

<b>Ordering Provisions Subcommittee</b>	
<b>Issue No.</b>	1
<b>Key Issue</b>	<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>
<b>Other Committees Reviewing Issue</b>	Enforcement Initiation/Investigation Prioritization/NOV Policy (Item C)
<b>Recommendation</b>	<p><b>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?</b></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 3<sup>rd</sup> party helps to preserve agency resources. Cons: 1) The selection of a 3<sup>rd</sup> 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 3<sup>rd</sup> 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><b>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?</b></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"> <li>• LBB measures would not be affected.</li> <li>• <b>Initial agency resources needed:</b> Cost of audit or review of specific cases to determine effectiveness of compliance certifications.</li> <li>• <b>On-going agency resources needed:</b> 1) Costs of on-going review of certifications based on findings of initial audit. 2) Increased resources to pursue escalated enforcement for false certifications.</li> </ul>
<p><b>Other Alternatives</b></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>

<b>Notes</b>	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.
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<b>Ordering Provisions Subcommittee</b>	
<b>Issue No.</b>	2
<b>Key Issue</b>	<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>
<b>Other Committees Reviewing Issue</b>	None
<b>Recommendation</b>	<p><b>A) Should orders contain additional standard provisions that communicate to the respondent the consequences of failure to comply with the provisions of the order?</b></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"> <li>• The Office of Legal Services has provided language to be inserted into the orders. Therefore, this recommendation could be implemented immediately.</li> <li>• There is no effect on LBB measures, EPA delegation or the need to change state statutes.</li> </ul>

	<p><b>B) Should small business and small local government be given different consideration from larger entities in establishing additional language in an order?</b>  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><b>Other Alternatives</b></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.

<b>Ordering Provisions Subcommittee</b>	
<b>Issue No.</b>	3
<b>Key Issue</b>	<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> <hr/> <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>
<b>Other Subcommittees Reviewing Issue</b>	
<b>Recommendation</b>	<p><b>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?</b></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"> <li>• No LBB measure would be affected.</li> <li>• There are no coordination issues with EPA.</li> <li>• SBLGA would need to ensure that local staff is available to assist a respondent throughout the Enforcement process</li> <li>• 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.</li> <li>• There is no cost of implementation.</li> <li>• A time frame for implementation will be established upon approval of the recommendation and consideration of other factors.</li> </ul> <p><b>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?</b></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>
<b>Other Alternatives</b>	N/A
<b>Notes</b>	If any of these recommendations are implemented, the new procedures should be in the published guidance available to staff and to the public.

<b>Ordering Provisions Subcommittee</b>	
<b>Issue No.</b>	4
<b>Key Issue</b>	<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>
<b>Other Subcommittees Reviewing Issue</b>	
<b>Recommendation</b>	<p><b>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?</b></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"> <li>• No LBB measure would be affected.</li> <li>• 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.</li> <li>• A time frame for implementation will be established upon approval of the recommendation and consideration of other factors.</li> </ul>
	<p><b>B) Are there situations where additional monitoring and/or other restrictions, other than to correct a specific violation, should be required?</b></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><b>C) Should small business or small local government be given different consideration from larger entities in development of ordering provisions?</b></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"> <li>• 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.</li> <li>• There is no additional cost, impact on LBB measures or EPA coordination issues associated with this recommendation.</li> <li>• SBLGA should be involved in development of the alternative standard TRs for small businesses or local governments.</li> </ul>
<p><b>Other Alternatives</b></p>	<p>N/A</p>

<b>Ordering Provisions Subcommittee</b>	
Issue No.	5
<b>Key Issue</b>	<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>
<b>Other Committees Reviewing Issue</b>	Compliance History Use, Compliance History Classification, Collections
<b>Recommendation</b>	<p><b>A) Should ordering provisions differ for repeat violators to include more specific requirements, additional monitoring, or other restrictions?</b></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"> <li>• <b>Initial agency resources needed:</b> 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.</li> <li>• <b>On-going agency resources needed:</b> 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.</li> <li>• The regulated entity will incur more cost in meeting the requirements for additional monitoring.</li> <li>• The multi-media team could be assembled immediately with guidelines due in 90 days.</li> </ul>
	<p><b>B) Should ordering provisions be used to require self-examination or assessment of root causes of violations for Repeat Violators?</b></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"> <li>• <b>Initial agency resources needed:</b> 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.</li> <li>• <b>On-going agency resources needed:</b> 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.</li> </ul>

	<ul style="list-style-type: none"> <li>• The regulated entity will incur more cost in meeting the requirement for a root cause analysis.</li> <li>• The multi-media team could be assembled immediately with guidelines due in 90 days.</li> </ul>
	<p><b>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?</b></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"> <li>• <b>Initial agency resources needed:</b> Staff time dedicated by a multi-media team to develop guidelines for the financial evaluation of repeat violators.</li> <li>• <b>On-going agency resources needed:</b> 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.</li> <li>• The multi-media team could be assembled immediately with guidelines due in 90 days.</li> </ul>

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"> <li>• <b>Initial agency resources needed:</b> 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.</li> <li>• If the requirement is feasible, rules and statutes may need to be revised to ensure that requirement can be implemented.</li> <li>• <b>On-going agency resources needed if requirement is determined to be feasible:</b> <ol style="list-style-type: none"> <li>1) Procedures to track compliance with the requirement to post performance bonds, and</li> <li>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.</li> </ol> <ul style="list-style-type: none"> <li>• The regulated entity will incur costs in obtaining performance bonds. There may also be audit and collateral costs to the regulated entity.</li> <li>• The multi-media team could be assembled immediately with guidelines due in 90 days.</li> </ul> </li> </ul>
<p><b>Other Alternatives</b></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"> <li>- 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.</li> <li>- 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.</li> <li>- 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.</li> </ul>
<p><b>Notes</b></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>