

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.