

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Kathleen Hartnett White, Chairman Date: March 29, 2006
Ralph Marquez, Commissioner
Larry R. Soward, Commissioner

Thru: Glenn Shankle, Executive Director
John Steib, Deputy Director, Office of Compliance and Enforcement

From: John Sadlier, Director, Enforcement Division

Subject: March 29, 2006 Agenda, 1:00 pm Agenda Item 3: Consideration of Enforcement Review Implementation status, as it relates to implementation of Penalty Policy Issues.

Issue

TCEQ Docket No. 2006-0294-MIS. Consideration of Enforcement Review Implementation status, as it relates to implementation of Penalty Policy Issues.

Background and Current Practice

Administrative Penalty Policy and Rule issues were presented before the Commission at the January 14, 2005, August 12, 2005, September 16, 2005, and March 10, 2006 Commission Work Sessions. The Commission directed staff to conduct a series of stakeholder meetings on key issues related to the calculation of administrative penalties.

After receiving direction at the September 16, 2005 Work Session, staff developed a list of potential stakeholders who could be notified a month in advance of the meetings via Email, developed a web page for information on the stakeholder meetings with an open invitation to all interested participants, and scheduled the meetings which took place in November and December of 2005, at six locations throughout the State. Comments were accepted through the end of December. The meetings were summarized and posted on the web as well as a summary of additional comments received outside of the meetings.

The Executive Director was briefed on the outcome of the stakeholder meetings on February 6, 2006. At the March 10, 2006 Commission Work Session, the Commission directed staff to re-evaluate the current Penalty Policy, the enforcement process review decisions, and the comments received by Stakeholders to determine which parts of the policy should be developed into rules and which should remain as policy and/or guidance. The Commission also indicated that they wanted to retain a formal Enforcement Policy that would assert the Commission's policy statement on Enforcement and Penalties and then rules would be developed to implement that policy.

Administrative Penalty Policy/Rule Question 1 What should the Commission consider when calculating the penalty adjustment for Economic Benefit?

Option 1 Apply economic benefit adjustments to all entities with the exception of small municipalities (i.e., cities with <5,000 in population and counties with <25,000 in population,

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etc.).

Pros/Cons: This would alleviate concerns voiced by small municipalities with limited income. This will require either rule or policy change. The Executive Director agrees with Option 1.

Option 2 Continue to have economic benefit apply to all regulated entities in accordance with current Agency policy.

Pros/Cons: Status quo. No rule or policy change would be necessary. The Executive Director does not support Option 2.

Option 3 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).

Pros/Cons: This is the position that was advocated by environmental groups and their members during the stakeholder comment period. To recover all economic benefit realized would substantially increase penalties in some cases. This will require either rule or policy change. The Executive Director agrees with Option 3 as long as the exceptions in Option 1 apply.

Option 4 First-time violators should be given special consideration (i.e., no enhanced penalty for economic benefit) because the cost of compliance in itself is often substantial, particularly for small businesses and small local governments.

Pros/Cons: This is the position that was advocated by small business and local government groups, including school districts. These groups also conveyed an issue that they are normally not in a position to have staff that are solely dedicated to environmental issues and they do not have the sophistication of larger businesses or governments, stressing compliance assistance over enforcement. This will require either rule or policy change. The Executive Director does not agree with Option 4.

Option 5 Economic benefit enhancements should only apply when there is a deliberate delay of a necessary cost of compliance because the methodology to calculate economic benefit is so difficult.

Pros/Cons: This is the position that was advocated by some representatives of the regulated entities. However, this option requires the Executive Director to make a determination about whether a respondent’s action was deliberate. This will require either rule or policy change. The Executive Director does not agree with Option 5.

Option 6 TCEQ should use the same methodology that the Environmental Protection Agency (EPA) uses which involves a computerized modeling system (“BEN model”) to determine economic benefit adjustments. EPA calculates an economic benefit and then adjusts the penalty to ensure recovery of the full cost of economic benefit.

Pros/Cons: This option has the same result as Option 3 above, in that it requires recovery of all of the realized economic benefit from a violation. This position was advocated by several representatives from different groups, but there was no consensus, or much discussion, on this issue during the stakeholder meetings. This will require either rule or policy change and minimal costs to obtain the model from EPA and for training staff. The Executive Director defers to the Commission on the issue of using the BEN model so long as Options 1 and 3 apply.

Administrative Penalty Policy/Rule Question 2 What should the Commission consider when calculating the penalty for a Small Business or a Small Local Government?

Option 1 Determine through rule-making how to define small businesses and local governments based upon current Federal and State definitions and allow deferral of some of the penalty for those that qualify as small.

Pros/Cons:

- The majority of stakeholder comments 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.
- The Executive Director agrees with Option 1.

Option 2 Consider whether or not longer compliance deadlines are appropriate for respondents that meet the definition of small.

Pros/Cons: There appeared to be consensus on allowing longer compliance deadlines. The Executive Director agrees with Option 2.

Option 3 Maintain the methodology relating to small versus large entities that is in the current penalty policy.

Pros/Cons: The current penalty policy doesn't take into account "micro" businesses or governments who may have severe economic issues. The Executive Director prefers that any definition identifying small businesses/governments be as uncomplicated as possible.

Administrative Penalty Policy/Rule Question 3 What should the Commission consider when calculating the penalty adjustment related to Good Faith Efforts to Comply?

Option 1 Good faith reductions should not be allowed for Default Orders.

Pros/Cons: There appeared to be consensus on eliminating good faith effort reductions for Default Orders. The Executive Director defers to the Commission regarding Option 1.

Option 2 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).

Pros/Cons: Status quo. No changes to rule or policy would be required. The Executive Director agrees with Option 2.

Option 3 Good faith reductions should be allowed when some, but not all, of the violations are corrected.

Pros/Cons: Most commenters felt that there should be good faith reductions for any violations corrected. The Executive Director agrees with Option 3.

Administrative Penalty Policy/Rule Question 4 What should the Commission consider when calculating the penalty adjustment related to Culpability?

Option 1 Permittees, Registrants, and Licensees should be held culpable unless the alleged violation is truly something that they could not have foreseen.

Pros/Cons: Environmental groups felt that an upward adjustment of the penalty for culpability should occur if the entity is permitted, registered, or has received a previous NOV, NOE, or Commission Order. Small business groups felt that an upward adjustment of the penalty for culpability should occur if the entity has received a previous NOV, NOE, or Commission Order but not just because an entity is permitted or registered. The comments received from large businesses varied but most concurred with the case-by-case basis described in Option 2. The Executive Director agrees with Option 1.

Option 2 Culpability should be determined on a case-by-case basis regardless of status of authorization.

Pros/Cons: Status quo. No changes to rule or policy necessary. The Executive Director does not agree with Option 2.

Administrative Penalty Policy/Rule Question 5 What should the Commission consider in using standard penalties for violations that the current penalty policy classifies as “potential” or “programmatic”?

Option 1 Standard base penalties should be used to calculate the penalty for all violations except in the following situations:

- where an actual discharge or emission has occurred; and/or
- environmental or human health effects have been documented.

Factors such as good faith efforts, culpability, and compliance history should continue to affect the final penalty pursuant to statutory requirements.

Option 2 Standard base penalties should be used to calculate the penalty for all violations except

in the following situations:

- where an actual discharge or emission has occurred; and/or
- environmental or human health effects have been documented;
- where regulatory authorization has not been obtained; and/or
- where there has been an impairment of water rights.

Factors such as good faith efforts, culpability, and compliance history should continue to affect the final penalty pursuant to statutory requirements.

Pros/Cons: Staff received very mixed reactions to this concept from stakeholders:

- Small business representatives stated a desire that penalties for all violations be clearly defined.
- Environmental groups were concerned about the lack of consideration for the duration of the violation and that the percentages in the examples provided to the Commissioners during the Enforcement Process Review appeared to be too low. Several concerns were raised about which violations would qualify for standard penalties.
- Regulated community representatives were concerned about the lack of flexibility to consider all circumstances of a violation and that the list should be significantly trimmed.
- The Executive Director strongly supports standard penalties.

Administrative Penalty Policy/Rule Question 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?

Option Determine 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.

Pros/Cons: There was consensus from stakeholders regarding a need for a better definition for determining the number of penalty events. The Executive Director agrees with the option stated above.
