

**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 and 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.

