

INSIGHTS

TCEQ Accepting Comments on Proposed Changes to Penalty Policy

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At a September 24, 2020 Work Session, TCEQ Executive Director Toby Baker sought approval from the TCEQ Commissioners to propose changes to the TCEQ's Penalty Policy (RG-253) that will give the agency discretion to significantly increase administrative penalties for certain violations. The TCEQ formally opened the public comment period on the proposed changes on September 30, 2020, and will be accepting public comments on the proposed changes through October 30, 2020.

The TCEQ Penalty Policy establishes the policies that the agency uses in calculating penalties for purposes of administrative enforcement actions – the most-common type of environmental enforcement brought by the TCEQ that is initiated by a Notice of Enforcement (NOE) and typically resolved through an agreed enforcement order that assesses administrative penalties and may require corrective measures to be undertaken by the respondent. In the September 24 Work Session, Executive Director Toby Baker described the proposed changes as part of the agency's efforts to drive greater accountability in the regulated community and to reduce the risk (and incidence) of major industrial accidents.

The proposed changes to the Penalty Policy can be broken into four primary categories:

1. **Increased base penalties for certain categories of violations.** The changes would increase the base penalty amounts for violations associated with actual releases of pollutants that are classified as Moderate and Minor Harm under the policy, as well as releases that are classified as Major Harm from minor sources. (Releases classified as Major Harm from major sources already have base penalties at the statutory maximum.) The changes would also increase the base penalties for violations classified as Programmatic Major violations under the policy (for example, the complete failure to comply with applicable recordkeeping or reporting requirements).
2. **Increased violation counts for certain categories of violations.** The changes would give the TCEQ the discretion to increase the violation counts for every category of violation under the policy, other than Actual Major and Programmatic Major violations. For example, under the changes a violation classified as an Actual Moderate violation can be counted up-to weekly, when it is currently limited to up-to monthly violation counts under the current policy, and a violation classified as an Actual Minor violation would be counted up-to monthly, when it is limited to up-to quarterly violation counts under the current

policy. (The proposed changes do not affect Actual Major and Programmatic Major violations because the Penalty Policy already allows the TCEQ to count those violations up-to daily, consistent with statutory limits.)

3. **Penalty enhancement for air emissions events in high-population counties.** Targeting air releases in high-population counties, the Penalty Policy would add a 20% enhancement to base penalties for air emissions events that occur in counties with populations that exceed 75,000. (This would reportedly include the 50 largest counties in the state.)
4. **Elimination of 20% penalty reduction for early settlement for certain respondents.** Under Texas Water Code section 7.105, the TCEQ is required to refer enforcement cases to the Office of the Attorney General of Texas (OAG) when the company has had two or more final agreed enforcement orders within the two years preceding the violation. While the TCEQ makes these required referrals to OAG, the OAG often declines to pursue civil enforcement of these cases and allows the TCEQ to resolve the case through administrative enforcement. In administrative enforcement cases, the TCEQ routinely offers respondents a 20% penalty deferral (reduction) for prompt settlement. Under the proposed changes to the Penalty Policy, any enforcement matter that triggered the statutory referral to the OAG (i.e., two or more recent agreed orders) would not be eligible for the 20% penalty reduction for prompt settlement when OAG declines to pursue the case and the TCEQ seeks to resolve the matter through administrative enforcement.

In aggregate, the changes would give the TCEQ discretion to increase penalties for a wide variety of violations, with the greatest potential impact likely coming in the enforcement of long-running violations that the agency classifies as Minor or Moderate violations, as they will be subject not only to higher base penalties but also to violation counts that are 3X or 4X greater than are available under the TCEQ's current Penalty Policy.

A copy of the current penalty policy that identifies the proposed changes is attached, and can also be found [here](#).

The TCEQ will be accepting comments on the proposed changes to the Penalty Policy until October 30, 2020.

On **Friday, October 16 at 8:30 am CT**, Bracewell will hold a one-off Environmental Essentials webinar to discuss the proposed changes in greater detail and provide some real-world examples of how the proposed changes might increase administrative penalties for members of the regulated community in Texas. We will also discuss the changes that the TCEQ plans to make to its Compliance History Rule (30 Tex. Admin. Code Chapter 60), similarly aimed at large industrial accidents. Look for a separate invite to the webinar!