

**NEW MEXICO ENVIRONMENT DEPARTMENT
AIR QUALITY BUREAU
CIVIL PENALTY POLICY**

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Date

Contents

Introduction	2
Effective date	3
Purpose, objectives and usage.....	3
Disclaimer.....	3
Definitions	4
Civil penalty amounts.....	4
Calculation methodology	6
Settlement	10
Supplemental environmental projects	10
Penalty mitigation for SEPs	12
Field citations	13
Administrative Compliance Costs	13
Release of information.....	13
Appendix A – Sample Penalty Calculation Worksheet.....	14
Appendix B – Matrices for Gravity Factors, Multi-Day Components and Adjustment Factors	17
Appendix C – Criteria for Environmental Audits	19
Appendix D – Voluntary Disclosures	21
<i>Appendix E – Reserved</i>	25
Appendix F – Gravity Determination Examples	26

Introduction

The Air Quality Control Act, NMSA 1978, Section 74-2-12(A), authorizes the Secretary of Environment to assess a civil penalty for a violation of the Federal Clean Air Act (“CAA”) and its implementing regulations (“federal regulations”), The New Mexico Air Quality Control Act (“AQCA”) or the AQCA implementing regulations at Title 20, Chapter 2 of the New Mexico Administrative Code (“NMAC”). The Civil Penalty Policy (“Policy”) provides guidance to the Air Quality Bureau (“AQB”) in determining the amount of a civil penalty in enforcement actions in which AQB does not seek the statutory maximum penalty. The Policy is consistent with the United States Environmental Protection Agency (“EPA”) Clean Air Act Stationary Source Civil Penalty Policy and other guidance in the EPA Clean Air Act Enforcement Compendium.

Effective date

The Policy is effective thirty (30) days following signature by the AQB Chief. This Policy supersedes all previous New Mexico Environment Department (“NMED”) AQB Civil Penalty Policies and applies to all alleged violations for which penalties have not been settled or agreed to by AQB and the alleged violator as of the effective date of this Policy.

Purpose, objectives and usage

The primary purpose of enforcement is to deter noncompliance and ensure a level playing field for economic competitors. The specific objectives of the Policy are to:

- to ensure the fair and consistent determination of civil penalties;
- to impose civil penalties proportional to the gravity of the violation;
- to provide a defensible basis for civil penalties in enforcement actions; and
- to recover the economic benefit of noncompliance.

The AQB uses the Policy to determine the appropriate civil penalty, justified by the facts, in enforcement actions unless the AQB seeks the statutory maximum civil penalty. The AQB must recover a penalty that includes a gravity component commensurate with the seriousness of the violation plus the economic benefit of noncompliance. Economic benefit may include avoided costs, delayed costs, or wrongful profit while violating. The AQB only adjusts the civil penalty as authorized by the Policy. A civil penalty may be adjusted upward as new facts come to light, or as negotiations for settlement indicate such a need. Civil penalties may not exceed the statutory maximum of \$15,000 per day per violation, pursuant to NMSA 74-2-12.1.A., unless an administrative compliance order has been violated, and then civil penalties may not exceed \$25,000 per day per violation.

Disclaimer

The Policy guides the AQB in determining the amount of a civil penalty for violations of the CAA, AQCA, or NMAC. This policy is intended as guidance and is not a final agency action. Examples included in Appendix F are for context and general understanding; AQB may adjust the gravity factors presented in Appendix F when warranted. This Policy does not create any right, duty, obligation, or defense in any person. The AQB may revise, amend, supplement, or revoke all or part of the Policy without public notice or comment.

Definitions

1. Claim – the number of times a particular deviation from a permit or regulation occurs. Multiple claims may be due to multiple pieces of equipment with the same violation, periodic (repeated, but not continuous) violation of a requirement, multiple facilities violating the same requirement, etc.
2. Economic Benefit – the avoided or delayed costs of compliance. An additional economic benefit may include wrongful profit while an ongoing violation occurs.
3. Extent of Deviation – the degree to which a regulatory or permit limit/parameter has been exceeded. Extent of Deviation is one part of the overall Gravity Component for a violation.
4. Gravity Component – the Extent of Deviation, Potential for Harm, and the number of Claims and/or the Multi-Day Component.
5. Multi-Day Component – a determination of the penalty based on a violation continuing for a period of time. The Multi-Day Component may be based on timeframes other than days (such as hours or months) as the Bureau deems appropriate.
6. Potential for Harm – the actual or possible harm to human health or the environment or to the integrity of the regulatory program used to determine the Gravity of a violation.
7. Violation – deviation from a specific requirement in an air quality permit condition, Federal regulation, or NMAC promulgated pursuant to the CAA or AQCA. Violations may relate to allowable emission limits, monitoring requirements, recordkeeping requirements, reporting/notification requirements or testing requirements.

Civil penalty amounts

The Policy establishes a five-step process for determining the civil penalty amount for each violation:

1. Determine the gravity factors: Potential for Harm and Extent of Deviation;
2. Determine the number of claims, and/or applicable multiple day component;
3. Apply the appropriate adjustment factors;
4. Calculate the Gravity Component (from steps 1-3) of the penalty; and
5. Calculate and add the economic benefit of noncompliance.

In lieu of this five-step process, the AQB may calculate penalties according to Appendix F, Table 3 for emissions of an air contaminant in excess of the rate specified by an air quality permit, federal

regulation, or NMAC. For this calculation methodology, adjustment factors may not be applied, although economic benefit of noncompliance should be added if applicable.

For violations which represent imminent harm and substantial endangerment, the Bureau will calculate the maximum penalty allowable.

The civil penalty shall not exceed the statutory maximum (\$15,000 per violation per day) as specified by the AQCA Section 74-2-12(B). The statutory maximum may constitute the appropriate civil penalty for violations involving actual harm to human health or environment, willful violations, and other violations as determined in the sole discretion of the AQB.

In general, each violation of a requirement (of a permit condition, federal regulation or NMAC) that results from an independent act or failure to act will be assessed a separate civil penalty. For example, failure to test an engine may be a condition of a permit but also a requirement in a federal or state regulation, but is considered an independent failure; thus, it is one violation with one corresponding penalty. If a violated requirement is distinguishable from another violated requirement, both will be assessed as separate penalties. For example, failure to submit an engine test notification is a separate violation from failure to submit the engine test report.

Some requirements may be violated more than once. The number of claims of a violation equals the number of discrete or separate occasions an owner/operator violates a requirement at one source and/or the number of sources at which the violation(s) occurred. For example, failure to complete quarterly testing for one engine over the course of two years would result in eight (8) claims (one for each quarter missed). If more than one emissions unit (source) missed the quarterly testing, the 8 claims would be multiplied by the number of units for which testing was required, but did not occur.

The AQB will not assess separate penalties for the following:

- Violation of duplicative requirements found in more than one place within an air quality permit, Federal regulation, or NMAC;
- Violation of additional requirements in federal regulations, NMAC or permits which impose the same legal duty as a violation already alleged; or
- Violation of one requirement which itself causes the violation of a second requirement, without exception. For example, exceeding the operating hours of a regulated engine may or may not cause an excess emission, and therefore, if emissions are exceeded, these are deemed separate violations. As a contrasting example, failing to test an engine will always result in failing to keep the record for the engine test; therefore, these are not considered separate violations.

Calculation methodology

1. Determine the gravity factors.

- a. **Potential for Harm** - The CAA, AQCA, NMAC and the permitting program are intended to prevent harm to human health or the environment. Some violations create the potential for direct harm to human health or environment (e.g., the violation of emission limits or air quality standards). Other violations create the potential for indirect harm to human health or the environment by jeopardizing the integrity of the regulatory program (i.e., impeding the ability to evaluate compliance with regulations and/or permit conditions). Finally, some violations create the potential for both direct and indirect harm.

The potential for harm to human health or the environment depends on the probability and seriousness of exposure of a human or environmental receptor to an air pollutant. Actual harm is not required. A violation either caused or could have caused the release of a pollutant when the integrity of a procedure, process, or facility is compromised. Inadequate provisions for the detection of a release of a pollutant, such as inadequate monitoring and incomplete or inaccurate records, are considered evidence of a potential release of a pollutant.

Potential for Harm may be Minimal, Significant or Severe. Appendix F, Tables 1 and 2 include examples of Potential for Harm classifications for many violation types. However, the final determination of the Potential for Harm will be determined by AQB, taking into account relevant factors.

- b. **Extent of Deviation** – The degree to which a violation deviates from a requirement may be classified as Minor, Moderate or Major.

A minor deviation is a deviation of no more than 25% from a numerical parameter, including but not limited to emissions standards or limits, parametric limits, and/or applicability thresholds. A moderate deviation is a deviation of between 25 and 100% from a numerical parameter. A major deviation is a deviation of more than 100%

from a numerical parameter. Deviations from non-numerical requirements may be in number of days or other similar parameters. Examples of other deviations have been determined by experience and practice and may be found in Appendix F, Tables 1 and 2. Again, these tables present examples only; AQB makes the final determination of Extent of Deviation based on relevant factors in specific cases.

2. Determine the multiple day component, if any.

The AQB may add a multiple day component to account for the duration of an ongoing violation. This is the number of consecutive instances of a violation, assessed on a per day basis, or assessed according to the applicable monitoring or compliance period (e.g., hours, days, months or other units of time) at the discretion of the AQB. The first instance of a violation is accounted for in the gravity component of the penalty. The AQB shall have sole discretion to decide whether subsequent instances of a violation are assessed as a multiple day component of a continuous violation or as discrete violations (claims). Some violations warrant both multiple claims and multi-day consideration. For example, a violation for operating without a permit at three facilities would have 3 claims with a multi-day component based on the time of unauthorized operation. The gravity component would be multiplied by the 3 claims and the total number of days (minus 3) would comprise the multi-day component.

The AQB assesses a civil penalty for the number of instances of a violation and multi-day component (when applicable) supported by credible evidence. The AQB will presume that a source continuously violated a requirement from the first provable instance of a violation until the source demonstrates compliance through submitted credible evidence. The AQB retains sole discretion as to how multiple day components are applied, as supported by case law and precedent.

3. Apply adjustment factors.

Adjustment factors allow the AQB to adjust the civil penalty to reflect legitimate, case-by-case differences between violations of the same requirement by different violators. The range for each adjustment factor is specified in Appendix B.

- a. Effort to comply** – A downward penalty adjustment to the Gravity Component for a violator's good faith effort to comply or to mitigate/prevent harm; an upward adjustment for a violator's delay or refusal to take action. The AQB may adjust

downward a civil penalty for violations detected and disclosed as a result of a voluntary environmental self-evaluation, also known as an environmental audit. See Appendices C and D. (In some cases a civil penalty may be waived.) A smaller downward adjustment may also be made for self-reporting that is not required by permit or by regulation, whether or not it qualifies as a voluntary disclosure per Appendix D criteria. Reporting required by permit or regulations (e.g., excess emissions or deviations in Title V reports) will not qualify for Appendix D penalty mitigation, although such reporting may qualify for a slight adjustment downward for “Effort to comply,” depending on circumstances. At the Bureau’s discretion, Title V deviations reported in a timely manner according to requirements in Appendix D (rather than in the semi-annual reports, for example) may qualify for penalty reduction or mitigation, depending on individual circumstances.

- b. Negligence/Willfulness** – Upward adjustments for failure to use reasonable care or evidence that the violation was intentional. Consideration may be given to the degree of control, foreseeability of an event, possible precautions that could have been taken, knowledge of the violation and level of sophistication regarding the requirement violated. Prior notice regarding the same or similar requirement is evidence of knowledge regarding the requirement. A violator’s lack of knowledge regarding a given requirement does not excuse the violation. The AQB may refer for criminal prosecution any violation for which there is evidence of a willful violation or reckless disregard for human health or the environment.
- c. History of noncompliance** – Upward adjustments for previous alleged noncompliance within the last three (3) years, unless documentation submitted after an allegation shows compliance. Prior violations approved as voluntary disclosures in accordance with Appendix D of this Policy are considered when evaluating history of noncompliance. History looks at the frequency, the recency and the gravity of previous violations, whether violations are the same/similar or different from each other. A prior violation by the violator’s parent company, sister company, subsidiary, affiliate, or other entity with ownership interest, responsibility or control may constitute a history of noncompliance.
- d. Financial condition** – The amount of penalty assessed is partly based on the gross sales of the violator. Violators with higher gross sales will be assessed a larger penalty. The AQB may consider a parent company’s gross sales when assessing a civil penalty to its

subsidiary or affiliate. If a civil penalty may result in bankruptcy or preclude implementation of measures to comply, prevent or mitigate harm, the AQB may consider installment payments, delayed payments or abatement. However, the AQB may still seek a civil penalty that may result in bankruptcy if the violator refuses to correct a violation, the violator has a significant history of noncompliance, or the violation is willful or created a serious threat to human health or the environment. A violator claiming financial hardship bears the burden of demonstrating a lack of ability to pay the civil penalty, to implement a remedial measure to achieve compliance or to prevent or mitigate harm to human health or the environment.

4. Calculate the Economic Benefit of Noncompliance

The AQB must obtain a civil penalty that recovers the economic benefit of noncompliance, including both delayed and avoided costs. To calculate economic benefit, the AQB may use the most updated version of EPA's BEN model. However, AQB may use a more aggressive economic benefit model or calculation to address concepts like wrongful profit. Delayed cost is an expenditure that the violator deferred to a later date, thereby collecting interest or wrongfully using money for investment that should have been used for compliance; the delayed cost does not include the amount eventually spent toward compliance. Avoided cost is an expenditure that the violator never incurred due to the violation; that expenditure plus interest results in the total avoided cost.

Additionally, some violations may result in wrongful profit. The AQB will use available data to estimate wrongful profit. This is not included in the BEN model and will be considered on a case-by-case basis.

5. Calculate the overall penalty

The total penalty is calculated by adding together the penalty assessed for each violation based on applicable gravity factors, number of claims, and the multi-day component. This sum is then multiplied by one plus the total of the adjustment factors. Finally, the economic benefit is added. Whenever the AQB assesses a civil penalty, an explanation for each part of the assessment will be provided.

6. Alternative Assessment for Excess Emissions Violations

In cases involving emissions of air contaminants in excess of applicable limits, where the quantity of excess emissions is known directly or can be reliably estimated, the AQB may determine the Gravity Component on a dollar-per-pound basis, using the values in Table 3 of

Appendix F. To this total, an Economic Benefit may be added to the calculation. Because each pound of excess emissions is accounted for in the penalty assessment, it is not necessary to calculate a multiday component when using Table 3. No credit for self-reporting may be granted for excess emissions reporting, nor do excess emissions violations qualify for penalty mitigation under Appendix D as the reporting is required by State rule (20.2.7 NMAC).

Settlement

The AQB encourages settlement at any time during an enforcement action, provided the settlement is consistent with the objectives and requirements of the AQCA and CAA. The violator may request a settlement conference to provide information which affects the case. The AQB may adjust the civil penalty on the basis of such information, although any economic benefit still must be recovered along with a significant portion of the Gravity Component. The settlement process does not affect or delay the violator's obligation to comply fully and promptly with the requirement that is the basis for the violation nor any other requirement in a regulation or permit.

The AQB may establish a settlement position lower to, equal to or higher than the civil penalty (if reasonably justified, up to the statutory maximum) calculated under the Policy. If the violator submits new information which affects the civil penalty, the AQB will consider the new information and recalculate the civil penalty if appropriate. A recalculated penalty may be lower than the original penalty calculation (if less serious than previously believed, for example) or higher than the original penalty (if additional days of violation are discovered, for example). If an economic benefit is newly determined based on supplied information, the penalty will be increased by the amount of that benefit.

Except for the final penalty calculation which will be published upon a final agreement, settlement offers are confidential.

Supplemental environmental projects

With concurrence of the Compliance and Enforcement Division Director, the AQB will allow the use of a supplemental environmental project ("SEP") in lieu of a portion of a civil penalty when the AQB determines that such a project aligns with the mission statement of the Department. SEPs are environmentally beneficial projects voluntarily undertaken in settlement of an enforcement action; they are not otherwise required by law, regulation or permit requirement. SEPs may not be initiated prior to the commencement of the enforcement action at issue or prior to AQB's approval of the project scope.

SEPs may not provide a benefit to the violator, and may not be any part of a requirement of injunctive relief or corrective action in the current or any previous enforcement action.

Additional criteria:

- The project may not directly or indirectly implement or expand an existing air program administered by the Bureau;
- The project may not involve any donation or gift to any individual or entity;
- The project has a nexus to the violation, as determined by the Bureau;
- The project must be fully described, including a schedule of completion and evaluation in a binding and enforceable settlement document signed by the violator;
- The settled civil penalty must exceed \$25,000;
- The project must fall into one or more of the following categories:
 - **Pollution prevention** – preventing emissions to the atmosphere of an air pollutant. A Pollution Prevention SEP cannot transfer pollution to another regulated emission unit, facility, or to another environmental medium.
 - **Pollution reduction** – reducing the amount or toxicity of an air pollutant already generated before emission to the atmosphere.
 - **Assessment/Audit** – A systematic, internal review of a specific process or operation designed to identify and provide information about opportunities to reduce the emission of air pollutants, or an independent evaluation of a violator’s environmental infrastructure (policies, practices, procedures, training programs, operation and maintenance programs, inventory control, coordination and communication between units or personnel, budgeting for environmental compliance, recordkeeping and reporting systems, emergency plans, hazard identification, risk assessment, and control systems). An additional type of audit may be an environmental compliance audit for which an independent evaluator analyzes the violator’s compliance with all environmental requirements, including permit conditions and applicable air regulations (federal and State). Penalty mitigation may only be credited to cost of assessment/audit, not to corrective actions determined by assessment/audit.

Penalty mitigation for SEPs

The maximum penalty mitigation for SEPs will be 80% of the overall cost for the SEP (and may be up to 100% only for governmental agencies, political subdivisions or nonprofit organizations), although each project will be evaluated on a case-by-case basis. Where the proposed SEP substantially benefits the violator or produces a profit, the SEP will not be approved. In settlements involving a SEP, the AQB must still collect a civil penalty that equals or exceeds either the economic benefit of noncompliance plus ten percent (10%) of the Gravity Component, or twenty five percent (25%) of the Gravity Component, whichever is greater. (Possible exclusions to this minimum penalty may apply for governmental agencies, political subdivisions or nonprofit organizations.) The AQB must also collect administrative compliance costs.

For any audits conducted as part of a SEP, corrective actions for discovered violations may not be included in the SEP cost. Costs not required for compliance may include capital costs (e.g., for a redundant control), one-time, non-depreciable costs (e.g., an aerial survey) and annual operation and maintenance costs for the number of years that such costs will be expended for the SEP. Any savings or other economic benefits accruing from the SEP must be disclosed and subtracted from SEP costs. SEPs, as proposed by the violator, may be part of the settlement negotiations; however, approval is at the sole discretion of the Department. Settlements do not require inclusion of a SEP.

Evaluation of the SEP benefit considers whether the SEP results in a significant reduction in the emission of air pollutants; whether the SEP furthers the development and implementation of innovative processes, technologies, or methods; whether the SEP mitigates damage or reduces risk to populations that may have been disproportionately exposed to air emissions, including but not limited to low income populations, vulnerable populations and minorities; whether the SEP reduces the emission or discharge of pollutants to more than one medium, such as air and water; and whether the SEP develops and implements pollution prevention techniques or practices.

Stipulated penalties will be applied for any failure to implement the SEP according to the final agreement. Stipulated penalty amounts must be monetarily significant to deter noncompliance while ensuring a level playing field. In addition, all costs not incurred and documented must be paid to the State General Fund, prorated by the percentage granted for penalty mitigation. These provisions will be articulated in the final agreement along with a total civil penalty amount for failing to complete a SEP on time and/or abandoning the SEP prior to completion.

Field citations

Field citations may be issued only for minor violations, pursuant to 20.2.90.7 NMAC. The maximum penalty for field citations is \$1,000 per day per violation or a maximum total of \$15,000 per violation. Minor violations include those that do not result in an increase in emissions of any air contaminant, do not cause an increase in toxic air contaminant emissions beyond any standard or limitation, do not contribute to the violation of any ambient air quality standard, and do not hinder the ability of the department to determine compliance with any environmental requirements. Failure to correct a violation may result in issuance of an administrative compliance order, with higher penalties assessed. Field citation penalties take into account the violator's effort to comply and history, according to the matrix below. Administrative compliance costs will not be assessed for field citations.

	History	
Effort to Comply	First Time Offender	Multiple Time Offender
Cooperation	\$100	\$500
No Cooperation	\$200	\$1000

Any person or entity receiving a field citation may request a hearing before the Department. See 20.2.90.110 NMAC.

Administrative Compliance Costs

Under the October 31, 2023 Guidance Memo on Administrative Compliance Costs, the AQB shall assess administrative compliance costs on permittees and licensees in addition to any civil penalties that may be due. These costs, calculated as set forth in Section of the Guidance Memo, cover the time and expense when NMED must take resource-intensive compliance actions beyond permit or license compliance verification. For compliance monitoring with settlements and SEPs, the AQB reserves the right to assess additional administrative compliance costs. Failure to pay Administrative Compliance Costs may result in accrual of additional fees and/or civil enforcement.

Release of information

The AQB releases public records relating to civil penalties in accordance with the Inspection of Public Records Act ("IPRA"), the federal Freedom of Information Act ("FOIA") and Department Policy. Applicable exemptions from disclosure under IPRA or FOIA may include, but are not limited to, attorney-client privilege, attorney work-product privilege, and confidential settlement documents. Final settlement agreements, including penalty calculations, are not confidential.

Appendix A – Sample Penalty Calculation Worksheet

Company:	Sample Company	Calculations by:	Staff name
Facility:	Example A Central Tank Battery	Reviewed by:	Manager name
NOV #:	XYZ-1234567-2301	Date of calculation:	December 31, 2022
Permit #:	NSR #0000M1R3	Source class:	Major/PSD/NA/SM-80

CIVIL PENALTY CALCULATION

Confidential - for settlement purposes only

Violation #1 Failure to obtain a Title V Permit pursuant to 20.2.70 NMAC while operating as a major source.

A.	Gravity Determination	Penalty	\$7,500.00
	Potential for harm: Severe		
	Extent of deviation: Major		
	Quantity: 1		

Basis: Potential for harm is Severe and Extent of deviation is Major, as detailed in the Bureau's Civil Penalty Policy, Sections VI.C.1.a, VI.C.1.b. The Potential for harm to the regulatory program is considered severe as the lack of a major source permit substantially undermines the regulatory program and has a high potential to impact human health and the environment. The Extent of Deviation is 100% due to the lack of a major source permit.

The Example A Central Tank Battery notified the Bureau that it had exceeded Title V volatile organic compound emission threshold beginning January 1, 2019 and continuing through December 31, 2022 which made the facility subject to Title V permitting as of January 1, 2020. Example A Central Tank Battery operated as a major source without applying for a Title V permit January 1, 2020 through December 31, 2022.

B.	Multi-Day Component	Penalty	\$1,095,000.00
	Number of days: 1,095		
	Multiplier: 1,000		
	Quantity: 1		

Basis: The violation continued between January 1, 2020 and December 31, 2021 for a total of 1,096 days. Per Bureau discretion, one day is accounted for in the gravity determination.

Adjustment Factors		Factor Total	2.0
Basis:	I. Effort to comply:	Minimal cooperation / minimal compliance	0.2
	Sample Company disclosed the emissions issue to the Bureau and has worked to correct it. However, the violation continued for three years.		
Basis:	II. Negligence/willfulness:	Negligent	0.2
	The company violated a regulatory requirement of the New Mexico Administrative Code (NMAC). The Department considers such a violation to be negligent in that Sample Company is reasonably presumed to have knowledge of these requirements.		
	III. History of noncompliance:	No history of noncompliance	0
Basis:	IV. Financial Condition:	Gross sales > \$100,000,000	0.6
	Source of financial information (e.g., Dun & Bradstreet), accessed December 30, 2022.		
	V. Mathematical adjustment		1.0
C.	Economic Benefit	Penalty	\$17,075.00
Basis:	Sample Company operated as a Title V source, but avoided the costs of Title V annual fees from 2020 to 2022 in the amount of \$30,454. Using the EPA Economic Benefit (BEN) Model, AQB calculated a \$17,075 economic benefit of the avoided costs of Title V annual fees using January 1, 2020 as the non-compliance date for permit fees and a penalty payment date of June 30, 2023.		
Violation Penalty:			
	A. Gravity Determination	\$7,500.00	
	B. Multi-Day Component	\$1,095,000.00	
	Adjusted Gravity + Multi-Day Components		\$2,205,000.00
	C. Economic Benefit		\$17,075.00
	Violation Total		\$2,222,075.00
TOTAL CALCULATED PENALTY			\$2,222,075.00

Appendix B – Matrices for Gravity Factors, Multi-Day Components and Adjustment Factors

Gravity Factors – all sources (per claim)

Potential for Harm	Extent of Deviation		
	Major	Moderate	Minor
Severe	\$7,500	\$6,000	\$5,000
Significant	\$5,000	\$4,000	\$3,000
Minimal	\$3,000	\$2,500	\$2,000

* * * *

Multi-Day Component – Title V Major Sources, Prevention of Significant Deterioration (PSD) Sources, Synthetic Minor $\geq 80\%$ Sources, and Sources in Nonattainment Areas (per day or other time parameter)

Potential for Harm	Extent of Deviation		
	Major	Moderate	Minor
Severe	\$1,000	\$800	\$600
Significant	\$600	\$500	\$400
Minimal	\$400	\$300	\$200

Multi-Day Component – all other sources (per day)

Potential for Harm	Extent of Deviation		
	Major	Moderate	Minor
Severe	\$500	\$400	\$300
Significant	\$400	\$300	\$200
Minimal	\$200	\$125	\$75

Adjustment Factors*

<u>A. Effort to Comply (Range -0.2 to 0.4)</u>	
Excellent Cooperation / Exceeds Compliance	-0.2
Cooperation	0.0
Minimal Cooperation / Minimal Compliance	0.2
No Cooperation / No Compliance (Ongoing violation or obstacle to reaching agreement)	0.4
<u>B. Negligence / Willfulness (Range 0.0 to 0.6)</u>	
Not Negligent or Willful	0.0
Negligent	0.2
Very Negligent	0.4
Probably Willful	0.6
<u>C. History of Noncompliance (Range 0.0 to 0.6)</u>	
No history of noncompliance	0.0
History of noncompliance with different regulation(s)	0.2
History of noncompliance with same or similar regulation(s)	0.4
Substantial history of noncompliance with any regulation(s)	0.6
<u>D. Financial Condition (Range 0.0 to 0.6)</u>	
Gross Sales Less than \$500,000/ Government Facility	0.0
Gross Sales between \$500,000-\$1,000,000	0.1
Gross Sales between \$1,000,000- \$5,000,000	0.2
Gross Sales between \$5,000,000-\$10,000,000	0.3
Gross Sales between \$10,000, 000-\$50,000,000	0.4
Gross Sales between \$50,000,000 - \$100,000,000	0.5
Gross Sales More than \$100,000,000	0.6

***Total adjustment = sum of adjustment factors + 1**

Appendix C – Criteria for Environmental Audits

NMED encourages all regulated entities to conduct regular environmental audits. An environmental audit means a systematic, well-documented and objective review by regulated entities or independent third parties of facility or company operations and owner/operator practices related to meeting environmental requirements. For purposes of penalty mitigation described in Appendix D, Condition 1 for disclosed violations, the audit proposal must be approved by the AQB Chief prior to initiation. Approval of the audit proposal will require a written agreement between the company undertaking an audit for one or more facilities and the AQB.

Once an approved audit is undertaken, discovered violations are expected to be disclosed to the AQB in a timely manner, whether or not the violations are eligible for penalty mitigation.

The environmental audit proposal should include the following elements:

1. Reason for the audit (may include periodic due diligence, acquisition of facilities, change in management, etc.).
2. Entity or personnel conducting the audit. If personnel employed by the violator or company affiliated with the violator will be used, include a description of how objectivity will be protected. Provide contact information for all entities and personnel involved. Consent to contact those involved must be granted to NMED.
3. Scope of work to be performed, such as:
 - a. List of facilities subject to the audit;
 - b. List of regulations to be analyzed for compliance at subject facilities;
 - c. For permitted facilities, a statement as to which (if any) permit conditions will not be analyzed for compliance at subject facilities;

- d. A statement as to whether emissions calculations will be reviewed or undertaken to determine if permitting actions or new regulatory requirements are required;
 - e. A statement as to whether a physical site visit will be included to confirm facilities are operating according to regulations, permits, registrations or applications;
 - f. A description of any sampling or monitoring that will provide data for any of the above; and
 - g. Any other analysis to be undertaken regarding facility operation, owner/operator procedures, training programs, documentation, environmental staffing or budgeting, etc.
- 4. Estimated timelines, including start date, milestone or task completion dates, and final report date.
 - 5. Monthly progress reports must be submitted electronically to the designated Compliance & Enforcement personnel for any audits and subsequent disclosures and corrective actions that occur for longer than 30 days.
 - 6. Copy of the auditor's final report must be submitted with a certification that all discovered potential violations have been disclosed and appropriate corrective actions recommended.
 - 7. Once all corrective actions have been completed, a final report from the Company certifying that all corrective actions are complete must be submitted within 30 days of corrective action completion.

Overall, environmental audits should be completed within one year of initiation and all corrective actions should be completed within 60 days of disclosure. Exceptions to completion dates may be requested by the violator as long as adequate justification is provided. The Compliance & Enforcement Section Chief will determine whether to grant extensions of time, based on the information supplied. A tolling agreement may be requested by the Bureau to extend the statute of limitations for issuing a compliance order, should an extension of time be granted.

The Department will not request a voluntary environmental audit report to trigger a civil or criminal investigation. If, through an inspection or other investigation, the AQB has reason to believe a violation has occurred, the AQB may seek any information relevant to identifying violations or determining liability or extent of harm. This may include any existing audits.

With respect to federal, state or municipal facilities, NMED will not utilize the federal Freedom of Information Act ("FOIA") or the state Inspection of Public Records Act ("IPRA") to request information

from governmental agencies. In certain circumstances, environmental audit reports may be accessible to the public under FOIA or IPRA.

Appendix D – Voluntary Disclosures

NMED encourages owner/operators of regulated sources to voluntarily discover, disclose, correct and prevent violations of requirements of federal and state regulations and air quality permit conditions. Appendix D – Voluntary Disclosures (“Appendix D”) amends, but does not supersede, AQB Civil Penalty Policy (“Policy”) to assist Bureau personnel in proposing appropriate penalties or in negotiating settlements in administrative and judicial enforcement actions involving voluntary self-evaluation. Appendix D of the Policy is not a final agency action and is intended solely as internal guidance. It does not create any rights, duties or obligations, or defenses, implied or otherwise, in any third parties.

A disclosure is voluntary if not required by statute, regulation, air quality permit, order or agreement. A voluntary disclosure of discovered violations may reduce civil penalties under the following conditions:

- 1. Systematic Discovery.** The violation was discovered through an environmental audit or a systematic procedure or practice that reflects the owner/operator’s due diligence in preventing, detecting, and correcting violations. When a violation is discovered through a systematic procedure or practice, the owner/operator must provide accurate and complete documentation to AQB as to how systematic procedures or practices meet the commonly accepted definition for due diligence. See Appendix C.
- 2. Voluntary Discovery.** The violation was identified voluntarily, and not through a legally mandated monitoring, reporting or emissions testing requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. In addition, the violation was not disclosed after notification by any governmental agency that a violation may have occurred, after submission of credible third-party evidence that a violation may have occurred or after NMED compliance personnel initiated an inspection or investigation. The

reporting of excess emissions, because it is required by regulation, is not a voluntary discovery. For Title V reporting obligations, NMED may consider non-egregious violations or deviations as voluntary if they are reported within the timeframes shown below or as agreed upon in a pre-approved audit (see Appendix C). Reporting of deviations in Title V reports is not considered a voluntary disclosure. Similarly, disclosure of deviations or violations within the 45-day reporting window will not be considered voluntary.

3. Prompt Disclosure. The owner/operator voluntarily and fully discloses a specific violation in writing to AQB within 21 calendar days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, prior to (a) the commencement of a federal, state or local agency inspection, investigation or information request; (b) notice of a citizen suit; (c) the filing of a complaint by a third party; or (d) the regulated entity's knowledge that the discovery of the violation by NMED or a third person or entity was imminent. If the regulated entity suspects that it will be unable to meet the 21 day deadline, the owner/operator may contact AQB in writing before the 21 day period has passed to propose alternative disclosure terms. Monthly status updates may, if pre-approved by AQB, be deemed to satisfy this requirement.

Full disclosure includes the identification of the facility, citation of the regulation or permit condition violated, the equipment involved (if any), proposed corrective action and a proposed corrective action completion date. Corrective actions must be initiated as soon as practicable following disclosure, and in no event more than 60 days from the date of discovery, unless an adjusted schedule is approved by AQB.

4. Prompt Correction and Remediation. The regulated entity corrects the violation expeditiously and in no event more than 60 days from the date of discovery, certifies in writing that violations have been corrected, and takes appropriate prompt measures as determined by NMED to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must notify AQB in writing before the 60-day period has passed, including a justification for the requested extension. However, the AQB cannot approve corrective action deadlines that contradict existing regulatory deadlines, such as reporting requirements in NMED 20.2.7 *Excess Emissions*. Such violations must be corrected as expeditiously as possible, but in no event later than regulations or permit conditions require.

5. Remediation of Imminent and Substantial Endangerment. The owner/operator immediately remedies any condition that has created or may create an imminent and substantial endangerment to human health or the environment.

6. Prevention of Recurrence. The owner/operator implements appropriate measures to prevent a recurrence of the violation at any subject facility, which may include modified process improvements, as well as upgrading its environmental auditing or due diligence efforts. The implementation of such measures must be completed within 60 days, unless AQB allows a greater amount of time given the nature of the violation and type of measure.

7. No Repeat Violations. The specific violation has not occurred within the past three years at the same facility. For purposes of this section, a "violation" includes:

- (a) any violation of a federal or state environmental law identified in a civil or administrative order, consent agreement, stipulated final order, conviction or plea agreement, except for violations which are determined to be without basis by a court or administrative entity with competent jurisdiction;
- (b) any act or omission for which the regulated entity has previously received a Notice of Violation or Notice of Corrective Action from the EPA or NMED; or
- (c) any act or omission for which the regulated entity has previously received penalty mitigation from the EPA or NMED.

8. Cooperation. The owner/operator cooperates and provides information reasonably necessary and required by NMED to determine the applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to AQB employees or contractors, and assistance in any further investigations into the violation and other related compliance problems of the regulated entity.

9. Written Agreement. NMED may require that an owner/operator enter into a written agreement, stipulated final order, administrative consent order, or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

10. Excluded Violations. The violation is not one which (a) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to human health or the

environment; (b) violates the specific terms of any judicial or Administrative order, or consent agreement; or (c) is required to be reported to EPA or NMED by regulation or permit condition.

Civil Penalty Reduction

Owner/Operators of discovered violations may be eligible for the following adjustments in civil penalties:

1. Elimination of gravity-based penalties – applicable to entities which meet all of the conditions (1-10) in this Appendix.
2. Reduction (up to 75%) of gravity-based penalties – applicable to entities which meet conditions 2-10 in this Appendix.

NMED retains its full discretion to recover any economic benefit gained through noncompliance. NMED may exclude self-disclosed violations which meet all of the conditions 2-10 above when determining an entity's adjustment factor for history of noncompliance under the AQB Civil Penalty Policy.

If NMED intends to collect a penalty, a Notice of Violation may be issued, after which a compliance order (Administrative Compliance Order, Judicial Compliance Order or Signed Agreement and Stipulated Final Compliance Order) would then be issued for settlement.

Appendix E – Reserved

Appendix F – Gravity Determination Examples

Note: The following matrices provide examples solely as guidance. These matrices provide no rights of defense and NMED may use its discretion to determine gravity factors, considering all factors and circumstances.

¹**Table 1: TITLE V/PSD/ /NONATTAINMENT/SYNTHETIC MINOR ≥ 80%**

		EXTENT OF DEVIATION		
		MAJOR	MODERATE	MINOR
POTENTIAL FOR HARM	SEVERE	<ul style="list-style-type: none"> Construction without a permit Operation/modification without a permit or modification/revision* Failure to submit application to modify permit** Failure to install control equipment* Failure to maintain control equipment** Failure to comply with operational limits: > 2 times rate* Failure to comply with operational limits (rate unknown)* Failure to conduct a valid initial or RATA compliance test: late > 60 days** Failure to submit Title V ACC or S-A: late > 60 days** Any violation of emission limitation* Failure to provide information needed to determine compliance (willful)** 20.2.50 NMAC violations** Failure to report excess emissions* 	<ul style="list-style-type: none"> Failure to submit emissions inventory* Failure to comply with operational limits: > 1.25 and ≤ 2 times rate* Failure to conduct a valid initial or RATA compliance test: late 31 to 60 days** Failure to submit Title V ACC or S-A: late 31 to 60 days** 	<ul style="list-style-type: none"> Failure to comply with operational limits: ≤ 1.25 times rate* Failure to conduct a valid initial or RATA compliance test: late ≤ 30 days** Failure to submit Title V ACC or S-A: late ≤ 30 days**
	SIGNIFICANT	<ul style="list-style-type: none"> NSPS, NESHAP, BACT, MACT Violations** Other NMAC violations (except Part 50 or reporting excess emissions)** Relocation without prior approval** 	<ul style="list-style-type: none"> Failure to control fugitive emissions* Failure to submit non-Title V annual, semi-annual and/or quarterly report: late > 30 days** Failure to comply with monitoring requirements* Failure to comply with recordkeeping requirements** Failure to comply with other reporting requirements** Failure to provide information required by permit or regulation (negligent)** 	<ul style="list-style-type: none"> Failure to submit semi-annual and/or quarterly report: late ≤ 30 days**
	MINIMAL		<ul style="list-style-type: none"> Failure to submit notification of substitution Failure to submit non-federal, non-TV report: late ≥ 30 days** Failure to pay annual permit fees: > 60 days late** 	<ul style="list-style-type: none"> Failure to post permit Failure to submit non-federal, non-Title V report: late ≤ 30 days** Failure to pay annual permit fees: < 60 days late**

*Multi-day component applies

** Multi-day component may apply

¹ If actual emission rates caused a facility to operate at thresholds higher than allowed by an existing permit at the time the violations occurred, the source/facility size will be based on the actual emission rates.

¹**Table 2: MINOR/SYNTHETIC MINOR <80% / SOURCES NOT REQUIRING A PERMIT BUT SUBJECT TO FEDERAL AND/OR STATE REGULATIONS**

		EXTENT OF DEVIATION		
		MAJOR	MODERATE	MINOR
POTENTIAL FOR HARM	SEVERE	Severe will apply if actual emissions exceed Title V thresholds or if information is withheld willfully. See Table 1.		
	SIGNIFICANT	<ul style="list-style-type: none"> Construction without a permit Operation without a permit* Failure to submit application to modify permit** Failure to install control equipment* Failure to maintain control equipment** Failure to comply with operational limits: > 2 times rate* Failure to comply with operational requirements (rate unknown)* Failure to conduct a valid initial or RATA compliance test: late > 60 days** Any violation of emission limitation* NSPS, NESHAP, MACT Violations** NMAC Violations** Relocation without prior approval** 	<ul style="list-style-type: none"> Failure to conduct a valid initial or RATA compliance test: late 31 to 60 days** Failure to comply with operational limits: > 1.25 and ≤ 2 times rate* Failure to submit emissions inventory* Failure to control fugitive emissions* Failure to submit annual, semi-annual and/or quarterly report: late > 30 days** Failure to comply with monitoring requirements* Failure to comply with recordkeeping requirements** Failure to comply with other reporting requirements** Failure to submit initial or final excess emissions report* Failure to provide information required by permit or regulation** 	<ul style="list-style-type: none"> Failure to comply with operational limits: up to 1.25 times rate* Failure to conduct a valid initial or RATA compliance test: late up to 30 days** Failure to submit federal annual, semi-annual and/or quarterly report: late ≤ 30 days**
	MINIMAL	<ul style="list-style-type: none"> Construction without a Notice of Intent (NOI) Operation without a Notice of Intent (NOI)* 	<ul style="list-style-type: none"> Failure to submit notification of substitution Failure to submit non-federal report: late ≥ 30 days** Failure to pay annual permit fees: late > 60 days** 	<ul style="list-style-type: none"> Failure to post permit Failure to submit non-federal report: late ≤ 30 days** Failure to pay annual permit fees: late < 60 days**

*Multi-day component applies

** Multi-day component may apply

¹ If actual emission rates caused a facility to operate at thresholds higher than allowed by an existing permit at the time the violations occurred, the source/facility size will be based on the actual emission rates.

Table 3: EXCESS EMISSIONS ^{1, 2, 3}			
EXTENT OF DEVIATION FROM ALLOWABLE LIMIT OR RATE			
	> 2 times or No Allowable Rate	> 1.25 and ≤ 2 times	≤ 1.25 times
\$ per pound or portion thereof	\$4.00	\$3.00	\$2.00

¹**For excess emissions of hazardous air pollutants or hydrogen sulfide**, or emissions of criteria pollutants or precursors to ozone in a nonattainment area, these amounts may be doubled.

²**For continuing excess emissions at a facility**, the following penalty per pound will be assessed:

- 10 - 19 excess emissions events or 10-19 excess emissions days in a 30-day period - \$8.00 per pound, regardless of extent of deviation
- 20 - 24 excess emissions events or 20-24 excess emissions days in a 30-day period - \$15.00 per pound, regardless of extent of deviation
- 25 or more excess emissions events or 25 or more excess emissions days in a 30-day period - \$30.00 per pound, regardless of extent of deviation

³**For violations representing imminent harm and substantial endangerment**, the maximum statutorily allowable penalty will be assessed.