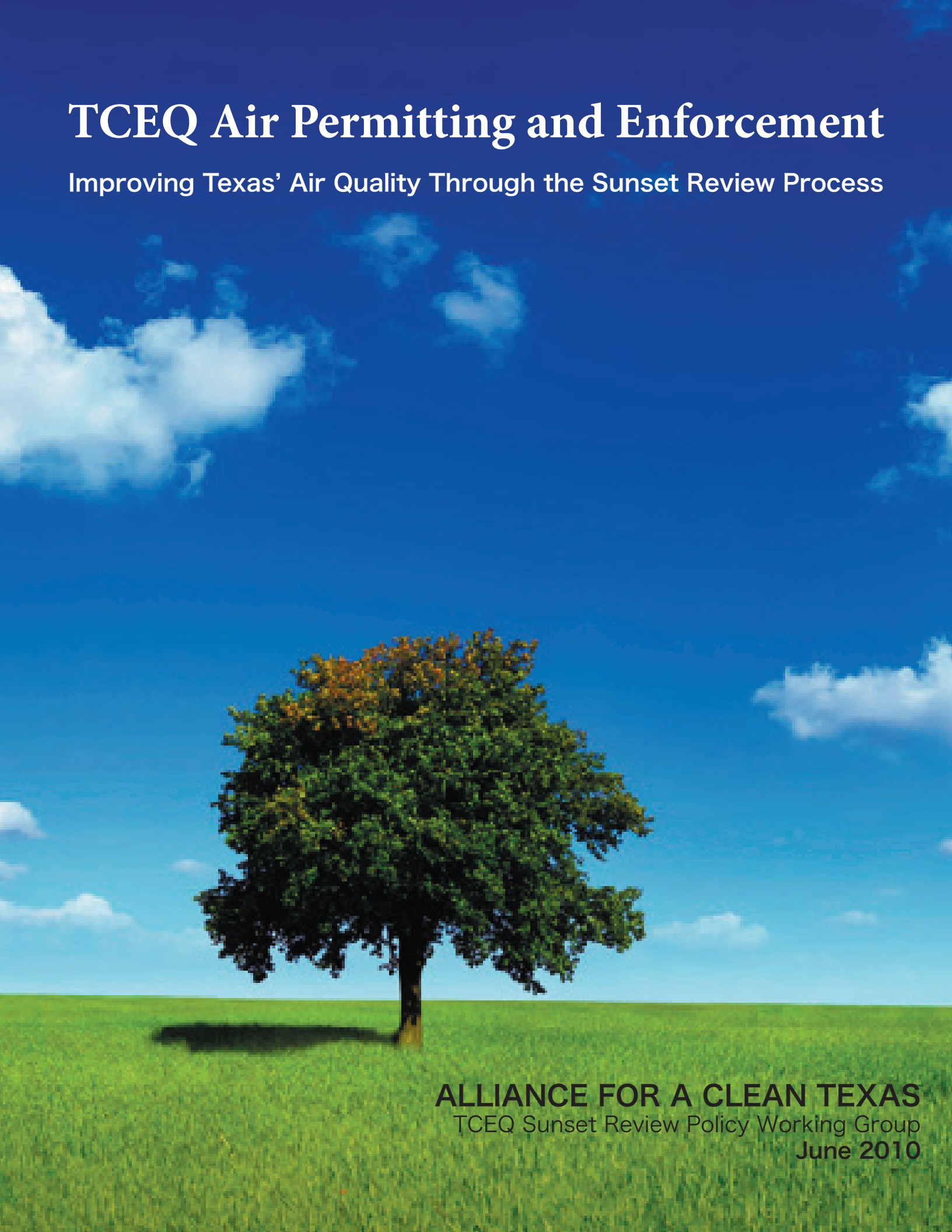
TCEQ Air Permitting and Enforcement

Improving Texas' Air Quality Through the Sunset Review Process



ALLIANCE FOR A CLEAN TEXAS
TCEQ Sunset Review Policy Working Group
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Alliance For A Clean Texas (ACT) is an alliance of environmental, public interest, consumer rights and religious organizations dedicated to improving public health, quality of life and the environment in Texas by working for change at the regulatory and legislative levels.

This paper was produced by the ACT TCEQ Sunset Review Policy Working Group and Air Alliance Houston.

ACT TCEQ Sunset Review Policy Working Group

Eric Allmon, *Law Offices of Lowerre, Frederick, Perales & Allmon*
Ramon Alvarez, Ph.D., *Environmental Defense Fund*
Erin Boeke Burke, *Texas Impact*
Elena Craft, Ph.D., *Environmental Defense Fund*
Karen Hadden, *SEED*
Ilan Levin, *Environmental Integrity Project*
Rick Lowerre, *Law Offices of Lowerre, Frederick, Perales & Allmon*
Christina Mann, *Environmental Integrity Project*
Cyrus Reed, Ph.D., *Sierra Club, Lone Star Chapter*
Robin Schneider, *Texas Campaign for the Environment*
Tom "Smitty" Smith, *Public Citizen*
Larry Soward, *Air Alliance Houston*
Matthew Tejada, Ph.D., *Air Alliance Houston*

For further information on permitting, please contact
Ilan Levin *ilevin@environmentalintegrity.org*
Larry Soward *lsoward@swbell.net*

For further information on enforcement, please contact
Larry Soward *lsoward@swbell.net*
Matthew Tejada *tejada@airalliancehouston.org*

Towards a Clean Texas

On its surface, Texas' air quality is an issue so intricate in its detail and so sensitive to our fickle Texas weather as to confound even the most committed observer. Our state environmental agency, the Texas Commission on Environmental Quality (TCEQ), is tasked with not only understanding our state's air but with regulating it to ensure that its quality does not pose a threat to human health or environmental integrity. This regulation entails an enormous effort that includes air monitoring, health advisories, toxicological sampling and air modeling research. The foundation of air quality regulation in Texas as it is in any other state, however, is permitting and the effective enforcement of those permits.

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The current review of TCEQ by the Texas Sunset Advisory Commission provides the opportunity to both assess the agency's overall effectiveness at regulating air quality and to identify potential improvements. This review could hardly have been more timely. The state of Texas is at present beset by more environmental challenges than at possibly any other time in its history. From chronic toxic air pollution in residential areas to dwindling water resources, a growing population's constant encroachment on critical habitat to the nearly overwhelming task of tackling global climate change – the work before our state is immense and requires the swiftest of action.

The accumulation of these environmental challenges, however, should not be taken to indicate that our state environmental agency has been totally incapable of rising to meet these challenges. Over the past decade the TCEQ has achieved a number of important environmental victories in some arenas while it has also exhibited an almost trail-blazing progressiveness in others. Examples of these include innovative funding programs to reduce NOx and Particulate Matter emissions from diesel engines in ozone non-attainment areas to use of the newest emissions monitoring and measuring technologies for major industrial facilities.

There are, in fact, likely very few current challenges with which the TCEQ should not be able to effectively grapple given its financial resources and statutory authorities. For a mixture of reasons, however, our state agency at times seems incapable of meeting many challenges in a straightforward and efficient enough manner to effectively protect the health of our citizens and the environmental integrity of our state's natural resources. The TCEQ will continue to fight an uphill battle against such existing and future challenges until it creates an air permitting

program that is reasonable and efficient and an enforcement structure that is transparent and fair.

Alliance for a Clean Texas' (ACT) goal is to provide the Sunset Commission useful insight into TCEQ throughout the review process. As a coalition of environmental and other public interest organizations, our guiding principle is that TCEQ should be as responsive to and inclusive of the public's needs and concerns as it is to any other stakeholder.

We share TCEQ's goal of "clean air, clean water, and the safe management of waste" and welcome the current Sunset review as an opportunity to achieve this goal more effectively and reliably.

Our guiding principle throughout the Sunset review process is to enhance TCEQ's ability to serve the needs of the 24 million Texans who currently rely on the agency to protect their health and their environment. We share TCEQ's goal of "clean air, clean water, and the safe management of waste" and welcome the current Sunset review as an opportunity to achieve this goal more effectively and more reliably.

This paper takes on the issue which consumes the vast majority of TCEQ's time and efforts – air quality. Subsequent papers will be devoted to other areas such as water quality, governance and waste management.

As part of the Sunset review process, agencies are asked to identify and discuss policy issues in a Self Evaluation Report (SER). TCEQ identified eight policy issues in its SER. Five of those eight coincide with issues presented and discussed in this paper.

SER Issue 1: Should the legislature consider revising the state's air permitting process?

SER Issue 2: Should the effectiveness of the current standard for evaluating compliance history in the TCEQ's permitting and enforcement procedures be evaluated?

SER Issue 4: Does the TCEQ's current enforcement authority allow for the expanded use of incentives and innovative projects to achieve compliance, as well as sufficient deterrence to protect the environment?

SER Issue 5: How should the agency use monitoring activities in its regulatory processes?

SER Issue 6: Are there any additional avenues, including technological advances, that should be considered to enhance the public's participation in the TCEQ's regulatory activities?

Rather than answering each of these issues specifically, this paper groups the identified issues and recommended solutions into the two broad programmatic areas which underlie the majority of TCEQ's regulatory authority: air permitting and air enforcement.

Our expertise in regulatory processes, coupled with our work with and on behalf of organizations and individuals around the state, provides a unique focus on the public's role in environmental and public health protection. We hope these recommendations are adopted as the best path forward for the agency charged with protecting so much that is precious to our state.

Issues and Findings

Air Permitting Issue 1
The applicability and use of Standard Permits (SPs) is too broad, appropriate measures to promote public notice and opportunity to comment on a facility's use of SPs are lacking.

Air Permitting Issue 2
The applicability and use of Permits by Rule (PBRs) is too broad, appropriate measures to promote public notice and opportunity to comment on a facility's use of PBRs are lacking.

Air Permitting Issue 3
TCEQ policy not to impose additional monitoring requirements in permits unless requested or agreed to by the applicant/permittee has inhibited the ability to accurately monitor all emissions at a site, thus resulting in an inaccurate and incomplete emissions inventory.

Air Permitting Issue 4
TCEQ policy not to impose new and/or more stringent conditions in permit amendment and renewal requests unless agreed to by the applicant/permittee has allowed the continued operation of facilities without consideration of technology developments or changed circumstances.

Air Permitting Issue 5
More statutory flexibility allowing the TCEQ to hold a hearing on an air permit amendment, modification or renewal for good cause is needed.

Air Permitting Issue 6
The lack of clear authority to deny an air permit for good cause is problematic.

Air Permitting Issue 7
Current statutory authority allowing a qualified facility to make physical and operational changes without obtaining a permit or other approval from the TCEQ inhibits, if not eliminates, public notice and opportunity to comment on the requested changes.

Air Permitting Issue 8
Current processes relating to permit alterations do not include appropriate measures

to promote public notice and opportunity to comment on all permit alterations and modifications.

Air Permitting Issue 9

Flexible Permits as currently issued do not meet applicable federal permitting requirements, and are not enforceable as an EPA-approved SIP component.

Air Permitting Issue 10

Failure to analyze the cumulative impacts, or potential impacts, of new or expanded pollution emissions on the overall air quality, public health and property within an airshed does not afford the required demonstration that any new major source of air pollution will not cause or contribute to a violation of any NAAQS.

Air Permitting Issue 11

The Air Pollutant Watch List has not been adopted as enforceable standards in rules.

Air Permitting Issue 12

The Effects Screening Levels have not been adopted as enforceable standards in rules.

Air Permitting Issue 13

All parameters, provisions and conditions in air permits are not clear, understandable, measurable, and easily capable of determining compliance.

Air Permitting Issue 14

All activities intended to effectuate a specific development/building plan or prepare the site for a specific facility are not included in the determination of "start of construction" for air permitting purposes.

General Enforcement Issue 1

The current statutory caps on administrative penalties are problematic in several specific enforcement situations and/or penalty components.

General Enforcement Issue 2

TCEQ's current Enforcement Initiation Criteria (EIC) do not require initiation of enforcement action for all violations.

General Enforcement Issue 3

The scope of the current Field Citation Program should be expanded to cover other programs or other violations to help promote quick on-site resolution of clear-cut violations and corrective actions with a specified, reduced penalty.

General Enforcement Issue 4
Despite clear statutory authority otherwise, the TCEQ does not revoke or suspend permits, licenses, certificates, registrations even when warranted in enforcement actions.

General Enforcement Issue 5
Additional or enhanced policies/procedures could be implemented to help expedite the handling of enforcement cases.

General Enforcement Issue 6
Current statutory and regulatory limitations on authorized uses of SEP funding are problematic when applied to local governmental entities.

General Enforcement Issue 7
The TCEQ's current repeat-violator definition is overly complex and confusing.

Penalty Policy Issue 1
The TCEQ Penalty Policy has not been adopted as a rule and some policies that are regularly and routinely utilized in penalty determination/assessment arise outside that document.

Penalty Policy Issue 2
Should separate media-specific penalty policies be adopted.

Penalty Policy Issue 3
Incorporating standard penalties into the Penalty Policy could help expedite the handling of enforcement cases.

Penalty Policy Issue 4
Penalties calculated pursuant to the Penalty Policy are not high enough to accurately reflect the environmental harm or human health effects from a violation, and are not effective to deter future noncompliance.

Penalty Policy Issue 5
Under the current penalty policy, consideration of the economic benefit resulting from noncompliance and any resulting adjustment of a penalty does not adequately account for the economic benefit received by the violator and/or provide an appropriate deterrent effect.

Penalty Policy Issue 6
A better methodology for determining the number of penalty events than the one currently expressed in the TCEQ's Penalty Policy is needed.

Penalty Policy Issue 7

Calculating a penalty for multiple permit parameter violations only on the basis of a single event, even when that event is significant and severe and occurs over a very short duration, prevents the calculated/assessed penalty from being an amount adequate to address the particular violation(s) and/or provide an appropriate deterrent effect, given the daily statutory penalty caps.

Penalty Policy Issue 8

Should the current policies/practices relating to financial inability to pay be revised.

Penalty Policy Issue 9

An application for a permit, amendment or renewal should not be processed if the applicant owes fees or penalties.

Penalty Policy Issue 10

The TCEQ has no statutory authority to assess interest on delinquent penalties or penalty payment plans.

Compliance History Issue

The current compliance history formula is not required by statute and is too complex.

TCEQ Air Permitting

Introduction

The TCEQ implements and enforces air quality permitting in the state pursuant to authority granted by the Texas Clean Air Act (TCAA), found in Texas Health & Safety Code, Chapter 382, as well as through authority delegated to it by the EPA based on the approved State Implementation Plan ("SIP"), to implement provisions of the Federal Clean Air Act (FCAA) relating to all federally regulated air pollutants in Texas. The TCEQ permits approximately 1,700 major air emissions sources in Texas through two air permitting programs: New Source Review (NSR) permitsauthorize the construction or modification of a facility; and Title V Federal Operating permits authorize continued operation of existing facilities. All major sources of air pollution must obtain both a preconstruction NSR and an Operating permit.

Under this delegation, the EPA retains oversight over Texas' implementation and enforcement of federal requirements, and can impose sanctions against the state for failure to comply with the approved SIP and federal requirements. The EPA is entitled to not only review and comment on individual air permits, but also to comment on proposed permitting rules during their development and adoption. Certain new TCEQ rules must be submitted to the EPA for approval to be incorporated into the SIP. Not all TCEQ air permitting rules are required to be approved by EPA. However, where a state statute or rule deals with a federal requirement, federal law mandates that TCEQ must demonstrate that the new rule does not circumvent or backslide from existing federal law and rules.

Through this process, the EPA approved the original Texas NSR permitting program and numerous updates to it over the years. However, the EPA has not approved significant portions of various air permitting rules submitted to it since 1993 as revisions to the SIP, thus creating what's known as a "SIP gap" --- the differences between what is enforceable by the TCEQ and what is enforceable by the EPA under the approved SIP.

A SIP gap occurs during the period between the effective date of the TCEQ's adopted rules and the date the EPA approves those actions as a revision to the SIP. In settlement of a lawsuit relating to its failure to act on approximately 25 rule packages the TCEQ had submitted for SIP approval since 1993, the EPA agreed to a schedule to eliminate the SIP gap. During the course of meeting its settlement obligations, the EPA formally notified the TCEQ that a number of components of pending NSR permitting rules are not approvable as part of the SIP because they are not fully compliant with federal law and regulations.

Environmental groups have also raised numerous programmatic issues that remain unresolved, including: TCEQ issues permits that are not part of the SIP-approved NSR air permitting program; some TCEQ rules and policies do not assure compliance with the FCAA; and TCEQ is failing to issue Operating permits that comply with federal law. Environmental groups have also petitioned EPA to exercise stricter oversight in Texas, to prohibit construction of new major sources that do not meet minimum federal NSR permitting requirements; and to limit the use of Flexible Permits, permits-by-rule (PBRs), and standard permits that may allow circumvention of federal standards and lack meaningful reporting or monitoring to ensure that public health is protected.

In addition to these very significant NSR- and Operating permit-related issues, a number of other concerns or issues exist relating to the general effectiveness and enforceability of air permits and other authorizations issued by the TCEQ, and the flexibility which the TCEQ has in determining and addressing air permit issues.

To this end, this paper presents a number of issues, along with recommendations to address those issues, that are intended to provide the TCEQ more authority where needed, more flexibility where appropriate, and more clarity in its roles and responsibilities in air permitting. Collectively, the recommendations presented herein would result in important improvements to the TCEQ's air permitting program, and help address the SIP-related issues. Several recommendations would make the permitting program stronger by making the process more predictable, more effective and clearer. Some recommendations would more specifically tie permitting requirements to emission sources, and afford greater protection to the environment and public health. All are intended to help supplement or enhance TCEQ's well-established air permitting program. Depending upon the specific issue and recommendation, implementation may require anything from an operational or policy change within TCEQ up to a statutory change followed by a rule-making process and resulting appropriate policy and operational changes.

The recommendations presented herein are summarized as follows:

- Restrict or clarify the applicability of Standard Permits (SPs) and Permits by Rule (PBRs), and implement appropriate measures to promote public notice and opportunity to comment on a facility's use of SPs and/or PBRs
- Authorize the imposition of additional monitoring requirements in permits under appropriate circumstances
- Authorize the imposition of different and/or more stringent conditions upon renewal or amendment of an air permit under certain appropriate circumstances
- Authorize a hearing on an air permit amendment, modification or renewal for any good cause determined
- Authorize the denial of an air permit renewal under certain appropriate circumstances
- Repeal the statutory provision allowing a qualified facility to make physical and operational changes without obtaining a permit or other approval from the TCEQ
- Implement appropriate measures to promote public notice and opportunity to

comment on all permit alterations and modifications

- Require flexible permit program to be limited to minor NSR permits; be as stringent as any applicable federal permitting requirements
- Require the evaluation and consideration of the cumulative effects on ambient air quality, public health and property from new or expanded pollution emissions under certain appropriate circumstances
- Revise the current Air Pollutant Watch List (APWL) and Effects Screening Levels (ESL) processes and require that they be adopted as enforceable standards in rules
- Implement appropriate measures to ensure that all parameters, provisions and conditions in air permits be clear, understandable, measurable, and easily capable of determining compliance
- Include all activities intended to effectuate a specific development/building plan or prepare the site for a specific facility when determining "start of construction" for air permitting purposes

Overview of Texas Air Permitting Program

The main objective of the TCEQ Air Permits Division is to review and authorize air applications and registrations for facilities that, when operational, would emit contaminants into the air. This objective is met through two air permitting programs: **New Source Review (NSR) Permits** and **Title V Federal Operating Permits**. The NSR Permits Program has a major and a minor component. The term "major" is used to determine the applicability of federal (or major) NSR and Title V and is based on a stationary source's annual potential to emit a federally regulated pollutant. The state's "minor" NSR program applies to all facilities that emit pollutants at levels less than a major source.

The NSR Permit Program requires stationary sources of air pollution to obtain authorization before construction or alteration of a facility. For "major" NSR facilities, the authorization types include a Prevention of Significant Deterioration (PSD) permit and a Nonattainment (NA) permit. Several types of "minor" NSR authorizations are available, and a source's facilities may be able to qualify for more than one type under the NSR permits program.

Title V refers to the section of the FCAA that requires this type of permit. The Title V Operating Permit Program requires major sources and certain federally identified minor sources to obtain a permit that consolidates all applicable air requirements in a single document. A Title V permit grants a source permission to operate. Note: Currently, there are 52,000 active NSR permits and authorizations at 28,000 sites. In the Title V Program, there are currently 500 General Operating Permits (GOPs) and 1,100 Site Operating Permits (SOPs) at 1,400 sites.

NSR Permits Program

The NSR Permits Program requires stationary sources of air pollution to obtain permits

before construction begins. The NSR is also referred to as construction permitting or preconstruction permitting. Under the TCAA, the NSR program addresses all contaminants emitted from a facility, including those pollutants for which there is a national ambient air quality standard (NAAQS) and precursors to the formation of identified pollutants, if applicable.

Note: The TCEQ has issued guidelines as to what is considered "start of construction." "Construction" is broadly interpreted as anything other than site clearance or site preparation. Equipment may be received at a plant site and stored provided no attempt is made to assemble the equipment or to connect the equipment into any electrical, plumbing, or other utility system. Portable equipment such as hot mix asphalt plants and rock crushers may be placed on the property provided no work is done to assemble or erect the equipment. All work such as excavation, form erection, or steel-laying pertaining to foundations upon which permit units will rest shall be considered construction. For permit units not requiring a concrete foundation, the erection or construction of associated items like earthen dams, placement of piling, soil stabilization, storage tank fills, or retaining structures shall be considered construction, and will NOT be allowed without prior receipt of the construction permit. Land clearing, soil load bearing tests, leveling of the area, sewer and utility lines, road building, power line installation, fencing, construction shack building, etc., are considered "site clearance/ preparation." However, once the soil and site are ready for foundations, the first excavation into the readied soil is "start of construction."

Primary NSR Authorizations:
Before work begins, a person who plans to construct a new facility or to modify an existing facility must satisfy the criteria of a streamlined authorization for a de minimis facility or source, a permit by rule, or a standard permit or obtain a case-by-case permit (minor NSR permit or federal NSR PSD or NA permit).

De Minimis Facilities/Sources. De minimis emissions do not require a registration, authorization, or certification before construction. To qualify, emissions must either: (1) meet the conditions specified by TCEQ rule; (2) be from a source category type listed on TCEQ's website as de minimis; or (3) be declared de minimis by the TCEQ ED.

Permit-by-Rule (PBR) Claims and Registrations. Permits by rule allow facilities to emit air contaminants below certain thresholds without obtaining and individual permit. Some PBRs require registration. Facilities must meet all conditions specified by TCEQ rules for PBR requirements. There is no case-¬by-case review for PBRs. A PBR cannot be used to authorize emissions that must undergo PSD or NA review. The public can participate in PBR rule development and adoption, but there is no public participation at the time a facility claims a PBR.

Standard Permit (SP) Claims and Registrations. If an applicant cannot claim a PBR for a facility, the facility may qualify for a SP. Standard permits are tailored to industry type. Facilities must meet all conditions specified by the SP, and there is no case-by-case review

for SPs. A SP cannot be used to authorize emissions that must undergo PSD or NA review. The public can participate in the SP adoption process, but there is no public participation at the time a facility claims a PBR.

New Construction or Modification Permit. Applicants with facilities that do not qualify for PBRs or SPs can submit an NSR permit application. New construction and modifications to extant facilities are also known as case-by-case permits for major or minor sources. Applicants can negotiate a best available control technology (BACT) and emission limit, which is not allowed for PBRs and SPs. An applicant must demonstrate compliance with all applicable rules and regulations and acceptability of off-property health impacts due to permitted emissions. The public participates in the permitting process and has the opportunity to request meetings and hearings on individual applications. A minor NSR construction permit must be renewed every 10 years. .

PSD Permit. A PSD permit is a federal NSR permit required if an applicant wants to locate in an area that meets NAAQS and permitted emissions would exceed federal significant emission levels for regulated pollutants. Applicants must identify/demonstrate BACT and demonstrate compliance with all applicable rules and regulations and acceptable off-property impacts due to permitted emissions. The public participates in the permitting process and has the opportunity to request meetings and hearings. A PSD permit does not expire but can be modified. If a PSD permit is required, the authorization is separate, based on federal requirements, and PSD, NA and minor NSR permit authorizations can cover a facility at the same time.

Nonattainment Permit. An NA permit is a federal NSR permit required if an applicant wants to locate a source of emissions to an area that does not meet NAAQS and permitted emissions would exceed federal significant emission levels for that area. Unlike PSD permits, NA permitting requires the installation of lowest achievable emissions rate [LAER] control technology and the acquisition of emission reductions to offset the proposed emissions increases. [LAER is that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the EPA, and that reflects: (a) the most stringent emission limitation that is contained in any approved SIP for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or (b) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.]. The public participates in the permitting process and has the opportunity to request meetings and hearings. An NA permit does not expire but can be modified. If an NA permit is required, the authorization is separate, based on federal requirements, and NA, PSD and minor NSR permit authorizations can exist at the same time.

Other NSR Authorizations:
112(g) Permit. A 112(g) permit is a permit that establishes federally enforceable case-by-case maximum achievable control technology (MACT) emission limitations and controls for hazardous air pollutants (HAPs) at a major source. [MACT is the emission

limitation which is not less stringent than the emission limitation achieved in practice by the best controlled similar source, and which reflects the maximum degree of reduction in emissions that the ED, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable by the constructed or reconstructed major source.]. Under FCAA 112(g), relating to HAPs, the division must determine MACT standards for major sources of HAPs for which a standard has not been promulgated or has been vacated by the courts. These permits are often incorporated as part of a federal NSR permit.

Plant-wide Applicability Unit (PAL) Permit. Major source permit applicants have the option of establishing a federal PAL for all facilities at a site or a stand-alone process. The site-wide emission caps provide facilities with greater flexibility to modernize operations without subjecting the proposed project to all demonstrations required by federal NSR. A PAL must be renewed every 10 years.

Flexible Permit. A flexible permit is a NSR construction or modification permit that covers emissions from many components/units of a facility. This type of authorization allows an owner or operator more flexibility in managing operations by staying under an overall emissions cap or individual emission limitation. [Note: the differences between flexible permits and PALs are discussed in detail below under Issues/Options relating to flexible permits.]

Maintenance; Startup, Shutdown Permit (MSS). An MSS permit is a construction or modification permit for major or minor NSR that establishes emission limitations for planned MSS sources or activities.

Permit Amendment. After a permit is issued, the permit holder may change the manner in which the facility is operated. An amendment consists of a change in method of control, change in character of emissions; or increase in actual or allowable emissions. Amendments go through the same review process as an NSR permit for a new facility, which may include public participation if the emissions increases exceed the de minimis criteria defined by TCEQ rule and change in character.

Changes to a Qualified Facility. The 74th Texas Legislature [1995] passed SB 1126 [See Appendix 1] which gave qualified facilities the flexibility to make physical and operational changes without a permit or permit amendment. All facilities involved must be qualified at the time of the change. A facility is qualified if it had a permit or amendment issued within 120 months before the change occurred or it is exempted from permitting requirements, or has controls that are at least as effective as 10-year old BACT. Qualified facilities can make changes without a permit or amendment if there are no net increases in emissions, or emissions of new contaminants. Facilities can consider decreases in emissions from other qualified facilities at the same site when determining whether there has been a net increase. When modifications to an existing facility meet these criteria, the existing permit can be modified through an expedited process, which is less cumbersome

than other methods for changing the conditions of the permit. SB 1126 cannot be used to authorize new facilities. SB 1126 authorization requires notification, documentation, and recordkeeping. Notification may be pre-change, post-change or on an annual basis, depending on the type of change made.

Title V Federal Operating Permit Program

The Title V Operating Permit Program requires major sources and certain minor sources to obtain a permit that consolidates all applicable air requirements in a single document. A Title V permit grants a source permission to operate. There are two types of operating permits:

General Operating Permit (GOP). The GOP is a streamlined Title V authorization that is designed to cover numerous similar sources. An owner or operator can apply for an authorization to operate under a GOP. The GOP is similar to an NSR SP as it contains uniform conditions that apply to all sources in a defined class. Applicants cannot claim a GOP if they are subject to NSR case-by-case construction or modification permits. The public participates in GOP adoption.

Site Operating Permit (SOP). The SOP documents all requirements that apply at a site, or an area for large sites. The public participates in the process and is notified through public notice in newspapers and sign postings, and has the opportunity to request meetings and petition the Environmental Protection Agency (EPA). Applicants must certify compliance with the SOP annually.

After initial permit issuance, changes at a site or in applicable requirements may result in the need to revise the Title V permit. Changes at a site may include addition or removal of emission sources, operational changes, or changes to existing monitoring, reporting, recordkeeping, and testing requirements identified in the permit. The public participates in the process and is notified through public announcement at the TCEQ Web site or public notice in newspapers and sign postings, and has the opportunity to request meetings. Also, the public can petition the EPA for significant revisions and renewals.

Air Permitting Process

Once an air permit application is deemed administratively complete, it is transferred to one of five permitting sections listed below for the technical review to determine whether the operations of a proposed facility will comply with all applicable federal and state rules and regulations and not adversely impact the public health or welfare.

During the technical review process, the permit reviewer: checks compliance history and regional site review comments; identifies sources; reviews emission characterization; quantifies emissions; determines federal applicability; determines BACT; determines the applicability of federal and state regulatory limits; evaluates impacts on the public health and welfare; and, drafts the permit. In addition, the technical review includes, as applicable: first public notice verification; second public notice preparation and

verification; meetings with the public; and, response to comments from public notices, meetings, and hearings.

The *Rule Registrations Section (R&RS)* conducts the technical review for PBRs and SPs. For SPs and those PBRs that require notice to TCEQ, reviewers ensure that each PBR claim meets all of the general conditions and specific conditions of the PBR or that the facility meets the general and specific conditions of the SP. The reviewer checks that the registrant has included necessary emission calculations.

The R&RS also conducts the technical review for Title V general operating permits. The process for granting an authorization to operate is streamlined since these authorizations are not subject to individual public notice and the permit requirements are predetermined. The permit reviewer must determine if the application meets the qualification criteria, verify site-wide and unit-specific requirements, and ensure that the application has proper certification.

The *NSR Permits Sections (Chemical, Combustion and Coatings; and Mechanical, Agricultural and Construction)* conduct the technical review for NSR case-by-case permits. This type of review is more complicated than one of the streamlined permit authorizations. In addition to new construction and modification to existing facilities, other activities requiring NSR authorization include changes in application representations and renewal of existing authorizations. The NSR Permits Sections also conduct the technical review for major sources or major modifications, which are similar to a minor NSR case-by-case permit review but can be more complex.

PSD Permits. PSD permitting applies to major sources and major modifications in attainment areas. A permit reviewer determines applicability of federal regulatory limits; evaluates BACT; and evaluates impacts through an air quality analysis to demonstrate that permitted emissions will not cause or contribute to an exceedance of an NAAQS or PSD increment concentration. The effects to visibility, soil and vegetation, and any adverse impacts to Class I areas must also be determined. The permit reviewer also develops the preliminary determination summary of key portions of the technical review, part of the second public notice package.

NA Permits. Nonattainment permitting applies to major sources and major modifications in nonattainment areas. The permit reviewer determines applicability of federal limits based on the specific nonattainment county designation; evaluates lowest achievable emission rate controls, which are usually more stringent than BACT; and oversees the acquisition of emission reductions to offset the proposed emissions increases.

The *Operating Permits Section (OPS)* conducts the technical review for Title V site operating permits. Permit reviewers evaluate Title V applications and develop permits that codify all applicable state and federal requirements for all of the emission units at a permitted site or area. The SOP includes all applicable requirements including emissions limits and monitoring, record keeping, and reporting. The permit also requires that the

source report compliance status with respect to permit conditions to the TCEQ. The permit reviewer also develops the statement of basis, a document that explains the terms of the permit and is part of the public notice package. In addition, the technical review includes public notice verification and response to comments, as applicable.

EPA's Recent Review of TCEQ Air Permitting

On September 8, 2009, EPA announced that it is proposing to disapprove several key aspects of the Texas air permitting program that do not meet FCAA requirements followed by other states. Also, on November 26, 2008, EPA proposed disapproval of the "public participation" component of the air permitting program as related to air permits for new and modified sources.

Citing that Texas's air permitting program should be transparent and understandable to the public, protective of air quality, and expressive of clear and consistent requirements, EPA stated that its notices of proposed disapproval make clear its view that significant changes are necessary for compliance with the FCAA. Under the FCAA, all states must develop plans approved by EPA for meeting federal requirements to achieve and maintain attainment of the NAAQS and to protect public health. Since EPA approved Texas's major clean-air permitting plan in 1992, the state has submitted over 30 regulatory changes to the EPA-approved plan. The disapproval proposals being made by EPA represent some of its main concerns with the state's air-permitting program and the need to more effectively work toward improved air quality as required by law.

EPA is proposing disapproval of Texas's air permitting program elements, including: public participation; modification of existing qualified facilities; the definition for best available control technology (BACT) and two subparagraphs under the definition for modification of existing facility; PALs; and, flexible permits. EPA determined that these components do not meet the FCAA and EPA's NSR regulations, and therefore, are not fully approvable. EPA also determined that the deficient provisions are not separable from the remainder of the relevant rules.

As to **public participation,** EPA published its formal notice of disapproval of the "public participation" component of the air permitting program as related to air permits for new and modified sources in the Federal Register on November 26, 2008. [See Vol. 73, No. 229, Page 72001 et. seq.]. In doing so, EPA stated that Texas's program provided inadequate opportunities for the public to review permit decisions, as compared with public participation opportunities provided by other states. The specific concerns and objections to this component of the air permitting program are fully and extensively set forth in the Federal Register notice cited above. This proposed disapproval addresses State Implementation Plan (SIP) revisions to TCEQ's public participation rules for new and modified sources submitted to EPA for approval on December 15, 1995, July 22, 1998 and October 25, 1999 ("revised rules"). EPA's primary concerns with TCEQ's submission are discussed in section IV of the November 26, 2008 preamble under the following headings: Minor NSR Public Participation; Projects Subject to Prevention of Significant

Deterioration (PSD); Project for a Plant-wide Applicability Limit (PAL) and Project for a Flexible Permit.

The TCEQ submitted comments on January 27, 2009, highlighting that its rules currently require notice of draft PSD permit applications, opportunity to request a meeting and preparation of a response to comment prior to approval of a permit application. [See Appendix 2]. TCEQ has agreed to initiate rulemaking to address EPA's public participation concerns relating to Minor NSR notice. On December 9, 2009, the Commission proposed changes to the public notice/public participation rules for air quality permits. These proposed new and amended rules were published in the January 15, 2010 edition of the Texas Register [See Vol. 35, No. 3], and consideration of final adoption is expected June 2, 2010, with an effective date of June 24, 2010.

As to **flexible permits**, **qualified facilities** and **NSR Reform** issues, EPA published three formal notices of disapproval in the Federal Register on September 23, 2009. [See Vol. 74, No. 183, Pages 48450 - 48495]. Of particular concern to EPA is whether the use of flexible permits and changes at qualified facilities circumvents Major NSR SIP requirements. The specific concerns and objections to these air permitting components are fully and extensively set forth in the Federal Register notices. As background, TCEQ submitted the initial flexible permit rules to EPA for SIP approval on November 29, 1994; Qualified Facilities on March 13, 1996; and NSR Reform on June 10, 2005 and February 1, 2006.

On September 25, 2007, EPA issued Fair Notice letters to flexible permit holders advising that permits issued under flexible permit rules reflect Texas state requirements and not necessarily federally applicable requirements. Accordingly, EPA has indicated that flexible permit holders must continue to comply with applicable federal requirements. Similarly, because pending qualified facilities rules are not SIP approved, changes sought under this program likewise reflect only Texas state requirements. The TCEQ has notified the regulated community, via website notice, that until such time as it adopts revised rules, submits them to EPA for SIP review and receives EPA SIP approval, any action taken on pending applications which are implicated in the Federal Register notices may result in additional permitting requirements or enforcement in the future because of the uncertainty of EPA action on the proposed Federal Register disapproval notices.

On November 23, 2009, the TCEQ submitted its formal responses to the EPA disapproval notices relating to flexible permits, qualified facilities, and NSR Reform. [See Appendices 3,4, 5]. The TCEQ generally reiterated that there is no federal circumvention because these programs currently include a federal applicability review, and stated that it will make this explicit in rule. Note: EPA filed detailed responses to TCEQ's comments submitted on October 23, 2009, regarding qualified facility changes and flexible permits on November 12, 2009. [See Appendix 6].

The TCEQ is pursuing rulemaking projects to address the three disapproval proposals according to the following tentative schedule. In addition, the TCEQ is currently scheduled to propose rules to address the definition of PSD Best Available Control

Technology (BACT) at its January 13, 2010 Agenda.

Proposed Disapproval Component	Agenda for Proposal	Texas Register Publication Date	Agenda for Adoption	Effective Date
Qualified Facilities	03/30/10	04/15/10	09/15/10	10/07/10
BACT	01/13/10	01/29/10	06/02/10	6/24/10
Flexible Permitting	05/19/10	06/04/10	10/20/10	11/11/10
NSR Reform	08/11/10	08/27/10	01/12/11	02/03/11

Note: EPA announced that final decisions about changing the Texas air permitting program will be made under an expedited schedule agreed to in the Consent Decree and Settlement Agreement resolving the lawsuit brought by the Business Coalition for Clean Air (BCCA) Appeal Group, et al. [See Notice of the Propose Consent Decree and Settlement Agreement at 74 Fed. Reg. 38, 015 (July 30, 2009)]. Under the settlement, EPA was required to issue its final decision on the public participation proposal by November 30, 2009. Under the settlement, EPA has less than one year to issue its final decisions on the three remaining proposals outlined above, finalizing the qualified facilities revision, flexible permit revision, and NSR Reform revision no later than March 2010, June 2010, and August 2010, respectively. EPA is required to complete action on all 30 of the state's proposed regulatory changes by December 31, 2013.

Air Permitting Issue 1

The applicability and use of Standard Permits (SPs) is too broad, appropriate measures to promote public notice and opportunity to comment on a facility's use of SPs are lacking.

The TCEQ is authorized to issue standard permits (SPs), which apply broadly to facilities within a particular source type. Sec. 382.051(b) of the Health & Safety Code expressly authorizes the TCEQ to issue a general permit for numerous similar sources subject to Section 382.054. Sec. 382.05195 of the Health & Safety Code specifically authorizes the TCEQ to issue a SP for new or existing similar facilities if the commission finds that: (1) the SP is enforceable; (2) the commission can adequately monitor compliance with the terms of the SP; and (3) the facilities will use control technology at least as effective as that described in Health & Safety Code Section 382.0518.

If a facility meets all of the conditions of a SP, it can qualify to use the SP to authorize its emissions. There is no case-by-case review for SPs. A SP cannot be used to authorize emissions that must undergo PSD or NA review. The public can participate in the SP adoption process only through the opportunity to comment on the published proposed SP, but there is no public participation at the time a facility claims a PBR.

The TCEQ is required to publish notice of a proposed SP in the Texas Register and in one or more statewide or regional newspapers designated by rule that will, in the commission's judgment, provide reasonable notice throughout the state. If the SP is to be effective for only part of the state, the notice shall be published in a newspaper of general circulation in the area to be affected. The TCEQ by rule may require additional notice to be given. The notice must include an invitation for written comments by the public to the TCEQ regarding the proposed SP and must be published not later than the 30th day before the date the commission issues the SP. The TCEQ shall hold a public meeting to provide an additional opportunity for public comment, and shall give notice of the public meeting not later than the 30th day before the date of the meeting. If the commission receives public comment related to the issuance of a SP, the commission shall issue a written response to the comments at the same time the commission issues or denies the SP. The response must be made available to the public, and the commission shall mail the response to each person who made a comment. The commission makes a copy of any issued SP and response to comments available to the public for inspection at the commission's Office of Permitting and Registration in its Austin office, and also in the appropriate regional offices.

The commission by rule shall establish procedures for the amendment of a SP and for

an application for, the issuance of, the renewal of, and the revocation of an authorization to use a SP. The adoption or amendment of a SP or the issuance, renewal, or revocation of an authorization to use a SP is not subject to Chapter 2001, Government Code [the Administrative Procedure Act]. A facility authorized to emit air contaminants under a SP shall comply with an amendment to the SP beginning on the date the facility's authorization to use the SP is renewed or the date the commission otherwise provides. Before the date the facility is required to comply with the amendment, the SP, as it read before the amendment, applies to the facility. The commission may delegate to the executive director the authority to issue, amend, renew, or revoke an authorization to use a SP.

Pursuant to Chapter 116, Subchapter F of TCEQ rules, currently, the TCEQ has adopted SPs for: Air Quality Pollution Control Projects; Animal Carcass Incinerators; Boilers; Concrete Batch Plants with Enhanced Controls; Electric Generating Units; Municipal Solid Waste Landfills; Oil and Gas Facilities; Permanent Hot Mix Asphalt Plants; Permanent Rock and Concrete Crushers; Sawmills; Temporary Hot Mix Asphalt Plants; Temporary Rock Crushers; and Concrete Batch Plants. As of December, 2009, TCEQ is requesting public comments on seven proposed standard permits that could be used to authorize a variety of agricultural operations and proposed new standard permits for Temporary Rock Crushers and Permanent Rock and Concrete Crushers.

An owner or operator who chooses to use a SP is required to register to use a SP. The registration to use a SP is valid for a term not to exceed ten years. Registration to use a SP is required to be sent by certified mail, return receipt requested, or hand delivered, to the ED, the appropriate TCEQ regional office, and any local air pollution program with jurisdiction, before a SP can be used. The registration must be submitted on a required form and must document compliance with the requirements of TCEQ rules. Construction may begin any time after receipt of written notification from the ED that there are no objections or 45 days after receipt by the ED of the registration, whichever occurs first, except where a different time period is specified for a particular SP. A copy of the SP along with information and data sufficient to demonstrate applicability of and compliance with the SP shall be maintained in a file at the facility site and made available at the request of representatives of the ED, the EPA, or any air pollution control agency having jurisdiction.

In guidance and prior SIP actions, EPA has specified requirements for SPs. EPA has stated that, to be approvable, standard permits must: (1) be applicable only to a narrowly defined source category; (2) include specific emission limits; and (3) include specific timeframes and compliance methods. [EPA memorandum: "Guidance on Enforceability Requirements for Limiting Potential to Emit Through SIP and Section 112 Rules and General Permits" (May 21, 2008)]. Standard permits cannot be used to make site-specific determinations. Further, states must demonstrate that the issuance of the SP will not cause or contribute to a violation of air quality standards. EPA has proposed disapproval of Texas' Pollution Control Prevention Standard Permit for failure to meet these requirements.

Recommendations

Option 1: To clarify the applicability of SP, consistent with EPA requirements, SPs should: (1) be applicable only to narrowly-defined source categories; (2) include the specific emission limits applicable to all sources that may seek coverage under the SP; and (3) include specific monitoring and reporting requirements sufficient to demonstrate compliance with the SP. In addition, at the time of adoption, TCEQ should be required to demonstrate that the emissions that may be authorized pursuant to the SP will not cause or contribute to a violation of air quality standards.

Option 2: To promote public notice, a facility's registration to use a SP should be required to be posted on a publicly accessible internet Web site, and the TCEQ should be provided with the Web address link for the registration materials. The TCEQ shall post on its Web site the identity of all owners and operators filing such registration and the Web address link required.

Option 3: To promote public opportunity to comment, the public should be given at least 30 days to file written comments before a facility's registration to use a SP is considered accepted by the ED. Upon a showing of good cause, the ED may grant an additional 30 days to file comments.

Option 4: Notice of the ED's acceptance of a registration to use a SP should be posted on the TCEQ Web site. *Note: A SP is effective any time after receipt of written notification from the ED that there are no objections or 45 days after receipt by the ED of the registration, whichever occurs first, except where a different time period is specified for a particular SP.*

Option 5: The ED's acceptance of a registration to use a SP should be subject to the TCEQ's motion to overturn (MTO) process set forth in Section 50.139 of the TCEQ rules. *Note: Under current TCEQ rules [Section 50.131], air quality SPs are excluded from MTO coverage.*

Option 6: SPs should not be available to facilities with a bad compliance history and/or repeat violators.

Option 7a: All SPs covering a facility should be consolidated into the facility's site-specific [individual] permit at the first available opportunity [i.e. when the permit is amended or renewed], but no later than 5 years after the registration to use a SP. *Note: Health & Safety Code Section 382.0511 provides that the commission may consolidate into a single permit any permits, special permits, standard permits, permits by rule, or exemptions for a facility or federal source. Current TCEQ rules allow permitted facilities and processes to be modified if the changes will meet a PBR under Chapter 106 or a SP under Subchapter F, Chapter 116. The rules also require that these claims be consolidated into the permit when the permit is next amended or renewed. There are two different scenarios that determine when and how a PBR or SP is consolidated in the permit for that facility when the permit is amended or renewed: consolidation by reference and consolidation by incorporation. Consolidation of certain PBRs and SPs by reference is mandatory. All SPs and PBRs that directly affect the emissions of permitted facilities must, at a minimum, be referenced when*

a NSR permit is amended. If SPs and PBRs occur at the permitted site, but do not directly affect permitted facilities, consolidation is not required, but at the request of the permit holder may be consolidated by reference. Referencing will not require a BACT review but may require an impacts review based on TCEQ guidance. Consolidation of all other PBRs and SPs by incorporation is voluntary. If the permit holder requests incorporation (i.e. reauthorization under the permit), PBRs and SPs may be incorporated but will undergo BACT and impacts review based on TCEQ guidance. When incorporated into the permit, the original authorization becomes void. The incorporation of PBRs and SPs requires an amendment. [See Appendix 7].

Option 7b: All SPs covering a facility should be incorporated into the facility's site-specific [individual] permit, rather than be referenced.

Option 7c: When SPs covering a facility are consolidated into the facility's site-specific [individual] permit, they should undergo BACT and impacts review.

Option8: A facility's site-specific [individual] permit should not be allowed to be voided when the facility meets the requirements for a PBR and/or SP. [See Note below under Option 7 relating to PBRs.]

Air Permitting Issue 2

The applicability and use of Permits by Rule (PBRs) is too broad, appropriate measures to promote public notice and opportunity to comment on a facility's use of PBRs are lacking.

Permits by rule (PBRs) are similar to SPs, but are adopted through the rulemaking process rather than through the permitting process. Health and Safety Code Sec. 382.05196 states that TCEQ may adopt permits by rule "for certain types of facilities" that "will not make a significant contribution of air contaminants to the atmosphere." The PBR must "specifically define the terms and conditions" of the permit. Sec. 382.05196(a) specifically prohibits TCEQ from adopting any PBR "authorizing any facility defined as 'major' under any applicable preconstruction permitting requirements of the federal Clean Air Act (42 U.S.C. Section 7401 et seq.) or regulations adopted under that Act."

Pursuant to TCEQ rules, some PBRs require registration. To qualify for a PBR, the following general requirements must be met: total actual emissions authorized under PBR from the facility shall not exceed 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NOx); or 25 tpy of volatile organic compounds (VOC) or sulfur dioxide (SO2) or inhalable particulate matter (PM10); or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. There is no case-¬by-case review for PBRs. A PBR cannot be used to authorize emissions that must undergo PSD or NA review. The public can participate in PBR development and adoption only through the rule-making processes, but there is no public participation at the time a facility claims a PBR.

Chapter 106 of the TCEQ rules identifies certain types of facilities or changes within facilities which are eligible for coverage by air PBRs. PBRs for similar activities are grouped in a subchapter, as follows: Subchapter C: domestic and comfort heating and cooling; Subchapter D: analysis and testing; Subchapter E: aggregate and pavement; Subchapter F: animal confinement; Subchapter G: combustion; Subchapter I: manufacturing; Subchapter J: food preparation and processing; Subchapter K: General; Subchapter L: feed, fiber, and fertilizer; Subchapter M: metallurgy; Subchapter N: mixers, blenders, and packaging; Subchapter O: oil and gas; Subchapter P: plant operations; Subchapter Q: plastics and rubber; Subchapter R: service industries; Subchapter S: surface coating; Subchapter T: surface preparation; Subchapter U: tanks, storage, and loading; Subchapter V: thermal control devices; Subchapter W: turbines and engines; Subchapter X: waste processes and remediation.

Certain PBRs, including many in Subchapter K, are not source-category specific and

are used by major sources to authorize emissions at units covered by major NSR or PSD permits. Facilities use these PBRs to authorize increases in emissions that would otherwise violate the terms of their individual permits. Facilities are not limited in the number of PBRs that can be used to authorize increases in emissions. The air quality impacts of the cumulative PBR authorizations are not evaluated.
An owner or operator may certify and register the maximum emission rates from facilities permitted by rule in order to establish federally-enforceable allowable emission rates which are below the emission limitations in TCEQ rules relating to PBRs. The registration must be submitted on a required form. All representations with regard to construction plans, operating procedures, and maximum emission rates in any certified registration become conditions upon which the facility permitted by rule shall be constructed and operated. It is unlawful for any person to vary from such representation if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in an increase in the discharge of the various emissions, unless the certified registration is first revised. Certified registrations must be submitted no later than the date of operation. All certified registrations shall be maintained on-site and be provided immediately upon request by representatives of the TCEQ or any local air pollution control agency having jurisdiction over the site. Upon request, the TCEQ shall make any such records available to the public in a timely manner.

In guidance and prior SIP actions, EPA has specified requirements PBRs. EPA has stated that, to be approvable, PBRs must: (1) be applicable only to a narrowly defined source-category; (2) include specific emission limits; and (3) include specific timeframes and compliance methods. [EPA memorandum: "Guidance on Enforceability Requirements for Limiting Potential to Emit Through SIP and Section 112 Rules and General Permits" (May 21, 2008)]. PBRs cannot be used to make site-specific determinations. Further, states must demonstrate that the issuance of the PBR will not cause or contribute to a violation of air quality standards. EPA has filed comments with TCEQ stating that a PBR should only be used for small minor sources (PTE less than 100 TPY/250 TPY) and is not a vehicle for major sources to supplement emission limits or conditions in a federally enforceable permit. EPA has consistently expressed concerns about PBRs that authorize a category of emissions, such as Maintenance/Start-up/Shut-down (MSS), or that modify an existing NSR permit. These PBRs are inconsistent with the approved SIP and may serve as a circumvention of CAA requirements. [EPA letter from Jeff Robinson, EPA Region 6, Chief Air Permits Section, to Richard Hyde, TCEQ, Director Air Permits Division (May 21, 2008), p. 5].

Recommendations

Option 1: To clarify the applicability of PBRs, consistent with EPA requirements, PBRs should: (1) be applicable only to narrowly-defined source categories; (2) include the specific emission limits applicable to all sources that may seek coverage under the PBR; and (3) include specific monitoring and reporting requirements sufficient to demonstrate compliance with the PBR. PBRs should be prohibited from authorizing generic increases in emissions. In addition, at the time of adoption, TCEQ should be

required to demonstrate that the emissions that may be authorized pursuant to the PBR will not cause or contribute to a violation of air quality standards.

Option 2: To promote public notice, a facility's registration to be permitted by rule should be required to be posted on a publicly accessible internet Web site, and the TCEQ should be provided with the Web address link for the registration materials. The TCEQ shall post on its Web site the identity of all owners and operators filing such registration and the Web address link required.

Option 3: To promote public opportunity to comment, the public should be given at least 30 days to file written comments on a facility's registration to be permitted by rule.

Option 4: A facility's registration to be permitted by rule should be subject to the TCEQ's motion to overturn (MTO) process set forth in Section 50.139 of the TCEQ rules. *Note: Under current TCEQ rules [Section 50.131], air quality PBRs are excluded from MTO coverage.*

Option 5: PBRs should not be available to facilities with a bad compliance history and/or repeat violators, or to facilities that are part of a major emissions source.

Option 6a: All PBRs covering a facility should be consolidated into the facility's site-specific [individual] permit at the first available opportunity [i.e. when the permit is amended or renewed], but no later than 5 years after the registration to be permitted by rule. [See Note above under Option 7a relating to SPs.]

Option 6b: All PBRs covering a facility should be incorporated into the facility's site-specific [individual] permit, rather than be referenced.

Option 6c: When PBRs covering a facility are consolidated into the facility's site-specific [individual] permit, they should undergo BACT and impacts review.

Option 7: A facility's site-specific [individual] permit should not be allowed to be voided when the facility meets the requirements for a PBR and/or SP. *Note: Current law allows facilities to obtain any authorization for which they qualify. In some cases, facilities hold an individual, site-specific permit, but the owner/operator subsequently determines that those facilities meet the conditions of a PBR or SP. The TCEQ allows individual, site-specific permits to be voided and authorization changed to a PBR/SP under certain circumstances. If all facilities which are related to a production line or operation meet the conditions of a PBR/SP, the permit may be voided. When the PBR/SP requires registration, this action must be completed prior to the permit being voided. In no case can a facility which is part of, or related to, a particular process be claimed under a PBR/SP and deleted from a permit unless the entire process and related facilities can meet PBR/SP requirements. [See Appendix 8].*

Air Permitting Issue 3

TCEQ policy not to impose additional monitoring requirements in permits unless requested or agreed to by the applicant/permittee has inhibited the ability to accurately monitor all emissions at a site, thus resulting in an inaccurate and incomplete emissions inventory.

Health & Safety Code Section 382.016 provides that the commission may prescribe reasonable requirements for measuring and monitoring the emissions of air contaminants from a source or from an activity causing or resulting in the emission of air contaminants subject to the commission's jurisdiction. Section 382.021 authorizes the commission to prescribe the sampling methods and procedures to be used in determining violations of and compliance with the commission's rules, variances, and orders, including: ambient air sampling; stack-sampling; visual observation; or any other sampling method or procedure generally recognized in the field of air pollution control.

It has been the general practice/policy of the TCEQ to not impose additional monitoring requirements in permits unless requested or agreed to by the applicant/permittee. This practice has effectively inhibited the ability to accurately monitor all emissions at a site, whether authorized or not. It has also resulted in a less than accurate and complete emissions inventory.

Recommendations

Option 1: The TCEQ should be expressly authorized to impose additional monitoring requirements in permits in the following circumstances: (1) across-the-board; (2) if the facility is in a non-attainment area or subject to any TCEQ program which identifies areas of air quality concerns, such as APWLs, etc.; (3) if the facility is a major facility; (4) if the facility emits any pollutant of concern [e.g. ozone, APWL]; and/or (5) additional monitoring is necessary/appropriate as a matter of enforcement against the facility.

Option 2: The TCEQ should require fence-line monitoring: (1) if the facility is in a non-attainment area or is subject to any TCEQ program which identifies areas of air quality concerns, such as APWLs, etc.; (2) if the facility is a major facility; (3) if the facility emits any pollutant of concern [e.g. ozone, APWL]; and/or (4) additional monitoring is necessary/appropriate as a matter of enforcement against the facility.

Option 3: The TCEQ should require speciated monitoring for stacks, flares and other emission sources where multiple pollutants are involved.

Air Permitting Issue 4

TCEQ policy not to impose new and/or more stringent conditions in permit amendment and renewal requests unless agreed to by the applicant/permittee has allowed the continued operation of facilities without consideration of technology developments or changed circumstances.

Section 382.055 of the Health & Safety Code provides that in reviewing permit renewals, the commission may not impose conditions more stringent than the existing permit unless the commission determines more stringent conditions are necessary to avoid a condition of air pollution or to ensure compliance with other state and federal air quality control requirements. It further states that the commission can impose as a condition for renewal only those requirements the commission determines to be economically reasonable and technically practicable considering the age of the facility and the effect of its emissions on the surrounding area. In practice, these thresholds are almost never reached and permits are routinely renewed without any emissions reductions unless the applicant volunteers to do so.

Health & Safety Code Section 382.0511(b) provides that "consistent with the rules adopted under Subsection (d) and the limitations of this chapter, including limitations that apply to the modification of an existing facility, the commission may amend, revise, or modify a permit." Section 382.0541(a)(7) authorizes the commission to "reopen and revise an affected federal operating permit if:
(A) the permit has a term of three years or more remaining in order to incorporate requirements under the federal Clean Air Act (42 U.S.C. Section 7401 et seq.) adopted after the permit is issued;
(B) additional requirements become applicable to an affected source under the acid rain program;
(C) the federal operating permit contains a material mistake;
(D) inaccurate statements were made in establishing the emissions standards or other terms or conditions of the federal operating permit; or
(E) a determination is made that the permit must be reopened and revised to assure compliance with applicable requirements."

Section 305.62(d) of TCEQ rules provides that "if good cause exists, the executive director may initiate and the commission may order a major amendment, minor amendment, modification, or minor modification to a permit and the executive director may request an updated application if necessary. Good cause includes, but is not limited to:

(1) there are material and substantial changes to the permitted facility or activity which justify permit conditions that are different or absent in the existing permit;
(2) information, not available at the time of permit issuance, is received by the executive director, justifying amendment of existing permit conditions;
(3) the standards or regulations on which the permit or a permit condition was based have been changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued;
(4) an act of God, strike, flood, material shortage, or other event over which the permittee has no control and for which there is no reasonably available alternative may be determined to constitute good cause for amendment of a compliance schedule;

Notwithstanding these provisions, under current Commission policy, as well as historical policies and practices, new and/or more stringent conditions may not be imposed when addressing permit amendment and renewal requests unless agreed to by the applicant/ permittee.
The result of this is continued operation of facilities without consideration of technology developments that, if required as a condition of permit renewal, could significantly reduce air emissions from the source.

Note: Air permits are issued for a period of 10 years unless sooner amended or renewed.

Recommendations

Authorize the commission to impose different and/or more stringent emission requirements when amending or renewing air permits if: (1) the facility is located within an area included within the Air Pollutant Watch List and the facility emits an air contaminant on the Air Pollutant Watch List; (2) the facility is located in an area designated as nonattainment of a National Ambient Air Quality Standard and the TCEQ has adopted a State Implementation Plan to demonstrate attainment; or (3) new or revised state or federal air quality standards are applicable to the facility for which an amendment or renewal is sought.

Air Permitting Issue 5

More statutory flexibility allowing the TCEQ to hold a hearing on an air permit amendment, modification or renewal for good cause is needed.

Section 382.0561 of the Health & Safety Code provides that the commission shall not hold a hearing on a permit amendment, modification, or renewal if the basis of a request by a person who may be affected is determined to be unreasonable. Reasons for which a request for a hearing on a permit amendment, modification, or renewal shall be considered to be unreasonable include, but are not limited to, an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. Section 382.056(g) specifies that the commission may not seek public comment and may not hold a public hearing in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted, and the applicant's compliance history is other than the lowest classification.

Recommendations

Option 1: Amend the statute to allow the TCEQ to hold a hearing on an air permit amendment, modification, or renewal for any good cause determined by the Commission, even if the amendment, modification or renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

Option 2: Repeal/revise statutes that restrict hearings on air permit amendments, modifications, or renewals:

A. Health & Safety Code Section 382.058 which specifies that for a concrete plant that performs wet batching, dry batching, or central mixing only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.

B. Health & Safety Code Section 382.056(g) which specifies that the commission may not seek public comment and may not hold a public hearing in response to a request for a public hearing on an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

Air Permitting Issue 6

The lack of clear authority to deny an air permit for good cause is problematic.

For new permits, Section 382.0518 sets out a process whereby the Commission issues a report setting forth any objections it has and gives the permit applicant the opportunity to correct those problems. If the Applicant "makes the alterations in the person's plans and specifications to meet the commission's specific objections, the commission shall grant the permit." 382.0518(d). Applicants have recently argued that this statutory provision means the TCEQ lacks authority to deny a preconstruction permit because the statute says that the TCEQ "shall" grant the permit.

The federal Clean Air Act requires state permitting authorities to retain broad authority, including the authority to deny a preconstruction permit if an applicant fails to satisfy preconstruction permit requirements. Texas has already committed, in order to retain authority to implement federal Clean Air Act programs, that the TCEQ has the authority to deny a preconstruction permit. Moreover, under longstanding federal law, a state is never required to issue a preconstruction permit, even if the applicant meets all requirements. A state always retains plenary authority to deny a permit for policy or economic reasons.For renewals, Section 382.055 of the Health & Safety Code generally provides that air permits issued on or after December 1, 1991 are subject for review every ten years after the date of issuance. It also expressly provides that if the applicant meets the commission's requirements in accordance with the renewal schedule, the commission shall renew the permit.

TCEQ rule 116.314 requires the ED to renew an air permit if it is determined that the facility meets the requirements of the rules. An air permit renewal cannot be denied unless the TCEQ follows a very exact procedure. Prior to denial, the ED must provide notice to the permit holder with a report which describes the basis for denial. If denial is based on failure to meet the requirements of the renewal rules, the report shall establish a schedule for compliance with the renewal requirements. The report must be forwarded to the permit holder no later than 180 days after the commission receives a completed application. The permit must be renewed if the requirements are met according to the schedule specified in the report. If denial is based on failure to maintain substantial compliance with the TCAA or the terms of the existing permit, the renewal denial shall be final. After failure to satisfy the commission requirements for corrective action by the deadline specified in the ED's report, the applicant shall show cause in a contested case proceeding why the

permit should not expire.

Recommendations

Option 1: The TCEQ should be authorized to deny an air permit, whether new or renewal, for good cause, including failure to maintain compliance with the TCAA or the terms of the existing permit; inability to meet all applicable state and federal air quality standards and regulations; etc.

Option 2: Give the TCEQ express authority to deny a permit, whether new or renewal, if it finds: (a) construction of the facility has never been completed; (b) the facility has never been commercially operated; or (c) the facility has ceased operation for the preceding 5 years or more. [e.g. ASARCO (El Paso Smelter) permit renewal].

Air Permitting Issue 7

Current statutory authority allowing a qualified facility to make physical and operational changes without obtaining a permit or other approval from the TCEQ inhibits, if not eliminates, public notice and opportunity to comment on the requested changes.

The 74th Texas Legislature [1995] passed SB 1126 [See Appendix 1] which gave qualified facilities the flexibility to make physical and operational changes through an expedited process, without a permit or permit amendment.

The bill analysis for SB 1126 stated:

> *Currently, facilities that are required to obtain an air permit must complete a process that includes modeling for the potential health effect, a review to determine if the facility is using the best available control technology, and a contested case hearing offered to the affected persons. Facilities are also required to apply for a permit amendment and again complete the program whenever the facility intends to change its processes or equipment. The permitting process has become longer since facilities have become larger and more complex, which has resulted in increasing costs to the Texas Natural Resource Conservation Commission.*
>
> *As proposed, C.S.S.B. 1126 redefines "modification of existing facility"; requires the Texas Natural Resource Conservation Commission to consider specific factors in determining whether a proposed change at a facility will allow an increase in allowable air pollution.*

Under SB 1126's qualified facility flexibility, an existing facility [SB 1126 cannot be used to authorize new facilities] that satisfies certain criteria will be classified as a "qualified facility." These criteria require that the existing facility either (1) was issued a permit or permit amendment or was exempted from pre-construction permit requirements no earlier than 120 months before the change will occur, or (2) uses air pollution control methods that are at least as effective as the BACT that was required or would have been required for the same class or type of facility by a permit issued 120 months before the change will occur. A qualified facility may make physical and operational changes without obtaining a permit or other approval from the TCEQ if the change will not result in a net increase in allowable emissions of any air contaminant or the emission of any new

air contaminant (i.e., one not previously emitted or allowed to be emitted). To achieve no net increase in allowable emissions and no emissions of any new air contaminant, the TCEQ will consider the facility's addition of air pollution control methods to reduce emissions. The TCEQ also will consider emission decreases from other qualified facilities at the same air account number to offset emission increases from the change. These emission decreases (trades) will be reductions in either allowable emissions or actual emissions depending on whether the other facility is a qualified facility due to a permit, exemption, or the use of BACT. Although no TCEQ approval is required to make a change under the qualified facility flexibility, rules require that the TCEQ be notified of the change, with the type of notification dependent on the relative significance of the change:

- Pre-change notification. If intra-plant trading exceeds reportable limits stated in the SB 1126 guidance document, the TCEQ must be notified before the change occurs.
- Post-change notification. For changes that fall within the reportable limits stated in the SB 1126 guidance document, the change may be implemented and then the TCEQ notified.
- Annual report. If emission trades from other qualified facilities are not involved, the change may be reported through an annual report.

For all changes made under the qualified facility flexibility, the owner/operator is responsible to ensure that changes conform to applicable requirements, and must maintain records that demonstrate the change is allowed under the qualified facility flexibility.

Only a "qualified facility" will be able to use the additional flexibility provided by SB 1126. Facilities that do not satisfy the criteria to be a qualified facility will continue to be subject to the definition of "modification," which is based on whether a change at a facility will result in an increase in actual emissions or in the emission of a new air contaminant. The scope of the qualified facility flexibility under SB 1126 is limited. SB 1126 only revised the Texas "minor new source review" program to allow some changes to be made without a requirement to obtain a permit or other "approval" from the TCEQ. SB 1126 does not supersede federal requirements such as Nonattainment (NA) Review and Prevention of Significant Deterioration (PSD) review of new major sources and major modifications to existing sources. SB 1126 also does not supersede other TCEQ regulations controlling emissions, such as those for VOC or NO, nor does SB 1126 supersede the TCEQ's general powers and duties to control the quality of the state's air and to take action to control a condition of air pollution if it finds that a condition of air pollution exists.

If the original permit for a facility was issued more than 120 months before the change will occur, it is still possible for the facility to be a qualified facility on the basis of a permit. If the facility has undergone a subsequent permit action, such as amendment, within the past 120 months, and as part of that action TCEQ had the opportunity to review and revise the air pollution control requirements for the facility, then the facility will be a qualified facility on the basis of the permit. It is not necessary that the TCEQ require any revision to the control requirements as a result of that review. For facilities that have undergone permit renewal within 120 months of a change, qualification is not

automatic unless the facility underwent a permit amendment at time of permit renewal. A facility's status as a qualified facility is not perpetual. A facility can be a qualified facility at one point in time, but later lose its status as a qualified facility if its permit, exemption, or control methods fall outside the 120-month period. Therefore, the owner/operator of a facility must continually review the qualified status of the facility.

Permits generally contain Special Conditions that may limit operational flexibility (e.g., limits on the throughput, production levels, or fuel usage). If a change made under the qualified facility flexibility would result in the violation of a permit special condition, the permit holder must revise the permit special condition to stay in compliance with the permit. This revision can be made through the permit alteration process or under the notification process set forth in TCEQ rules.

Recommendations

Option 1: Repeal the statutory provision that allows a qualified facility to make physical and operational changes without obtaining a permit or other approval from the TCEQ.

Option 2: To promote public notice, notice of all changes by a qualified facility without obtaining a permit or other approval from the TCEQ should be required to be posted on a publicly accessible internet Web site, and the TCEQ should be provided with the Web address link for the notice. The TCEQ shall post on its Web site the identity of the qualified facility making such changes and the Web address link required.

Option 3a: To promote public opportunity to comment, the public should be given at least 30 days to file written comments on all changes by a qualified facility without obtaining a permit or other approval from the TCEQ.

Option 3b: To promote public opportunity to comment, the public should be given at least 30 days to file written comments on all changes by a qualified facility if "pre-change" notice to the TCEQ is required; the public should be given at least 15 days to file written comments on all other changes by a qualified facility without obtaining a permit or other approval from the TCEQ.

Option 4: The notice of the change(s) required to be given to the TCEQ by a qualified facility should be posted on the TCEQ Web site.

Option 5: Changes by a qualified facility without obtaining a permit or other approval from the TCEQ should be subject to the TCEQ's motion to overturn (MTO) process set forth in Section 50.139 of the TCEQ rules.

Air Permitting Issue 8

Current processes relating to permit alterations do not include appropriate measures to promote public notice and opportunity to comment on all permit alterations and modifications.

Health & Safety Code Section 116.116(c) defines a permit alteration as: (A) a decrease in allowable emissions; or (B) any change from a representation in an application, general condition, or special condition in a permit that does not cause: (i) a change in the method of control of emissions; (ii) a change in the character of emissions; or (iii) an increase in the emission rate of any air contaminant. Requests for permit alterations that must receive prior approval by the executive director are those that: (A) result in an increase in off-property concentrations of air contaminants; (B) involve a change in permit conditions; or (C) affect facility or control equipment performance. The executive director shall be notified in writing of all other permit alterations not specified above. A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of rules relating to BACT. Permit alterations are not subject to the requirements of the rules requiring a BACT demonstration. No public notice is required.

Recommendations

Option 1a: To promote public notice, notice of all permit alterations should be required to be posted on a publicly accessible internet Web site, and the TCEQ should be provided with the Web address link for the notice. The TCEQ shall post on its Web site the identity of the facility making such alterations and the Web address link required.

Option 1b: To promote public notice and opportunity to comment, the TCEQ should specify by rule which permit alterations should be required to be subject to public notice/comment. All such permit alterations should be required to be posted on a publicly accessible internet Web site, and the TCEQ should be provided with the Web address link for the notice. The TCEQ shall post on its Web site the identity of the facility making such alterations and the Web address link required.

Option 2: To promote public opportunity to comment, the public should be given at least 30 days to file written comments on all permit alterations before ED approval.

Option 3: The notice of the ED's approval of permit alteration(s) should be posted on

the TCEQ Web site.

Option 4: Alterations to a permit should be subject to the TCEQ's motion to overturn (MTO) process set forth in Section 50.139 of the TCEQ rules.

Air Permitting Issue 9

Flexible Permits as currently issued do not meet applicable federal permitting requirements, and are not enforceable as an EPA-approved SIP component.

A flexible permit is a minor NSR construction or modification permit that covers emissions from many facilities at a site. Section 382.051 of the Health & Safety Code authorizes the TCEQ to issue a single federal operating permit or preconstruction permit for multiple federal sources or facilities located at the same site. The TCEQ established the Flexible Permit Program in 1994 to provide operational flexibility for petroleum refineries, and to provide an authorization mechanism for the large number of grandfathered facilities that existed in the state at that time.

The Flexible Permit Program contained in Chapter 116, Subchapter G of the TCEQ rules is a voluntary authorization mechanism that an owner or operator may choose to utilize in lieu of obtaining a "traditional" permitting authorization under Chapter 116, Subchapter B. These Subchapter G permits differ from those issued under Chapter 116, Subchapter B primarily by adding flexibility features through the use of emission caps, certain control technology, and other operational flexibility to achieve emission reductions with the ultimate goal of having a well-controlled plant site after the final cap is implemented. Owners or operators are allowed to structure flexible permits to best serve their needs while assuring BACT equivalent controls and acceptable impacts.

Some basic rules of flexible permits are:

- Facilities are limited to one flexible permit per plant site or account; however, the applicant can choose which facilities to include.
- The applicant can choose to establish caps or individual emission limitations for certain pollutants with not all pollutants emitted from the source(s) included in the flexible permit.
- The final permit may contain an overall emission cap for all sources per pollutant, combination of multiple emission caps that cover groups of facilities, and/or individual emission limitations for individual facilities.
- The flexible permit is not restricted to grandfathered sources. The applicant may choose to combine grandfathered, existing permitted, and newer facilities to maximize flexibility at the site.

The federal air permitting program has an equivalent to Texas's flexible permits in plant-wide application limits (PALs). EPA adopted a rule under NSR Reform concerning a Plant-wide Applicability Limit (PAL), which can be described as an emissions "bubble" over a facility, under which the facility can trade pollution increases against pollution

decreases. These offsetting trades can occur not only from different pieces of polluting equipment at a facility, but also over time. Under a PAL, the source has total operational and design flexibility and as long as the PAL is not exceeded, federal new source review is avoided. The PAL concept encourages pollution control and innovative technologies to be contemplated to accommodate future growth.
The PAL provides for similar flexibility incentives as are derived from the Texas flexible permit. Should the PAL be exceeded, federal new source review would be applied to the project which caused the limit to be exceeded.

The TCEQ has incorporated PALs in Subchapter C of Chapter 116 of the rules, and developed a policy whereby applicants can obtain a PAL in addition to the emission cap limit associated with their flexible permit. The PAL is an independent emission limit in the permit and is based on historical, actual emissions. In certain cases, an environmental contribution of 10 % will be imposed in setting up the PAL. If the source stays under the PAL, federal review and contemporaneous netting will not be triggered. The PAL is a voluntary option that may be established when the flexible permit is obtained, or after the fact, at the request of the applicant. If it is obtained after the fact, an amendment will be required. Otherwise establishing the PAL can be done in conjunction with the flexible permit. The PAL is established for each criteria pollutant based on the two-year average actual emissions prior to the establishment of the flexible permit. The PAL would serve as the limit under which federal NSR would not be triggered. Public notice is required to obtain the PAL in either case, but the notice can be combined with any permit notice that is otherwise being conducted. The PAL is a federal applicability limit only and does not impact other state NSR requirements.

Even though generally equivalent, there are some significant differences between flexible permits and PALs. Most significantly, emission caps in federal PALs are based on historical, actual emissions, while emission caps in flexible permits issued by the TCEQ are based on allowable emissions, assuming maximum design capacity. Flexible permit emission caps also may include an additional "Insignificance Emissions Factor" of up to 9% of the total emission cap or individual emission limitation. PAL emission caps include no such "insignificance factor." Under federal regulation, PALS are designed for major emission sources only. The TCEQ claims that flexible permits are applicable to only minor sources, but this is an area of significant dispute.

Overlaying the PAL concept onto the flexible permit may provide a viable avenue to sources that have committed to a particular control strategy and that wish to preserve emissions for future growth. This process may be beneficial for those flexible permits that result in large reductions in emissions as a result of adding controls. Even for sources that have set their flexible permit limit to one that is just under the federal significance levels, obtaining a PAL may benefit the applicant by avoiding NA and PSD new source review and by alleviating the need for netting when modifications are made, provided the PAL is not exceeded.

[Note: Netting is an accounting procedure whereby all emission increases and decreases

at a source over a specified period of time (under existing rules the netting period begins on the date of the emission increase and goes back to November 15, 1992, for major sources that emit 250 tpy or more, and goes back five years for major sources emitting less than 250 tpy) are added/ subtracted to derive a net total. If the sum of these emission changes (netting) and the sum of proposed emissions from project exceeds the significance level for the pollutant, federal NSR is required. If the project is potentially subject to nonattainment review, the applicant may avoid netting if they agree to undergo nonattainment review and will offset the project emission increase.]

Recommendations

Option 1: The flexible permit program should clearly be limited to minor NSR permits, and not be used to circumvent the major NSR requirements. It should be as stringent as any applicable federal permitting requirements.

Option 2: Emission caps in flexible permits should be set at a level that is equivalent to or more stringent than one based on existing actual emissions, rather than allowable emissions as is currently done.

Air Permitting Issue 10

Failure to analyze the cumulative impacts, or potential impacts, of new or expanded pollution emissions on the overall air quality, public health and property within an airshed does not afford the required demonstration that any new major source of air pollution will not cause or contribute to a violation of any NAAQS.

Applicable federal and state regulations make it clear that it must be demonstrated that any new major source of air pollution will not cause or contribute to a violation of any NAAQS in any air quality region. [40 CFR 52.21(k); 30 TAC 116.161]. While an individual point source's emissions might have only an insignificant impact on air quality levels in an airshed, the resulting cumulative impact of the new or expanded emissions and emissions from other facilities in the airshed could be significant. Only when a cumulative effects analysis is done can it reasonably be demonstrated that new or expanded emissions will not cause or contribute to a violation of any NAAQS in an airshed.

Currently, the TCEQ does cumulative effects analyses for criteria pollutants [e.g. NOx, Lead, SO2], using EPA guidance. It does not do cumulative effects analyses for ozone or PM2.5. For certain criteria pollutants, EPA has developed "de minimis" (also known as "significant") concentration levels. If emission of a criteria pollutant is not at or below the established de minimis level, it must be demonstrated that the emission satisfies both applicable "increment" analysis and the appropriate air quality standard (e.g. for SO2, CO). Also, even if the concentration is below the "increment," it cannot be above the de minimis level in a non attainment area. Every county has an increment value developed by EPA (a nationwide value) for certain pollutants (SO2, PM, NOx). An emission can't exceed the increment amount for that area.

If an emission is below a de minimis/significance level, that implies that it doesn't "cause or contribute" to air pollution in non-attainment area. If an emission is above the de minimis level, no permit can be issued at the requested emissions level; the applicant must lower the requested emissions level.

No de minimis/significance levels or increment levels have been established for ozone in Texas, but have been established for one of the ozone precursors, NOx. To do a cumulative effects review for ozone, a de minimis/significance level for ozone would have to be established by rule; otherwise any source would "contribute" to ozone formation for any amount of precursor emissions within the non-attainment area.

The de minimis/significance level could be the minimum detection level of an ozone monitor. To determine ozone precursor allowables (i.e. de minimis/significance levels), a meaningful emissions database is needed. Such a database does not currently exist in Texas, but the TCEQ was appropriated funds by the 2009 Legislature to establish an air permits allowable emissions database. However, photochemical ozone models are already available in non-attainment areas from the TCEQ or local Councils of Government (COGs). The cost to an air permit applicant to do cumulative effects modeling may be approximately $100,000. Since cumulative effects modeling does not have the same "rigor" as SIP ozone attainment analysis, there will not be much benefit gained from cumulative effects analysis of major sources located within non-attainment areas. Here, an appropriate comparable analysis is already being done through NSR non-attainment permitting (LAER, offsets) and also through the SIP process.

Recommendations

Option 1a: Require the TCEQ to evaluate and consider the cumulative effects on ambient air quality, public health and property from all expected air contaminant emissions from any facility or proposed facility and from other facilities located within a prescribed distance [e.g. 100 miles] from the facility or proposed facility.

Option 1b: Require the TCEQ to evaluate and consider the cumulative effects on ambient air quality, public health and property from all expected air contaminant emissions from any facility or proposed facility and from other facilities located within a distance specified by commission rule.

Option 2a: Require the TCEQ to evaluate and consider the formation of ozone due to the cumulative effects of the facility's expected emissions, authorized emissions from issued permits for a new major source or a major modification to an existing major source, and actual authorized emissions from all permitted facilities located within a prescribed distance [e.g. 100 miles] from the facility or proposed facility.

Option 2b: Require the TCEQ to evaluate and consider the formation of ozone due to the cumulative effects of the facility's expected emissions, authorized emissions from issued permits for a new major source or a major modification to an existing major source, and actual authorized emissions from all permitted facilities located within a distance specified by commission rule.

Option 3a: Limit any cumulative effects review established under Options 2a or 2b above to facilities within a certain distance of a designated criteria pollutant non-attainment county. *Note: This will avoid having to do cumulative effects analyses when the likelihood of any impact on criteria pollutant levels is not really an issue.*

Option 3b: Limit any cumulative effects review established under Options 2a or 2b and 3a above to whether the emissions will negatively affect compliance with any SIP.

Option 4a: Limit any cumulative effects review established under Options 2a or 2b above to electric generating facilities (EGUs) within a certain distance of a designated ozone non-attainment county. *Note: Since EGUs are the single largest point source of NOx emissions in the statewide Emissions Inventory, evaluating the cumulative effects from EGU emissions will address a significant portion of ozone-producing point sources. There are 175 EGUs in Texas and 1,700 major sources.*

Option 4b: Limit any cumulative effects review established under Options 2a or 2b and 4a above to whether the emissions will negatively affect compliance with the SIP.

Option 5: Limit any cumulative effects review established under Options 2a and 2b above to whether the emissions will cause an area to be designated a non-attainment area.

Option 6: Require the TCEQ to formalize the cumulative effects analysis in rule, thus allowing all interested stakeholders an opportunity to participate in the development of that process, and making it clear to all what will be required in the future.

Air Permitting Issue 11

The Air Pollutant Watch List has not been adopted as enforceable standards in rules.

The Air Pollutant Watch List (APWL) is a list of areas in Texas where specific pollutants were measured at levels of concern. It is maintained by the TCEQ Toxicology Division (TD) and is intended to alert TCEQ technical personnel and the public to cities and counties within the state that have areas with elevated concentrations of special-interest air pollutants.

The APWL is composed of the following information: area of concern listed by county, city and TCEQ Region; APWL site number; year added; pollutant of interest; and area boundaries. An area of concern is defined as an area in which one or more particular pollutants has been measured at a level that can potentially cause adverse short-term or long-term health effects (or both) or odor.

The purpose of the APWL is to: heighten awareness in areas of concern for interested parties; encourage efforts to reduce emissions; help the TCEQ focus resources to conduct facility inspections and field investigations, pursue enforcement activities, increase pollution prevention efforts, and prioritize mobile monitoring efforts; and, help in review of air permits. In the past, APWLs were mainly directed to TCEQ staff and industry. However in June 2009, due to increased legislative interest, the TD began notifying legislators whose districts include an APWL area two weeks prior to any proposed or final changes to the APWL area.

In 2009 and January 2010, six APWL areas and nine pollutants were removed from the APWL, and 7 more pollutants in 5 counties are proposed to be removed in 2010. As of March 1, 2010, there are 11 APWLs in 10 Texas counties.

An area or pollutant (or both) are added to the APWL when persistent elevations of measured concentrations of the pollutant of interest are determined by the TD to be of concern for potential to cause adverse short- or long-term health effects (or both) or odor. Once the affected legislative officials are notified of this determination, a 30-day public comment period is opened. Notification of this comment period is put on the APWL Web site and individuals signed up for the TD listserv are sent notifications via email. After the close of the comment period, all comments and any additional monitoring information are re-evaluated. Following a final notification to legislative officials, the pollutant and/or area is placed on the APWL.

The process of removing a pollutant and/or area from the APWL is similar to the addition

process. In order to be eligible for removal from the APWL, long-term monitoring in these areas must show a decreasing trend and/or mobile monitoring must show that levels of pollutants are no longer at a level of potential concern. In addition, the TD takes into account industry efforts to control or reduce emissions of the pollutant of concern that could have contributed to the monitored decrease in ambient concentrations. Legislators whose districts are in these areas are notified of the proposal to remove these pollutants from the APWL and the public is given a 30-day comment period. The public comment period consists of posting relevant data on the APWL Web site along with the public comment form. Those signed up for the TD listserv are notified of the update via email. After all comments and any additional monitoring data are reassessed, a final notification is provided to legislative officials prior to the final removal of the chemical and/or area.

Interested parties may suggest that the TD consider specific pollutants and locations for addition to or removal from the APWL by filling out an APWL Recommendation Form and submitting it to the TD. The TD will acknowledge receipt of the completed form and evaluate the information.

Recommendations

Option 1: Require the TCEQ to: (1) establish and maintain an air pollutant and/or toxics watch list for each air contaminant that the TCEQ determines exceeds federal or state ambient air quality standards or health effects screening levels; (2) designate areas of the state where modeled or monitored ambient air concentrations of one or more air contaminants exceed any ambient air quality standards or health effects screening levels adopted by the TCEQ; and (3) ensure that the emission requirements in any permit issued in a designated area are consistent with any ambient air quality standards or health effects screening levels adopted by the TCEQ.

Option 2: Require the TCEQ to adopt the air pollutant and/or toxics watch list as enforceable standards in rules.

Air Permitting Issue 12

The Effects Screening Levels have not been adopted as enforceable standards in rules.

Effects Screening Levels (ESLs) are used to evaluate the potential for effects to occur as a result of exposure to concentrations of constituents in the air. ESLs are based on data concerning health effects, the potential for odors to be a nuisance, effects on vegetation, and corrosive effects. They are not ambient air standards. It is the TCEQ's policy that if predicted or measured airborne levels of a constituent do not exceed the screening level, adverse health or welfare effects are not expected; if ambient levels of constituents in air exceed the screening levels, it does not necessarily indicate a problem but rather triggers a review in more depth. Both short- and long-term ESLs are listed. "Short-term" generally indicates a one-hour averaging period. "Long-term" indicates an annual averaging period.

Recommendations

Option 1: Require the TCEQ to: (1) adopt effects screening levels for all air contaminants that evaluate the potential for adverse health effects to occur as a result of exposure to concentrations of the air contaminants; and (2) require emission sources to comply with any adopted ESLs.

Option 2: Require the TCEQ to adopt ESLs list as enforceable standards in rules.

Option 3: Require the TCEQ to adopt ESLs at least as stringent as those adopted by the EPA.

Air Permitting Issue 13

All parameters, provisions and conditions in air permits are not clear, understandable, measurable, and easily capable of determining compliance.

Understandably, large, complex industrial facilities with numerous and diverse emission sources are regulated by permits that contain extensive, diverse and often complex provisions and parameters intended to cover all of the facility's emission sources and processes. As a practical matter, this makes it difficult, if not sometimes nearly impossible, to determine what is exactly authorized or covered by the permit; how much pollution a specific source is emitting; whether an emission is in compliance with the permit's terms; and what activities, conduct etc. the permittee is required to do or prohibited from doing. This aspect, in turn, makes it difficult for TCEQ inspectors to adequately monitor the facility's compliance and document and penalize violations. This is especially true with flexible permits, a voluntary authorization mechanism that an owner or operator may choose to utilize in lieu of obtaining a traditional permitting authorization. Here, a regulatory "bubble" is placed over a facility in which the final permit may contain an overall emission cap for all sources per pollutant, combination of multiple emission caps that cover groups of facilities, and/or individual emission limitations for individual facilities.

Also, many large, complex industrial facilities are covered by numerous PBRs and SPs, in addition to an individual site-specific permit. This makes it very difficult and inefficient for TCEQ inspectors and the general public to know exactly what is regulated and how.

Recommendations

Option 1: Authority to issue flexible permits should be eliminated or revised.

Option 2: All PBRs and SPs covering a facility should be consolidated into the facility's site-specific [individual] permit at the first available opportunity [i.e. when the permit is amended or renewed], but no later than 5 years after the registration to be permitted by rule or registration to use a SP.

Air Permitting Issue 14

All activities intended to effectuate a specific development/building plan or prepare the site for a specific facility are not included in the determination of "start of construction" for air permitting purposes.

Section 382.0518(a) of the Health & Safety Code states: "before work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit from the commission." Under current TCEQ guidelines, "construction" is broadly interpreted as anything other than site clearance or site preparation. Under these guidelines, all work such as excavation, form erection, or steel-laying pertaining to foundations upon which permit units will rest shall be considered construction. However, land clearing, soil load bearing tests, leveling of the area, sewer and utility lines, road building, power line installation, fencing, construction shack building, etc., are considered "site clearance/preparation" and not "start of construction."

If activities such as "excavation" and "steel-laying pertaining to foundations" are considered construction under TCEQ's "broad interpretation" approach, it is reasonable to likewise include activities such as "sewer and utility lines" and "power line installation" as "start of construction." Often, these activities involve significant costs and are intended to effectuate a specific development/building plan; i.e. the site is being prepared for a specific facility.

Note: In 2005, the Legislature added Section 382.004 to the Health & Safety Code which provides: "(a) to the extent permissible under federal law and notwithstanding Section 382.0518, a person who submits an application for a permit for a modification of or a lesser change to an existing facility under this subtitle may, at the person's own risk, begin construction related to the application after the application is submitted and before the commission has issued the permit; (b) The commission may not consider construction begun under this section in determining whether to grant the permit sought in the application."

Recommendation

TCEQ guidance relating to what comprises "start of construction" should be revised to include all activities that intended to effectuate a specific development/building plan or prepare the site for a specific facility, such as sewer, utility and power line installations.

TCEQ Enforcement Policies, Processes & Procedures

Introduction

The TCEQ is the State's primary and comprehensive environmental regulatory agency, deriving its authorities and responsibilities primarily from various sections of the Texas Water Code and Texas Health & Safety Code. TCEQ has also been delegated the authority and responsibility to implement most federal environmental programs in Texas. All the functions assigned to the TCEQ by state and federal law are designed to protect the state's air, water and land resources and the public health.

The agency regulates approximately 400,000 public and private facilities and/or individuals in Texas that affect, or have the potential to significantly affect, the environment and/or public health. The agency's various regulatory programs are aimed for the goal of clean air, clean water, and the safe management of waste.

Charged with the responsibility of enforcing compliance with state and federal environmental laws and monitoring air and water quality within Texas, the TCEQ regularly and routinely maintains and conducts various and diverse programs and functions designed to meet this responsibility. However, the agency is often criticized for either not having the appropriate authority, or not exercising that authority when available, to ensure that it is enforcing environmental laws fairly, effectively and timely. Numerous opportunities exist to help improve or enhance the TCEQ's current enforcement authorities and responsibilities, thus helping to ensure that the state's air, water and land resources and the public health are meaningfully and adequately protected.

While there is often much debate about what our environmental laws should be, we too often insufficiently examine whether the environmental laws we do have are being properly and effectively enforced. Yet examination of this latter question is critical to any meaningful assessment of environmental protection or policy. Whether or not there is agreement with the goals of current environmental laws, examining and determining whether and how our environmental laws are enforced is critical to the successful operation of any such environmental law, both presently and in the future. The question of the effectiveness of our environmental enforcement efforts is best answered by examining whether our environmental laws clean the environment and protect public health. When there are limited financial resources to pursue these efforts, as is the case

in Texas, the answer to this question must also include whether we are operating as effectively and efficiently as possible.

The problem is often not the lack of strong environmental laws, but the lack of adequate enforcement of those laws. Despite strong state and federal laws mandating clean water and air, polluters face little threat of penalty if they violate their permits or authorizations. Environmental regulatory agencies like the TCEQ must be given the available tools and authority to do the job effectively and efficiently. A streamlined enforcement process, with clean and simple legal requirements and sufficient flexibility to address all issues and circumstances that reasonably arise in the course and scope of achieving compliance, would offer a powerful tool for a habitually underfunded and understaffed regulatory agency like the TCEQ.

To this end, this paper presents a number of issues, along with recommendations to address those issues, that are intended to provide the TCEQ more authority where needed, more flexibility where appropriate, and more clarity in its roles and responsibilities for enforcement and compliance. Collectively, the recommendations presented herein would result in important improvements to the TCEQ's enforcement program. Several recommendations would make the enforcement program stronger by making the process more timely, more predictable and clearer. Some recommendations would more firmly tie violations to appropriate consequences. All are intended to help supplement or enhance TCEQ's well-established, and often successful, enforcement programs. Depending upon the specific issue and recommendation, implementation may require anything from an operational or policy change within TCEQ up to a statutory change followed by a rule-making process and resulting appropriate policy and operational changes.

The recommendations presented herein are summarized as follows:

- Raise statutory caps for penalties and specifically allow the use of speciation
- Require automatic initiation of enforcement for all permit violations
- Expand the Field Citation Program
- Enhance TCEQ's authority to suspend or revoke a permit
- Expedite the handling of enforcement cases
- Enhance the flexibility for the use of SEP projects by local governmental entities
- Re-define "repeat violator"
- Adopt the TCEQ Penalty Policy in rule
- Adopt media-specific penalty policies
- Adopt standard penalties for most common programmatic violations
- Increase penalties to accurately reflect harm and to deter future noncompliance
- Recover the economic benefit of noncompliance
- Adopt better methodology for determining the number of penalty events
- Revise financial inability to pay policies
- Enhance collection of delinquent fees and penalties
- Develop new approach compliance history methodology

TCEQ's Enforcement Processes/Procedures Generally

Chapter 7 of the Texas Water Code sets forth the general enforcement authority of the TCEQ by providing that "the commission may initiate an action under this chapter to enforce provisions of this code and the Health and Safety Code within the commission's jurisdiction as provided by Section 5.013 of this code and rules adopted under those provisions". [Sec. 7.002] Sec. 7.051 authorizes the TCEQ to assess an administrative penalty against any person who violates a provision of the Water Code or the Health and Safety Code, a rule or order adopted by the commission, or a permit issued by the commission. Sec. 7.105 authorizes the commission or the executive director to institute legal proceedings to compel compliance with the relevant provisions of the Water Code and the Health and Safety Code and rules, orders, permits, or other decisions of the commission. Subchapter E of Chapter 7 [Sec. 7.141 et. seq.] sets forth the Commission's criminal enforcement authority.

The TCEQ's Office of Compliance and Enforcement (OCE) is charged with enforcing compliance with the state's environmental laws and monitoring air and water quality within Texas. OCE's Field Operations Division (FOD) operates across the State through its 16 Regional Offices, which conduct scheduled and unannounced compliance inspections for regulated entities, investigate unauthorized activities and investigate citizen complaints. The Litigation Division of the Office of Legal Services (OLS) provides legal representation and support to OCE by negotiating agreed enforcement orders, litigating enforcement actions, pursuing delinquent fees and penalty payments, advising the agency concerning cleanup standards and recovery of cleanup costs, and coordinating the SEP and Environmental Audits programs. Through the Special Investigations Section, the Litigation Division investigates and assembles evidence on environmental crimes. The TCEQ's enforcement process begins when a violation is discovered during an inspection conducted either at the regulated entity's location or through a review of records at TCEQ offices. Most violations noted during inspections will be handled through implementation of an informal corrective action plan at the regional level. Development of the plan will occur through regional meetings with noncompliant entities and/or Notice of Violation (NOV) letters. NOVs are written notifications to inspected respondents that document and communicate violations observed during an inspection, specify timeframes to respond, and require corrective actions and documentation of compliance. If the violations cited in an NOV are corrected within the time given, the respondent is not referred for enforcement; if they are not corrected in time, the respondent may then be referred for formal enforcement action.

If significantly noncompliant violations or other serious and/or continuing violations are identified during an inspection, as defined by the agency's Enforcement Initiation Criteria, the Regional Office will initiate formal enforcement action by preparing and sending a written Notice of Enforcement (NOE) to the regulated entity inspected. The NOE sets forth the violations and puts the respondent on notice that the case has been referred for formal enforcement. This notice also lets respondents know that they can appeal the NOE by requesting an enforcement review meeting if they believe the violations were

cited in error and/or they have new information that was not previously evaluated by the investigator.

When violations are serious enough to warrant formal enforcement action, the TCEQ is authorized to enforce correction of the violations and to seek penalties to deter future noncompliance. The TCEQ is allowed to pursue penalties in two different types of enforcement actions: administrative orders that are issued by the Commissioners; or referral of the case to the OAG for enforcement through the courts, including potential civil penalties. Most enforcement cases are handled through the administrative order process.

If the case is expected to settle quickly, the enforcement coordinator drafts an agreed order, which describes the alleged violations and any actions that need to be taken to correct them. The agreed order will also normally include an administrative penalty calculated by the enforcement coordinator according to the TCEQ's Penalty Policy. Where possible, the TCEQ encourages expeditious settlement of enforcement actions by extending a settlement offer in the agreed order. During the time allowed for settlement, the respondent has the opportunity to discuss the violations with the enforcement coordinator and provide additional documentation that may influence the inspection findings, calculated penalty, or both. If the respondent agrees with the terms of the agreed order and the penalty amount, the case is set for approval by the Commissioners at an Agenda meeting.

If settlement does not occur within a short time, or if the respondent contests the enforcement action, the agency will start the process that can lead to an administrative enforcement hearing. An attorney in the Litigation Division of OLS is assigned, who drafts an Executive Director's Preliminary Report and Petition (EDPRP), notifying the respondent of the violations, the penalty assessed, and any corrective actions needed to bring the respondent back into compliance with the regulations. The respondent may request an administrative hearing, which is held in front of an administrative law judge (ALJ) with the State Office of Administrative Hearings (SOAH). However, a settlement can still occur at any time prior to a final decision on the order by the Commissioners. After the SOAH hearing, the ALJ makes a recommendation to the TCEQ Commissioners about an enforcement order. The Commissioners consider this recommendation and then make the final decision whether to issue, deny, or modify the ALJ's recommended action. The Commissioners have ultimate approval of all administrative enforcement orders, whether agreed or contested.

If the respondent does not file a timely answer to the EDPRP, the Commissioners may issue a default order.

As mentioned above, the TCEQ is also allowed to pursue penalties by referral of the case to the OAG for enforcement through the courts, including potential civil penalties. This option may be appropriate in a number of circumstances, including cases in which: (1) immediate remedial action is necessary to prevent imminent and substantial

endangerment to public health and/or the environment, in which case the OAG can seek a Temporary Restraining Order or Temporary Injunction; (2) violation(s) of an Agreed Commission Order have occurred; (3) the respondent fails to comply with a default order; or (4) Commission resources dictate case referral to the OAG.
Whether formal or informal enforcement has ensued, the enforcement process for the cited violations ends once the respondent fully complies with the order, including payment of any penalty.

Water Code Sections 7.051 and 7.053, enacted by the 75th Legislature and effective September 1, 1997, provide the TCEQ with the authority to assess penalties, set forth the factors that the Commission must consider in determining the amount of penalty to assess, and set the minimum and maximum penalties that may be assessed per violation per day. To effectuate and administer this statutory authority and its directives, the TCEQ has developed, adopted and utilized numerous policies relating to penalties. For the most part, these policies have been compiled into the TCEQ Penalty Policy [see Appendix 9], but some policies that are regularly and routinely utilized arise outside that formal document.

The TCEQ's Enforcement Penalty Policy was originally published October 1, 1997, and was revised January 1, 1999, to clarify the penalty matrix, duration of penalty events and good faith efforts adjustments and to revise the compliance history matrix. The Penalty Policy was again revised September 1, 2002, in order to ensure conformity with new compliance history rules [Chapter 60]. The 2002 version is the current TCEQ Penalty Policy.

When first developed in 1997, the Penalty Policy was intended to function for a period of time and then be adopted in rulemaking, incorporating lessons learned from its implementation. However, none of the TCEQ's established penalty policies, or the statutory directives set forth in Water Code Sec. 7.053, have ever been explicitly adopted into TCEQ rules. The TCEQ has adopted 30 TAC Chapter 70 – Enforcement, which only provides general rules governing enforcement actions at the TCEQ. In these rules, Sec. 70.3 authorizes the ED to use enforcement guidelines that are neither rules nor precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings. It specifies that these guidelines do not establish rules which the public is required to obey or with which it is to avoid, and do not convey any rights or impose any obligations on members of the public. Sec. 70.5 recites all the remedies found in the Water Code, the Health and Safety Code, and the Administrative Procedures Act which are available to the TCEQ in enforcement actions. These include, but are not limited to, issuance of administrative orders with or without penalties; referrals to the OAG for civil judicial action; referrals to the Environmental Protection Agency (EPA) for civil judicial or administrative action; referrals for criminal action; or permit, license, registration, or certificate revocation or suspension. The rule also specifies that the ED is not precluded from seeking any remedy in law or equity not specifically mentioned in these rules. In addition, it authorizes an enforcement matter to be resolved informally without a contested case proceeding in appropriate circumstances.

As stated, Water Code Sec.7.053 requires the TCEQ to consider the following factors in determining the amount of an administrative penalty:
(1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
(2) the impact of the violation on:
(A) air quality in the region;
(B) a receiving stream or underground water reservoir;
(C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
(D) affected persons;
(3) with respect to the alleged violator:
(A) the history and extent of previous violations;
(B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
(C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
(D) economic benefit gained through the violation; and
(E) the amount necessary to deter future violations; and
(4) any other matters that justice may require.

The TCEQ's Penalty Policy describes the agency's policies regarding the computation and assessment of administrative penalties consistent with statutory provisions; addresses how the TCEQ staff is to evaluate violations in terms of harm and severity for the purpose of recommending administrative penalties to the Commission; and, describes what adjustments may be made to the proposed base penalty amount after the review of all case-specific information and information relating to the respondent's compliance history, as required by Water Code 5.754(e).

A fundamental component of the Penalty Policy is the computation of the base penalty amount for a violation. Violations are 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 Penalty Policy has 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). A violation is first evaluated to determine whether there has been a release and is categorized as either an actual release or a potential release. The second factor assessed is the degree of harm (damage) that has affected or could have affected human health or property.

These two factors are incorporated into a penalty matrix from which the base penalty is determined. The TCEQ also evaluates 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 TCEQ utilizes that distinction for the respondent's sites. Individuals and operators are considered minor respondents unless otherwise noted. Anything not explicitly covered will be determined on a case-by-case basis.

Next, the number of violation events will be determined, which 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, 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 which are separate in time. [e.g. failure to submit a required report] For these discrete events, one penalty event will be assessed for every documented observation.

Other violations are considered to be continuing; not constrained by documented observations of the noncompliance. [e.g. exceeding permitted discharge or emission limits] For continuing violations, the number of events is linked to the level of impact of the violation by considering the violation as if it recurred with certain frequency.

After a base penalty multiplied by the number of events is established for all violations included in the enforcement action, the next step is the evaluation of adjustments to the penalty amount. Adjustments to the penalty amount may be made based upon the following factors relating to the respondent:

- compliance history: based on the compliance history developed pursuant to Chapter 60 of the TCEQ rules, staff will determine the penalty enhancement for the respondent by evaluating the number of each of the components, and totaling the percentage adjustments. If the total is less than zero, the penalty enhancement will default to zero. The percentage adjustment for each type of component is specified in the Penalty Policy.
- repeat violator: when a respondent is designated as a repeat violator [determined according to Section 60.2(d)] at the site under enforcement, the recommended administrative penalty will be enhanced by 25 percent.
- culpability: whether the respondent could have reasonably anticipated and avoided the violation(s) will be determined. 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 EDPR, whichever occurs first). Staff will determine whether documentation that indicates culpability exists (e.g. contractor notes; agency letters; respondent notes). If culpability exists, then 25 percent will be added to the penalty amount; otherwise, nothing will be added. Note: Other forms of culpability, such as NOVs) and orders, are included in compliance history.
- good-faith effort to comply: considers the respondent's efforts to return the site to complete compliance with all applicable rules and regulations cited in the enforcement

action. The analysis 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. Quality is defined as the degree to which the respondent took action. The two categories of quality are extraordinary [action taken by the respondent which goes beyond what would be expected under the rules] and ordinary [action taken by the respondent to correct the violations as expected under the rules. Good-faith effort is not considered for cases involving only discrete violations. The Penalty Policy prescribes how much of a reduction will be given for good-faith efforts, with the maximum reduction being 50 percent.

- economic benefit gained through noncompliance: the 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 the following issues must be evaluated 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, the overall economic benefit gained will be estimated. Only capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained will be evaluated in the calculation of economic benefit. Once the economic benefit has been estimated and totaled for all violations included in the enforcement action, it will be compared to specified 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.

- 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 determined according to Section 60.2(f).
- other factors as justice may require: an adjustment of the penalty amount, on a case-by-case basis, may be recommended or adopted upon a consideration of factors unique to the situation. This adjustment may result in an increase or decrease of the penalty amount.

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.

As a component of the TCEQ's 2001 Sunset legislation [HB 2912], the Legislature directed the agency to develop a uniform standard for evaluating compliance history; to track and report the compliance history of all regulated entities; and to develop a performance assessment for regulated entities to determine eligibility for innovative programs and to establish permit and enforcement guidelines. [Water Code Sec. 5.753 and 5.754]. As required by the statute, the TCEQ adopted compliance history rules, Chapter 60, in January 2002. [see Appendix 10].

The compliance history review and classification process at the TCEQ is intended to be a comprehensive and uniform assessment of the regulated community's environmental compliance performance, holding these entities accountable within existing permit and enforcement guidelines, and within new regulatory structures that provide incentives to exceed minimum regulatory expectations. TCEQ is required to consider a regulated entity's compliance history in all permitting and enforcement matters.
As required by Chapter 60, the compliance history of every owner or operator of a facility that is regulated under any of the following Texas environmental laws is rated:

- Water Code Chapter 26 (water quality)
- Water Code Chapter 27 (injection wells)
- Solid Waste Disposal Act (Texas Health & Safety Code Chapter 361)
- Clean Air Act (Texas Health & Safety Code Chapter 382)
- Radiation Control Act (Texas Health & Safety Code Chapter 401)

These owners and operators are known as "customers," and a customer can be an individual, a company, a governmental agency or any of several other kinds of organizations. If a customer is affiliated with more than one "regulated entity", then more than one compliance history rating is developed for that customer: one rating for the customer's overall compliance history, considering all facilities and activities that must be consider, and a separate rating for that customer's compliance rating at each regulated entity.
The TCEQ also enforces many other state laws that are not considered in creating compliance histories, and current statutes/ rules do not authorize the creation and publication of ratings based on a customer's history of compliance with laws concerning the following:

- Water Code Chapter 11 (water rightshttp://tlo2.tlc.state.tx.us/statutes/docs/WA/content/pdf/wa.002.00.000011.00.pdf)
- Water Code Chapter 13 (water rates and services)
- Water Code Chapter 37 (occupational licensing and registration)
- Health & Safety Code Chapter 363 (waste minimization, recovery, and recycling)
- Health & Safety Code Chapter 366 (on-site sewage disposal systems)
- Health & Safety Code Chapter 370 (toxic chemical release reporting)
- Health & Safety Code Chapter 371 (collection, management, and recycling of used oil)

The compliance history of a customer, overall or with a particular regulated entity, is based on many factors, from which a numerical rating is developed. This numerical rating is then converted to a general classification. The compliance history entails both

positive and negative factors related to the customer's environmental performance at a site over the past five years, such as whether at this site this customer has:

- conducted a self-audit under the Texas Environmental, Health, and Safety Audit Privilege Act
- participated in voluntary environmental management systems
- participated in voluntary on-site compliance assessment audits
- participated in voluntary pollution-reduction programs
- received an enforcement order, court judgment, consent decree, or criminal conviction for environmental violations under the jurisdiction of the TCEQ or the EPA
- received an enforcement order, court order, or criminal conviction related to environmental violations in another state
- received a citation for a chronic excessive emissions event
- received a notice of violation from the TCEQ since September 1, 1999
- received one or more inspections from the TCEQ (and, if so, the results of those inspections).

This information is compiled in a document called a compliance history report.

TCEQ's Chapter 60 rules spell out the procedure for quantifying the significance of each factor in the compliance history. The resulting rating is intended to indicate a measure of the customer's noncompliance. A rating of zero indicates perfect compliance, with the rating increasing with each failure to comply. If the TCEQ has no information on which to base a rating, the customer is assigned a rating of 3.01 and classified as "average by default." Ratings are converted to classifications as follows:

If the calculated rating is:	**Then the performance is classified as:**	**This classification means that at this site the customer:**
Below 0.10	High	Complies with environmental regulations extremely well.
0.10–45.00	Average	Generally complies with environmental regulations.
45.01 or greater	Poor	Fails to comply with a significant portion of the relevant environmental regulations.

Ratings (and, therefore, classifications) are updated each September 1 based on the compliance history for the previous five years. Compliance history classifications are published online in the TCEQ's Compliance History Database and in a list of classifications on the agency's Web site. New classifications are published the first working day of each October, reflecting the September 1 update. Periodically, the list and online database are updated to incorporate changes that have resulted from corrections or appeals.

Compliance history reports are also updated whenever any of the following events occurs:

- receipt of a customer's application for a new permit;
- receipt of a customer's application to renew or amend an existing permit;
- receipt of a customer's application to participate in an innovative program;
- formal enforcement action is begun against a customer.

Only those classifications that result from compliance history ratings of at least 30 may be appealed. Anyone who has an interest in a compliance history classifica¬tion may appeal the classification, which must be received no later than 45 days after the classification was posted on the TCEQ Web site. Only the TCEQ can correct an error, but anyone at any time may bring an error to attention and ask that it be cor¬rected. Correctable errors can include clerical errors, such as: typographical errors (e.g. a name is misspelled); filing errors (e.g. an investigation within the five-year compliance period is missing from the report); mathematical errors (e.g. a rating calculation is incorrect); factual errors found in the report (e.g. a notice of violation [NOV] in the compli¬ance history report, when in fact no written NOV was issued; a notice of enforcement [NOE] is listed as an NOV in the compliance history report).

Pursuant to Water Code Sec. 5.754, the current classification and an updated compliance history report of a customer must be considered in a number of regulatory decisions. For example, poor performers are allowed to continue operating under their current permit, but: might not be able to renew existing permits at the affected sites; might not be able to obtain new permits; will be subject to stricter permit conditions in the future; the affected sites will be subject to higher enforcement penalties; the affected sites are not eligible for "announced" investigations [a routine field investigation except that the TCEQ investigator will call the customer shortly before the investigation]; and, neither the customer nor the affected site will be eligible to participate in innovative TCEQ programs, such as obtain authorization under a general or flexible permit. In making these major decisions, the current classification [the one developed each September 1], along with the compliance history for the five years immediately preceding the event, is used.

Important Historical Information

2003 State Auditor Report:

In December 2003, the State Auditor's Office (SAO) issued an audit report relating, in part, to the TCEQ's enforcement functions. [see Appendix 11]. As it related to administrative penalties, the SAO report generally found that the TCEQ does not "does not consistently assess penalties in accordance with its policies and standards. The policies are complex, and it is difficult to calculate penalties accurately." The audit also found that "if unaddressed, these inconsistencies could limit the Commission's ability to ... hold environmental violators accountable, and deter future instances of noncompliance."

The audit found "the lack of timely enforcement orders and settlement of enforcement cases could allow violations to continue and slows penalty collections." The audit specifically found that the TCEQ does not consistently settle enforcement cases, or does not refer unsettled cases to the Litigation Division and/or issue enforcement orders to alleged violators, within timeframes established in its policies. Noting that the TCEQ's philosophy is to promote voluntary compliance and to work with entities to correct violations prior to finalizing enforcement orders and collecting penalties, the audit stated that a strong enforcement function is important in protecting the State's human and natural resources, and delays in the enforcement process could result in violators' continuing to pollute and cause the State to lose the use of penalty funds. It further noted that "the Commission's recent changes to its penalty policies may reduce their effectiveness as a deterrent to polluters."

To address these deficiency findings, the SAO recommended that the TCEQ revise and streamline its penalty policy and penalty calculation worksheet. In response, the TCEQ agreed to review the administrative penalty process to ensure assessments, adjustments and deferrals are made in accordance with existing policies, and agreed to review the penalty policy. It noted, however, that the statute requires the Commission to consider certain items, and that it believed the penalty policy addresses those items; that the penalty policy must be flexible to accommodate hardship circumstances, and that the Commission is authorized to exercise discretion.
The SAO additionally found that the cost of penalty deferrals may outweigh the benefits; the practice of deferring penalties for some violators may not be cost-effective. Noting that the TCEQ offers a deferral to any violator that has not committed the same or a similar violation in the past, the Auditor found that it is possible for violators with lengthy enforcement histories to qualify for the deferral as long as none of the previous violations were for the same or a similar violation. The SAO recommended that the TCEQ determine whether the cost of deferrals is worth the benefit of shortening the settlement time, given that offering a deferral generally does not shorten the settlement time enough for the Commission to meet its deadline.

The SAO found that the TCEQ's revised 2002 penalty policy reduces penalty enhancements from the 1999 penalty policy levels for entities with long histories of prior violations. This new penalty policy has the potential to weaken the deterrence influence of enforcement actions on the regulated community, as well as decrease the penalty dollars assessed and collected.

Another audit finding involved the culpability component of administrative penalty adjustments. Under its 1999 penalty policy, the TCEQ evaluated an entity's culpability based on whether the entity had received a prior notice of violation (NOV) for the same or a similar violation. Under the 2002 policy, the TCEQ no longer considers NOVs when evaluating culpability but does consider them with regard to compliance history. Culpability is further limited to the existence and discovery of documentation suggesting prior knowledge of the deficiency. As a result, there is little evidence left with which to determine culpability. Not using NOVs to determine culpability will allow repeat violators

to avoid paying penalty enhancements.

The SAO found the reduction for a good-faith effort to comply allows entities six months or longer to resolve violations and have their penalties reduced. Under established guidelines, the TCEQ up to two months to issue an NOV and up to four months after screening to issue a draft order. If the violator addresses the violation during this time, the Commission reduces the penalty, resulting in a forfeiture of penalty dollars collected and interest revenue earned by the State.

Finally, the SAO found that the 2002 penalty policy revisions subject all entities that receive more than $15,000 in economic benefits from noncompliance to a penalty enhancement of 50 percent of the base penalty. The entities that are subject to the enhancement often have economic benefits that exceed their penalties, which could reduce their incentive to comply. The enhancement does not significantly increase the impact because the penalty enhancement is a percentage of the base penalty, not a percentage of the benefit gained by noncompliance. Noting that the Commission contends that the cost of making repairs or adjustments to come into compliance should be considered in the enforcement process, and the cost of coming into compliance is often greater than the economic benefit gained, the SAO cited that because these repairs or adjustments are needed for the entity to operate legally, their costs should not be considered as part of the penalty.

TCEQ's Internal Review of its Enforcement Programs:

During 2004, after the issuance of the SAO Report, the TCEQ conducted an extensive self-review of its enforcement functions, which resulted in a number of recommended changes to its enforcement policies, processes and procedures. Several recommendations proposed to sharpen the agency's focus on preventing and reducing risk to human health and the environment by assigning a higher priority and additional agency inspection and enforcement resources to those violations causing harm or that have the potential to cause harm. For instance, inspections would be scheduled based primarily on a facility's potential risk to the environment. Because unauthorized facilities are less likely to install the controls needed to protect the environment, field resources would also be reserved every year to address sectors that have high levels of unauthorized operations. To ensure proper enforcement against environmental problems detected through citizen complaints, the agency would implement a new complaints manual and a nuisance odor protocol. To improve the complaint receiving process and 24-hour accessibility, direct links on the agency Web site were created to file a complaint online, provide information on Citizen Collected Evidence and to provide and explain the Nuisance Odor Protocol.

Several recommendations proposed to make the enforcement program stronger by making the process faster and more predictable. The enforcement process timeline was streamlined from approximately 250 days to 185 days for agreed settlement cases. To help promote quick resolution of violations and corrective actions with a specified, reduced penalty, a one-year Field Citation pilot program was developed and implemented

statewide to cite certain clear-cut violations on-site regarding specific programs. The financial inability to pay process was streamlined by enforcing a 30-day deadline to submit documentation supporting a financial inability to pay request, running from the respondent's receipt of the proposed draft order.

By eliminating individual assessments for minor violations, the use of standard penalties could shorten timelines and allow a shift of resources to more serious violations. The use of standard and minimum penalties would also make outcomes more predictable, thus enhancing deterrence. Eliminating some penalty deferrals and enhancing penalty amounts for cases that do not settle quickly could encourage speedier resolution of cases and address violations more quickly.

Respondents will continue to be required to certify compliance with enforcement orders prior to closing out the orders. Criteria were developed to determine where appropriate monitoring, either by the agency or the respondent, is necessary to demonstrate compliance prior to order close-out. In order to address false compliance certification on orders, staff was directed to verify completion of corrective actions via on-site inspections rather than through a paper audit, except when paper certification/documentation is sufficient.

In order to improve the internal communication between the Enforcement Division and other areas of the agency during enforcement order development, a forum was established after the monthly director's meetings to discuss orders under development and evaluate standard conditions and processing procedures, as well as conferring on specific cases as needed to ensure comprehensive requirements that do not conflict with permit requirements or timeframes.

On a case-by-case basis when permit applications and enforcement actions occur at the same time for an entity, the permit application will be used as an additional compliance tool by including, in some circumstances, special permit provisions addressing enforcement issues.

A primary and significant component of the Enforcement Review Process was the review of the agency's Penalty Policy and its application, resulting in a number of recommendations by the ED to amend/reform the Penalty Policy. After a series of stakeholder meetings on key issues related to the calculation of administrative penalties, the Commission directed staff to re-evaluate the current Penalty Policy, the enforcement process review decisions, and the comments received by stakeholders to determine which parts of the policy should be developed into rules and which should remain as policy and/or guidance. The Commission also indicated that they wanted to retain a formal Enforcement Policy that would assert the Commission's policy statement on Enforcement and Penalties and then rules would be developed to implement that policy. At its October 10, 2006 Work Session, the Commission directed staff to schedule the outstanding penalty policy issues and the proposals related to the pending rulemaking for the compliance history rule on a future work session prior to the end of the calendar year.

As a result of all the various discussions and all written comments received regarding the penalty policy, the ED drafted a proposed rule that incorporated all the Penalty Policy issues [see Appendix 12], and proposed to present that proposed rule package to the Commissioners prior to the end of calendar year 2006, as directed. However, the Penalty Policy rulemaking project was placed on hold until further notice from the Commission. As of June 1, 2010, no proposed penalty policy rule package has ever been scheduled for Commission consideration, and no date for any future consideration by the Commission has been established.

Another significant component of the Enforcement Review Process was the review of the compliance history rules and processes, resulting in a number of recommendations by the ED to amend/reform the compliance history rules and processes. After the Commissioners provided the ED with direction on a number of the issues and instructions to proceed with formal rulemaking, a draft rule package was scheduled for consideration in August of 2006. However, given the approaching 2007 legislative session, the Commission directed the ED to hold the package until further notice. At the direction of the Commissioners, an informal discussion with interested parties was held, and as a result of that discussion and all written comments received regarding the rulemaking project, the ED prepared a revised draft compliance history rule intended to reflect all changes needed to implement the Commissioners previous directions, decisions and guidance [see Appendix 13], and proposed to present that rule package to the Commissioners. However, as of September 1, 2009, the proposed rule package has never been formally taken up by the Commissioners.

The ED's draft compliance history rule proposed to change the current rule as follows:

- in the site rating formula, excluded violations cited in federal orders from the numerator, exclude self-reported violations from the numerator and denominator until addressed in an enforcement order, added "site complexity" to the denominator, and included positive components such as early compliance with a rule or participation in an agency-supported voluntary pollution reduction program;
- redefined repeat violator as having more than one of the "same" major violation;
- changed nomenclature of classification from "average by default" to "unclassified";
- added a requirement that, as part of a due diligence performed, compliance history information must be disclosed by the seller to the buyer prior to a change in ownership. This recommendation differed from previous Commission approval/directive that compliance history reflect the environmental performance record of only the current owner and not previous persons or owners. This would change the current rule which evaluates a five-year history for the site regardless of ownership, and is consistent with the statute, which requires the Commission to consider the violator's history and extent of previous violations;
- added language that allows a regulated entity access to its compliance history information prior to publication on the agency's Web site; and
- revised the appeal of classification language to allow all average performers, as well as poor performers, the opportunity to appeal.

General Enforcement Issue 1

The current statutory caps on administrative penalties are problematic in several specific enforcement situations and/or penalty components.

The TCEQ has the authority to assess administrative penalties in 28 environmental program areas under a number of statutory provisions located in the Texas Water Code (TWC) and the Texas Health & Safety Code (THSC). These statutes provide the TCEQ with the authority to assess penalties, set forth the factors that the Commission must consider in determining the amount of penalty to assess, and set the minimum and maximum penalties that may be assessed per violation per day. They also specify the civil penalties that may be assessed through judicial processes. For almost all air, water and waste violations, penalties are authorized up to $10,000 per day, per violation for most administrative enforcement cases and $25,000 per day, per violation for most civil judicial cases. There are some statutory provisions for certain specific regulated program activities that authorize lower administrative and civil penalty amounts. [See Water Code Sec. 7.052]. Each day that a continuing violation occurs may be considered a separate violation, and the TCEQ can authorize an installment payment schedule for most administrative penalties assessed.

Given these statutory authorities and restrictions, for large, complex regulated facilities and/or significant violation events, it is fairly common for a calculated penalty, after consideration of all the factors that must consider in determining the amount of penalty to assess and then making the appropriate adjustments, to exceed the statutory maximum penalty that may be assessed per violation per day. In these instances, the calculated penalty must be lowered to the statutory maximum penalty. Accordingly, the penalty then finally assessed may not truly reflect the penalty appropriate for the violation(s) involved, and may offer no meaningful deterrence to future non-compliance. In these instances, many in the regulated community may simply look at their maximum liability for the violation(s) [the statutory penalty cap] in evaluating the cost of compliance versus the cost of noncompliance, thus making a business decision to treat the likely penalty as a "cost of doing business." To meaningfully deter violations, the penalties assessed must force a very significant business decision by the violator, or potential violator, as to the cost of compliance versus the cost of noncompliance. If handled as a simple business decision, the violator will almost always choose the less costly approach.

The statutory maximum penalties create problems in several specific enforcement situations and/or penalty components. First, when violations result from significant and severe events that occur over a very short duration, such as unauthorized air emissions events or wastewater bypasses, with documented harm to human health or the environment, the statutory maximum penalty may prevent the calculated/assessed penalty

from being an amount adequate to address the particular violation(s) and/or provide an appropriate deterrent effect. Here, speciation, the process of assessing/imposing penalties for multiple violations in a single, short-term event based on the speciated components of the emission or discharge, could help offset the limitations imposed by the statutory penalty cap. If a penalty is calculated only on the basis of the single event, the total assessed penalty cannot exceed the daily statutory cap. If penalties are calculated for the multiple violations in a single event based on the speciated components, the statutory cap would apply to each violation. The TCEQ uses speciation in most water quality violations, but not air violations, and the OAG uses speciation when pursuing civil judicial enforcement.

Next, when economic benefit of noncompliance is considered, the statutory maximum penalty may likewise prevent the calculated penalty, adjusted for the economic benefit received by the violator, from being an amount adequate to address the particular violation(s) and/or provide an appropriate deterrent effect. In a significant number of violation instances, if economic benefit of noncompliance is completely and meaningfully considered and included in the calculated penalty, the final assessed administrative penalty would most likely exceed the statutorily mandated maximum.

Recommendations

Option 1: Raise the current statutory caps on all administrative penalties set forth in the Water Code and the Health & Safety Code. The Legislature should reevaluate/adjust the statutory caps every five years to account for inflation.

Option 2: Adjust the current statutory caps on all administrative penalties set forth in the Water Code and the Health & Safety Code, for violations of permits and authorizations issued under federally delegated programs, to be consistent with federal administrative penalty levels. For example, under the Clean Water Act, the EPA is authorized to issue administrative penalties in two classes, with two different statutory caps: Class I – where the amount of a penalty may not exceed $10,000 per violation, except that the maximum amount of any class I penalty shall not exceed $25,000; and Class II – where the amount of a penalty may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II penalty shall not exceed $125,000. The Legislature should reevaluate/adjust these statutory caps every five years to account for any adjustments in penalty amounts made by the federal government, or to account for inflation.

Option 3: Specifically authorize the TCEQ to use speciation, and thus exceed the statutory penalty caps, when violations result from significant/severe violation events that occur over a short duration, with documented or potential harm to human health or the environment. Penalties would be calculated for multiple violations in a single event based on the speciated components, with the statutory cap applying to each component violation.

General Enforcement Issue 2

TCEQ's current Enforcement Initiation Criteria (EIC) do not require initiation of enforcement action for all violations.

One of the recommendations adopted/implemented as a result of the agency's enforcement review in 2004 was to develop a risk-based investigation strategy that focuses resources on those facilities that pose a significant risk to human health and the environment. To focus investigations, monitoring, enforcement, and compliance assistance under such a strategy approach, the agency's EIC was revised, with EIC Revision 12 [see Appendix 14] being the currently approved version, effective July 1, 2008.

In order to promote consistency in handling air, water and waste violations, the criteria specified in the EIC are used for initiating formal enforcement actions. The EIC divides violations into three categories, with different criteria associated with each: Category A violations require automatic initiation of formal enforcement action when documented during an investigation; Category B violations require a NOV at the first occurrence, then require initiation of formal enforcement action if the violation is not corrected by an established NOV deadline or if the violation is documented at two consecutive investigations within the most recent 5-year period; and Category C violations may require initiation of formal enforcement action if the entity receives a notice of violation for the same violation 3 times within the most recent 5-year period, including the notification for the current violation. It is important to note that some criteria have specific exclusions written into them which change the required enforcement action for the excluded violation(s), and that variances to the violation categories and handling are authorized in particular situations.

The EIC is to be reviewed and updated, as appropriate, on an annual basis, and the Commission has the opportunity to review any proposed revisions before final approval by the ED.

Recommendations

Option 1: TCEQ should revise the EIC to require automatic initiation of enforcement for all permit violations, unless it finds the violations are de minimis, or are a result of force majeure, an act of God, war, strike, riot or other catastrophe.

Option 2: TCEQ should revise the EIC to require automatic initiation of enforcement for all permit violations that have the potential to harm the environment or public health.

General Enforcement Issue 3

The scope of the current Field Citation Program should be expanded to cover other programs or other violations to help promote quick on-site resolution of clear-cut violations and corrective actions with a specified, reduced penalty.

Another recommendation adopted as a result of the TCEQ's enforcement process review was the implementation of a field citation pilot program statewide on March 13, 2006, covering nine specific violations. Since April 27, 2007, the TCEQ's Field Citation Program has shifted from a pilot to a permanent program. The Field Citation Program currently covers violations in the following programs: Petroleum Storage Tanks (PST); (PST) Stage I and II vapor recovery; Storm water (industrial and construction); Occupational Licenses; Dry Cleaners; On-site Sewage Facilities; and Water Rights.

The field citation process is different from the traditional enforcement process in that when the TCEQ conducts an investigation, the investigator may cite certain clear-cut violations and hand a penalty assessment to the respondent on the spot. The field citation is intended to promote a quick resolution for any of the field citation-eligible violations documented during an investigation, while offering a reduced penalty as compared to a penalty calculated through the traditional enforcement process. A respondent has the right to appeal the field citation to the Regional Director within the 30 days from the investigation date, but after the 30th day, the respondent will be subject to higher penalties for the unsettled field citation.

When a field citation is issued, the respondent has two options: (1) settle the field citation by paying the total assessed field citation penalty within 30 days from the investigation date, and correcting the violation(s) and documenting/certifying completion of any required corrective actions within 45 days from the investigation date; or (2) choose not to accept the field citation, in which case the field citation will be referred to the Enforcement Division for a standard administrative enforcement order, either agreed or contested. In this process, the reduced penalty opportunity is removed.

Recommendation

The scope of the current Field Citation Program should be expanded to include additional programs and/or to add additional violations in the current programs subject to field citations. [e.g. failure to post signage as may be required in air, water and waste permits or rules.]

General Enforcement Issue 4

Despite clear statutory authority otherwise, the TCEQ does not revoke or suspend permits, licenses, certificates, registrations even when warranted in enforcement actions.

Water Code Sections 7.302 and 7.303 provide that after notice and hearing, the commission may revoke or suspend a permit on any of the following grounds:
(1) violating any term or condition of the permit, and revocation, suspension, or revocation and reissuance is necessary in order to maintain the quality of water or the quality of air in the state, or to otherwise protect human health and the environment consistent with the objectives of the statutes or rules within the commission's jurisdiction;
(2) having a record of environmental violations in the preceding five years at the permitted or exempted site;
(3) causing a discharge, release, or emission contravening a pollution control standard set by the commission or contravening the intent of a statute or rule;
(4) including a material mistake in a federal operating permit issued under Chapter 382, Health and Safety Code, or making an inaccurate statement in establishing an emissions standard or other term or condition of a federal operating permit;
(5) misrepresenting or failing to disclose fully all relevant facts in obtaining the permit or misrepresenting to the commission any relevant fact at any time;
(6) a permit holder failing to ensure that the management of the permitted facility conforms or will conform to the statutes and rules within the commission's jurisdiction.

However, currently it is not the policy/practice of the TCEQ to revoke or suspend permits, licenses, certificates, registrations in enforcement actions.

The closest approaches to this enforcement measure are one currently utilized by the TCEQ in one specific instance and one recently authorized by the Legislature but not presently implemented. First, if a respondent defaults in a Petroleum Storage Tank (PST) enforcement case by failing to file an answer or failing to participate in either the preliminary or evidentiary hearing once a matter is referred to SOAH, the current Commission policy is to revoke the respondent's delivery certificate. [authorized by 30 TAC 334.8(c)(6)]. When a delivery certificate has been revoked, fuel suppliers are prohibited from delivering motor fuel into the PSTs. To implement this policy, the agency's enforcement petitions conspicuously inform the respondent that failure to answer or participate in any hearing will result in revocation of the delivery certificate. Where a delivery certificate is held by a party that is not otherwise a part of an enforcement case, petitions will be served on both the owner and the operator of the PST, since both are affected by the revocation. Note: The Commission has directed staff to look

into other opportunities to revoke other certificates, such as certificates for dry cleaning facilities and dry cleaner drop stations [authorized by 30 TAC 337.11(f)], but to date, no additional certificate revocations have been pursued.

Secondly, House Bill No. 3547, enacted by the 81st Legislature in 2009, authorizes the TCEQ to order a dry cleaning facility or dry cleaning drop station to cease operation if the violation is not corrected within 30 days after the receipt of the NOV. If the owner or operator does not correct the violation within the prescribed time, the commission may order the dry cleaning facility or dry cleaning drop station to cease operation. This authority became effective September 1, 2009 for violations occurring on or after that date. See Appendix 15 for an article describing how some other states handle revocation of permits, licenses, etc. in enforcement actions.

Recommendation

Direct the TCEQ to adopt/implement a specific policy that a permit shall be revoked or suspended when deemed appropriate in enforcement actions, pursuant to Water Code Sections 7.302 and 7.303, especially if the respondent is a repeat violator or if the TCEQ finds the violations to be willful or grossly negligent. Under any circumstances, the TCEQ should suspend a permit until the respondent comes into compliance.

General Enforcement Issue 5

Additional or enhanced policies/procedures could be implemented to help expedite the handling of enforcement cases.

As indicated above, the SAO found "the lack of timely enforcement orders and settlement of enforcement cases could allow violations to continue and slows penalty collections." The audit specifically found that the TCEQ does not consistently settle enforcement cases, or does not refer unsettled cases to the Litigation Division and/or issue enforcement orders to alleged violators, within timeframes established in its policies. Noting that the TCEQ's philosophy is to promote voluntary compliance and to work with entities to correct violations prior to finalizing enforcement orders and collecting penalties, the audit stated that delays in the enforcement process could result in violators' continuing to pollute and cause the State to lose the use of penalty funds.

In the agency's enforcement review process, significant focus was placed on how long the enforcement process takes. In response, the TCEQ streamlined the enforcement process timeline from approximately 250 days to 185 days (with settlement achieved); implemented a Field Citation Program to cite certain clear-cut violations on-site regarding certain specific programs; and, streamlined the financial inability to pay process by enforcing a 30-day deadline to submit supporting documentation.

Recommendations

Option 1: The TCEQ should set/enforce firm deadlines for processing enforcement cases to settlement; e.g. enforce the 185-day timeline currently in place.

Option 2: The TCEQ should expand the scope of the current Field Citation Program, as discussed above, to allow more minor enforcement cases to be resolved in the Field Offices more quickly.

Option 3: The ED should be delegated the authority to issue certain enforcement orders, such as agreed orders and field citation approvals, thus avoiding the time necessary to schedule/post such items on Commission Agendas. *[Note: Senate Bill No. 1693, enacted by the 81st Legislature in 2009, authorized the commission to delegate to the executive director the authority to issue an administrative order, including an administrative order that assesses penalties or orders corrective measures, to ensure compliance with the provisions of the statutes within the TCEQ's jurisdiction and rules adopted under those provisions.]* In carrying out this authority, the ED should be required to post notice of his proposed action(s) on items delegated to him for decision/action on the TCEQ's website

and in the Texas Register, and to issue notice to any complainants involved, affording a reasonable period of time to comment. In implementing this recommendation, the ED could utilize the TCEQ's current E-agenda program, or establish a regular, standard "Executive Director's Agenda" date. The items could also be handled on a county-specific or media-specific basis to facilitate timely and efficient processing, both for the agency, the regulated community and the interested public.

General Enforcement Issue 6

Current statutory and regulatory limitations on authorized uses of SEP funding are problematic when applied to local governmental entities.

Water Code Sec. 7.067 currently prohibits the commission from approving a SEP project that is necessary to bring a respondent into compliance with environmental laws, that is necessary to remediate environmental harm caused by the respondent's alleged violation, or that the respondent has already agreed to perform under a preexisting agreement with a governmental agency. A SEP must directly or indirectly benefit the environment above and beyond legal compliance requirements. If federal, state, or local law requires the project being proposed to be carried out, the project cannot qualify as a SEP; nor can a SEP be used to fix the problems that are the basis of the enforcement action taken by the TCEQ.

TCEQ policy also provides that a SEP cannot generally be located "on-site"; i.e. at the actual site of the facility that committed the violations. However there are three exceptions to this rule, so long as the SEP is not necessary to bring the respondent into compliance with environmental laws and is not necessary to remediate the environmental harm caused by the respondent's violation: (1) cities, counties or other governmental entities may perform a SEP within their jurisdiction; (2) nonprofit organizations may also be eligible to perform a SEP on-site when the benefit to the environment far outweighs the benefit to the nonprofit organization; and (3) if the project would make the respondent eligible for a Proposition 2 tax exemption and the respondent agrees not to apply for this tax exemption. Also, TCEQ policy requires that the SEP project must follow, not precede, an enforcement action. SEP credit will not be approved for a project already completed, already included in a respondent's budget or already committed to be undertaken. Although these statutory and policy limitations are well-founded in most violation situations, they can be problematic at times when local governments are involved who often have limited financial resources. In these situations, compliance initiatives could likely be furthered if the respondent was allowed to commit to SEP projects that would enable it to come into compliance quicker or remediate any harm already caused by the violation(s).

Recommendation

Revise current TCEQ policies applicable to local governmental entities to provide more discretion/flexibility in the approval/use of SEP projects on-site and when a project has already been completed, already included in a respondent's budget or already committed to be undertaken.

General Enforcement Issue 7

The TCEQ's current repeat-violator definition is overly complex and confusing.

Although primarily a compliance history component [Water Code Sec. 7.754(c)(2), 30 TAC Sec. 3], the repeat violator definition can/should be used in other enforcement considerations. Water Code Sec. 7.053 requires the TCEQ to consider the history and extent of previous violations [i.e. repeat violations] in determining the amount of an administrative penalty.

TCEQ Rule 60.3(a)(3) provides, in part:
(D) Upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.
(E) The commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This includes violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

Rule 60.3(c) provides:
(c) Enforcement. For enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements.
(1) Poor performers are subject to any additional oversight necessary to improve environmental compliance.
(2) The commission shall consider compliance history classification when assessing an administrative penalty.
(3) The commission shall enhance an administrative penalty assessed on a repeat violator.

Accordingly, the current Penalty Policy provides that 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, with the repeat violator designation determined according to Rule 60.2(d). [see Appendix 16].
The proposed Chapter 60 rule revisions developed by the ED as result of agency enforcement review kept the repeat-violator criteria as in the existing rule, but specified that a person may be classified as a repeat violator at a site when, on multiple, separate occasions, the same major violation(s) occurs during the compliance period. The "same major violation" is defined in the proposed rule as a violation at a site of the same chapter, section, and subsection of a commission rule or statute. The ED acknowledged that the

outcome of this change would be fewer repeat violators.

Recommendations

Option 1: Make targeted, meaningful changes to the present definition/formula of repeat violator by modifying the definition of major violation found in Rule 60.2(c)(1) to ground it to impact-related violations. In order to address the violations with a high potential to impact human health and the environment and as well as those demonstrating a disregard for environmental regulations, one approach could be to utilize the EIC.

Option 2: Amend the current definition found in Rule 60.2(d)(1) to include systemic violations of the terms and conditions of TCEQ authorization(s). Violations should not be limited to the same violation; rather a pattern of behavior should dictate the use of the term repeat violator. The TCEQ should also have the ability to classify a person as a poor performer if the agency can demonstrate performance issues impacting human health and/or the environment as well as systemic inability, either through lack of resources or disregard for rules and regulations, to comply with the terms and provisions of a TCEQ authorization. The EIC's definitions of certain A, B and C violations and a specific frequency based on an entities size and complexity should be incorporated in order to capture some measure of systemic violations.

Penalty Policy Issue 1

The TCEQ Penalty Policy has not been adopted as a rule and some policies that are regularly and routinely utilized in penalty determination/assessment arise outside that document.

To effectuate and administer the statutory administrative penalty authority and its directives, the TCEQ has developed, adopted and utilized numerous policies relating to penalties. For the most part, these policies have been compiled into the TCEQ's Penalty Policy document, but some policies that are regularly and routinely utilized arise outside that formal document. The TCEQ's Enforcement Penalty Policy was originally published October 1, 1997, and was revised January 1, 1999, and September 1, 2002. The 2002 version is the current TCEQ Penalty Policy.

When first developed in 1997, the Penalty Policy was intended to function for a period of time and then be adopted in rulemaking, incorporating lessons learned from its implementation. However, none of the TCEQ's established penalty policies, or the statutory directives set forth in Water Code Sec. 7.053, have ever been explicitly adopted into TCEQ rules. The TCEQ has adopted 30 TAC Chapter 70 – Enforcement, which only provides general rules governing enforcement actions at the TCEQ. In these rules, Sec. 70.3 authorizes the ED to use enforcement guidelines that are neither rules nor precedents, but rather announce the manner in which the agency expects to exercise its discretion in future proceedings.

Water Code Sec. 5.103 requires the TCEQ to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of this state. It also requires that the TCEQ must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency. The TCEQ's Penalty Policy is certainly an "agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of the agency."

Benefits to adopting the Penalty Policy by rule include:
- adds strength at a SOAH hearing or judicial proceeding on penalty recommendation or assessment if Penalty Policy is in rule rather than policy document;
- clarity/simplification of all the agency's penalty policies through the rule-making process and incorporation of all policies approved by the Commission;
- settles more non-contested cases because a rule affords less room to negotiate;
- saves resources when negotiations limited;
- provides more uniform penalty recommendations and decisions;

• rulemaking through the Administrative Procedures Act will provide a transparent, reasoned justification for the policies;
• EPA concerns about enforcement can be addressed during the public participation component of the rulemaking process;
• no statutory changes are required.

Possible negatives associated with adopting the Penalty Policy by rule include:
• creates some inflexibility for change; makes changing the policy when warranted more difficult and time consuming
• takes some discretion away from the ED and commissioners in making enforcement/penalty decisions
• rulemaking process is very involved procedurally, with extensive stakeholder involvement and expenditure of significant staff resources

Recommendation

Direct the TCEQ to promulgate the Penalty Policy in rule, incorporating all currently existing internal guidance documents/memos relating to penalty policies into the formal Penalty Policy rule. The agency should be authorized to supplement/clarify the Penalty Policy through guidance documents, thus maintaining flexibility for agency discretion.

Penalty Policy Issue 2

Should separate media-specific penalty policies be adopted.

The regulated community subject to the TCEQ's jurisdiction is significantly diverse, both as to size and complexity of facilities and types of violations that occur. Also, the type and nature of discharges or emissions that occur and the actual or potential environmental or human health effects vary across the regulated community, depending on the media involved [i.e. air, water, waste].

However, TCEQ's current penalty policy applies a standard, common approach to all violations, no matter the media involved. Applying the same penalty policies to vastly different facilities and sectors of the state's regulated community in different media can be problematic. A "one-policy-fits-all" approach does not always work fairly and sometimes results in unreasonable outcomes. Air regulations are more complex and have greater opportunities for violations. Wastewater discharge permit levels are generally set at levels that do not expect 100% compliance with the limits on a continuous basis [e.g. 30-day averages]. The severity and significance of violations in different media rarely have any relation to compliance in other media.

Recommendation

Given the significant differences in the regulatory expectations and requirements between different media, separate media-specific penalty policies should be developed/adopted.

Penalty Policy Issue 3

Incorporating standard penalties into the Penalty Policy could help expedite the handling of enforcement cases.

By eliminating individual assessments for minor violations, the use of standard penalties could shorten timelines and allow a shift of agency enforcement resources to more serious violations. The use of standard penalties would also make outcomes more predictable, thus enhancing deterrence.

The Field Citation Program already specifies fixed, standard penalties for the specific violations encompassed in the Program's scope. At the March 29, 2006 Agenda, the Commission directed staff to develop standard base penalties for programmatic violations; i.e. those that do not involve actual discharges or emissions and/or documented environmental or human health effects. Pursuant to this directive, staff developed a proposed standard penalty table for some specific, common programmatic violations. [see Appendix 17]. However, since standard penalties would be part of the Penalty Policy, further development and implementation of the proposed standard penalty table was effectively placed on hold since the proposed Penalty Policy rulemaking package has never been scheduled for Commission deliberation, and no date for any future consideration by the Commission has been established.

Recommendation

The TCEQ should adopt standard penalties for the most common programmatic violations. Common violations for major program areas should be researched and the violations divided into common categories, which are then assigned a standard penalty amount for each category as a percentage of the statutory limit for major and minor sources. Any documented violation falling within a proposed category would be assessed the penalty amount associated with that category. The standard penalties should be periodically reviewed and adjusted as necessary to account for inflation and other relevant circumstances.

Penalty Policy Issue 4

Penalties calculated pursuant to the Penalty Policy are not high enough to accurately reflect the environmental harm or human health effects from a violation, and are not effective to deter future noncompliance.

Deterrence of future violations is a long-recognized goal of penalty assessment. Water Code Sec. 7.053(3)(E) expressly provides that in considering the amount of a penalty the commission shall consider the amount necessary to deter future violations. TCEQ historical data indicates that the assessed penalty did not deter future violations by the same entity in a significant percentage of time.

Recommendation

Revise the Environmental/Property and Human Health Penalty Matrix to increase the penalties assessed.

Example:

Harm Level:	Major	Moderate	Minor
Respondent:	Major/Minor	Major/Minor	Major/Minor
Actual Release	100% / 75%	75% / 50%	50% / 20%

[Percentages reflect the percentage of the statutory maximum penalty that will be utilized to calculate the base penalty.]

Penalty Policy Issue 5

Under the current penalty policy, consideration of the economic benefit resulting from noncompliance and any resulting adjustment of a penalty does not adequately account for the economic benefit received by the violator and/or provide an appropriate deterrent effect.

Water Code Sec. 7.053(3)(D) requires the TCEQ to "consider" the economic benefit of noncompliance (EBN) in setting penalties. The TCEQ currently defines economic benefit as monetary gain derived from a failure to comply with any TCEQ regulation or State statute. Economic benefit may include, but is not limited to, any or all of the following: (1) the return a respondent may earn by delaying the capital costs of purchasing and installing pollution control equipment; (2) the return a respondent may earn by delaying a one-time expenditure; and (3) the return a respondent may earn by avoiding the costs of compliance.

To determine whether a respondent has gained an economic benefit (during the alleged violation period), the TCEQ evaluates 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 the overall economic benefit gained will be estimated. Only capital expenditures, one-time non-depreciable expenditures, periodic costs, and interest gained are evaluated in the calculation of economic benefit. Capital expenditures 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 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 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 is currently handled in two different manners by the TCEQ:

One hundred percent of the avoided costs of compliance (i.e. economic benefit) are recovered through an adjustment under "other factors that justice may require," to the extent allowed under the statutory penalty caps. The only exception to this is that the TCEQ does not attempt to recover avoided costs of compliance from governmental and non-profit entities.

The TCEQ also seeks to recover some of the delayed costs of compliance when the delayed costs exceed $15,000. In these cases, the base penalty for the violation(s) is increased by 50%, as set forth in the matrix below. The economic adjustment factor is capped so the adjustment amount does not exceed the economic benefit gained.

Economic Benefit Matrix:

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

Inclusion of economic benefit cannot result in a final assessed administrative penalty that exceeds statutorily mandated maximums.
At the September 7, 2007 Work Session, two Commissioners directed staff to lower the threshold for applying EBN relating to delayed costs of compliance to $7,500, and include that change in the proposed penalty policy rule. However, since no proposed penalty policy rule has ever been considered by the Commissioners, that threshold change has never been implemented.

In December 2003, the SAO, noting that the 2002 penalty policy revisions subject all entities that receive more than $15,000 in economic benefits from noncompliance to a penalty enhancement of only 50 percent of the base penalty, found that entities that are subject to the enhancement often have economic benefits that exceed their penalties, which could reduce their incentive to comply. Also, in a December 2003 report on the TCEQ's TPDES enforcement program, EPA recommended that the TCEQ change its penalty policy to "collect at least the economic benefit of noncompliance and the gravity portion for the actual time period of noncompliance. This practice would serve to 'level the playing field' and make it economically impractical to violate the permit requirements."

In FY 2007, only 6% of the total EBN accrued by violators was recovered through the EBN component of assessed penalties. TCEQ enforcement data indicates that economic benefit is actually applied in less than 10% of all cases because the economic benefit is either negotiated out of agreed orders or the amount does not exceed the $15,000 threshold. In cases where economic benefit does exceed the $15,000 threshold, the recovery is usually very small after deducting the $15,000 threshold.

See Appendix 18 for examples of how some other states and the EPA treat EBN when calculating penalties. For an example of recent legislative consideration of EBN in Texas see Appendix 19.

Recommendations

Option 1: Recover all of the economic benefit, whether from avoided or delayed costs, as an add-on to the base penalty, up to the statutory amount allowed for the penalty.

Option 2: Allow the total deferral of economic benefit for local governments, non-profit organizations (such as churches and charitable organizations), and public service entities (such as school districts and hospital districts), provided that compliance is achieved in accordance with the schedule and terms of the enforcement order. Also, allow the deferral of up to $5,000 of economic benefit for small businesses, provided that compliance is achieved in accordance with the schedule and terms of the enforcement order.

100

Penalty Policy Issue 6

A better methodology for determining the number of penalty events than the one currently expressed in the TCEQ's Penalty Policy is needed.

The current TCEQ Penalty Policy provides that 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. 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. For these violations, one penalty event will be assessed for every documented observation. 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 (e.g. for each sample analysis documenting a violation).

Other violations are considered to be continuing, and 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 end-point 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 SOAH. Discrete violations are not revised because they are considered single events.

The number of events is determined by dividing 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. A penalty is then calculated by multiplying the base penalty amount by the number of penalty events determined for the violation being considered. This step is done for each violation included in the enforcement action.

During the TCEQ's 2004 Enforcement Review Process, significant comment focused on the component of the Penalty Policy as it related to determining the number of violation events when calculating appropriate penalties. There was general consensus among all stakeholders regarding a need for a better definition for determining the number of penalty events, but there were different viewpoints as to how to accomplish that and to

what end.

Environmental groups primarily focused their comments on the calculation of the number of events for continuous major programmatic violations. Noting that programmatic violations are classified as major if more than 70% of any rule or permit requirement is not met, they stated that the level of severity of violations classified into this category varied widely depending on the significance of the rule. In addition to addressing this through standard penalties, they recommended that the Penalty Policy be revised to explicitly state that a violation should be considered continuous only when there is no possible way to count it as a series of discrete events. For example, a company that is out of compliance for record-keeping over several years could be cited for each occasion that it was required to certify compliance with rules, rather than citing a single event.

In the same context as determining the number of violation events, environmental groups also commented that the Penalty Policy does not presently handle well the scale of a violation. For example, the policy does not presently distinguish between situations where a facility fails to properly monitor two pumps for leaks and where a facility fails to properly monitor an entire unit. They also commented that the current policy fails to define the scale of a violation involving multiple units; i.e. should a violation covering several units at the same facility be counted as separate violations for each distinct operating unit or simply one violation for the entire facility. They recommended that each operating unit be cited as a violation because this approach would more accurately reflect the total scale of the offense.

The regulated community primarily commented that the violation count used for penalty calculations under the current Penalty Policy is not applied consistently, and can be manipulated to calculate a significantly large penalty for an event or series of events with little or no environmental impact. They claimed that application of the current policy has been used to generate nonsensical results, such as multi-million dollar penalty calculations for fugitive emissions monitoring or leak detection and repair (LDAR) violations that had little or no impact on the environment, based on counting each component that was not monitored as a separate violation. The number of events for a given violation should be consistent with the violation, and the TCEQ should not arbitrarily decide whether the events should be categorized as monthly, quarterly, or annual. For example, if the violation is for failing to report under a permit, it should be tied to the reporting frequency or the permit term. The TCEQ should continue to focus its efforts and penalties on those situations where there is an 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. They also stated that use of a violation count should not penalize a company for attempting to repair a recurring noncompliance or result in a higher penalty for an intermittent event that a company is working to resolve than for a longer, on-going problem, simply based on violation count.

In the context of Title V deviations, they commented that current TCEQ guidance

provides little in the way of clarity or meaningful instructions on counting deviations. For example, they claimed it makes no sense to count a deviation that is attributable to the same root cause and may occur for several hours as an alleged repeat violation of an hourly permit limit; or to penalize those companies that implement the most comprehensive compliance reporting systems. The number of deviations included in a deviation report, in and of itself, should not be viewed as a measure of a Title V permit holder's compliance efforts, since all deviations are not automatically violations.
As a result of the Enforcement Review and all the various discussions and comments received, the ED recommended that the methodology for determining the number of violation events be revised. However, since this revision would be part of the Penalty Policy, it has not proceeded since the proposed Penalty Policy rulemaking package has never been scheduled for Commission consideration, and no date for any future consideration by the Commission has been established.

The ED's proposed rule provisions relating to determining the number of violation events provided that the number of events for all base penalties will be based on case-specific information, such as the number of times the violation is observed, the specific requirement violated, the degree of non-compliance, the duration of the violation, etc., as follows:

"In determining the number of events to assess for an actual release, the executive director will consider whether the release was continuing or discrete in nature.

(l) If the executive director determines that a release is discrete in nature, one penalty event will be proposed for every documented or observed release.

(2) If the executive director determines that a release is continuing in nature, the number of events will be determined by the level of impact of the violation. The penalty for the continuing violation will be assessed at the following frequency:

(A) Major harm: daily events;

(B) Moderate harm: monthly events; or

(C) Minor harm: quarterly events.

(i) For the purposes of this section, one month equals one calendar month, one quarter equals three calendar months.

(ii) For the purposes of this chapter, any part of a day equals a "day;" any part of a month equals a "month;" any part of a quarter equals a "quarter."

(iii) The duration of events concerning continuous violations will be calculated from the initial date of documented noncompliance and extend until the date the respondent returned to compliance or the date of the notice of enforcement if the respondent is not yet in compliance by that date.

(iv) The duration of events will be revised, as appropriate, to reflect extended noncompliance if settlement is not achieved within the time frame established for an expedited enforcement action and prior to referral to the State Office of Administrative Hearings and every six months thereafter until the evidentiary hearing is conducted.

(v) The executive director may determine that it is appropriate to assess the

number of events at an amount other than the amounts prescribed in this section in order to make the assessment commensurate with the specific facts applicable to the violation.

The base penalty for a violation in which a release has occurred will be calculated by multiplying the base penalty for the release by the number of events as prescribed in this section."

Recommendations

Option 1: The Penalty Policy should be revised to explicitly state that a violation should be considered continuous only when there is no way to count it as a series of discrete events.

Option 2: A violation covering several units at the same facility should be counted as separate violations for each distinct operating unit, not one violation for the entire facility; i.e. each operating unit should be cited as a violation to more accurately reflect the total scale of the offense.

Option 3: If the violation is for failing to report under a permit, registration or order, it should be tied to the reporting frequency or the permit, registration or order term.

Penalty Policy Issue 7

Calculating a penalty for multiple permit parameter violations only on the basis of a single event, even when that event is significant and severe and occurs over a very short duration, prevents the calculated/assessed penalty from being an amount adequate to address the particular violation(s) and/or provide an appropriate deterrent effect, given the daily statutory penalty caps.

Water Code Sec. 7.052 sets the maximum penalties that may be assessed per violation per day. These statutory maximum penalties are problematic in some specific enforcement situations and/or penalty components. For example, when violations result from significant and severe events that occur over a very short duration, such as unauthorized air emissions events or wastewater bypasses, with documented harm to human health or the environment, the statutory maximum penalty may prevent the calculated/assessed penalty from being an amount adequate to address the particular violation(s) and/or provide an appropriate deterrent effect.

Here, speciation, the process of assessing/imposing penalties for multiple violations in a single, short-term event based on the speciated components of the emission or discharge, could reasonably help offset the limitations imposed by the statutory penalty cap. If a penalty is calculated only on the basis of the single event, the total assessed penalty cannot exceed the daily statutory cap.

Water Code Sec. 7.052 sets maximum penalties that may be assessed per violation per day. The permits issued by the TCEQ specifically list separate and distinct pollutant parameters as permit limitations. If an entity does not comply with any specific permit parameter, that is a violation. So, if an entity has 10 specific pollutant parameters that are regulated by its permit and 5 of those specific parameters are violated in a significant pollution event, that is reasonably 5 separate violations under Sec. 7.052. If penalties are calculated for the multiple violations in a single event based on the speciated components, the statutory cap would apply to each violation. In the example above, the maximum daily penalty should reasonably be $50,000 --- 5 violations x $10,000/day per violation.

The TCEQ applies speciation when calculating penalties in most water quality violations; i.e. a noncompliant wastewater discharge is assessed penalties for each parameter violated, such as biochemical oxygen demand, total suspended particles, nitrogen, dissolved oxygen, etc. However, the TCEQ does not speciated when calculating penalties in other media violations, especially air violations. The OAG applies speciation when pursuing

civil penalties in judicial enforcement proceedings referred to that office by the TCEQ.

Recommendation

Specifically authorize the TCEQ to calculate penalties for multiple violations in a single event based on the speciated components across the board in all media programs.

Penalty Policy Issue 8

Should the current policies/practices relating to financial inability to pay be revised.

When the TCEQ determines that a respondent who is an operating business has shown a financial inability to pay an assessed penalty, all or part of the penalty may be deferred. The current practice is to require payment of an administrative penalty up to 1% of annual revenue, and allow a payment plan of up to 36 months. Given the payment plan timeframe, the practical charge to annual revenue is 0.33% assuming consistent revenue for a 3 year period. Some respondents may be asset rich and revenue poor, in which case, if the initial screen of 1% of annual revenue does not completely pay the assessed penalty, a more thorough analysis to include the respondent's assets is applied. The analysis determines whether liquid assets (cash, marketable securities, etc.), borrowing capacity, nonessential assets, or other factors indicate an ability to pay beyond 1% of annual revenue. The minimum payment plan for an operating business is proposed to be $100 per month for a maximum of 36 months.

Example 1: Operating Business; Penalty, $10,000; Annual Revenue per Tax Return, $500,000
- 1% of annual revenue = $5,000
- Penalty ($10,000) > 1% annual revenue ($5,000)
- Analysis of assets performed to determine ability to pay $5,000 difference between the penalty assessed and the 1% screen
- If analysis of assets demonstrates full capacity to pay, penalty of $10,000 payable up to 36 months
- If analysis of assets demonstrates ability to pay $7,500, penalty of $7,500 payable up to 36 months
- If analysis of assets demonstrates no additional ability to pay, penalty of $5,000 payable up to 36 months

Example 2: Operating Business; Penalty, $10,000; Annual Revenue per Tax Return, $2,000,000.
- 1% of annual revenue = $20,000
- Penalty ($10,000) < 1% of annual revenue ($20,000)
- Full penalty of $10,000 payable up to 36 months with no analysis required.

Non-operating businesses undergo a similar analysis of assets, with the minimum payment plan for non-operating businesses being $100 per month for a maximum of 12 months.

Recommendation

On-going businesses should not be allowed any financial inability to pay deferral. Longer payment plans should be used instead.

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Penalty Policy Issue 9

An application for a permit, amendment or renewal should not be processed if the applicant owes fees or penalties.

Water Code Sections 7.302(b)(6) and 7.303(b)(6) provide that, after notice and hearing, the Commission may suspend or revoke a license, certificate, or registration the commission has issued, place on probation a person whose license, certificate, or registration has been suspended, reprimand the holder of a license, certificate, or registration, or refuse to renew or reissue a license, certificate, or registration if the person is indebted to the state for a fee, payment of a penalty, or a tax imposed by a statute within the commission's jurisdiction or a rule adopted under such a statute.

Withholding issuance of a new, amended or renewed permit, registration, certification or license to an entity/person who owes delinquent penalties or fees will aid in the collection of delinquent fees and penalties.

Recommendation

Do not issue new or amended permits or permit renewal, registrations, certifications or licenses to an entity/person who owes delinquent penalties or fees. A permit application should not be considered administratively complete until delinquent accounts have been paid, and the application should be held in abeyance for a time period to allow the applicant to pay the fees and/or penalties. If fees and/or penalties are not paid within a certain amount of time (e.g. within 30 days after notice), the permit application should be returned to the applicant.

Penalty Policy Issue 10

The TCEQ has no statutory authority to assess interest on delinquent penalties or penalty payment plans.

Interest is defined as compensation for the use, forbearance or detention of money (Finance Code Chapter 301, Sec 301.002 (4), Definitions). The TCEQ is authorized by the Water Code to impose interest on delinquent fees, and the agency currently assesses interest on delinquent fees at a rate of Prime plus 1 percent. There is no statutory authority to assess interest on delinquent penalties or payment plans.

While any interest assessed will increase the amount of money owed to the state, it will be an incentive for respondents to pay or pay timely.

Recommendation

Give the TCEQ express statutory authority to assess interest charges on delinquent penalties or for late payment of administrative penalties.

Compliance History Issue

The current compliance history formula is not required by statute and is too complex.

Water Code Sections 5.753 and 5.754 require the TCEQ to develop a uniform standard for evaluating compliance history; to track and report the compliance history of all regulated entities; and to develop a performance assessment for regulated entities to determine eligibility for innovative programs and to establish permit and enforcement guidelines. As required by the statute, the TCEQ adopted compliance history rules [30 TAC Chapter 60] in January 2002.

The compliance history review and classification process at the TCEQ is intended to be a comprehensive and uniform assessment of the regulated community's environmental compliance performance, thereby holding these entities accountable within existing permit and enforcement guidelines as well as within new regulatory structures that provide incentives to exceed minimum regulatory expectations. TCEQ is required to consider a regulated entity's compliance history in all permitting and enforcement matters.

The TCEQ's current compliance history rules and processes have been widely criticized by both the regulated community and environmental and public interest organizations. Even the TCEQ itself has problems with the current compliance history statute, rules and processes, based on its experience implementing the program. There is little disagreement among interested parties that Water Code Section 5.753(a) should be revised to address the concerns about the compliance history formula and calculation.

Recommendation

Option 1: Develop a new approach that applies different formulas, or different variations of the same formula, to different industry sectors. For example, the number of service stations in a particular region of the state could be factored into the denominator of the formula for that specific sector, and the number of compressor stations in the state could be factored into the formula for pipeline operators. Larger, more complex sites, on the other hand, would not have their compliance history classification determined by the same formula as smaller sites. For example, if the investigation component was removed from the denominator (or dramatically diminished by the removal of DMRs and Title V deviation report reviews from the denominator), many large complex sites would be "poor" performers, since these sites have thousands of opportunities for noncompliance on a daily basis, and as a result, have more compliance history components than smaller, less complex facilities.

Option 2: Reform the compliance history formula to include NOEs. *[Note: to make inclusion mandatory would require statutory directive; TCEQ could include through rule change.]*

Option 3: Change the current 5-year period to some other period of years, or use a different period for certain cases or permits. For major facilities, the compliance history period should reflect the time period of the facilities general operating permit, i.e. be a rolling score for a ten year period.

Appendices

Note: Appendices may be viewed online at http://www.acttexas.org/issues/TCEQsunset/airquality/appendices. The complete appendices are available for download on the Alliance for a Clean Texas website: http://www.acttexas.org/issues/TCEQsunset/airquality/appendices.pdf

Appendix 1 --- SB 1126; 74th Texas Legislature [1995]
Appendix 2 --- TCEQ comments submitted to EPA on January 27, 2009, relating to public participation rules
Appendix 3 --- TCEQ formal comments submitted to EPA on November 23, 2009, concerning EPA disapproval notice relating to flexible permits

Appendix 4 --- TCEQ formal comments submitted to EPA on November 23, 2009, concerning EPA disapproval notice relating to qualified facilities

Appendix 5 --- TCEQ formal comments submitted to EPA on November 23, 2009, concerning EPA disapproval notice relating to NSR Reform

Appendix 6 --- EPA responses dated November 12, 2009, to TCEQ's comments submitted on October 23, 2009, regarding qualified facility changes and flexible permits
Appendix 7 --- TCEQ memorandum dated September 26, 2006, relating to PBR and SP consolidation into permits
Appendix 8 --- TCEQ memorandum dated December 9, 2005, relating to voiding permits and claiming PBRs and SPs
Appendix 9 --- TCEQ Current Penalty Policy [Second Revision; effective September 1, 2002]
Appendix 10 --- TCEQ Compliance History rules [30 TAC Chapter 60]
Appendix 11 --- State Auditor Report No. 04-016; The Commission on Environmental Quality's Enforcement and Permitting Functions for Selected Programs; issued December 2003
Appendix 12—ED's Draft Rule, Chapter 75, Penalties [March 2006]
Appendix 13 — ED's Draft Rule, Chapter 60, Compliance History [April 2008]
Appendix 14 — TCEQ Enforcement Initiation Criteria, Revision No. 12, effective July 1, 2008
Appendix 15 -- Keeping Bad Actors Off the Stage - Some Tools for Dealing with Repeat Offenders; Environmental Council of the States (ECOS) article; Spring 2002

Appendix 16 --- TCEQ "Repeat-Violator" rule, Sec. 60.2, effective August 29, 2002

Appendix 17 --- ED's Proposed Standard Penalty Table
Appendix 18 --- State/EPA Penalty Policies relating to Economic Benefit of Noncompliance
Appendix 19 --- House Bill No. 826 by Gattis; 81st Legislature, 2007


Sierra Club
Public Citizen
Environmental Defense Fund
Texas Impact
Air Alliance Houston
Texas Campaign for the Environment
SEED Coalition
Environmental Integrity Project
Environment Texas
Texas League of Conservation Voters
Re-Energize Texas
Texas Center for Policy Studies
Greater Edwards Aquifer Alliance
Hill Country Alliance
National Wildlife Federation
Clean Water Action
Baptist Christian Life Commission
ACT
Alliance for a Clean Texas