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Penalty Policy

Effective January 28, 2021

Office of Compliance and Enforcement / Enforcement Division

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Penalty Policy

Fifth Revision, Effective January 28, 2021

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Penalty Policy

Fifth Revision, Effective January 28, 2021

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 should evaluate violations in order to recommend administrative penalties to the commission.

This policy includes a description of how the TCEQ evaluates the harm and severity of violations and how it determines proposed penalties. It includes a discussion of what adjustments the agency may make to the base penalty amount after completing its review of case-specific information and information concerning the respondent.

The Fifth Revision of this Penalty Policy (effective January 28, 2021) applies to all investigations conducted on or after January 28, 2021 documenting violations that occurred or began on or after September 1, 2011.

For investigations conducted prior to January 28, 2021:

- The Fourth Revision of the Penalty Policy (effective April 1, 2014) applies to violations that occurred on or after September 1, 2011, and that are included in Enforcement Action Referrals (EARs) assigned on or after April 1, 2014.

- The Third Revision of the Penalty Policy (effective September 1, 2011) applies to violations that occurred on or after September 1, 2011, and that are included in EARs assigned before April 1, 2014.

- The Second Revision of the Penalty Policy (effective September 1, 2002) applies to violations that occurred before September 1, 2011.

Statutory Authorizations

The Commission has the authority to assess administrative penalties under a number of statutes located in the Texas Water Code (TWC), the Texas Health and Safety Code (THSC), and the Texas Transportation Code (TTC). These statutes include: TWC Chapters 7, 11, 12, 13, 16, and 28A; THSC Chapters 341 and 371; and TTC Chapter 548.

These statutes give the commission the authority to assess penalties and set forth the factors that it must consider in determining the amount of penalty to assess (see chart below).

Table 1: Statutorily Authorized Penalties

Program	**Statute/ Chapter**	**Administrative penalties, per violation per day**
Aggregate Production Operations	TWC/28A	See Below
Air Quality	TWC/7	$0 –25,000
Dam Safety	TWC/12	N/A
Dry Cleaners	TWC/7	See Below
Edwards Aquifer	TWC/7	$0 –25,000
Industrial and Hazardous Waste	TWC/7	$0 –25,000
Land over MSW Landfills	TWC/7	$0 –25,000
Levees	TWC/16	$0 –1,000
Medical Waste	TWC/7	$0 –25,000
Municipal Solid Waste	TWC/7	$0 –25,000
Occupational Licenses	TWC/7	$0 –5,000
On-Site Sewage Disposal	TWC/7	$0 –5,000
Petroleum Storage Tank	TWC/7	$0 –25,000
Public Water Supply	THSC/341	See Below
Public Water Utilities	TWC/13	$0 –5,000
Radioactive Substances	TWC/7	$0 –25,000
Rock Crushers and Concrete Batch Plants	TWC/7	See Below
Subsurface Excavation	TWC/7	$0 –25,000
Toxic Chemical Release Reporting	TWC/7	$0 –25,000
Underground Injection Control	TWC/7	$0 –25,000
Underground Water	TWC/7	$0 –25,000

Program	Statute/ Chapter	Administrative penalties, per violation per day
Used Oil	TWC/7	$0 –5,000
Used Oil Filter	THSC/371, TWC/7	$0 –5,000
Vehicle Emission Inspections	TTC/548	$0 –500
Waste Tires	TWC/7	$0 –25,000
Water Quality	TWC/7	$0 –25,000
Water Rights	TWC/11	$0 –5,000
Water Rights Use Reports	TWC/11	See Below
Water-Saving Performance Standards	TWC/7	$0 –5,000

Aggregate Production Operations

TWC Section 28A.102 states: "The Commission may assess a penalty of not less than $5,000 and not more than $20,000 for each year in which an aggregate production operation operates without being registered under this chapter. The total penalty under this section may not exceed $40,000 for an aggregate production operation that is operated in three or more years without being registered."

Computer and Television Recycling

TWC Section 7.052(b-1) states: "The amount of the penalty assessed against a manufacturer that does not label its computer equipment or covered television equipment or adopt and implement a recovery plan as required by Section 361.955, 361.975, or 361.978, Health and Safety Code, as applicable, may not exceed $10,000 for the second violation or $25,000 for each subsequent violation. A penalty under this subsection is in addition to any other penalty that may be assessed for a violation of Subchapter Y or Z, Chapter 361, Health and Safety Code."

TWC Section 7.052(b-2) states: "Except as provided by Subsection (b-1), the amount of the penalty for a violation of Subchapter Y or Z, Chapter 361, Health and Safety Code, may not exceed $1,000 for the second violation or $2,000 for each subsequent violation. A penalty under this subsection is in addition to any other penalty that may be assessed for a violation of Subchapter Y and Z, Chapter 361, Health and Safety Code."

Dry Cleaners

TWC Section 7.0525 states: "(a) Except as provided by Subsection (b), the amount of the penalty for a violation of Section 374.252, Health and Safety Code, may not exceed $5,000. (b) The amount of the penalty for a violation of Section 374.252(a)(3), Health and Safety Code, may not exceed $10,000."

THSC Section 374.252 states: "(b) If a registration fee is not paid on or before the 30th day after the date the fee is due, the commission may assess a penalty not to exceed $50 per day for each day the fee is not paid."

THSC Section 374.252 states: "(c) If a registration application for an operating dry cleaning facility or drop station is not filed with the commission on or before the 30th day after the date the application is due, the commission may assess a penalty not to exceed $50 per day for each day the application is not filed."

Public Water Supply

THSC Section 341.049(a) states: "(a) If a person causes, suffers, allows, or permits a violation of this subchapter or a rule or order adopted under this subchapter, the commission may assess a penalty against that person as provided by this section. The penalty shall not be less than $50 and not more than $5,000 for each violation. Each day of a continuing violation may be considered a separate violation." This applies to violations of this subchapter that occur on or after September 1, 2019.

Violations occurring before September 1, 2019 are subject to a penalty of not less than $50 and not more than $1,000 for each violation. Each day of a continuing violation may be considered a separate violation.

Rock Crushers and Concrete Batch Plants

TWC Section 7.052(b) states: "Except as provided by subsection (b-3), 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 unless the facility holds any type of permit issued by the commission other than the permit required for the facility. If the facility holds another type of permit the commission may exercise discretion whether to assess a penalty of $10,000 per day per violation.

Water Rights Use Reports

TWC Section 11.031(b) states: "A person who fails to file an annual report with the commission as required by Subsection (a) or fails to timely comply with a request by the commission to make information available under Subsection (d) is liable for a penalty for each day the person fails to file the statement or comply with the request after the applicable deadline in an amount not to exceed: (1) $100 per day if the person is the holder of a water right authorizing the appropriation of 5,000 acre-feet or less per year; or (2) $500 per day if the person is the holder of a water right authorizing the appropriation of more than 5,000 acre-feet per year."

Penalty Calculation

Major and Minor Sources

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

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 nonattainment areas. In serious ozone nonattainment counties the threshold is 50 tons per year for volatile organic compounds (VOCs) and nitrogen oxides (NO_x). In severe ozone nonattainment counties the threshold is 25 tons per year for VOCs and NO_x.
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. 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.

Concentrated Animal Feeding Operations (CAFOs)

All CAFO facilities are considered minor sources.

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 per year. Commercial industrial facilities are major sources.

Minor: A generator of 12,000 kg or less of hazardous waste per year.

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

Minor: A landfill accepting 20 tons or less 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 100,000 gallons.

Minor: An underground storage tank facility that has a monthly throughput of 100,000 gallons or less.

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 suppliers will be classified as minor sources unless specific circumstances exist that would cause them to be classified as major.

Radioactive Waste

All facilities are considered major sources.

Underground Injection Control

All Class I and Class III facilities are considered major sources. Class V facilities will be determined site by site.

Waste Tires

Major: A facility with more than 500 tires.

Minor: A facility with 500 or fewer tires.

Water Quality

Major: Municipal facilities with a daily average flow of 1 million gallons per day or greater are considered major facilities. Industrial facilities are classified as major or minor facilities based on a point scale used by the EPA. The TCEQ Water Quality Division uses the EPA's classification schedule to designate a facility as major or minor. All water quality permittees are designated as major or minor.

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

Water Rights

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

Minor: A water right of 5,000 or fewer acre-feet.

Total Base Penalty (Subtotal 1)[1]

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 below) will be multiplied by the highest penalty amount allowed by the applicable statute (see discussion in "Statutory Authorizations") to determine the base penalty amount for each specific violation. The total of all the violation penalty calculations will be the Total Base Penalty (Subtotal 1).

When calculating the violation base penalties, violations will be broken into two categories--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— (1) the Environmental, Property and Human-Health Penalty Matrix and (2) the Programmatic Penalty Matrix.

Environmental, Property and Human-Health 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 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

1 Subtotals correlate to the TCEQ’s Penalty Calculation Worksheet.

corresponding standards.

In the absence of such data or standards, or both, 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 is available, the degree of impact must be evaluated in light of scientific knowledge of the expected effects of such a release.[2]

Definitions[3]

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 has 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, quality, or both of the affected resource or resources.

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 or quality of the affected resource or resources.

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 together.

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2 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.

3 These definitions do not directly address pollutant concentrations or protective levels. As noted below, in "Distinguishing Major Harm from Moderate or Minor Harm," if a release of a significant amount of pollutants causes the concentration of any pollutant to exceed a level that is protective of human health or environmental receptors, the release falls into the "major harm" category.

Table 2: (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 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 release, the more likely that the release will be a "significant amount."

Table 3: (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 harmed or economic activity diminished? If so, what and how? Were normal use or enjoyment of property or environmental resources adversely impacted? If so, what and how?
How adversely was the affected resource impacted?	Consider the sensitivity, value and 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 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

Harm is categorized as major, moderate, or minor. 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, or the pollutant must be present in significant amounts as defined in this document, or both. Definitions for each category of harm appear in Table 4.

Table 4: 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 that 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 that **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 that 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 that 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 that **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 that would not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.

	Actual Release	**Potential Release**
Minor Harm	Human health or the environment has been exposed to **insignificant** amounts of pollutants that **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 that 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 that **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 that would not detrimentally affect aquatic life or result in a safety hazard, property damage, or economic loss.

The following tables summarize the criteria used to determine major, moderate, and minor harm.

Table 5: Criteria of Harm

Harm	**Significant* amounts of pollutants**	**Exceeds levels that are protective**
Major	Yes	Yes
Moderate	Yes	No
Minor	No	No

* See definitions in Table 4.

Table 6: Environmental, Property and Human-Health Matrix

	Major Harm	Moderate Harm	Minor Harm
Source	Major/Minor	Major/Minor	Major/Minor
Actual release	100%/50%	50%/25%	30%/15%
Potential release	30%/15%	15%/5%	7%/3%

Programmatic Penalty Matrix

In the Programmatic Penalty Matrix, violations are 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.

Table 7: Programmatic Penalty Matrix

Major	Moderate	Minor
Major/Minor Source	Major/Minor Source	Major/Minor Source
20%/10%	7%/2.5%	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 less than 30 percent of a rule or permit requirement is not 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.

Determining the Number of Violation Events

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

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 or releases, endangerment, the commingling of water that meets TCEQ standards with contaminated water or other unauthorized substances, 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.

Table 8: Continuing Violations

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

The duration of events concerning continuous violations, for 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 date of noncompliance (e.g., documented from sample results or 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. Use of this date will assure that no one will be affected by the priority the agency gives to each case.

The duration of events will be revised, as appropriate, to reflect extended noncompliance. *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 five quarters for a violation that continued for 13 months.

Calculation for Subtotal 1: Multiply the base penalty amount by the number of penalty events determined for the violation being considered. Perform this step for each violation included in the enforcement action and total the base penalty amounts.

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. The penalty amount may be adjusted based on the following factors relating to the respondent:

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

Compliance History (Subtotal 2)

TCEQ personnel will develop a compliance history for the respondent using Title 30,

Texas Administrative Code (TAC), Chapter 60, no matter what program area is under consideration in the enforcement action. Based upon the compliance history, personnel will determine the penalty enhancement for the site, mobile unit, or individual who is required to be registered, certified, or licensed by the TCEQ before performing regulated 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 Table 9.

Table 9: Compliance History Enhancement for a Site Under Enforcement

Component	Percentage Adjustment	Plus or minus Adjustment?
Written notices of violation (NOV) with same or similar violations as those in the current enforcement action	5% for each NOV	plus
Other written NOVs	2% for each NOV	plus
Agreed final enforcement orders containing a denial of liability	20% for each order	plus
Adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders issued by this state or the federal government, or any final prohibitory emergency orders issued by the Commission	25% for each order	plus
Non-adjudicated final court judgments or consent decrees containing a denial of liability issued by this state or the federal government	30% for each court judgment and consent decree	plus
Adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, issued by this state or the federal government	35% for each court judgment and consent decree	plus
Criminal convictions issued by this state or the federal government	50% for each count	plus

Component	Percentage Adjustment	Plus or minus Adjustment?
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, 75th Legislature, 1997	1% for each audit	minus
Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 75th Legislature, 1997	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 or offer of a product that meets future state or federal government environmental requirements	5%	minus

Calculation for Subtotal 2: Multiply Subtotal 1 by the total percentage adjustment of compliance history components.

Repeat Violator (Subtotal 3)

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 TAC Section 60.2(f).

Calculation for Subtotal 3: Multiply Subtotal 1 by 25 percent or 0 percent.

Compliance History Classification (Subtotal 7)

The administrative penalty will be modified, based upon the classification of the respondent in the enforcement action, as specified in Table 10. Compliance history classification of the respondent will be determined according to 30 TAC Section 60.2(h).

Table 10: Compliance History Classification Adjustment

Respondent's Classification	Percentage Adjustment
High Performer	–10% (no adjustment for default orders)
Satisfactory Performer	0% (no adjustment)
Unsatisfactory Performer	+10%

Calculation for Subtotal 7: Multiply Subtotal 1 by the appropriate compliance history classification percentage.

The total penalty enhancement based on the compliance history will be capped at 100% of the base penalty.

Culpability (Subtotal 4)

In assessing culpability, personnel will determine whether the respondent could have reasonably anticipated and avoided each violation. This determination will be specific to the site 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 the TCEQ before performing certain activities, rather than on a site-specific basis. Personnel 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 the TCEQ before performing certain activities]).

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

Note: Since other forms of culpability, such as NOVs and orders, are included in compliance history, these will not be considered for culpability determination.

Calculation for Subtotal 4: Multiply Subtotal 1 by 25 percent or 0 percent as appropriate.

Good Faith Effort to Comply (Subtotal 5)

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

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

- Corrective actions are completed before there is an EDPR or an initial settlement offer, but the actions are completed after the issuance of an NOV or Notice of Enforcement (NOE).

- Corrective actions are completed as soon as violations are identified and before the issuance of an NOV or NOE.

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 be considered for each violation case by case.

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 complied with applicable rules and regulations cited in the enforcement action. There will be no reduction for default orders.

Table 11: Percentage Reductions for Timeliness

Quality of Action	Action before NOV or NOE	Action between NOV or NOE and EDPR or Settlement Offer
Extraordinary	50%	25%
Ordinary	25%	10%

Calculation for Subtotal 5: Multiply Subtotal 1 by the appropriate good faith effort to comply percentage reduction.

Economic Benefit (Subtotal 6)

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 derive by delaying the capital costs of pollution-control equipment; (2) the return a respondent can derive by delaying a one-time expenditure; and (3) the return a respondent can derive 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 any item 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 any item 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 any item 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 TCEQ personnel will estimate the overall economic benefit gained. Only capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained will be evaluated in the calculation.

Capital expenditures include all depreciable investment outlays necessary to achieve compliance with the environmental regulation or permit. Depreciable capital investments are usually 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 non-depreciable 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 expenditure could be for 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 increased accordingly. The economic adjustment factor will be capped so the adjustment amount does not exceed the economic benefit gained.

Table 12: Economic Benefit Matrix

% Adjustment	Dollar Range of Benefit
None	Less than $15,000
50%	$15,000 or more

Calculation for Subtotal 6: Determine the estimate of the economic benefit of each violation included in the enforcement action. Add all of the economic benefit totals for each violation and then determine the total dollar amount of benefit. If the total dollar amount of benefit equals or exceeds $15,000, multiply the base penalty amount using the associated percentage in Table 12.

Nonprofit organizations, political subdivisions and other governmental authorities will not be subject to an economic benefit enhancement.

Avoided Costs

All avoided cost returns earned by a respondent will be included in the total assessed penalty, with the exception of non-profit organizations, political subdivisions, and other governmental authorities. Avoided costs will be included as an “other factors as justice may require” adjustment.

Final Subtotal

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, case by case, 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 violations by the respondent. If the notification is not required by statute, permit, or rule, TCEQ personnel 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.

Statutory-Limit Adjustment

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.

Deferral

A respondent may be eligible for a deferral under specific conditions outlined below.

- A 1660 Administrative Order with no culpability enhancement may be eligible for a 20% expedited settlement deferral. Orders with statutorily mandated penalties, Findings Orders, orders with a culpability enhancement, orders in which the respondent has two or more prior administrative penalty orders as set out in TWC Sections 7.105(b)(2), (b)(4), and (b)(6), and orders referred to the Litigation Division will not be eligible for a 20% expedited settlement deferral.

- If the TCEQ determines through its Financial Inability to Pay review outlined in 30 TAC Section 70.8 that a respondent cannot pay a portion or any of the penalty, a deferral of up to 100% may be offered.

- If the respondent receives a finding from the process outlined in TWC Section 7.034 (Deferral of Penalty for Certain Utility Facilities) that a respondent cannot pay a portion or any of the penalty, a deferral of up to 100% may be offered.

- At the discretion of the commission, the executive director may recommend a conditional deferral of up to 100% for certain violations.

All deferrals are contingent upon the respondent coming into full and timely compliance with the administrative order. Failure to achieve such compliance may result in the collection of the final assessed administrative penalty, including the deferred portion of the penalty.