

March 29, 2006 Agenda, 1:00 pm
Attachments for Agenda Item 3
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**Attachment 1: Administrative Penalty Rule
Executive Summary for Stakeholder Meetings**

Administrative Penalty Rule Executive Summary for Stakeholder Meetings

The Commission directed the Executive Director to conduct six stakeholder meetings regarding issues raised on the administrative penalty policy during the enforcement process review. The meetings were held in Arlington, Amarillo, El Paso, Houston, McAllen, and San Antonio in November and December of 2005.

Stakeholders were asked to provide comment concerning the Commission's current penalty policy and invited to comment on the following major elements that would be considered by the Commission in the pending rulemaking.

- economic benefit
- small business and small local government issues
- good faith efforts to comply
- culpability
- standard penalties
- other factors as justice may require

Significant Comments Received From Stakeholders Included:

Pre-proposal Draft ("Strawman") Distributed Prior to Publication of the Rule: Most of the commenters indicated that they would like the opportunity to comment on a strawman prior to publication of the proposed rule.

Executive Director's Response: The Commission should simply propose the rule otherwise we are basically going through an executive review process three times just to get the final rule published. Comments should just be received through the formal rulemaking process.

Economic Benefit¹:

- Environmental groups and their members advocated that TCEQ should recover all realized economic benefit and not allow the violators to consider enforcement a "cost of doing business" in Texas (over 500 Emails were received, as well as additional written comments on this topic).
- Small businesses commented that first time violators should be given special consideration because the cost of compliance in itself is substantial.
- Regulated community indicated that calculating economic benefit is difficult and that deliberate delay of a necessary cost of compliance is rare.
- Several commenters felt that we should consider EPA's computerized model for calculating economic benefit gained (BEN Model).

Executive Director's Response: Economic benefit adjustments should apply to all with the exception of small municipalities (i.e., cities with < 5,000 in population and counties with < 25,000 in population, etc.). The use of "Muni-Pay" may be appropriate for small municipalities.

Small Business & Local Governments:

- The majority of commenters did not object to defining small business in the rule but there was no consensus on how to define it (employees only, revenues, should there be more than one category, i.e., micro & small).
- There appeared to be consensus on allowing deferrals rather than standard downward adjustments as long as corrective action is completed.
- There appeared to be consensus on allowing longer compliance deadlines.

Executive Director's Response: A definition of small business needs to be determined. Deferral of some of the penalty may be appropriate for those that qualify as small.

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

Administrative Penalty Rule Executive Summary for Stakeholder Meetings

Good Faith Efforts to Comply:

- There appeared to be consensus on eliminating good faith effort reductions for Default Orders
- Most commenters felt that there should be good faith reductions for any violations corrected.

Executive Director's Response: Good faith reductions should not be allowed for Default Orders. Downward adjustments should only be applied if the violator took measures to prevent and/or correct the violation before TCEQ discovered it (or before the violator self reported it). It is ok to apply it in situations where some of the violations are corrected but not all.

Culpability:

- Most commenters agreed that TCEQ should allow reductions for self reported violations, with one dissenting comment from the environmental group or individual category.
- Environmental groups felt that culpability should apply if the entity is permitted, registered, or has a previous NOV, NOE, or Commission Order. Small business groups felt that culpability should apply if the entity has had a previous NOV, NOE, or Commission Order, but, not simply because the entity is permitted or registered. The regulated community did not believe a "blanket" designation should be used that it should be determined on a case-by-case basis.

Executive Director's Response: Permittees, Registrants, and Licensees are culpable unless it is truly something that they could not have foreseen.

Standard Penalties: We received very mixed reactions to this concept:

- Small business representatives wanted all penalties to be clearly defined, so thought that standard penalties would be good.
- Environmental groups were concerned about the lack of consideration for the duration of the violation and that the percentages in the examples provided appeared to be too low. Several concerns were raised about the violations that would qualify for standard penalties.
- Regulated community representatives were concerned about the lack of flexibility to consider all circumstances of a violation, that the list should be significantly trimmed, and that standard penalties would take the place of NOVs and therefore everything would be penalized (they took issue with some of the examples provided).

Executive Director's Response: Standard base penalties should be developed except in situations where environmental or human health effects have been documented. To comply with the statutory factors that the commission should consider, each factor should be evaluated on a simplistic basis where a positive response decreases the standard base penalty by a certain percentage (i.e., 5%) and a negative response increases the penalty by the same percentage. For example, if they have a poor compliance history then the standard penalty is increased by 5% and if they had a high compliance history then it would decrease by 5%.

Other: There was consensus regarding a need for a better definition for determining the number of penalty events.

Executive Director's Response: There should be a clearer method for determining the number of penalty events that takes the duration of the violation into account and equally applies adjustments to the penalty.

**Attachment 2: Administrative Penalty Rule -
Detailed Summary of All Comments Received
from Stakeholders**

Administrative Penalty Rule – Detailed Summary of All Comments Received from Stakeholders

*The following documentation represents all comments received during the administrative penalty rule stakeholder process. Areas that appear to represent consensus are represented as **blue** text, areas of obvious disagreement are represented in **red** text.*

Strawman Proposal:

The subject of developing a strawman proposal prior to publishing the draft rule was a topic of interest at each of the stakeholder meetings. Many industry representatives indicated that they purposefully did not comment in these meetings because they were not sure which direction the TCEQ was heading and they wanted something to look at before commenting.

Economic Benefit

What should the Commission consider when calculating the penalty adjustment for Economic Benefit? For example:

Should the rule require that all of the realized economic benefit gained through the violation(s) be recovered through the administrative penalty?

Small Business & Local Governments:

Yes, otherwise there is not an "adequate punishment" for the crime and they would get a "benefit" from the violation.

In almost all instances, the economic benefit would equal only the cost of compliance.

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

Yes, any economic benefits gained through a violation should be considered and if it is determined that the violation was willful and/or intentional the benefits should be recovered through the administrative penalty.

Environmental Groups or Individuals:

All realized economic benefit gained through the violations should be recovered through the administrative penalty.

The \$15,000 threshold for economic benefit enhancement should be eliminated and the TCEQ should recover economic benefit up to the statutory caps rather than adjusting the base penalty.

The full economic benefit should be recovered regardless of whether the violations involve actual harm or are egregious, whether or not the respondent is a "major", and/or whether or not the penalty is mitigated due to an inability to pay determination.

When calculating the penalty adjustment for economic benefit, it should include all benefits earned by the non-compliance. Only when companies learn that there is no benefit for violations, will they work to stop them.

The TCEQ substantially underestimates the economic benefit of noncompliance. For example, in situations where it is clear that insufficient management direction or oversight resulted in a major program failure (e.g., leak detection and repair (LDAR) monitoring), there should be some value ascribed to the avoided costs of managing effective environmental programs. Another example of undercounting is the method by which LDAR monitoring is valued. We are told that the cost of a high quality LDAR contractor, or well-managed plant monitoring, is about 25 cents per component higher than low quality work. When a plant is discovered to have failed to conduct complete LDAR monitoring, the economic benefit reflects only the cost of monitoring the unmonitored components. Such a failure also calls into question the quality of the rest of the LDAR program. Since careful attention to detail is critical to reducing fugitive emissions, the economic benefit calculation should also reflect the incremental cost of high quality monitoring across the entire plant. In general, the methods by which economic benefit are calculated deserve thorough scrutiny and we encourage the TCEQ to initiate a suitable review process.

Regulated Community (Not Obviously Small Business or Governmental):

Generally, it is illogical for TCEQ to assume that a regulated entity always gains some economic benefit by non-compliance. TAB has found that many of its members end up spending as much or more than the TCEQ-calculated “economic benefit” to realize compliance after the violation. Seldom does a regulated entity gain an economic benefit from deliberately delaying a necessary cost of compliance.

First time violations should not have an economic benefit penalty for small business, because the cost of compliance for most small business is itself a substantial economic impact alone.

TCEQ should only attempt to recover economic benefit where a company avoided the installation of required controls and it is clear that there was an economic benefit to that noncompliance. In such cases—which TIP predicts are rare—it is appropriate to recover that economic benefit through an administrative penalty.

A penalty should be adjusted based on the economic benefit of noncompliance only when it is clear that a company has avoided installing required controls and, as a result of the failure to install those controls, realized a cost savings. A decision to disregard clear regulatory or statutory requirements to save money should trigger a penalty adjustment for economic benefit of noncompliance. A decision that is based on a good-faith interpretation of a complex regulatory requirement should not be considered disregard and should not serve as a basis for penalty adjustment based on a perceived economic benefit.

Except in rare cases, there is no appreciable economic benefit realized from noncompliance with environmental regulations. The calculations used to demonstrate economic benefit frequently fail to take into account all of the variables that must be considered when balancing the economics of noncompliance. These calculations also frequently employ a “perfect hindsight” analysis of what should have been done to avoid the noncompliance. This is an unrealistic approach to the question of economic benefit.

Efforts to assess economic benefits for a municipal entity should be avoided as a waste of taxpayer dollars. Penalties assessed against a municipal entity are passed on directly to the

citizens. Ultimately, the citizen taxpayers pay the cost of any required corrective actions, the penalties for the actual violation, any penalty enhancement due to “economic benefits”, and the costs of government on both sides of the enforcement action [example cited TCEQ staff spending time to calculate the “benefit” while staff, lawyers, and consultants of the local government spend time challenging the economic benefit enhancement].

Consideration of economic benefit should be limited to the actual cost avoided by the non-compliance – penalties that seek to otherwise disgorge perceived financial gain are too speculative.

The Commission should not seek to impose more stringent penalties for economic benefit unless there is environmental harm, a knowing violation, or significant competitive advantage relative to other participants in the same market or a competitive advantage such as early market entry in the case of permitting.

Economic benefit should be considered in the penalty process if it demonstrated that the benefit was gained through a practice of avoiding compliance-related issues that would provide an economic benefit to a company. The evidence supporting the economic benefit could be complex and difficult to quantify.

• Where a significant economic benefit is evident, should the rule allow the Commission to require the violator to undertake corrective actions that surpass the minimum action required for compliance?

Small Business & Local Governments:

Yes, this would be a greater deterrent for not committing the violation again.

If the economic benefits are recovered through the administrative penalty I do not think that the violator should be required to make corrective actions that surpass the minimum action required for compliance – the violator has already paid the penalty and should not be punished twice for the same offense.

Environmental Groups or Individuals:

The rule should require the violator to undertake corrective actions that are greater than the minimum action required for compliance.

Regulated Community (Not Obviously Small Business or Governmental):

The rule should not require the violator to undertake corrective actions that surpass the minimum required for compliance to offset the economic benefit gained - this could result in lengthy negotiations and delay compliance.

No, beyond-the-minimum corrective actions should not be required of a violator because it would foster an atmosphere of using enforcement in place of rulemaking.

It may be difficult for TCEQ to find the statutory authority to place a higher corrective action standard on one party versus another.

The rule should not allow the Commission to require a violator to undertake corrective actions that surpass the minimum action required for compliance. To do so establishes a higher standard for compliance, a rulemaking function, through the guise of enforcement. The

Commission should not be allowed to demand corrective action beyond what is required for compliance.

- **Are there better means of determining economic benefit than the methodology expressed in the Commission's current penalty policy (see Attachment No. 1)? If so, what are they?**

Small Business & Local Governments:

Use the current method and then calculate how much the person and or company gained by doing what they did and add to that the cost of cleanup.

When considering the calculation of economic benefit, the TCEQ enforcement staff should coordinate with the TCEQ Office of Chief Engineer.

Economic benefit should be calculated differently for local governments. TCEQ should look at EPA's policies on governmental entities that look at not only the BEN model, but, at other mitigating factors looking at the population and customers served, etc.

Environmental Groups or Individuals:

EPA's BEN model should be used to calculate economic benefit because it has long been used by EPA and other States and has stood up to challenge in court.

Regulated Community (Not Obviously Small Business or Governmental):

The factors described in the TCEQ's current penalty policy are appropriate to calculate the economic benefit of violations, however, it may be appropriate in some instances to collect all economic benefit gained. The rule needs to have that flexibility to address on a case-by-case basis, however, collecting the entire economic benefit may be excessive for small municipalities in light of the corrective action costs that may be necessary. There needs to be a balance between economic benefit gained and corrective action necessary to correct the violations.

Economic benefit doesn't look at the entire picture, e.g., the entity's ability to foresee a violation. Culpability could be used to offset the economic benefit or look at how far back in time you go when determining the economic benefit gained and when the entity should have foreseen the violation. Economic benefit calculations should focus on what the company was avoiding doing that resulted in the noncompliance. The issue is whether the company actually knew that the problem existed and whether they were truly avoiding doing something or if they were unaware that they were noncompliant.

Economic benefit should be used when looking at bad actors.

Calculating the economic benefit of noncompliance is problematic. There is no single equitable method to calculate economic benefit, and the unintended consequences of doing so would likely be disastrous.

TCEQ's policy with regard to penalty adjustments for the economic benefit of noncompliance is based on a flawed premise: that there is always an economic benefit to noncompliance. It is illogical and unreasonable to assume that there is an economic benefit to every noncompliance with an environmental requirement. Recognizing this fact, the U.S. EPA's penalty policy does not automatically assume an economic benefit to any noncompliance. Nor does the Texas Water Code require TCEQ to consider economic benefit in every case. TCEQ should change

the premise that an economic benefit always exists and limit applicability of the economic benefit penalty adjustment to circumstances where a true economic benefit was realized.

TCEQ's current methodology often finds economic benefit when there is none, because it requires TCEQ staff to calculate an economic benefit for every noncompliance. TCEQ staff will assume that the company has realized an economic benefit based upon the costs of returning to compliance — that is, the estimated cost of repairs represents an economic benefit because the company *could have* incurred that cost before the violation. This does not reflect the reality of operating complicated industrial sites. Not everything operates as designed and malfunctions will occur despite proper design and operational practices. The occurrence of a violation or failure of equipment does not mean that a company could have, or should have, predicted the malfunction and spent money before the violation occurred to correct the problem. Malfunctions can take place despite an aggressive preventive maintenance program. Application of economic benefit under current practices can actually be construed as a disincentive to fixing a problem related to a noncompliance, because if a company spends money or assigns personnel to fix a problem, TCEQ staff will treat those costs as an economic benefit of noncompliance when assessing any penalty. If a company can demonstrate that it had established and was implementing a reasonable preventative maintenance program, then there should not be any allegation that the company gained some economic benefit because a malfunction occurred and it cost money to make a repair.

The current penalty policy establishes a 50 percent penalty adjustment based on an economic benefit equal to or greater than \$15,000. TCEQ should not establish additional requirements for “significant” economic benefit without changing how it assesses economic benefit and clearly defining what would be considered “significant” economic benefit. As discussed above, TCEQ staff currently treats as economic benefit a number of costs or expenses that are not economic benefits of noncompliance; as a result, TIP believes that penalty adjustments or other requirements based on a “significant” economic benefit are unreliable.

Any economic benefit approach adopted by the TCEQ should be narrowly focused to address the rare instances where a company or municipality intentionally or negligently fails to meet their environmental obligations and the actions result in direct and substantial cost savings. Since this is so rare, it seems an inappropriate use of time and effort to develop a formula for use on limited occasions. It will be very difficult to develop a formula that is fair on all occasions.

Small Business/Small Local Governments

What should the Commission consider when calculating the penalty for a Small Business or a Small Local Government? For example:

- **Should the rule provide a unique definition of “small business” and “small local government” for the purposes of calculating a penalty? If so, what?**

Small Business & Local Governments:

A definition could be made of what is a small business (example: less than five employees) and what is a small government (example: city of less than 5,000 or county of less than 15,000).

Special consideration should be given to local governments, they should be treated as the partners that they are. There should be unique definitions and downward adjustments for small businesses and local governments.

If penalties for local governments are necessary, such as for repeat violators, the money and resources should remain in the local government, such as a community service type situation.

Consideration should be given to small businesses and local governments when determining penalty amount. A unique definition for small business/local government may be appropriate. With respect to wastewater treatment plants, a flow based definition may be appropriate. Additional stakeholder discussion may be needed in order to determine whether the definition should be flow based or population based.

Small businesses and especially local governments (not just small local governments) should be viewed differently when assessing penalties because of budgeting issues. These governments can only budget by the fiscal year.

School districts should be considered in the definition of small local governments.

Penalties should not be assessed against school districts - compliance not conviction should be the direction to take with districts since they are already financially stretched. Offer assistance to school districts to achieve compliance rather than assess penalty.

Income levels should not be associated with the definition of a small business. The definition should be 100 or fewer employees only. Gross income has little relation to profits, especially in industries such as automobile recyclers where cost-of-goods are so high.

The employee component of the definition for small businesses should be 100 employees or fewer with no income associated with the definition due to the complexity of determining financial assessments for small businesses across the spectrum.

Small businesses and governments are different than big businesses in people and knowledge resources and money. TCEQ needs to recognize these limitations.

In the small business advisory committees there does not appear to be a consensus on how to define a small business based upon financial considerations. If there does have to be a financial consideration it should be set at no less than \$15 million gross sales.

If a financial consideration is used it should be based upon cost of goods sold, for example, gross revenues minus cost of goods sold, then gross profit would be determined from that. If that were used, then a gross profit of \$1 - 2 million could be used.

This should be defined strictly on the number of employees and this level should be 100 employees or fewer. There should be **no income associated with the definition** due to the complexity of determining an appropriate financial assessment for small businesses across the spectrum. We feel that the employee count is a very effective benchmark since attempting to establish size on revenue is fraught with problems. If the Commission feels it is absolutely necessary to include an income definition, the financial component of the definition should be very simple to calculate, such as using gross sales (as opposed to net). The definition should be set at no less than 15 million gross sales. This figure has been based on data that the Houston SBAC received from several members on gross company revenues versus number of

employees. ***[Comments almost identical to this one were received from several small business advisory committees and the Compliance Advisory Panel]***

Calculated penalties should not be different between small and large businesses, but, the penalty for small businesses, who are first time violators, should be used to get them into compliance rather than paid to the State. This would keep them in business and work to get them compliant, rather than force them into bankruptcy. After given this chance to get compliant and then they continue to be non-compliant several times, then after the third chance, they should just be treated the same as all violators and should not be treated differently.

The employee component of 100 employees or less is adequate for defining small business. No income related component is necessary.

Small businesses and local governments should be exempt from formal enforcement for first time violations. An alternative would be automatic referral to the Small Business and Local Government Assistance Program for help in resolving violations.

Local governments, especially counties, should be uniquely defined. Counties are different from small business, cities, and other local governments. Counties are administrative arms of the state, partners in accomplishing the people's business, and we hope these rules will strengthen that partnership. Defining a small county can be problematic, but a population of 25,000 and below may be considered a small county.

The Texas Municipal League urges TCEQ to consider the effects any changes to the policy would have on our member cities' ability to meet permit requirements. For example, if TCEQ adopts an expansive definition of "small local government", more cities would qualify for assistance such as downward adjustments of penalties and for deferral of penalties. In other words, a broad definition would allow more cities to focus resources on meeting permit requirements. Currently, 756 of our member cities have a population less than 5,000. We have 886 member cities with a population of less than 10,000. A definition of 25,000 would include an additional 100 cities, resulting in a group of 985 cities.

When calculating penalties, the Commission should consider the unique problems of the small cities (i.e., lack of funds for improvements, difficulty retaining qualified personnel). A small local government might be defined as one with a population of less than ___ or one serving less than ___ customers. Most small governmental entities do not compensate their officers (they volunteer their time to the community), and most have limited knowledge concerning the operations of the water/wastewater systems.

Small businesses might be treated somewhat differently as a for-profit operation. But taking into account the type of violation and the effects on the environment – it may be better to have service from a small privately owned system with a few problems than have unmonitored individual septic systems and untested private wells.

Environmental Groups or Individuals:

Small businesses and local governments are like everyone else -they should not get any special treatment.

Presently the policy allows for a downward adjustment of the penalty for minor sources. Small businesses already eligible for discounts based on the size of their operations should not be eligible for these discounts as well.

Regulated Community (Not Obviously Small Business or Governmental):

The definition of small business for the purpose of the penalty policy should be namely, a business which employs 100 or fewer people without regard for income. We do not believe that the amount of revenue a small business makes should be a factor in defining a small business because of the difficulty of establishing an appropriate financial “magic number” for small business, which are far-ranging in economic structure and income. If the decision is made to include an income factor, it needs to be very simple to calculate, e.g., using gross sales instead of net sales. We would suggest using a figure of no less than 15 million in gross sales.

If malice and/or economic benefit can be proven, then penalty and enforcement action shall be the same.

• Should the rule provide for a standard downward adjustment of the penalty for small business and small local government?

Small Business & Local Governments:

A business should not have to pay fully for the actions of a single employee unless it is the owner of the business that is being accused. Same for small government, the city or county should not be penalized fully for the actions of one person. Perhaps it could be calculated as to how much that person knew/did to perpetuate the crime and how much other persons in the agency knew.

The rules should provide for a reduction of penalties for small business identical to the sliding reduction scale that OSHA utilizes to set penalties for small business. The SBAC recommends a minimum of a 50% reduction in penalty for a small business.

The proportionality of a fine issued by the TCEQ should distinguish between a small business and a big business. For example, a \$5,000 fine levied against a small business owner has much greater impact in its revenues compared to a \$50,000 fine levied against a billion dollar corporation.

A standard downward adjustment of penalties for local governments may be considered as an option.

Yes the rule should provide for a downward adjustment of penalties taking into consideration the finances of the city. But also the commission should consider the type of violation (was it willful? could it have been weather related?) and most importantly the effects on the environment.

Environmental Groups or Individuals:

The rule should not provide automatically for a standard downward adjustment of the penalty for small business and local government.

An across-the-board discount to small businesses and small local governments is unwarranted. TCEQ should, however, have the flexibility in reducing penalties when small governments or small businesses are making a substantial investment in their operations to address compliance issues and the full penalty would impact their ability to make those investments.

Regulated Community (Not Obviously Small Business or Governmental):

The rule should not provide for a standard downward adjustment for small businesses or local governments - the TCEQ should continue to exercise discretion and flexibility when dealing with these types of entities.

The rule should provide for a standard downward adjustment of the penalty for small business and small local governments because such entities are handicapped in two ways in trying to achieve environmental compliance in the first place. First, small businesses are not as well “plugged in” to the system for becoming educated on environmental rules and regulations. Where many larger businesses belong to both a trade association and a general business association, most small businesses belong to neither, and so lose out on learning about environmental compliance requirements, except by word of mouth. Secondly, small businesses rarely have a staff position, or even part of a staff position, dedicated to environmental compliance and, in general, lack the resources for this kind of position. While ignorance of the law is no excuse, it does seem appropriate to allow some kind of downward penalty adjustment for a small business which was unaware that they were violating the law. A final reason for a downward adjustment is that a small business has less of an ability to pay than a larger business. Often lacking cash reserves, many small businesses operate from “hand to mouth,” and may be unable to pay the full penalty without economic hardship which would endanger jobs.

• Should the rule provide for deferral of penalties in lieu of a standard downward adjustment (deferred contingent upon compliance with the administrative order)?

Small Business & Local Governments:

This deferral could be fair if it was proven the actor was doing this alone without knowledge of other persons.

TCEQ should defer the entire penalty rather than applying downward adjustment for school districts.

The rule should not provide for a standard downward adjustment of a penalty for a small business. It should provide for a deferral of penalties in lieu of a standard downward adjustment.

The rule should allow entities under enforcement and facing a penalty to defer 100% of the penalty with the agreement that an investment will be made in the entity’s operations to achieve compliance.

There should be a way for small businesses to work off penalties so that they do not have to come up with a large amount of money at one time.

We support the concept of the rule providing for a deferral of penalties in lieu of a standard downward adjustment, provided the contingencies in the deferment are realistic and recognize the limitations of county manpower, administrative complexities, and financial resources in meeting order requirements.

Yes the rule should provide for a deferral of penalties taking into consideration the finances of the city. But also the commission should consider the type of violation (was it willful? could it have been weather related?) and most importantly the effects on the environment.

Environmental Groups or Individuals:

No comments received specific to this question.

Regulated Community (Not Obviously Small Business or Governmental):

Deferral of penalties, or stipulated penalties, should be allowed based upon when corrective action is completed.

It would be entirely appropriate for the rule to allow the staff to provide for a deferral of penalties in lieu of a standard downward adjustment (deferred contingent upon compliance with the administrative order).

• Should the rule allow for longer compliance deadlines for small business and small local government?

Small Business & Local Governments:

Deadlines should remain flexible for a case-by-case analysis of the situation. As long as adequate progress is being made then allowances should be made also.

The rule should allow for longer compliance deadlines for small businesses on a case-by-case basis.

Longer compliance deadlines for local governments should be included in the adopted rules.

The rules should allow for longer compliance deadlines for small businesses and local governments because most of these operations are dependent on grants and loans for any improvements or expansion – the application process is quite lengthy and sometimes there is a waiting period before funds are released.

Environmental Groups or Individuals:

No comments received specific to this question.

Regulated Community (Not Obviously Small Business or Governmental):

Longer compliance deadlines may be appropriate in some cases for small businesses and local governments, but, should not be routinely applied.

It would be entirely appropriate for the rule to allow longer compliance deadlines for small business and small local government, as each case is considered individually. In addition, since most small business compliance infractions are generally of small risk, it would not be putting the environment in jeopardy to delay compliance.

It should be clear that all entities regardless of size are required to meet corrective action requirements in a manner that is fair and equitable. For example, a small business or municipality with effluent discharge violations should not be allowed to delay implementation of a corrective action plan when such delay could result in additional costs or harm to another, e.g., downstream regulated entity.

Good Faith Efforts to Comply

What should the Commission consider when calculating the penalty adjustment related to Good Faith Efforts to Comply? For example:

- **Should the rule provide for good faith reductions when some, but not all, violations are corrected?**

Small Business & Local Governments:

This should be considered when calculating the penalties.

TCEQ should consider applying good faith reductions, even when none of the violations have been resolved, if the respondent has begun corrective actions. In some situations, it can take years to complete corrective actions, particularly when permits are required.

Downward adjustments for good faith efforts should be provided for school districts and TCEQ should provide assistance.

The rule should provide for good faith reductions when some or all violations are corrected. This will encourage faster compliance.

Since smaller companies have limited economic and human resources, the rule should provide for good faith reductions when some, but not all, violations are corrected. This will encourage early compliance from respondents.

Yes the commission should consider the good-faith efforts to correct all or part of the problems after the NOV. Even if respondents are deemed culpable a good faith reduction should be considered – again considering that officers of small local governments are dependent on the employees to operate the system within the permit parameters. Many times those employees operate with limited experience and training and even less money.

Environmental Groups or Individuals:

The rule should not provide for good faith reductions when some, but, not all, violations are corrected.

Good faith penalty reductions should be limited to cases where all violations have been corrected and the violators were not culpable.

Regulated Community (Not Obviously Small Business or Governmental):

Penalty reductions should be allowed for good faith efforts to comply, whether some or all of the violations are corrected. Penalty reductions should not be allowed for good faith efforts to comply for respondents that are deemed culpable or in Orders issued by Default.

Yes, the rule should 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. Sometimes it takes longer to comply with one of the corrective actions rather than another, especially when the enforcement action addresses an enforcement issue that is historical in nature-- sometimes considerably longer. It would be appropriate to give good faith reductions in calculating the penalty adjustment when some, but not all, violations are corrected. Good faith is good faith, no matter when it occurs. The agency should give credit for good faith

in the expectation that others will see the value of quickly completing corrective actions. If no credit is given for partial completion of corrective actions, there is no incentive for the offender or any potential offender to quickly complete corrective actions.

TCEQ Should Allow Penalty Adjustment for Good Faith Efforts to Comply for Discrete (Past) Violations. Current TCEQ policy provides that good faith will not be considered in cases involving discrete (or past) violations, such as emissions events. Thus, even if a company has gone above and beyond to resolve the root cause that resulted in an emissions event or other past noncompliance, and incurred significant expense in doing so, current TCEQ policy is that “good faith” cannot be considered as a potential adjustment to the penalty. The Commission should use the Administrative Penalty Rule to change this illogical position and allow for good-faith penalty adjustments for discrete violations. Such a policy will encourage the type of diligent after-the fact evaluation to prevent future violations and eliminate a policy that fails to recognize what truly are good-faith efforts to attain and maintain compliance.

The rule should allow for penalty reductions based on good-faith efforts to comply when some, but not all, violations qualify for good-faith compliance efforts. The fact that an enforcement action involves one event for which an adjustment for good faith effort to comply cannot be made (e.g., a discrete violation, under the current policy) should not eliminate the potential for penalty reduction based on good-faith efforts to comply. A more equitable policy would consider good faith efforts to comply for every alleged violation, independently. The Penalty Policy should allow TCEQ to consider good faith for each alleged violation, and determine for each violation whether the company has taken action that merits adjustment based on a good-faith effort to comply. Credit for good-faith efforts should not be disallowed merely because a corrective action has not yet been completed for some or all of the violations included in an NOE.

Yes. Good faith efforts are practical demonstrations of an entity’s response to the discovery of a noncompliance. Prompt response at correcting the noncompliance should be positively recognized. Some violations take longer to correct than others, and an entity should receive positive recognition for all prompt response actions, even if some violations take longer to correct.

Any adopted penalty matrix should give considerable reduction in penalty, if the violation is corrected as soon as possible after detection by the agency.

The rule should provide for good faith reductions when some, but not all, violations are corrected. It may not be possible to correct all violations during the penalty assessment period. For example, if one of the violations is failure to have a permit, obtaining the permit may take an extended period of time. A better alternative may be to allow for deferred penalties for those violations that cannot be remedied within the penalty assessment period. With a deferred penalty, if a party cannot resolve all violations within the penalty assessment period, there is incentive for a party to resolve as many violations or as much of a violation as possible upon discovery and complete correction according to a reasonable timeframe. Further, the agency should acknowledge that good faith may be demonstrated by the type of solution the party seeks to employ. A complex solution may require more time and achieve a better environmental result. This evidences good faith even though compliance may occur later in time.

The rule should absolutely provide for good faith reductions when some, but not all, violations are corrected. Self-reporting should be encouraged as a means of corrective action and should be promoted by the TCEQ.

- **Should the rule prohibit the application of a good faith reduction for respondents that are deemed culpable?**

Small Business & Local Governments:

Yes.

The rule should prohibit the application of a good faith reduction for respondents that are deemed culpable.

Environmental Groups or Individuals:

The rule should prohibit good faith reductions for respondents that are culpable.

Good faith penalty reductions should be limited to cases where all violations have been corrected and the violators were not culpable.

There is some value in encouraging companies to identify and correct problems promptly. Nevertheless, we believe that violators should not be rewarded with penalty discounts simply for making “Good Faith Efforts to Comply,” which is, of course, the obligation of every facility permitted to release air pollution. In particular, such penalty reductions should not be offered in situations where (1) the violation went undetected for a lengthy period of time (e.g., several leak inspection periods or reporting periods), (2) the violator is deemed culpable, or (3) the violator does not admit responsibility for the situation in a timely manner. We agree that such penalty reductions should be applied on a violation-by-violation basis, rather than requiring all these criteria to be met for all violations. Our opinion regarding penalty adjustments for “Culpability” follows the same principles.

Regulated Community (Not Obviously Small Business or Governmental):

Penalty reductions should not be allowed for good faith efforts to comply for respondents that are deemed culpable.

If the object of enforcement is environmental compliance, and a credit for good faith efforts encourages faster remediation and compliance, then it would appear to be a contradiction for the agency not to allow a good faith credit even when a respondent is deemed culpable by TCEQ.

TCEQ should not prohibit the application of a good faith reduction for respondents that are deemed culpable in the absence of clear rules on determining culpability. To date, few companies are deemed culpable. However, the language in the Penalty Policy is vague as to how TCEQ staff will make such a determination — “staff will consider whether the respondent could have reasonably anticipated and avoided the violation(s).” In the absence of a clear methodology for determining culpability, TCEQ should not establish a bright-line rule prohibiting the application of a good-faith reduction. Rather, TCEQ should look at the circumstances surrounding the particular alleged violation and determine if the good faith reduction is appropriate.

All positive responses of an entity should be recognized. The penalty calculation should take into account the totality of circumstances surrounding the enforcement action. Prompt response actions should be encouraged and rewarded. The objective of TCEQ should be compliance, and policies that reward compliance should be encouraged.

The rule should prohibit the application of a good faith reduction for respondents that are deemed culpable based on a conscious or knowing disregard for the rules.

- **Should the rule prohibit a good faith reduction in Default Orders?**

Small Business & Local Governments:

Perhaps, with adequate investigation and consultation with the original sentencing court.

The rule should prohibit a good faith reduction in Default Orders.

Environmental Groups or Individuals:

The rule should prohibit good faith reductions in Default Orders.

Regulated Community (Not Obviously Small Business or Governmental):

Penalty reductions should not be allowed for good faith efforts to comply in Orders issued by Default.

The rule should prohibit a good faith reduction in Default Orders absent a procedural issue with the Default Order, e.g., a problem with notice.

Culpability

What should the Commission consider when calculating the penalty adjustment related to Culpability? For example:

- **Should the rule provide for a penalty reduction in cases where the violation(s) were documented during a self-inspection and voluntarily self-reported?**

Small Business & Local Governments:

Yes. This would encourage honesty and encourage better “self regulation” and reward honesty in reporting.

Downward adjustments should be provided for school districts for culpability when violations are self reported.

When an entity does a self inspection and voluntarily reports, a reduction in penalty should be provided to encourage respondents to report. Also, there should be a reduction for permitted entities, which would be a further incentive to obtain a permit.

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

The rule should provide for a penalty reduction in cases where the violations were documented during a self-inspection and voluntarily self-reported. This would provide an incentive to respondents.

Self reported violations should not carry the same weight as violations discovered during inspections or complaint investigations.

Yes the rule should provide for a penalty reduction in cases where the violations were documented during a self-inspection and voluntarily self-reported. Honesty should be rewarded and encouraged.

Environmental Groups or Individuals:

A violation is a violation, regardless of being self-reported or discovered during an inspection.

Regulated Community (Not Obviously Small Business or Governmental):

Penalty reductions should be allowed regarding culpability for self-reported violations when corrective action has voluntarily begun. This would encourage violators to come forward and begin corrective action sooner.

As an incentive to reporting, the rule should provide for a penalty reduction in cases where the violation or violations were documented during a self-inspection and voluntarily self-reported.

Culpability reductions should be allowed when violations are self reported and corrective actions have been undertaken, even if those actions are not completed yet.

The rule should provide for a penalty reduction in cases where violations are identified during a self-inspection and voluntarily self-reported. It is important to encourage self-reporting. As discussed below, while implementation of the Title V operating permits program will result in few air quality-related violations being voluntarily self-reported at major sources, the TCEQ should implement similar measures to encourage accurate and complete selfreporting under Title V.

TCEQ should implement a form of penalty mitigation for items that are selfreported under Title V. In particular, penalty mitigation is warranted when a violation is reported that TCEQ would not have identified through the normal course of inspection, to encourage the submittal of accurate and complete Title V deviation reports. Otherwise, companies that are diligent in satisfying their Title V deviation reporting obligations will be subject to greater scrutiny and greater risk of penalty than companies that fail to report all deviations.

Yes, this is consistent with both the state and federal audit policies that encourage self-inspection and self-reporting. This approach should encourage positive compliance behavior and therefore should be recognized and rewarded. TCEQ should consider completely waiving penalties in appropriate circumstances for self-reported violations.

Voluntarily disclosed violations, even outside of the Texas Environmental, Health, and Safety Audit Privilege Act, should receive significant reduction in penalty.

The rule should provide for a penalty reduction or elimination in cases in which a violation was documented during a self-inspection and voluntarily self-reported. Self-reporting should be done promptly and the Commission should provide a reasonable deadline so that the regulated community will have a firm date by which to self-report. Providing an incentive to self-report and clarify on a deadline for self-reporting will encourage self-reporting. This approach could be modeled on EPA's policy regarding self-disclosure.

The rule should absolutely provide for a penalty reduction or elimination in cases where the violation(s) were documented during a self-inspection and voluntarily self-reported. This would

encourage the violator to come forward rather than to try and hide the violation. The ultimate intent is to achieve compliance at all PST facilities.

- **Should the rule provide that an entity is culpable if it is permitted, registered, or is previously issued a notice of violation, notice of enforcement, or Commission Order?**

Small Business & Local Governments:

Yes. Notice of violation is just that, notice that there is wrongdoing and allowing the violation to exist or continue after knowing it is wrong shows culpability.

An entity should be considered culpable if it has been previously issued an NOV, NOE, or Commission Order. An exception would be if the company is permitted or registered; otherwise there will be a disincentive to permit or register.

An entity should be considered culpable if it has been previously issued a notice of violation, notice of enforcement, or Commission Order for the identical or very similar violation. An exception would be if the company is permitted or registered; otherwise there will be a disincentive to permit or register.

The dictionary defines culpability as “deserving blame”. The type and cause of the offense should be considered to determine culpability – there are always some things that cannot be controlled (weather, equipment failure, etc.). Having a permit, or receiving an NOE/NOV, does not necessarily mean neglect or intentional mismanagement.

Environmental Groups or Individuals:

The rule should provide an entity culpable if it has a permit, is registered, or has previously been issued a notice of violation, notice of enforcement, or Commission Order.

Regulated Community (Not Obviously Small Business or Governmental):

There should be a case-by-case review for penalty adjustments for culpability based upon entities with permits at other sites taking into account the different media at each site. In addition, the Commission should not consider an entity culpable simply based upon the fact that it had received a prior Commission Order that may be unrelated to the current violation.

A blanket designation of culpability merely if an entity is permitted or registered should not be supported. The agency may assume a violation has occurred because an entity is permitted and therefore “should have been aware” of the violation, but the violation is based on a grey area of the rules or a new interpretation of policy of which the company is not or has not become aware. Further, violations are often caused by not understanding regulatory requirements or equipment malfunction. In addition, the mere holding of a permit or registration does not necessarily convey understanding of all the nuances of TCEQ environmental regulations.

The Administrative Penalty Rule should not provide that an entity is culpable if it is permitted, registered, or is previously issued a notice of violation, notice of enforcement, or Commission Order. This approach would fail to consider site complexity, and would find larger sites culpable far more often than smaller sites. The fact that an entity is permitted or registered should not impact culpability. Moreover, the fact that an entity has been previously issued a notice of violation or been involved in an enforcement action will often have no relation to a subsequent

violation — particularly at large, complex sites that may have thousands or tens of thousands of compliance points. Such a policy could consider sites “culpable” on completely unrelated events, and is not warranted.

If prior events are taken into account for penalty adjustment purposes, the evaluation should be limited to the “regulated entity” as the term is used by the TCEQ’s Central Registry, or “site” as the term is used in the Title V operating permits program. Events at another site or regulated entity that is owned or operated by the same company (the “customer” as the term is used by the TCEQ’s Central Registry) should not be taken into consideration when evaluating culpability.

No. Violations can occur due to many different causes. A policy that concludes that an entity is culpable simply because a violation occurred illogically assumes a certain mental state on the part of the operator. For example, it would be irrational to conclude that all permitted operators are culpable for violations resulting from all equipment malfunctions.

The rule should provide that an entity is culpable only in certain instances after previous issuance of a notice of violation, notice of enforcement, or Commission Order. If an issue is specifically and clearly identified in the previous NOV, NOE, or Order and the entity wholly fails to address the issue, then a finding of culpability and an appropriate calculation in the penalty is proper.

The rule should not provide that an entity is culpable based only upon the entity being permitted or registered. Having a permit or being registered alone does not indicate culpability. It may be circumstantial evidence that an entity is aware of the requirements that it is subject to, but it is not an indication that the entity is blameworthy, which is what “culpable” means. For example, if there is a good faith dispute over the applicability or interpretation of a permit requirement or rule, the permitted or registered party should not be deemed culpable simply because it is permitted or registered.

Standard Penalties

What should the Commission consider in using standard penalties for violations that the current penalty policy classifies as “potential” or “programmatic”? For example:

- **Can the 12 proposed violation categories for standard penalties (see Attachment No. 2) be consolidated into fewer categories, while continuing to capture all programmatic and potential violations? If so, how?**

Small Business & Local Governments:

No comments received specific to this question.

Environmental Groups or Individuals:

Potential or programmatic penalties are just that - penalties and treated as such. Do not make some penalties more or less important.

Regulated Community (Not Obviously Small Business or Governmental):

Without any experience with standard penalties it is not possible to determine whether they should be expanded or consolidated.

The 12 proposed violation categories should be trimmed significantly. The list should be trimmed to violations that can be completely demonstrated by the visual inspection of an inspector during a single site visit. Any further investigation required to determine the presence or extent of a violation suggests that the violation is not sharply defined enough for a standard penalty.

- **Can the proposed violation categories for standard penalties be ranked by order of importance? If so, what is the appropriate ranking?**

Small Business & Local Governments:

No comments received specific to this question.

Environmental Groups or Individuals:

No comments received specific to this question.

Regulated Community (Not Obviously Small Business or Governmental):

The standard penalties should not be ranked. The Commission should focus on those violations that actually cause harm.

Without any experience with standard penalties, ranking the list would tend to complicate the process at a time when the Commissioners are striving for a simpler, more transparent penalty process. It is also not clear to what “order of importance” refers. Does order of importance equate to amount of risk or something else?

TIP believes that such a ranking process would be problematic. In addition, an up-front ranking of the penalty categories may further limit the flexibility and discretion that is necessary for an equitable enforcement process.

The list should be significantly trimmed before any ranking can occur. Further, the simpler the system the more likely would be the benefits from such a system.

- **Additional Comments on Standard Penalties**

Small Business & Local Governments:

Standard penalties should be established and this will help make the enforcement penalty process more transparent. There should be a list or matrix developed that is published to clearly outline the violations and associated penalties. Stating that they will be percentages of the statutory maximum is confusing.

Industry needs to know what the penalty will be. The current policy is confusing and hard to understand, particularly for small businesses. They need to know what to expect so that they understand the consequences of non-compliance - standardized penalties would be good.

We feel that standard penalties should be established and this will help to make the enforcement penalty process more transparent. We would suggest establishing a list/matrix,

which would clearly outline the violation and the associated penalty. Thus, a respondent would not have to reference several other lists and calculate the percentages.

Environmental Groups or Individuals:

Standard penalties will be too low. The maximum of 25% is too low especially considering the cost of the damage caused by the violation.

Standardized minimum penalties can be supported, provided that those penalties are set at levels high enough to deter violations and that they function as a floor, and not a ceiling. The standardized penalty table included in the backup appears to be a step in the wrong direction...they may significantly lower penalties.

A standardized penalty should include a factor regarding a unit of time versus a one-time event. For example, the standardized penalty should be assessed for each month of non-compliance.

Pg1, Attachment 2 – Reporting, Compliance, Certifications, and Notifications, Air – Failure to submit Title V certification or emissions event notice, deviation reports, emissions inventories, and deviations on Title V certifications should be significant and should lead to full penalties, not standard penalties. The percent for Major and Minor Entities is too small to have a deterrent effect.

Pg2, Attachment 2 – Records, Air – All the record failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

Pg4, Attachment 2 – Quality Control/Analysis, Air - All the quality control failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

Pg5, Attachment 2 – Operations and Maintenance, Air - All operations and maintenance failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

Pg6, Attachment 2 – Security/Emergency Preparedness, Air - All security failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

Pg7, Attachment 2 – Construction, Capacity, and Design Requirements, Air - All construction failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

Pg7, Attachment 2 – Financial Assurance and Penalty Payments, Air - All financial assurance failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

The suggested standard penalty, “Failure to construct the facility in accordance with representations made in the permit application,” can be a very serious violation. We recommend evaluating this more along the lines of the current penalty policy. We recommend extending the practice of detailing standard penalty calculation guidelines to encompass calculation of the number of events, where practicable. For example, “open-ended lines” are often, but not always, cited as potential minor violations, one event per open line. Yet on occasion all the open

lines are cited as one event per violation, even if several open lines are noted during the same violation. When an open-ended line is found, but no leak is detected, it is the type of violation that is suitable for being a standard penalty (\$1,000 per instance, no evidence that the line is leaking). As the TCEQ encounters repeated instances of a common violation, it could post a description of current practice for calculating the penalty associated with this type of violation to the website. This informal notice, as opposed to an official policy statement, would keep the public and the regulated community abreast of how it is interpreting the penalty policy.

Regulated Community (Not Obviously Small Business or Governmental):

Standard penalties may be appropriate, however, the Commission should not create too many perceived objective criteria for enforcement because that limits the discretion, flexibility, or evaluation of circumstances and situations that may be necessary to determine a fair penalty.

Standard penalties are very problematic. There is a concern that the standard penalties would be used to take the place of NOVs and that the regulated community would not be given an opportunity to comply before a ticket or standard penalty is assessed. The standard penalty list of violations looks like violations that would never get to enforcement without an accompanying Category A violation.

There is a perception in the regulated community is that if you don't pay the penalty assessed in a field citation, and you go through formal enforcement, the penalty will be higher.

The standard penalties have some requirements listed that are not in the rules now (e.g., failure to label emission points, backup generators, etc). There was a concern about why these would be standard penalties.

There are some things that standard penalties should be use for and some that they should not. Standard penalties should be used for clear-cut, simpler violations, particularly when their use would result in an expedited settlement saving all parties time and money. Standard penalties should not be used as a strict formula, preventing the use of flexibility when considering all the circumstances of a violation.

TIP supports the concept of applying standard penalties in the enforcement process, but believes that a number of safeguards must be established to ensure that the use of standard penalties does not lead to an inflexible enforcement process that produces inequitable results.

Entities Must Not be Subject to Further Enforcement for a Violation Addressed through Standard Penalty If a violation is classified as a standard penalty violation and the company is issued a standard penalty, the TCEQ's issuance of the standard penalty should represent full resolution of enforcement based on that violation. TCEQ must ensure that no additional enforcement takes place for an event that has previously been addressed through a standard penalty. If a company faces additional enforcement based on an issue that was subject to a standard penalty, the company would be subject to what amounts to double-jeopardy and the streamlining and simplification benefits associated with the use of standard penalties will be jeopardized.

TCEQ Should Establish a De Minimis Category for which Penalties Will Not Apply TCEQ should use the categorization of violations to include a de minimis concept in the rules, identifying categories of minor violations for which no enforcement action should be taken. Prior agency penalty policies, as well as the U.S. EPA's penalty policy, establish reasonable compliance limits. For example, "failure to record CEMS data, temperatures, feed rates, coating and solvent usage" (in the Records/Air category) should have an associated compliance percentage. No monitor will function 100 percent

of the time and no employee is infallible. If data is collected at least 98 percent of the time, TCEQ should exercise enforcement discretion and not assign any penalty. Creation of a de minimis category is warranted.

TCEQ Should Not Aggregate Standard Penalties to Assess Massive Penalties The standard penalty tables do not identify whether multiple alleged violations will be assessed as a single penalty or whether each omission (e.g., each day a monitoring log is not completed) will be assessed as a separate violation. TCEQ should not assess a separate standard penalty for related, ongoing violations in such a manner that a minor event or omission would become subject to a large penalty. As discussed in Section F below, the use of violation counts to generate astronomical penalties for environmentally insignificant violations is a problem under the current Penalty Policy. That problem should not be extended through the use of standard penalties.

The Rule Should Provide for Appeal of a Standard Penalty TCEQ should ensure that an appeal process is available, even for violations that fall within a standard penalty violation category. Codification of the Penalty Policy as rule and the TCEQ's attempt to simplify the enforcement process should not sacrifice fairness or a company's due process rights.

Standard penalties should be reserved for sharply defined violations. Records that do not exist, equipment that is not present, deadlines that are not met, etc. are possible opportunities for standard penalties. For example, in TCEQ's Attachment No. 2, falsification of data would not be an appropriate category of violations for standard penalties since these types of events are fact sensitive.

The use of standard penalties should not be the preferred method of assessing penalties, as too many factors might enter into the reasons for a violation and standard penalties do not appreciate these differing facts.

Potential or programmatic violations should be classified as causing minor harm rather than major harm unless an actual release can be demonstrated to have occurred. Any standard penalty should be "spelled out" precisely and applied equally for any given offense.

Other Issues

Are there better means of determining the number of events for a given violation than the methodology expressed in the Commission's current penalty policy (see Attachment No. 1)? If so, what are they?

Small Business & Local Governments:

No comments received specific to this question.

Environmental Groups or Individuals:

One key area where the current administrative penalty policy needs clarification is in the calculation of the number of events for continuous major programmatic violations. Because programmatic violations are classified as major if more than 70% of any rule or permit requirement is not met, we found that the level of severity of violations classified into this category varied widely depending on the significance of the rule. In addition to addressing this through standard penalties, the TCEQ should consider additional policy guidance explaining how to establish the number of events for continuous programmatic violations. More generally, we recommend that the administrative penalty policy be revised to explicitly state that a violation should be considered continuous only when there is no possible way to count it as a series of

discrete events. For example, a company that is out of compliance for recordkeeping over several years could be cited for each occasion that it was required to certify compliance with rules, rather than citing a single event.

Regulated Community (Not Obviously Small Business or Governmental):

The number of events for a given violation should be consistent with the violation. Commission staff should not arbitrarily decide whether the events should be categorized as monthly, quarterly, or annual. For example, if the violation is for failing to report under a permit, it should be tied to the reporting frequency or the permit term. The number of and severity of events should be the focus of the enforcement process.

The determination of violation events needs to be defined more clearly, it appears to be an unwritten policy now.

The violation count used for penalty calculations under the current Penalty Policy is not applied consistently, and can be used to calculate an astronomical penalty for an event or series of events with little or no environmental impact. The current policy can also result in the assessment of a higher penalty for an intermittent event that a company is working to resolve than for a longer, on-going problem, based on violation count. The Administrative Penalty Rule should address the inconsistent application of violation counts and the often illogical results generated by the use of such inconsistent violation counts. TCEQ should take a more common-sense approach in determining the number of events associated with noncompliance. The use of a violation count should not penalize a company for attempting to repair a recurring noncompliance. Additionally, violation count should not be subject to manipulation and the “manufacturing” of an astronomical proposed penalty based on multiple environmentally insignificant violations that result from the same root cause. Application of the current policy has been used to generate nonsensical results, such as multi-million dollar penalty calculations for fugitive emissions monitoring or leak detection and repair (“LDAR”) violations that had little or no impact on the environment, based on counting each component that was not monitored as a separate violation.

TCEQ must recognize that the total number of Title V deviations summed on report forms does not equate to an indication of the site’s compliance record. Sites with more diligent and comprehensive investigation systems may report more deviations than sites with superficial or less-comprehensive self-assessment programs. TCEQ guidance provides little in the way of clarity or meaningful instructions on counting deviations — for example, it makes no sense to count a deviation that is attributable to the same root cause and may occur for several hours as an alleged repeat violation of an hourly permit limit. It also makes no sense to penalize those companies that implement the most comprehensive compliance reporting systems. The number of deviations included in a deviation report, in and of itself, should not be viewed as a measure of a Title V permit holder’s compliance efforts. As TCEQ has previously stated, not all deviations are automatically violations.

As an incentive, self-reported violations could always be assessed a single event.

Comments on Current Penalty Policy

Small Business & Local Governments:

The goal should be for compliance, not penalties. It is a poor use of tax payer's money to shift money from a local government to the State for penalties in a case addressing violations that are already resolved and that did not cause any environmental harm.

For purposes of determining a repeat violator, a Department of Defense or Texas National Guard installation, along with its annexes, facilities, training ranges and adjoining land, should be considered a governmental subdivision or agency as described in 30 TAC §3.2(25). However, the compliance history of one military installation should not count against the compliance history of a separate installation.

The following definition should be added to the definition of person in 30 TAC §3.2(25): Each military installation shall be defined as a separate person for purposes of determining repeat violator status under rule 30 TAC §60.2(d).

A definition of "military installation" should be added to 30 TAC Chapter 3: A Department of Defense or Texas National Guard installation to include its annexes, facilities, training ranges and adjoining lands under the direct responsibility of a single local commander.

Each military installation is commanded by separate and distinct military commanders who maintain separate operating budgets for their respective installations. The purpose of enhancing penalties for corporations and other organizations with multiple locations and operations does not have the same deterrent effect for military installations. Encouraging measures to enhance compliance on a military installation is best accomplished by giving an installation commander control over his individual compliance history, rather than penalizing him for violations beyond his control.

TCEQ should not penalize for self reported data. Self reported data (DMRs) are currently counted as if the violations have been included in a final order when they are really just self reported violations - that is objectionable. If you get hit for self reporting you are basically getting hit for doing what you are supposed to be doing (self report) when there are so many others that are not.

Enforcement penalties need to be tied to environmental impact. The real focus should be on eliminating and preventing actual pollution and contamination of the environment.

Environmental Groups or Individuals:

Enforcement must be swift and certain and the regulated community must know what to expect, particularly when dealing with violations that create harm. The current policy is too vague and allows too much reduction in penalties and negotiation.

The costs of the damage caused by the violation must be addressed.

The rule should consider the gross income of violator in order to address the issue of a company considering the penalty a "cost of doing business".

The rule should include violations that are called "areas of concern" for penalty calculation purposes.

The rule should require penalties for all violations, even those the TCEQ does not consider serious or unresolved.

The rule should not have two separate penalty matrices. This is too complex and time consuming.

The rule should not be based upon the size of the site. If a violation has occurred it should not matter what the size of the site is.

Deterrence should be an express goal of the enforcement program.

TCEQ's penalties are too low.

There should be no leniency for repeat violators.

The environmental/human health/ property matrix should be changed such that violators with actual releases will face higher penalties than under the current policy.

Pg 6: Categories of Harm, Major Harm – how would TCEQ know if “Human health or the environment has been exposed to pollutants which exceed levels that are protective of human health, etc.”? This burden of proof is too great and will rarely be met and therefore serious air pollution violations will not have maximum penalties.

Pg 6 & 8: Categories of Harm, Moderate Harm – define “significant” under Actual and Potential Release.

Pg 6: Categories of Harm, Minor Harm – define “insignificant” under Actual and Potential Release.

Pg 7: the first footnote reads, “For example, VOC emissions are known to contribute to ozone formation, but cause no observable immediate impacts.” This is untrue. Some VOCs are toxic (Benzene and 1,3-Butadiene, for instance) and cause such impacts.

Pg 8: the table labeled, (2) The Released Pollutant, “usable the resource” and “significant amount” are not defined.

Pg 9: The “degree of noncompliance” for “Minor” is much too low and needs to be greater.

Pg 12: Compliance History Enhancement for the Site Under Enforcement - the last 6 in the table should not be allowed. Companies should not be rewarded for violations and there is no assurance any of the 6 listed items relate to finding and or resolving the violation.

Pg 14: Why are only capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained evaluated in calculation of economic benefit? What about costs to the environment and people's health and welfare?

It appears that the 20% deferral has come to represent an automatic discount rather than a true incentive. [Example cites several instances where the standard 20% deferral was granted to companies that did not meet the initial TCEQ deadline to settle a case, or did not meet other criteria such as prior enforcement history.

Another issue that the penalty policy does not presently handle well is the scale of a violation. Presently, the policy does not distinguish between situations where a plant fails to properly monitor two pumps for leaks and where a plant fails to properly monitor an entire unit. The

policy also fails to define the scale of a violation involving multiple units. Should a violation covering several units at the same plant be counted as separate violations for each distinct operating unit or simply one violation for the entire plant? We recommend that each operating unit be cited as a violation because this approach more accurately reflects the scale of the offense.

Regulated Community (Not Obviously Small Business or Governmental):

TCEQ staff needs to address the process of double counting penalty enhancements, in particular, with the use of monthly self-reported discharge monitoring report data.

The current policy double dips allowing enhancements for each NOV or order and then again for customer compliance history classification.

It may not be appropriate to specify how to determine harm or severity in the rule. There needs to be room for negotiation based upon mitigating factors.

One of the things that the rule should retain is the way that the calculation looks at harm to the environment versus recordkeeping.

An issue was raised regarding the statewide enhancement due to the performance of another facility in the State. It was recommended that this enhancement to the penalty be discontinued.

Another issue is that there are inconsistencies throughout the State (from Region to Region) regarding similar instances - some are more stringent and some are less stringent.

A question was raised about EPA consent decree enhancements and whether or not there is a difference in the calculation if the consent decree is a joint State/EPA decree or if it is just an EPA consent decree.

An issue was raised regarding the number of NOVs sent (original versus follow-up) and how they may be counted as additional NOVs for compliance history when they are really just follow-up letters. Could there be a category of NOVs rather than just counting all NOVs?

TIP supports TCEQ's attempts to streamline and clarify the enforcement process. TIP is concerned, however, that codification of the Penalty Policy in the Administrative Penalty Rule could eliminate the flexibility and agency discretion that is necessary for fair and equitable treatment of the regulated community in the enforcement context. Agency flexibility and discretion must be maintained, and codification may not be the best way to preserve this important element of the penalty assessment process. TIP also believes that TCEQ should use the Administrative Penalty Rule to change the flawed premise upon which a penalty adjustment in the current policy is based: that there is always an economic benefit to noncompliance. The application of this assumption leads to inconsistent and often-illogical results under the current policy. TCEQ should also expand the circumstances in which the good-faith effort to comply can be used as a penalty adjustment, and provide penalty reductions for violations that are voluntarily reported. The Administrative Penalty Rule should also address double-counting in the current penalty calculation by eliminating the compliance history component enhancements as recommended by staff. Finally, TCEQ should use the Administrative Penalty Rule to establish principles for counting the number of violations that lead to consistent results and avoid the unreasonably high penalty amounts that can be calculated under the current policy through manipulation of the violation count.

The current Penalty Policy contains two potential adjustments to a penalty amount: an adjustment based on “Compliance History” and an adjustment based on “Compliance History Classification.” The Enforcement Process Review resulted in a staff recommendation that TCEQ simplify the penalty policy by eliminating the Compliance History Worksheet from the penalty calculation and replacing that Worksheet with a potential adjustment based on the respondent’s overall compliance history classification. Using compliance history for two adjustments to a penalty amount constitutes double-counting compliance history when evaluating whether to make a penalty adjustment. The Commission agreed with the Steering Committee’s recommendation, and it should direct TCEQ staff to eliminate the compliance history component enhancements.

TCEQ should develop media-specific penalty policies. A tailored approach, based on the specific media and the nature and significance of the event, is more appropriate than a “one size fits all” approach to determining the number of events. TCEQ should consider the types of events it typically sees in each medium and develop more-tailored approaches for air, water and waste violations and penalty assessment.

Good faith efforts to comply should be better defined and should result in penalty mitigation.

Supplemental Environmental Projects should be encouraged by the proposed rules.

The Commission should move away from any definition of culpability that is based on a party’s reasonable anticipation. The Commission should not use a standard for culpability that is essentially a negligence standard. Any definition of culpability should require demonstration of a knowing disregard for the law.

The Commission evaluates appropriate penalties based upon the throughput of the facility. Using EPA’s designation of major/minor facilities/sources, the TCEQ has established a throughput of 50,000 gallons per month in determining a major source (>50,000 gallons) from a minor source (<50,000 gallons). Today, a typical metropolitan PST facility far exceeds the 50,000 gallon designation. As a result, most sites fall into the major source category. The threshold should be increased by either doubling or tripling the throughput designation.

The TCEQ does not follow their current policy and is too lenient in penalty calculations. The vast majority of the TCEQ’s leniency can be attributed to three causes: leniency towards inadequate leak detection and repair programs, undercounting the number of events so that the penalty does not truly reflect the duration of violations, and dropped cases. ***These problems can generally be addressed by following current TCEQ policy*** regarding the calculation of penalties.

General Comments

Small Business & Local Governments:

No additional general comments received.

Environmental Groups or Individuals:

516 Email Comments received stating the following (as of 1/2/2006):

“I support TCEQ's efforts to strengthen penalties against polluters.

These changes will make sure polluters aren't allowed to keep illegally gained profits, deterring crime and leveling the playing field for law-abiding businesses.”

Additional comments received along with the above 500+ general statements:

- These changes will make sure polluters aren't allowed to keep illegally gained profits, deterring crime and leveling the playing field for law-abiding businesses.” Please make sure that our laws are enforced. Unless legislated penalties are enforced for pollution violations, there will not be the appropriate disincentives to shape appropriate business decisions and behaviors. Businesses need to operate in socially responsible ways, but will avoid doing so when allowed. This provides an unfair advantage to them over responsible businesses who should be 'rewarded' for their voluntary responsible behaviors.
- Congratulations to the Texas Commission on Environmental Quality for its efforts to strengthen penalties against polluters. Keep up the good work!
- Corporations doing business in Texas have shown over and over and over again that they will not voluntarily take significant measures to reduce or eliminate pollution, even if it SAVES THEM MONEY!!! Texas is probably the joke among major polluters - Heh...Heh...if you can't get it done here, take it to Texas. They won't do anything!

Since industry will not act voluntarily, strong enforcement is necessary. Hit them in the only place that matters to them - the pocket book.

- I am further concerned that so little is done to monitor pollution. So much goes undetected and unreported that merely strengthening penalties, while a good thing in itself, is not enough. It must be followed up with consistent monitoring.
- I applaud the efforts of the Texas Commission on Environmental Quality to impose financially meaningful penalties on polluters. Keep up the good work.
- Too long they have not been held accountable and therefore THUMB their noses at the restraints.
- So many people are suffering from various illnesses, especially respiratory problems in children, that we must act for the greater good and look beyond the profits of the lobbyists and do the right thing.
- Texas is a beautiful gift our children will inherit. Let's make sure we do what needs to be done for their heritage.
- Polluters will not stop unless the penalties are strong enough to have a deterrent effect.
- I am a native Texan, born in Orange in 1945. I have watched with sorrow what has happened to my beloved Texas' environment. I support TCEQ's efforts to strengthen penalties against polluters.
- These changes will make sure polluters aren't allowed to keep illegally gained profits, deterring crime and leveling the playing field for law-abiding businesses.

- TCEQ's job is to make polluters pay. I'm appalled that you haven't been doing it before. Please do it now.
- I am deeply concerned about pollution in our environment. My sixth grandchild arrives in a week, and I want them to have a cleaner world.
- The proposed changes would reduce the likelihood of any company polluting because it is cheaper to do so.
- Put a stop to polluting our environment.
- Pollution in Texas is a BIG problem, so I support TCEQ's efforts to strengthen penalties against polluters. I am sick and tired of them trashing our beautiful state!
- I support TCEQ's efforts to strengthen penalties against polluters who break the law and hurt our health and environment. For too long, many Texas polluters have violated our environmental laws and gotten away with it.
- Thank you for taking a stand to safeguard our health and environment.
- I want to make sure polluters who break the law and harm our health and environment are dealt with fairly, but firmly. This is one area of public policy that cannot be negotiated away.
- In a climate where health care is already a problem, pollution in North Texas contributes immeasurably to health problems of all kinds.
- I think we should have done this much much earlier.
- Texans have been subsidizing polluters too long by sacrificing out clean air and water for their profits.
- When industries are allowed to pollute without penalty or with only minimal penalty, their profits are at the price of our health and enjoyment of the environment. Their profits, then, are not entirely rightfully earned but are partly taken from what actually belongs to others with whom they share the planet.
- Please help to discourage the behavior of irresponsible companies who find it cheaper to pollute than to pay the consequences. Make the fines fit the crimes! Average citizens are counting on you.
- As someone who lives in the most polluted city in the country, Houston, I am tired of watching the companies that are mostly responsible for the contamination of our air, soil, and water, get by with a small slap on the wrist when they are caught. A slap that is so small as to be generally considered a minor cost of doing business akin to paying the telephone or utility bill.

- Experience has shown that without strict enforcement and strong penalties against mega-polluters in place, there are no incentives to ensure the health of air, water, soil, plant and animal life in Texas or anywhere else.
- I support TCEQ's efforts to strengthen penalties AND THEN ACCESS THEM against polluters.
- It's a pleasure to have government officials doing the job they are supposed to do. Thank you very much.
- For much too long, industries in Texas have had their way against efforts to curb their pollution of our environment. Corporate power is in control in Texas, and neither the ballot nor the voice of the people matters.
- I truly feel the best way to stop polluters is to make it economically very painful to break the law. If penalties don't impact their business, if companies don't reliably get penalized, there's no incentive to play by the rules. Our health and our environment depend on people like you standing up and making sure penalties are stiff and penalties are enforced.
- Aggressive fines and penalties for breaking environmental laws or exceeding standards and limitations would make it cost effective for offenders to bring their operations into compliance.
- Fair is fair and enough is enough! Protect the citizens of Texas and get tough on crime!!!
- Companies and individuals need to have the incentive to do the right thing instead of getting a slap on the wrist for harming our property, our health, and our environment. And if companies make a profit off of their pollution, those profits should be taken away. Period. Please be tough on polluters who break the law and irreparably harm our environment, threatening our collective future and who break the law.
- I am the mother of three children and I would hope that those that are in power will help to improve the quality of our environment for their health and future.
- We need to do whatever it takes to make our environment as safe and clean as possible.
- I am sick and tired of businesses that are allowed to pollute public air, waterways and the earth. Businesses and stockholders should not be allowed to profit at the expense of their pollution. Existing laws and associated penalties should be enforced to the fullest. The TCEQ is negligent when it refuses to enforce existing anti-pollution laws. Do your job! And your job is not to support polluters, it is to protect the public against polluters.
- These changes will make sure crime does not pay when it comes to pollution. My mother, who never smoked, died too young of lung cancer after living most of her life in one of the most polluted cities in America, Houston. I am convinced there is a connection, just as with high levels of air pollution and rising rates of childhood asthma. Polluters should pay so much it hurts, and hurt so much they clean up their act.

- What is being done to guarantee protection on our endangered wetlands, species and wildlife?
- As a person who has battled lung problems for most of my 75 years, I'm concerned that my children and grandchildren live in an environment that will be healthier than we now have. Our beautiful Texas deserves to be preserved and cared for by all Texans.
- Do not give in to the whining of corporations about having to be good citizens and how much it will cost. Our water and air (in particular) are getting filthier by the day. It is time to stop these corporate criminals! Allowing them to have say over these rules would be an example of fascism. Corporations have already had their way for far too long in Texas, and we have the air and water to prove it. Do the right thing--increase the fines polluters pay and pass their form of dirty business back to them. We are tired of paying the price in terms of health for their lawlessness.
- Then maybe we won't be known as the most polluted state in the nation!!!!!!
- The ozone levels in Arlington have increased 3 fold this year according to the Ft Worth Star Telegram.
- In addition, working with law enforcement to stop and cite smoking vehicles will help that problem, the community is urging you to become more diligent about these types of polluters!!
- Businesses must be responsible as all citizens are responsible for keeping our air and water clean.
- Texas is very polluted, and it is an outrage that we allow people (but usually corporations) to get away with violating our already weak anti-pollution laws. As a citizen, I resent being forced to pay with my health for their profits.
- Thank you for what you are doing to protect the environment. I really do appreciate you and all you do.
- It is already too easy for many corporations to avoid complying with environmental regulations. Without the threat of severe penalties for violations, polluters have no incentive to comply with pollution prevention laws, leaving our citizens at risk of contaminated property, water, and air in their neighborhoods.
- IT'S TIME TO ENFORCE THE LAWS AND "REALLY" FINE THESE COMPANIES REAL FINES NOT .50 CENTS ON THE MILLION.THIS GOOD OLE BOY REGIME HAS TO GO.
- Bravo! I am behind the TCEQ in its efforts to strengthen penalties against polluters. Polluters shouldn't get to keep illegally gained profits. They need to hear a strong message that law-abiding businesses are the only kind we need.
- It is only through the enforcement of our laws and strict application of penalties that polluters will adjust their misdeeds. Let us all be held accountable under the laws by

which we have composed for the good of ourselves and our posterity. Please continue to do what you can to protect our environment by applying and increasing fines for violators.

- EACH ONE OF US IS RESPONSIBLE FOR HELPING OUR EARTH...THANKS FOR STEPPING UP AND TAKING THIS STEP FOR US ALL!!!!
- Without significant penalties, many corporations factor the cost in as a part of doing business. The penalties need to be strong enough to actually deter their crimes.
- The time is long overdue for Texas to get serious about controlling the enterprises that profit from polluting our state! Enough talk - it's time TO ACT...
- For too long polluters have found it less costly to pay a fine than to correct problems with their process.
- Right now there is an economic INCENTIVE TO POLLUTE in Texas.
- Our quality of life is dependent on a healthy environment. In the long run Texas will only attract business and investment if we are a state that is desirable to live in. In addition, the increased medical costs from pollution will have to be borne by all of us. The penalties for polluters should reflect this extra cost and well as the loss of future business growth.
- I personally think it is immoral for these polluters to be allowed to excrete their noxious product on taxpayers who are subsidizing them!
- I would like to see tough action against polluters who break the law and hurt our health and environment.
- These changes are long overdue and will help ensure polluters are not allowed to keep illegally gained profits, deterring crime and leveling the playing field for law-abiding businesses. Its time for Texas to demand environmental responsibility of those doing business in our state and properly penalize those that place profit over public health. Future generations of Texans deserve no less.
- Big money speaks. Let's be sure that this time the "big money" represents the stiff fines levied on polluters and the "speaks" represents the cleanup.
- Most Texans love their state and respect the land. We must keep the land, water, and air safe for future generations.
- I have had experience with a polluter that is registered to do so. Ignorance and disregard for others quality of life as well as the environment almost made him loose his license. BUT, since TCEQ cannot monitor him, he gets by with MURDER.
- Please step up to the plate and support the people and the land in Texas by making it harder for polluters to trash our great state.

- I lived in South Dallas for 20 years, raising my family there, and My Son Sean has health problems that may have been aggravated by the Midlothian cement plants as he got sicker as he went to school in Desoto (prevailing winds). I have written letters, read about the sleazy politics down there (Joe Barton), and am frankly disgusted that corporate profit is put WAY ahead of our children's health. Shame On YOU!!! Texas has the worst air and record in country, HELP US!
- Numerous amount of toxic & noxious gas that already exist and we continually breathe everyday... as evidenced by all types of cancers (that were unheard of 2 or so decades ago..) plus the increase in asthma & other pulmonary illnesses, & possibly infertility issues & congenital anomalies. We have to look forward and take care of our future generation now. Thank you for your support for this important initiative.
- I was born in Texas and have lived almost my entire life in this great state. As Texas, most of us like to think of ourselves as descendants of trail blazers, hard working, and optimistic. I hope we all are honest and fair and truly care about the legacy of this state in more ways than humorous myths and the old, we are the biggest, the toughest, or the best braggers... My vote and my support is only and always for legislation, laws, and the people who are tough on crime. The most heinous of crimes are those being perpetrated against the environment. POLLUTERS ARE CRIMINALS AND MUST BE STOPPED AND MADE TO PAY BY USING THEIR PROFITS TO CLEAN UP OUR STATE (and the planet). We can't continue to give "breaks" to big business, big oil, or any other company or lobby by overlooking the payoffs and "good ol' boys" club favoritism... It's part of what's eating the away at the soul of this entire country - greed, corruption and "taking the easy way out."
- IT is time that Texas realized its responsibilities to our children and society in general. We can't waste time any longer. Please take this important step to improve our environment. It may not save us, but at least we can say we tried.
- If penalties do not approach the level of illegally-generated profits, common business sense will dictate that violating environmental law is a reasonable course of action. The repair of environmental damage--when it is possible--is invariably costlier than prevention.
- As a long-time public health nurse and public health advocate (including 9 years on the Tx Board of Health), I am appalled at the lack of concern about the health status (and thus productivity in school and workplace) of Texans. It is high time that pollution prevention be taken seriously in our state.
- Polluting should not be profitable in Texas!
- I am adding my own words to this letter. There are times I can't take a walk in my neighborhood because of the smell. Some company is dumping and polluting the air. I then call the poison control for Harris County. Make these penalties stronger so on any given night I can walk my neighborhood and not worry about the poison in the air.
- I strongly support the development of rules governing administrative penalties that will assure the levying of tough penalties for violations of pollution control requirements and that will send a clear signal to regulated businesses, individuals, and government bodies

that violations will not be tolerated. The State of Texas needs an environmental enforcement program that has a strong, deterrent effect against future violations. The only way to achieve that is if a polluter knows, as a result of the track record of the regulatory agency, that he or she will be fined heavily for any violation incurred. That will contribute to a climate where regulated enterprises take effective steps to avoid violations, for the benefit of public health and environmental protection.

I especially urge you to include in the rules provisions that will assure that no polluter achieves any economic value as a result of violations of pollution control laws and permit requirements. All fines should be structured so as to recover all of the economic value that a violator may have obtained as a result of the violation(s) – no exceptions. If administrative penalties become simply the cost of doing business for a polluter, then there is little or no deterrent value to those fines, and our state's environment and our quality of life will suffer accordingly.

- I urge agency staff to draft proposed new rules that will result in tougher penalties for violations of pollution control laws, including the recovery to the State of Texas of any economic benefit a polluter has gained by violating the law.
- Please draft new rules that will result in tougher penalties for violations of pollution control laws, including the recovery to the State of Texas of any economic benefit a polluter has gained by violating the law.
- Please consider defining a violator as an individual and/or a corporate entity. The persons in charge of an organization shall also be made responsible on a personal basis for the wrongs of the companies under their direction and not merely have the company (shareholders) pay for the results of his/her violation(s) of the law.
- Please draft a new set of rules which will actually be tough on the violations of pollution control laws, especially measures which will bring money to our fair state which could be used for all sorts of protection and clean up measures, and would make those responsible for the pollution actually pay to clean it up. Thank you for your time.
- I just read today (12/2) in the Austin American Statesman, (A2) that EPA is requiring companies to report chemical spills only every other year. Any weakening of this type of regulation or the penalties for violations imposed for such spills is irresponsible to the citizens of the United States. I ask that here in Texas TCEQ draft new rules that will result in tougher penalties for violations of pollution control laws, including the recovery to the State of Texas of any economic benefit a polluter has gained by violating the law. Please do this for all the citizens of Texas.
- Please improve the health and welfare of Texans by tightening the pollution control rules as well as punishment for violations. Violators should have to reimburse the state for any monetary advantage they have accrued through pollution. This is not simply a short term situation, but so many of the pollutants have interminable long term effects on humans and the environment. Please remember this is the only planet we have...let us do our best to preserve it in its natural state.
- I am writing in support of higher penalties for individuals or businesses which violate state laws resulting in damage to the environment and human health. The current

penalty structure has been criticized as too weak to motivate polluters to stop polluting. In addition, I would suggest that any economic advantage in profits accrued by the polluter during the period of violation be assessed and these profits be required to be given to the State of Texas so that the state has adequate funding to deal with the consequences of the pollution. I urge you to make substantial improvements in protection of the environment, human health and economic well-being in Texas, perhaps modeling your policies after states with strong environmental protection programs.

- Please do not weaken further Texas pollution laws. All Texans have to live under enough air, water, and other environmental pollution as it is. With thousands moving to Texas each year, Texas should be leading - not trailing - the rest of the country in enacting and enforcing the toughest possible environmental standards.
- Bottom line- we need penalties that make it highly undesirable for companies to break the law and continue to operate. Penalties should not be a cost of doing business, but rather a strong incentive to do it right the first time.
- I'm a native Texan (unlike the man who started the downhill slide), but no longer call that state "home". One very strong reason is that the power-hungry Republicans - who owe everything to big industry and don't care a whit about the average Texan - have practically ruined the state. With a Republican governor, a Republican state legislature, and a Republican congressional delegation (created by illegal redistricting), I see little relief until Texas voters wake up.

Weakening Texas pollution laws as opposed to strengthening them, is just another nail in the coffin for Texans, and another windfall for the international corporations that control the state.

Regulated Community (Not Obviously Small Business or Governmental) :

Stop the existing, combative, & excessive legal approach by TCEQ to all Texas businesses, small or large. It is counterproductive, time consuming and expensive for the State of Texas.

TCEQ engineers must become goodwill ambassadors to urge all businesses into compliance in the least practical time with the best solutions and use the courts only as a last resort.

Any civil penalties must be considered on an individual basis with penalties judged on the severity of the non compliance.

**Attachment 3: Summary of Individual
Administrative Penalty Stakeholder Meetings**

Amarillo Penalty Rule Stakeholder's Meeting
Panhandle Regional Planning Commission, 415 W. Eighth Avenue
November 4, 2005
10:00 am thru 2:00 pm
Attendees

Jose Alaniz, Gilvin-Terrill, LTD

Jim Benton

Stefan Bressler, Panhandle Regional Planning Commission

Steve Bustas, Oneok WesTex

Cindy Cockerham, Senator Kel Seliger's Office

Willie Herrera

Denise Jett, ConocoPhillips

John Kiehl, Panhandle Regional Planning Commission

Steven Miller, municipality

Marvin Sistrunk, Hale County

Steve Studtmann, Oneok WesTex Transmission, L.P.

E E Wauson

Ben Weinheimer, Texas Cattle Feeders Association

Shelly Williamson, Valero

Anne Dobbs, TCEQ Enforcement Division

Jody Henneke, TCEQ Office of Public Assistance

John Gillen, TCEQ Office of Public Assistance

Brad Jones, TCEQ Region 1 - Amarillo

Amarillo Penalty Rule Stakeholder's Meeting
Panhandle Regional Planning Commission, 415 W. Eighth Avenue
November 4, 2005
10:00 am thru 2:00 pm
Meeting Summary

I. Welcome and Introductions

Jody Henneke, TCEQ Office of Public Assistance, opened the meeting by introducing TCEQ staff Anne Dobbs, Special Assistant to the Director of the Enforcement Division; John Gillen, Office of Public Assistance; and Brad Jones, Regional Director, Region 1 - Amarillo.

The following introductory remarks were made by Ms. Henneke: The purpose of this meeting is for the TCEQ to take comments on the penalty policy. Comments may also be submitted in writing through December 19, 2005. Following the meetings, Anne Dobbs will post meeting summaries and a list of attendees on the web site.

II. Scope of the Proposed Rule

Anne Dobbs explained that the Commission has recently undertaken a comprehensive review of the Agency's enforcement process. This review covered everything from investigation through enforcement initiation criteria and what should go into a final order, including the penalty calculation. The review included input from stakeholders, similar to this process, including the regulated community, interested citizens, environmental groups, etc. One of the outcomes of this review process is that the Commissioners have directed the Executive Director to begin the rule-making process to adopt the current penalty policy into a rule. This rule making will address how penalties will be calculated but will not address when an enforcement action should be initiated.

The rule making will take each of the factors that the statute requires the Commission to consider when assessing an administrative penalty (i.e., nature and extent of the violation, economic benefit gained, good faith efforts to correct the violation, compliance history, etc.) and will specify how those factors will be applied to the penalty calculation. The Commission specifically directed staff to conduct stakeholder meetings prior to initiating formal rule making. What this means is that the Commission's position regarding this rule making is undecided at this time. The Commission is interested in receiving comments on the background materials that have been posted on the web, which include six main issues raised during the review process, the current penalty policy, and a list of examples of violations that could be included as standard penalties.

Once all comments have been received (written comments will be taken until December 19, 2005), a proposal will be drafted for approval by the Commission, then the proposal will be published in the Texas Register for a 30-day comment period. There may be a hearing held during the comment period. After that the Commission has 6 months to publish a final rule in the Texas Register.

III. Procedural Ground Rules

Attendees were asked to sign in and were told that Email addresses provided could become part of the public record. Attendees were invited to come to the microphone, provide their name, whether or not

they are representing a company or organization, and to provide any comments that they would like. The meeting will be summarized and placed on the web site.

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

The following comments were received:

Is the intent of this project to modify & structure the penalty policy so that there is some predictability to the process? Is the rule going to take into account the size of the entity that is under enforcement? TCEQ staff indicated that the intent of the project is to take the current penalty policy, incorporate changes that the Commissioners feel will improve it, and make it a formal rule. There has been no final decision yet on exactly how small businesses or local governments will be handled, however, that is something that is being considered.

The standard penalties have some requirements listed that are not in the rules now (e.g., failure to label emission points, backup generators, etc). There was a concern about why these would be standard penalties. Staff indicated that the information in the standard penalty tables was put together as a starting point. No decisions have been made as to which violations will be included and attendees were encouraged to provide specific comments on the standard penalties. In addition, it was recommended that it will be important to carefully review the proposed rule

One of the things that the rule should retain is the way that the calculation looks at harm to the environment versus recordkeeping.

An issue was raised regarding the statewide enhancement due to the performance of another facility in the State. It was recommended that this enhancement to the penalty be discontinued.

Another issue is that there are inconsistencies throughout the State (from Region to Region) regarding similar instances - some are more stringent and some are less stringent.

A question was raised about EPA consent decree enhancements and whether or not there is a difference in the calculation if the consent decree is a joint State/EPA decree or if it is just an EPA consent decree.

An issue was raised regarding the number of NOV's sent (original versus follow-up) and how they may be counted as additional NOV's for compliance history when they are really just follow-up letters. Could there be a category of NOV's rather than just counting all NOV's?

V. Closing Remarks

Jody Henneke reminded attendees that the web site would be maintained up-to-date with summaries and names of attendees for each of the six meetings. Attendees were told that the TCEQ staff would be here to take comments until 2:00 pm. They were also told that they were welcome to come talk to staff "off the record" but if they wanted to provide comments on the penalty policy and upcoming rule, then we would ask them to speak "for the record" and would turn the microphone and recorder back on.

Arlington Penalty Rule Stakeholder's Meeting
North Central Texas Council of Governments, 616 Six Flags Dr.
December 1, 2005
2:00 pm thru 6:00 pm
Attendees

Jaime Bretzmann, Martin Marietta Materials

Julie Burnfield, East Texas Council of Governments

JR Coolidge, Fort Worth Small Business and Local Government Advisory Committee

Wendy Cooper, Cantey & Hanger, L.L.P.

Owen Daniel, Midland Mfg. Co.

Ed Daniels, Lockheed Martin

Alice Derbyshire, DFW Biodiesel, Inc.

Maj. Randon Draper, Department of Defense

David P. Duncan, TXU Power

Melissa Gardner, Strasburger & Price

Nancy Garnett, TXI

Martha Gidney, TXU Electric Delivery

Diana Helms, Senator Craig Estes' Office

Billy Hunt, Valero Energy

Jerry Johnson, TXU Power

Joe McHaney, Pacific Biodiesel of Texas

J.P. McHaney, Pacific Biodiesel of Texas

Jeff Mayfield, North Texas Municipal Water District

Jeannette Pennington, Midstate Environmental Services

T.C. Michael, City of Fort Worth

Joe Polanco, Dallas Small Business Advisory Committee

Dewayne Quertermous, Greater Fort Worth Sierra Club

Steve Rothwell, City of Dallas Storm Water Management

Tim Schulz, Fort Worth Aluminum Foundry

Joe Stankiewicz, North Texas Municipal Water District

Received 12/1/05 - hand delivered
to Anne Dobbs at Arlington
stakeholders meeting

Dallas Small Business Advisory Committee

November 22, 2005

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
PO Box 13087 MC-109
Austin, TX 78711-1065

Glenn,

On behalf of the Dallas SBAC, we'd like to thank you for this occasion to voice our comments regarding the TCEQ Administrative Penalty Rule.

Small business is the backbone of this State's economy, and we think it's crucial that it participate in maintaining a viable environment in Texas. Yet, to treat these firms similarly as to large Fortune 1000 companies is unfair – especially in the areas of penalties.

Over the past several weeks, the SBAC chairs as well as the CAP have discussed these issues. We have also discussed it at the local level and here are various thoughts/recommendations on the major areas being addressed in the upcoming stakeholders meetings:

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

Small Business/Small Local Governments -- The employee component of the definition should be 100 employees or fewer **with no income associated with the definition** due to the complexity of determining an appropriate financial assessment for small businesses across the spectrum. We feel that the employee count is a very effective benchmark since attempting to establish size on revenue is fraught with problems.

If it is necessary to include an income definition, the financial component of the definition should be very simple to calculate, such as using gross sales (as opposed to net). The definition should be set at no less than 15 million gross sales. The CAP and the SBAC encourage small businesses to provide statistics reflecting their business size and revenues so that the regulatory definition will accurately reflect real world experience.

The rule should not provide for a standard downward adjustment of a penalty for a small business.

It should provide for a deferral of penalties in lieu of a standard downward adjustment.

The rule should allow entities under enforcement and facing a penalty to defer 100% of the penalty with the agreement that an investment will be made in the entity's operations to achieve compliance.

The rule should allow for longer compliance deadlines for small businesses on a case-by-case basis.

Page Two
Glenn Shankle, TCEQ
November 22, 2005

Good Faith Efforts to Comply – Since smaller companies have limited economic and human resources, the rule should provide for good faith reductions when some, but not all, violations are corrected. This will encourage early compliance from respondents.

The rule should prohibit the application of a good faith reduction for respondents that are deemed culpable.

The rule should prohibit a good faith reduction in Default Orders.

Culpability - The rule should provide for a penalty reduction in cases where the violations were documented during a self-inspection and voluntarily self-reported. This would provide an incentive to respondents.

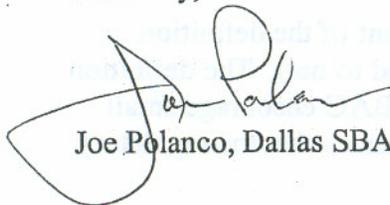
An entity should be considered culpable if it has been previously issued a notice of violation, notice of enforcement, or Commission Order. An exception would be if the company is permitted or registered; otherwise there will be a disincentive to permit or register.

Standard Penalties – We feel that standard penalties should be established and this will help to make the enforcement penalty process more transparent. We would suggest establishing a list/matrix which would clearly outline the violation and the associated penalty. Thus, a respondent would not have to reference several other lists and calculate the percentages.

Other Issues – We have no comments on any other topic.

We appreciate the opportunity to make these comments and the willingness of the Commissioners and the staff to review these ideas. Over the years the State of Texas has worked with small business to understand our concerns and make the appropriate adjustments. We look forward to this continued cooperation.

Sincerely,



Joe Polanco, Dallas SBAC Co-Chair



Ken Benson, Dallas SBAC Co-Chair

CC:

Mr. John Sadlier, Division Director
Enforcement Division MC-219

Ms. Tamra Oatman, Section Manager
Small Business and Local Government Assistance MC-106

Received 12/1/05 - hand delivered to
Anne Dobbs at Arlington
stakeholders meeting



DEPARTMENT OF THE AIR FORCE
AIR FORCE CENTER FOR ENVIRONMENTAL EXCELLENCE
REGIONAL ENVIRONMENTAL OFFICE
525 SOUTH GRIFFIN SUITE 505
DALLAS TEXAS 75202-5023

1 Dec 05

Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas

Re: Administrative Penalty Policy Revision

Dear Commission,

I am writing to you in my capacity as the Department of Defense Regional Environmental Coordinator (DOD REC), Region 6, in response to revising your administrative penalty policy. I propose that the following language be added to the section labeled "Repeat Violator" of the Commission's Current Penalty Policy, Second Revision, (Effective September 1, 2002):

For purposes of determining a repeat violator, a Department of Defense or Texas National Guard installation, along with its annexes, facilities, training ranges and adjoining land, shall be considered a governmental subdivision or agency as described in 30 Texas Code Part I, Chapter 3 Rule 3.2 (25). However, the compliance history of one military installation shall not count against the compliance history of a separate installation.

Additionally, I recommend that future rulemaking related to Administrative Penalties include an amendment to existing 30 TEX ADMIN. CODE, Part 1, Chapter 3, Rule §3.2 (25) to modify the definition of "person" by adding the following bold faced language:

(25) Person—An individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity. **Each military installation shall be defined as a separate person for purposes of determining repeat violator status under rule §60.2(d).**

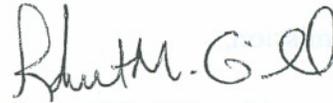
Correspondingly, the definition of "military installation" should be added between the existing definitions found at §3.2 (20) and (21) to read:

(21) Military installation—A Department of Defense or Texas National Guard installation to include its annexes, facilities, training ranges and adjoining lands under the direct responsibility of a single local commander.

This proposed clarification of policy and rule is justified by the reason that each military installation is commanded by separate and distinct military commanders who maintain separate operating budgets for their respective installations. The purpose of enhancing penalties for corporations and other organizations with multiple locations and operations does not have the same deterrent effect for military installations. Encouraging measures to enhance compliance on a military installation is best accomplished by giving an installation commander control over his individual compliance history, rather than penalizing him for violations beyond his control.

I respectfully request this amendment be included in your final administrative penalty policy. Please contact me if you have questions or if I may further assist. I may be reached at (214) 767-4653.

Sincerely



Robert M. Gill
DoD REC Region 6

El Paso Penalty Rule Stakeholder's Meeting
Rio Grande Council of Governments, 1100 North Stanton
December 5, 2005
1:00 pm thru 5:00 pm
Attendees

Evaristo Cruz, Rio Grande Council of Governments

David Ornelas, El Paso Water Utilities

Clay Reynolds, Kermit Independent School District

A.L. Ward, Kermit Independent School District

Jody Henneke, TCEQ Office of Public Assistance

Anne Dobbs, TCEQ Enforcement Division

John Gillen, TCEQ Office of Public Assistance

Archie Clouse, Regional Director, TCEQ Region 6 - El Paso

Pamela Aguirre, Small Business and Local Government Assistance, TCEQ Region 6 - El Paso

El Paso Penalty Rule Stakeholder's Meeting
Rio Grande Council of Governments, 1100 North Stanton
December 5, 2005
1:00 pm thru 5:00 pm
Meeting Summary

I. Welcome and Introductions

Jody Henneke, TCEQ Office of Public Assistance, opened the meeting by introducing TCEQ staff Anne Dobbs, Special Assistant to the Director of the Enforcement Division; John Gillen, Office of Public Assistance; and Pamela Aguirre, Compliance Assistance Coordinator, Small Business and Local Government Assistance, TCEQ Region 6 - El Paso.

The following introductory remarks were made by Ms. Henneke: The Commission has been doing a comprehensive review of the agency's enforcement process for the last 1½ to 2 years. The purpose of this meeting is for the TCEQ to take comments on one of the components of that review, the penalty policy. Before starting a formal rule-making process, the Commission directed staff to conduct six stakeholder meetings. This rule making will address how penalties will be calculated but will not address when an enforcement action should be initiated or what constitutes a violation. Comments may also be submitted in writing through December 19, 2005. Following the meetings, Anne Dobbs will post meeting summaries and a list of attendees on the web site.

II. Scope of the Proposed Rule

Anne Dobbs explained that the staff have been directed to take the current penalty policy, make it better, and adopt it as a rule.

There are many elements that the law requires the Commission to consider when calculating a penalty (i.e., economic benefit, compliance history, good faith efforts to comply, nature and extent of the violation, etc). This rule making will specify how these factors will be considered in the penalty calculation. The Commissioners have instructed staff to try to gain a full understanding of what the issues and concerns are related to the penalty policy, before beginning drafting a rule. There have been no decisions made about what will be included in the rule, by either the Executive Director's staff or the Commissioners.

The backup material has five general categories and an "other" category with questions to get the stakeholders thinking about the issues raised during the enforcement process review. We are seeking comments on the backup material including the issues outlined, the current penalty policy, and the possibility of standardized penalties.

At the conclusion of these six stakeholder meetings, we will brief the Executive Director and Commissioners on the comments received during the stakeholder meetings. They will then direct us on how and when to proceed or they may decide not to proceed with a rule. If it is determined that a rule will be developed we will draft a proposed rule and, with Commission approval, we will then publish that rule in the Texas Register for a 30-day comment period. At this point, we don't

know exactly what the Commission will move forward into a proposal or what will happen after it is proposed. There may be a hearing or there may be additional stakeholder meetings - that is undetermined at this point.

III. Procedural Ground Rules

Stakeholders were asked to step up to the microphone and provide comments on the current penalty policy and/or any of the background materials provided. Attendees were reminded that their comments would be summarized, posted on the Agency's website, and shared with the Executive Director and Commissioners.

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

There were no comments from attendees.

V. Closing Remarks

Jody Henneke reminded attendees that the web site would be maintained up-to-date with summaries and names of attendees for each of the six meetings. Attendees were told that the TCEQ staff would be here to take comments until 5:00 pm and were reminded that we would take written comments until December 19, 2005. They were also told that they were welcome to come talk to staff "off the record" but if they wanted to provide comments on the penalty policy and upcoming rule, then we would ask them to speak "for the record" and would turn the microphone and recorder back on.

Houston Penalty Rule Stakeholder's Meeting
Houston-Galveston Area Council, 3555 Timmons
November 10, 2005
3:00 pm thru 7:00 pm
Attendees

Doug Caffey, City of Freeport

Carl Carlsson, Suez Energy Generation North America

Meitra Farhadi, Texas Pipeline Association

Christine Fernandez, Haynes and Boone LLP

Raika Hammond, Texas Municipal League

Steven R. Hanson, Shell

Steve Kilpatrick, Dow Chemical

Larry E. Lee, P.E.

Cheryl Mergo, Houston-Galveston Area Council

Carol Morton, Texas Automobile Recyclers Association

Matt Paulson, Texas Industry Project

Karl Pepple, City of Houston

Charles Rivette, Waste Management of TX

Ricardo Saucedo, Safety-Kleen

David A. Speaker, Chevron Phillips Chemical Company LP

Gordon Spradley, Waste Management

John Wilson, GHASP

John Sadlier, TCEQ Enforcement Division, Austin

Jody Henneke, TCEQ Office of Public Assistance, Austin

John Gillen, TCEQ Office of Public Assistance, Austin

Anne Dobbs, TCEQ Enforcement Division, Austin

Catherine Albrecht, TCEQ Enforcement Division, Region 12 - Houston

Rebecca Johnson, TCEQ Enforcement Division, Region 12 - Houston

Don Thompson, TCEQ Field Operations Division, Region 12 - Houston

Faye Liu, TCEQ Office of Public Assistance, Region 12 - Houston

Cynthia Williams, Small Business & Local Government Assistance, Region 12 - Houston

Houston Penalty Rule Stakeholder's Meeting
Houston-Galveston Area Council, 3555 Timmons
November 10, 2005
3:00 pm thru 7:00 pm
Meeting Summary -

Includes Both Verbal and Written Comments Provided During the Meeting

I. Welcome and Introductions

Jody Henneke, TCEQ Office of Public Assistance, opened the meeting by introducing TCEQ staff: John Sadlier, Director of the Enforcement Division; Anne Dobbs, Special Assistant to the Director of the Enforcement Division; John Gillen, Office of Public Assistance; Don Thompson, Regional Director, Region 12 - Houston; Catherine Albrecht and Rebecca Johnson, Enforcement Coordinators, Region 12 - Houston; Faye Liu, Office of Public Assistance, Region 12 - Houston; and Cynthia Williams, Small Business & Local Government Assistance Coordinator, Region 12 - Houston.

The following introductory remarks were made by Jody Henneke: The Commission has been doing a comprehensive, or holistic, review of the agency's enforcement process for the last 1½ to 2 years. The purpose of this meeting is for the TCEQ to take comments on one of the components of that review, the penalty policy, and capturing that policy into rule form. We are here at the direction of the Commissioners. Comments may also be submitted in writing through December 19, 2005. Following the meetings, Anne Dobbs will post meeting summaries and a list of attendees on the web site.

II. Scope of the Proposed Rule

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

At the conclusion of these six stakeholder meetings, we assume that the Commission will request that staff draft a proposed rule. At this point in time, we are uncertain as to how the Commission will move forward with the proposal.

III. Procedural Ground Rules

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

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

The following comments were received from stakeholders:

Economic Benefit

In almost all instances, the economic benefit would equal only the cost of compliance.

Small Business/Small Local Governments

Income levels should not be associated with the definition of a small business. The definition should be 100 or fewer employees only. Gross income has little relation to profits, especially in industries such as automobile recyclers where cost-of-goods are so high. Another example would be an Automobile Auction Pool, where the gross sales of the cars are multi millions, but the sales price is then turned over to the vehicle seller (insurance companies), and the small buyers fee and sellers fee are the only funds that go to pay the few employees and operating expenses.

Good Faith Efforts to Comply

The rule should provide for good faith reductions when some or all violations are corrected. This will encourage faster compliance.

Culpability

When an entity does a self inspection and voluntarily reports, a reduction in penalty should be provided to encourage respondents to report. Also, there should be a reduction for permitted entities, which would be a further incentive to obtain a permit.

Standard Penalties

Standard penalties should be established to make the enforcement penalty process more transparent.

Other Issues

The TCEQ should develop a strawman rule and go back out for comment from the public before publishing as a draft rule.

V. Closing Remarks

Attendees were told that the TCEQ staff would be here to take comments until 7:00 pm. They were also told that they were welcome to come talk to staff “off the record” but if they wanted to provide comments on the penalty policy and upcoming rule, then we would ask them to speak “for the record” and would turn the microphone and recorder back on.



President Linda Pitman Dulaney Auto & Trk Parts P.O. Box 1043 Amarillo, TX 79105	Vice President Craig Barker Hi-Way Auto Parts 11315 Hwy 64 West Tyler, TX 75704	Secretary-Treasurer Jannette Patke Tucker Patkes Auto Parts 13130 Cullen Blvd Houston, TX 77047	Past President Debbie Lambing Lone Star Auto Salvage 4115 Hwy 59 North Lufkin, TX 75901	Executive Director <i>person to A. Dobbs</i> Carol Morton P.O. Box 9 New Caney, TX 77357 www.texasara.com
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Received 11/10/05 - delivered

These comments are included in the Houston meeting summary.

TEXAS AUTOMOTIVE RECYCLERS ASSOCIATION

Directors

District 1
Cody Lindeman
Dulaney Auto Parts
Plainview

District 2
Karen Shirley
DC Wrecking
Lubbock

District 3
Rick Sage
RCS Recyclers
Tyler

District 4
Barry Rubin
American Auto
Salvage, Inc.
Forth Worth

District 5
Hugh Pettigrew, Jr.
Big D Auto Parts, Inc.
Dallas

District 6
Brad Williams
A-1 Auto Wrecking
Nacogdoches

District 7
Johnny Patke
Parts Locators
Unlimited
Pearland

District 8
Mark Hardy
Burnett Auto Salvage
Burnet

Directors

District 9
James Cooley, Jr.
H-Way Auto Parts
Brownwood

District 10
Daniel Snyder
Snyder Salvage
Holland

District 11
Doug Gonzalez
Doug's Hwy 90
Auto Salvage
Beaumont

District 12
Chip Collins
Chrysler Heaven
Fort Worth

District 13
Carter Frank
Johnny Franks
Auto Parts
Houston

District 14
Bruce Ormand
A-1 Imports
Austin

District 15
Don Anderson, Jr.
Dons Auto Parts
Mercedes

September 8, 2005

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
PO Box 13087 MC-109
Austin, TX 78711-1065

Dear Mr. Shankle:

Thank you for the opportunity to voice our comments regarding the TCEQ Administrative Penalty Rule.

Most of our industry is comprised of small family owned businesses that provide a vital service in recycling. Automobiles are the most recycled product in the county. It is our desire to promote full compliance with all environmental regulations in a manner that allows these small businesses to remain viable.

Economic Benefit – In almost all instances, the economic benefit would equal only the cost of compliance.

Small Business/Small Local Governments – We feel that no income level should be associated with the definition of a small business. The definition should be 100 or fewer employees only. Gross income has little relation to profits, especially in industries such as ours where cost-of-goods are so high. Another example would be an Automobile Auction Pool, where the gross sales of the cars are multi millions, but the sales price is then turned over to the vehicle seller (insurance companies), and the small buyers fee and sellers fee are the only funds that go to pay the few employees and operating expenses.

P.O. Box 9, New Caney, TX 77357

281-354-8272 800-710-8272 FAX: 281-354-7171 E-Mail: txautorecyclers@aol.com Website: texasara.com



Good Faith Efforts to Comply – The rule should provide for good faith reductions when some or all violations are corrected. This will encourage faster compliance.

Culpability – When an entity does a self inspection and voluntarily reports, a reduction in penalty should be provided to encourage respondents to report. Also, there should be a reduction for permitted entities, which would be a further incentive to obtain a permit.

Standard Penalties – Standard penalties should be established to make the enforcement penalty process more transparent.

Again, we appreciate the opportunity to have our comments considered.

Respectfully yours,

Carol Morton, Executive Director

CC:

Mr. John Sadlier, Division Director
Enforcement Division MC-219

Ms. Tamra-Shae Oatman, Section Manager
Small Business and Local Government Assistance MC-106

McAllen Penalty Rule Stakeholder's Meeting
McAllen City Hall, Commission Chambers, 3rd Floor
November 2, 2005
10:00 am thru 2:00 pm
Attendees

Jim Darling, City of McAllen

Marcie Oviedo, Lower Rio Grande Development Council

Ludy Saenz, Lower Rio Grande Development Council

Carlos A. Sanchez, City of McAllen, Engineering Department

Mike Stewart, TACA - Texas Aggregates and Concrete Association

Jody Henneke, TCEQ Office of Public Assistance

John Sadlier, TCEQ Enforcement Division

Anne Dobbs, TCEQ Enforcement Division

Monica Galvan, TCEQ Region 15 - Harlingen

Jaime Garza, TCEQ Region 15 - Harlingen

Ronnie Garza, TCEQ Region 15 - Harlingen

John Gillen, TCEQ Office of Public Information

Filemon Olvera, TCEQ Region 15 - Harlingen

McAllen Penalty Rule Stakeholder's Meeting
McAllen City Hall, Commission Chambers, 3rd Floor
November 2, 2005
10:00 am thru 2:00 pm
Meeting Summary

I. Welcome and Introductions

Jody Henneke, TCEQ Office of Public Assistance, opened the meeting by introducing TCEQ staff John Sadlier, Director of the Enforcement Division; Anne Dobbs, Special Assistant to the Director of the Enforcement Division; John Gillen, Office of Public Assistance; Jaime Garza, Enforcement Coordinator, TCEQ Region 15 - Harlingen; Monica Galvan, Investigator, TCEQ Region 15 - Harlingen; Filemon Olvera, Investigator, TCEQ Region 15 - Harlingen; Ronnie Garza, Small Business Coordinator, TCEQ Region 15 - Harlingen.

The following introductory remarks were made by Ms. Henneke: The Commission has been doing a comprehensive review of the agency's enforcement process for the last 1½ to 2 years. The purpose of this meeting is for the TCEQ to take comments on one of the components of that review, the penalty policy. Comments may also be submitted in writing through December 19, 2005. Following the meetings, Anne Dobbs will post meeting summaries and a list of attendees on the web site.

II. Scope of the Proposed Rule

John Sadlier explained that the staff have been directed to take the current penalty policy, make it better, and adopt it as a rule. Before starting a formal rule-making process, the Commission directed staff to conduct six stakeholder meetings. The comments from each of the meetings will be summarized and posted on the web.

There are many elements that the law requires the Commission to consider when calculating a penalty (i.e., economic benefit, compliance history, good faith efforts to comply, nature and extent of the violation, etc). This rule making will specify how these factors will be considered in the penalty calculation. The backup material has six major elements and questions to get the stakeholders thinking about these factors and how they work for them, whether they are members of the general public, environmental community, or regulated community. We are seeking comments on the backup material including the current penalty policy. The rule will address how we calculate penalties, it will not address what types of violations come to enforcement - that is a separate project that the Commission is also looking at.

At the conclusion of these six stakeholder meetings, we will draft a proposed rule and, with Commission approval, we will then publish that rule in the Texas Register for a 30-day comment period. At this point, we don't know exactly what the Commission will move forward into a proposal or what will happen after it is proposed. There may be a hearing or there may be additional stakeholder meetings.

III. Procedural Ground Rules

John Sadlier and Jody Henneke explained that this is a different type of stakeholder meeting that involves asking attendees to step up the microphone and tell us exactly what you think, rather than having a strawman proposal that everyone can sit down and talk about. Since we are at the very front end of the process, the Commission thought it would be best for us to take comment on the rule and identify procedures that need to be changed to improve the process before we actually began drafting a rule. Attendees were asked to make comments on where we are now, how the current policy impacts them, and help us think through what would be positive changes to the penalty policy. Attendees were invited to come to the microphone, provide their name, whether or not they are representing a company or organization, and to provide any comments that they would like regarding the current penalty policy, the questions posed and the examples of standard penalties included in the background information posted on the web.

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

There were no comments from attendees.

V. Closing Remarks

Jody Henneke reminded attendees that the web site would be maintained up-to-date with summaries and names of attendees for each of the six meetings. Attendees were told that the TCEQ staff would be here to take comments until 2:00 pm. They were also told that they were welcome to come talk to staff “off the record” but if they wanted to provide comments on the penalty policy and upcoming rule, then we would ask them to speak “for the record” and would turn the microphone and recorder back on.

San Antonio Penalty Rule Stakeholder's Meeting
Alamo Area Council of Governments, 8700 Tesoro Drive
November 8, 2005
10:00 am thru 2:00 pm
Attendees

Nolan Anderson, NE ISD - Transportation Dept.

Erich Birch, Birch & Becker, LLP

Carol Batterton, Water Environment Association of Texas

Robert Boyd, Comal County

Chris Doremus, Westward Env. Inc.

Debra Engler, San Antonio Water System

Russell Ehlinger, SW ISD

Dr. Robert Fitzgerald, Medina County Environmental Action Association

Alyne Fitzgerald, Medina County Environmental Action Association

John Franklin, San Antonio ISD

David Hendricks, San Antonio Express-News

Tom Hornseth, Comal County

Cary Humphrey, San Antonio Water System

James Kemmett, San Antonio ISD

Julie Klumpanyan, Valero Energy Corporation

Jack Lappeus, Air Conditioning Contractors of America (ACCA) - San Antonio

Angela Moorman, Russell, Moorman & Rodriguez, LLP/ North Texas Municipal Water Dist.

Alberto Molina, Fort Sam Houston

Judy Peterson, State Representative Jose Menendez

Michele Petty, Alamo Sierra Club

Eddie Pike, Fort Sam Houston

Jeff Saitas, Saitas & Arenson

Lizette Sanchez, Arguindegui Oil Co. Ltd.

Eric Tiemeyer, Valero Energy

John Gillen, TCEQ Office of Public Assistance, Austin

John Sadlier, TCEQ Enforcement Division, Austin

Anne Dobbs, TCEQ Enforcement Division, Austin

Mary Jennings, TCEQ Enforcement Division, Austin

Rebecca Clausewitz, TCEQ Enforcement Division, Region 13 - San Antonio

Yuliya Dunaway, TCEQ Enforcement Division, Region 13 - San Antonio

Trina Grieco, TCEQ Enforcement Division, Region 13 - San Antonio

Tracy Gross, TCEQ General Counsel's Office

George Ortiz, Small Business & Local Government Assistance, Region 13 - San Antonio

Carmen Ramirez, Small Business & Local Government Assistance, Region 16 - Laredo

San Antonio Penalty Rule Stakeholder's Meeting
Alamo Area Council of Governments, 8700 Tesoro Drive
November 8, 2005
10:00 am thru 2:00 pm
Meeting Summary -

Includes Both Verbal and Written Comments Provided During the Meeting

I. Welcome and Introductions

John Gillen, TCEQ Office of Public Assistance, opened the meeting by introducing TCEQ staff: John Sadlier, Director of the Enforcement Division, Anne Dobbs and Mary Jennings, Special Assistants to the Director of the Enforcement Division; Tracy Gross, Assistant General Counsel; Trina Grieco, Rebecca Clausewitz, and Yuliya Dunaway, Enforcement Coordinators, Region 13 - San Antonio; George Ortiz, Small Business Coordinator, Region 13 - San Antonio, Carmen Ramirez, Small Business Coordinator, Region 16 - Laredo.

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

II. Scope of the Proposed Rule

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

At the conclusion of these six stakeholder meetings, we assume that the Commission will request that staff draft a proposed rule. At this point in time, we are uncertain as to how the Commission will move forward with the proposal.

III. Procedural Ground Rules

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

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

The following comments were received from stakeholders:

Economic Benefit

The rule should not require the violator to undertake corrective actions that surpass the minimum required for compliance to offset the economic benefit gained - this could result in lengthy negotiations and delay compliance.

The factors described in the TCEQ's current penalty policy are appropriate to calculate the economic benefit of violations, however, it may be appropriate in some instances to collect all economic benefit gained. The rule needs to have that flexibility to address on a case-by-case basis, however, collecting the entire economic benefit may be excessive for small municipalities in light of the correction action costs that may be necessary. There needs to be a balance between economic benefit gained and corrective action necessary to correct the violations.

When considering the calculation of economic benefit, the TCEQ enforcement staff should coordinate with the TCEQ Office of Chief Engineer.

Economic benefit doesn't look at the entire picture, e.g., the entity's ability to foresee a violation. Culpability could be used to offset the economic benefit or look at how far back in time you go when determining the economic benefit gained and when the entity should have foreseen the violation. Economic benefit calculations should focus on what the company was avoiding doing that resulted in the noncompliance. The issue is whether the company was actually knew that the problem existed and whether they were truly avoiding doing something or if they were unaware that they were noncompliant.

Economic benefit should be used when looking at bad actors.

Economic benefit should be calculated differently for local governments. TCEQ should look at EPA's policies on governmental entities that look at not only the BEN model, but, at other mitigating factors looking at the population and customers served, etc.

Small Business/Small Local Governments

Special consideration should be given to local governments, they should be treated as the partners that they are. There should be unique definitions and downward adjustments for small businesses and local governments.

The goal should be for compliance, not penalties. It is a poor use of tax payer's money to shift money from a local government to the State for penalties in a case addressing violations that are already resolved and that did not cause any environmental harm.

If penalties for local governments are necessary, such as for repeat violators, the money and resources should remain in the local government, such as a community service type situation.

Consideration should be given to small businesses and local governments when determining penalty

amount. A unique definition for small business/local government may be appropriate. With respect to wastewater treatment plants, a flow based definition may be appropriate. Additional stakeholder discussion may be needed in order to determine whether the definition should be flow based or population based.

The rule should not provide for a standard downward adjustment for small businesses or local governments - the TCEQ should continue to exercise discretion and flexibility when dealing with these types of entities.

Deferral of penalties, or stipulated penalties, should be allowed based upon when corrective action is completed.

Longer compliance deadlines may be appropriate in some cases for small businesses and local governments, but, should not be routinely applied.

Small businesses and especially local governments (not just small local governments) should be viewed differently when assessing penalties because of budgeting issues. These governments can only budget by the fiscal year.

School districts should be considered in the definition of small local governments.

Penalties should not be assessed against school districts - compliance not conviction should be the direction to take with districts since are already financially stretched. Offer assistance to school districts to achieve compliance rather than assess penalty.

TCEQ should defer the entire penalty rather than applying downward adjustment for school districts.

Good Faith Efforts to Comply

Penalty reductions should be allowed for good faith efforts to comply, whether some or all of the violations are corrected. Penalty reductions should not be allowed for good faith efforts to comply for respondents that are deemed culpable or in Orders issued by Default.

TCEQ should consider applying good faith reductions, even when none of the violations have been resolved, if the respondent has begun corrective actions. In some situations, it can take years to complete corrective actions, particularly when permits are required.

Downward adjustments for good faith efforts should be provided for school districts and TCEQ should provide assistance.

Culpability

Penalty reductions should be allowed regarding culpability for self-reported violations when corrective action has voluntarily begun. This would encourage violators to come forward and begin corrective action sooner. In addition, TCEQ staff needs to address the process of double counting penalty enhancements, in particular, with the use of monthly self-reported discharge monitoring report data.

There should be a case-by-case review for penalty adjustments for culpability based upon entities with permits at other sites taking into account the different media at each site. In addition, the Commission should not consider an entity culpable simply based upon the fact that it had received a prior Commission Order that may be unrelated to the current violation.

Culpability reductions should be allowed when violations are self reported and corrective actions have been undertaken, even if those actions are not completed yet.

The current policy double dips allowing enhancements for each NOV or order and then again for customer compliance history classification.

Downward adjustments should be provided for school districts for culpability when violations are self reported.

Standard Penalties

Standard penalties may be appropriate, however, the Commission should not create too many perceived objective criteria for enforcement because that limits the discretion, flexibility, or evaluation of circumstances and situations that may be necessary to determine a fair penalty.

The standard penalties should not be ranked. The Commission should focus on those violations that actually cause harm.

Standard penalties are very problematic. There is a concern that the standard penalties would be used to take the place of NOVs and that the regulated community would not be given an opportunity to comply before a ticket or standard penalty is assessed. The standard penalty list of violations looks like violations that would never get to enforcement without an accompanying Category A violation.

There is a perception in the regulated community is that if you don't pay the penalty assessed in a field citation, and you go through formal enforcement, the penalty will be higher.

Standard penalties will be too low. The maximum of 25% is too low especially considering the cost of the damage caused by the violation.

Other Issues

The number of events for a given violation should be consistent with the violation. Commission staff should not arbitrarily decide whether the events should be categorized as monthly, quarterly, or annual. For example, if the violation is for failing to report under a permit, it should be tied to the reporting frequency or the permit term. The number of and severity of events should be the focus of the enforcement process.

There should be no leniency for repeat violators.

The determination of violation events needs to be defined more clearly, it appears to be an unwritten policy now.

It may not be appropriate to specify how to determine harm or severity in the rule. There needs to be

room for negotiation based upon mitigating factors.

Enforcement must be swift and certain and the regulated community must know what to expect, particularly when dealing with violations that create harm. The current policy is too vague and allows too much reduction in penalties and negotiation.

The costs of the damage caused by the violation must be addressed.

The rule should consider the gross income of violator in order to address the issue of a company considering the penalty a “cost of doing business”.

V. Closing Remarks

Attendees were told that the TCEQ staff would be here to take comments until 2:00 pm. They were also told that they were welcome to come talk to staff “off the record” but if they wanted to provide comments on the penalty policy and upcoming rule, then we would ask them to speak “for the record” and would turn the microphone and recorder back on.

*Hand delivered to A. Dobbs 11/8/05
These comments are included in the
San Antonio Meeting Summary.*



WATER ENVIRONMENT ASSOCIATION OF TEXAS

P.O. Box 40988 • Austin, Texas 78704-0017 • 512/693-0060 • Fax 512/693-0062 • Toll Free 866-406-9328 • website: weat.org

November 8, 2005

Ms. Anne Dobbs
Texas Commission on Environmental Quality
Enforcement Division MC 224
P. O. Box 13087
Austin, TX 78711

Dear Ms. Dobbs:

The Water Environment Association of Texas (WEAT) is pleased to provide comments on the Texas Commission on Environmental Quality's (TCEQ) administrative penalty policy and proposed rulemaking. WEAT is a professional association of engineers, environmental scientists and others who are involved in wastewater treatment and water quality management. We are a member association of the Water Environment Federation and we are dedicated to promoting scientifically sound environmental policy and regulations.

We have enclosed our responses to the questions posed by TCEQ on the attached pages. We appreciate the opportunity to participate in this stakeholder process. Please feel free to contact me at 512-924-2102 or carbat@beecreek.net if you have any questions or need any additional information from WEAT.

Sincerely,

A handwritten signature in cursive script that reads "Carol Batterton".

Carol Batterton
Executive Director

Comments from the Water Environment Association of Texas (WEAT) on

Texas Commission on Environmental Quality's

Administrative Penalty Rule

Economic Benefit

1. What should the Commission consider when calculating the penalty adjustment for Economic Benefit?

For example:

- Should the rule require that all of the realized economic benefit gained through the violation(s) be recovered through the administrative penalty?

WEAT believes that the factors described in TCEQ's current penalty policy are appropriate to calculate the economic benefit of violations. In some cases, it may be appropriate to recover the entire economic benefit of the violation(s), where appropriately calculated, through the administrative penalty. However, we believe that the Commission should exercise some discretion and flexibility in cases such as small municipalities or utilities where collecting the entire amount of the economic benefit might be excessive in light of the corrective actions required. Additionally, because the calculation of economic benefit can be highly technical (e.g. the cost to install additional treatment technology), WEAT suggests that before assessing economic benefits in penalty calculation, enforcement staff coordinate with the Office of Chief Engineer.

- Where a significant economic benefit is evident, should the rule allow the Commission to require the violator to undertake corrective actions that surpass the minimum action required for compliance?

We do not believe that requiring additional corrective measures is an appropriate enforcement response in this case. Requiring measures beyond what is required to return to compliance could result in lengthy negotiations and delay compliance.

- Are there better means of determining economic benefit than the methodology expressed in the Commission's current penalty policy (see Attachment No. 1)? If so, what are they?

WEAT believes that the TCEQ's current approach is acceptable.

Small Business/Small Local Governments

2. What should the Commission consider when calculating the penalty for a Small Business or a Small Local Government?

For example:

- Should the rule provide a unique definition of “small business” and “small local government” for the purposes of calculating a penalty? If so, what?

WEAT believes that a unique definition of small local government is appropriate. With respect to wastewater treatment facilities, we suggest that further stakeholder discussion may be needed in order to determine whether the definition should be flow based or population based.

- Should the rule provide for a standard downward adjustment of the penalty for small business and small local government?

The rule should not provide for a standard downward adjustment for small businesses or local governments, however, as stated above, the TCEQ should continue to exercise discretion and flexibility when working with small businesses and local governments.

- Should the rule provide for deferral of penalties in lieu of a standard downward adjustment (deferred contingent upon compliance with the administrative order)?

Yes, WEAT supports a complete or partial deferral of penalties upon completion of the requirements in an administrative order.

- Should the rule allow for longer compliance deadlines for small business and small local government?

WEAT believes that longer compliance deadlines may be appropriate in some cases for small businesses and local governments, but that these extended deadlines should be negotiated on a case by case basis, and not routinely applied.

Good Faith Efforts to Comply

3. What should the Commission consider when calculating the penalty adjustment related to Good Faith Efforts to Comply?

For example:

- Should the rule provide for good faith reductions when some, but not all, violations are corrected?

Yes, WEAT supports good faith reductions when some, but not all violations are corrected. TCEQ should give consideration to the nature of the violation, the circumstances that caused the violations, and time required for corrective action.

- Should the rule prohibit the application of a good faith reduction for respondents that are deemed culpable?

Yes.

- Should the rule prohibit a good faith reduction in Default Orders?

Yes.

Culpability

4. What should the Commission consider when calculating the penalty adjustment related to Culpability?

For example:

- Should the rule provide for a penalty reduction in cases where the violation(s) were documented during a self-inspection and voluntarily self-reported?

Yes. WEAT believes that a penalty reduction for self-reported violations would encourage violators to come forward and begin corrective action sooner. Additionally, Commission staff needs to directly address the process of double counting on penalty enhancements. The current process uses monthly reporting data to enhance base penalty calculations, notwithstanding situations when the cause of both is the same. For example, when calculating penalties for effluent violations associated with TPDES permits, Commission staff first assesses the penalty for unauthorized discharges and then enhance the same penalty based on self-reported Discharge Monitoring Report (DMR) data, simply on reading that these are the same or similar violations. The Commission should eliminate this practice.

- Should the rule provide that an entity is culpable if it is permitted, registered, or is previously issued a notice of violation, notice of enforcement, or Commission Order?

No. Every enforcement action is unique and the Commission should continue to use good judgment, discretion and flexibility when dealing with permittees. It is important to also keep in mind that many regulated entities hold multiple permits

that are unrelated, and simply judging culpability based on whether an entity has received some prior administrative action is too restrictive.

Standard Penalties

5. What should the Commission consider in using standard penalties for violations that the current penalty policy classifies as “potential” or “programmatic”?

For example:

- Can the 12 proposed violation categories for standard penalties (see Attachment No. 2) be consolidated into fewer categories, while continuing to capture all programmatic and potential violations? If so, how?

WEAT believes the proposed arrangement may be appropriate. However, WEAT would suggest that the commission not create too many perceived objective criteria for enforcement. As noted, the enforcement process should provide discretion and flexibility. Underlying circumstance and situations need to be fully considered before establishing penalties for enforcement actions.

- Can the proposed violation categories for standard penalties be ranked by order of importance? If so, what is the appropriate ranking?

WEAT does not believe that a ranking process is necessary. However, WEAT strongly urges the Commission to focus its efforts on those violations which cause actual harm. Penalty calculations are often challenged simply because programmatic violations are elevated in importance, or an assumption of actual harm from a discharge is made.

Other Issues

6. Are there better means of determining the number of events for a given violation than the methodology expressed in the Commission’s current penalty policy (see Attachment No. 1)? If so, what are they?

The number of events should be consistent with the violation. For example, if the violation is for failing to report under the permit, it should be tied to the reporting frequency or the permit term. Commission staff should not arbitrarily decide whether the events should be categorized as monthly, quarterly, or annual. Additionally, as noted above, the Commission should continue to focus its efforts and penalties on those situations where there is an actual discharge or release, and an actual harm. In deciding the number of events and the severity of same, this should be the focus of the enforcement process.

**Attachment 4: Written Comments Received
Outside of Penalty Stakeholder Meetings**

November 12, 2005

Ms. Anne Dobbs
Program Specialist
Texas Commission on Environmental Quality
Enforcement Division, MC 224
P.O. Box 13087
Austin, Texas 78711-3087

Dear Ms. Dobbs,

Enclosed are my personal comments regarding the stake-holder's meeting on calculation of administrative penalties for environmental violations. I am sorry I was unable to attend the meeting on November 10, 2005. I was out-of-town for a week and arrived back in town that day.

I have the following comments to make about this topic:

- 1) I support a rule that requires that all realized economic benefit gained through the violations be recovered through the administrative penalty.
- 2) I support requiring the violator undertake corrective actions that are greater than the minimum action required for compliance.
- 3) The rule should not provide automatically for a standard downward adjustment of the penalty for small business and small local government.
- 4) The rule should not provide for good faith reductions when some, but not all, violations are corrected.
- 5) The rule should prohibit good faith reduction for respondents that are culpable.
- 6) The rule should prohibit good faith reductions in Default Orders.
- 7) The rule should provide an entity is culpable if it has a permit, is registered, or has previously been issued a notice of violation, notice of enforcement, or Commission Order.
- 8) The rule should include violations that are called "areas of concern" for penalty calculation purposes.
- 9) The rule should require penalties for all violations, even those the TCEQ does not consider serious or unresolved.
- 10) The rule should not have two separate penalty matrices. This is too complex and time consuming.

11) Why should the penalty be based on the size of the site? If the violation has occurred it should not matter what the size of the site is.

12) **On page 6, Categories of Harm, Major Harm**, how would TCEQ know if "Human health or the environment has been exposed to pollutants which exceed levels that are protective of human health, etc."? This burden of proof is too great and will rarely be met and therefore serious air pollution violations will not have maximum penalties.

13) **On pages 6 and 8, Categories of Harm, Moderate Harm**, define "significant" under Actual and Potential Release.

14) **On page 6, Categories of Harm, Minor Harm**, define "insignificant" under Actual and Potential Release.

15) **On page 7**, the first footnote reads, "For example, VOC emissions are known to contribute to ozone formation, but cause no observable immediate impacts." This is untrue. Some VOCs are toxic (benzene and 1,3-Butadiene, for instance) and cause such impacts.

16) **On page 8**, the table labeled, **(1) The Released Pollutant**, there is no place where TCEQ takes into account combined effects of pollutants. This is needed. In addition "significant amount" is not defined.

17) **On page 8**, the table labeled, **(2) The Released Pollutant**, "usable the resource" and "significant amount" are not defined.

18) **On page 9**, the "degree of noncompliance" for "Minor" is much too low and need to be greater.

19) **On page 12, Compliance History Enhancement For the Site Under Enforcement**, the last 6 in the table, should not be allowed. Companies should not be rewarded for violations and there is no assurance any of the 6 listed items relate to finding and or resolving the violation.

20) **On page 14**, why are only capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained evaluated in calculation of economic benefit? What about costs to the environment and people's health and welfare?

21) **On page 1 of Attachment No. 2, Reporting, Compliance, Certifications, and Notifications, Air**, I consider Failure to submit Title V certification or emissions event notice, deviation reports, emissions inventories, and deviations on Title V certifications to be significant and should lead to full penalties. The

percent penalty for Major and Minor Entities is too small to have a deterrent effect.

22) **On page 2 of Attachment 2, Records, Air**, all the record failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

23) **On page 4 of Attachment 2, Quality Control/Analyses, Air**, all quality control failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

24) **On page 5 of Attachment 2, Operations and Maintenance, Air**, all operations and maintenance failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

25) **On page 6 of Attachment 2, Security/Emergency Preparedness, Air**, all security failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

26) **On page 7 of Attachment 2, Construction, Capacity, and Design Requirements, Air**, all construction failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

27) **On page 7 of Attachment 2, Financial Assurance and Penalty Payments, Air**, all financial assurance failures are significant and should result in full penalties. The percent penalty for Major and Minor Entities is too small to have a deterrent effect.

I appreciate this opportunity to comment. Thank you.

Sincerely,



Brandt Mannchen
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713-664-5962
brandtshnfbt@juno.com

Tax PIRG, et. al.

November 17, 2005

Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
MC-109
P.O. Box 13087
Austin, Texas 78711-3087

Dear Mr. Shankle:

We, the undersigned, appreciate the opportunity to comment on issues related to the future rulemaking for 30 Texas Administrative Code ch. 75 (related to Administrative Penalties). The assessment of sufficiently high penalties against violators is one of the best and most effective tools we have as a state to deter lawbreakers, encourage compliance and improve environmental quality.

Unfortunately, according to the State Auditor, the enforcement process by the Commission "does not consistently ensure that violators are held accountable". With few violations resulting in fines and with fines often assessed lower than the economic benefit derived by ignoring the law, polluters have incentives to break the law over and over again. Weak enforcement thus encourages pollution, deprives the state of critical revenue and puts law-abiding businesses at a competitive disadvantage.

So we welcome this opportunity to advise the Commission on the proposed rulemaking. We are very encouraged by many of the recommendations your staff have put forward and believe they are critical steps towards deterring violators. We support the recommendation that language be added to TCEQ's penalty policy that makes deterrence an express goal of the enforcement program.¹ The addition of such language makes the penalty policy consistent with the mandate of the TCEQ's authorizing statute. *See* TEX WATER CODE, SEC. 7.053(3)(E). We support the recommendation to change the environmental/human health/property matrix such that 'actual releases' will face higher penalties than under the current policy.² This will help reverse the downward trend in penalties assessed by TCEQ in recent years³ and properly increase financial consequences for violators who cause environmental harm. Finally, we strongly support the recommendation to "eliminate the \$15,000 threshold for economic benefit enhancement and recover economic benefit on non-compliance up to statutory caps, rather than adjusting the base penalty".⁴ This change will bring the policy into line with EPA recommendations, and eliminate the perverse competitive advantage currently enjoyed by violators.

¹ TCEQ *Enforcement Process Review Draft Final Report*, pg. 95-97. Aug. 20, 2004.

² *Ibid.* pg. 100

³ Alliance for a Clean Texas. *Environmental Enforcement in Texas: A review of trends and issues*. February 2003

⁴ TCEQ *Enforcement Process Review Draft Final Report*, pg. 89. Aug. 20, 2004.

We support the goal of changes that could “shorten timelines and allow a shift of resources to serious violations” making “outcomes more predictable, which enhances deterrence”.⁵ However, the standardized penalty scheme as proposed will “significantly lower penalties” in 60% to 70% of all cases, which may certainly address industry concerns about predictability by setting ceilings, rather than floors, on penalties, but which will not enhance deterrence. This is particularly troubling in the case of violations known as ‘potential releases’ or ‘programmatic’ violations. Furthermore, some so-called “paperwork” violations, many of which are fundamental to an entire regulatory system largely based on self-reporting, are not the type of violations for which standardized penalties should be used.

Attached are specific responses to some of the questions posed by the Commission. We look forward to actively participating in this process and thank you for the Commission’s ongoing commitment to improving the enforcement process.

Sincerely,

Luke Metzger
Advocate, Texas Public Interest Research Group (TexPIRG)
700 West Avenue
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Christy Muse
Director, Hill Country Alliance
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Cyrus Reed
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Senior Attorney, Environmental Defense
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Austin, Texas 78701

Thomas ‘Smitty’ Smith
Director, Public Citizen’s Texas office

⁵ Ibid. pg. 2.

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Juan Parras
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Houston, Texas 77023

Gary Hogan
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2117 Rolling Creek Run
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Linda Stegenga
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Janice Bezanson
Texas Committee on Natural Resources
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Austin, TX 78746

Bee Moorhead
Texas Impact
700 West Avenue
Austin, Texas 78701

Response by TexPIRG, Hill Country Alliance, Texas Center for Policy Studies, Texas Campaign for the Environment, Environmental Defense, Public Citizen, Texas Environmental Justice Advocacy Services, Chapel Creek Neighborhood Association, Eco-Awareness Coalition, Texas Committee on Natural Resources, and Texas Impact to TCEQ request for input on future rulemaking for 30 Texas Administrative Code ch. 75

What should the Commission consider when calculating the penalty adjustment for Economic Benefit?

As the Enforcement Process Review Draft Final Report (the Report) suggests, full recovery of the economic benefit of non-compliance (EBN) is the logical and prevailing norm in environmental penalty policies.⁶ Accordingly, the EPA recommended in its July 2003 TCEQ Enforcement Program Review that TCEQ “collect at least the economic benefit of noncompliance...for the actual time period of the noncompliance” in order to “‘level the playing field’ and make it economically impractical to violate the permit requirements.”⁷

The dual goals of punishment and deterrence provide a basic, compelling justification for requiring full recovery of the economic benefit from polluters. For the sake of deterrence, TCEQ must penalize polluters for violating the law. A polluter, in other words, must be made worse off, financially, for its violation. In order to achieve this, a polluter must first pay the cost to come into compliance with the law, an obligation that every regulated entity has. The polluter should also have to forfeit the economic benefit it gained from its noncompliance. Once compliance costs are paid and the full economic benefit is forfeited, the polluter is effectively returned to the same position, financially, as if it had complied with the law from the outset. At this point, the polluter has neither gained nor lost from its violation. Penalties for violations therefore must be imposed on a polluter over and above both the compliance cost and the full recovery of its economic benefit.

The TNRCC recognized this principle in its 1994 enforcement policy, where it noted:

⁶ As presented in Penalty Policy Issue 2 Attachment A, the penalty policies of New York, New Jersey, California and Florida provide for the full recovery of economic benefits. Moreover, the penalty policies in states surveyed by TexPIRG, including Oklahoma, Illinois, and Tennessee, require full recovery of economic benefit. See ODEQ Administrative Procedures Manual, Enforcement Section, p. 6, revised 12/26/01; 415 ILL. COMP. STAT. 5/42 (Civil Penalties at § 42(h)(5)(7), 2003; Letter of February 20, 2004 from Tennessee Dept. of Envir. and Conservation to TexPIRG.

⁷ Environmental Protection Agency, Compliance Assurance and Enforcement Division, Water Enforcement Branch. *TCEQ Enforcement Program Review, July 8 – 11, 2003, and July 24, 2003 Final Report*. Dec. 11, 2003.

*To offset the advantages of non-compliance for entities driven primarily by such economic considerations, enforcement penalties must at least exceed the costs saved by a company operating in violation of environmental laws before any real deterrent effect is achieved. This requires recovering the economic benefits of non-compliance plus a penalty component.*⁸

We urge TCEQ to return to this common-sense policy and recover the full economic benefit from polluters. As the State Auditor's Office noted in its December 2003 report on TCEQ's enforcement program, doing so would generate millions of dollars annually for the state.⁹

The TCEQ is urged not to adopt the Report's recommendation that "any cost of compliance" be taken "into account...in the calculation of economic benefit received." We strongly agree with the recommendation of the State Auditor's Office that compliance costs "should not be considered" in determining and recovering a polluter's economic benefit. (SAO Report No. 04-016, p. 29.) A polluter's compliance cost should not be considered because economic benefits are the savings a polluter derives from noncompliance *over and above* the cost of compliance itself. Economic benefit is a category of savings separate from compliance costs that commonly includes—among other items—the interest a polluter earned on the investment of capital that should have been spent on pollution controls. Thus, forcing a polluter to pay its compliance cost does nothing to recover that polluter's economic benefit. As explained above—at a bare minimum—when a polluter is caught, in addition to paying its compliance cost, it must also forfeit the entire economic benefit it gained as a result of its noncompliance. Allowing a polluter to deduct its compliance cost from its economic benefit undermines the goals of punishment and deterrence. If TCEQ offsets a polluter's compliance cost against its economic benefit, TCEQ will effectively allow that polluter to keep some portion of its ill-gotten gains. Allowing a polluter to retain any portion of an economic benefit perpetuates a system wherein regulated entities have an economic incentive to violate the law. Moreover, such an allowance would be unfair to those who abided by the law and paid compliance costs without being compelled by the state to do so.

The TCEQ should adopt the recommendation to "recover [the] economic benefit of noncompliance rather than a percentage of base penalty." The current practice of recovering a percentage of the base penalty almost always results in a recovery that falls far short of what is necessary to eliminate the incentive for noncompliance.

The TCEQ should reject the recommendation that the full economic benefit be recovered "only on cases with actual harm or egregious violations." To eliminate the incentives for noncompliance, TCEQ must take the economic gain out of *any* violation of

⁸ TCEQ 1994 Enforcement Policy at 3.

⁹ SAO Report No. 04-016, p. 29. The SAO reviewed 80 enforcement cases from FY 2001 to FY 2003, and found that polluters derived an economic benefit from noncompliance of \$8.6 million, but were assessed total penalties of only \$1.7 million. The difference in these cases alone was nearly \$7 million. These funds should be recovered by TCEQ and used to fund its financially strapped enforcement program, not retained by polluters as a benefit from their illegal activity.

any environmental law. There is no justification for tying the recovery of economic benefit to the severity of the violation. TCEQ should firmly establish a penalty regime that creates strong disincentives for noncompliance, regardless of the particular consequences of the noncompliance.

Along similar lines, the TCEQ should also reject the recommendation that economic benefit be recovered “only when the respondent is determined to be a major facility as defined by the penalty policy.” There is no justification for linking facility type to the recovery of economic benefit. In all cases, TCEQ must strive to make the violation of environmental laws a financially unwise decision for regulated entities.

In order to eliminate any perverse financial incentives to violate environmental laws, TCEQ must adopt the Report’s recommendation that the \$15,000 threshold for economic benefit be eliminated. There is no justification for giving polluters a \$15,000 free ride for violating the law.

Likewise, we urge the TCEQ to adopt the recommendation that economic benefit be recovered even if a penalty is mitigated due to inability to pay. Adoption of this recommendation strengthens the deterrence effect of the penalties while preventing violators from using accounting measures to avoid recovery of economic benefit.

Understandably, regulated industries, which oppose the recovery of economic benefit in general or for their violations, question how economic benefit is calculated. The courts that have reviewed the standard models, however, have upheld them. The Third Circuit ruled:

Precise economic benefit to a polluter may be difficult to prove. The Senate Report accompanying the 1987 amendment that added the economic benefit factor to section 309(d) recognized that a reasonable approximation of economic benefit is sufficient to meet plaintiff's burden for this factor. . . . The determination of economic benefit or other factors will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic benefit will suffice.¹⁰

In the mid-1980s, EPA developed a computer model to assist enforcement officials in making this ‘reasonable approximation’. This ‘BEN model’ quantifies a company's economic savings that result from delaying capital investments in pollution control equipment and avoiding related operations and maintenance expenses. The model seeks to use standard financial cash flow and net present value analysis techniques, based

¹⁰ *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.* 913 F. 2d 64 (3d Cir. 1990), cert. Denied, 498 U.S. 1109 (1991). The Fifth Circuit also holds that reasonable approximations of economic benefit will suffice, stating: “Finally, and most importantly, we note that a court need only make a “reasonable approximation” of economic benefit when calculating a penalty under the CWA.”

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F. 3d 546, 576 (5th Cir. 1996), cert. Denied, 519 U.S. 811 (1996), citing a survey of twenty-seven states found that over 50% of the respondents currently use the BEN model. Other states, including Texas, use their own matrices to calculate EBN. *Powell Duffryn* at 80.

on generally accepted financial principles. The model attempts to calculate the costs of complying on-time and of complying late, adjusted for inflation and tax deductibility. In 1999, EPA conducted a public review of the model and improved BEN's precision and user-friendliness.

Members of the regulated community have commented that TCEQ has neither the expertise nor the tools to properly evaluate economic benefit beyond the current EPA BEN model "avoided cost" calculation. For years, TCEQ staff have calculated and collected portions of the economic benefit of non-compliance (EBN). In the interests of consistency with EPA and other states, TCEQ may want to consider adopting the EPA's BEN model to calculate EBN, which as has been mentioned, has long been used and has stood up to court challenge.

EPA has recently worked to more fully calculate EBN by including calculations of any competitive advantage gained by a violator through increased market share or sale of products containing banned materials. These calculations, though, are separate from the BEN model and are still in development. In the future, TCEQ could choose to adopt EPA policy regarding calculations of competitive advantage.

Members of the regulated community have commented that full recovery of economic benefit presumes that company intentionally disobeys the law. EBN does not presume that a company intentionally disobeys the law. As the adage goes, ignorance of the law is no excuse. Once compliance costs are paid and the full economic benefit is forfeited, the polluter is effectively returned to the same position, financially, as if it had complied with the law from the outset. At this point, the polluter has neither gained nor lost from its violation. Penalties for violations can then be imposed on a polluter over and above both the compliance cost and the full recovery of its economic benefit. It is this punitive portion of the penalty which can then reflect any concerns about intent.

What should the Commission consider when calculating the penalty for a Small Business or Small Local Government?

The Report recommends a 15% penalty reduction for small businesses and small local governments. (p. 92.) For purposes of the reduction, small businesses are defined as those which are "independently owned and operated," generate annual revenues of less than \$1 million, and have less than 100 total employees. Small local governments are defined as those counties with less than 50,000 residents or those cities with less than 10,000 residents. TCEQ already makes a substantial effort to ease the burden on small businesses and small local governments. An across-the-board discount to small businesses and small local governments is unwarranted. TCEQ should, however, have flexibility in reducing penalties when small governments or small businesses are making a substantial investment in their operations to address compliance issues and the full penalty would impact their ability to make those investments.

What should the Commission consider in using standard penalties for violations that the current penalty policy classifies as "potential" or "programmatic"?

We support TCEQ's efforts to impose a regime of standardized minimum penalties, provided those penalties are set at levels high enough to deter violations and that they function as a floor, and not a ceiling. In particular, we support the change to environmental/ human health / property matrix such that 'actual releases' will face higher penalties than under the current policy. Unfortunately, the recommended standard penalties for 'common violations', including potential releases and programmatic violations, appear to be a step in the wrong direction.

- Despite concerns expressed by the State Auditor's Office, the EPA, and many others that TCEQ penalties are currently too low to be effective, the Report now recommends a schedule of penalties that may, in the Report's own assessment, "may significantly lower penalties" in 60% to 70% of all cases. (p. 100.)
- Some of the insufficient penalties established in the "Standard Penalty Table" address what the Report refers to as "paper violations." However, some violations warrant severe penalties and should not be considered trivial because they are "paper violations." For example, the Penalty Table establishes a penalty of 10% of the statutory limit for entities with regulated air emissions if they fail "to submit Title V certification or emissions event notice." (p. 115.) For a major facility, that would be a penalty of \$1,000. Similarly, the failure to submit a discharge monitoring report (DMR) would trigger a penalty of 10% of the statutory limit. Here again, a major facility would be subject to a fine of just \$1,000 for failure to maintain records that are absolutely vital to the integrity of the regulatory scheme. These are examples of violations for which standardized penalties should not be used.
- We oppose the staff recommendation to eliminate the policy of factoring the standard penalty against a unit of time. According to the recommendation, common violations could be considered "discrete events," and the penalties would be assessed only once. Taking this approach would severely undermine the integrity and credibility of the regulatory program, as the agency depends on entities to obtain their permit and enter the system. These penalties are so low that a major facility may choose to disregard these requirements and treat the penalty a basic cost of doing business. Consider, by way of comparison, California's Clean Water Enforcement Act, where failure to submit a DMR results in a \$3000 fine for *every month* out of compliance. Not only is the base fine three times that proposed in the staff report, but ongoing non-compliance is properly treated more severely than that of just a one-time violation.

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Enforcement Division



Golden Triangle Small Business Advisory Committee

December 9, 2005

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
PO Box 13087 MC-109
Austin, TX 78711-1065

RE: Penalty Policy Stakeholder Comments

Dear Mr. Shankle:

Once again, we appreciate the opportunity to make comments on changes to the TCEQ's enforcement policy and process. Our committee supports the contents of the letter submitted by Joe Polanco of the Dallas Small Business Advisory Committee. In addition, the members of the Golden Triangle Small Business Advisory Committee would like to add the following comments:

In response to question #2:

The employee component of 100 employees or less is adequate for defining small business. No income related component is necessary.

The proportionality of a fine issued by the TCEQ should distinguish between a small business and a big business. For example, a \$5000 fine levied against a small business owner has much greater impact in its revenues compared to a \$50,000 fine levied against a billion dollar corporation.

Enforcement penalties need to be tied to environmental impact. The real focus should be on eliminating and preventing actual pollution and contamination of the environment.

Small Businesses and Local Governments should be exempt from formal enforcement for first time violations. An alternative would be automatic referral to the Small Business and Local Government Assistance Program for help in resolving the violations.

In response to question #4:

Self reported violations should not carry the same weight as violations discovered during inspections or complaint investigations.

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We consider this a serious responsibility and hope that you will continue to consider our input. Again, thank you for responding to our concerns.

Golden Triangle Small Business Advisory Committee

December 9, 2005

Mr. Glenn Sparks, Executive Director
Texas Commission on Environmental Quality
PO Box 13087 MC-106
Austin, TX 78711-1065

RE: Feasibility Policy Stakeholder Comments

Dear Mr. Sparks:

Once again, we appreciate the opportunity to provide input on changes to the TCEQ's enforcement policy and process. Our comments are attached for your review. The Chairman of the Golden Triangle Small Business Advisory Committee, Candace Broucher, and I have discussed the following:

In response to question #1:

If a regulatory component of a permit is violated or less is achieved for existing non-point source, the revenue related enforcement is necessary.

The proportionality of a fine based on the TCEQ should distinguish between a small business and a big business. For example, a \$5000 fine levied against a small business would have much greater impact on the revenues compared to a \$50 fine levied against a billion dollar corporation.

Enforcement penalties need to be levied to avoid a total impact. The total impact should be on abatement and preventing future pollution and contamination of the environment.

Small businesses and local governments should be exempt from fines and penalties for first time violations. An alternative would be automatic referral to the small business and local government assistance program for help in resolving the violations.

In response to question #2:

Self-reported violations should not carry the same weight as violations discovered during

Kindest regards,



Candace Broucher, Chair
Golden Triangle Small Business Advisory Committee

cc: Mr. John Sadlier, Division Director
Enforcement Division, MC-219

Ms. Tamra-Shae Oatman, Section Manager
Small Business and Local Government Assistance, MC-106

December 14, 2005

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
P. O. Box 13087 MC-109
Austin, TX 78711-1065

Dear Mr. Shankle,

Thank you for the opportunity to respond to questions on TCEQ's administrative penalties. We appreciate the effort the agency is making towards early involvement of stakeholders on this issue.

Attached are our comments.

Sincerely,

Mary S. Miksa
Vice-president

e157

Attachment

From: Mary Miksa <MMiksa@txbiz.org>
To: "Anne Dobbs" <ADOBBS@tceq.state.tx.us>
Date: 12/14/2005 4:59:40 PM
Subject: Administrative penalties

Anne--

Attached is the cover letter and a copy of our comments on administrative penalties. Since my assistant has left for the day, it will go in the mail tomorrow to Glenn.

Thanks for your help and for the opportunity to comment on the issue before you have even drafted the rule.

Mary

Mary S. Miksa
Senior Vice President of Governmental Affairs
Texas Association of Business
1209 Nueces Street
Austin, TX 78701
Phone: (512) 477-6721 ext 105
Fax: (512) 322-0678
E-mail: mmiksa@txbiz.org

Comments on TCEQ's Administrative Penalties

Texas Association of Business

Dec. 12, 2005

1. **Economic Benefit.** What should the Commission consider when calculating the penalty adjustment for Economic Benefit?
 - a) Should the rule require that all of the realized economic benefit gained through the violation(s) be recovered through the administrative penalty?

TAB response: *Generally, it is illogical for TCEQ to assume that a regulated entity always gains some economic benefit by non-compliance. TAB has found that many of its members end up spending as much or more than the TCEQ-calculated "economic benefit" to realize compliance after the violation. Seldom does a regulated entity gain an economic benefit from deliberately delaying a necessary cost of compliance.*

In addition to our general comment, we have two specific comments. First, calculating the economic benefit of noncompliance is problematic. The unfairness of the proposed formula is that if one decides to implement a technology to avoid a problem, say after the second violation, the formula above would calculate the value of the money (interest saved) back to the time of equipment installation that had resulted in the original violation. This would be done regardless of whether or not the regulated entity had any ideas or any information suggesting there would ever be a second violation. There is no single equitable method to calculate economic benefit, and the unintended consequences of doing so would likely be disastrous. Any such requirement has the practical effect of empowering the enforcer to utilize 20/20 hindsight and decide what decision (technology investment) should have been made. The decision might not have been as clear at that point in the past as it is at a later time when the enforcement action is being taken. It is fundamentally unfair to second-guess decisions made in the past based on the information one has today. When the agency has reason to believe that the entity made a conscious decision to risk noncompliance for economic purposes using an unreasonable interpretation, it is appropriate for economic benefit to be calculated and factored into the penalty."

Secondly, first time violations should not have an economic benefit penalty for small business, because the cost of compliance for most small business is itself a substantial economic impact alone.

- b) Where a significant economic benefit is evident, should the rule allow the Commission to require the violator to undertake corrective actions that surpass the minimum action required for compliance?

TAB response: No, beyond-the-minimum corrective actions should not be required of a violator because it would foster an atmosphere of using enforcement in place of rulemaking.

- c) Are there better means of determining economic benefit than the methodology expressed in the Commission's current penalty policy (see Attachment No. 1)? If so, what are they?

TAB's Response: We don't know of any economic benefit policy that is fair. Any economic benefit requirement has the practical effect of empowering the enforcer to utilize 20/20 hindsight and decide what decision (technology investment) should have been made. The decision might not have been as clear at that point in the past as it is at the later time when the enforcement action is being taken. The "new" technology used at the time may have been one of many that could have been used and may not necessarily be the one that proved the best over the long haul. It is unfair to second-guess decisions made in the past based on the information one has today.

2. **Small Business/Small Local Governments.** What should the Commission consider when calculating the penalty for a Small Business or a Small Local Government?

- a) Should the rule provide a unique definition of "small business" and "small local government" for the purposes of calculating a penalty? If so, what?

TAB's Response: The definition of small business for the purpose of the penalty policy should be namely, a business which employs 100 or fewer people without regard for income. We do not believe that the amount of revenue a small business makes should be a factor in defining a small business because of the difficulty of establishing an appropriate financial "magic number" for small business, which are far-ranging in economic structure and income. If the decision is made to include an income factor, it needs to be very simple to calculate, e.g., using gross sales instead of net sales. We would suggest using a figure of no less than 15 million in gross sales.

- b) Should the rule provide for a standard downward adjustment of the penalty for small business and small local government?

TAB's Response: The rule should provide for a standard downward adjustment of the penalty for small business and small local governments because such entities are handicapped in two ways in trying to achieve environmental compliance in the first place. First, small businesses are not as well "plugged in" to the system for becoming educated on

environmental rules and regulations. Where many larger businesses belong to both a trade association and a general business association (like TAB), most small businesses belong to neither, and so loose out on learning about environmental compliance requirements, except by word of mouth. Secondly, small businesses rarely have a staff position, or even part of a staff position, dedicated to environmental compliance and, in general, lack the resources for this kind of position. While ignorance of the law is no excuse, it does seem appropriate to allow some kind of downward penalty adjustment for a small business which was unaware that they were violating the law. A final reason for a downward adjustment is that a small business has less of an ability to pay than a larger business. Often lacking cash reserves, many small businesses operate from "hand to mouth," and may be unable to pay the full penalty without economic hardship which would endanger jobs.

- c) Should the rule provide for a deferral of penalties in lieu of a standard downward adjustment (deferred contingent upon compliance with the administrative order)?

TAB Response: For the reasons mentioned in 2 (b) above, it would be entirely appropriate for the rule to allow the staff to provide for a deferral of penalties in lieu of a standard downward adjustment (deferred contingent upon compliance with the administrative order).

- d) Should the rule allow for longer compliance deadlines for small business and small local government?

TAB Response: For the reasons mentioned in 2 (b) above, it would be entirely appropriate for the rule to allow longer compliance deadlines for small business and small local government, as each case is considered individually. In addition, since most small business compliance infractions are generally of small risk, it would not be putting the environment in jeopardy to delay compliance.

3. **Good Faith Effort to Comply.** What should the Commission consider when calculating the penalty adjustment related to Good Faith Efforts to Comply?

- a) Should the rule provide for good faith reductions when some, but not all, violations are corrected?

TAB Response: Yes, the rule should 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. Sometimes it takes longer to comply with one of the corrective actions rather than another, especially when the enforcement action addresses an enforcement issue that is historical in nature-- sometimes considerably

longer. For this reason, TAB believes it would be appropriate to give good faith reductions in calculating the penalty adjustment when some, but not all, violations are corrected. Good faith is good faith, no matter when it occurs. The agency should give credit for good faith in the expectation that others will see the value of quickly completing corrective actions. If no credit is given for partial completion of corrective actions, there is no incentive for the offender or any potential offender to quickly complete corrective actions.

- b) Should the rule prohibit the application of a good faith reduction for respondents that are deemed culpable?

TAB Response: *If the object of enforcement is environmental compliance, and a credit for good faith efforts encourages faster remediation and compliance, then it would appear to be a contradiction for the agency not to allow a good faith credit even when a respondent is deemed culpable by TCEQ. Also, see our comments above at 3(a).*

- c) Should the rule prohibit a good faith reduction in Default Orders?

TAB Response: *No comment.*

- 4. **Culpability.** What should the Commission consider when calculating the penalty adjustment related to Culpability?

- a) Should the rule provide for a penalty reduction in cases where the violation(s) were documented during a self-inspection and voluntarily self-reported?

TAB Response: *As an incentive to reporting, the rule should provide for a penalty reduction in cases where the violation or violations were documented during a self-inspection and voluntarily self-reported.*

- b) Should the rule provide that an entity is culpable if it is permitted, registered, or is previously issued a notice of violation, notice of enforcement, or Commission Order?

TAB response: *We are leery of such a black-and-white determination of culpability. We have seen cases among our member companies where the agency assumes a violation has occurred because an entity is permitted and therefore "should have been aware" of the violation, but the violation is based on a grey area of the rules or a new interpretation of policy of which the company is not or has not become aware. For that reason, we would not support a blanket designation of culpability merely if an entity is permitted or registered. Further, violations are often caused by not understanding regulatory requirements or equipment malfunction. In*

addition, the mere holding of a permit or registration does not necessarily convey understanding of all the nuances of TCEQ environmental regulations.

5. **Standard Penalties.** What should the Commission consider in using standard penalties for violations that the current penalty policy classifies as “potential” or “programmatic”?

TAB General Comment: *There are some things that standard penalties should be use for and some that they should not. Standard penalties should be used for clear-cut, simpler violations, particularly when their use would result in an expedited settlement saving all parties time and money. Standard penalties should not be used as a strict formula, preventing the use of flexibility when considering all the circumstances of a violation.*

- a) Can the 12 proposed violation categories for standard penalties (see Attachment No. 2) be consolidated into fewer categories, while continuing to capture all programmatic and potential violations? If so, how?

TAB response: *We are not sure that consolidating or expanding the list of proposed violation categories would be a fruitful exercise at the present time since we lack experience with its application.*

- b) Can the proposed violation categories for standard penalties be ranked by order of importance? If so, what is the appropriate ranking?

TAB response: *We are not sure that ranking the list of proposed violation categories would be a fruitful exercise at the present time since we lack experience with its application. It is also lengthy and specific. It seems to us that ranking the list would tend to complicate the process at a time when the Commissioners are striving for a simpler, more transparent penalty process. It is also not clear to what “order of importance” refers. Does order of importance equate to amount of risk or something else?*

6. **Other Issue.** Are there better means of determining the number of events for a given violation than the methodology expressed in the Commission’s current penalty policy (see Attachment No. 1)? If so, what are they?

TAB has no further comments.

Entered # 15 12/27/05

Larry E. Lee, P.E.
Consulting Engineer
9027 Eldora Drive
Houston, Texas 77080

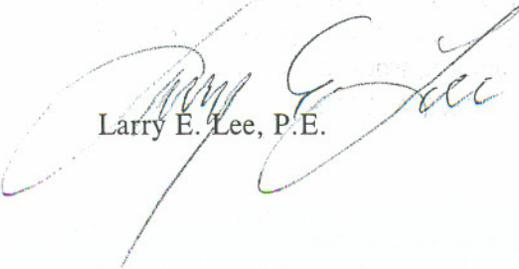
Comments To; CEQ, State of Texas and others
In Reference To; 11-10-05 Admin. Penalty Stakeholder Meeting

In response to the TCEQ request, my comments relevant to ongoing tasks of TCEQ and their proposed penalty recommendations are as follows;

- 1) TCEQ must identify all of their problems now. Only symptoms are treated by TCEQ as they have never identified their own problems which still go unaddressed today.
- 2) All TCEQ meetings must be open to the public when the commission is in session.
- 3) The appointed TCEQ Commission must have a licensed knowledge in Chemical, Mechanical and Civil Engineering fields, be from the working community & not from the legal community.
- 4) TCEQ must be in the business of education to implement CFR guidelines & requirements.
- 5) TCEQ must insure their manuals agree with the Code of Federal Regulations. Do this now.
- 6) All TCEQ manuals must be compatible with the existing local & state laws. Check now.
- 7) TCEQ must acknowledge that CFR rules hold precedent over city, county, and state laws.
- 8) TCEQ must share information with the businesses they are targeting for taxing, compliance, or regulation goals. Send all information with first contact including name & toll free numbers.
- 9) Stop the existing, combative, & excessive legal approach by TCEQ to all Texas businesses, small or large. It is counterproductive, time consuming and expensive for the State of Texas.
- 10) TCEQ engineers must become goodwill ambassadors to urge all businesses into compliance in the least practical time with the best solutions and use the courts only as a last resort.
- 11) TCEQ inspectors must be capable of answering all questions within a reasonable time
- 12) If the TCEQ has notified any targeted business in writing of any suspected non compliance issue, then the business must comply but in a reasonable time to all concerned.
- 13) If after a written warning is issued and non compliance is observed, only then should legal action be considered with notice of anticipated civil or criminal penalties.
- 14) If at a public hearing compliance is not realized, then a civil penalty should be considered and administered with appropriate notice of appeal if requested.
- 15) Any civil penalties must be considered on an individual basis with penalties judged on the severity of the non compliance.
- 16) Chose fuel efficient vehicles for TCEQ employees, and only on an as needed basis.
- 17) Send TCEQ engineers to open meetings, not legal counsel who are unfamiliar with CFR's.
- 18) Examine feedback from all small and large businesses and do this regularly.

At present, the TCEQ is held in low public esteem. If this is to change then knowledge of the scientific community and businesses regulated must come from the top and pass through to all employees of the TCEQ. TCEQ must implement an in-house, and ongoing training program now open to their employees and all businesses regulated on a no charge basis.

Respectfully submitted on December 15, 2005


Larry E. Lee, P.E.

From: Robert Markeloff <markeloff@kingwoodcable.com>
To: <Pen_Rule@tceq.state.tx.us>
Date: Mon, Dec 19, 2005 8:10 AM
Subject: Thoughts on Penalty Policy

Dear Ms. Anne Dobbs :

I understand you are seeking preliminary input on how to restructure your proposed rules for administrative penalties. I have a few thoughts here:

1. When calculating the penalty adjustment for economic benefit, is should include all benefits earned by the non-compliance. Only when companies learn that here is no benefit for violations, will they work to stop them.
2. Small businesses and local governments are like everyone else - they should not get any special treatment.
3. God faith penalty reductions should be limited to cases were all violations have been corrected and the the violations were not culpable.
4. A violation is a violation, regardless of being self-reported or discovered during an inspection.
5. Potential or programmatic penalties are just that - penalties and treated as such. Do not make some penalties more or less important.

Bottom line- we need penalties that make it highly undesirable for companies to break the law and continue to operate. Penalties should not be a cost of doing business, but rather a strong incentive to do it right the first time.

Robert Markeloff
3710 Ember Spring Dr.
Kingwood, TX 77339

TEXAS INDUSTRY PROJECT

COMMENTS ON TCEQ ADMINISTRATIVE PENALTY RULE

December 19, 2005

The Texas Industry Project ("TIP") appreciates the opportunity to comment on the Texas Commission on Environmental Quality's ("TCEQ's") Administrative Penalty Rule as part of the ongoing stakeholder process. TIP is comprised of 52 companies in the chemical, refining, oil and gas, electronics, forest products, terminal, electric utility and transportation industries with operations in Texas. A list of TIP member companies is attached.

I. Summary

TIP supports TCEQ's attempts to streamline and clarify the enforcement process. TIP is concerned, however, that codification of the Penalty Policy in the Administrative Penalty Rule could eliminate the flexibility and agency discretion that is necessary for fair and equitable treatment of the regulated community in the enforcement context. Agency flexibility and discretion must be maintained, and codification may not be the best way to preserve this important element of the penalty assessment process. TIP also believes that TCEQ should use the Administrative Penalty Rule to change the flawed premise upon which a penalty adjustment in the current policy is based: that there is always an economic benefit to noncompliance. The application of this assumption leads to inconsistent and often-illogical results under the current policy. TCEQ should also expand the circumstances in which the good-faith effort to comply can be used as a penalty adjustment, and provide penalty reductions for violations that are voluntarily reported. The Administrative Penalty Rule should also address double-counting in the current penalty calculation by eliminating the compliance history component enhancements as recommended by staff. Finally, TCEQ should use the Administrative Penalty Rule to establish principles for the counting the number of violations that lead to consistent results and avoid the unreasonably high penalty amounts that can be calculated under the current policy through manipulation of the violation count.

II. Comments on Administrative Penalty Rule

A. Standard Penalties

TIP supports the concept of applying standard penalties in the enforcement process, but believes that a number of safeguards must be established to ensure that the use of standard penalties does not lead to an inflexible enforcement process that produces inequitable results.

1. *Entities Must Not be Subject to Further Enforcement for a Violation Addressed through Standard Penalty*

If a violation is classified as a standard penalty violation and the company is issued a standard penalty, the TCEQ's issuance of the standard penalty should represent full resolution of enforcement based on that violation. TCEQ must ensure that no *additional* enforcement takes place for an event that has previously been addressed through a standard penalty. If a company faces *additional enforcement* based on an issue that was subject to a

standard penalty, the company would be subject to what amounts to double-jeopardy and the streamlining and simplification benefits associated with the use of standard penalties will be jeopardized.

2. *TCEQ Should Establish a De Minimis Category for which Penalties Will Not Apply*

TCEQ should use the categorization of violations to include a *de minimis* concept in the rules, identifying categories of minor violations for which no enforcement action should be taken. Prior agency penalty policies, as well as the U.S. EPA's penalty policy, establish reasonable compliance limits. For example, "failure to record CEMS data, temperatures, feed rates, coating and solvent usage" (in the Records/Air category) should have an associated compliance percentage. No monitor will function 100 percent of the time and no employee is infallible. If data is collected at least 98 percent of the time, TCEQ should exercise enforcement discretion and not assign *any* penalty. Creation of a *de minimis* category is warranted.

3. *TCEQ Should Not Aggregate Standard Penalties to Assess Massive Penalties*

The standard penalty tables do not identify whether multiple alleged violations will be assessed as a single penalty or whether each omission (*e.g.*, each day a monitoring log is not completed) will be assessed as a separate violation. TCEQ should not assess a separate standard penalty for related, ongoing violations in such a manner that a minor event or omission would become subject to a large penalty. As discussed in Section F below, the use of violation counts to generate astronomical penalties for environmentally insignificant violations is a problem under the current Penalty Policy. That problem should not be extended through the use of standard penalties.

4. *TCEQ Should Not Attempt to Rank Standard Penalty Categories*

TCEQ has asked whether it should rank the proposed violation categories for standard penalties by order of importance. TIP believes that such a ranking process would be problematic. In addition, an up-front ranking of the penalty categories may further limit the flexibility and discretion that is necessary for an equitable enforcement process.

5. *The Rule Should Provide for Appeal of a Standard Penalty*

TCEQ should ensure that an appeal process is available, even for violations that fall within a standard penalty violation category. Codification of the Penalty Policy as rule and the TCEQ's attempt to simplify the enforcement process should not sacrifice fairness or a company's due process rights.

B. *Penalty Adjustment for Economic Benefit of Noncompliance*

1. *TCEQ Must Change the Fundamental Principle Behind Penalty Adjustments for Economic Benefit of Noncompliance*

TCEQ's policy with regard to penalty adjustments for the economic benefit of noncompliance is based on a flawed premise: that there is always an economic benefit to noncompliance. This is simply not the case. Until the TCEQ accounts for the fact that there is not always an economic benefit of noncompliance and limits the application of the economic

benefit penalty adjustment, penalty adjustment for economic benefit of noncompliance will continue to lead to illogical and unwarranted results.

As an example: one TIP member company was recently cited for failure to conduct a performance test by the required date. The company had performed the full performance test after the deadline. The company was assessed a penalty for not conducting a timely performance test, and TCEQ staff then added the calculated interest for the deferred cost of the performance test as “economic benefit of noncompliance.” The company’s failure to conduct a timely performance test generated truly insignificant savings for the company, as it incurred the full cost of the performance test after the deadline — yet TCEQ staff felt compelled to try and calculate an economic benefit. This illogical result is due to the fact that the current policy requires that an economic benefit component be evaluated for each noncompliance, even when in most cases there is truly no economic benefit.

It is illogical and unreasonable to assume that there is an economic benefit to every noncompliance with an environmental requirement. Recognizing this fact, the U.S. EPA’s penalty policy does not automatically assume an economic benefit to any noncompliance. Nor does the Texas Water Code require TCEQ to consider economic benefit in every case. TCEQ should change the premise that an economic benefit always exists and limit applicability of the economic benefit penalty adjustment to circumstances where a true economic benefit was realized.

2. Penalties should be Adjusted for Economic Benefit in Limited Circumstances

TCEQ should only attempt to recover economic benefit where a company avoided the installation of required controls and it is clear that there was an economic benefit to that noncompliance. In such cases—which TIP predicts are rare—it is appropriate to recover that economic benefit through an administrative penalty.

As stated above, TCEQ’s current methodology often finds economic benefit when there is none, because it requires TCEQ staff to calculate an economic benefit for every noncompliance. Staff will in some circumstances estimate delayed costs under “other” and simply create a number based on best judgment. It is TIP’s experience that every time a company spends money or existing personnel resources on repairs following a violation, TCEQ staff will assume that the company has realized an economic benefit — that is, the estimated cost of repairs represents an economic benefit because the company *could have* incurred that cost before the violation. This does not reflect the reality of operating complicated industrial sites. Not everything operates as designed and malfunctions will occur despite proper design and operational practices. The occurrence of a violation or failure of equipment does not mean that a company could have, or should have, predicted the malfunction and spent money before the violation occurred to correct the problem. Malfunctions can take place despite an aggressive preventive maintenance program.

Application of economic benefit under current practices can actually be construed as a disincentive to fixing a problem related to a noncompliance, because if a company spends money or assigns personnel to fix a problem, TCEQ staff will treat those costs as an economic benefit of noncompliance when assessing any penalty. If a company can demonstrate that it had established and was implementing a reasonable preventative maintenance program, then there should not be any allegation that the company gained some economic benefit because a malfunction occurred and it cost money to make a repair.

A penalty should be adjusted based on the economic benefit of noncompliance only when it is clear that a company has avoided installing required controls and, as a result of the failure to install those controls, realized a cost savings. A decision to disregard clear regulatory or statutory requirements to save money should trigger a penalty adjustment for economic benefit of noncompliance. A decision that is based on a good-faith interpretation of a complex regulatory requirement should not be considered disregard and should not serve as a basis for penalty adjustment based on a perceived economic benefit.

3. *Use of “Significant” Economic Benefit*

The current penalty policy establishes a 50 percent penalty adjustment based on an economic benefit equal to or greater than \$15,000. TCEQ should not establish additional requirements for “significant” economic benefit without changing how it assesses economic benefit and clearly defining what would be considered “significant” economic benefit. As discussed above, TCEQ staff currently treats as economic benefit a number of costs or expenses that are not economic benefits of noncompliance; as a result, TIP believes that penalty adjustments or other requirements based on a “significant” economic benefit are unreliable.

C. **Penalty Adjustment for Good Faith Efforts to Comply**

1. *TCEQ Should Allow Penalty Adjustment for Good Faith Efforts to Comply for Discrete (Past) Violations*

Current TCEQ policy provides that good faith will not be considered in cases involving discrete (or past) violations, such as emissions events. Thus, even if a company has gone above and beyond to resolve the root cause that resulted in an emissions event or other past noncompliance, and incurred significant expense in doing so, current TCEQ policy is that “good faith” cannot be considered as a potential adjustment to the penalty. The Commission should use the Administrative Penalty Rule to change this illogical position and allow for good-faith penalty adjustments for discrete violations. Such a policy will encourage the type of diligent after-the-fact evaluation to prevent future violations and eliminate a policy that fails to recognize what truly are good-faith efforts to attain and maintain compliance.

2. *TCEQ should Evaluate Good Faith Efforts to Comply for Each Violation Independently*

The current Penalty Policy takes an “all or nothing” approach with respect to good faith efforts to comply — that is, a penalty adjustment is only merited when good-faith efforts can be claimed for all of the violations involved in an enforcement action. Thus, if TCEQ determines that a good-faith effort to comply does not apply for a violation included in a single Notice of Enforcement (NOE), good faith cannot be considered for any of the alleged violations identified in one or more NOEs included in a formal enforcement action — even if qualifying good-faith efforts have been made for other violations. The rule should allow for penalty reductions based on good-faith efforts to comply when some, but not all, violations qualify for good-faith compliance efforts.

The fact that an enforcement action involves one event for which an adjustment for good faith effort to comply cannot be made (*e.g.*, a discrete violation, under the current policy) should not eliminate the potential for penalty reduction based on good-faith efforts to comply. A more equitable policy would consider good faith efforts to comply for every alleged violation, independently. The Penalty Policy should allow TCEQ to consider good faith for each alleged violation, and determine for each violation whether the company has taken action that

merits adjustment based on a good-faith effort to comply. Credit for good-faith efforts should not be disallowed merely because a corrective action has not yet been completed for some or all of the violations included in an NOE.

3. *Adjustment based on Good Faith for Respondents Deemed Culpable*

TCEQ has asked whether the Administrative Penalty Rule should prohibit the application of a good faith reduction for respondents that are deemed "culpable." TIP believes that TCEQ should not prohibit the application of a good faith reduction for respondents that are deemed culpable in the absence of clear rules on determining culpability.

To date, few companies are deemed culpable. However, the language in the Penalty Policy is vague as to how TCEQ staff will make such a determination — "staff will consider whether the respondent could have reasonably anticipated and avoided the violation(s)." In the absence of a clear methodology for determining culpability, TCEQ should not establish a bright-line rule prohibiting the application of a good-faith reduction. Rather, TCEQ should look at the circumstances surrounding the particular alleged violation and determine if the good faith reduction is appropriate.

D. *Penalty Adjustment for Culpability*

1. *A Penalty Reduction Should Be Provided for Voluntarily Self-Reported Violations*

The rule should provide for a penalty reduction in cases where violations are identified during a self-inspection and voluntarily self-reported. It is important to encourage self-reporting. As discussed below, while implementation of the Title V operating permits program will result in few air quality-related violations being voluntarily self-reported at major sources, the TCEQ should implement similar measures to encourage accurate and complete self-reporting under Title V.

2. *A Penalty Reduction Should Be Provided for Violations Reported in Title V Deviation Reports*

Under the Title V program, major sources are required to report "any indication of noncompliance" in a Title V deviation report. As a result, few (if any) air-quality related violations can be classified as voluntarily reported by Title V sources, despite the fact that they will be self-reported as deviations.

TCEQ should implement a form of penalty mitigation for items that are self-reported under Title V. In particular, penalty mitigation is warranted when a violation is reported that TCEQ would not have identified through the normal course of inspection, to encourage the submittal of accurate and complete Title V deviation reports. Otherwise, companies that are diligent in satisfying their Title V deviation reporting obligations will be subject to greater scrutiny and greater risk of penalty than companies that fail to report all deviations.

One such mechanism that TCEQ should consider would be the use of a "warning letter," as opposed to a notice of violation, for certain violations identified in Title V deviation reports. TIP understands that such a policy could not extend to all violations reported in a deviation report; companies should not be allowed to avoid enforcement for serious, knowing violations simply because they are included in a mandatory deviation report. However,

violations of a certain nature that are reported under Title V should trigger a response from TCEQ other than a notice of violation or notice of enforcement.

3. *Culpability of Entities that are Permitted, Registered or Previously Subject to Enforcement Action*

The Administrative Penalty Rule should not provide that an entity is culpable if it is permitted, registered, or is previously issued a notice of violation, notice of enforcement, or Commission Order. This approach would fail to consider site complexity, and would find larger sites culpable far more often than smaller sites. The fact that an entity is permitted or registered should not impact culpability. Moreover, the fact that an entity has been previously issued a notice of violation or been involved in an enforcement action will often have no relation to a subsequent violation — particularly at large, complex sites that may have thousands or tens of thousands of compliance points. Such a policy could consider sites “culpable” on completely unrelated events, and is not warranted.

TIP notes that the reference to “entity” in the question to stakeholders regarding culpability is vague and in need of explanation. TIP believes that, if prior events are taken into account for penalty adjustment purposes, the evaluation should be limited to the “regulated entity” as the term is used by the TCEQ’s Central Registry, or “site” as the term is used in the Title V operating permits program. Events at another site or regulated entity that is owned or operated by the same company (the “customer” as the term is used by the TCEQ’s Central Registry) should not be taken into consideration when evaluating culpability.

E. The Penalty Adjustment for Compliance History Should Be Eliminated

The current Penalty Policy contains two potential adjustments to a penalty amount: an adjustment based on “Compliance History” and an adjustment based on “Compliance History Classification.” The Enforcement Process Review resulted in a staff recommendation that TCEQ simplify the penalty policy by eliminating the Compliance History Worksheet from the penalty calculation and replacing that Worksheet with a potential adjustment based on the respondent’s overall compliance history classification. Using compliance history for two adjustments to a penalty amount constitutes double-counting compliance history when evaluating whether to make a penalty adjustment. The Commission agreed with the Steering Committee’s recommendation, and it should direct TCEQ staff to eliminate the compliance history component enhancements.

F. Violation Count

1. *Penalty Calculation and Violation Count*

The violation count used for penalty calculations under the current Penalty Policy is not applied consistently, and can be used to calculate an astronomical penalty for an event or series of events with little or no environmental impact. The current policy can also result in the assessment of a higher penalty for an intermittent event that a company is working to resolve than for a longer, on-going problem, based on violation count. The Administrative Penalty Rule should address the inconsistent application of violation counts and the often illogical results generated by the use of such inconsistent violation counts.

TCEQ should take a more common-sense approach in determining the number of events associated with noncompliance. The use of a violation count should not penalize a company for attempting to repair a recurring noncompliance. Additionally, violation count

should not be subject to manipulation and the “manufacturing” of an astronomical proposed penalty based on multiple environmentally insignificant violations that result from the same root cause. Application of the current policy has been used to generate nonsensical results, such as multi-million dollar penalty calculations for fugitive emissions monitoring or leak detection and repair (“LDAR”) violations that had little or no impact on the environment, based on counting each component that was not monitored as a separate violation.

The penalty policy should not allow this type of manipulation of penalty amounts.

2. *Deviation Reporting and Violation Count*

TCEQ must recognize that the total number of Title V deviations summed on report forms does not equate to an indication of the site’s compliance record. Sites with more diligent and comprehensive investigation systems may report more deviations than sites with superficial or less-comprehensive self-assessment programs. TCEQ guidance provides little in the way of clarity or meaningful instructions on counting deviations — for example, it makes no sense to count a deviation that is attributable to the same root cause and may occur for several hours as an alleged repeat violation of an hourly permit limit. It also makes no sense to penalize those companies that implement the most comprehensive compliance reporting systems. The number of deviations included in a deviation report, in and of itself, should not be viewed as a measure of a Title V permit holder’s compliance efforts. As TCEQ has previously stated, not all deviations are automatically violations.

G. TCEQ Should Develop Media-Specific Penalty Policies

TIP recommends that TCEQ develop media-specific penalty policies. A tailored approach, based on the specific media and the nature and significance of the event, is more appropriate than a “one size fits all” approach to determining the number of events. The example cited above relating to violation count reveals how use of a non-media specific penalty policy leads to penalties that fail to reflect the significance (or insignificance) of the violation when compared across media.

TCEQ should consider the types of events it typically sees in each medium and develop more-tailored approaches for air, water and waste violations and penalty assessment.

* * *

TIP appreciates the opportunity to comment on the Administrative Penalty Rule and to participate in the ongoing stakeholder process. If you have any questions about TIP’s comments, please contact Matt Paulson at 512.322.2582.

TEXAS INDUSTRY PROJECT
(2005 Member Companies)

1. Albemarle Corporation
2. Advanced Micro Devices, Inc.
3. BASF Corporation
4. BP
5. Calpine Corporation
6. Celanese Chemicals, Ltd.
7. CenterPoint Energy Houston Electric, LLC
8. Chevron Phillips Chemical Company LP
9. Chevron Corporation
10. ConocoPhillips
11. Degussa Engineered Carbons, LP
12. Dixie Chemical Company, Inc.
13. Dow Chemical Company, The
14. Duke Energy Field Services, LP
15. Dynegy Inc.
16. Eastman Chemical Company
17. E. I. Du Pont de Nemours & Company
18. Entergy Services, Inc.
19. Enterprise Products Operating L.P.
20. ExxonMobil Chemical Company
21. Firestone Polymers, LLC
22. GB Biosciences Corporation
23. Goodyear Tire & Rubber Company, The
24. Hexion Specialty Chemicals, Inc.
25. Huntsman Corporation
26. IntercontinentalTerminals Company
27. International Paper Company
28. Kinder Morgan Liquid Terminals, LLC
29. LBC Houston, LP
30. Lockheed Martin Aeronautics Company
31. Lyondell Chemical Company
32. LYONDELL-CITGO Refining LP
33. Marathon Ashland Petroleum LLC
34. MeadWestvaco Corporation
35. Merisol USA, L.L.C.
36. NOVA Chemicals Corporation
37. Occidental Chemical Corporation
38. Odfjell Terminals (Houston) LP
39. Premcor Refining Group Inc., The
40. Reliant Energy, Inc.
41. Rohm and Haas Texas, Incorporated
42. Sempra Energy
43. Shell Oil Company
44. Solutia Inc.
45. ST Services
46. Sterling Chemicals, Inc.
47. Stolthaven Houston Inc.
48. Temple-Inland Forest Products Corporation
49. Texas Genco, L.P.
50. Texas Instruments Incorporated
51. Union Pacific Railroad Company
52. Valero Energy Corporation
53. Vopak Logistics North America, Inc.

✓
Entered 12-12-05

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MONDAY, DECEMBER 19, 2005

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
PO Box 13087 MC-109
Austin, TX 78711-1065

Re: TCEQ Administrative Penalty Rule

Dear Mr. Shankle:

Please accept the following comments on behalf of clients of the firm of Birch & Becker, LLP, regarding the future rulemaking for 30 Texas Administrative Code Chapter 75, currently referred to as the Administrative Penalty Rule. The firm's clients are regulated under many of the Texas Commission on Environmental Quality ("TCEQ") environmental programs, and therefore will be directly impacted by the new rules in the event of enforcement actions initiated by TCEQ.

The firm has been actively involved with the Enforcement Review conducted over the past two years by TCEQ, and has commented at each opportunity during the review. The firm also attended the Penalty Policy Stakeholders meeting held in San Antonio, and participated in discussions during that meeting. Since TCEQ has not yet drafted proposed rules, the following comments are general in nature, and are in response to the six issues where TCEQ requested input from Stakeholders. Our brief comments are as follows:

1. **Economic Benefit.** What should the Commission consider when calculating the penalty adjustment for Economic Benefit?
 - a) Should the rule require that all of the realized economic benefit gained through the violation(s) be recovered through the administrative penalty?

Response: Except in rare cases, there is no appreciable economic benefit realized from noncompliance with environmental regulations. The calculations used to demonstrate economic benefit frequently fail to take into account all of the variables that must be considered when balancing the economics of noncompliance. These calculations also frequently employ a "perfect hindsight" analysis of what should have been done to avoid the noncompliance. This is an unrealistic approach to the question of economic benefit.

Attempts to determine the economic benefit of violations by a municipal entity are even harder to justify. Penalties assessed against a municipal government are passed on directly to the citizens, and attempts to calculate the possible benefits realized from the noncompliance of a governmental entity are a waste of tax dollars at every level. The staff of the state government (TCEQ) will spend time calculating the "benefit," while the staff, lawyers and consultants of the local government, will spend time challenging the economic benefit penalty enhancement. Ultimately, the citizen taxpayers pay the cost of any required corrective actions, the penalties for the actual violation, any penalty enhancement due to "economic benefits," and the costs of government on both sides of the enforcement action. Efforts to assess economic benefits for a municipal entity should be avoided as a waste of taxpayer dollars.

The Environmental Management System ("EMS") concept is in large part premised on the understanding that it is more economical to stay in compliance with regulatory programs than it is to be in noncompliance. The belief that there is some economic benefit to being in noncompliance with environmental laws is no longer a widely shared view.

Today most municipalities and companies strive to stay in compliance with environmental regulations. There may be the rare instance where a company or municipality intentionally or negligently fails to meet its environmental obligations and these actions then result in direct and substantial costs savings. Any economic benefit approach adopted by TCEQ should therefore be narrowly focused to address these rare instances.

- b) Where a significant economic benefit is evident, should the rule allow the Commission to require the violator to undertake corrective actions that surpass the minimum action required for compliance?

Response: As noted above, it will be the rare occasion where there is a true economic benefit. Regardless, it may difficult for TCEQ to find the statutory authority to place a higher corrective action standard on one party versus another.

- c) Are there better means of determining economic benefit than the methodology expressed in the Commission's current penalty policy (see Attachment No. 1)? If so, what are they?

Response: As noted above, it will be the rare occasion where there is a true economic benefit, and therefore it seems an inappropriate use of time and effort to develop a formula for use on limited occasions. It will be very difficult to develop a formula that is fair on all occasions.

2. **Small Business/Small Local Governments.** What should the Commission consider when calculating the penalty for a Small Business or a Small Local Government?

- a) Should the rule provide a unique definition of "small business" and "small local government" for the purposes of calculating a penalty? If so, what?

Response: At this time, we have no comment on penalty policies concerning small businesses or small local governments. However, it should be clear that all entities regardless of size are required to meet corrective action requirements in a manner that is fair and equitable. For example, a small business or municipality with effluent discharge violations should not be allowed to delay implementation of a corrective action plan when such delay could result in additional costs or harm to another, e.g., downstream, regulated entity.

- b) Should the rule provide for a standard downward adjustment of the penalty for small business and small local government?

Response: No comments at this time.

- c) Should the rule provide for a deferral of penalties in lieu of a standard downward adjustment (deferred contingent upon compliance with the administrative order)?

Response: No comments at this time.

- d) Should the rule allow for longer compliance deadlines for small business and small local government?

Response: No comments at this time. However, as noted above, extended compliance deadlines should not result in adverse impacts to other regulated entities.

3. **Good Faith Effort to Comply.** What should the Commission consider when calculating the penalty adjustment related to Good Faith Efforts to Comply?

- a) Should the rule provide for good faith reductions when some, but not all, violations are corrected?

Response: Yes. Good Faith Efforts are practical demonstrations of an entity's response to the discovery of a noncompliance. Prompt response at correcting a noncompliance should be positively recognized. Some violations take longer to correct than others, and an entity should receive

positive recognition for all prompt response actions, even if some violations take longer to correct.

- b) Should the rule prohibit the application of a good faith reduction for respondents that are deemed culpable?

Response: All positive responses of an entity should be recognized. The penalty calculation should take into account the totality of circumstances surrounding the enforcement action. Prompt response actions should be encouraged and rewarded. The objective of TCEQ should be compliance, and policies that reward compliance should be encouraged.

- c) Should the rule prohibit a good faith reduction in Default Orders?

Response: No comment at this time.

4. **Culpability.** What should the Commission consider when calculating the penalty adjustment related to Culpability?

- a) Should the rule provide for a penalty reduction in cases where the violation(s) were documented during a self-inspection and voluntarily self-reported?

Response: Yes. This is consistent with both the state and federal audit policies that encourage self-inspection and self-reporting. This approach should encourage positive compliance behavior and therefore should be recognized and rewarded. TCEQ should consider completely waiving penalties in appropriate circumstances for self-reported violations.

- b) Should the rule provide that an entity is culpable if it is permitted, registered, or is previously issued a notice of violation, notice of enforcement, or Commission Order?

Response: No. Violations can occur due to many different causes. A policy that concludes that an entity is culpable simply because a violation occurred illogically assumes a certain mental state on the part of the operator. For example, it would be irrational to conclude that all permitted operators are culpable for violations resulting from all equipment malfunctions.

5. **Standard Penalties.** What should the Commission consider in using standard penalties for violations that the current penalty policy classifies as "potential" or "programmatic"?

Response: Standard penalties should be reserved for sharply defined violations. Records that do not exist, equipment that is not present, deadlines that are not met, etc., are possible opportunities for standard penalties. For example, In TCEQ's Attachment No. 2 (referenced in the next question), falsification of data would not be an appropriate category of violations for standard penalties since these types of events are fact sensitive.

- a) Can the 12 proposed violation categories for standard penalties (see Attachment No. 2) be consolidated into fewer categories, while continuing to capture all programmatic and potential violations? If so, how?

Response: A brief review of Attachment No. 2 suggests the list should be trimmed significantly. The list should be trimmed to violations that can be completely demonstrated by the visual inspection of an inspector during a single site visit. Any further investigation required to determine the presence or extent of a violation suggests that the violation is not sharply defined enough for a standard penalty.

- b) Can the proposed violation categories for standard penalties be ranked by order of importance? If so, what is the appropriate ranking?

Response: The list should be significantly trimmed before any ranking can occur. Further, the simpler the system the more likely would be the benefits from such a system.

6. **Other Issue.** Are there better means of determining the number of events for a given violation than the methodology expressed in the Commission's current penalty policy (see Attachment No. 1)? If so, what are they?

Response: As an incentive, self-reported violations could always be assessed as a single event. There are no additional comments on this issue at this time.

As noted above, since there are no specific TCEQ rules on which to comment, these comments are only preliminary responses to the questions presented by TCEQ and issues discussed during the Stakeholders meeting. Additional comments will be provided as TCEQ provides more information as draft rules are developed.

Thank you for the opportunity to provide these comments. Please include Birch & Becker, LLP, on all future correspondence, notices of meetings, or other updates regarding this TCEQ rulemaking concerning the Administrative Penalty Rule

Sincerely,



Erich M. Birch

cc: Mr. John Sadlier, Division Director, Enforcement Division MC-219 ✓
Ms. Tamra-Shae Oatman, Section Manager, Small Business and Local Government Assistance MC-106

revised 12/19/05



Houston Small Business Advisory Committee

December 19, 2005

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
PO Box 13087 MC-109
Austin, TX 78711-1065

Glenn,

On behalf of the Houston Area SBAC, we would like to thank you for this opportunity to voice our comments regarding the TCEQ Administrative Penalty Rule.

Small business is the backbone of our State's economy, and we think it's crucial, therefore, that small business participate in maintaining a viable environment in Texas. The overriding theme that we wish to convey to the Commission is that to treat small business, in the Agency's penalty policy, similarly as to large Fortune 1000 companies is unfair.

Over the past several weeks, the SBAC members have discussed these issues, and here are our thoughts/recommendations on the major areas of concern:

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

Small Business/Small Local Governments – This should be defined strictly on the number of employees and this level should be 100 employees or fewer. There should be **no income associated with the definition** due to the complexity of determining an appropriate financial assessment for small businesses across the spectrum. We feel that the employee count is a very effective benchmark since attempting to establish size on revenue is fraught with problems.

If the Commission feels it is absolutely necessary to include an income definition, the financial component of the definition should be very simple to calculate, such as using gross sales (as opposed to net). The definition should be set at no less than 15 million gross sales. This figure has been based on data that the Houston SBAC received from several members on gross company revenues versus number of employees.

The rules should provide for a reduction of penalties for small business identical to the sliding reduction scale that OSHA utilizes to set penalties for small business. The rules should also allow entities under enforcement and facing a penalty to defer 100% of the penalty with the agreement that an investment will be made in the entity's operations to achieve compliance. The SBAC recommends a minimum of a 50% reduction in penalty for a small business.

The rules should allow for longer compliance deadlines for small businesses on a case-by-case basis.

Good Faith Efforts to Comply – Since smaller companies have limited economic and human resources, the rule should provide for good faith reductions when some, but not all, violations are corrected. This will encourage early compliance from respondents.

The rule should prohibit the application of a good faith reduction for respondents that are deemed culpable. Culpability shall be as defined below.

The rule should prohibit a good faith reduction in Default Orders.

The rule should provide for a penalty reduction in cases where the violations were documented during a self-inspection and voluntarily self-reported. This would provide an incentive to respondents.

Culpability - An entity should be considered culpable if it has been previously issued a notice of violation, notice of enforcement, or Commission Order for the identical or very similar violation. An exception would be if the company is permitted or registered; otherwise there will be a disincentive to permit or register.

Standard Penalties – We feel that standard penalties should be established and this will help to make the enforcement penalty process more transparent. We would suggest establishing a list/matrix, which would clearly outline the violation and the associated penalty. Thus, a respondent would not have to reference several other lists and calculate the percentages.

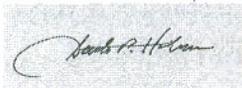
Other Issues – We have no comments on any other topic.

We appreciate the opportunity to make these comments and the willingness of the Commissioners and the staff to review these ideas. Over the years the State of Texas has worked with small business to understand our concerns and make the appropriate adjustments. We look forward to this continued cooperation.

Sincerely,

Jack P. Holmes

Co-Chair



CC:

Mr. John Sadlier, Division Director
Enforcement Division MC-219

Ms. Tamra Oatman, Section Manager

Small Business and Local Government Assistance MC-106

extended 12/27/05

Compliance Advisory Panel

December 19, 2005

Mr. Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
PO Box 13087 MC-109
Austin, TX 78711-1065

Mr. Shankle,

On behalf of the CAP, we'd like to thank you for this occasion to voice our comments regarding the TCEQ Administrative Penalty Rule. Over the past several weeks, the CAP has reviewed the questions posed by TCEQ regarding the penalty policy. The issue we consider most significant is the definition of small business and here are our recommendations.

The employee component of the definition should be 100 employees or fewer with no income associated with the definition due to the complexity of determining an appropriate financial assessment for small businesses across the spectrum. We feel that the employee count is a very effective benchmark since attempting to establish size on revenue is fraught with problems.

If it is necessary to include an income definition, the financial component of the definition should be very simple to calculate, such as using gross sales (as opposed to net). The definition should be set at no less than 15 million gross sales. The CAP and the SBAC encourage small businesses to provide statistics reflecting their business size and revenues so that the regulatory definition will accurately reflect real world experience.

The rule should allow entities under enforcement and facing a penalty to defer 100% of the penalty with the agreement that an investment will be made in the entity's operations to achieve compliance.

We appreciate the opportunity to make these comments and the willingness of the Commissioners and the staff to review these ideas. Over the years the State of Texas has worked with small business to understand our concerns and make the appropriate adjustments. We look forward to this continued cooperation.

Sincerely,



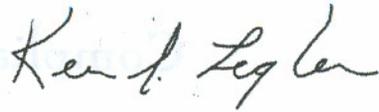
Mark Shelton, CAP Chair
Appointed by Speaker



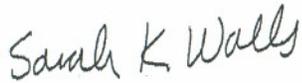
Robert J. Curnock, CAP Member
Appointed by Governor



Jack Godfrey, CAP Member
Appointed by Speaker



Ken J. Legler, CAP Member
Appointed by Governor



Sarah K. Walls, CAP Member
Appointed by Lt. Governor

CC: Mr. John Sadlier, Enforcement Division MC-219
Ms. Tamra Oatman, Small Business and Local Government Assistance MC-106
Mr. Brent Wade, Executive Assistant to Commissioner Ralph Marquez MC-100
Ms. Sonia Ralls, Executive Assistant to Executive Director Glenn Shankle MC-109

entered 12/27/05

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RIO DE JANEIRO

December 19, 2005

**VIA FACSIMILE (512-239-0134) and
E-MAIL (Pen_Rule@tceq.state.tx.us)**

Ms. Anne Dobbs, Program Specialist
Texas Commission on Environmental Quality
Enforcement Division MC-219
PO Box 13087
Austin, Texas 78711-3087

Re: Comments on Future Rule Making for 30 Tex. Admin. Code Chapter 75 on
Administrative Penalties

Dear Ms. Dobbs,

Thompson & Knight LLP respectfully submits the following comments regarding the Texas Commission on Environmental Quality's ("TCEQ") proposed future rule making for 30 Tex. Admin. Code Chapter 75 on administrative penalties.

COMMENTS REGARDING THE TCEQ'S PROPOSED FUTURE RULE MAKING FOR 30 TEX. ADMIN. CODE CHAPTER 75 ON ADMINISTRATIVE PENALTIES

Comments related to Question #1 under Economic Benefit.

The rule should not allow the Commission to require a violator to undertake corrective actions that surpass the minimum action required for compliance. To do so establish a higher standard for compliance, a rulemaking function, through the guise of enforcement. An entity can voluntarily take on additional obligations and the Commission from considering the additional measures. The Commission should not be allowed to demand corrective actions beyond what is required for compliance.

The Commission should not seek to impose more stringent penalties for economic benefit unless there is environmental harm, a knowing violation, or significant competitive advantage relative to other participants in the same market. The Commission should also consider whether

noncompliance afforded the violator a competitive advantage such as early market entry in the case of permitting.

Comments related to Question #3 under Good Faith Efforts to Comply.

The rule should provide for good faith reductions when some, but not all, violations are corrected. It may not be possible to correct all violations during the penalty assessment period. For example, if one of the violations is failure to have a permit, obtaining the permit may take an extended period of time. A better alternative may be to allow for deferred penalties. Under such a system, for those violations that cannot be remedied within the penalty assessment period, the Commission could provide a timeframe for coming into compliance and provide for avoidance of the penalty if all violations are remedied according to the approved timeframe. With a deferred penalty, if a party cannot resolve all issues within the penalty assessment period, there is incentive for a party to resolve as many violations or as much of a violation as possible upon discovery and complete correction according to a reasonable timeframe. Further, the agency should acknowledge that good faith may be demonstrated by the type of solution the party seeks to employ. A complex solution may require more time and achieve a better environmental result. This evidences good faith even though compliance may occur later in time.

The rule should prohibit the application of a good faith reduction for respondents that are deemed culpable based on a conscious or knowing disregard for the rules.

The rule should prohibit a good faith reduction in Default Orders absent a procedural issue with the Default Order, *e.g.* a problem with notice.

Comments related to Question #4 under Culpability.

The Commission should move away from any definition of culpability that is based on a party's reasonable anticipation. The Commission should not use a standard for culpability that is essentially a negligence standard. Any definition of culpability should require demonstration of a knowing disregard for the law.

The rule should provide for a penalty reduction or elimination in cases in which a violation was documented during a self-inspection and voluntarily self-reported. Self-reporting should be done promptly and the Commission should provide a reasonable deadline so that the regulated community will have a firm date by which to self-report. Providing an incentive to self-report and clarity on a deadline for self-reporting will encourage self-reporting. This approach could be modeled on EPA's policy regarding self-disclosure.

Ms. Anne Dobbs
December 19, 2005
Page 3 of 3

The rule should provide that an entity is culpable only in certain instances after previous issuance of a notice of violation, notice of enforcement, or Commission Order. If an issue is specifically and clearly identified in the previous notice of violation, notice of enforcement, or Commission Order and the entity wholly fails to address the issue, then a finding of culpability and an appropriate calculation in the penalty proper.

The rule should not provide that an entity is culpable based only upon the entity being permitted or registered. Having a permit or being registered alone does not indicate culpability. It may be circumstantial evidence that an entity is aware of the requirements that it is subject to, but it is not an indication that the entity is blameworthy, which is what "culpable" means. For example, if there is a good faith dispute over the applicability or interpretation of a permit requirement or rule, the permitted or registered party should not be deemed culpable simply because it is permitted or registered.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Brendan Lowrey", with a long horizontal line extending to the right.

Brendan Lowrey

cc: Jim Morriss (Thompson & Knight LLP)
Becky Jolin (Thompson & Knight LLP)

Vinson & Elkins

John Riley jriley@velaw.com
Tel 512.542.8520 Fax 512.236.3329

December 19, 2005

Via Facsimile No. 239-0134

Ms. Anne Dobbs
Program Specialist
Texas Commission on Environmental Quality
Enforcement Division, MC-219
P.O. Box 13087
Austin, TX 78711-3087

Re: Re: Rulemaking on Administrative Penalties

Dear Ms. Dobbs:

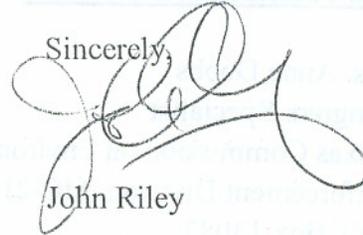
Vinson & Elkins, L.L.P. appreciates the opportunity to comment on the TCEQ's rulemaking effort on the calculation of administrative penalties. We understand that this effort is undertaken as part of the TCEQ's enforcement process review and that there is no actual proposal with the wording of the rules available at this time. Further, recognizing that there will more opportunity for comment if the agency decides to go forward with a proposed rule, we offer only some preliminary comments below:

- any adopted penalty matrix should give considerable reduction in penalty, if the violation is corrected as soon as possible after detection by the agency;
- voluntarily disclosed violations, even outside of the Texas Environmental, Health, and Safety Audit Privilege Act, should also received significant reduction in penalty;
- good faith efforts to comply should be better defined and should result in penalty mitigation;
- consideration of economic benefit should be limited to the actual cost avoided by the non-compliance - penalties that seek to otherwise disgorge perceived financial gain are too speculative;
- Supplemental Environmental Projects should be encouraged by the proposed rules; and

- the use of standard penalties should not be the preferred method of assessing penalties, as too many factors might enter into the reasons for a violation and standard penalties do not appreciate these differing facts.

We look forward to making more specific comments as this effort continues.

Sincerely,



John Riley

JAR:ccw

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entered 12/27/05



December 19, 2005

Ms. Anne Dobbs
TCEQ Enforcement Division, MC 219
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Austin, TX 78711-3087
(512) 239-0134 (fax)
adobbs@tceq.state.tx.us
pen_rule@tceq.state.tx.us

Certified Mail – Return Receipt Requested
7004-2510-0004-3626-3018

Re: **VALERO ENERGY CORPORATION'S RESPONSE TO TCEQ ADMINISTRATIVE PENALTY RULE (RULEMAKING FOR 30 TEXAS ADMINISTRATIVE CODE CH. 75) (AS RELATED TO ADMINISTRATIVE PENALTIES)**

Dear Anne:

Valero Energy Corporation respectfully submits the below comments concerning the current penalty policy changes as part of the review of the enforcement process as outlined on the TCEQ penalty stakeholders web site: <http://www.tceq.state.tx.us/compliance/enforcement/stkholder/noticeadmpen.html>. According to your e-mail, sent to Billy Hunt and Michael Umphress on November 16, 2005, the deadline for written comments on these issues is December 19, 2005. Along with the hardcopy being sent by Certified Mail, I am sending this response via fax and to pen_rule@tceq.state.tx.us.

Economic Benefit

1. What should the Commission consider when calculating the penalty adjustment for Economic Benefit?

Response: Valero does not practice any principle of avoiding compliance-related issues that would provide an economic benefit to the company. Valero takes a proactive stance in addressing compliance issues and believes that prevention is the preferred economic approach in achieving compliance with state and federal programs. Any economic benefit realized through non compliance should be considered in the penalty process; however, the evidence supporting the economic benefit could be complex and difficult to quantify.

Small Business/Small Local Governments

2. What should the Commission consider when calculating the penalty for a Small Business or a Small Local Government?

Response: If malice and/or economic benefit can be proven, then penalty and enforcement action shall be the same.

Good Faith Efforts to Comply

3. What should the Commission consider when calculating the penalty adjustment related to Good Faith Efforts to Comply?

Response: The rule should absolutely provide for good faith reductions when some, but not all, violations are corrected. Self-reporting should be encouraged as a means of corrective action and should be promoted by the TCEQ.

Culpability

4. What should the Commission consider when calculating the penalty adjustment related to Culpability?

Response: The rule should absolutely provide for a penalty reduction or elimination in cases where the violation(s) were documented during a self-inspection and voluntarily self-reported. This would encourage the violator to come forward rather than to try and hide the violation. The ultimate intent is to achieve compliance at all PST facilities.

Standard Penalties

5. What should the Commission consider in using standard penalties for violations than the current penalty policy classifies as "potential" or "programmatic"?

Response: Potential or programmatic violations should be classified as causing minor harm rather than major harm unless an actual release can be demonstrated to have occurred. Any standard penalty should be "spelled out" precisely and applied equally for any given offense.

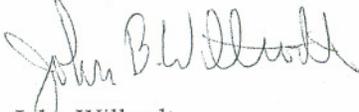
Other Issues

6. Are there better means of determining the number of events for a given violation than the methodology expressed in the Commission's current penalty policy (see Attachment No. 1)?

Response: The commission evaluates appropriate penalties based upon the throughput of the facility. Using EPA's designation of major/minor facilities/sources, the Petroleum Storage Tank Division has established a throughput of 50,000 gallons per month in determining a major source (>50,000 gallons) from a minor source (<50,000 gallons). Today, a typical metropolitan PST facility far exceeds the 50,000 gallon designation. As a result, most sites fall into the major source category. The threshold should be increased by either doubling or tripling the throughput designation.

Valero appreciates the TCEQ's efforts in seeking industry comments by providing six stakeholders meetings through out the state. In fact, Billy Hunt and Mike Umphress, from our Dallas office, were able to attend and meet, not only with you, but with John Steib, Deputy with the Office of Compliance and Enforcement and Frank Espino, Region 4 Director, during the December 1st meeting in Arlington. Their conversations with you and the other TCEQ representatives proved valuable. My group is responsible for PST compliance related issues in Texas and I want to express my appreciation for the cooperation and insight that the staff of the TCEQ provides.

Sincerely,



John Willrodt
Director of Retail Compliance
Valero Energy Corporation

Cc:

Paul Clark
Martin Dominguez
Terry Hankins
Billy Hunt
Kent Hamel
Joanne Schaefer
Michael Umphress



December 19, 2005

Anne Dobbs, Program Specialist
Texas Commission on Environmental Quality
Enforcement Division MC-219
PO Box 13087
Austin, Texas 78711-3087

Dear Ms. Dobbs,

I am writing to submit GHASP's comments on the TCEQ administrative penalty process. In the next few days, we will also be issuing a report that will further document problems we have identified with the application of the penalty calculation policy. While this report will not be issued in time to meet your deadline, we hope you will consider its findings as you develop recommendations for changing the enforcement process.

Briefly stated, our forthcoming report will document that in 26 enforcement cases handled by the TCEQ during the past five years, of the 147 violations included in those cases, TCEQ calculated 60% of them too leniently. If the TCEQ had followed its own written policies, the state could have collected fines totaling \$3.3 million, rather than just \$470,000, from the 13 companies included in our case review.

Furthermore, the TCEQ was consistently lenient in the cases with the largest potential fines. In cases where we determined that the TCEQ could have assessed in excess of \$40,000 in fines, the TCEQ never collected more than 45% of that amount. Often, the cases with the biggest discounts were also the cases that took the longest to complete. Collectively, our research suggests that when a chemical plant or refinery faces a potentially large fine, it has usually been successful at convincing TCEQ staff to stall the enforcement process and dramatically reduce the fine.

The vast majority of the TCEQ's leniency can be attributed to three causes: leniency towards inadequate leak detection and repair programs, undercounting the number of events so that the penalty does not truly reflect the duration of violations, and dropped cases. ***These problems can generally be addressed by following current TCEQ policy*** regarding the calculation of penalties.

Economic Benefit Penalty

As will be noted in our forthcoming report, we found that in 26 air pollution enforcement cases against petrochemical and refinery companies in the Houston area, the penalty amount for the violations generally exceeded the economic benefit for the same violations. However, we continue to have concerns with the manner in which the economic benefit, and the penalties intended to reflect the economic benefit, are calculated.

While we have not conducted a thorough review of the method by which economic benefit is calculated, we have general impression that it substantially underestimates the economic benefit of noncompliance. For example, in situations where it is clear that insufficient management direction or oversight resulted in a major program failure (e.g., LDAR monitoring), there should be some value ascribed to the avoided costs of managing effective environmental programs. Another example of undercounting is the method by which LDAR monitoring is valued. We are told that the cost of a high quality LDAR contractor, or well-managed plant monitoring, is about 25 cents per component higher than low quality work. When a plant is discovered to have failed to conduct complete LDAR monitoring, the economic benefit reflects only the cost of monitoring the unmonitored components. Such a failure also calls into question the quality of the rest of the LDAR program. Since careful attention to detail is critical to reducing fugitive emissions, the economic benefit calculation should also reflect the incremental cost of high quality monitoring across the entire plant. In general, the methods by which economic benefit are calculated deserve thorough scrutiny and we encourage the TCEQ to initiate a suitable review process.

We also note that our review is limited to air pollution violations by chemical plants, refineries and associated facilities in the Houston region. As such, we have not captured the full range of the economic benefit issue that would be apparent by a less targeted study.

In general, we are dissatisfied with the current economic benefit enhancement. In the few violations we reviewed where the economic benefit was greater than the penalty amount, the penalty was not sufficiently increased to recover the economic benefit. If adjustments are made to the economic benefit calculation as described above, surely this circumstance will occur more often.

Penalty Discounts

We have not reviewed issues related to small business and small local governments. Presently the policy allows for a downward adjustment of the penalty for minor sources. Small businesses already eligible for discounts based on the size of their operations should not be eligible for these discounts as well. In the few cases we reviewed relating to small businesses, the penalties were not large (typically about \$1,000); so our review suggests there is not much room to further reduce penalties.

While not discussed in our report, we found several instances where the standard 20% deferral was granted to companies that did not meet the initial TCEQ deadline to settle a case, or did not meet other criteria such as prior enforcement history. It appears that the 20% deferral has come to represent an automatic discount rather than a true incentive.

There is some value in encouraging companies to identify and correct problems promptly. Nevertheless, we believe that violators should not be rewarded with penalty discounts simply for making "Good Faith Efforts to Comply," which is, of course, the obligation of every facility permitted to release air pollution. In particular, such penalty reductions should not be offered in situations where (1) the violation went undetected for a lengthy period of time (e.g., several leak inspection periods or reporting periods), (2) the violator is deemed culpable, or (3) the violator does not admit responsibility for the situation in a timely manner. We agree that such penalty reductions should be applied on a violation-by-violation basis, rather than requiring all these criteria to be met for all

violations. Our opinion regarding penalty adjustments for "Culpability" follows the same principles.

Standard Penalties

While we have not reviewed each of the proposed standard penalties for air violations, we generally agree that more detail and specific guidance than the present penalty policy includes would be an improvement. However, the suggested standard penalty, "Failure to construct the facility in accordance with representations made in the permit application," can be a very serious violation. We recommend evaluating this more along the lines of the current penalty policy.

We recommend extending the practice of detailing standard penalty calculation guidelines to encompass calculation of the number of events, where practicable. For example, "open-ended lines" are often, but not always, cited as potential minor violations, one event per open line. Yet on occasion all the open lines are cited as one event per violation, even if several open lines are noted during the same violation. When an open-ended line is found, but no leak is detected, it is the type of violation that is suitable for being a standard penalty (\$1,000 per instance, no evidence that the line is leaking).

As the TCEQ encounters repeated instances of a common violation, it could post a description of current practice for calculating the penalty associated with this type of violation to the website. This informal notice, as opposed to an official policy statement, would keep the public and the regulated community abreast of how it is interpreting the penalty policy.

Continuous Programmatic Violations

One key area where the current administrative penalty policy needs clarification is in the calculation of the number of events for continuous major programmatic violations. Because programmatic violations are classified as major if more than 70% of any rule or permit requirement is not met, we found that the level of severity of violations classified into this category varied widely depending on the significance of the rule. In addition to addressing this through standard penalties, the TCEQ should consider additional policy guidance explaining how to establish the number of events for continuous programmatic violations.

More generally, we recommend that the administrative penalty policy be revised to explicitly state that a violation should be considered continuous only when there is no possible way to count it as a series of discrete events. For example, a company that is out of compliance for recordkeeping over several years could be cited for each occasion that it was required to certify compliance with rules, rather than citing a single event.

Violation Scale

Another issue that the penalty policy does not presently handle well is the scale of a violation. Presently, the policy does not distinguish between situations where a plant fails to properly monitor two pumps for leaks and where a plant fails to properly monitor an entire unit. The policy also fails to define the scale of a violation involving multiple units. Should a violation covering several units at the same plant be counted as separate violations for each distinct operating unit or simply one violation for the entire plant? We recommend that each operating unit be cited as a violation because this approach more accurately reflects the scale of the offense.

In summary, we believe that the current administrative penalty policy needs some adjustments, but the main problem is that it has not been followed over the past several years. If the adjustments discussed above are made, and the enhanced policy is diligently applied, we believe it will result in relatively fair penalties for violations of air pollution regulations. We also hope that higher penalties will more effectively deter companies from being careless or negligent with respect to controlling air pollution.

Thank you for the opportunity to comment and we welcome any opportunity to further discuss these issues.

Sincerely,



John D. Wilson
Executive Director

noted 12/19

TEXAS ASSOCIATION OF COUNTIES

1210 San Antonio • Austin, TX 78701



P.O. Box 2131 • Austin, TX 78768-2131

Sam D. Seale • Executive Director
December 19, 2005

Mr. Glenn Shankle
Executive Director
Texas Commission on Environmental Quality
P.O. 13087 MC-109
Austin, Texas 78711-1065

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ENFORCEMENT DIVISION

Dear Mr. Shankle:

Thank you for the opportunity to comment on the commission's Penalty Policy rule.

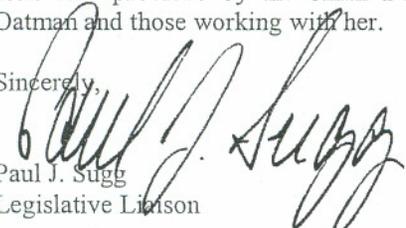
As we have noted in previous communications with the commission, we believe that local governments, and especially counties, should be uniquely defined in the proposed rules for the purposes of calculating a penalty. Counties are different from small business and, for that matter, different from cities and other local governments. Counties are administrative arms of the state, partners in accomplishing the people's business, and we hope these rules will help to strengthen that partnership.

Defining a small county can be problematic, but a population of 25,000 and below may be considered a small county. County tax bases differ, but because counties rely primarily on the property tax as a revenue source even the mid-range penalties proposed could adversely affect the tax rate. A standard downward adjustment of penalties for local governments may be considered as an option.

We support the concept of the rule providing for a deferral of penalties in lieu of a standard downward adjustment, provided the contingencies in the deferment are realistic and recognize the limitations of county manpower and financial resources (and administrative complexity required in complying with an administrative order) in meeting such an administrative order. Longer compliance deadlines for local governments should be included in the adopted rules as well.

We appreciate the opportunity to comment on the commission's proposed rules. We appreciate the assistance provided by the Small Business and Local Government Assistance staff, especially Tamra Oatman and those working with her.

Sincerely,


Paul J. Sugg
Legislative Liaison

CC: Mr. John Sadlier
Ms. Tamra-Shae Oatman



December 19, 2005

Mr. John Sadlier, Division Director
Enforcement Division MC-219
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-1065

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DEC 21 2005
ENFORCEMENT DIVISION

Via email: pen_rule@tceq.state.tx.us

Dear Mr. Sadlier:

Please accept this letter in response to issues related to future rulemaking regarding the Texas Commission on Environmental Quality's (TCEQ) penalty policy. The Texas Municipal League (TML) is a non-profit association of 1,083 incorporated cities (of approximately 1,210 cities in the state). We provide legislative, legal, and educational services to the elected and appointed officials of our member cities.

The TCEQ penalty policy essentially affects all Texas cities. TML urges TCEQ to consider the effects any changes to the policy would have on our member cities' ability to meet permit requirements. For example, if TCEQ adopts an expansive definition of "small local government," more cities would qualify for assistance such as downward adjustments of penalties and for deferral of penalties. In other words, a broad definition would allow more cities to focus resources on meeting permit requirements.

Currently, 756 of our member cities have a population less than 5,000. We have 886 member cities with a population less than 10,000. A definition of 25,000 population would include an additional 100 cities, resulting in a group of 985 cities.

Thank you for the opportunity to comment on behalf of Texas cities on this proposal. Please contact me with questions

Yours truly,

Raika Hammond
Legal Counsel

1821 Rutherford Lane

Suite 400

Austin, Texas

78754-5128

512-231-7400

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Web site: www.tml.org



cc:
Ms. Tamra-Shae Oatman, Section Manager
Small Business and Local Government Assistance MC-106

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ENFORCEMENT DIVISION

December 19, 2005
Mr. John Zarlier, Division Director
Enforcement Division MC-219
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-1007

Dear Mr. Zarlier:

Please accept this letter in response to your request to waive the penalty regarding the Texas Commission on Environmental Quality's (TCEQ) penalty policy. The Texas Municipal League (TML) is a non-profit association of 1,083 incorporated cities (of approximately 1,210 cities in the state). We provide legislative, legal, and educational services to the elected and appointed officials of our member cities.

The TCEQ penalty policy essentially affects all Texas cities. TML urges TCEQ to consider the effect any changes to the policy would have on our member cities' ability to meet permit requirements. For example, if TCEQ adopts an expansive definition of "small local government," more cities would qualify for assistance such as downward adjustments of penalties and for deferral of penalties. In other words, a broad definition would allow more cities to focus resources on meeting permit requirements.

Currently, 750 of our member cities have a population less than 2,000. We have 880 member cities with a population less than 10,000. A definition of 25,000 population would include an additional 100 cities, resulting in a group of 980 cities.

Thank you for the opportunity to comment on behalf of Texas cities on this proposal. Please contact me with questions.

Yours truly,

Peter Hammond
Legal Counsel



CITY OF LOVELADY

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DEC 22 2005
ENFORCEMENT DIVISION

December 19, 2005

Anne Dobbs, Program Specialist and Rule Lead
pen-rule@tceq.state.tx.us

RE: Administrative Penalty Rule Comments

Dear Ms. Dobbs

Please consider the following comments:

Economic Benefits

YES any economic benefits gained through a violation should be considered and if it is determined that the violation was willful and/or intentional the benefits should be recovered through the administrative penalty. I would guess that this situation would occur most often in the operation of private industry/businesses.

If the economic benefits are recovered through the administrative penalty I do not think that the violator should be required to make corrective actions that surpass the minimum action required for compliance—the violator has already paid the penalty and should not be punished twice for the same offense.

When calculating penalties, the Commission should consider the unique problems of the small cities (i.e. lack of funds for improvements, difficulty retaining qualified personnel) A small local government might be defined as one with a population less than _____ or one serving less than _____ customers. Most small governmental entities do not compensate their officers (they volunteer their time to the community), and most have limited knowledge concerning the operations of the water/wastewater systems. YES the rule should provide for a downward adjustment and or deferral of penalties taking into consideration the finances of the city. But also the commission should consider the type of violation (was it willful, could it have been the weather related (i.e. rainfall, temperature, wind) and most importantly the effects on the environment.)

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CITY OF FORT WORTH

Small businesses might be treated somewhat differently as a for-profit operation. But again taking into account the type of violation and the effects on the environment—it may be better to have service from a small privately owned system with a few problems than have unmonitored individual septic systems and untested private wells.

The rules should allow for longer compliance deadlines for small businesses and local governments because most of these operations are dependent on grants and loans for any improvements or expansion—the application process is quite lengthy and sometimes there is a waiting period before funds are released.

Good Faith Efforts to Comply

YES the commission should consider the good-faith efforts to correct all or part of the problems after the NOV. Even if respondents are deemed culpable a good faith reduction should be considered—again considering that officers of small local governments are dependent on the employees to operate the system within the permit parameters. Many times those employees operate with limited experience and training and even less money.

If the owner/operator defaults on an agreement they should show just cause before a good faith reduction might be considered.

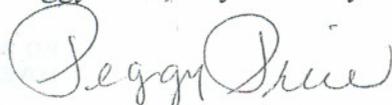
Culpability

YES the rule should provide for a penalty reduction in cases where the violations were documented during a self-inspection and voluntarily self-reported. Honesty should be rewarded and encouraged.

The dictionary defines Culpability as “deserving blame”. Again, the type and cause of the offense should be considered to determine culpability—there are always some things that cannot be controlled (weather, equipment failure, etc.) Having a permit, or receiving and NOE/NOV does not necessarily mean neglect or intentional mismanagement.

Thank you for considering these comments.

Peggy Price, City Secretary



Cc: Mr. Glenn Shankle, Executive Director, TCEQ
Mr. John Sadlier, Division Director, TCEQ
Ms. Tamra-Shae Oatman, Section Manager, TCEQ