did not request payment plans without true need. The payment term should be decreased and minimum payment amount should be increased based on ability to pay. This should discourage those with the present ability to pay the penalty from requesting a payment plan.</p> <p><u>Minimum payment amount: \$100.</u> The workgroup consensus was that the monthly payment amount should be no less than \$100. This standard could be applied to those respondents who are out of business and are unable to pay more than \$100/month (plus interest, if allowed to be assessed). The workgroup then discussed a simplified process to determine minimum payments based on an evaluation of inability to pay as shown in the example below:</p>

	<p>Respondent Revenue (2003 tax return): \$1,000,000 Minimum ability to pay determined to be 1% of revenue: 1% x \$1,000,000 = \$10,000. Maximum payment term: 36 months Minimum monthly payment: \$280 + interest (if allowed to be assessed) for 36 months. If the penalty assessed is less than \$10,000, the respondent gets the number of months needed to pay off at \$280/month. If the penalty is greater than \$10,000, additional financial review is needed.</p> <p>Both the % of revenue established as the minimum ability to pay and the maximum payment plan term are variables that would be established by policy.</p>
	<p><u>Basis:</u> Positive Implications:</p> <ul style="list-style-type: none"> • Provides a simplified method for Financial staff to calculate minimum payment amounts and allows them to focus extra analysis on the cases warranting it. • Recognizes that all operating businesses have the capacity to pay at least 1% of annual revenue for the most recent completed tax year. (Spread over 36 month period is equivalent to paying 0.33% of annual revenue/year (plus interest, if allowed).) • Streamlines enforcement processing time currently spent awaiting completion of backlogged analyses. • Creates a standard easily determinable by a SOAH Judge in contested cases. • Since the money is owed to the state, the state is essentially loaning the money to the person, firm, or business. As with any other loan, the respondent should pay interest (if charging interest is approved). • If interest on installment payments is approved, interest rate could increase in proportion to term of payout (just like any other loan), thus encouraging faster pay-off and discouraging those who do not need payment plans from requesting them. <p>Negative Implications:</p> <ul style="list-style-type: none"> • Allows payments for up to 36 months and up to 60 months in extreme circumstances. • 1% of annual revenue could be considered arbitrary and either too high or too low.
	<p>Implementation Impacts:</p> <ul style="list-style-type: none"> • Requires new statutory authority to assess interest on penalties and payment plans. (See Issue No. 5) • Implementation cost is minimal because Financial Administration is in the process of obtaining a new accounts receivable system and the interest utility function is included in the specifications.

Other Alternatives	<p>The subcommittee considered the alternatives listed below but felt the recommendation presented earlier in this document was the better option.</p> <ol style="list-style-type: none"> 1. Maximum term of 12, 24, 48, 72, 84 months. Minimum payment determined by payout period. Longer payment terms are harder to collect. 2. No installment payments. All penalties paid in full within 30 days of the Commission Order.
Notes	<p>The interest component of this recommendation will require additional statutory authority.</p> <p>While there is statutory authority to assess interest on fees, there is no statutory authority to assess interest on penalties and payment plans. The subcommittee recommends that legislative authority for interest be sought. (See Issue No. 5)</p>

Collections/Financial Inability to Pay Subcommittee	
Issue No.	5
Key Issue	<u>Interest Charges:</u> Would the assessment of interest charges on payment plans and/or delinquent penalties encourage payment or result in less requests for payment plans?
	<u>Basis:</u> Requested by Steering Committee on March 11.
Other Subcommittees Reviewing Issue	None
Recommendation	<p><u>Assessment of Interest Charges on Payment Plans:</u></p> <p>The agency currently assesses interest on delinquent fees at a rate of Prime plus 1 percent. The consensus of the workgroup is to impose interest charges on payment plans for administrative penalties. This recommended interest would be considered a financing charge for the use of payment plans.</p> <p>Interest rates should increase with the length of the payment plan to discourage using the agency as a lender.</p> <p>The revenue accounting system would have to be upgraded substantially to treat these accounts more like loans. The Financial Revenues section is investigating a new accounts receivable and billing system and will include in its functional requirements the ability to assess a finance charge. Commission rules will be impacted by this decision.</p> <p>Positive Implications:</p> <ul style="list-style-type: none"> • Discourages payment plans. • Shortens the length of payment plans and/or makes the agency the “lender” of last resort.

	<p>Negative Implications:</p> <ul style="list-style-type: none"> • Charging interest may serve to increase delinquent amounts owed. <p><u>Assessment of Interest Charges on Delinquent Administrative Penalties:</u> Administrative penalties are assessed against a respondent through agreement (Agreed Order), by default, or following a contested case hearing. Administrative penalties assessed in an Agreed Order are either paid in full when the respondent signs the order, or a payment plan is issued. Interest on payment plans is addressed above. Therefore, the question is whether the assessment of interest charges for late payment would encourage prompt payment of administrative penalties associated with Default Orders or Orders following contested case hearings.</p> <p>Default Orders result from the failure of the respondent to request a hearing or reach agreement with the agency; consequently, they often result in non-payment of the penalty. While interest will increase the amount of money owed to the agency, it will likely also be an incentive for respondents to pay more quickly. Therefore, it is recommended that the agency seek legislative authority to assess interest charges on delinquent penalties as well.</p> <p><u>Basis:</u> Interest is defined as compensation for the use, forbearance or detention of money (Finance Code Chapter 301, Sec 301.002 (4), Definitions).</p> <p>The Commission is authorized by the Water Code to impose interest on delinquent fees. A similar structure could be applied to payment plans for administrative penalties which would increase the amount of revenue collected on accounts that are slowed by payment plans.</p> <p>The use of interest charges may encourage prompter payment of penalties.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • LBB measures are not affected. • Time to implement is contingent upon implementation of a new accounts receivable system which can compute interest charges for delinquent accounts and payment plans. The agency is currently reviewing bids for a new system. Estimated completion date is August 31, 2005. • Statutory authority is needed to assess interest on delinquent penalties and payment plans.
<p>Other Alternatives</p>	<p>Other options may serve to encourage payment:</p> <ul style="list-style-type: none"> • Quicker referral to the AG and the assessment of their costs. • Referral to a collection agency. • Referral for enforcement action and the assessment of an administrative penalty for non-payment. • Withholding of permits, registrations, licenses, and authorizations. <p>These options could be combined to enhance the agency's collections capabilities.</p>

Notes	While there is statutory authority to assess interest on fees, there is no statutory authority to assess interest on delinquent penalties or payment plans. The subcommittee recommends that legislative authority be sought to assess interest on payment plans. In addition, conforming rule changes may be necessary.
--------------	--

Collections/Financial Inability to Pay Subcommittee	
Issue No.	6
Key Issue	<u>Additional Collection Tools:</u> Would tools such as the ability to levy bank accounts or garnish wages be helpful in collecting delinquent accounts?
	<u>Basis:</u> Requested by Steering Committee on March 11.
Other Subcommittees Reviewing Issue	None.
Recommendation	The workgroup consensus is not to utilize the tools listed above at this time. Other alternatives such as interest charges, payment plans, use of a collection agency, and withholding permits for unpaid penalties and fees are recommended and would be more efficient for collecting delinquent accounts. If these alternatives are not effective in decreasing delinquent accounts then Financial and Legal could take steps to revisit the options above and seek needed legislative authority.
	<u>Basis:</u> Garnishing wages and levying bank accounts require legislative authority. Garnishing wages would not be effective against corporations. Additional agency resources would be needed to administer this alternative.
	<u>Implementation Impacts:</u> None
Other Alternatives	Other options to decrease delinquent accounts are recommended by the subcommittee. The use of a collection agency, payment plans, interest charges and withholding permits/certificates/renewals are better alternatives.
Notes	<p>Examples of approaches under consideration which will improve collections:</p> <ul style="list-style-type: none"> • Quicker referral to the AG and the assessment of their costs. • Referral to a collection agency. • Referral for enforcement action and the assessment of administrative penalty for non-payment. • Withholding of permits, registrations, licenses, and authorizations. <p>Additionally, the billing interface established between the Accounts Receivable system and CCEDS will improve collections by automating invoicing, demand letters, and placement on warrant hold.</p> <p>The subcommittee is not recommending that we utilize these tools. If the recommendation is adopted, no additional statutory authority is needed.</p>

Enforcement Process/Agency Coordination Subcommittee	
Issue No.	1
Key Issue	<u>Streamline the Existing Enforcement Process</u> : How can the current enforcement time lines be revised to streamline the existing enforcement process?
	<u>Basis</u> : Public Comment, State Auditor’s Report, Staff Input and Review of the Current Policy.
Other Subcommittees Reviewing Issue	None
Recommendation	<ul style="list-style-type: none"> • Enforcement cases should be assigned to an Enforcement Coordinator (EC) within 7 days after the Enforcement Action Referral (EAR) is approved in CCEDs by the Section Manager. If the referral is not produced in CCEDs, then the case should be assigned within 7 days of the receipt of the hard copy of the referral to the Enforcement Division; • Abandon the current enforcement case priority criteria that establishes the amount of time the EC has to mail out the draft order and require that all draft orders and penalty calculations worksheets (PCW) be mailed to the respondent no longer than 60 calendar days after the date that the case is assigned to the EC; • If the enforcement screening decision is to refer the case directly to the Litigation Division (LD) for processing, then the case (which includes technical requirements, PCW, and backup documentation) should be forwarded to LD within 60 calendar days after the enforcement screening date; • In the event that the respondent declares an intent not to settle an expedited enforcement action, the case should be referred to the Litigation immediately (without regard for the normal 30 day settlement period); • The settlement deadline should <u>always</u> be limited to 30 calendar days after the date that the draft order and PCW are mailed to the respondent unless an extension of the settlement deadline is approved by the Enforcement or Litigation Division Director; • If a respondent fails to settle or agree to an SEP or provide all the documentation to demonstrate financial inability to pay within 30 days of receiving the draft order, the Enforcement Division refers the case to the Litigation Division and the proposed penalty is increased by 25%; • An extension of the settlement deadline for claims of financial inability to pay penalties should be approved only if the appropriate financial documentation is submitted to the Financial Administration Division within 30 calendar days after the date of receipt of the draft order by the respondent;

- An extension of the settlement deadline for inclusion of a SEP should be approved only if an agreement concerning the amount of the administrative penalty to be paid by the respondent is reached within 30 calendar days after the date of receipt of the draft order and PCW by the respondent;
- Provide SEP information to the respondent during the investigation exit briefing. The information (pamphlet/brochure) should include information concerning basic program requirements/restrictions and a listing of the pre-approved SEPs. The information packet should also include a requirement that the respondent provide the agency with a written declaration that they desire to perform an SEP. The declaration must be submitted to the agency within 30 calendar days from the date of the investigation to retain eligibility;
- An extension of the settlement deadline should never exceed 90 calendar days. This requirement would have the result of limiting the period of time that agency staff and the respondent would have to complete negotiations regarding SEPs and claims of days. This requirement would have the result of limiting the period of time that agency staff and the respondent would have to complete negotiations regarding SEPs and claims of financial inability to pay penalties;
- Reallocate staff resources in such a manner as to increase the number of staff dedicated to financial reviews and the SEP program;
- Remove the invitation for the respondent to submit financial documentation necessary to support a claim of inability to pay the proposed penalty from the order cover letter. The option should only be discussed when the respondent claims financial hardship either in writing or verbally during settlement negotiations;
- If final agreement concerning an SEP and/or claim of financial inability to pay is not reached within 90 calendar days after the date of the extension approval letter then within 95 calendar days after the date of the extension approval letter the enforcement case should be referred to LD for processing (assuming a signed order and penalty payment have not been received by the cashier's office) and the proposed penalty is increased by 25%;
- Settled enforcement actions should be set for consideration by the commission on a date not later than 70 calendar days after the date that the signed agreed order and penalty payment are received by the cashier's office;
- Issued orders containing technical requirements should be tracked/monitored by dedicated ECs whose only function is to ensure timely compliance with the ordering provisions;
- Change the rules to allow service of petition at last known address as provided to TCEQ (in Central Registry);
- Review the use of Findings Orders to ensure that the criteria match up with the agency's compliance history system and permitting decisions.

- Change format of agenda backup materials to include a copy of the Agreed Order or the Default Order and a memo summarizing the facts and issues. The commissioners will receive all of the information they currently receive. The format would facilitate more timely development of the backup.
- Set in place a 90 day review process in which the Litigation Division Management and Enforcement Division Management meet to discuss cases in which an Executive Director's Preliminary Report and Petition (EDPRP) has not been filed within 90 days after referral to the Litigation Division to either get the cases moving or to appropriately dispose of them. Also, have a 180 day review to ensure that no case is in the Litigation Division longer than 180 days without an EDPRP being filed;
- Ensure that Senior Attorneys and Enforcement Section Managers and Division Directors have easy access to case tracking reports from CCEDS (automatically provided to them by e-mail). Building data extracts would help the management of both divisions ensure that cases are processed in a timely manner;
- Reevaluate the advantages/disadvantages of placing enforcement coordinators and litigation attorneys in the field offices. Matrix management of enforcement related personnel may be slowing case processing times;
- Reallocate staff resources in such a manner as to increase the number of staff dedicated to financial reviews and the SEP program;
- Revise the current case assignment process to allow enforcement coordinators and litigation attorneys to develop media specific expertise. The multimedia approach currently used fosters a scenario where coordinators and attorneys struggle to understand case specific facts and therefore slow overall case processing times.

Basis:

Statistical data compiled for fiscal years 2002 through 2004 indicate that barring an extension of the settlement deadline for inclusion of an SEP, determination of financial ability to pay penalties, and/or referral to the Litigation Division, the average length of time between the enforcement screening date and the date of order issuance was:

FY 2002 = 292 days
 FY 2003 = 323 days
 FY 2004 = 291 days

Implementation of the streamlined process should result in an order issuance time line that would not typically exceed **approximately 167 days** from the enforcement screening date (again barring an extension for SEP, ability to pay determination, and/or referral to the Litigation Division).

The streamlined process should also result in a decrease of the time necessary to issue an agreed order when an extension of the settlement deadline is granted by the Enforcement Division. The average length of time between the enforcement screening date and the date of order issuance when an extension was granted for inclusion of an SEP was:

FY 2002 = 417 days (the extension added an additional 125 days to the enforcement process)

FY 2003 = 509 days (the extension added an additional 186 days to the enforcement process)

FY 2004 = 523 days (the extension added an additional 232 days to the enforcement process)

Implementation of the streamlined process should result in an order issuance time line that would not typically exceed **approximately 257 days** from the enforcement screening date when an extension is granted for an SEP.

The order issuance time line would also be decreased when an extension of the settlement deadline is granted for a determination of ability to pay the administrative penalty. The average length of time between the enforcement screening date and the date of order issuance when an extension was granted for an ability to pay determination was:

FY 2002 = 545 days (the extension added an additional 253 days to the enforcement process)

FY 2003 = 491 days (the extension added an additional 168 days to the enforcement process)

FY 2004 = 588 days (the extension added an additional 297 days to the enforcement process)

The streamlined process would again result in an order issuance time line that would not typically exceed **approximately 257 days** from the enforcement screening date when an extension is granted for an ability to pay determination.

The time line recommended for preparation and mail-out of the draft agreed order (i.e., not to exceed 60 days from the screening date), was implemented by the Enforcement Division at the beginning of fiscal year 2004. Implementation of this measure has drastically decreased the average time taken to complete this task as follows:

FY 2002 = 111 days

FY 2003 = 159 days

FY 2004 = 52 days (through February 2004)

Allowing service of process at the last known address of the respondent, as set forth in Central Registry, would save approximately 20 days in the process. This situation happens in about 15% of the cases.

Modifying the use of Findings Orders would result in approximately 30-45 less days being necessary to negotiate an Agreed Order. Thus, Agreed Orders could be negotiated more quickly and corrective action (the same corrective action that would be required in a Findings Order) could be begun and be completed quicker. Currently, if a respondent has an attorney, then much of the time in trying to reach a settlement is spent in arguing about the type of order, i.e. 1660 (in which the respondent denies all the allegations) or a Findings Order (in which the commissioners specifically find that the respondent committed certain violations) because of the ramifications of having "Findings of Facts and Conclusions of Law." Changing the Agenda backup material would reduce the amount of time that is spent reviewing the materials and would decrease the opportunity for errors. All of the necessary information would be set out in the memo. Currently, errors in the agenda backup can result in a case being continued from one Agenda to another for up to a month, or being remanded to the ED and taking several months before it is again set on Agenda.

The 90/180 day Litigation review process would help ensure that cases are moved through the process in a timely manner.

Having the case tracking reports easily available would allow management to identify problem cases quickly and set needed deadlines or assist in resolving the cases.

Disadvantages - Decreasing the time frames in which to negotiate a final agreement concerning SEPs and ability to pay determinations may require additional staff or a reallocation of existing resources in both the Litigation and Financial Administration Divisions. The decreased time lines may also result in an increase in the number of cases that are referred to the Litigation Division after settlement negotiations concerning SEP and ability to pay have failed to produce an agreement. Currently, the percentage of enforcement cases referred to the Litigation Division after negotiations conducted by the EC have failed is as follows:

FY 2002 = 19 percent

FY 2003 = 12 percent

FY 2004 = 15 percent

The degree to which the Litigation Division could be effected by shortened negotiation time lines is incalculable. However, the percentage of enforcement cases that have received an extension for either SEP and/or an ability to pay determination are listed below and we believe that a significant portion of these cases may not achieve settlement under the shortened time line and therefore would be referred to the Litigation Division:

FY 2002 = 21 percent (245 of the 1167 cases mailed out received extensions)

FY 2003 = 12 percent (62 of the 518 cases mailed out received extensions)

FY 2004 = 10 percent (78 of the 781 cases mailed out received extensions through February 2004)

	<p>The recommendation to shorten the settlement deadline to 30 days for Enforcement would increase the number of cases sent to the Litigation Division. Resources would need to be shifted upon implementation of this recommendation in order to avoid creating a backlog situation in the Litigation Division.</p> <p>If one half of the cases reviewed for SEP and/or inability to pay failed to reach agreement within the 90 day extension period, then the Litigation Division could expect to receive an additional 78 cases per annum based on the workload representations for FY 2004. These additional cases would again require either additional staff or a reallocation of existing staff resources.</p> <p>Discontinuing the Findings Orders could result in a perception by the public that the agency was being less strict with violators since the violators would get to deny any wrong-doing (while at the same time paying the same penalty and performing the same corrective actions that they would have been required to do with a Findings Order).</p>
	<p><u>Implementation Impacts:</u> Implementation of the recommendations will/may require:</p> <p>Adding or reallocating existing agency staff to support the agency's enforcement and litigation functions, to support the evaluation of processing of SEPs, and to support the review of financial inability to pay claims.</p> <p>Evaluating the effectiveness of matrix management through a contracted cost-benefit analysis of maintaining matrixed-management enforcement-related employees.</p> <p>Evaluating the appropriateness of current career ladders for enforcement-related personnel to ensure a maximum retention of experienced personnel is achieved.</p> <p>Evaluating and adjusting career ladder entry points for enforcement-related personnel in order to attract high potential candidates.</p> <p>Decreasing the number of cases being submitted for formal enforcement action through a revision of the agency's current enforcement initiation criteria.</p> <p>Revising the Enforcement Division's Standard Operating Procedures (SOP) to:</p> <ul style="list-style-type: none"> a) require that all enforcement cases be assigned to an Enforcement Coordinator (EC) within 7 days after the Enforcement Action Referral (EAR) is approved in CCEDs; b) remove the current enforcement case priority criteria that establishes the amount of time the EC has to mail out the draft order; c) require that all draft orders and penalty calculations worksheets (PCWs) be mailed to the respondent, or referred to the Litigation Division (LD) for processing, not longer than 60 calendar days after the date that the case is assigned to the EC; d) allow for immediate settlement termination in the event that the respondent declares an intent not to settle an expedited enforcement action;

	<p>e) limited the normal settlement deadline to 30 calendar days unless extended at the Director level;</p> <p>f) limit settlement extensions, regardless of justification, to 90 days;</p> <p>g) grant a settlement extension for inclusion of a SEP only if an agreement concerning the amount of the administrative penalty is reached within 30 days after the date draft order is received by the respondent;</p> <p>h) remove the invitation to submit financial documentation necessary to support a claim of inability to pay the proposed penalty from the order cover letter;</p> <p>i) provide for a 25% upward adjustment of the penalty in the event that settlement is not achieved within the established deadline; and</p> <p>j) require that all settled enforcement actions be set for commission consideration 70 calendar days after the date the final documents are received by the cashier's office.</p> <p>Adding or reallocating existing staff so that issued orders are monitored by dedicated ECs whose only function is to ensure timely compliance with the ordering provisions.</p> <p>Revising the current rules to allow service of petition at last known address as provided to TCEQ (in Central Registry).</p> <p>Evaluating the use of Findings Orders, except in the case of Default Orders.</p> <p>Revising agenda backup materials to just a copy of the Agreed Order or the Default Order and a memo summarizing the facts and issues.</p> <p>Establishing a 90 day review process in which the LD and Enforcement Division management meet to discuss cases in which an Executive Director's Preliminary Report and Petition (EDPRP) has not been filed within 90 days after referral to the Litigation Division.</p> <p>Build CCEDS data extracts to help enforcement-related managers ensure that cases are processed in a timely manner.</p>
<p>Other Alternatives</p>	<ul style="list-style-type: none"> • Using an environmental risk-based approach, revise the Enforcement Initiation Criteria (EIC) in such a manner as to decrease the total number of cases being referred for enforcement; • Allow the Chairman or General Counsel to sign certain final orders (criteria to be established), allowing those orders to be issued without undergoing the Agenda process. This process may require new statutory authority (i.e., a revision of Tex. Water Code § 5.122). If the signatory requirement was changed it may be possible to reduce the amount of time lost between the date the settled order is received by the cashier's office and the date of commissioner's agenda, by one half;

	<ul style="list-style-type: none">• Allow only small businesses and small local governments (as defined by the penalty policy subcommittee) the opportunity to demonstrate an inability to pay penalties.• Fund upgrades of CCEDs in order to generate executive summaries automatically.• Consider allowing a 25% penalty reduction for small businesses and small local governments which agree to settle within 30 days of receiving the draft order.
--	--

EXISTING ENFORCEMENT PROCESS
 WITHOUT EXTENSION FOR SEP or FINANCIAL REVIEW or REFERRAL TO LD
 FISCAL YEAR 2002

Approved EAR received	EAR Assigned	Case Screened/Prioritized	Draft Order mail out	Settlement Achieved/Agenda Preparation	Commissioner's Agenda/Order Approved	
? days	14 calendar days	60 to 120 calendar days	60 calendar days	142 days (average)	Total = 292 days (average)	

PROPOSED ENFORCEMENT TIME LINES

Approved EAR received	EAR Assigned	Draft Order mail out	Settlement Achieved/Agenda Preparation	Commissioner's Agenda/Order Approved	
7 days	60 days or less	30 days	70 days	Total = 167 days or less	

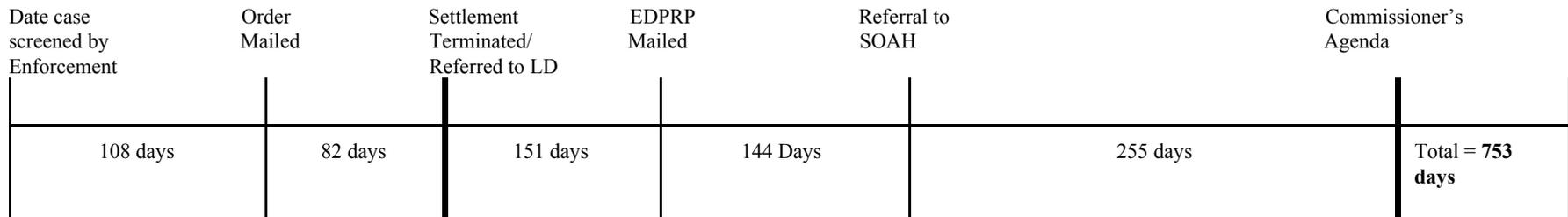
**EXISTING ENFORCEMENT PROCESS
INCLUDING EXTENSION FOR SEP or FINANCIAL REVIEW
FISCAL YEAR 2002**

Approved EAR received	EAR Assigned	Case Screened/Prioritized	Draft Order mail out	Referred for SEP or Financial Review	Agenda Preparation	Commissioner's Agenda/Order Approved
? days	14 calendar days	60 to 120 calendar days	60 calendar days or less	Referral for SEP added an additional 125 days to the case (average) Referral for financial review added 253 days to the case (average)	90 days	Total = 417 days Total = 545 days

PROPOSED ENFORCEMENT TIME LINES

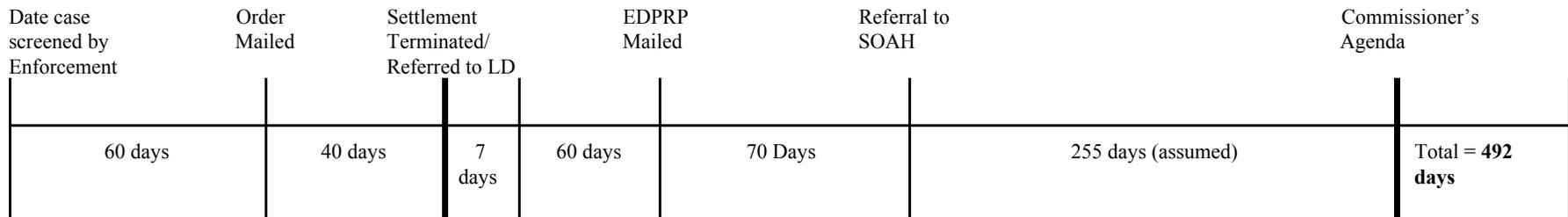
Approved EAR received	EAR Assigned	Draft Order mail out	Referred for SEP or Financial Review	Agenda Preparation	Commissioner's Agenda/Order Approved
7 days	60 days or less	30 calendar days or less	Extension (if needed) will never exceed 90 days	70 days	Total = 257 days or less

**EXISTING ENFORCEMENT PROCESS
WITH REFERRAL TO LITIGATION DIVISION SETTLED THROUGH THE HEARING PROCESS
FISCAL YEAR 2002 (AVERAGES)**



Total time case processing time within LD = 550 days

PROPOSED TIME LINE



Total time case processing time for LD = 392 days

Total case processing time from investigation to order issuance = 522

FYI - The average time line for cases where expedited settlement has failed and the case was resolved by LD without hearing in FY 2002 is 642 days from screening to order issuance. Implementation of recommendations would result in an average of 304 to order issuance (i.e., 100 days in Enforcement, 190 days in LD, and 14 days to signature).

Enforcement Process/Agency Coordination Subcommittee	
Issue No.	2
Key Issue	<p><u>Fast Tracked Enforcement Process:</u> A) Should the TCEQ have a fast track enforcement process in addition to the current process (“expedited” and “contested” process)? B) Should the TCEQ develop standard penalties and or field citations?</p> <p><u>Basis:</u> Public Comment.</p>
Other Subcommittees Reviewing Issue	Penalty Policy and EIC
Recommendation	<p>Develop a limited citation program which could be issued by the Regional Managers. A schedule of penalties would need to be developed for specific violations or types of violations. This would be an all or nothing process in which the respondent would be required to accept the citation or choose to go through the more formal enforcement process. The program could initially be developed for such programs as PST, violations of the outdoor burning rule, OSSF, Watermaster, Public Water Supply, and parts of the control of pollution from motor vehicles violations. The program could be limited to a specific range of penalties. A limit on the number of citations for the same violation could be established so that if a respondent receives two (2) citations for the same violation in a three year period, upon receipt of the third violation the respondent would be referred for enforcement action through the regular process. Field citations should not be eligible for SEP offsets.</p> <p><u>Advantages:</u> A citation program has the potential to improve the efficiency of the enforcement process for the types of violations and allow for little or no investigator discretion. These would be a yes/no type of violation, the respondent is either in compliance with the requirement or they are not. It would also provides the respondents with certainty in the penalty and quick resolution.</p> <p><u>Disadvantages:</u> It would, however, require additional training for Regional Staff and if not properly implemented could lead to inconsistencies in application across regions. It would also require the development of the citation form. A citation program administered at the regional level might also require a change in statutory authority to implement. The issue of statutory authority for such a program has been considered several times over the years with varying opinions.</p>
	<p><u>Basis:</u> Public Comment and a 1994 staff memo outlining a field citation program. This concept has been around for a significant number of years. Statistics from CCEDS regarding Agreed Orders with assessed penalties of \$0 to \$500 dollars indicate that 100 Orders in that range were issued in FY 2002, 85 in FY 2003, and 19 through February of FY 2004.</p>

Implementation Impacts: The first step in implementing a citation program would be to get explicit statutory authority along the lines of that for the Watermaster Program.

A standard citation format would need to be developed for the program. The type of format will probably depend on the type of program to be implemented. For example, if the recommendation is to implement a program where the actual citation is issued under the signature of the Regional Manager and not issued in the field then the citation itself would probably not need to be very detailed. However, if the recommendation is for the citations to be issued in the field then the format may need to be more detailed and would probably need to be considered as accountable property.

There would need to be a complete review of the types of violations and penalty amounts that would be covered by such a program.

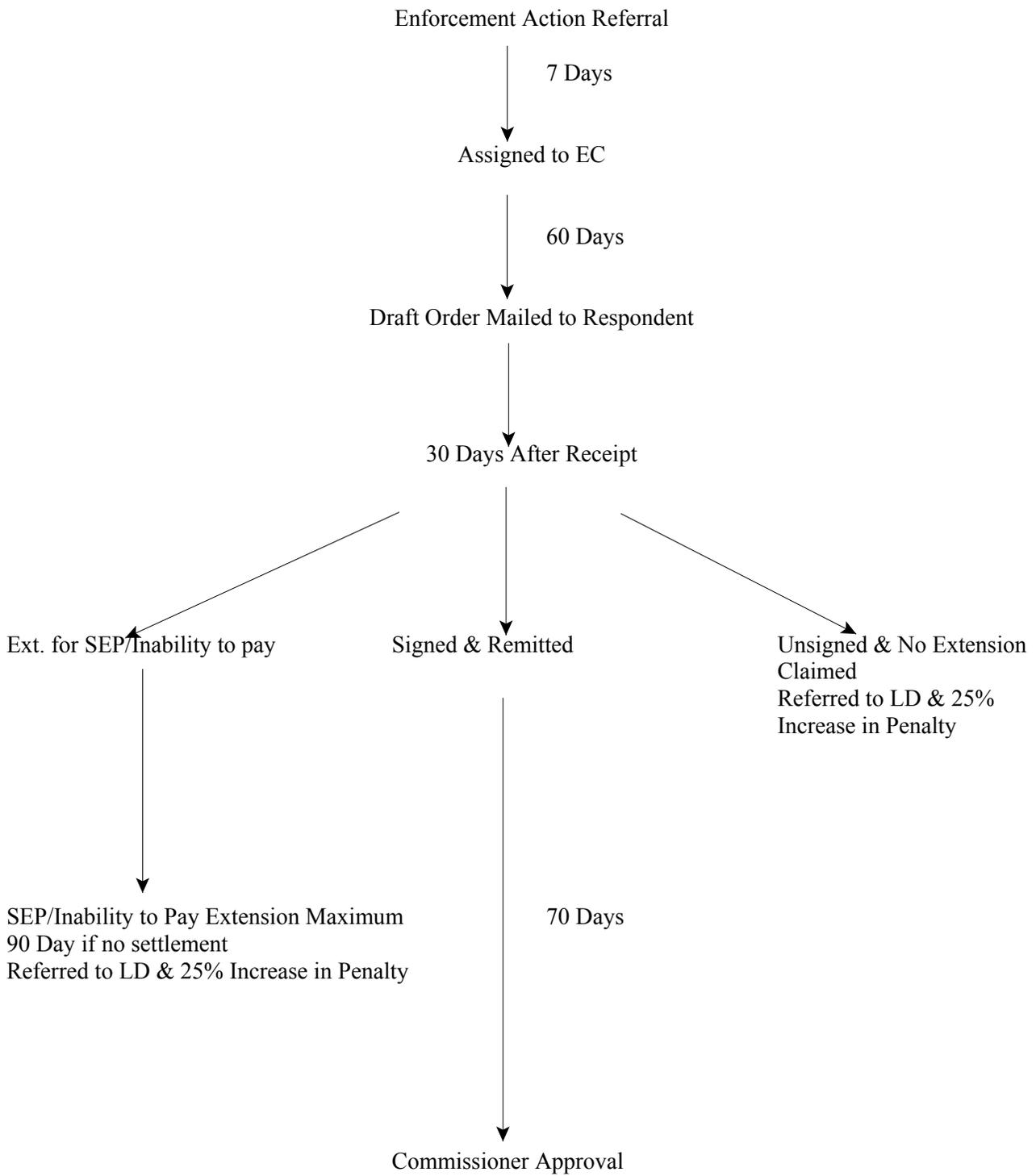
Rulemaking would be necessary to establish the types of violations and the penalty schedule covered by the program.

There would also be a need for additional inspector training and citation program procedures would need to be developed. If the program is established such that the citation is issued after the inspection in the same manner that NOVs are currently issued then many of the existing SOPs should be applicable. If an in-the-field citation program is the choice then a more extensive training program would need to be developed.

The following is a list of some of the implementation procedures that would need to be considered:

- (1) The screening criteria would need to be revised or a new criteria would need to be developed;
- (2) Establish timeframes for compliance to be achieved to help facilitate consistency between regions;
- (3) Establish the process by which payment would be remitted;
- (4) Establish a timeframe for a respondent to remit payment or appeal the citation after which the agency would pursue the more formal enforcement process;
- (5) Develop an appeals process; and
- (6) Develop an SOP to ensure region-to-region consistency within the program.

<p>Other Alternatives</p>	<p>1) Initiate a standard agreed order and standard penalty consistent the recommendations of the Penalty Policy Subcommittee regarding standard penalties.</p> <p>2) Initiate a process whereby notice equivalent to the EDPRP is mailed out with initial settlement offers. Give the Respondent 30 days to either agree to settle or file an answer requesting a hearing. Then, all cases would come to Agenda after the 30-day settlement period (as set forth in Issue No. 1) for a “docket call,” with the exception of cases where an answer was filed (those would be referred directly to Litigation for referral to SOAH within 60 days). Enforcement would present settled and defaulting matters to the Commissioners for preliminary approval, Respondents could come to Agenda to request a hearing or present information to the Commission, or the Commission could approve an extension for inclusion of a SEP or a financial inability to pay determination. The Commission would have the option of approving settled or default orders, remanding a matter back to the ED, or referring matters to SOAH. For settled and default matters, the items would then be published in the <i>Texas Register</i> for public comment and then set on a second Commission Agenda for final approval. (See Attachment B for a timeline of this alternative process).</p> <p>Pros: Provides earlier Commission oversight in the enforcement process. Provides more public interaction with the Commission on enforcement matters.</p> <p>Cons: May be seen as onerous to small businesses and small local governments to travel to Austin for Agenda “docket calls.” Would necessitate at least two Commission Agenda settings to finalize every enforcement action. Would add some additional processing time to the “expedited” process for cases that settle during the first 30 days.</p> <p>3) Consider the development of a compliance support program that would allow certain respondents to receive a partial reduction in the penalty for attending a TCEQ certified training program within 90 days of receipt of the draft order and PCW.</p>
----------------------------------	---



Enforcement Process Issue 2 Attachment A

Enforcement Process Issue No. 2 - Attachment B

PROPOSED ALTERNATIVE ENFORCEMENT TIME LINES IF SETTLEMENT ACHIEVED WITH RESPONDENT AND DRAFT ORDER APPROVED IN PRINCIPLE AT FIRST AGENDA

Approved EAR received	EAR Assigned	Draft Order mail out	Settlement Achieved	First Agenda*	Texas Register End Date	Second Agenda	Order Issued
	Case processed by the Enforcement Division	Settlement Negotiations	Processing by Chief Clerk	Preparation of the executive summary, caption, and public comment period	Processing by Chief Clerk	Chief Clerk Processing of Order	
7 days	60 days or less	30 days	19 days	45 days	19 days	10 days	190 days

- * Other potential actions at the first agenda
- Commission remand to staff for continued negotiation with respondent
 - Commission directive to staff for preparation of a Default Order
 - Commission schedules case for hearing at SOAH
 - Commission approves extension for SEP negotiations or financial review

Enforcement Process/Agency Coordination Subcommittee	
Issue No.	3
Key Issue	<u>Financial Inability to Pay Procedures</u> : How can the financial inability to pay process be streamlined and or simplified?
	Basis : Staff Input and Review of Current Policy
Other Subcommittees Reviewing Issue	The Collections/Financial Inability to Pay Subcommittee is reviewing this issue from the perspective of how the financial inability to pay process can be improved and made more effective. However, that Subcommittee is not reviewing this issue from a timing perspective.
Recommendation	<p>1. <u>30-day deadline</u> - Institute and enforce a 30-day deadline, running from the respondent's receipt of the draft order, to submit documentation supporting a financial inability to pay. Inherent in this recommendation is that the 30-day deadline constitutes a cut-off date beyond which claiming a financial inability to pay is not an option. If financial inability to pay is raised by the respondent during case development, then the enforcement coordinator will send the forms with the draft order, which is earlier than the documents are now being sent. (Currently, the forms are being sent within 60 days after the draft order is sent.)</p> <p style="padding-left: 40px;"><u>Advantages</u>: provides a clear deadline for making a financial inability to pay request and submitting documentation; reduces the number of financial inability to pay analyses which are requested as a delaying tactic; and provides a firm date beyond which a case cannot be slowed down to process a financial inability to pay analysis.</p> <p style="padding-left: 40px;"><u>Disadvantages</u>: making a financial inability to pay request will no longer be an option once the matter is referred to the Litigation Division unless the respondent had already submitted the required documentation (the 30-day deadline will have passed); increases barriers to making a financial inability to pay showing; and requires a rule change to modify the date that documentation is required (30 TAC §70.8).</p> <p>2. <u>Remove the reference to financial inability to pay in the initial communication</u> to the respondent. This would place the burden on the Respondent to make an affirmative statement of a financial inability to pay, rather than have it offered as an option by the enforcement coordinator.</p>

Advantages: would reduce the number of financial inability to pay analysis requests, because that option would no longer be “advertised;” would decrease the number of financial inability to pay requests which are initiated but never completed (simply requesting a financial inability to pay analysis adds a minimum of 20 days to the process even if no documentation is ever sent in by the respondent, because under the current system the respondent has 20 days to submit initial documentation); would decrease the time needed to process many enforcement matters, because the time for receiving documentation and performing a financial inability to pay analysis would be removed; and would reduce the time required for a financial inability to pay analysis, because the back-log of such analyses would be reduced.

Disadvantages: placing the burden on the respondent to raise the issue of a financial inability to pay adds an additional hurdle to a respondent’s ability to making a claim of financial inability to pay; if the cut-off date for requesting a financial inability to pay determination is not strictly enforced, this change could increase the likelihood that such a request is made later in the process.

Basis:

1. Data supplied by the Financial Administration Division shows that the number of financial inability to pay analyses that are being performed continued to rise (60 in calendar year 2000, 106 in calendar year 2002, 90 in calendar year 2003).

2. In 2003, approximately 48% of those requesting a financial inability to pay analysis were determined to be fully able to pay the proposed penalty amount.

3. One FTE, in the Financial Administration Division, at most, is devoted to performing financial inability to pay analyses. That same FTE also performs the analyses for state lead cases. In the past there have been about 19 state lead cases per year, however, this year it will likely be around 30. In addition, there is a recent trend (particularly out of the Abilene office) to request analyses demonstrating that respondents are eligible to be put on the SEP recipient list, which adds to the workload carried by the single FTE.

Due to the backlog and the devotion of a single FTE to financial inability to pay analyses, turnaround time for the performance of a financial inability to pay analysis generally ranges from 60-90 days. This does not include the 20 days allotted for document submission to enforcement/litigation.

	<p><u>Implementation Impacts:</u> Requires a revision to 30 TAC § 70.8(b), a change to the NOE letter, and operational change in the way the Financial Administration Division handles these claims. The Collections/Financial Inability to Pay Subcommittee is drafting a more detailed implementation plan for how financial inability to pay claims are analyzed.</p> <p>a) amend 30 TAC § 70.8(b) to provide that the deadline for submittal of financial inability to pay documentation is 30 days after the initial settlement offer is mailed out;</p> <p>b) provide for an extension of the settlement deadline for inclusion of an inability to pay claim only if all of the information to make a determination has been received within 30 calendar days after the date of receipt of the draft order and PCW by the respondent; and</p> <p>c) require that the penalty be increased by 25% in the event that settlement is not reached within the extension deadline.</p>
<p>Other Alternatives</p>	<p><u>Alternatives:</u></p> <ol style="list-style-type: none"> 1. Remove the financial inability to pay option altogether. <p style="margin-left: 40px;"><u>Advantages:</u> reduces the time to execute an order; holds respondents equally accountable for the full penalty regardless of financial status.</p> <p style="margin-left: 40px;"><u>Disadvantages:</u> increases the potential for default orders (respondents who truly cannot afford to pay the penalty will have no option but to default); corrective actions that may otherwise have been taken if respondent could comply with the order without paying the full penalty may not be taken; requires a rule change (30 TAC §70.8).</p> 2. Filter out “repeat customers” (i.e. only allow one financial inability to pay deferral per x years) or those with poor compliance histories are ineligible, although the latter is likely to have only a negligible impact. 3. Provide an additional FTE (or percentage) to perform financial inability to pay analyses. 4. Simplify the review process (i.e. determine as a % of income or similar standard). <i>Note:</i> the Collections/Financial Inability to Pay Subcommittee is looking at this issue in detail as part of their review. 5. Alter the way determinations for cities are made, since such determinations take significantly (up to three times) more time than an individual respondent’s analysis. <i>Note:</i> the Collections/Financial Inability to Pay Subcommittee is looking at this issue in detail as part of their review.
<p>Notes</p>	<p>This subcommittees’ original primary recommendation was to develop an optional “fast track” process not allowing for a financial inability to pay analysis nor a SEP and provided a deferral as an incentive. However, based on feedback from the Steering Committee, the subcommittee has removed that recommendation.</p>

Enforcement Process/Agency Coordination Subcommittee	
Issue No.	4
Key Issue	<u>SEP Process:</u> How could the SEP process be streamlined and or simplified?
	<u>Basis:</u> Public Comment, State Auditor's Report, Staff Input, and Review of Current Policy.
Other Subcommittees Reviewing Issue	SEP
Recommendation	<p>An extension of the settlement deadline for inclusion of a Supplemental Environmental Project (SEP) should be approved only if an agreement concerning the amount of the administrative penalty to be paid by the respondent is reached within 30 calendar days after the date of receipt of the draft order and PCW by the respondent. This recommendation would require an expanded pre-approved third party list of SEPs from which the respondent could choose.</p> <p>Provide SEP information to the respondent during the investigation exit briefing. The information (pamphlet/brochure) should include information concerning basic program requirements/restrictions and a listing of the pre-approved SEPs. The information packet should also include a requirement that the respondent provide the agency with a written declaration that they desire to perform an SEP. The declaration must be submitted to the agency within 30 calendar days from the date of the investigation to retain eligibility.</p>
	<p>If final agreement concerning an SEP is not reached within 90 calendar days after the date of the extension approval letter then within 95 calendar days after the date of the extension approval letter the enforcement case should be referred to LD for processing (assuming a signed order and penalty payment have not been received by the cashier's office) and the proposed penalty would increase by 25%.</p> <p><u>Advantages:</u> This would insure that the process continues to move forward and provides certainty as to when an action will move to the next stage of the enforcement process.</p> <p><u>Disadvantages:</u> This recommendation has the potential to shift more cases to the Litigation Division and increase the Division's work load.</p>
	<u>Basis:</u> Discussion and consensus by the subcommittee members with input from the Litigation Division.

	<p><u>Implementation Impacts:</u></p> <p>1) A reallocation or addition of staff for the evaluation and processing of SEPs.</p> <p>2) Revisions to the Litigation\Enforcement Division Standard Operating Procedures (SOPs) to:</p> <p>a) provide for an extension of the settlement deadline for inclusion of a SEP only if an agreement concerning the amount of the administrative penalty to be paid by the respondent is reached within 30 calendar days after the date of receipt of the draft order and PCW by the respondent; and</p> <p>b) require that the penalty be increased by 25% in the event that settlement is not reached within the extension deadline.</p> <p>3) Providing SEP information to the respondent during the investigation exit briefing would require the development of a pamphlet or brochure to include information concerning basic program requirements/restrictions and a listing of the pre-approved SEPs.</p> <p>4) Develop, through interaction with local governments, regulated community, and associations, a comprehensive list of eligible and viable SEPs. (See SEP Issue No. 3)</p> <p>5) Revision is needed to the current Notice of Violation to state that a declaration of intent must be submitted to the agency within 30 calendar days from the date of the investigation to retain SEP eligibility.</p>
Other Alternatives	Discontinue the SEP program. This is also an alternative recommendation discussed by the SEP Subcommittee in its Issue No. 1.

Enforcement Process/Agency Coordination Subcommittee	
Issue No.	5
Key Issue	<p><u>Investigation/Enforcement Resources:</u> How can TCEQ increase or reallocate resources to target investigative/enforcement activities?</p> <p>Current distribution of investigative staff has not been changed for several years. If changes are made to current investigation targeting strategies, then investigators will need to be in regions that best support those strategies.</p> <p><u>Basis:</u> Public Comment.</p>
Other Subcommittees Reviewing Issue	EIC

<p>Recommendation</p>	<p>It is not the recommendation of this subcommittee to increase the number of investigative or enforcement staff until the full effect of implementing changes to current processes can be evaluated. It is, however, anticipated that if some of these recommendations (compressed settlement timelines) are implemented, it may result in additional cases being referred to Litigation; thus, additional staff in that division may be needed.</p> <p>The following is a list of recommendations that could increase the effectiveness of the agency's investigation/enforcement programs without adding additional staff:</p> <ul style="list-style-type: none"> • Task Field Operations Division and Enforcement Division to evaluate current training needs of current investigative and enforcement staff for all programs (Air, Water Waste). When specific areas of deficiency are noted, initiate a process by which specific training can be obtained. Considerations would include cost effectiveness (travel dollars) and applicability. • Task Field Operations Division to evaluate the current distribution of investigators and management structure across the state to ensure that the goals of the agency are being effectively met.
	<ul style="list-style-type: none"> • Begin a progression of developing media specific (expert) enforcement coordinators that can be utilized by less experienced staff. • Ensure that a formalized mentoring program for investigative and enforcement staff is in place to ensure that formal and informal processes are implemented in a consistent manner. • Encourage Enforcement Coordinators to participate in programmatic training offered to field staff. This will allow the Ecs to be more efficient with a better understanding of their work product, will increase the effectiveness of ordering provisions, and will allow coordinators to more readily determine compliance with current orders. • Evaluate the effectiveness of having Enforcement Coordinators and Litigation Attorneys in region offices (Matrix Management). It is a perception and, perhaps a reality, that there is some time and effectiveness lost during the communication process between coordinators/attorneys in the field and their management in central office.
	<p><u>Implementation Impacts:</u></p> <p>Survey the training needs through evaluation of current training levels, program required training, and currently available courses. In addition, an evaluation of the cost effectiveness (i.e., travel dollars, production time lost) versus value added from the training, may be required.</p> <p>Complete the current study undertaken by the Field Operations Division to evaluate the distribution of investigative staff in relation to the distribution of regulated entities and their relative priority.</p> <p>Characterize the current media specific experience available within the enforcement-related divisions and where gaps are identified, provide program-specific training</p>

	<p>through field operations and other outside sources (i.e., TEEX, regulated community, and contract vendors).</p> <p>Evaluate whether mentoring programs are in-place and implement programs where shortfalls are noted.</p> <p>Revise current enforcement-related Standard Operating Procedures (SOPs) and formally include mentoring tasks in performance plans and functional job descriptions of management and senior staff.</p> <p>Develop methods to encourage enforcement staff to participate in programmatic training offered to field staff through the formal establishment of training requirements and criteria and by ensuring that staff workloads are adjusted accordingly. Time lost through participation in training events will be regained through an increase in production as expertise increases.</p> <p>Evaluate the effectiveness of matrix management through a contracted cost-benefit analysis of maintaining matrixed-management employees, specifically with regard to enforcement coordinators and litigation attorneys.</p>
Other Alternatives	Consider the appropriate ratio of compliance assistance activities to investigation/enforcement activities to support the agency's overall compliance and enforcement priorities.

Enforcement Process/Agency Coordination Subcommittee			
Issue No.	6		
Key Issue	<u>Investigation/Enforcement Training</u> : How can the TCEQ achieve better trained investigative and enforcement staff?		
	<u>Basis</u> : Public Comment		
Other Subcommittees Reviewing Issue	None		

<p>Recommendation</p>	<ul style="list-style-type: none"> • The agency should consider enhancing its ability to conduct distant learning as a mechanism to enhance communication and training opportunities at a reduced cost for staff and the regulated community. Examples of distant learning include: online self-paced inspector and enforcement curriculum training modules, interactive video conferencing, and desktop internet-based seminars and workshops. A video conferencing pilot project was conducted in the Houston and Arlington regional offices. • The agency should consider alignment of the Environmental Investigator (EI) Career Ladder with the Enforcement Coordinator, and Natural Resource Specialist tracks to encourage equitable and cross-division staff development opportunities. Currently, the EI career ladder provides an increased advantage for advancement that may discourage staff from pursuing an Enforcement Coordinator or Natural Resource Specialist position. • The agency should consider integrating the Environmental Investigator Professional Development Plan (PDP) requirement for Basic or Senior "certification" into the career ladder "training topics" as a formal mechanism for promotions or merit increases. This concept may be a good model for the Enforcement Coordinator track and other career ladders. • The agency should encourage and recognize senior agency staff that serve as mentors and technical specialists to support the development of technical guidance, regulatory development training and entry-level staff development. This effort should result in a higher level of technical consistency and adequately trained workforce. • The agency should encourage the development of additional CCEDS training capacity to increase staff's ability and expertise to use the system. In addition, the agency should invest resources to increase in-house staff expertise to design and produce reports to supplement services currently provided through contractor assistance. This should increase the number of staff with the ability to utilize the system beyond a core group of staff in central and regional offices. • The agency should encourage the enhancement of CCEDS to allow secure remote access to the system to provide staff the ability to utilize the system 24 hours a day from any location. • The agency should continue to build core media program expertise and encourage the cross-training of staff to attend air, water, and waste training workshops offered by the agency. • The agency should review the use of dedicated training funds to identify additional opportunities to offer core air, water, and waste technical training beyond the current training offered through the Training Academy. The Training Academy could be used to offer advanced environmental technical training beyond office productivity and staff development training currently offered.
------------------------------	--

	<p><u>Basis:</u> Discussion and consensus by the subcommittee members. Public comment indicated that staff should be better trained.</p>
	<p><u>Implementation Impacts:</u></p> <ol style="list-style-type: none"> 1) Distance Learning - OCE/FOD is allocating funding for FY05; SBEA is researching use of internet-based seminars and workshops. 2) Alignment - OCE should implement alignment beginning in FY05. 3) PDP - OCE should implement in FY05. 4) Mentoring - OCE should review and make recommendations in in FY05. 5) CCEDS Training - OCE will continue to build capacity in FY05. Management should review appropriate level of resources allocated to meet needs. 6) Remote Access - OAS will provide secure remote access to desktop applications beginning in FY05. This will allow staff to access CCEDS from remote locations. 7) Core Training - Management should prioritize in FY05 and review budget allocation for training. 8) Training Funds - TCEQ should review of use of allocated training funds for core media vs. office productivity training opportunities.
Other Alternatives	<ul style="list-style-type: none"> • Consider outsourcing technical training using contractor assistance.

Enforcement Process - Communications Subgroup	
Issue No.	1
Key Issue	<u>External Communication:</u> How can the TCEQ better share enforcement-related information (i.e. agreed orders, status of pending enforcement actions, etc.) with the public and the regulated community?
	<u>Basis:</u> Public Comment
Other Subcommittees Reviewing Issue	Complaints, Supplemental Environmental Projects, Compliance History Use, Enforcement Process
Recommendation	<p>Enhance TCEQ Enforcement Information on the Public Web Site (also see issues 2 and 4)</p> <ul style="list-style-type: none"> • The information currently available on the agency's external Web site is lacking in content and utility. • Redesign the enforcement portion of the Web site, keeping in mind that the definition of enforcement varies between customer groups and does not necessarily start and stop with the agency's definition. • Link the enforcement process information to other topics that relate to enforcement such as compliance history, citizen collected evidence, enforcement initiation criteria (EIC), supplemental environmental projects (SEPs), and monthly agency enforcement reports. • Implementation of HB2912 includes posting pending enforcement action data on the public Web site. The project is scheduled for development this fall, to be posted by 12/31/04. The legislative implementation team's definition for the purposes of loading data to the Web does not capture the whole picture for the public (or for staff). The definition should be expanded to include information up to when the action is complete. • Load PDFs of enforcement orders on the public site. • Link to EPA's enforcement database (www.epa.gov/idea/otis/mm_idea_query.html) to provide the additional avenue of information. Be sure that the link is accompanied by a basic description of what visitors can expect to find. <p>Review, Update, and Expand Agency Outreach Materials Related to Enforcement</p> <ul style="list-style-type: none"> • Review all outreach materials related to the enforcement process. Ensure that existing materials are appropriate for all customer groups (local governments, elected officials, small businesses, private citizens, etc.) • If necessary, develop revised and/or additional outreach materials. These materials should include those that can be easily modified for use on the regional level. For example, previously prepared and approved slide presentations could be loaded on the T-Net for staff outreach use. • Survey regional staff to determine if improvements are needed to existing outreach materials. <p>Expand Agency Outreach Efforts on the Local Level</p> <ul style="list-style-type: none"> • Focus on outreach at a regional office level. Encourage regional office staff (investigators, SBLGA, etc.) to actively pursue opportunities to speak

	<p>to local groups, such as civic organizations and schools.</p> <ul style="list-style-type: none"> • Develop incentives that recognize regional employees who voluntarily participate in local outreach events. For example, outreach activity could be considered an opportunity to obtain an “exceeds” on annual appraisals, justification for a merit increase, or an additional option under the career ladder promotion criteria. • Identify small, local media contacts that will work with the agency to promote enforcement related articles, announcements, etc.
	<p><u>Basis:</u></p> <p>Enhance TCEQ Enforcement Information on the Public Web Site</p> <ul style="list-style-type: none"> • The subcommittee noted during discussion that the small amount of enforcement information currently posted on the public site is disjointed and often buried. • Clear enforcement related information should appear within the first or second layer of the Web site. • Public comment mentioned the need to expand the content of the current Web site. <p>Review, Update, and Expand Agency Outreach Materials Related to Enforcement</p> <ul style="list-style-type: none"> • Only one enforcement publication currently exists that could be used to educate the general public. This document “The TCEQ Has Inspected Your Business” (RG-344), is designed to be distributed to facilities that have received an inspection. Otherwise, the agency does not have a similar outreach piece designed for the general public. <p>Expand Agency Outreach Efforts on the Local Level</p> <ul style="list-style-type: none"> • A large number of comments on the surveys indicated a desire to see the agency perform more outreach on the local level. • The subcommittee noted during discussion that the level of effort related to outreach varies among regions and programs.
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Dedicate content savvy staff and Web trained staff to create or revise Web content. Usability test to ensure desired outcome. (3 to 9 months) • Develop a content maintenance process to ensure timely, accurate information on the Web. • Dedicate evaluation, writing, editing, and design resources for outreach materials. • Dedicate staff time to present and otherwise interact with the community.
<p>Other Alternatives</p>	

Enforcement Process - Communications Subgroup	
Issue No.	2
Key Issue	<p><u>Internal Communication:</u> How can the TCEQ incorporate enhanced internal communication tools to improve effectiveness and consistency of the enforcement process?</p> <p><u>Basis:</u> Staff Input; Subcommittee Input; and Review of Current Practices</p>
Other Subcommittees Reviewing Issue	Enforcement Process
Recommendation	<p>Develop and post on the T-Net (and/or the public Web site) a step by step description of the enforcement process for staff. (Much of this could consist of links to the public site; see issues 1 and 4.)</p> <ul style="list-style-type: none"> • Each office has its own T-Net page to address its own needs. However, other staff that are not directly associated with the enforcement process, or who only deal with one portion of the process, need the whole picture. <p>Expand the data that will be loaded to the public site to implement HB2912 and provide additional data on the T-Net for staff viewing. (See also issue 1.)</p> <ul style="list-style-type: none"> • Internal communication would speed up if the names of the investigator, enforcement coordinator, and litigation attorney were posted on the T-Net. This should be done in conjunction with implementation of HB2912 on the public site as described under issue 1. • Load PDFs of enforcement orders on the public site to speed up answers to what exactly is in the orders. • Link to EPA's enforcement database (www.epa.gov/idea/otis/mm_idea_query.html) to provide the additional avenue of information. <p>Instruct staff attorneys to contact the investigator and the enforcement coordinator prior to filing the EDPRP (Executive Director's Preliminary Report and Petition).</p> <ul style="list-style-type: none"> • Whether face-to-face or via telephone conferencing, meeting by at least these key staff would promote knowledge transfer. • This requirement should be added to the litigation manual. <p>Evaluate matrix management of enforcement and litigation staff to include no more than two locations per case.</p> <ul style="list-style-type: none"> • It is hard enough to manage communication between two locations. If the inspector, the enforcement coordinator, and the staff attorney are all in different locations, this increases chances of miscommunication. Also, if a staff attorney is in a field office other than the office the inspector is in, the process is slowed by the need to transmit documents to and from different offices. • Even when it works internally, having staff in several locations working on a case is confusing to the public and elected officials. <p>Set up training and regular reinforcement of what information is available and where.</p>

	<ul style="list-style-type: none"> • New staff need training, but maintenance of knowledge is also important. • We have a “captive audience” for the T-Net, so we can show people what is available and how to access it. <p>Expand use of video conferencing.</p> <ul style="list-style-type: none"> • Provides face-to-face communication from remote locations.
	<p><u>Basis:</u></p> <ul style="list-style-type: none"> • Subgroup discussions focused on identifying improvements needed to assist enforcement and non-enforcement staff on access to information and each other. • Matrix management concerns were part of public comment received.
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Dedicate content savvy staff and Web trained staff to create or revise Web content. Usability test to ensure desired outcome. (3 to 9 months) • Develop a content maintenance process to ensure timely, accurate information on the Web. (Build into original development) • Change procedure in the litigation manual. • Change in matrix management procedures. • Evaluate best training vehicles and methods. Develop the training and the maintenance method. • Fund video conferencing.
Other Alternatives	

Enforcement Process - Communications Subgroup	
Issue No.	3
Key Issue	<p><u>Complaint Education:</u></p> <p>A) How can the TCEQ better educate the public on filing a complaint or reporting environmental problems?</p> <p>B) How can the TCEQ educate the public on citizen collected evidence?</p>
	<u>Basis:</u> Public Comment
Other Subcommittees Reviewing Issue	Complaints
Recommendation	<p>Revise the TCEQ public Web site to provide easier access to information with respect to agency complaint procedures.</p> <ul style="list-style-type: none"> • Clearly use the word “complaints” throughout the Web site, since that is the term that the public more readily relates to. • Revise the home page to include a clearly marked link to the complaint reporting information. • The complaints information should clearly delineate the different levels of complaints, such as those that need immediate response and those that will be handled the next working day. This would ensure that the complainant is clear on when to expect an agency response and knows what procedure

	<p>to use when reporting.</p> <ul style="list-style-type: none"> • Clear links to guidance on the definition and use of citizen collected evidence should be developed. • The recently developed Nuisance Odor Protocol should be added to the Web site. <p>More extensively publicize the agency Web site as an avenue for complaints.</p> <ul style="list-style-type: none"> • Take proactive steps to expand the number of Web sites of other agencies and organizations that link to our Web site. • Set up a WebTrends report to evaluate frequency of Web access to complaint information. <p>More extensively publicize the TCEQ complaint handling procedures in forums other than the Internet, including to other people who are routinely out in the field.</p> <ul style="list-style-type: none"> • The 1-800 complaints line number should be listed prominently and consistently in the government pages of Texas phone books (“the blue pages”). • Information cards, which list phone number contacts for various types of complaints, should be prepared and distributed to staff so they have an easy reference guide. • Provide relevant information to people such as police officers and utility repair staff as to what types of things the agency would want reported. Newsletters, trade magazines, seminars, and training events would be good mechanisms for this information exchange, as well as the peace officer training the agency currently offers. • Survey applicable staff to determine if improvements or changes are needed on the agency brochure “Do You Want to Report An Environmental Problem?” and obtain input from the public and regulated community through the SBLGA CAP program. <p>Agency staff at all levels should be encouraged to include complaint handling procedures when making presentations in appropriate venues.</p> <ul style="list-style-type: none"> • Develop guidance instructing staff to include the complaint handling procedures in appropriate presentations. • Make applicable information for presentations available to staff on the T-Net, to enhance the consistency of the information presented and to minimize the need for the presenter to prepare the information each time.
--	---

	<p><u>Basis:</u> Although the mechanisms for effective and efficient complaint handling are in place at the TCEQ, public comments indicated that knowledge of these procedures may not be widespread. Steps should be taken to make this information more readily available to the public.</p> <p>The subcommittee looked at a number of other agency Web sites, as well as organization Web sites, to determine the frequency with which the TCEQ link appeared. A Google search was also conducted.</p> <p>The subcommittee looked at the current enforcement and complaints information on the TCEQ Web site, as well as that of other states' environmental agencies, to evaluate those items that would be best to include.</p> <p>Agency complaint handling procedures for receiving complaints by telephone, by e-mail, by mail, and through the Web were reviewed.</p>
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Add a link to the home page and convert existing Web material. (1 month) • Evaluate existing Web material and usability test. (additional 2 or 3 months) • Dedicate a team to create a communications plan to targeted audiences and determine needed resources. (Resource needs depend on what audiences are targeted and level of effort.) • Contract to develop presentation materials to make available for download from the T-Net.
Other Alternatives	<p>As an alternative to the statewide public awareness campaign recommended in Communications Issue No. 4, the agency could implement a targeted public campaign highlighting the TCEQ complaint reporting process that is aimed at particular audiences based upon certain complaint types. These types should be selected based on the risk factors incorporated in the agency work plan strategy. Targeted types of complaints should be re-evaluated annually along with the work plan.</p>
Notes	<p>The recommendations for more extensive publicizing of the agency complaint reporting and handling procedures would obviously increase the workload on the regional staff with respect to the complaints that would have to be investigated. While the positive side of this is obvious, it is a fact that the regional offices are in many cases already doing all that they can with respect to the workload. Resources need to be evaluated to ensure that staff workload is distributed appropriately based on agency priorities.</p>

Enforcement Process - Communications Subgroup	
Issue No.	4
Key Issue	<u>Enforcement Education</u> : What is the best way to educate the public and regulated community on the enforcement process?
	<u>Basis</u> : Public Comment
Other Subcommittees Reviewing Issue	None
Recommendation	<p>Objective: Establish a clear, concise, and direct characterization of the enforcement process that will be delivered using various communication tools to educate both the public and regulated entities.</p> <p>Elements:</p> <ul style="list-style-type: none"> • <u>Statement of Objective</u> – to have available to all regulated entities and the public information sufficient to clearly explain the specific outcome of meeting, or failing to meet, the requirements of the TCEQ. • <u>Clear Process Path</u> – the enforcement process must be sufficiently logical and predictable that it can be reduced to a simple flow diagram of steps, actions, and conclusions. Obviously, this product must depend on the outcome of considerations for changes to the process as part of the overall process review. • <u>Clear Definitions</u> – the message must include clear definitions of the important terms, such as investigation, notice of violation, notice of enforcement, and order. • <u>Direct and Predictable</u> – anyone reviewing the process should be able to predict with reasonable certainty what outcome will arise from specific actions. Potential outcomes – penalties, ordering provisions, use of compliance history, and supplemental environmental projects (SEPs) – should be spelled out directly. • <u>Management Priority</u> – consistent description of the enforcement process should become a routine objective of agency representatives whenever the appropriate opportunity for presentation of a significant agency issue becomes available. • <u>Staff Priority</u> – Agency staff presented with the obligation to explain the enforcement process must be familiar with the details and capable of directing any party to the best source of information. <p>Communication Tools: The focus of the communication must be on the most cost-effective media available. (Also see issues 1 and 2).</p>

	<p>Request proposals (bids) on a statewide agency public awareness campaign to better educate the public on what the agency does and the ways in which the agency improves and maintains the environment. Once a proposal is chosen, seek the funds needed to implement the campaign.</p> <p>The agency’s public Web site should be the core around which the communication of the enforcement process occurs. The agency Web site should contain all of the elements of the enforcement process “package” and must be maintained so that it is consistent with any part that is transferred to print or other media for other types of distribution.</p> <p>Other means of communication include:</p> <ul style="list-style-type: none"> • Reports or brochures that reproduce information available from the Web. • Targeted information directed to specific industry or business types (or public groups, associations, etc.) that tailor the enforcement process to specific interests or objectives (similar to the current SBLGA targeted information). • External meetings – annual Trade Fair, conferences, trade association proceedings, law conferences, local or regional meetings – all should be targeted as potential forums for agency presentation of a description of the enforcement process. • Additional use of internal tools to enhance staff coordination (see issue 2).
	<p><u>Basis</u></p> <ul style="list-style-type: none"> • Positive – a clear understanding of the process will help the public understand the other elements of enforcement and their context. A statewide campaign will reach a larger audience than other means of communication to the public. • Negative – a clear understanding of the process will increase public awareness of the legalistic, procedural complexity of the process. A negative implication of the statewide campaign is cost. Such an effort could require millions of dollars. As examples: the Drive Clean Across Texas campaign cost \$3 million to initially establish and \$1.5 million per year to maintain, and is targeted at only the nonattainment and near-nonattainment counties and not statewide. The statewide Don’t Mess With Texas campaign cost \$30 million to start up. • The success (or at least the difficulty) of the communication effort will depend significantly on the outcome of the broader effort to improve the “process.”
	<p><u>Implementation Impacts:</u></p> <p>1. Agency Communications would take the lead in drafting a Request for Proposal (RFP) that would encompass all elements necessary to conduct a statewide public education campaign. This campaign would educate Texans about the roles and responsibilities of the TCEQ and specifically, how the agency enforces state and federal environmental laws. This RFP could include as deliverables what communication tools would be utilized as part of the campaign such as, printed materials, web page designs, giveaway promotional items, and radio and/or</p>

	<p>television public service announcements. Once a proposal is chosen, funding for the RFP would have to be secured from the appropriate sources before the campaign could be implemented.</p> <p>2. Dedicate content savvy staff and Web trained staff to create or revise Web content. Usability test to ensure desired outcome. (3 to 9 months)</p> <p>3. Develop a content maintenance process to ensure timely, accurate information on the Web. (Build into original development)</p> <p>4. Dedicate a team to create a communications plan to targeted audiences and determine needed resources. (Resource needs depend on what audiences are targeted and level of effort.)</p> <p>5. Dedicate evaluation, writing, editing, and design resources for outreach materials.</p>
Other Alternatives	

Enforcement Process - Communications Subgroup	
Issue No.	5
Key Issue	<p><u>Compliance History Education:</u> What is the best way to educate the public and regulated community on the use of compliance history?</p> <p><u>Basis:</u> Public Comment</p>
Other Subcommittees Reviewing Issue	Compliance History Use
Recommendation	<p>Design an easily explainable rating system.</p> <ul style="list-style-type: none"> • We need to be able to use a familiar comparison, such as a report card or a test curve. • We need a rating system that puts compliance information into perspective. Example: if a company has a large number of inspections, the public's assumption is that they are a bad player to have needed so many. They may just have that many sites that come up for inspection. • We need relative comparisons: small business to small business; refinery to refinery. • We need to define exactly what the implications of a ranking is for a business, i.e. why they should care, what are the consequences for enforcement, permitting, and their public relations. <p>Rework Web and enforcement materials to relate compliance history to the rest of the enforcement process.</p> <ul style="list-style-type: none"> • Incorporate compliance history into the enforcement process description that we need to create for the public Web (see issues 1 and 4) • Keep in mind terminology that the public uses: "Are they in good standing with the TCEQ?" "Are they a good company?" "How do you rank them?" • Re-label for clarification. For example, the number of inspections in CCEDS not only includes on-site inspections, but also record reviews, like DMRs. If these can't be separated in reports, we should at least modify the heading to

	<p>indicate both, such as “Inspections and Records Reviews.”</p> <p>Publish lists of poor and high performers.</p> <ul style="list-style-type: none"> • Publish lists on the public Web site. • Publish lists in local newspapers (this would require funding). • Attempt to publicize in local media (media may lose interest after the first lists are published). • We would need to quality assure the rankings, so the agency should give companies a set time to challenge the ranking before publishing. <p>Include the rating in enforcement and permit actions (this recommendation provided by the Compliance Use subcommittee).</p> <ul style="list-style-type: none"> • We could require that compliance ratings be published in public notices required by permitting actions. • We could include the rating in the notices we publish in the <i>Texas Register</i>.
	<p><u>Basis:</u></p> <p>We discussed legislative intent:</p> <ul style="list-style-type: none"> • ensure compliance is factored meaningfully into the enforcement process. • provide a report card for companies. <p>We also discussed current stumbling blocks to understanding, which we concluded are the biggest hurdle to education:</p> <ul style="list-style-type: none"> • There is a fair amount of compliance history information on the public Web site. However, there is a lack of enforcement process information on the Web, so it’s hard for the public to picture how compliance history fits in. • Compliance history is probably explained as well as it can be on the Web, but without the ability to put ratings and the information on compliance reports into perspective, such as small business compared to a refinery, it’s hard to paint a clear picture for the public.
	<p><u>Implementation Impacts:</u></p> <ul style="list-style-type: none"> • Dedicate content savvy staff and Web trained staff to create or revise Web content. Usability test to ensure desired outcome. (3 to 9 months) • Develop a content maintenance process to ensure timely, accurate information on the Web. (Build into original development) • Funding for publishing lists in newspapers. • Changes to public notice requirements.
<p>Other Alternatives</p>	

Complaint Procedures Subcommittee	
Issue No.	1
Key Issue	<p><u>Complaint guidance document:</u> What recommendations for change, if any, are needed for the draft Guidance Document for Field Operations Investigation of Complaints to ensure timely response and adequate follow through?</p>
	<p>Basis: Need to review, finalize, and implement draft complaint document prior to implementation; Public Comment; Staff Input; and Review of Current Practices.</p>
Other Subcommittees Reviewing Issue	EIC
Recommendation	<p>The Complaints Subcommittee reviewed the June 9, 2004 complaint guidance document in its entirety to ensure it addressed and resolved the key issue as it related to timely response and adequate follow through of complaints based on previously received public comments, current survey comments, and staff evaluations. Specifically, the team concluded that:</p> <ul style="list-style-type: none"> (1) the proposed guidance document was adequately revised to address the above issues and should be implemented; (2) the agency should continue to accept anonymous complaints; (3) a sensitivity training component should be included in the Basic Investigator Training, as well as in all annual programmatic investigator training; (4) initial and followup training at regular intervals is crucial to effective complaint handling and response; (5) Citizens Collected Evidence (CCE) applicability continues to exist; (6) the ability to provide complaint handling and response training to the public upon request would be an effective means to expand the public's knowledge of changes in complaint procedures; and (7) FOD should periodically review other states' protocols to determine if TCEQ's protocol is still progressive and cutting edge. <p>The positive implications of the implementation of the Complaint Guidance document include: (1) greater consistency between and within TCEQ regions and staff, (2) greater responsiveness and objectivity by staff, and (3) not a significant resource increase to implement.</p> <p>Basis: The Complaints Subcommittee reviewed the complaint guidance document draft, as well as HB2912 and the public comments.</p> <p>A Complaints Guidance team was organized in February 2003 to review and rewrite the existing complaints manual to accommodate CCEDS and assess the adequacy of current procedures for current applicability and modify as needed. The subcommittee reviewed the work performed by the Complaints Guidance team.</p>

	<p><u>Implementation Impacts:</u> Implementation of the latest draft Complaints Guidance document should:</p> <ul style="list-style-type: none"> • require no additional LBB measures; • include a copy of the document being provided to EPA Region VI; • be accomplished within one month of final commission approval. Training of all Field Operations Division field investigators should be conducted within one year of final commission approval; • supersede the current Complaint Guidance document being used by the Field Operations Division; • have a minimal implementation cost. Initial and followup training, including sensitivity training of agency staff, can be conducted at regularly scheduled training events.
Other Alternatives	<p>Essentially none, however, the subcommittee did consider and disregarded the following alternatives: (1) discard and rewrite the proposed complaints guidance document - this was considered unproductive and unnecessary as the complaints guidance team had thoroughly assessed the needs of the state and the agency, and was better able to determine what would effectively work in the field; and (2) continue to use the current protocol - it was determined that the proposed complaints guidance document was a better process because it reflected the changes needed to coincide with the current database system the investigators are using.</p>
Notes	<p>The Complaints Subcommittee members reviewed HB2912 and concluded that the agency has implemented all relevant provisions.</p> <p>The Complaints Subcommittee members agreed that this document is inter-related with key issue number 2 - Nuisance Odor Protocol report.</p>

**Guidance Document
for
Field Operations Investigation of Complaints**

June 9, 2004

TABLE OF CONTENTS

Section 1	General Complaint Information	<u>3</u>
1.1	Definition of a Complaint	<u>3</u>
1.2	Confidentiality	<u>3</u>
Section 2	Pre-Investigation Procedures	<u>4</u>
2.1	Obtaining Initial Information	<u>4</u>
2.1.1	Where and When	<u>4</u>
2.1.2	What	<u>4</u>
2.1.3	Who	<u>4</u>
2.1.4	Citizen Collected Evidence	<u>4</u>
2.1.5	Confidentiality	<u>5</u>
2.1.6	Anonymous Complaints	<u>5</u>
2.1.7	Providing Basic Information to the Complainant	<u>5</u>
2.1.8	Sites with Multiple Complainants	<u>5</u>
2.2	Complaint Referrals	<u>6</u>
2.2.1	Local Programs, Authorized Agents and Councils of Government	<u>7</u>
2.2.1.1	Local Program	<u>7</u>
2.2.1.2	Authorized Agent	<u>7</u>
2.2.1.3	COG	<u>7</u>
2.3	Complaints Not Routinely Investigated	<u>7</u>
2.4	Complaint Assignment and Prioritization	<u>8</u>
2.5	Receipt of Complaint by Investigator	<u>8</u>
2.5.1	Definition of Complaint Investigation and Complaint Response	<u>8</u>
2.6	Preparation/Pre-investigation	<u>8</u>
Section 3	Site Investigation	<u>9</u>
3.1	Conducting Complaint Site Investigations	<u>9</u>
3.2	Authority, Access, and Right of Entry	<u>9</u>
3.3	Photograph Policy	<u>10</u>
Section 4	Post Investigation	<u>11</u>
4.1	Updating CCEDS	<u>11</u>
4.2	Final Complaint Report	<u>11</u>
4.3	Multimedia Complaints	<u>11</u>
4.4	Violation Documentation	<u>12</u>
4.5	Quarterly Updates	<u>12</u>
4.6	Final Notice	<u>12</u>
4.6.1	Final Notice to Complainants	<u>12</u>
4.6.2	Final Notice to Respondents	<u>12</u>
4.7	Procedure for Continuing Unconfirmed Complaints	<u>13</u>
4.7.1	Regional Recommendation Memo	<u>13</u>
4.7.2	Central Office Review	<u>13</u>
4.7.3	Notification of Complainant	<u>14</u>
4.8	Closure	<u>14</u>
4.9	Filing and Retention	<u>14</u>
	Appendix A	<u>15</u>
	Appendix B	<u>16</u>

Section 1

General Complaint Information

1.1 Definition of a Complaint

A complaint is a type of incident [as defined by the Field Operations Division Standard Operating Procedure on the Web (FODWEB) Incident Guidance/Introduction] [\(Insert hyperlink\)](#) which is a communication, either oral or written, to the Texas Commission on Environmental Quality (TCEQ), reporting a situation or event which the complainant alleges is a possible environmental, health, and/or regulatory concern and the complainant is requesting action to be taken by the TCEQ. The subject of the complaint may or may not be under TCEQ's jurisdiction. The complainant may or may not be anonymous.

1.2 Confidentiality

As policy, the Agency holds all complainant information confidential. To the extent possible, the TCEQ will hold as confidential complainant identity, and all information that could lead to the identification of a complainant. (Please refer to FODWEB, Investigation Guidance/Post Investigation/File Confidentiality.) [\(Insert hyperlink\)](#) Access to complainants' names and addresses will be generally limited to Agency personnel. Complainant contact information will be documented in CCEDS, but will not be released unless directed by the Attorney General's office in response to an open records request. When conducting investigations resulting from a complaint, the investigator will take all reasonable measures to protect the identity of the complainant. It is the discretion of the investigator and regional management to determine what actions constitute reasonable measures.

Some circumstances may occur in which revealing the complainant's identity is necessary. If the role of the complainant changes (e.g. from complainant to a party to a hearing), the Agency cannot guarantee confidentiality. Additionally, if a complaint results in a formal legal proceeding, the court or administrative law judge may require the complainant's identity to be disclosed. Additionally, in order to substantiate the violations, the complainant's testimony at the legal proceeding may be necessary. The complainant may be required to testify when Citizen Collected Evidence is used in a formal enforcement proceeding and should be advised at the time the evidence is accepted.

Issues regarding confidentiality should be made clear to the person when taking information from the complainant in person or over the telephone. Only if the complainant wants to be anonymous and no record is kept of his/her identity, can the Agency guarantee complete confidentiality. If programmatic issues regarding confidentiality and the investigation of a complaint exist (e.g., nuisance complaints), provide this information to the caller at the time of initial contact.

Section 2

Pre-Investigation Procedures

2.1 Obtaining Initial Information

The collection of the initial information is key in the effective and efficient investigation of a complaint. A complaint can arrive at the Agency in a variety of formats such as walk-in, telephone, petition, letter, fax, e-mail. Documentation of the information is the same for all these contact methods. The required initial information includes the following:

2.1.1. Where and When?

Where is the alleged activity occurring? Try to get detailed directions to the site (precise street numbers, landmarks, etc.) When does it occur (late at night, only on weekends)? How long has this activity gone on? If the activity happened years ago, what recent occurrence prompted the call (e.g., former employee, illness)?

2.1.2. What?

What is the nature of the problem? Which media does it involve? What is the impact or effect? Does the occurrence constitute an imminent threat to the environment or public safety? Get specific details about what the complainant believes is the problem, including details about the materials, potential hazards, etc. Has the complainant called anyone else regarding this threat (e.g., EPA, local government, media, TDH, RRC)?

2.1.3. Who?

What company or other entity does the complainant think is responsible for the activity and why? What evidence or basis does the complainant have for believing this party is responsible? Get specific details, including names, addresses and phone numbers if available, and the type of activity that may be the source of the problem.

Always repeat all information to assure accuracy. Try to be clear in your questions to the complainant and in what you write down. Get as much information as you can so that the investigator can effectively investigate the complaint. Use of a data entry form is optional. Any data entry forms are not a component of the public file information and may contain confidential information. File or discard the documents according to the SOP on confidential information. Perform data entry into CCEDS as described in the CCEDS User Manual.

2.1.4 Citizen Collected Evidence [\(Insert hyperlink, Texas Water Code § 7.0025.\)](#)

At times, the complainant may furnish additional information relating to the complaint, including photographs, video tapes, or sample results. This information is to be received and evaluated by the regional office. A Citizen Collected Evidence Log form should be completed to document receipt and evaluation of the evidence. If appropriate, it may be used to substantiate a violation. For more information, refer to the guidance on Citizen Collected Evidence. (Insert hyperlink.)

2.1.5 Confidentiality

Persons recording the complaint information will explain that all complainant information is held confidential to the extent possible. Make it clear to the complainant that confidentiality cannot, however, be guaranteed.

2.1.6 Anonymous Complaints

Confidentiality regarding the identity of the complainant cannot be guaranteed unless the complainant is anonymous; this should be made clear to the person when taking the information. If a complaint is made known to the agency by a complainant who wishes to remain anonymous, the complaint is investigated following the same procedures as any other complaint. Should your programmatic area have regulations that effectively prohibit investigation of an anonymous complaint (e.g., an air nuisance odor) make that clear to the caller at the time of initial contact. Should the caller continue to be anonymous note that in the complaint investigation information.

An anonymous complaint is when contact information is not documented within CCEDS. Provide the caller with the information on how they would obtain results of investigations (e.g., the assigned investigator, copy of the final report, etc.).

2.1.7 Providing Basic Information to the Complainant

During initial contact with the complainant by telephone, be sure to provide a brief outline of the complaint investigation policy and procedure. This would include information regarding confidentiality, the range of time frames possible for a complaint investigation, the possibility of a referral (e.g., local program or county), time frames for reports, etc.

Programs have protocols for the handling of specific types of complaints (e.g., odor, water rights, etc.). See program investigator manuals for additional information.

2.1.8 Sites with Multiple Complainants

A site can have multiple complaints filed with the Agency. The Agency can receive these complaints by two main methods. First is by a petition, when many persons sign and submit a document enumerating their concerns, and providing each person's name and relevant information. When the Agency receives these types of complaints, CCEDS has a means to note this in the "Number Complaining" field. Only the designated lead on the petition will have the personal information entered into the system. This person will be the recipient of any Agency correspondence regarding the investigation.

The second type of multiple complaints per site occurs when the Agency receives more than one call on the same site, issue or condition, within hours, days or weeks of each other. When this situation occurs, the region may document each complainant in a separate incident, all of which can be associated to a single investigation in CCEDS. Alternately, the region may create a single incident, and should document each complainant, including phone number and address, using the CCEDS Contact Maintenance window, and each communication using the CCEDS Contact Communication Log Maintenance window. The "number of persons complaining" information must also be updated to reflect any additions.

When the Agency receives many individual calls regarding the same condition (i.e., >15 - 20), the Regional Director should contact the Field Operations Division Director regarding the number of complaints. At this point, management must establish a specific plan designed to investigate the complaints effectively. These situations should not be a routine occurrence; field management has the option of specialized handling to adapt to unique situations as they arise.

2.2 Complaint Referrals

Should the complaint belong to another program within the region, either transfer the call to a person (not voice mail) in that program or offer to have that program contact the complainant. If the caller prefers, take the information and provide that information immediately to the appropriate program.

When the complaint is not within TCEQ jurisdiction, provide a contact number for the appropriate agency. Request the complainant contact the appropriate agency. If the complainant prefers that the TCEQ take the information, inform the caller that TCEQ will forward the complaint to the appropriate agency. Refer the complaint immediately and enter it into CCEDS as a referred complaint. When referring the complaint to a Local Air Program (LAP), relay the information to the LAP and the LAP will enter it into CCEDS.

Central Office Field Operations Division or other divisions within the Agency may receive the initial complainant contact. The office receiving the contact may offer to contact the appropriate regional office or suggest that the complainant contact the regional office directly. The regional office will gather the initial CCEDS complaint data entry information. The "received" date is the initial date received by the regional office.

2.2.1 Local Air Programs, Authorized Agents and Local Governments

There are three categories for regional/local governments with authority to conduct investigations of citizen complaints. These are Local Air Programs (Air and Stage II); Authorized Agents for On-Site Sewage Facilities (OSSF); and local government solid waste projects for which Councils of Government (COG) administer pass-through grants.

When a regional office receives a complaint for which a local air program, authorized agent or local government has jurisdiction or authorization to investigate, the complainant should be provided with a contact number of the appropriate location that will more readily handle their concerns. Should the complainant insist on this agency taking the information, inform the caller that the complaint will be forwarded to the appropriate agency. Refer the complaint immediately. To document the referral to another agency (other than a Local Air Program), enter the data into CCEDS according to the appropriate priority notation for referral to another agency. For Local Air Programs, relay the information to the Local Air Program, who will enter it into CCEDS. At the time of the referral, the Complaints Coordinator or investigator should request a final report from the investigating authority, if such a report is not required by a Memorandum of Understanding.

2.2.1.1. Local Air Program: In some regions, a local governmental authority has been delegated responsibility for responding to complaints within its jurisdiction. In those areas that have such local programs, complaints should be referred to the controlling entity. Local programs will investigate and document complaints according to the guidance provided in this document.

2.2.1.2 Authorized Agent: OSSF Authorized Agent authority is issued by an Agreed Order with the Agency. The Authorized Agents are responsible for responding to complaints within their areas of jurisdiction. The investigations conducted and actions taken by Authorized Agents are not tracked in CCEDS. For further information, refer to the OSSF Investigator Manual.

2.2.1.3. Local Government Solid Waste Program: The 74th Legislative session (1996) produced House Bill 3072 that directed the TCEQ to allocate half its solid waste fee appropriation for grants to local governments. In addition, the bill required the Agency to allocate the solid waste grant funds among the 24 Councils of Government (COGs). The COGs administer pass-through grants for regional and local solid waste projects (i.e., illegal dumping, used oil, etc.). Each regional office maintains a list of local government contacts for complaint referrals.

2.3 Complaints Not Routinely Investigated

There are categories of complaints that the TCEQ does not routinely investigate based on [Appendix A](#).

Complaints for which there is not enough information provided by the complainant to conduct an investigation will be entered as a CCEDS incident, but will not be investigated. These complaints will be closed with explanatory comments.

2.4 Complaint Assignment & Prioritization

Once a complaint has been received by the Agency, the appropriate program/region should assign the complaint a priority and an investigator according to the FODWEB [\(Insert hyperlink\)](#) and the CCEDS Users Manual [\(Insert hyperlink\)](#).

Deadlines for responding to complaints should be assigned using the guidance in [Appendix B](#), and the workload scheduling priorities for incidents from FODWEB. The Section Manager, Team Leader, Work Leader or designee should assign the complaint a priority and an investigator within one working day of receipt. The Section Manager, Team Leader or Work Leader should note any deviation.

2.5 Receipt of Complaint by Investigator

The investigator should receive the complaint the day that the Section Manager, Team Leader or Work Leader assigns responsibility for the investigation. The investigator will enter the initial complaint incident information into CCEDS within five working days after receiving the complaint. For all complaints other than anonymous complaints and Priority 1 incidents, the assigned investigator will attempt to contact the complainant within two (2) working days of his/her assignment to the case, and/or before conducting the investigation.

2.5.1 Definition of Complaint Investigation and Complaint Response

A complaint may include a site visit or a file search. A complaint investigation begins (CCEDS investigation start date) when information is gathered from a file search, verbal inquiry, a site visit, or any combination of the above. This date must be entered into a CCEDS investigation associated with the CCEDS complaint incident to stop the priority deadline clock.

2.6 Preparation/Pre-investigation

As with any investigation preparation, investigator preparation before entering the field is vital. To prepare for a complaint investigation, follow the FODWEB Pre-investigation Section [\(Insert hyperlink\)](#). Complaints do not require prior notice of investigation [see FODWEB Scheduling the Investigation Section [\(Insert hyperlink\)](#)]. For complaints involving nuisance odors, refer also to the Nuisance Odor Protocol [\(Insert hyperlink\)](#).

Section 3

Site Investigation

3.1 Conducting Complaint Site Investigations

The investigation should be conducted as outlined in the FODWEB Investigation Section. [\(Insert hyperlink\)](#) See Program Manuals for media-specific guidance. See Nuisance Odor Protocol [\(Insert hyperlink\)](#) for nuisance odor complaints.

Follow the same procedure for entrance and exit meetings as required for scheduled compliance investigations.

Multiple investigations on a complaint are possible, but only one investigation can be associated to the complaint incident (see CCEDS User Manual). [\(Insert hyperlink\)](#)

Investigations at isolated locations, MSW unauthorized sites or investigations in emotionally volatile situations pose particular investigator safety concerns. When investigating these situations, having additional field staff, law enforcement, or personnel from other agencies accompany the investigator may be prudent and appropriate.

Should no site representative or complainant be available at the time of the site investigation and the complaint site cannot be found, document the steps taken to find the site and investigate the issue of concern.

3.2 Authority, Access, and Right of Entry

FODWEB Obtaining Access to Investigate Site [\(Insert hyperlink\)](#) includes information on an investigator's authority and right-of-entry. Also included is information on what to do if the owner or operator denies you entry into a site. In particular, the investigator must be aware of certain restrictions:

DO NOT enter property without permission, nor climb over a fence or locked gate. Property boundaries are still boundaries, despite whether the fence is down or the gate is broken.

DO NOT prevaricate or embellish to gain entry.

DO NOT attempt a site visit outside your own region unless authorized by that region.

DO NOT put yourself at risk!

It is important that you observe these restrictions; failure to do so could place you in danger. It could also jeopardize any enforcement if evidence found on a site is tainted or unusable due to illegal entry or misrepresentation.

3.3 Photograph Policy

FODWEB Additional Investigator Information/Photographic and Digital Records [\(Insert hyperlink\)](#) contains information regarding the policy on photographs.

DRAFT

Section 4

Post Investigation

4.1 Updating CCEDS

Within three working days after the complaint investigation is begun, regional staff should use the basic information to create an investigation in CCEDS, and associate it with the complaint incident. This will allow tracking of priority deadlines.

4.2 Final Complaint Report

The Final Complaint Report is to be approved in CCEDS within 60 days following the conclusion of the investigation. A complaint investigation is concluded upon receipt of the last information necessary to complete the investigation report. The reviewing supervisor is responsible for assuring the investigation and documentation are complete.

The content of the Final Complaint Report should include how and when the complaint was investigated, who investigated the complaint, the results/findings of the investigation, and how the complaint was addressed. There should be no reference to the complainant (name, location, etc.) in the body of the report nor any description that would identify the complainant. Peer review must ensure that any such information is redacted from the report before supervisor approval in CCEDS.

4.3 Multimedia Complaints

Complaints may involve multiple program areas. Complaint information should be provided to the appropriate section for coordination and possible multi-media investigation.

No adequate means of recording such complaints as “multimedia” currently exists in the CCEDS system unless all the media are investigated by a single investigator and documented in a single investigation. The CCEDS Users Manual Committee is studying this issue and will incorporate resulting process decisions into the CCEDS Users Manual. The Complaints Committee will update this section to refer the reader to the appropriate section of the CCEDS Users Manual. Meanwhile, the investigator or manager should note multimedia complaints, with the investigation numbers, in the description or comment field of the CCEDS Incident Detail window when creating the incident, and in the Investigation Comments window.

If a single investigator conducts investigations in more than one media, multiple program types may be selected and associated for both the incident and investigation.

4.4 Violation Documentation

The FODWEB section Evaluate Findings [\(Insert hyperlink\)](#) details how to document violations.

4.5 Quarterly Updates

It is a statutory requirement that for every complaint received, the Agency must make written quarterly notifications of investigation status to the complainant(s), and the subject(s) of the complaint, until final disposition of the complaint. The regional office will be responsible for these notifications until final disposition by verification of compliance, or issuance of a Notice of Violation. If the complaint is referred for enforcement (by issuance of a Notice of Enforcement) or litigation, this requirement will become the responsibility of the appropriate division. Retain copies of all Quarterly Update letters in the region files. Handle the complainant Quarterly Updates as confidential documents since they contain complainant information.

4.6 Final Notice

The purpose of the Final Notice is to inform complainants and the subject(s) of complaints of the final disposition of the Agency's investigation of their concerns.

4.6.1 Final Notice to Complainants

The region must notify each complainant in writing of the results of the complaint investigation when the investigation is completed. This may be accomplished by sending a standard cover letter [\(Insert hyperlink\)](#) and a copy of the Final Complaint Report.

4.6.2 Final Notice to Respondents

The region must also notify the subject of the complaint ("respondent") in writing of the results of the complaint investigation when the investigation is completed. This may be accomplished by sending an appropriate letter indicating findings which may include a Notice of Violation or Notice of Enforcement.

Enclose a copy of the complaint brochure (GI 278) with the letters to the complainants and respondents unless one was previously provided. Complaints that do not meet the criteria for investigation will obviously not require a Final Notice Letter.

If for any reason the region cannot provide a Final Notice letter (e.g., the complainant is anonymous or did not provide contact information), the regional investigator should document the reason(s) in the investigation report.

If, after investigation, the region refers the complaint to another division or to another regulating entity for further action, the region should provide contact information to the complainant in this Final Notice letter.

If the complaint is the result of a petition, the region should provide the Final Notice letter only to the petitioning group's primary contact person.

Retain copies of all Final Notice letters in the region files. Handle the complainant Final Notices as confidential documents due to the complainant information contained on the correspondence.

4.7 Procedure for Continuing Unconfirmed Complaints

Field Operations Division has established a procedure to handle continuing unconfirmed complaints, in which the region has taken all feasible actions and a complainant continues to call the Agency to complain. In this situation, the regional Section Manager will prepare a memo recommending discontinuance of complaint investigations. Submit the memo through the Regional Director to the Field Operations Division Central Office (FOD-CO) for peer review.

4.7.1 Regional Recommendation Memo

The memo and supporting documentation should include the following information:

- Name(s) and address(es) of complainant(s)
- Name and address of the complaint source
- Description of the nature of the complaints
- Number of complaints and complaint investigations
- Date, time and nature of each complaint
- Date, time and summary of complaint investigation results
- Discussion of any enforcement activity related to these complaints
- Discussion of any additional or unusual actions by the region (samples, monitoring, after-hours investigations, etc.)
- Discussion of any actions by the company in response to these complaints.
- Discussion of any additional or unusual circumstances regarding the complainant(s) or the complaint source that contribute to the conclusion that additional investigations are unwarranted.

4.7.2 Central Office Review

FOD-CO will convene an ad-hoc Unconfirmed Complaints Committee to review the recommendation. The team will consist of the Field Operations Assistant Division Director, Field Operations Program Liaison, Regional Section Manager, Enforcement Section Manager, Legal Division Liaison and a representative from the Office of Public Assistance. The team may also include other Agency staff, such as toxicology or sampling staff.

The team will review the facts of the case and the reasons for the recommendation to cease complaint investigation. If the team reaches a consensus that the region has taken all appropriate actions, and that there is no benefit to continued investigation, the region will cease response to these complaints.

4.7.3 Notification of Complainant

If the review process results in the decision to discontinue response, the Field Operations Division Director will notify the complainant(s) by letter that the Agency has done all it can do, and that it will no longer respond to that individual's complaints against that entity. Typically, this letter will include a commitment by the regional office to conduct periodic surveillance of the facility to ensure continued compliance with Agency rules and regulations. The Field Operations Division Director will also confirm this decision by Interoffice Memo to the Regional Director.

4.8 Closure

A complaint incident is automatically closed in CCEDS when it is associated with an investigation. A complaint investigation may be approved and is considered closed when no further regional action is necessary, when the responsible party is implementing a plan of corrective action, or the case has been referred to the central office for formal enforcement action, or to the Corrective Action Section for remediation and closure. A complaint may be approved and closed even though the violation is not completely resolved and additional contacts and/or follow-ups with the responsible party are required. Complaints should be closed at the earliest possible time.

4.9 Filing and Retention

The routing of complaint reports to Central Records is to be handled according to Records Management Procedures and the Document Coding Chart. Each region is to establish a filing procedure for those working files maintained within each office. Each region's complaint process is to include these filing procedures.

Appendix A Complaints Not Routinely Investigated

General

1. Recurring unconfirmed complaints that have been evaluated by the Unconfirmed Complaints Committee as being unsubstantiated in accordance with Field Operations policy
2. Complaints that do not fall under TCEQ statutory jurisdiction
3. Complaints against facilities that have not been built
4. Complaints of stressed vegetation or sick animals without a report from a qualified expert (such as the county extension agent, a veterinarian, etc.) indicating a cause/effect relationship.
5. Complaints where the complainant has not first sought relief from the entity with primary jurisdiction (e.g., Local Programs, Authorized Agents, Local Government).

Air

1. Complaints about odor [\(Insert hyperlink to Odor Protocol\)](#) from mobile sources.
2. Complaints of emissions from non-commercial dusty roads.
3. Complaints of emissions which impacted the complainant while traveling on a public road, and for which health impacts were not alleged.
4. Anonymous nuisance [\(Insert hyperlink to odor protocol\)](#) complaints where an identifiable aggrieved party is necessary to substantiate confirmation of the alleged situation.
5. Complaints of outdoor burning [\(Insert hyperlink to Outdoor Burning\)](#) of yard or household waste (as allowed by outdoor burning rules) at a private residence, and for which health impacts were not alleged.

Water

1. Complaints involving private wells when there is no reasonable cause to believe that there is contamination from off-site.
2. Water rights complaints from non-permitted water rights holders. Refer to the most recent Water Rights program guidance memo [\(Insert hyperlink\)](#).

Waste

1. Complaints of contaminated gasoline
2. Complaints regarding individual dead animals [\(Insert hyperlink to MSW Investigator Guidance\)](#).

Appendix B Complaint Prioritization

Complaints should be addressed as soon as possible, within the assigned priority deadlines. Assign priorities using FODWEB-defined workload scheduling priorities [\(Insert hyperlink\)](#) according to the following guidance for complaints

- 1** - Immediately. An imminent threat to public health, safety or the environment which requires immediate emergency response. Most of these events will be classified as emergency response incidents rather than complaints.
- 2** - Within one (1) working day. Complaints which are a potential threat to public health, safety or the environment, but which do not require dispatch of Emergency Response personnel.
- 3** - Within fourteen (14) calendar days. Complaints which have a potential to adversely affect public health or safety.
- 4** - Within thirty (30) calendar days. Complaints which have a potential to adversely affect the environment.
- 7** - Complaints which the TCEQ does not routinely investigate, but that need to be tracked. This may include complaints referred to other entities and complaints not routinely investigated, as well as complaints for which insufficient information was provided.

Complaints are prioritized according to the character of the event and its impact on human health and the environment. Management has discretion to alter response times within the prioritization window.

Complaint Procedures Subcommittee	
Issue No.	2
Key Issue	<u>Nuisance Odor Protocol Report</u> : What recommendations for change, if any, are needed for the draft Nuisance Odor Protocol Review Team report?
	Basis: Need to review, finalize, and implement draft nuisance odor protocol report prior to implementation, Public Comment, Staff Input, and Review of Current Practices.
Other Subcommittees Reviewing Issue	None
Recommendation	<p>The Complaints Subcommittee reviewed the Nuisance Odor Protocol document in its entirety to ensure it addressed and resolved the key issue as it related to timely response and adequate follow through of odor complaints based on previously received public comments, current survey comments, and staff evaluations. Specifically, the team concluded that:</p> <p>(1) the proposed protocol was adequately revised to address the above issues and that the protocol, the FIDO chart, and associated forms should replace the existing nuisance odor investigation protocol;</p> <p>(2) the stakeholder reassessment conclusions and recommendations are still valid and further stakeholder involvement is not necessary at this time;</p> <p>(3) initial and followup training at regular intervals is crucial to effective implementation of the protocol;</p> <p>(4) Citizens Collected Evidence (CCE) applicability continues to exist;</p> <p>(5) the ability to provide odor protocol training to the public upon request would be an effective means to expand the public’s knowledge of changes in complaint procedures;</p> <p>(6) the public would benefit from posting the Nuisance Odor Protocol and FIDO Chart on the external Web and from developing a brochure explaining the process for nuisance odor determinations;</p> <p>(7) FOD should periodically review evolving technologies to determine their odor reevaluation potential; and</p> <p>(8) FOD should periodically review other states’ protocols to determine if TCEQ’s protocol is still progressive and cutting edge.</p> <p>The positive implications of the implementation of the Nuisance Odor protocol document (and the FIDO chart) include: (1) greater consistency between and within TCEQ regions and staff, (2) less staff subjectivity, (3) greater responsiveness and objectivity by staff, and (4) not a significant resource increase to implement.</p> <p><u>Basis</u>: The Complaints Subcommittee received a presentation from one of the original Nuisance Odor Protocol (NOP) team members who discussed the process the NOP team employed to develop the revised nuisance odor protocol document and FIDO chart. This individual walked the subcommittee members through the entire document plus attachments and answered all questions satisfactorily to assure the subcommittee that the NOP team had considered all options and avenues when developing the document and FIDO chart.</p>

	<p>The NOP team was organized in February 2003 and worked for eight months to: (1) develop the proposed protocol and FIDO chart, (2) review and ascertain the continued effectiveness of the stakeholders recommendations regarding odor complaint response, (3) explore the types and effectiveness of the evolving technologies for odor complaints response, (4) develop a training regime for FOD field investigators at regular intervals, as well as the for the public upon request, (5) determine that CCE did not need to be modified, (6) review and determine the continued appropriateness of existing guidance to address the issue of nuisance odor violations at CAFOs; (7) review and determine the need to incorporate other states' current practices into the revised protocol; and (8) work with OPRR and OLS to ensure that odor control is taken into consideration in all permit reviews.</p>
	<p>Implementation Impacts: Implementation of the draft Nuisance Odor Protocol Review Team report should:</p> <ul style="list-style-type: none"> • require no additional LBB measures; • include a copy of the protocol, the FIDO chart, and associated forms being provided to EPA Region VI; • be accomplished by the end of January 2005; • supersede the current Nuisance Odor Protocol being used by the Field Operations Division; • have a minimal implementation cost. Funds will be needed to purchase butanol reference method instruments for the regions and delegated local programs. Followup training of agency staff can be conducted at regularly scheduled training events. There will be an unknown cost associated with the potential training of the public and publication of the brochure.
Other Alternatives	<p>Essentially none, however, the subcommittee did consider and disregarded the following alternatives: (1) discard and rewrite the proposed Nuisance Odor Protocol and FIDO chart - this was considered unproductive and unnecessary as the NOP team, comprised of FOD, MOPs, and legal staff, had thoroughly assessed the needs of the state and the agency, and was better able to determine what would effectively work in the field; (2) continue to use the current protocol - it was determined that the proposed Nuisance Odor Protocol and FIDO chart was a better process because it was less subjective, more objective, and therefore defensible, and would lead to greater consistency in and between the regions; and (3) explore other states' processes/protocols - this was considered unnecessary since one of the directives of the NOP team was to review and consider potential incorporation of other state's protocols when developing the TCEQ revised protocol.</p>
Notes	<p>The Complaints Subcommittee members agreed that this document is inter-related with key issue number 1 - Guidance Document for Field Operations Investigation of Complaints.</p>

Nuisance Odor Protocol Review Team Report

February 1, 2004

[This page is intentionally left blank]

TABLE OF CONTENTS

Nuisance Odor Protocol Review Team	
Executive Summary	1
Nuisance Odor Protocol Review Team Report	
Team Tasks and Goals	4
Team Members	4
Discussion	4
Process	5
Summary of Team Recommendations	
Assessment of the 1993 Nuisance Odor Task Force Report	5
Evaluation of Agency Odor Investigation Procedures	6
Technology	6
Permitting/Registration	9
Concentrated Animal Feeding Operations	9
Citizen Collected Evidence	10
Training	10
Case Studies	11
Appendix A	
Nuisance Odor Task Force Report to the Texas Air Control Board	
Appendix B	
Nuisance Odor Task Force 1993 Report	
Recommendations Summary and Implementation	
Appendix C	
Odor Complaint Handling Procedures, December 8, 1993	
Appendix D	
Odor Complaint Investigation Procedures, November 13, 2002	
Appendix E	
Odor Complaint Investigation Procedures, February 1, 2004	
Appendix F	
CAFO Violation Review Committee Memo, January 9, 2001	
Appendix G	
Continuing Unconfirmed Complaint Procedures Memo, November 2, 2000	

Nuisance Odor Protocol Review

Executive Summary

On March 23, 2003 at the direction of Texas Commission on Environmental Quality (TCEQ) Executive Director Margaret Hoffman, a team was formed to evaluate TCEQ odor complaint investigation procedures to determine whether revisions are necessary at this time given advances in odor detection technology, evolution of issues related to odor regulation, and reconsideration of the historical context of the existing protocol. The team was selected by Ms. Jennifer Sidnell, Director, Field Operations Division, and included staff with extensive experience in nuisance odor investigation and the development of the existing odor investigation policy and procedures. The team was asked to review and evaluate existing documents, make recommendations for changes to the “Odor Complaint Investigation Procedures,” and determine the need for the formation of a stakeholders group to investigate the issues related to nuisance odor investigation. The team was also asked to develop an effective ongoing nuisance odor training program for investigators.

In December 1992, Texas Air Control Board (TACB) Chairman Kirk Watson appointed a Task Force on Nuisance Odors to "identify measures by which efforts to protect the public from the effects of offensive odors can be made efficient, more effective, and more equitable." On December 8, 1993, based on recommendations from the Task Force, the Texas Natural Resource Conservation Commission (TNRCC) Field Operations Division published a guidance document, "Odor Complaint Handling Procedures." This document was reissued on November 18, 2002 with primarily administrative revisions.

The team’s first task was to review the 1993 Task Force recommendations and evaluate the current status of implementation of those recommendations. It was determined that the recommendations from the Task Force are still appropriate, and that the agency has successfully implemented most of these recommendations.

The team reviewed the existing “Odor Complaint Investigation Procedures” and determined that the overall procedures remained valid and were consistent with the agency’s policies and the conclusions of the 1993 Task Force. However the team recommended some updates and clarifications in these written procedures. The team determined that the “Categorization of Odors” chart (contained in the procedures and used to assess whether an observed odor represents nuisance conditions) did not adequately clarify the evaluation that an investigator makes of the four principal attributes of odor (frequency, intensity, duration, and offensiveness--FIDO) when determining nuisance odor conditions. Therefore, the team revised the chart into a decision matrix referred to as the FIDO Chart, specifically emphasizing these odor attributes in a step-by-step process. The team also made administrative updates of the written procedures to reflect current agency organizational structure, etc. The updated “Odor Complaint Investigation Procedures” document (Appendix E) including the “FIDO Chart” will replace the existing procedures document used by field investigators to conduct investigations resulting from nuisance odor complaints.

In order to get input from experienced odor investigators on the updated procedures and FIDO Chart, team members conducted an assessment of several historical or existing nuisance odor cases in their regions to compare it with the existing protocol. These evaluations confirmed that the updated procedures and FIDO Chart clarified the significance of the four FIDO attributes and provided a more complete tool for tracking and charting these attributes over time.

The team felt that agency odor complaint handling procedures, including the updated procedures document and FIDO chart, conformed with the recommendations of the 1993 Task Force and that no additional stakeholder input was required at this time.

The team also addressed several other topics related to odor investigations. Following is a brief description of each of these areas, and the team recommendations.

Odor Detection Technology

Following a recommendation of the 1993 task force, the team reviewed current technology as it relates to odor detection equipment. The first type of equipment reviewed was instrumentation that measures specific compounds known to be odorous. The agency currently utilizes these instruments for compound-specific analysis. It is recommended that the agency develop protocols for this equipment which address procedures and limitations of their use in conducting odor evaluations.

Second, the team reviewed an emerging technology that registers a generalized response to odorous air, rather than measuring specific compounds. It may be possible that this instrument can be “trained” to recognize a specific odor source, or an intensity range for a specific type of odor. The Monitoring Operations Division has purchased one of these instruments, and is currently evaluating it. The team recommends that the Field Operations Division continue to work with Monitoring Operations to evaluate this type of instrument for use in odor evaluation.

The team also reviewed the measurement of odor intensity by the butanol referencing method, which relates the intensity of an odor to a specific known concentration of butanol. The team considers this a promising technique for the measurement of odor intensity, and recommends that the Field Operations Division investigate the feasibility of developing a portable version of this method for use by field investigators. It also recommends that this technique be utilized in training field investigators to understand and recognize odor intensity.

Finally, the team recommends that the Field Operations Division, in conjunction with the Monitoring Operations Division, conduct a periodic review of evolving technologies and their potential for use in the field evaluation of odors.

Permitting/Registration

The team recognizes the impact of a source’s operating procedures and controls on the potential for odor emissions, and recommends that the Field Operations Division work with the Office of Permitting, Remediation, and Registration, and the Office of Legal Services, to develop procedures

for periodic review of permit requirements to identify any areas where permit requirements or application review might enhance the control of odorous emissions.

Concentrated Animal Feeding Operations (CAFO)

Because of the close proximity of CAFOs and residential areas in some parts of Texas, and the involvement of the Texas Supreme Court in limitation of the agency's authority to regulate emissions from these types of facilities, the Field Operations Division has established a procedure for central office review of all potential nuisance odor violations at CAFOs. The team determined that this procedure is still valid and appropriate, and recommends no changes to this procedure at this time.

Citizen Collected Evidence

The agency has established procedures for the use of citizen collected evidence in the establishment of an enforcement case. These procedures require that the evidence collected by a citizen be gathered according to agency investigation and data collection procedures. The Odor Protocol documents the procedures to be used by an investigator or a citizen to collect and document information regarding nuisance odor. The team makes no recommendation for changes to this process related to citizen collected evidence.

Training

The team recommends that every investigator who will conduct odor investigations receive training on odor issues and the Odor Protocol prior to conducting such investigations. It is also recommended that all investigators involved in odor investigations participate in periodic refresher training on odor issues and odor investigation. Further, it is recommended that training on odor issues and odor investigation be made available to all field investigators, whether or not their primary job function includes conducting odor investigations.

Nuisance Odor Protocol Review Team Report

Team Tasks and Goals

Due to recent citizen and legislative concerns about emissions from the Northeast Travis County Landfills, Texas Commission on Environmental Quality (TCEQ) Executive Management has requested that the agency's nuisance odor policy and investigation procedures be reviewed. The charge to the team is to review existing documentation and procedures, assess their current applicability, make recommendations for changes to the existing odor complaint investigation procedures, and determine if there is a need for input from external stakeholders to address these issues. The team has also been asked to develop an effective and ongoing nuisance odor investigation training program.

Team Members

Archie Clouse (Lead), Director, El Paso Regional Office; Jim Reed, Technical Specialist, Field Operations Division, Central Office, Austin; Barry Kalda, Air/Waste Section Manager, Austin Regional Office; Robert Ross, Assistant Director, Dallas/Fort Worth Regional Office; Michael Martin, CAFO Investigator, Stephenville Office; Booker Harrison, Senior Attorney, Litigation Division; Salal Tahiri, Air Section Manager, Waco Regional Office; Kim Watson, Air Team Leader, Houston Regional Office; and Dick Flannery, Assistant to the Air Section Manager, Houston Regional Office.

Discussion

In December 1992, Texas Air Control Board (TACB) Chairman Kirk Watson appointed a Task Force on Nuisance Odors to "identify measures by which efforts to protect the public from the effects of offensive odors can be made efficient, more effective, and more equitable." On December 8, 1993, based on recommendations from the Task Force, the Texas Natural Resource Conservation Commission (TNRCC) published a guidance document, "Odor Complaint Handling Procedures" regarding agency procedures for investigating nuisance odor complaints and enforcement of *30 Texas Administrative Code, Chapter 101.4* (nuisance rule). This document was revised and updated in November 2002, and reflects current agency policy and procedures for investigating nuisance odors.

On March 23, 2003, Jennifer Sidnell, at the direction of Executive Director Margaret Hoffman, assembled a team to revisit the odor investigation protocol. This team included staff with extensive

experience in nuisance odor investigation and the development of agency odor investigation policy and guidance.

Process

The team met by teleconference thirteen times beginning March 28, 2003, and ending November 7, 2003. During that period, it also met three times in Austin for two-day work sessions during which it discussed issues and worked on the preparation of the draft report and recommendations. The two primary tasks were 1) an evaluation of the recommendations of the August 1993 “Nuisance Odor Task Force Report to the Texas Air Control Board,” and 2) evaluation and revision of the agency’s nuisance odor investigation procedures. In addition, the team conducted an evaluation and review of several issues related to odor detection and investigation, including 1) odor detection technology, 2) involvement of New Source Review permitting in odor control, 3) odor issues related to Concentrated Animal Feeding Operations (CAFO), 4) the impact of citizen collected evidence rules and procedures on odor investigations, and 5) training of investigators in odor investigation procedures. In order to evaluate the effectiveness of the proposed new procedures, the team also reviewed several historical odor investigation cases using the proposed new procedures, and used these proposed procedures in conjunction with existing procedures on a trial basis during odor investigations in selected regions.

Summary of Team Recommendations

Assessment of the 1993 Nuisance Odor Task Force Report

The first task addressed by the team was review and assessment of the 1993 “Nuisance Odor Task Force Report to the Texas Air Control Board.” The twenty-eight member Task Force agreed on 18 recommendations, and presented alternative options for several issues on which consensus was not achieved.

The team determined that the recommendations of the Task Force are still appropriate, and that the agency has successfully implemented most of these recommendations. It was concluded, therefore, that additional stakeholders input is not necessary at this time.

A copy of the Task Force Report is attached as Appendix A. The team’s analysis of this report including the current implementation status of its recommendations is found in Appendix B.

The team’s discussion and recommendations regarding each of the recommendations by the 1993 Task Force are incorporated in Appendix B. The team concluded that the issues

evaluated by the 1993 Task Force, and the conclusions and recommendations reached are still valid, and that further stakeholder involvement is not necessary at this time.

Evaluation of Agency Odor Investigation Procedures

Based on the recommendations of the 1993 Task Force report, by memo dated December 14, 1993, the Field Operations Division adopted its first “Odor Complaint Handling Procedures” (Appendix C). This document outlined the procedures an investigator was to follow in response to a complaint, and provided guidance in the subjective determination of whether an observed odor constitutes a nuisance violation. This guidance included a decision-making flow chart based on the statutory definition of nuisance, as well as a “Categorization of Odors” chart which provided a range of descriptions of odor situations from “barely detectable” odors which occur on an intermittent basis to very strong persistent odors which may be considered a nuisance.

This document was updated and revised November 18, 2002 (“Odor Complaint Investigation Procedures”), to reflect administrative changes in the agency, as well as some general changes in Field Operations Division Standard Operating Procedures (FODSOP). The most notable changes include updating the agency name, updating complaint prioritization categories according to FODSOP, and eliminating obsolete references to enforcement timeframes. There were no substantive changes in complaint investigation procedures or the “Categorization of Odors” chart.

The attached revised “Odor Complaint Investigation Procedures” (Appendix E) do not significantly alter the procedures for investigation, but provide an improved tool for evaluation of the four characteristics of odors that must be considered to make a nuisance determination--frequency, intensity, duration, and offensiveness (FIDO). The most significant change is the replacement of the “Categorization of Odors” chart with the “FIDO Chart,” which will be used by investigators to evaluate odors during odor complaint investigations. Use and application of this methodology for characterizing odors is discussed in the revised Procedures document.

The team recommends that this revised Odor Protocol including the FIDO Chart and associated forms replace the existing odor investigation protocol.

Technology

Currently there are several types of technology that can assist in the determination of one or more of the odor attributes. The team has reviewed several types of instrumentation and makes the following recommendations:

1. Widely used instruments that measure specific compounds, such as Gas Chromatograph/Mass Spectrometers and flame and photo ionization detectors, and including new instruments that automatically scan for a large number of compounds.

These can help determine odor intensity, odor type (and therefore offensiveness), and odor frequency and duration. These instruments can be helpful in situations where the odorous components consist of a small number of specific gases or aerosols. Often, however, odorous emissions result from a complex mixture of compounds not easily measured by these instruments (e.g., reduced sulfur compounds from sewage treatment plants, or a combination of reduced sulfur compounds and mercaptans from a landfill). These instruments could also be helpful where they do not directly measure the odorous compounds but instead measure a tracer compound that is present with the odorous compounds. However, using the tracer method to determine intensity should only be employed in cases where the relative concentration of the tracer compound and the odorous compounds is constant.

The agency has a number of these types of instruments and the team recommends their use for odor evaluations where appropriate.

The team recommends that protocols be developed for each instrument that deal specifically with procedures and limitations when being used for odor evaluations.

2. Cryano Nose 320 (The Electronic Nose)

The Cryano NoseChip™ or “electronic nose” manufactured by Cryano Sciences is a relatively new type of instrumentation that is currently being evaluated. It does not measure specific compounds, but uses a grid of transistor junctions that are exposed as a group to the odorous air. Each junction reacts differently to a particular set of compounds, creating a unique electrical current. The microprocessor analyzes the combined pattern of responses and produces a fingerprint of the particular combination of gaseous compounds.

The instrument can be “trained” by exposing it to known odor sources (e.g., a set of landfill odors of various intensities or a set of various sources of odor from a wastewater treatment plant). The microprocessor would produce the fingerprints of each source and store them in labeled files. (These sets of files can be uploaded and stored on a computer and downloaded back to the instrument as needed. Therefore unlimited sets of fingerprints can be generated for later use.) If the training is done using a team of experienced investigators, the instrument can be “trained” to develop fingerprints based on a consensus of the intensity and offensiveness of various sources of odors, thus imitating the odor panel approach that is often used and recommended in odor measurement literature.

In actual field use, the instrument could be used to sample the odors from a landfill. The instrument would compare these odors to its set of fingerprints of landfill odors of different intensities and identify the fingerprint most similar to the odor in question, and give a

confidence factor for the match. Thus, in theory, the instrument could be used to help determine the intensity and type of odors.

But, this method is relatively new and, to our knowledge, has never been used for odor investigations. Also, if the instrument proves useful for odor evaluations, significant staff resources would be required to prepare the instrument for each type of odor. However, there could be significant long-term benefit to the successful implementation of this method, even if used only in limited situations, because of the increased objectivity and consistency of the odor investigations.

Monitoring Operations has recently purchased one of these instruments and is currently evaluating it.

The team recommends that Field Operations purchase additional instruments and that FOD and MonOps develop and implement a plan for the testing and evaluation of this method.

3. Butanol Reference Method

The Butanol Reference Method is a method of rating intensity without regard to specific compounds or odor type, which was developed and tested by Texas A&M University in the early 1990s. It was reviewed by the 1993 Odor Task Force and tested by Texas Air Control Board regional offices at that time. The method consisted of an instrument that allowed an investigator to compare in the field the intensity of the subject odor to several known concentrations of 1-butanol. The odor intensity is reported as a standardized concentration in parts per million of 1-butanol.

The method gave reasonably consistent results and provided a way of indicating the human nose's sense of the intensity of the odor, separating intensity from offensiveness. However, the prototype instrument was very cumbersome to transport, set up and use, with large air tanks, mechanical valves, etc.

The team recommends that the butanol reference method be utilized in investigator training as a means of demonstrating the concept of odor intensity, as well as familiarizing the investigators with the varying intensity levels.

The team also recommends that the Field Operations Division and the Monitoring Operations Division investigate the feasibility of developing a portable version of the Butanol Reference Method that could be used for field determination of intensity levels.

4. Future Technology

With constant advances in microprocessor-controlled technology, it is likely that there will be future improvements in the above technologies, and development of other technologies that could enhance odor evaluation.

The team recommends a periodic review of evolving technologies to determine their odor evaluation potential.

Permitting/Registration

Nuisance odors are not necessarily the result of failure by a facility to operate in compliance with applicable regulatory or permit requirements. In many cases, nuisance odors occur even if the facility is operating in compliance with these requirements, but could be avoided if more appropriate odor-directed management practices or emission controls were utilized. Although permits typically require Best Available Control Technology and/or Best Management Practices, these may not always include consideration of controls and practices for odor control rather than compound-specific emission controls. In addition, emission control technology and practices change over time, and may not be subject to review before odor problems occur.

The team recommends that the Office of Compliance and Enforcement continue to work closely with the Office of Permitting, Remediation, and Registration and the Office of Legal Services to ensure that odor control is considered appropriately in permit review in all programs, and to enhance procedures for review of existing permit requirements related to odor control technology and practices.

Concentrated Animal Feeding Operations

Odor from Concentrated Animal Feeding Operations (CAFO) facilities have become problematic in certain areas where agricultural operations and residential areas merge. For purposes of this discussion, “CAFO” refers to any animal feeding operation, regardless of size. Recent trends show that the number and size of Texas CAFOs will continue to rise. Traditionally, anaerobic lagoons have been used to manage runoff and manure generated by CAFOs. As the size and number of these CAFOs has increased, so has the size and number of lagoons. This has created a major problem for people living in close proximity to these operations due to odors and other airborne pollutants associated with these operations.

The F/R cattle ruling by the Texas Supreme Court has significantly impacted the way the agency addresses odor issues at CAFO facilities. Essentially, this decision upheld a district court determination that, in this case, the odor emissions from this feed lot were caused by “natural processes,” and were thus exempt from regulation under the Texas Clean Air Act’s definition of “air contaminant.” Further, the F/R decision established a two-part test to determine whether emissions are from a “natural process.” The first test is that the process must be one that “occurs in nature.” The second test is that the process must be “affected and controlled by human devices only to an extent normal and usual for the particular area involved.”

By memo dated January 9, 2001, the Field Operations Division prescribed a process for review of these cases by a committee of central office staff. This memo is attached as Appendix F. This team evaluated the issue of nuisance odor violations at animal feeding operations, and has determined that this existing guidance is still valid and appropriate.

A regulatory tool available to the investigator is the Air Standard Permit Authorization in the CAFO rules (321.46). This rule requires set-back limits from permanent odor sources to residences, business structures, schools, churches, and public park areas without written consent of the land owner. The CAFO owner must also develop and implement a plan to control odors at a CAFO. The plan will identify all structural and management practices that the owner will employ to minimize odors and control air contaminants at the facility.

Citizen Collected Evidence

The executive director is authorized by statute to initiate an enforcement action based on information provided by a private individual (Tex. Water Code §7.0025; 30 TAC §70.4). The agency developed a program for citizen collected evidence which includes guidance for the collection of evidence, and a web site which discusses this process and provides links to agency protocols, procedures, and guidelines for collecting and submitting evidence. The rule specifies that any information or evidence submitted by a citizen must be collected according to agency protocols and procedures in order to be considered as viable evidence. The “Odor Complaint Investigation Procedures” documents the procedures to be used by an investigator or a citizen to collect and document information related to odor complaints. This document is available on the agency web site.

The team recognizes that there is an existing process and makes no recommendations for changes relating to Citizen Collected Evidence.

Training

In order to provide for increased consistency and objectivity in the investigation of odor complaints, it is essential that investigators participate in a broad-based training program regarding odor issues as well as the revised “Odor Complaint Investigation Procedures.” This would include discussion of the issues and recommendations presented in this report, as well as specific instruction on the use of the FIDO chart and other odor investigation tools.

The team recommends that every investigator who will conduct odor investigations receive training on odor issues and the “Odor Complaint Investigation Procedures” prior to conducting any odor investigations. It is also recommended that periodic refresher training on odor issues and odor investigation be made available to all investigators. Furthermore, all investigators should receive basic information concerning the odor investigation procedures.

The team recommends the following components be included in all Annual Air Investigator Training events:

- **General Characteristics of Odors and Sources**
- **Review of Nuisance Rule and History of Odor Issues**
- **Odor Complaint Investigation Procedures**
- **FIDO Chart Use, Forms, and CCEDS Checklists**
- **Discussion and Demonstration of Butanol Reference Method (Relative Intensity)**
- **Demonstration of Cryano NoseChip™ (Electronic Nose)**
- **Case Study, Tabletop Exercise, and/or Field Trip**

Case Studies

Several regions conducted an assessment of the proposed FIDO Chart for the purpose of comparison with existing procedures.

Austin Region –A review of complaints received in the Northeast Travis County Landfills case indicates use of the FIDO chart would have led to an alleged nuisance condition approximately three months earlier than was actually the case. Many of the earliest complaints, starting in December 2001, had the descriptions of "gassy" and "gassy garbage." TCEQ fence line monitoring during January 2002, found Hydrogen Sulfide emanating from the landfills' boundaries.

In this case, due to the documented presence of hydrogen sulfide and the use of the term "gassy" by many complainants, the applicable table on the FIDO Chart would be the one entitled, "Odors Characterized as Highly Offensive." During the Spring of 2002, Austin regional investigators responded to dozens of odor complaints and routinely observed light to moderate odors in the neighborhoods. The observed frequency, intensity, and duration of this highly offensive odor would have resulted in a pattern on the FIDO Chart that would indicate a nuisance condition exists. In this case, the agency would likely have alleged a violation in January instead of April.

Dallas/Ft. Worth Region –The new FIDO chart has been taken to the field for all odor investigations since July 2003. The region feels that the chart concepts will allow the region to develop a team/project approach for problematic odor situations; for example, where it is difficult to determine by a single investigator during one or two investigations whether or not the odor impacts represent a nuisance odor condition. The use of the FIDO Chart and revised protocol promotes the development of a plan of investigations, odor logs, source process determinations, etc., to efficiently determine the pattern and impact of odors. These problematic odor situations have historically consumed a significant amount of regional resources when the situation cannot be successfully concluded but, because of continuing complaints, must still be investigated on a reoccurring basis.

El Paso Region –The El Paso Regional Office conducted an assessment of how the new FIDO Chart would have affected odor investigations/enforcement at a rendering plant in the town of Vinton in the El Paso Region.

A rendering plant in Vinton has been the source of numerous odor complaints for about 4 years beginning in 1999. Using the existing odor investigation protocol, the company was cited for multiple nuisance odor violations resulting in enforcement action including agreed orders with significant penalties. The violations were based on individual recurring highly offensive odor incidents in which investigators determined a nuisance condition on the spot. In these cases, making a decision regarding the existence of a nuisance odor was easy due to the strength and offensive nature of the odor. Use of the FIDO chart in this case would also have confirmed nuisance odor violations.

In this case study, the FIDO Chart tracked well with the observations made and would have provided an even better tool to document the frequency and duration of the odors. The use of the chart also accurately categorized the type of odor as offensive and simplified the process for determining a nuisance.

Houston Region--An assessment was made of how the new FIDO Odor chart would have affected odor investigations and enforcement performed at a hog farm in the town of New Caney, Montgomery County.

A hog farm in New Caney has been the source of numerous odor complaints since September 2001. Using the existing odor investigation protocol, the owner of the hog farm has been issued four nuisance odor violations that resulted in enforcement action, including an Agreed Order with technical requirements and penalties. All of the violations were based on recurring, highly offensive hog odors, in which the investigators determined a nuisance condition. During these investigations, determining the existence of nuisance odors was made easy due to the intensity, duration, and nature of the odor.

An assessment of these field investigations and violations using the FIDO Chart was conducted. It was determined that the odors documented during these investigations would have resulted in a confirmed nuisance. The chart would have provided an effective tool for documenting the frequency, intensity, duration, and nature of the odors, and would have simplified the process of determining the presence of a nuisance condition.

The experiences of the case studies indicate that the use of the FIDO Chart will enhance the regions' ability to effectively and consistently assess nuisance odors. Investigators also reported that the use of the Chart provided a systematic approach and more confidence in assessing nuisance odors.

Appendix E

Odor Complaint Investigation Procedures

February 1, 2004

Texas Commission on Environmental Quality ODOR COMPLAINT INVESTIGATION PROCEDURES

The following updates and supersedes the previous version of this document dated November 13, 2002, as well as all other guidance related to odor complaint investigation.

This narrative accompanies the attached flow chart which describes the prescribed process.

DETECTION OF ODOR AND INITIAL RESPONSE

Detection

An odor may be detected by a citizen and reported to a Texas Commission on Environmental Quality (TCEQ) regional office as a citizen complaint, or detected by an investigator without a citizen complaint as the initiating factor. In either case, the regional office should promptly make a determination regarding the appropriate action based on the guidelines below. If an investigation is appropriate, the investigation should be conducted according to the procedures specified in this document and the attached flow chart.

Initial Response

If an odor is detected, and adverse health effects are alleged by a complainant, or suspected by the investigator, it should be prioritized for immediate response, and an investigation should be conducted as soon as possible, regardless of the manner of detection. The definition of "alleged" or "suspected" health effects should remain very broad in this situation, to ensure that appropriate actions are taken any time there is a potential imminent threat to public health and safety.

If an odor is detected by either a complainant or an investigator, and adverse health effects are not alleged or suspected, an investigation should be conducted to determine the cause of the odor (or alleged odor) according to the incident prioritization procedures established by the Field Operations Division.

INVESTIGATION/DATA GATHERING

Following is a brief discussion of the information which should be collected and evaluated by the regional staff in a potential nuisance odor situation. This discussion is not intended to restrict the collection of any information which the investigator considers appropriate or necessary to evaluate the citizen concerns.

It should be noted that the following protocol assumes that the investigation was initiated by receipt of an odor complaint from a citizen. In order to successfully pursue a nuisance violation, there must be an identifiable aggrieved party (complainant).

If the investigation is initiated as the result of detection of an odor by an agency investigator (no complainant), or if the complainant requests anonymity, the purpose of the investigation would be to determine the cause of the odor and require corrective actions, if appropriate, rather than to confirm nuisance conditions. If, however, during the course of an investigation that was initiated by the investigator, an aggrieved party is identified, the investigator should proceed with the following investigation protocol to document the presence or absence of nuisance odor.

Complaint Information

The following information should be gathered by the regional office at the time that a complaint is received by telephone. If the complaint is received in some other manner, this information should be collected prior to the investigation.

- o Name(s) and address(es) of complainant(s).
- o Location where complainant(s) experienced the odor.
- o Dates, times, frequency, and duration when the complainant(s) experienced the odor.
- o Nature of any allegation of adverse effects on the complainant's health, property, animals, or vegetation.
- o Nature of any allegation of interference with the normal use and enjoyment of the complainant's property, animals, or vegetation.
- o Alleged source of the odor.

Investigation Data/Information

All odor complaint investigation activities and results should be documented in the investigation report. The items and discussion below should be included in the investigation, but should not be construed as limiting either the collection or reporting of relevant information.

- o Attempt to locate and assess the odor first-hand. It would be ideal if an investigator could be at the complainant's location at the time that the odor is occurring, in order to experience the same conditions that generated the complaint. This may not be possible, but an effort should be made

to duplicate the experience of the complainant, unless the conditions are considered potentially unsafe.

- o Describe the intensity and offensiveness of any odors observed during the investigation using the terms identified for those factors on the FIDO Chart (copy attached). (“FIDO” is an acronym for Frequency, Intensity, Duration, and Offensiveness).
- o Describe any physical effects experienced by the investigator which are indicative of adverse effects upon health (burning eyes, nose, throat, headache, vomiting, etc.)
- o Describe the normal use of property affected by the odor, and the manner in which such odor could reasonably be expected to interfere with this use.
- o Determine and document the extent of the odor plume. Document on a map of the vicinity the odor survey route, the time the investigator was at each location, and the odor observations at each location. This survey should include upwind and downwind observations at least.
- o Attempt to locate the source(s) of the odor.
- o If a source is identified, attempt to locate the specific cause of the odor (i.e., the specific compound, equipment, or process emitting the odor, and the reason(s), such as a plant upset).
- o Gather local meteorological data for the time when the complainant(s) alleged the occurrence of the odor, as well as the time when the investigation was conducted. This should include, at a minimum, estimates of wind speed and direction, temperature, humidity, precipitation, and sky cover.
- o Describe the terrain features of the area, including natural and man-made features which could influence the flow of air.
- o If the investigator has detected odors at the same location at other times, document a comparison of the current observations with the prior observations.
- o Collect information about the frequency and duration of any observed odors. This includes observations by the investigator during the course of the investigation, and information provided by the complainant or the source relative to these factors.
- o In some cases, such as recurring short-term odor situations, the investigator may ask the complainant to maintain a log of odor observations to document conditions related to the odors experienced. The complainant should be asked to utilize the same terminology as used on the FIDO Chart.

This log can be used to validate or invalidate complaints in conjunction with the other evidence of the case. It would not be used as the sole basis for issuance of a notice of violation. The attached "Odor Log" format should be used in all such situations.

- o The investigator may conduct interviews of other citizens in the area surrounding the complainant's location with the intention of gathering information or evidence to assist in a determination of the validity of the complaint. Caution should be taken, however, to ensure that this information-gathering procedure not be construed as "soliciting" additional complaints.

INVESTIGATION FOLLOWUP

Upon completion of the investigation, the information collected should be reviewed to determine whether a nuisance condition is confirmed. Based on statutory and regulatory language, a nuisance odor exists if an odor has been emitted in such concentration and duration as to a) be injurious to or adversely affect human health, welfare, animal life, vegetation, or property, or b) interfere with normal use and enjoyment of animal life, vegetation, or property. In the first case, if any adverse effect or injury is documented, the source should be required to take measures to mitigate the odor, and the regional office should initiate appropriate enforcement action against the responsible party. If such adverse effects or injury are not confirmed, the FIDO Chart would be used to evaluate the frequency, intensity, duration, and offensiveness of the odor, and to determine whether the evidence in the case constitutes a nuisance violation.

Adverse Impacts

If the preponderance of the evidence collected during the course of the investigation (including discussions with the complainant and observations by the investigator) confirms the presence of odors in such concentration and duration as to be injurious to or adversely affect human health, welfare, animal life, vegetation, or property, remedial action should be immediately required to mitigate the odors, and appropriate enforcement action should be initiated according to agency enforcement procedures. In this situation, these actions should be taken regardless of whether the incident was complaint-generated or detected by the investigator.

Interference with Normal Use and Enjoyment of Animal Life, Vegetation, or Property

If the preponderance of the evidence does not confirm the presence of odors in such concentration and duration as to be injurious to or adversely affect human health, welfare, animal life, vegetation, or property, the investigator should evaluate all the evidence collected during the course of the investigation using the FIDO Chart. This chart is used to determine whether a nuisance odor violation should be issued based on whether the frequency, intensity, duration, and offensiveness of

observed and documented odors combine to cause interference with the normal use and enjoyment of animal life, vegetation, or property.

Each of the four tables on the FIDO Chart represents a level of offensiveness (Highly Offensive, Offensive, Unpleasant, and Not Unpleasant). The intensity of the observed odor is documented using the legend on the right side of the chart, with “VS” representing Very Strong odors, “S” for Strong, “M” for Moderate, “L” for Light, and “VL” for Very Light. The frequency and duration are then plotted on the horizontal and vertical axes of the appropriate table. If the odor situation is at least as intense as the colored block in which it is plotted, it is considered a nuisance odor. If the plot falls outside the colored area of the table (NA), the odor does not represent a nuisance.

Intensity and offensiveness are two distinct factors which should be evaluated separately.

Offensiveness is the innate character of the odor which can be distinguished even in very light concentrations. Intensity is the relative measure of the perceived concentration. Investigators learn to determine relative intensity through experience and/or training. The FIDO Chart incorporates these two distinct factors along with frequency and duration into one integrated tool.

If application of the FIDO Chart confirms a nuisance odor (confirms odors in such concentration and duration as to interfere with the normal use and enjoyment of animal life, vegetation, or property), the regional office should require the responsible party to correct the problem, issue a nuisance odor violation, and initiate appropriate enforcement action based on agency enforcement procedures.

EXAMPLE APPLICATION OF THE FIDO CHART DURING ODOR COMPLAINT INVESTIGATIONS

Following are brief discussions of example nuisance odor complaint investigations, and use of the FIDO Chart to evaluate whether or not nuisance conditions should be cited.

Example 1–Rendering Plant Odor

Scenario 1

A citizen complaint is received alleging “horrible odors” from a nearby rendering plant that occur almost every morning about 10:00 a.m., and last for about an hour. The investigator discusses this with the complainant and arranges to conduct an investigation at 10:00 a.m. the following morning. Upon arrival at the complainant’s residence, the investigator notices the odor which is consistent with improperly treated wastewater from a rendering plant. Further investigation confirms that the rendering plant less than 1/4 mile away is the source of the odor. By 11:00 a.m., the odor has almost completely gone away.

Using the FIDO chart, the investigator characterizes the odor as Highly Offensive, as indicated in the “Odor Characterization Examples” on the back of the chart, and determines that the intensity is

Strong. Based on testimony from the complainant, and on-site observation, the investigator determines that the odor only lasts for about an hour. The FIDO chart indicates that a Highly Offensive odor lasting for about an hour in a single occurrence must be at least Very Strong to be considered a nuisance (see Figure 1). No violation is confirmed at this time.

		ODORS CHARACTERIZED AS HIGHLY OFFENSIVE				
		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R T I O N	1 minute	NA	NA	VS	S	M
	10 minutes	NA	VS	S	M	L
	1 hour	VS	S	M	L	VL
	4 hours	S	M	L	VL	VL
	12 hours+	M	L	VL	VL	VL

Figure 1

However, based on testimony from the complainant that this strong odor occurs almost every day, usually about the same time, the investigator goes to the rendering plant and discusses this situation with the operations manager. It is determined that a process which is conducted at about this time every day is responsible for the odor.

Given all the evidence gathered in this investigation, it is determined that a Strong, Highly Offensive odor is likely to affect the complainant on almost a daily basis under the plant's current operating conditions. Review of the FIDO Chart shows that a Strong, Highly Offensive odor which lasts for about an hour only has to occur as often as quarterly to be considered a nuisance and justify a Notice of Violation. The Chart also shows that a Highly Offensive odor only has to have a Very Light intensity to be considered a nuisance if it occurs for an hour on a daily basis (see Figure 2).

		ODORS CHARACTERIZED AS HIGHLY OFFENSIVE				
		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R T I O N	1 minute	NA	NA	VS	S	M
	10 minutes	NA	VS	S	M	L
	1 hour	VS	S	M	L	VL
	4 hours	S	M	L	VL	VL
	12 hours+	M	L	VL	VL	VL

Figure 2

The investigator therefore concludes that this citizen has been subjected to a nuisance odor, and determines that a Notice of Violation is appropriate.

Scenario 2

If, during the course of the investigation, it is determined that the Strong, Highly Offensive odor occurs every two or three weeks, sometimes for only 10 or 15 minutes, sometimes for up to an hour, the investigator would need to “read between the lines” on the chart to estimate where the frequency and duration of this odor should be placed. In this case, the chart indicates that a Strong, Highly Offensive odor occurring for 10 minutes on a monthly basis would constitute a nuisance, or that it would only have to occur for one minute at a time on a weekly basis to be considered a nuisance. Since this odor has been documented to occur for between 10 minutes and an hour, and occurs more often than monthly, but less often than weekly, it would be reasonable to conclude that the odor is a nuisance.

Example 2 – Auto Body Shop Paint Odor

Scenario 1

A complainant alleges “paint odors” from a nearby auto body shop are so strong and unpleasant that he can’t go in the back yard to play with his kids. He says that normally the odors from the body shop are not a problem, but that since about 8:00 a.m. on this day, they are terrible. An investigator arrives to conduct an odor complaint investigation at 11:00 a.m.

The investigator determines that organic solvent odors from the painting operation, categorized as Offensive according to the “Odor Characterization Examples” on the back of the FIDO Chart, are impacting the complainant’s property with a Strong intensity. The odors continue for one more hour, until 12:00 p.m.

During the investigation at the facility, it is determined that a fork lift operator had accidentally knocked off the paint spray booth stack the night before and when painting began that morning the solvents were being emitted at ground level without the dilution afforded by the tall stack. At 12:00 p.m., the plant manager agrees to discontinue the painting process until the stack is repaired.

Application of the FIDO Chart for this one-time odor event (Frequency = Single Occurrence) indicates that an odor characterized as Offensive, with intensity characterized as Strong, with a duration of four hours, does not represent a nuisance. The FIDO Chart indicates that a single occurrence of an Offensive odor for four hours must be at least Very Strong to constitute a nuisance violation (see Figure 3 on next page).

		ODORS CHARACTERIZED AS OFFENSIVE				
		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	VS	S
	10 minutes	NA	NA	VS	S	M
	1 hour	NA	VS	S	M	L
	4 hours	VS	S	M	L	VL
	12 hours+	S	M	L	VL	VL

Figure 3

Scenario 2

The complainant states that the odors from the nearby auto body shop are not real strong, but that they happen just about every day, and usually last for about an hour. The odor is annoying because it is so frequent. When the investigator arrives, there are no odors present.

Investigation at the facility reveals that most of the work at the shop does not involve painting, and that they “batch” each day’s painting, resulting in perhaps an hour or so of painting each day.

Several investigations are conducted over the next few weeks. During two of these investigations painting operations are being conducted, and Light to Moderate odors are confirmed at the complainant’s property for an hour or a little more.

Application of the FIDO Chart indicates that odors characterized as Offensive, with Light intensity, which impact the complainant for approximately one hour (duration) on a daily basis (frequency), do represent a nuisance violation (see Figure 4).

		ODORS CHARACTERIZED AS OFFENSIVE				
		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	VS	S
	10 minutes	NA	NA	VS	S	M
	1 hour	NA	VS	S	M	L
	4 hours	VS	S	M	L	VL
	12 hours+	S	M	L	VL	VL

Figure 4

Scenario 3

The complainant states that strong paint odors from the auto body shop are experienced occasionally throughout the day about one day a week. They usually only last about 10 or 15 minutes at a time, but that on the days when they do occur, they become very annoying. When the investigator arrives to conduct an investigation, there are no odors observed, but the complainant indicates that the wind has shifted and the odors have disappeared. An odor survey confirms Strong, Offensive odors from the spray painting operation at a point downwind of the facility at the same distance as the complainant's house.

Investigation of meteorological conditions indicates that the complainant's residence is not downwind of the body shop according to prevailing wind direction, but that when the complaint was made, the residence was downwind of the facility. It also confirms that, typically, the complainant's house is downwind of the facility about one day each week.

Investigation at the facility reveals that painting occurs off and on during every work day and that there is only a short paint spray booth stack, thus limiting dispersion. The investigator concludes that Strong, Offensive odors are likely to impact the complainant any time painting operations are underway and the residence is downwind of the facility.

Review of the information collected during this investigation, and application of the FIDO Chart, indicates that the offensive painting odors are impacting the complainant's residence for 10 to 15 minute periods throughout any day when the orientation of the wind puts the residence downwind of the body shop. The frequency of this occurrence would be plotted as Weekly, since the wind direction causes the odors to impact the complainant's residence approximately weekly. The duration is at least 10 minutes (likely more) on these days. The FIDO Chart (See Figure 5) indicates that an Offensive odor with a Strong intensity on a weekly basis for 10 minutes or more is considered a nuisance. A notice of violation is therefore issued.

		ODORS CHARACTERIZED AS OFFENSIVE				
		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	VS	S
	10 minutes	NA	NA	VS	S	M
	1 hour	NA	VS	S	M	L
	4 hours	VS	S	M	L	VL
	12 hours+	S	M	L	VL	VL

Figure 5

Example 3 – Landfill Odor

Scenario 1

A complainant alleges “sickeningly sweet” garbage odors from a nearby landfill that are sometimes so bad he cannot spend any time in his yard. He adds that sometimes it is so bad he cannot open the windows of his house since the smell would come inside. The odors tend to be worse when the weather is quite cool and calm, especially in the late evening and early morning hours.

Using this information, the investigator determines that an investigation should be conducted after-hours. The investigator arrives in the complainant’s neighborhood at 6:00 a.m. on a cool and calm morning, when the odors should be at their worst. No odors are noted at the complainant’s address but during a drive through the neighborhood, the investigator notes garbage odors of Moderate intensity in various parts of the neighborhood until about 7:00 a.m. The odors diminish rapidly after the sun has risen and the winds have picked up.

Using the FIDO Chart, the investigator characterized the odor as Offensive, as indicated in the “Odor Characterization Examples” on the back of the chart. Plotting it as a Single Occurrence for one hour, no nuisance is confirmed (See Figure 6). The chart indicates that for a Single Occurrence, an odor must be at least Very Strong for four hours to be considered a nuisance, so no violation is documented. However, the chart also indicates that a Moderate odor occurring for one hour on a weekly basis would be considered a nuisance. The investigator would need to conduct additional investigations and collect additional information regarding the frequency and duration of these odors to make a final determination.

ODORS CHARACTERIZED AS OFFENSIVE		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R E S S I O N	1 minute	NA	NA	NA	VS	S
	10 minutes	NA	NA	VS	S	M
	1 hour	NA	VS	S	M	L
	4 hours	VS	S	M	L	VL
	12 hours+	S	M	L	VL	VL

Figure 6

Scenario 2

During the course of the investigation, the investigator determines the intensity of the odor is Light and that it lasts approximately 10 minutes. Three followup investigations during the next three weeks result in:

1. No odors detected.
2. An odor of light intensity that lasts for less than 10 minutes.
3. An odor of very light intensity that lasts for about two hours.

The conclusion is that the odors occur for between 10 minutes and 2 hours at a Light to Very Light intensity on a weekly basis (approximately).

Evaluation of the FIDO Chart indicates that an offensive odor occurring weekly for one hour would have to be at least a Moderate intensity to be considered a nuisance (See Figure 7). For an offensive odor at a Light intensity, the odor must have a duration of at least four hours on a weekly basis, or one hour on a daily basis to be considered a nuisance. In this case, although some odor is frequently observed, the intensity and duration are not great enough to confirm that a nuisance condition exists.

		ODORS CHARACTERIZED AS OFFENSIVE				
		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	VS	S
	10 minutes	NA	NA	VS	S	M
	1 hour	NA	VS	S	M	L
	4 hours	VS	S	M	L	VL
	12 hours+	S	M	L	VL	VL

Figure 7

Scenario 3

A complaint is received alleging that landfill odor is occurring in the neighborhood again, as it does on a regular basis. Review of the file indicates that such complaints have been received and investigated 16 times in the previous 12 month period, at least once per month. Further review indicates that investigators have confirmed Moderate to Strong odors occurring for approximately one hour on four different occasions. Review of complaint records, including odor logs kept by complainants, provides documentation that Moderate to Strong landfill odors are occurring in this neighborhood on about a monthly basis for 30 minutes to an hour at a time.

Using the FIDO Chart for Offensive odors, it is determined that an odor occurring on a monthly basis for one hour at a time must have at least a Strong intensity to be considered a nuisance. The same odor with a Moderate intensity would have to occur on a weekly basis to be considered a nuisance

(See Figure 8). Since the documented odors are only Moderate to Strong (not consistently Strong), and their duration is usually less than one hour, a nuisance violation is not confirmed.

		ODORS CHARACTERIZED AS OFFENSIVE				
		F R E Q U E N C Y				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	VS	S
	10 minutes	NA	NA	VS	S	M
	1 hour	NA	VS	S	M	L
	4 hours	VS	S	M	L	VL
	12 hours+	S	M	L	VL	VL

Figure 8

ODOR COMPLAINT INVESTIGATION PROCEDURES

FIDO CHART

ODORS CHARACTERIZED AS **HIGHLY OFFENSIVE**

		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	VS	S	M
	10 minutes	NA	VS	S	M	L
	1 hour	VS	S	M	L	VL
	4 hours	S	M	L	VL	VL
	12 hours+	M	L	VL	VL	VL

ODORS CHARACTERIZED AS **OFFENSIVE**

		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	VS	S
	10 minutes	NA	NA	VS	S	M
	1 hour	NA	VS	S	M	L
	4 hours	VS	S	M	L	VL
	12 hours+	S	M	L	VL	VL

ODORS CHARACTERIZED AS **UNPLEASANT**

		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	NA	VS
	10 minutes	NA	NA	NA	VS	S
	1 hour	NA	NA	VS	S	M
	4 hours	NA	VS	S	M	L
	12 hours+	VS	S	M	L	VL

ODORS CHARACTERIZED AS **NOT UNPLEASANT**

		FREQUENCY				
		Single Occurrence	Quarterly	Monthly	Weekly	Daily
D U R A T I O N	1 minute	NA	NA	NA	NA	NA
	10 minutes	NA	NA	NA	NA	NA
	1 hour	NA	NA	NA	NA	VS
	4 hours	NA	NA	NA	VS	S
	12 hours+	NA	NA	VS	S	M

INTENSITY LEGEND
VS
Very Strong
S
Strong
M
Moderate
L
Light
VL
Very Light



ODOR CHARACTERIZATION EXAMPLES

<u>Highly Offensive</u>	<u>Offensive</u>	<u>Unpleasant</u>	<u>Not Unpleasant</u>
Blood Drying Operations	Paper Mill Black Liquor	Well Digested or	Ketones, Esters, Alcohols
Undigested or Untreated	Landfill Garbage/waste	Chemically-Treated Sludge	Fresh-cut Grass or Hay
Sewage Treatment Primary	CAFO Lagoon Maintenance,	CAFO under Best Mgmt.	Normal Coffee Roasting
Sludge	Waste and Wastewater	Practices	Normal Food Preparation
Rendering Plant Processes	Handling	Waste-activated Sludge	Bakery
and Wastewater	Decaying Silage/ composting	Processes	Perfume
Decaying Animal/fish	Typical Grease Trap Odor	Water-based Painting	Spice Packaging
Hide Processing	Rubber/plastic/tire Burning	Styrene	Winery
Rancid Grease	Organic Acids	Gasoline, Diesel Fuel	
Acrolein	Aldehydes	Diesel Exhaust	
Landfill Gas and Leachate	Acrylates	Asphalt Odors	
H ₂ S	Septic Systems	Domestic Waste Burning	
	Organic Solvents (Oil- based)	Burned Coffee/food	
	Painting	Ammonia	
		Chlorine	
		Brush/wood Burning	

DETERMINING FREQUENCY/DURATION

Plant Processes

Constant, seasonal, intermittent (e.g. reactor top opened), upset condition, etc.

Process and environmental controls

Best Management Practices

Sampling/CEM data

Weather

Wind rose from source to receptor

Temperature variation affecting intensity vs climate data

Wind speed day, night, summer, winter

CAMS Station/NWS data

Terrain

Low areas/channels/valleys where odors can funnel
Changes that could affect local wind patterns

Complainant Information

Statements as to frequency, duration, intensity and character
Statements as to effects - how have odors interfered with normal use and enjoyment of property

Logs - time, effects, source operations, weather conditions

Knowledge of source operations - times, processes

Neighbor corroboration

Guest corroboration

HOW TO USE THE FIDO CHART

Each of the four tables on this FIDO Chart represents a level of offensiveness (Highly Offensive, Offensive, Unpleasant, and Not Unpleasant). The intensity of the observed odor is documented using the legend on the right side of the chart, with "VS" representing Very Strong odors, "S" for Strong, "M" for Moderate, "L" for Light, and "VL" for Very Light. The frequency and duration are then plotted on the horizontal and vertical axes of the appropriate table. If the odor situation is at least as intense as the colored block in which it is plotted for the corresponding duration and frequency, it is considered a nuisance odor. If the plot falls outside the colored area of the table (NA), the odor does not represent a nuisance.

Use checklist to document the following:

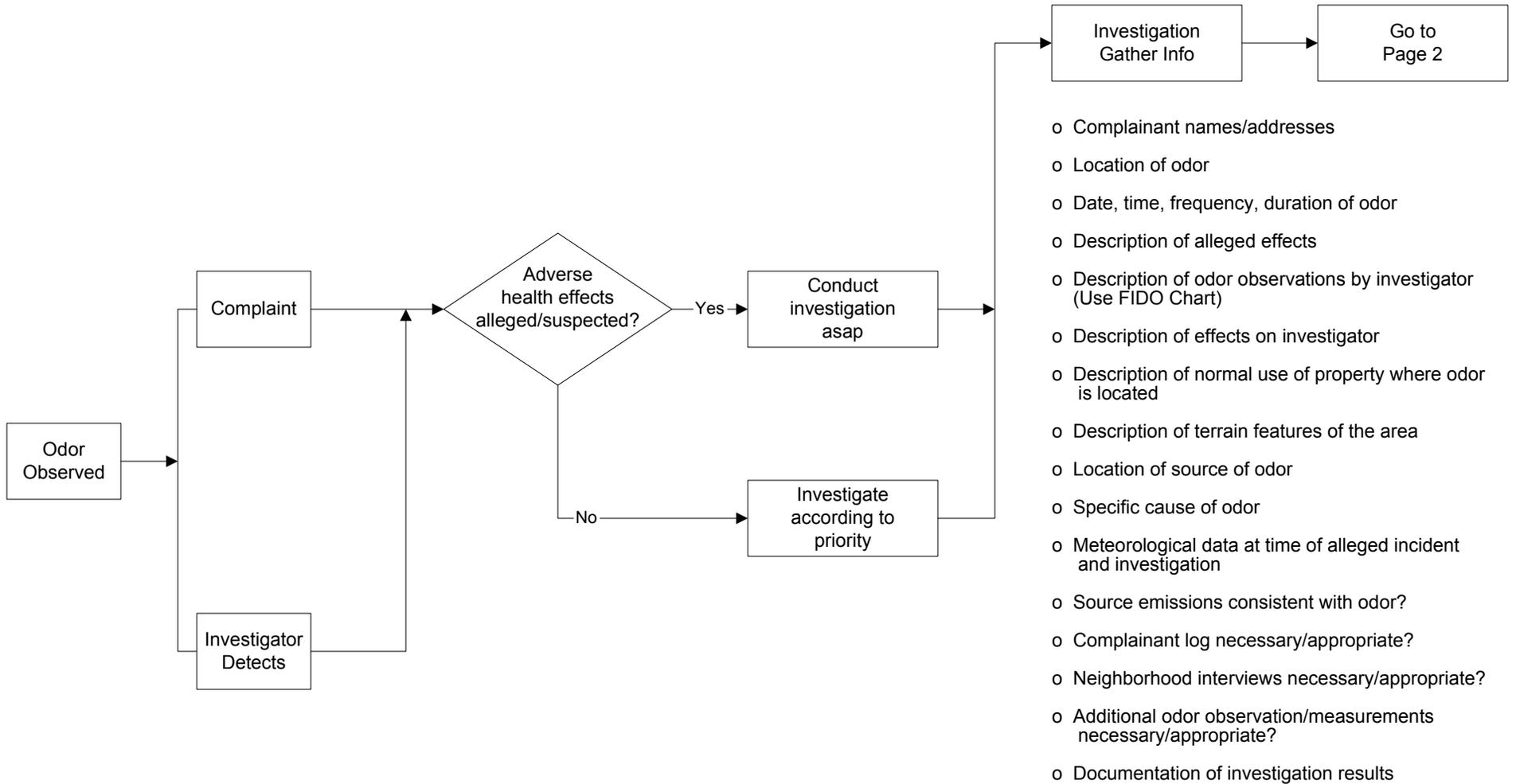
1. Characterize the odor to determine which offensiveness table to use (Not Unpleasant to Highly Offensive)
2. Assess intensity of odor (Very Light to Very Strong)
3. Determine the total duration of the odor(s) (1 minute to 24 hours)
4. Evaluate the frequency of odor occurrence (Single Occurrence to Daily)
5. Using Steps 1-4 above including previous investigation results, identify the block that corresponds with the information collected in order to determine if a nuisance condition exists.

ODOR LOG

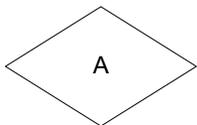
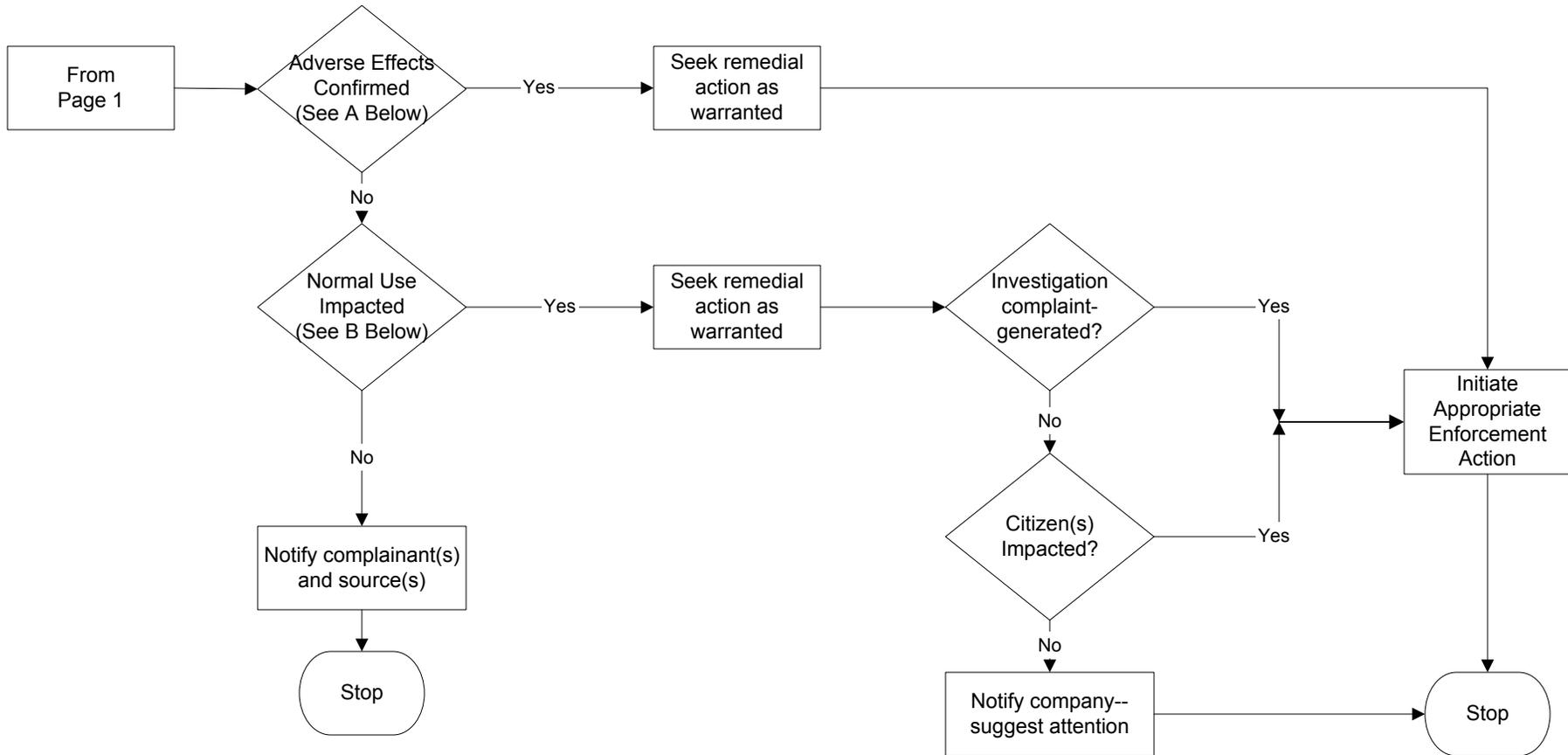
Dates and Times	Weather Conditions (wind direction/speed,	Odor Category (1 through 5)	Symptoms/Effects (nausea, headaches,

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

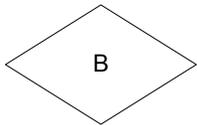
Nuisance Odor Complaint Investigation Process



Nuisance Odor Complaint Investigation Process (cont'd)



Preponderance of evidence (investigation results) indicates odor in such concentration and duration as to be injurious to or adversely affect human health, welfare, animal life, vegetation, or property.



Preponderance of evidence (investigation results using FIDO Chart) indicates odor in such concentration and duration as to interfere with normal use and enjoyment of animal life, vegetation, or property.

Complaint Procedures Subcommittee	
Issue No.	3
Key Issue	<p>Complaint Reporting: How can the TCEQ process for receiving complaints be improved, including accessibility 24-hours via telephone and agency website?</p>
	<p>Basis: Public Comment</p>
Other Subcommittees Reviewing Issue	Communications
Recommendation	<p>The terminology on the agency Web site “Reporting an Environmental Problem” should be changed to “Environmental Complaint”;</p> <p>The agency homepage and the Field Operations homepage should have a direct link to the “Environmental Complaint” page;</p> <p>The “Environmental Complaint” page should provide:</p> <ul style="list-style-type: none"> • the 888-777-3186 (Environmental Violations Hot Line) and 800-832-8224 (24-Hour Spill Reporting) numbers, including an explanation of each with information on how calls are handled after hours; • an active link to the online form to file a complaint; • a link to contact information for each region office; • a link to Citizen Collected Evidence information; • a link to Water Utilities consumer assistance; and • a link to the Nuisance Odor Protocol. <p>The “Environmental Violations Hot Line” number should be renamed “Environmental Complaint Hot Line”;</p> <p>The brochure “Do You Want to Report An Environmental Problem?” and agency “hold” message should be revised to reflect the changes in terminology and Web site information;</p> <p>The regions night mailbox message was reviewed for consistent terminology and content and changes were made to address public comments and were forwarded to region offices for implementation;</p> <p>The 888# should be listed on the Chief Clerk’s Office final action letter for permitting matters; and</p> <p>The 888# should remain a part of the agency hold message lineup.</p>

	<p>Basis: The Complaints Subcommittee noted a lack of consistent terminology for the Web site, brochure, and toll free numbers. Citizens, industry, and environmental groups expressed confusion about Web access and a toll free number to file a complaint. Subcommittee members agreed that the current Web site is not user friendly for filing a complaint. Changes would provide more consistent terminology to meet requirements in HB2912 and better promote the toll free numbers.</p>
	<p>Implementation Impacts: The following are the potential implementation impacts for improving the process of receiving complaints:</p> <ul style="list-style-type: none"> • None of the recommendations concerning this issue would require additional LBB measures. • The changes to the night mailbox messages have already been made. • The direct link from the agency’s homepage and the Field Operations homepage to the “Environmental Complaint” page should be completed by mid August 2004; • All of the remaining recommendations regarding the Web site should be completed by the end of October 2004; • One procedural change will be to add the ‘888’ telephone number on the Chief Clerk’s Office final action letter for permitting matters. • Implementation cost should be minimal. The main cost will be the reprinting of the brochures. Alternatives to minimize this cost are provided in the Other Alternatives Section.
Other Alternatives	<p>Make no change to Web site or brochure. Use the old brochure until the supply is exhausted. Phase in new brochure with consistent terminology at a later date. The disadvantage of this alternative is that there was significant public comment that the public found the current process confusing or did not know how to file a complaint currently with the agency.</p>
Notes	<p>This issue is inter-related with key issue number 5 - Complaint Access.</p>

NIGHT MAILBOX MESSAGE

You have reached the Texas Commission on Environmental Quality, Austin Regional Office. Our office hours are Monday through Friday, from 8:00 a.m. 5:00 p.m.

If you are calling to file an environmental complaint identifying an imminent threat to human health or the environment, please call toll free 1-888-777-3186, otherwise please leave a detailed message including your name, phone number and the nature of the complaint at the tone. Agency staff will then attempt to contact you on the next business day.

If you are calling to report the release of hazardous or regulated material, please call toll free 1-800-832-8224. If you are calling to report an upset or maintenance event, please call toll free 1-800-832-8224 to report the event. Additionally, please fax that information to this office at 512/339-3795.

Thank you and have a nice day.

NIGHT MAILBOX MESSAGE

You have reached the Texas Commission on Environmental Quality, Austin Regional Office. Our office hours are Monday through Friday, from 8:00 a.m. 5:00 p.m.

If you are calling to inquire about the smoke conditions in the area please be aware that the smoke is a result of agricultural burning in Mexico and Central America and is predicted to most heavily affect the South, Central and North Central areas of Texas over the next several days. Prevailing southerly winds are expected to continue to push the smoke from the Gulf of Mexico into Texas well into next week. You can take some precautionary measures by being aware of local smoke levels and stay indoors when smoke is present at higher levels and setting your air conditioning units to recirculate mode.

If you are able to access the internet the most recent environmental information is available on TCEQ's website www.tceq.state.tx.us under air quality. If you have health related questions please call your local public health department, the nearest TDH Regional Office or, TDH's Environmental Epidemiology and Toxicology Division in Austin, at 512-458-7269.

If you are calling with specific medical questions please contact your physician.

If you are calling to file an environmental complaint identifying an imminent threat to human health or the environment, please call toll free 1-888-777-3186, otherwise please leave a detailed message including your name, phone number and the nature of the complaint at the tone. Agency staff will then attempt to contact you on the next business day.

If you are calling to report the release of hazardous or regulated material, please call toll free 1-800-832-8224. If you are calling to report an upset or maintenance event, please call toll free 1-800-832-8224 to report the event. Additionally, please fax that information to this office at 512/339-3795.

Thank you and have a nice day.

Complaint Procedures Subcommittee	
Issue No.	4
Key Issue	<u>Citizen collected evidence (CCE):</u> What, if any, recommendations for change are needed to the citizen collected evidence rules and guidance?
	Basis: Public Comment
Other Subcommittees Reviewing Issue	Enforcement Process, EIC
Recommendation	1. No change is recommended to 30 TAC §70.4, Enforcement Action Using Information Provided by Private Individual.
	Basis: The Complaints Procedures Subcommittee reviewed the governing statute in the Water Code, §7.0025, Initiation of Enforcement Action Using Information Provided by Private Individual. The TCEQ rule closely follows the statute. In addition, the rule includes a requirement to treat CCE as a complaint subject to applicable complaint investigation procedures, if the ED determines not to initiate an enforcement action based on CCE [§70.4(e)].
	2. No changes are recommended to the current CCE protocols or procedures. The TCEQ should continue the current practice of requiring an individual to: (a) testify in enforcement proceedings, and (b) submit a sworn affidavit attesting to the facts that constitute the alleged violation, and demonstrating that relevant protocols were followed. In addition, the TCEQ should continue to process submitted information as a complaint if the individual doesn't submit the required affidavits or is not willing to testify.
	Basis: Comments received indicate that individuals may not wish to submit sworn affidavits or testify in enforcement actions. In addition, some individuals consider the CCE protocol standards too rigorous to reasonably achieve. Affidavits and testimony are required for two basic reasons: 1) the TCEQ can manage resources more effectively if an individual has committed to participating fully in the investigative and enforcement process, and 2) the use of CCE must be held to the same standards followed by the TCEQ for the investigation and enforcement processes and must be admissible in contested cases in order for cases based on CCE to proceed. The information collection protocol standards are minimum requirements and are the same as those followed by the TCEQ. The standards were developed to ensure the TCEQ has sufficient and credible information to support and justify an enforcement action, and to satisfy rules of evidence in contested cases. The standards for CCE must stay the same in order for the TCEQ to rely on CCE as the basis for enforcement actions.

	<p>It is important to note that even if the CCE does not meet the requirements in 30 TAC §70.4(a) through (d), §70.4(e) ensures that individual CCE is always investigated as a complaint. This information still may lead to enforcement action, even if it does not meet the protocol standards.</p> <p>3. The TCEQ should continue to provide: personal training and training of citizen/industry groups, as requested; and self-instructional training using materials available at regional offices.</p> <p>In addition, the TCEQ should increase CCE awareness by supplementing the current CCE Web site by adding a dedicated section related to training, which could include a copy of the training package used at the regional offices, and by publishing a report documenting the usefulness of CCE since the rule was adopted.</p> <p><u>Basis:</u> Several comments received suggest that individuals are not aware of CCE or how the TCEQ has used CCE. The TCEQ has training materials that could be placed on the Web which would enhance the <i>Guidelines for Gathering and Preserving Information and Evidence Showing a Violation</i> Web site. In addition, as part of an agreement between the TCEQ and EPA the Field Operations Division assessed complaints received in conjunction with CCE, whether the evidence was collected according to the TCEQ protocols, and the number of enforcement actions initiated as a result of CCE. This information should be shared with the public.</p>
	<p><u>Implementation Impacts:</u> Since the Complaint Procedures subcommittee recommended that no changes, there are no implementation impacts for these recommendations.</p>
Other Alternatives	<p>The TCEQ received comments for and against CCE. The Complaints Procedures Subcommittee believes that current statutes and rules are adequate to accept or reject CCE and allow the agency the flexibility to include information provided by individuals in the investigation and enforcement processes.</p>
Notes	<p>This issue interacts with subcommittee issues #1, (Complaint Guidance Document), #2 (Nuisance Odor Protocol Report), and #3 (Complaint Reporting), and might affect the Communication Subcommittee with the recommendation to add or enhance information on the TCEQ external Web site.</p>

Complaint Procedures Subcommittee	
Issue No.	5
Key Issue	<p><u>Complaint access:</u> What capital resources would be needed to develop an online complaint database that will allow public access to complaint information?</p>
	<p>Basis: Public Comment</p>
Other Subcommittees	Communications

<p>Recommendation</p>	<p>TCEQ should take steps to provide online access to the incident (complaint) data that is in CCEDS. This may involve seeking approximately \$50,000 in capital resources for the FY06-07 biennium from the 2005 Legislature. This “ball park” cost estimate is based on the TCEQ’s experience with developing the public web pages (report/query) for the Central Registry.</p> <p>In FY05, TCEQ should conduct a “feasibility study” to determine the best way to provide incident data to the public via the Web. This study would assess what data to provide and how to depict the data so it meets user needs. The study results would guide development of the online incident data system.</p> <p>Based on public comment, the system would be expected to provide the following incident (complaint) data:</p> <ul style="list-style-type: none"> • incident tracking number; • status (open, referred, closed); • priority (immediate, 1 day, 14, 30, 45, 60 days, refer, do not respond); • type (emission, fish kill, excess opacity, ww bypass, CERCLA, air shut down/start up, etc.); • location (region, county, etc.); • regulated entity and customer; • start and end dates; • number of complainants; • frequency (current, intermittent, past, predictable); • duration; • effect (environmental, financial, general, health, property, chronic); • nature (color, dust, odor, septic, smoke, taste, etc.); • receiving water body; • actions taken (text); • investigator comments (text); and • description. <p>This system should allow the user to query by:</p> <ul style="list-style-type: none"> • incident tracking number; • priority (immediate, 1 day, 14, 30, 45, 60 days, refer, do not respond); • location (region, county, etc.); • regulated entity and customer; • start and end dates; and • receiving water body.
	<p><u>Basis:</u> The Complaints Subcommittee reviewed the public comment and the data available in CCEDS to develop this recommendation. Most of the data requested in comments is currently captured in CCEDS and made available to members of the public via hard copy on a request basis. However, making the data available online would significantly improve accessibility. After the initial investment in developing the system, the availability of the data online could actually reduce the time spent by FOD in responding to individual inquiries about complaint follow-up.</p>

	<p><u>Implementation Impacts:</u> The following are the potential implementation impacts for development of an online complaint database that will allow public access to complaint information:</p> <ul style="list-style-type: none"> • Need to request capital resources for the FY06-07 biennium from the 2005 legislature. • Once the system is operational, EPA Region VI should be made aware of its existence. • Once the reporting parameters are established during the agency “feasibility study,” the implementation schedule can then be determined. • There are no statutes or agency policies that address the requirement for an online complaint tracking database. • There would be a new cost associated with maintaining the database.
<p>Other Alternatives</p>	<p>The subcommittee discussed options for providing access to complaints (incident) data via means other than a search-able online system. Options include:</p> <ul style="list-style-type: none"> • having more staff available to answer phone calls and provide data on a case-by-case basis; and • establishing Web sites or list serves for specific incidents which have a high level of public interest. <p>The subcommittee determined that a searchable on-line system would better meet the needs expressed in the public comment because it is flexible and convenient for all potential users and allows access to the greatest amount of data.</p>

Attachment 2

Summary of Public Input

Overview of Trends in the Public Comment

Compliance History Components/Definitions Subcommittee

- General focus on enforcement activity such as how violations or investigations are considered
- General discussion on what entity (site vs. person) the compliance history should be evaluated.

Compliance History Classification Subcommittee

- General dissatisfaction with the current classification system, including it being too complex and it not measuring true performance.
- General requests to re-evaluate the classification process vis-a-vis the Sunset report, statute, and legislative intent.
- Small businesses seem to be impacted negatively based on the current classification system.

Compliance History Use Subcommittee

- General opinion that those with good compliance history should receive incentives such as tax breaks, public recognition, less administrative burden, reduced fees, and/or less record keeping
- General opinion that those with a poor compliance history should be deterred from noncompliance with increased penalties, more stringent permit requirements, and permit denial/non-renewal.
- Some interest in having no incentives for those with a good compliance history. The opinion being that staying out of enforcement should be the incentive.

Enforcement Initiation/Investigation Prioritization/NOV Policy Subcommittee

- Investigation priorities should focus on improving the environment and protecting natural resources; TCEQ is too focused on paperwork violations.
- Investigation priorities should focus on facilities that do not have the required permits, that pose a potential for harm or a negative impact on the environment, instead of facilities that are trying to “do it right”.
- The quality of investigations is important, not the number carried out.
- The Enforcement Initiation Criteria (EIC) are too rigid and strict.
- Permit violations should automatically result in a penalty.
- Investigators and permit writers have different interpretations of permit requirements and different investigators interpret the rules and permits differently.
- Too much time is spent by investigators and facility representatives arguing rule interpretations and their application to particular facilities.
- The Enforcement Initiation Criteria (EIC) should be applied the same to both small businesses and large facilities.
- At the conclusion of an inspection, facility representatives should be informed of what problems or violations exist.
- Verbal notices of violation are senseless.
- Notices of violation are a very effective tool for improvement and change in the facility’s operations.
- Facilities should be given a longer time to achieve compliance after the inspection.

Penalty Policy Subcommittee

- The penalty policy should be less subjective, less complicated, and understandable to a lay person – more simplified and more standardized.
- Set specific penalties for specific violations and do not negotiate a lower penalty with the respondent.
- Recapture the full economic benefit received as a result of the noncompliance, focusing on profits realized from pollution. TCEQ should ensure careful assessment of economic benefit by rule or other public participation method, and provide the resources to do so.
- Allow the opportunity to dispute that portion of the penalty attributed to economic benefit.
- TCEQ should only analyze economic benefit in significant cases.
- The external perspective on establishing a small business or local government enforcement policy seems polarized and strongly dependent on the source of the survey. Suggestions for different treatment seem to focus on penalties in proportion to the size of the business in terms of gross receipts.
- Develop a mechanism for small entities outside the contested case enforcement process in which the matter might be informally resolved, perhaps in the region. This separate track for small business would differentiate not only the penalty amount, but in the process itself.
- Assess fines high enough to have deterrent effect. Many comments suggest that penalties be much higher, with no opportunity for negotiation, therefore acting as a stronger deterrent.
- The penalty policy should ensure that the amount of the penalty is more commensurate with the degree of harm. Penalties should be more in line with environmental damage or actual threat to the public.
- There should be consistent penalties for the same violations. TCEQ should establish a predetermined list of penalty amounts proportional to the harm. The penalty policy should set mandatory minimum penalties for specific violations.
- Develop uniform penalties on a violation by violation basis that are charged uniformly in all instances involving that violation.
- TCEQ should institute a different process or penalty scale for violations that are administrative, such as failure to process paperwork or a required report, unless there is actual harm. Some survey respondents suggest that we calculate penalties for administrative violations with some anticipation of what harm might have occurred, while others suggest we should not pursue administrative violations unless there a pattern is established.
- The penalty policy should deal more harshly with repeat violators.
- Under the good faith effort part of the penalty policy, TCEQ should give credit for partial efforts to comply rather than restricting adjustments to those instances where the entity achieves complete compliance.
- The penalty policy should be more available to interested parties, perhaps set by rule.
- In using compliance history to calculate a penalty amount, several commentators raised a concern with double counting of some elements such as a notice of violation (NOV); there are also concerns with the use of self-reported violations and NOVs as a basis for upward adjustments of the penalty.

Ordering Provisions Subcommittee

- Small businesses need longer times to comply with an order due to a lack of financial resources and knowledge of regulatory requirements. Similar comments were made about local governments due to required public approval processes.
- The agency should use administrative orders or compliance plans initially rather than formal enforcement with penalties, especially if violations were not harmful to the environment.
- Field inspectors should be more involved in overall enforcement decisions and requiring definitive, concrete proof of compliance with an order or follow-up by the agency to ensure the violations were corrected.
- Ordering provisions should solve the problem such that it does not occur again. In some cases, orders should include requirements for development of training and or referral to management training to help a company identify its weaknesses.
- TCEQ should provide definitive abatement plans and clearly define what needs to be done in plain language in order to come into compliance. It was also recommended that orders provide for compliance status reports.
- Regarding what should be in an order, several commentors suggested requiring more monitoring and testing and that contracts should be taken away or limited for repeat offenders.

Supplemental Environmental Project (SEP) Subcommittee

- There needs to be a direct environmental benefit resulting from a Supplemental Environmental Project (SEP).
- The process for participating in a SEP should be simpler.
- There is a need for more information regarding the result or benefit of a SEP to the community. Information should include not just that the project was completed but how it benefitted the community.
- There needs to be more public outreach regarding the SEP program so that it is better understood.

Collections Subcommittee

- Collect delinquent accounts promptly.
- Delinquent payments should be subject to collection agencies.
- Slow collections have weakened the enforcement process.
- Follow the recommendations in State Auditor's Office Report 04-016, Dec. 2003.
- The financial means of local governments should be considered in penalty assessment, as they may need to budget or seek public input on fee/tax increases.
- Small businesses should be given a payment plan and their financial means should be considered in penalty assessment.

Complaints Subcommittee

- The agency must ensure that there is a way to accept and quickly respond to complaints (within 24 hours, if possible).
- Investigations of complaints must be thorough and complete, with a response being provided to the complainant.

- The agency must clearly publicize its complaint procedures and have complaint information on the agency's website.
- In order to be able to conduct complaint investigations sufficiently, the agency needs more staff and that staff needs to be sensitive and well-trained.
- The rules and guidance for citizen collected evidence should be made easier for the agency to accept. Contrastingly, some comments said citizen collected evidence should not be accepted by the agency.
- The agency is looking after the interests of industry more than the interests of citizens.
- The agency should better enforce against nuisance odors, specifically landfills.
- Take anonymous complaints. Contrastingly, some comments said do not allow anonymous complaints.
- There needs to communicate more with citizens and industry and the agency should contact industry immediately when a complaint is filed.
- Be objective and use science and common sense when conducting an investigation.

Enforcement Process/Agency Coordination Subcommittee

- The enforcement process is too complex and there is a need for a much simpler process.
- There is a need for a more streamlined process, because the current process is slow and so complex that neither the respondent nor the public can understand it.
- The agency needs a fast track enforcement process or the ability to issue field citations.
- There are not enough investigators and enforcement staff to assure compliance with and enforcement of environmental regulations. The agency needs to find ways to retain experienced staff.
- Current staff is either inadequately trained and/or lack the industry specific experience to effectively fulfill their role as investigators and enforcement staff.
- There is not enough funding to provide for the level of staffing needed or the necessary training and equipment.
- Use penalties collected to fund the enforcement program better.
- Investigators and enforcement staff should be specialized in a particular media.
- The agency should implement career ladders which would allow for experienced investigators to become enforcement coordinators to utilize investigative experience.
- Reallocation will make staff more efficient.

Communications Subgroup of Enforcement Process Subcommittee

- TCEQ should aggressively promote its enforcement efforts, progress, and accomplishments to the general public.
- Increase the use of newspaper, radio, and TV ads. The general public does not know enough about what the TCEQ does or what its accomplishments are.
- The agency should use the website to better publicize enforcement actions and results.
- The agency should work with schools, civic groups, and local elected officials to promote the message of a cleaner environment.
- A media campaign is needed to publicize agency contact information and how to file a complaint.
- Information related to complaints, investigations results, and enforcement cases should be posted on the agency website.
- The TCEQ should publicize that unpermitted facilities and companies will be targeted for enforcement.
- There should be more public education about the enforcement process.

