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Texas Commission on Environmental Quality  
12100 Park 35 Circle  
Austin, TX 78753  
Via email to [agenda@tceq.texas.gov](mailto:agenda@tceq.texas.gov).

September 24, 2020

## **Re: Fifth Revision of the Commission's Penalty Policy**

Public Citizen appreciates the opportunity to provide these comments. We would welcome the opportunity to discuss our recommendations further. Please contact Adrian Shelley at [ashelley@citizen.org](mailto:ashelley@citizen.org), 512-477-1155.

### **I. The Commission should instate a mandatory minimum penalty policy.**

Above all else, the Texas Commission on Environmental Policy should instate a mandatory minimum penalty policy. Mandatory minimums would clearly indicate to industry that unsafe activities and pollution events of a certain size will not be tolerated. It would help to eliminate the economic incentive to operate dangerous, polluting facilities in Texas.

Mandatory minimum penalties should be assessed for a variety of violations. Violations that create egregious risks to human health and safety—such as the improper storage of explosive materials—should be assessed mandatory minimum penalties. Air and water pollution events should be assessed mandatory minimum penalties when they exceed thresholds to be determined by the Commission. In the worst cases, such penalties should meet the penalty cap of \$25,000 per day. Mandatory minimum penalties should not be eligible for mitigation by other factors in the penalty policy.

### **II. No rationale is given for the revised definition of “Major and Minor Sources” for Petroleum Storage Tanks.**

The Commission has not given a rationale for increasing its major source threshold for underground storage tanks from 50,000 gallons of monthly throughput to 100,000 gallons. More information should be provided about this proposed revision, including:

- 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 Commission should provide these details and a clearly articulate rationale. Doing so would 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.



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### **III. 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, the Commission may jeopardize federal approval to administer its underground storage tank program. Because the Commission 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). The proposed revision of the major source threshold should not proceed without approval from the U.S. Environmental Protection Agency or a demonstration that the “no less stringent” requirement has been met.

### **IV. We approve of increases to the percentages for actual releases in the Environmental, Property and Human Health Matrix and to major violations in the Programmatic Penalty Matrix.**

An “actual release” is one that is “existing in fact or reality; not merely potential.” “Major harm” occurs when, “Human health or the environment has been exposed to pollutants which exceed levels that are protective of human health or environmental receptors as a result of the violation.” Moderate harm occurs upon exposure to “significant” amounts of pollutants and minor harm occurs upon exposure to “insignificant” amounts of pollutants.

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.

Similarly, we approve of the revision to increase the penalty for major violations in the Programmatic Penalty Matrix to the extent that it will increase assessed penalties.

### **V. We approve of 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,



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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 approve of the revision 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. For this reason we believe that larger penalties are appropriate. We approve of this revision to the extent that it will increase assessed penalties.

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

Certain types of violations should be considered 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 the Commission 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.” 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.

#### **VII. Compliance History should be used more consistently.**

In our experience, a large number of facilities are unclassified with respect to compliance history. TCEQ should establish a timeline for classifying all facilities and a regular schedule for updating compliance history status.

#### **VIII. 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.

#### **IX. 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. Environmental Protection Agency administers a program under the Clean Air Act that designates some facilities “High Priority Violators.” The Commission should consider an additional multiplier for High Priority Violator status.

#### **X. A penalty should exceed the economic benefit of noncompliance.**



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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.

TCEQ should recover all 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.

**XI. The “Other Factors That Justice May Require” could consider 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 85,000 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.

**XII. Conclusion**

Again, 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.

Respectfully,

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