

Texas Commission on Environmental Quality  
12100 Park 35 Circle  
Austin, TX 78753

Via email to [penalty\\_policy@tceq.texas.gov](mailto:penalty_policy@tceq.texas.gov)

October 30, 2020

Re: Fifth Revision of the Commission's Penalty Policy

To the Texas Commission on Environmental Quality:

This letter is joined by organizations and individuals in Texas with an interest in improving environmental enforcement, reducing environmental pollution, and promoting the public's health: Achieving Community Tasks Successfully, Air Alliance Houston, Bayou City Waterkeeper, Bayou Preservation Association, Inc., the Coalition for Environment, Equity, and Resilience, the Coalition of Community Organizations, Earthworks, Environment Texas, Houston Climate Movement, Lone Star Chapter of the Sierra Club, Preserve our Hill Country Environment, Public Citizen, Mr. Steve Selzer, Texas Campaign for the Environment, Turtle Island Restoration Network, and West Street Recovery.

We appreciate the opportunity to comment on the TCEQ's fifth revision to its penalty policy and would welcome the opportunity to discuss these comments further. You may contact Adrian Shelley at [ashelley@citizen.org](mailto:ashelley@citizen.org), 512-477-1155 on our behalf.

### **Introduction**

TCEQ's proposed revisions to its penalty policy are both timely and appropriate. The current policy is more than five years old. Since the last revision, disasters, like the ITC fire in Deer Park, the TPC explosion in Port Neches, and countless damaging industrial releases during increasingly typical major storms, threatened communities' health and in some cases, closed down cities. We strongly believe these disasters could have been avoided through more vigorous enforcement of existing laws and the imposition of more serious penalties.

As the TCEQ has recognized, a more effective penalty policy will help deter regulated entities from polluting and reduce harmful and costly disasters. Many disasters begin as a pattern of pollution that goes unchecked. For example, before polluting local air and water with a massive fire at its Deer Park chemical storage facility in 2019, ITC discharged cyanide into Tucker Creek, an impaired water along the Ship Channel, eight times above the levels set by its state-issued permits — once as much as 1,138% above permitted limits. According to EPA's ECHO data, at its now-infamous Deer Park facility alone, the company violated the federal Clean Water Act standards six of the previous 12 quarters leading up to the ITC fire.<sup>1</sup> But the facility faced a formal enforcement action only once over the five years leading up to the fire, despite its repeated violations. It resulted in a \$18,300 fine.

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<sup>1</sup> Analysis and review by Bayou City Waterkeeper, available at <https://bayoucitywaterkeeper.org/texas-could-prevent-future-itc-fires/>.

And as documented in a recent report by Environment Texas,<sup>2</sup> on every single day in 2019, an industrial facility in Texas violated their permits and illegally polluted our air. These everyday pollution events add up, and in 2019 the Houston region experienced at least five high-profile chemical disasters.<sup>3</sup> Collectively, industrial facilities in Texas released over 174 million pounds of illegal air pollution in 2019. Illegal air pollution has more than doubled since 2015, when facilities released 68 million pounds.

But less than 3% of violations of air emissions standards from 2011-2016 resulted in a penalty from the state, according to a 2017 report from the Environmental Integrity Project and Environment Texas.<sup>4</sup> Environment Texas' more recent research has shown that TCEQ and the State of Texas only fined companies approximately 1 cent per pound of unauthorized air emissions in 2018.<sup>5</sup> We strongly believe that TCEQ's and the State's underenforcement of environmental laws has led to a pattern of unnecessarily repetitive legal violations (and avoidable pollution) across Texas.

Importantly, some communities bear a disproportionate burden of industrial pollution, in the form of dirtier air and water and increased cancer and other health risks. Many of these same communities also have been disproportionately affected by other disasters, including flooding associated with intense storms and COVID-19. By adopting and applying a stronger penalty policy, TCEQ will do more to serve these communities that have long endured unfair burdens of pollution and underenforcement.

Each pollution event represents an opportunity for TCEQ to make up for these shortfalls and fulfill its role in protecting the public's health through enforcement—and avoid another major disaster. As Executive Director Baker has made clear, by encouraging better maintenance and safety, revisions to the penalty policy will help protect the public's health. We support efforts to more specifically center TCEQ's penalty policy on a deterrence strategy.

To achieve deterrence, TCEQ must impose more consistently rigorous penalties. While TCEQ can not change maximum penalties, TCEQ can make changes in how and when penalties are assessed below that amount.

Ultimately, more must be done to protect the public's health and put an end to widespread non-compliance. Only with tougher, more vigorous enforcement to protect its people will Texas encourage persistent environmental violators to invest in better infrastructure and hazard mitigation — or force them to do business somewhere else. Unlawful pollution must become the exception, not the rule in Texas. The citizens living at the fenceline of industrial facilities, the responders to these facilities' disasters, and the people living in Texas deserve no less.

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<sup>2</sup> Environment Texas, Illegal Air Pollution in Texas 2020, available at [https://environmenttexas.org/sites/environment/files/reports/TX\\_Pollution\\_2020\\_scrn.pdf](https://environmenttexas.org/sites/environment/files/reports/TX_Pollution_2020_scrn.pdf)

<sup>3</sup> The Houston Chronicle has reported that a chemical explosion, fire, or toxic release occurs every six weeks in the greater Houston area. Mark Collette & Matt Dempsey, Chemical Breakdown, Houston Chronicle (May 7, 2016), available at <https://www.houstonchronicle.com/news/investigations/article/Dangerous-chemicals-roadblocks-to-information-7420931.php>.

<sup>4</sup> Environmental Integrity Project & Environment Texas, Breakdowns in Enforcement (2017), available at <http://www.environmentalintegrity.org/wp-content/uploads/2017/02/Breakdowns-in-Enforcement-Report.pdf>

<sup>5</sup> Environment Texas, Illegal Air Pollution in Texas 2020, available at [https://environmenttexas.org/sites/environment/files/reports/TX\\_Pollution\\_2020\\_scrn.pdf](https://environmenttexas.org/sites/environment/files/reports/TX_Pollution_2020_scrn.pdf)

We offer these comments to show our support for TCEQ's efforts to more effectively protect public health and identify other opportunities for achieving that goal through revisions to the penalty policy.

## Comments

### 1. TCEQ should treat penalties as mandatory.

TCEQ should adopt a policy that identifies circumstances in which penalties are mandatory. At a minimum, TCEQ should make clear that penalties must be imposed when violations create egregious risks to human health and safety, such as the improper storage of explosive materials and air and water pollution events that exceed specific thresholds to be determined by TCEQ.

Treating penalties as mandatory in these circumstances would clearly indicate to industry that unsafe activities and pollution events of a certain size will not be tolerated—and would help to eliminate the economic incentive to operate dangerous, polluting facilities in Texas. In the worst cases, such penalties should meet the penalty cap of \$25,000 per day.

TCEQ should clarify, too, that when mandatory penalties apply, they cannot be mitigated by other factors within the penalty policy.

### 2. TCEQ should not revise the definition of “Major and Minor Sources” for Petroleum Storage Tanks.

TCEQ has not explained why, when aiming to strengthen its penalty policy, it has increased its major source threshold for underground storage tanks from 50,000 gallons of monthly throughput to 100,000 gallons. At the TCEQ's September 24, 2020 Work Session, it was suggested that one reason for increasing the major source threshold for petroleum storage tanks was that the cost of compliance was overly burdensome for some of the smaller sources that meet the major source threshold.

If this is TCEQ's rationale for changing the threshold, it should back up this assertion with data about the cost of compliance for major and minor facilities.

TCEQ has not given any other rationale for increasing its major source threshold for underground storage tanks from 50,000 gallons of monthly throughput to 100,000 gallons. Without further explanation, this threshold change appears to work against TCEQ's stated intentions for revising the penalty policy. Cost alone is insufficient to justify this change, especially in light of the potential risks to the public's health. As Commissioner Lindley pointed out in the September 24 Work Session, even smaller entities may cause serious environmental damage; the potential for large penalties will help deter more petroleum storage tank operators from causing such damage. We ask TCEQ to retain the current threshold of 50,000 or provide more information to justify the change to 100,000.

Further, at a minimum, the public should know:

- How many tanks would meet the old and new thresholds.
- How often penalties are assessed against both major and minor tanks.
- The typical difference in volume of actual releases from major and minor tanks.
- The typical difference in penalty assessed on major or minor tanks.

- The cost of compliance for major and minor facilities.

TCEQ should provide these details and a clearly articulated rationale. Doing so would also help to determine whether this change jeopardizes federal approval of Texas' underground storage tank program, as explained below.

As a matter of policy, we disagree with the proposal to increase the major source threshold for underground storage tanks.

### **3. Texas may jeopardize federal approval of its underground petroleum storage tank program.**

Texas has received federal approval for its underground petroleum storage tank program. See 40 C.F.R § 282.93(a), which states:

The State of Texas is approved to administer and enforce an underground storage tank program in lieu of the Federal program under Subtitle I of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. 6991 et seq. The State's program, as administered by the Texas Department of Environmental Quality, was approved by EPA pursuant to 42 U.S.C. 6991c and Part 281 of this Chapter. EPA published the notice of final determination approving the Texas underground storage tank base program effective on April 17, 1995. A subsequent program revision application was approved effective on August 21, 2020.

By revising the major source threshold for underground storage tanks, TCEQ may jeopardize federal approval to administer its underground storage tank program. Because TCEQ has offered no rationale for its revision of the major/minor source definitions, it is impossible to determine whether the revision meets the "no less stringent" requirement of 42 U.S.C. § 6991c(b)(1). TCEQ should thoroughly review its petroleum storage tank program, including all relevant statutes, to ensure a revision of the major/minor source definitions will not impede its ability to administer and enforce the program. The proposed revision of the major source threshold should not proceed without approval from the U.S. EPA or by showing that the "no less stringent" requirement has been met.

### **4. We support increases to the percentages for actual releases in the Environmental, Property and Human Health Matrix**

We support increasing the percentage of the maximum statutory penalties for violations categorized as an "actual release." An "actual release" is one that is "existing in fact or reality; not merely potential." "The proposed revisions will increase the maximum penalty for actual releases that cause: (1) "Major Harm" from "Minor" sources from 30% to 50% of the base penalty; (2) "Moderate Harm" from "Major" sources from 30% to 50%; (3) "Moderate Harm" from "Minor" sources from 15% to 25%; (4) "Minor Harm" from "Major" sources from 15% to 30; and (5) "Minor Harm" from "Minor" sources from 5% to 15%.

The proposed penalty changes are an important first step for better ensuring compliance with TCEQ's permit restrictions. While no dollar amount is adequate compensation for the harms inflicted on fenceline communities, increasing the penalty percentage will deter

violators and potential violators from simply accepting these harms as the cost of doing business. These revisions will also help prevent future accidents by encouraging industry to make necessary capital investments in equipment maintenance and operations that make their facilities safer.

Because actual releases involve pollution exposure due to illegal activity, we approve of the revision to increase the percentages for actual releases in the Environmental, Property and Human Health Matrix to the extent that it will increase assessed penalties.

**5. We support increases to the percentages for major violations in the Programmatic Penalty Matrix.**

We also support TCEQ's decision to increase the percentage of penalties for "Programmatic" violations—or failures to submit reports, maintain records, obtain required permits or authorizations, and comply with other such duties.<sup>4</sup> The proposed revisions will increase the maximum penalty for programmatic violations that cause: (1) "Major Harm" from "Major" sources from 15% to 20%; and (2) "Major Harm" from "Minor" sources from 5% to 10%.

This revision recognizes that adhering to programmatic requirements are not merely administrative tasks, but crucial measures that can save lives. Proper recordkeeping and timely submission of reports to TCEQ allow TCEQ and the public to stay informed about hazardous items stored at nearby facilities, prevent events caused by human error, mitigate harms from climate disasters by accurately evaluating an event's scope, and take protective action. The proposed Penalty Policy will help encourage regulated facilities to prioritize these duties meant for public safety before disaster hits.

Complying with programmatic requirements also protects the safety of those who operate the plant and first responders who are first on the scene after catastrophic events. Increasing the penalty percentage for programmatic violations can thus incentivize industry to be better employers and neighbors.

**6. We support the revision to the number of events for calculating penalties for continuous violations.**

Table 8 is used to calculate penalties for continuing violations. In the penalty policy continuing violations are explained as:

Examples of violations that would be considered to be continuing are the exceeding of permitted discharge or emission limits, groundwater contamination, unauthorized discharges or releases, endangerment, the commingling of good and bad water in a public water supply, operating without a required permit, and other such violations.

When a continuous violation occurs, Table 8 is used to calculate the number of violations that will be considered for penalty. As the penalty policy explains, "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."

We support revising the penalty policy to increase the frequency of the number of events for the purposes of penalty calculations. Continuous events represent ongoing violations of the

law. In the case of actual releases, they indicate the continuous potential for harm to human health and the environment. By shortening the time periods, regulated entities will feel more incentive to remain in compliance with their permits and their obligations under law and also will feel significant motivation to more quickly address actual and potential releases, as well as programmatic violations, rather than allow violations to linger. Fewer violations and, especially, fewer continuing violations will save TCEQ and other state agencies, federal agencies such as the U.S. EPA, and local governments and agencies time, money, and other resources. This will also save Texas taxpayers money.

For this reason we believe that larger penalties for continuous violations are appropriate. We support this revision to the extent that it will increase assessed penalties.

Moreover, we have reviewed comments submitted by Port Arthur Community Action Network and agree with their proposal in comment #3b to modify potential releases to a daily/weekly/monthly scheme for major/moderate/minor severity, respectively.

#### **7. Violations involving multiple pollutants should be counted as multiple events.**

TCEQ should treat certain types of violations as multiple events for the purposes of penalty calculations. For example, an air pollution emissions event that includes the release of ten different pollutants in violation of ten separately applicable permit limits should be considered as ten events. This is a theory of penalty calculation known as “speciation” and it has generally not been applied by TCEQ in penalty calculations.

The theory behind the proposed revision to the number of events for a continuous violation is that it will “provide a more accurate assessment of the violation’s duration.”<sup>6</sup> Using that same logic, speciation of pollutants for penalty calculation will provide a more accurate assessment of the extent of a multipollutant event. We recommend the penalty policy be revised to require speciation.

#### **8. Compliance history should be used more consistently.**

In the September 24 Work Session, Executive Director Baker stated that along with the penalty policy, compliance history is one of two tools available to TCEQ for enforcement. But compliance history ratings are not updated quickly or frequently enough to be used effectively. Executive Director Baker cited the example of being forced to admit that TPC had a “satisfactory” compliance history rating even after the November 2019 explosion in Port Neches. As Executive Director Baker said, “That level of event needs to be able to be addressed in a more realtime way by this agency.”

In our experience, a large number of facilities are unclassified with respect to compliance history. To close this gap and improve enforcement, TCEQ should establish a timeline for classifying all facilities and a regular schedule for updating compliance history status. The proposal to quickly reassign companies to “under review” status seems like a step toward fixing this problem. But this is just a start; the TCEQ should consider differences between the EPA and TCEQ’s compliance history and make other efforts to make compliance history a more meaningful and useful tool. We look forward to the opportunity to review and comment on the January rule proposal.

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<sup>6</sup> See “TCEQ Interoffice Memorandum” (14 Sept. 2020) at pdf p. 3 *available at* <https://www.tceq.texas.gov/downloads/news/interoffice-memorandum-penalty-policy.pdf>.

**9. Out-of-state enforcement should be accounted for.**

The current penalty policy does not account for “Final enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states.” These are marked as N/A (not applicable) in the policy. TCEQ should develop a methodology for incorporating out-of-state violations into compliance history. In many cases, companies operating in Texas have facilities in many states (and other countries), and TCEQ should consider the company’s compliance record in those other states, subject to the laws and rules of those other states.

**10. EPA’s “High Priority Violator” designation should be used.**

The penalty policy includes a multiplier for facilities designated as “repeat violators” under 30 TAC § 60.2(f). The U.S. EPA administers a program under the Clean Air Act that designates some facilities “High Priority Violators.” TCEQ should consider an additional multiplier for High Priority Violator status.

**11. A penalty should exceed the economic benefit of noncompliance.**

As a matter of principle, a penalty should exceed the economic benefit of noncompliance. If it does not, companies will have an economic incentive not to comply with the law. This principle was stated in HB 3035 (86R), by Rep. Erin Zweiner. Although this bill was not passed into law, TCEQ could revise its penalty policy to remove this incentive to break the law. The policy on economic benefit should be revised to state that the commission shall, to the extent practicable, ensure that the amount of the penalty is at least equal to the value of any economic benefit gained by the alleged violator through the violation.

At a minimum, TCEQ should recover the full economic benefit of non-compliance as long as they determine there was an economic benefit, up to the maximum penalty cap. There is no reason to arbitrarily limit the recovery of the economic benefit of non-compliance simply because the violator achieved more than \$15,000 in economic benefit.

In past reviews, TCEQ has considered either eliminating this arbitrary limit or lowering it. While we favor completely eliminating the \$15,000 limit, another option would be lowering the limit from \$15,000 to another level, such as \$5,000.

**12. “Other Factors That Justice May Require” should include more factors than county population.**

The proposed revision to the “Other Factors That Justice May Require” is a 20% upward adjustment to the base penalty of a violation that occurs in a county with a population of 75,000 or greater. The theory behind this revision seems to be that violations in more populated areas are deserving of larger penalties because they potentially impact more people.

We agree with this theory and suggest that it could be applied in other ways. For example, an upward adjustment could be made based on the number of people living within a given distance from a facility. Or an adjustment could be made based on the number of people thought to have been exposed to pollution in the event of an actual release—the number of people downstream of a water discharge or within the airshed of an air emissions event, for example.

Further, during the September 24 Work Session, Chairman Niermann suggested that the Air Pollutant Watch list serves to address disproportionate impacts in communities that are overburdened with air pollution from multiple sources. In reply to that we note that the Air Pollutant Watch List has not been updated with new locations since 2005. See <https://www.tceq.texas.gov/toxicology/apwl/apwl.html>. Further, a detailed analysis of the Air Pollutant Watch list conducted by the Environmental Defense Fund in 2017 showed that areas removed from the APWL often immediately experience a deterioration in air quality. See [https://www.edf.org/sites/default/files/content/environmentaldefensefund\\_texas\\_white\\_paper\\_002.pdf](https://www.edf.org/sites/default/files/content/environmentaldefensefund_texas_white_paper_002.pdf). In its current neglected and ineffective state, we do not believe the APWL accomplishes anything for communities disproportionately impacted by air pollution.

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We appreciate the opportunity to provide these comments. If you wish to discuss the issues raised, please contact Adrian Shelley at [ashelley@citizen.org](mailto:ashelley@citizen.org), 713-702-8063. We would welcome the opportunity to discuss additional revisions to protect the public's health and reduce the amount of industrial pollution across the State.

Respectfully,

Achieving Community Tasks Successfully  
Air Alliance Houston  
Bayou City Waterkeeper  
Bayou Preservation Association, Inc.  
Coalition for Environment, Equity, and Resilience  
Coalition of Community Organizations  
Earthworks  
Environment Texas  
Houston Climate Movement  
Lone Star Chapter, Sierra Club  
Preserve our Hill Country Environment  
Public Citizen  
Steve Selzer  
Texas Campaign for the Environment  
Turtle Island Restoration Network  
West Street Recovery

A copy of this letter will be provided to:  
Loren Hopkins, Chief Environmental Science Officer, Houston Health Department  
Win Colbert, Assistant City Attorney, City of Houston  
Rock Owens, Chief, Environmental Section, Harris County Attorney's Office  
Harris County Judge Lina Hidalgo  
Harris County Commissioner Rodney Ellis  
Harris County Commissioner Adrian Garcia  
Harris County Commissioner R. Jack Cagle  
Harris County Commissioner Steve Radack