

Agenda for Administrative Penalty Stakeholder Meetings

I. Welcome and Introductions

II. Scope of the Proposed Rule

III. Procedural Ground Rules

IV. Opportunity for Comments on the Major Elements of the Proposed Rule or Related Issues
(see attached documentation of issues to be discussed)

V. Closing Remarks

**Texas Commission on Environmental Quality
Administrative Penalty Rule**

We specifically seek your input on the following issues as they relate to the future rulemaking for 30 Texas Administrative Code ch. 75 (related to Administrative Penalties):

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

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

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?
- 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?

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

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?

Attachment No. 1
Commission’s Current Penalty Policy

Texas Commission on Environmental Quality
Penalty Policy

Second Revision, Effective September 1, 2002

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Introduction

This document describes the policy of the Texas Commission on Environmental Quality (TCEQ) regarding the computation and assessment of administrative penalties. Enforcement actions may result from serious or unresolved violations discovered during an investigation, or from information that concerns violations and is gained from meetings related to permits. An investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, and may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. This document does not address when an enforcement action is initiated, but rather how TCEQ staff are to evaluate violations for the purpose of recommending administrative penalties to the commission.

This policy includes a description of how violations are evaluated in terms of harm and severity and how any proposed penalties are determined. It includes a discussion of what adjustments may be made to the base penalty amount after the review of case-specific information and information concerning the respondent.

Statutory Authorizations

The commission has the authority to assess administrative penalties under a number of statutes located in the Texas Water Code (TWC) and the Texas Health & Safety Code (THSC). These statutes include: TWC Chapters 7, 11, 12, 13, and 16; and THSC Chapters 341 and 371. These statutes provide the commission with the authority to assess penalties and set forth the factors that the commission must consider in determining the amount of penalty to assess (see chart below)

Statutorily Authorized Penalties

Program	Statute/Chapter	Administrative penalties, per violation per day	Civil penalties, per violation per day
Air Quality	TWC/7	\$0-10,000	\$50-25,000
Edwards Aquifer	TWC/7	\$0-10,000	\$50-25,000
Industrial and Hazardous Waste	TWC/7	\$0-10,000	\$50-25,000
Land over MSW Landfills	TWC/7	\$0-10,000	\$50-25,000
Medical Waste	TWC/7	\$0-10,000	\$50-25,000
Municipal Solid Waste	TWC/7	\$0-10,000	\$50-25,000
Petroleum Storage Tank	TWC/7	\$0-10,000	\$50-25,000
Radioactive Substances	TWC/7	\$0-10,000	\$50-25,000
Subsurface Excavation	TWC/7	\$0-10,000	\$50-25,000

Toxic Chemical Release Reporting	TWC/7	\$0-10,000	\$50-25,000
Underground Injection Control	TWC/7	\$0-10,000	\$50-25,000
Underground Water	TWC/7	\$0-10,000	\$50-25,000
Waste Tires	TWC/7	\$0-10,000	\$50-25,000
Water Quality	TWC/7	\$0-10,000	\$50-25,000
All Occupational Licenses	TWC/7	\$0-2,500	\$50-5,000
On-Site Sewage Disposal	TWC/7	\$0-2,500	\$50-5,000
Used Oil	TWC/7	\$0-2,500	\$50-5,000
Used Oil Filter	TH&SC/371, TWC/7	\$0-2,500	\$100-500
Water Saving Performance Standards	TWC/7	\$0-2,500	\$50-5,000
Weather Modification	TWC/7	\$0-2,500	\$50-5,000
Water Rights	TWC/11	\$0-5,000	\$0-5,000
Dam Safety	TWC/12	N/A	\$0-5,000
Public Water Utilities	TWC/13	0-\$500	\$100-5,000
Levees	TWC/16	\$0-1,000	\$0-1,000
Public Water Supply	TH&SC/341	\$50-1,000	\$50-1,000

Computing the Base Penalty Amount

Violations will be broken into two types--those that harm or have the potential to harm the environment and/or human health and those that are related to documentation. Because of this differentiation, the TCEQ will have two separate penalty matrices -- the Environmental/Property and Human Health Penalty Matrix and the Programmatic Penalty Matrix.

In the Environmental/Property and Human Health Penalty Matrix, the base penalty amount for violations is developed by first examining two factors: release and harm (damage). Release means the emission or discharge of pollutants into the environment or a public drinking water system; the unauthorized diversion, taking or storage of state water; or the unauthorized change of a flood elevation of a stream. A violation will be evaluated to determine whether there has been a release and will be categorized as either an actual release or a potential release. Actual is defined as "existing in fact or reality; not merely potential." Potential is defined as "existing in possibility; capable of development into actuality."

The second factor to assess is the degree of harm (damage) that has affected or could have affected human health, property associated with a water right or construction of a levee and/or environmental receptors. These two factors are incorporated into a penalty matrix from which the base penalty is determined.

The commission will also evaluate the appropriate penalty based upon the size of the respondent's site. Where the EPA has designated "major" facilities/sources from "minor" facilities/sources, the agency will utilize that distinction for the respondent's sites. The definitions used for each program area are described below. Individuals and operators are considered minor respondents unless otherwise noted. Anything not explicitly covered in this section will be determined on a case-by-case basis.

Major/Minor Sources

Air

Major:

1. Any stationary facility that is a source of non-hazardous air pollutants which directly emits, or has the potential to emit, 100 tons per year or more of any air pollutant except in some non-attainment areas. In serious ozone nonattainment counties the threshold is 50 tons per year for volatile organic compounds (VOC) and nitrogen oxides (NOx). In severe ozone nonattainment counties the threshold is 25 tons per year for VOC and NOx.
2. For the hazardous air pollutants listed in the Federal Clean Air Act, a source that emits or has the potential to emit 10 tons per year or more of a single pollutant or 25 tons per year or more of any combination of pollutants.
3. For purposes of the penalty policy, the respondent's site is considered major if any source at the site is major, even if the violation(s) is not for that source.

Minor: Defined as any non-major source.

Edwards Aquifer

Major: A construction project disturbing 5 acres or greater.

Minor: A construction project disturbing less than 5 acres.

Industrial and Hazardous Waste

Major: A generator of more than 12,000 kg of hazardous waste on an annual basis. Commercial industrial facilities are majors.

Minor: A generator of 12,000 kg or less of hazardous waste on an annual basis.

Levees

Major: Levee or other improvement constructed in the 100 year floodway designed for flood protection for a 100 year flood or greater.

Minor: Levee or other improvement constructed in the 100 year floodway designed for flood protection for less than a 100 year flood.

Municipal Solid Waste

Major: A municipal solid waste landfill accepting more than 20 tons of municipal solid waste disposed of daily, based on an annual average.

Minor: A municipal solid waste landfill accepting less than 20 tons of municipal solid waste disposed of daily, based on an annual average.

Petroleum Storage Tank

Major: An underground storage tank facility that has a monthly throughput of more than 50,000 gallons.

Minor: An underground storage tank facility that has a monthly throughput of less than 50,000 gallons.

Public Water Supply

Major: A retail public utility serving more than 1,100 total connections.

Minor: A retail public utility serving 1,100 or fewer total connections. In addition, non-retail public water supply entities will be classified as minor unless specific circumstances exist that would cause them to be classified as majors.

Radioactive Waste

All facilities will be considered majors.

Underground Injection Control

All Class I and Class III facilities will be considered majors. Class V facilities will be determined on a site-specific evaluation.

Waste Tires

Major: A facility with greater than 500 tires.

Minor: A facility with less than or equal to 500 tires.

Water Quality (including Concentrated Animal Feeding Operations (CAFO))

Major: Municipal facilities with a daily average flow of 1 million gallons per day or greater are considered major facilities. Industrial/CAFO facilities are classified as major or minor facilities using a point scale used by EPA Region 6. The TCEQ Water Quality Division uses EPA Region 6's classification schedule to determine if a facility is defined as major or minor. All water quality permittees are designated as major or minor.

Minor: Municipal facilities with a daily average flow less than 1 million gallons per day. Industrial/CAFO facilities are classified upon permitting as major or minor as described above.

Water Rights

Major: A water right of greater than 5,000 acre-feet.

Minor: A water right of less than or equal to 5,000 acre-feet.

Environmental/Property and Human Health Matrix

	Major Harm	Moderate Harm	Minor Harm
	Major/Minor Respondents	Major/Minor Respondents	Major/Minor Respondents
Actual release	100% / 50%	50% / 25%	25% / 10%
Potential release	50% / 25%	25% / 10%	10% / 5%

Harm is categorized as major, moderate, or minor. Definitions for each category of harm are provided below.

Categories of Harm

	Actual Release	Potential Release
Major Harm	Human health or the environment has been exposed to pollutants which exceed levels that are protective of human health or environmental receptors as a result of the violation. Unauthorized diversion, taking, or storage of state water or an unauthorized change in flood elevation of a stream which deprives others of water, severely affects aquatic life, or results in a safety hazard, property damage, or economic loss.	Human health or the environment will or could be exposed to pollutants which would exceed levels that are protective of human health or environmental receptors as a result of the violation. Potential for unauthorized diversion, taking, or storage of state water or an unauthorized change in flood elevation of a stream which would deprive others of water, severely affect aquatic life or result in a safety hazard, property damage, or economic loss.
Moderate Harm	Human health or the environment has been exposed to significant amounts of pollutants which do not exceed levels that are protective of human health or environmental receptors as a result of the violation. Unauthorized diversion, taking, or storage of a significant amount of state water or a significant unauthorized change in flood elevation of a stream which does not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.	Human health or the environment will or could be exposed to significant amounts of pollutants which would not exceed levels that are protective of human health or environmental receptors as a result of the violation. Potential for unauthorized diversion, taking, or storage of a significant amount of state water or a significant unauthorized change in flood elevation of a stream which would not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.
Minor Harm	Human health or the environment has been exposed to insignificant amounts of pollutants which do not exceed levels that are protective of human health or environmental receptors as a result of the violation. Unauthorized diversion, taking, or storage of an insignificant amount of state water or an insignificant unauthorized change in flood elevation of a stream which does not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.	Human health or the environment will or could be exposed to insignificant amounts of pollutants which would not exceed levels that are protective of human health or environmental receptors as a result of the violation. Potential for unauthorized diversion, taking, or storage of an insignificant amount of state water or an insignificant unauthorized change in flood elevation of a stream which would not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.

The following discussion is to assist in the practical application of the Environmental, Property and Human Health Penalty Matrix. Release of “significant” and “insignificant” amounts of pollutants is defined in terms

of the degree of impact on affected resources.

Assessment of Impact on Affected Resources

If sampling data are available and corresponding regulatory standards are applicable, an assessment of the impact should be based, at least in part, on such data and corresponding standards.

In the absence of such data and/or standards, the degree of impact should be evaluated in terms of the observed and documented effects the release has on the resource. Where both data and observed effects are available, both should be given due consideration in assessing impact. For releases where neither data nor direct observation are available, the degree of impact must be evaluated in light of scientific knowledge of the expected effects of such a release.¹

Definitions²

- An affected resource is human health, economic activity, normal use or enjoyment of property and/or other environmental resources (e.g., air quality, public or privately-owned water or land) that have been adversely impacted by a pollutant release.
- A release of a significant amount of pollutants is a release of pollutants in types or quantities that results in a loss of most or all of the quantity and/or quality of the affected resource(s).
- A release of an insignificant amount of pollutants is a release of pollutants in types or quantities that results in little or no loss of the quantity and/or quality of the affected resource(s).

Assessing Whether a Release Amount Is Significant or Insignificant

- Consider the release and the affected resource in light of the questions below.
- This is not a checklist or decision tree. The individual questions are not weighted, and must be considered as a whole.

¹ For example, VOC emissions are known to contribute to ozone formation, but cause no observable immediate impacts. A spill of liquid mercury may not contaminate soil or water, but is presumed to partially vaporize into the ambient air, where it may be harmful if inhaled.

² These definitions do not directly address pollutant concentrations or protective levels. As noted in the section Distinguishing Major Harm from Moderate or Minor Harm, if a release of a significant amount of pollutants causes pollutant concentration(s) to exceed levels that are protective of human health or environmental receptors, the release falls into the major harm category.

(1) The Released Pollutant

Questions to Ask	Factors to Consider
What was released?	Consider the available information about the substance’s toxicity or other qualities that could adversely impact the affected resource. The greater the released material’s toxicity, the more likely that a release will be a “significant amount.”
How much was released?	Was the substance released in a quantity sufficient to cause the adverse effects associated with it? The larger the quantity released, the more likely that the release will be a “significant amount.”

(2) The Affected Resource

Questions to Ask	Factors to Consider
What was the affected resource?	Consider the definition of an affected resource. Was human health or economic activity adversely impacted? If so, what and how? Were normal use or enjoyment of property and/or environmental resources adversely impacted? If so, what and how?
How adversely was the affected resource impacted?	Consider the sensitivity, value and/or usability of the affected resource, and any data or scientific knowledge that assesses the actual or expected impact of the release. The more sensitive, valuable and/or usable the resource, the more likely that a release that impacts the resource will be considered a “significant amount.”

Distinguishing Major Harm from Moderate or Minor Harm

For the release (or potential release) of pollutants to be considered major, the pollutant must be present in concentrations that exceed levels that are protective of human health or environmental receptors, and the pollutant must be present in significant amounts as defined in this guidance document.

The following table summarizes the criteria for Major, Moderate and Minor harm.

Harm	significant amounts of pollutants*	exceeds levels that are protective
Major	Yes	Yes
Moderate	Yes	No
Minor	No	No

* “significant amount” as defined in the definitions

In the **Programmatic Penalty Matrix**, violations will be categorized as major, moderate, or minor, based upon the degree of noncompliance. Programmatic violations include, for example, a failure to submit reports, a failure to maintain records, or a failure to obtain a permit or other authorization.

Programmatic Penalty Matrix

Major	Moderate	Minor
Major/Minor Respondent	Major/Minor Respondent	Major/Minor Respondent
25% / 10%	10% / 5%	1% / 1%

In the context of the penalty matrix, programmatic major means that all or almost all (greater than 70 percent) of a rule or permit requirement is not met, programmatic moderate means that much (30 to 70 percent) of a rule or permit requirement is not met, and programmatic minor means that most, but not all (at least 70 percent), of a rule or permit requirement is met. One exception to the use of this matrix is that the falsification of records will be assessed at 100 percent of the statutory maximum penalty.

Calculation: Each violation included in the enforcement action will be evaluated and categorized as actual release, potential release, or programmatic and then as major, moderate, or minor. The appropriate percentage (see the matrices above) will be multiplied by the highest penalty amount allowed by the applicable statute (see discussion in "Statutory Authorizations") to determine the penalty amount for each specific violation. The total of all the violation penalty calculations will be the base penalty amount.

Exception regarding rock crushers and concrete batch plants: TEX. WATER CODE § 5.5145(b) states, "The amount of the penalty for operating a rock crusher or a concrete batch plant that performs wet batching, dry batching, or central mixing, that is required to obtain a permit under Section 382.0518, Health and Safety Code, and that is operating without the required permit is \$10,000. Each day that a continuing violation occurs is a separate violation." Under these circumstances, the required statutory limit of \$10,000 will be utilized for every day of the unauthorized activity.

Determining the Number of Violation Events

The number of violation events that will be assessed a penalty depends on the number of times the violation is observed, the specific requirement violated, the duration of the violation, and other case information.

Certain violations will typically be considered discrete events. For these violations, one penalty event will be assessed for every documented observation. Discrete violations are situations that are observed and documented during an investigation - a discrete interval in time. These violations involve practices or actions that do not occur continuously. If they recur, they do so in individual instances that are separate in time. Examples of violations that would be discrete events are the failure to submit annual reports, the failure to collect or report monitoring data, the failure to perform a hazardous waste determination where required, and the failure to show a certificate of self-certification prior to accepting a fuel drop. For discretely occurring violations, one penalty event will be assessed for every documented observation of the noncompliance (for example, for each sample analysis documenting a violation).

Other violations are considered to be continuing. These violations are not constrained by documented observations of the noncompliance. Examples of violations that would be considered to be continuing are the exceeding of permitted discharge or emission limits, groundwater contamination, unauthorized discharges/releases, endangerment, the commingling of good and bad water in a public water supply, operating without a required permit, and other such violations. For continuing violations, the number of events will be linked to the level of impact of the violation by considering the violation as if it recurred with the frequency shown in the chart below.

Continuing Violations

	Harm or Severity	Number of Events
Actual Releases	Major	Up to daily
	Moderate	Up to monthly
	Minor	Up to quarterly
Potential Releases	Major	Up to monthly
	Moderate	Up to quarterly
	Minor	Single event
Programmatic	Major	Up to daily
	Moderate	Up to quarterly
	Minor	Single event

The duration of events concerning continuous violations, for the purposes of preparing an enforcement action, may begin with the initial date of noncompliance with a requirement, rule, or permit and extend up to the time that the enforcement documents are prepared.

In practice, continuous violations will be assessed beginning with the documented date of noncompliance (i.e., sample results, record review) or the date that the respondent “should have known,” whichever is appropriate, as the beginning point. The respondent is always considered knowledgeable of permit conditions.

The date the respondent returned to compliance or the enforcement screening date, whichever is appropriate, will be the endpoint for the assessed events. Utilizing this date will assure that no one will be impacted by the order in which cases are prioritized within the agency.

The duration of events will be revised, as appropriate, to reflect extended noncompliance when cases fail to settle expeditiously and/or prior to referral to the State Office of Administrative Hearings. Note: Discrete violations are not revised because they are considered single events.

To determine the number of events, divide the appropriate time frame into the duration of the violation. For this determination, any part of a day equals a “day;” any part of a month equals a “month;” any part of a quarter equals a “quarter.” For example an actual minor that is assessed as a quarterly event will have 5 quarters for a violation that continued for 13 months.

Calculation: Multiply the base penalty amount by the number of penalty events determined for the violation being considered. Do this step for each violation included in the enforcement action. Total the base penalty amounts to obtain subtotal 1.

Evaluating Adjustments to the Penalty Amount

Any adjustments to the penalty amounts will be made after a base penalty multiplied by the number of events is established for all violations included in the enforcement action. Adjustments to the penalty amount may be made based upon the following factors relating to the respondent:

- compliance history
- repeat violator
- culpability
- good-faith effort to comply
- economic benefit gained through noncompliance
- compliance history classification
- other factors as justice may require

Compliance History

Staff will develop a compliance history on the respondent utilizing the format found in 30 TEX. ADMIN. CODE § 60.1, no matter what program area is under consideration in the enforcement action. Based upon the compliance history, staff will determine the penalty enhancement for the site, mobile unit, or individual who is required to be registered, certified, or licensed by TCEQ prior to performing certain activities, by evaluating the number of each of the components, and totaling the percentage adjustments. If the total is less than zero, then the penalty enhancement will default to zero. The percentage adjustment for each type of component is specified in the following table:

Compliance History Enhancement For the Site Under Enforcement

Component	Percentage Adjustment	Plus or minus Adjustment?
Written NOV's with same or similar violations as those in the current enforcement action	5% for each NOV	plus
Other written NOV's	2% for each NOV	plus
Any agreed final enforcement orders containing a denial of liability	20% for each order	plus
Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	25% for each order	plus
Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government	30% for each court judgment and consent decree	plus
Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	35% for each court judgment and consent decree	plus

Any criminal convictions of this state or the federal government	50% for each count	plus
Final enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states	N/A	N/A
Chronic excessive emissions events	25% for each event	plus
Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995	1% for each audit	minus
Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995	2% for each audit for which violations are disclosed	minus
Environmental management systems in place for one year or more	10%	minus
Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	10%	minus
Participation in a voluntary pollution reduction program	5%	minus
Early compliance with, or offer of a product that meets future state or federal government environmental requirements	5%	minus

Calculation: Multiply subtotal 1 by the total percentage adjustment to obtain subtotal 2.

Repeat Violator

When a respondent is designated as a repeat violator at the site which is under enforcement, then the recommended administrative penalty for the case will be enhanced by 25 percent. Repeat violator designation will be determined according to 30 TEX. ADMIN. CODE § 60.2(d).

Calculation: Multiply subtotal 1 by 25 percent or 0 percent to obtain subtotal 3.

Culpability

In assessing culpability, staff will determine whether the respondent could have reasonably anticipated and avoided the violation(s). This determination will be made on a site-specific basis and will examine a five-year history (the five-year period preceding the date of initiating an enforcement action with an initial settlement offer or the filing date of an Executive Director’s Preliminary Report (EDPR), whichever occurs first). Culpability will be determined for mobile units, and for individuals for those who are required to be registered, certified, or licensed by TCEQ prior to performing certain activities, rather than a site-specific basis. Staff will determine whether documentation that indicates culpability exists (e.g., contractor notes; agency letters; respondent notes; investigations at other locations [for mobile units and for individuals who are required to be registered, certified, or licensed by TCEQ prior to performing certain activities]).

If culpability exists, then 25 percent will be added to the penalty amount; otherwise, nothing will be added to the penalty amount.

Note: Other forms of culpability, such as notices of violation (NOVs) and orders, are included in compliance history.

Calculation: Multiply subtotal 1 by 25 percent or 0 percent as appropriate to obtain subtotal 4.

Good-Faith Effort to Comply

In assessing good-faith efforts to comply, staff will consider the respondent's efforts to return the site to complete compliance with all applicable rules and regulations cited in the enforcement action. Thus, any reduction will be applied to all violations and events. The analysis of good-faith efforts involves two factors: the timeliness of the respondent's action(s) and the quality of that action(s). Accordingly, the respondent will be given credit for timeliness, quality, or both.

Timeliness is defined by the point when the respondent completed action to correct the violations. The following are the two scenarios that will be considered:

- Corrective actions are completed before there is an executive director's preliminary report (EDPR) or an initial settlement offer, but the actions are completed after the issuance of an NOV.
- Corrective actions are completed as soon as violations are identified and before the issuance of an NOV.

Quality is defined as the degree to which the respondent took action. The two categories of quality are extraordinary and ordinary. Extraordinary is defined as action taken by the respondent which goes beyond what would be expected under the rules. Ordinary is defined as action taken by the respondent to correct the violations as expected under the rules. Good-faith effort will not be considered for cases involving only discrete violations as defined by this policy.

The following matrix describes how much of a reduction will be given for good-faith efforts. The maximum reduction is 50 percent. Good faith efforts will only be considered if the respondent has achieved compliance with applicable rules and regulations cited in the enforcement action.

Percentage Reductions for Timeliness

Quality of Action	Action Before NOV	Action Between NOV & EDPR/Settlement Offer
Extraordinary	50%	25%
Ordinary	25%	10%

Calculation: Multiply subtotal 1 by the appropriate good-faith percentage reduction to obtain subtotal 5.

Economic Benefit

Economic benefit is defined as monetary gain derived from a failure to comply with TCEQ rules or regulations. Economic benefit may include any or all of the following: (1) the return a respondent can earn

by delaying the capital costs of pollution control equipment; (2) the return a respondent can earn by delaying a one-time expenditure; and (3) the return a respondent can earn by avoiding periodic costs.

To determine whether a respondent has gained an economic benefit (during the alleged violation period), staff must evaluate the following issues for each violation:

1. Did the respondent avoid or delay capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
2. Did the respondent gain any interest by avoiding or delaying capital outlay for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?
3. Did the respondent gain an economic advantage over its competitors?
4. Did the respondent avoid or delay disposal, maintenance, and/or operating costs?
5. Did the respondent receive increased revenue due to noncompliance?
6. Did the respondent avoid the purchase of financial assurance for item(s) specifically required by a permit or rule that is applicable to the facility or unit in question?

If the answer is "yes" to any of the above questions, then staff will estimate the overall economic benefit gained. Only capital expenditures, one-time nondepreciable expenditures, periodic costs, and interest gained will be evaluated in the calculation of economic benefit.

Capital expenditures will include all depreciable investment outlays necessary to achieve compliance with the environmental regulation or permit. Depreciable capital investments are usually made for things that wear out, such as buildings, equipment, or other long-lived assets. Typical environmental capital investments include groundwater monitoring wells, stack scrubbers, and wastewater treatment systems.

One-time nondepreciable expenditures include delayed costs the respondent should have made earlier (to prevent the violations) which need only be made once and are not depreciable (i.e., do not wear out). Such an expenditure could be purchasing land, setting up a record-keeping system, removing illegal discharges of dredged and fill material, disposing of soil from a hazardous waste site, or providing initial training to employees.

Periodic costs are recurring costs associated with operating and maintaining the required pollution control equipment.

Once the economic benefit has been estimated and totaled for all violations included in the enforcement actions, it should be compared to the following criteria, and the penalty amount will be increased accordingly. The economic adjustment factor will be capped so the adjustment amount does not exceed the economic benefit gained.

Economic Benefit Matrix

% Adjustment	Dollar Range of Benefit
None	Less than \$15,000
50%	Equal to or greater than \$15,000

Calculation: Determine the estimate of the economic benefit of each violation included in the enforcement action, add all the economic benefit totals, then determine the range that the estimate fits for each violation,

and multiply the associated percentage, based upon culpability, by the base penalty amount to obtain subtotal 6.

Compliance History Classification

The administrative penalty will be modified, based upon the classification of the person who is the respondent in the enforcement action, as specified in the following matrix. Compliance history classification of the respondent will be determined according to 30 TEX. ADMIN. CODE § 60.2(f).

Compliance History Classification Adjustment

Respondent's Classification	Percentage Adjustment
High Performer	- 10%
Average Performer	0% (no adjustment)
Poor Performer	+ 10%

Calculation: Multiply subtotal 1 times the appropriate percentage to obtain subtotal 7.

A final subtotal is determined by adding subtotal 1, subtotal 2, subtotal 3, subtotal 4, and subtotal 6, subtracting subtotal 5, and adding or subtracting, as appropriate, subtotal 7.

Other Factors That Justice May Require

The staff may recommend adjustment of the penalty amount, on a case-by-case basis, upon a consideration of factors unique to the situation. This adjustment may result in an increase or decrease of the penalty amount.

A downward adjustment due to "other factors that justice may require" may be appropriate when, for example, the TCEQ is notified of the violation(s) by the respondent. If the notification is not required by statute, permit, or rule, staff may recommend a downward adjustment.

A downward adjustment due to "other factors that justice may require" may be appropriate when, for example, a respondent has purchased a noncompliant water or wastewater facility as part of regionalization of service. Normally, respondents inherit the compliance history of purchased facilities but there may be circumstances where the resulting penalty does not reflect the efforts of the new provider and staff may recommend a downward adjustment.

An upward adjustment due to "other factors that justice may require" may be appropriate when, for example, a respondent who owns a station that conducts state inspections issued a motor vehicle inspection certificate for a motor vehicle without conducting all emission tests. If it is determined that the failure to conduct required emission testing was intentional, staff may recommend an upward adjustment.

Calculation: Multiply the final subtotal by the recommended percentage to obtain the final penalty amount.

Adjusted Total Penalty Amount Recommendation

The final penalty amount will be checked against the minimum and maximum penalty amounts allowed by statute per violation per day in order to obtain the final assessed penalty.

Attachment No. 2
Proposed Standard Penalty Violation Categories (with examples)
THIS TABLE IS PRESENTED FOR DISCUSSION PURPOSES ONLY

The recommended penalty is expressed in terms of a percentage of the statutory maximum

Category	Example violations
Falsification Recommended penalty Major Entity:100% Minor Entity:100%	Falsifying data or other information.
Reporting, Compliance Certifications, and Notification Recommended penalty Major Entity: 10% Minor Entity: 5%	<p>Failure to develop or submit plans or reports, deed recordation, notice of registration for solid waste activities, petroleum storage tank certifications, and notifications to the agency.</p> <p>Air Failure to submit Title V certification or emissions event notice Failure to submit deviation reports Failure to submit emissions inventory Failure to submit federal notice of compliance reports or emissions banking report Failure to submit sample results Failure to submit complete or submittal of inaccurate report Failure to report deviations on Title V certification Failure to provide all elements on emissions event reports</p> <p>Water Failure to submit engineering and financial planning for 75/90 capacity Failure to report exceedances that are greater than 40% of permit limit Failure to submit required monthly, quarterly, and annual reports, accurate reports, or complete reports Failure to notify media when reporting a bypass Failure to submit discharge monitoring report (DMR), accurate DMR, or complete DMR Failure to correctly report flow and effluent parameters Failure to provide noncompliance report (oral or written) Failure to provide notification on alterations where no permit is required Failure to submit pollution prevention plan Failure to submit plans and specs and obtain approval prior to construction of a public water supply Failure to provide required public notification Failure to submit well completion data to public drinking water program Failure to obtain new maintenance contract for on-site sewage facilities (OSSF) Failure to submit site evaluation with planning materials in OSSF Failure to notify permitting authority of the date construction is to begin in OSSF Failure to request all required inspections in OSSF Failure to notify agency of any sensitive features encountered during construction in Edwards Aquifer Failure to submit Notice of Intent (NOI) Failure to correct inaccurate information on NOI Failure to renew pretreatment agreement Failure to file a sanitary control easement</p>

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	<p>Waste Failure to submit annual waste summaries Failure to provide required notification of confirmation sampling events to region offices. Failure to provide notice to affected property owners for Affected Property Assessment Reports. Failure to provide construction notification of PSTs Failure to report required releases and spills to the agency. Failure to provide required written notification of Stage II system installation or testing. Failure to obtain an EPA ID number Failure to notify of one or more waste streams, waste management units or other incomplete or inaccurate information regarding the Notice of Registration Failure to register existing, new or removed PSTs. Failure to update changes or additional information to the PST registration Failure to fully and accurately complete the PST registration and self certification forms Failure to register used oil or tire recycling activities. Failure to submit required certification of compliance with order provisions. Failure to certify completion of closure or post closure care. Failure to have PST installation certifications. Failure to complete deed recordation or deed certification in county deed records for contaminated areas.</p>
<p>Records Recommended penalty Major Entity: 10% Minor Entity: 5%</p>	<p>Failure to produce or maintain any plans required by permit, rule, or statute or failure to maintain records or fail to have complete and accurate records available on site.</p> <p>Air Failure to maintain calibration logs or monitoring logs Failure to include all components on master component list Failure to maintain non-reportable emissions events log Failure to record CEMs data, temperatures, feed rates, coating and solvent usage Failure to record opacity readings in daily flare log</p> <p>Water Failure to adequately maintain records (includes no records and incomplete records) Failure to provide records of DMRs during investigation Failure to maintain registrations and authorizations on-site or in required vehicles Failure to provide inventory of all industrial users Failure to maintain up-to-date map of the public water system</p>

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	<p>Waste Failure to maintain an adequate operating record. Failure to maintain records of inspections, manifests or ground water analysis or waste analysis. Failure to maintain records related to the PST systems such as inventory control, registration, installation records, testing records, maintenance and service records, site assessment records, etc. Failure to maintain a copy of the CARB order, testing and maintenance records. Failure to maintain required records of the number of lead acid batteries purchased and accepted, returned etc. Failure to maintain required logs at scrap tire storage facilities. Failure to maintain required inspection records at MSW landfill.</p>
<p>Labeling/Placarding/Signage Recommended penalty Major Entity: 5% Minor Entity: 2%</p>	<p>Failure to label or properly label equipment, units, containers, tanks, vehicles, etc.</p> <p>Air Failure to label Emission Points with EPN Failure to tag all LDAR components (valve, pump, etc.) in a unit</p> <p>Water Failure to mark and identify all pump trucks for sludge transporters Failure to label tanks in storm water program Failure to mark all discharge valves and ports for sludge transporters Failure to place authorization stickers on motor vehicles Failure to properly label chemical tanks Failure to properly identify pipes</p> <p>Waste Failure to label a less than 90 day container or tank with the words “hazardous waste” or the beginning date of waste accumulation Failure to ensure that a tag, label or marking is applied to top of fill tube of each UST. Failure to post operating instructions on each dispenser equipped with a Stage II system.</p>
<p>Manifests Shipping Papers and Trip Tickets Recommended penalty Major Entity: 10% Minor Entity: 5%</p>	<p>Failure to use or maintain manifests, shipping papers or trip tickets as required.</p> <p>Air N/A</p> <p>Water Failure to use trip tickets when transporting sludge waste Failure to adequately complete trip ticket for sludge transports</p> <p>Waste Failure to use or properly complete manifest or shipping papers, (i.e., missing or incomplete information) on manifests. Failure to return signed copies of manifest (for receiving facilities) Failure to maintain required manifests or shipping paper for waste shipments for remediation related activities. Failure to use and maintain bills of lading for shipments of used oil filters and manifests for scrap tires.</p>

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<p>Quality Control/Analyses Recommended penalty Major Entity: 25% Minor Entity: 10%</p>	<p>Failure to follow required procedures and testing that ensure a safe product for employees, the public and the environment.</p>
	<p>Air Failure to conduct sampling on cooling towers or fuel gas Failure to perform required vehicle emissions test, stack test, performance test Failure to calibrate or test the calibration of an instrument Failure to monitor temperatures Failure to conduct opacity readings Failure to have a monitoring system in place, to record emissions, or to provide data to calculate emissions</p>
	<p>Water Failure to test or inspect, stormwater sewer systems for non stormwater flows Failure to monitor flow or disinfectant residuals Failure to conduct quarterly visual monitoring of stormwater discharge Failure to collect samples Failure to use industry accepted standards to obtain adequate measurements Failure to calibrate flow-measuring device, pH meter, chlorine meter, etc. Failure to follow appropriate analytical procedures and monitoring plans</p>
	<p>Waste Failure to complete hazardous waste determination or waste classification. Failure to complete required analysis and classification for land disposal restrictions. Failure to follow ground water sampling and analysis plan. Failure to conduct required tank or line tightness testing Failure to conduct required testing of cathodic protection equipment Failure to complete adequate statistical inventory reconciliation (SIR) Failure to conduct proper or adequate analysis of ground water samples in accordance with ground water sampling and analysis plan. Failure to conduct integrity assessments for hazardous waste tanks.</p>

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<p>Operations and Maintenance Recommended penalty Major Entity: 25% Minor Entity: 10%</p>	<p>Failure to follow required operating procedures and methods that protect human health and the environment from pollution exposure. Failure to conduct general preventative maintenance/housekeeping.</p>
	<p>Air Failure to maintain vehicle emission control devices or altering or bypassing vehicle emission control devices Failure to repair tears in baghouse bags Failure to maintain electrical grounding Exceeding limit rates for temperature, firing rate, pumping rate, usage rate, production limits, or destruction efficiency</p>
	<p>Water Failure to properly cover bar screens Failure to provide self-contained breathing apparatus at treatment plant Failure to properly house chlorination facilities/ improper ventilation of chlorine facilities Failure to provide backlog prevention device Failure to prevent livestock from grazing within lagoon system Failure to provide a lift station with an alarm Failure to maintain 2-foot freeboard Failure to properly waste sludge Failure to properly maintain treatment units (clarifiers, chlorine contact chambers, sludge digesters, etc.) Inadequate water line size or placement Water plant being operated by unlicensed operator or operator with inadequate license Failure to plug abandoned wells Failure to provide all-weather access road Failure to maintain adequate disinfectant residuals or turbidity levels Failure to complete customer service inspections Failure to maintain liner in lagoons at CAFO Failure to maintain manure stock piles at CAFO to prevent run-off Failure to provide facilities to prevent runoff of wastewater or stormwater at CAFO Failure to maintain sight gauges on sludge truck Failure to comply with conditions of an Edwards Aquifer protection plan</p>

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	<p>Waste Failure to ship hazardous waste off-site within 90 days or 180 days for a small quantity generator. Exceedance of storage time limit for universal waste rules, (generators, handlers etc.) Exceeding the allowable volume or number of containers in a permitted hazardous waste container storage area. Failure to inspect hazardous waste facility for malfunctions, deterioration, operator errors and discharges. Failure to have an adequate inspection schedule with required information for hazardous waste facilities Failure to take adequate precautions for ignitable, reactive or incompatible wastes Failure to maintain an adequate ground water monitoring system. Failure to keep hazardous waste drums closed with lids, Failure to maintain containers of hazardous waste in good condition. Failure to maintain adequate freeboard for hazardous waste surface impoundment. Failure to perform investigation and confirmation steps in response to suspected release Failure to properly remove from service a PST Failure to conduct inventory control or to conduct proper or adequate inventory control Failure to ensure that release detection, corrosion protection and spill and overflow equipment is properly maintained and operated properly Failure to conduct required inspections on PST systems including cathodic protection equipment. Failure to maintain and properly operate Stage II components (i.e., torn or damaged nozzle boots, etc.) Failure to conduct required inspections of the Stage II vapor recovery system. Failure to comply with training requirements for personnel involved with the Stage II systems. Failure to maintain required height and size requirements at scrap tire sites. Failure of a MSW landfill to follow closure and post closure care requirements. Failure to maintain proper cover requirements for MSW landfill. Failure to control windblown waste and litter. Failure to follow the site operating plan. Failure to have an adequate personnel training program for hazardous waste sites.</p>
<p>Security/ Emergency Preparedness Recommended penalty Major Entity: 25% Minor Entity: 10%</p>	<p>Failure to plan for or implement procedures to respond to fires, releases, emergencies, natural disasters, terrorist attacks.</p> <p>Air Failure to provide backup generator for major events or electrical failures Failure to provide emissions reduction plan</p> <p>Water Failure to provide lockable gates Failure to provide adequate intruder resistant fence Failure to provide backup generator for electrical failure</p>

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	<p>Waste Failure to prepare an adequate contingency plan. Failure to have a 24 hour surveillance system which monitors and controls entry to the active portion the of the facility. Failure to have a fence or natural barrier which completely surrounds the active portion of the facility; Failure to have a means to control entry at all times through gates, or other entrances. Failure to have required emergency equipment (i.e., alarms, fire extinguishers, fire control equipment, decontamination equipment, water at adequate pressure and volume, etc). Failure to make arrangements with local authorities. Failure to have an emergency coordinator. Failure to prepare a Fire Protection Plan for MSW landfill</p>
<p>Construction, Capacity and Design requirements Recommended penalty Major Entity: 25% Minor Entity: 10%</p>	<p>Failure to meet capacity, construction, and design requirements.</p> <hr/> <p>Air Failure to construct the facility in accordance with representations made in the permit application.</p> <hr/> <p>Water Failure to provide adequate raw water pump capacity Failure to provide adequate water pressure throughout distribution system Failure to provide adequate treatment plant capacity</p> <hr/> <p>Waste Failure to meet the design and construction requirement for landfills, drip pads, containment buildings, munitions and Explosive Storage, or tanks. Failure to have adequate secondary containment for hazardous waste tank. Failure to meet location standards for hazardous waste management units. Failure to install or construct required secondary containment for used oil handling facilities. Failure to install or properly construct required leachate collection and liners. Failure to meet location restrictions requirements for MSW landfill. Failure of MSW landfill to have required ground water monitoring system. Failure to install or properly install all components of a required Stage II system</p>
<p>Water Rights Recommended penalty Major Entity: 10% Minor Entity: 5%</p>	<p>Violations that concern state water rights. This category does not include a violation related to the impairment of an existing water right.</p> <hr/> <p>Water Rights Breaking, tampering with, or mutilating any seal or other device used to enforce orders of the commission, executive director, court, or watermaster.</p>
<p>Financial Assurance and Penalty Payments Recommended penalty</p>	<p>Failure to provide required financial assurance or pay administrative penalties required by a prior order.</p> <hr/> <p>Air Failure to pay administrative penalty from prior order.</p>
<p>Major Entity: 25% Minor Entity: 10%</p>	

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	<p>Water Failure to pay administrative penalty from prior order.</p>
	<p>Waste Failure to maintain financial assurance for closure or post closure for hazardous waste site. Failure to provide financial assurance for sudden and not sudden liability for a hazardous waste site. Failure to update closure and post-closure cost estimates for inflation or addition of new hazardous waste units. Failure to provide financial assurance for corrective action and for third party compensation for bodily injury or property damage caused by accidental releases for PSTs. Failure to provide required financial assurance for municipal waste sites including landfills, tire sites, and used oil sites and others.</p>
<p>Closure Activities/Site Assessment Activities Recommended penalty Major Entity: 25% Minor Entity: 10%</p>	<p>Failure to perform closure activities or site assessments.</p>