

NEW MEXICO ENVIRONMENT DEPARTMENT
AIR QUALITY BUREAU
CIVIL PENALTY POLICY

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I. 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 and its implementing regulations, the New Mexico Air Quality Control Act (AQCA) or the New Mexico Air Quality Control Regulations (AQCR). 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 EPA Clean Air Act Stationary Source Civil Penalty Policy and other guidance in the EPA Clean Air Act Enforcement Compendium.

II. EFFECTIVE DATE

The Policy is effective upon signature by the AQB Chief. This Policy supersedes all previous Civil Penalty Policies and applies to all violations for which penalties have not been assessed as of the effective date of this Policy.

III. PURPOSE AND OBJECTIVES

A primary purpose of enforcement is to deter noncompliance. Deterrence of noncompliance is achieved by:

- (1) a credible likelihood of detection of noncompliance;
- (2) a timely enforcement response;
- (3) the likelihood and appropriateness of sanctions, including injunctions and civil penalties; and
- (4) a perception of these factors in the regulated community.

The Policy is intended to ensure the appropriateness of sanctions in light of this purpose.

The specific objectives of the Policy are:

- (1) to ensure the fair and consistent determination of civil penalties;
- (2) to impose civil penalties proportional to the gravity of the violation;
- (3) to provide a defensible basis for civil penalties in enforcement actions;

- (4) to ensure a level playing field for economic competitors;
- (5) to recover the economic benefit of noncompliance with the AQCA and AQCR;
- (6) to provide an optional basis for the calculation of civil penalties by administrative and judicial tribunals.

IV. PRINCIPLES FOR APPLICATION

The AQB applies the Policy in accordance with the following principles:

- (1) The AQB uses the Policy to determine the civil penalty in enforcement actions, except when the AQB seeks the statutory maximum civil penalty;
- (2) The AQB uses the Policy to argue for the highest civil penalty justified by the facts, except when the AQB seeks the statutory maximum civil penalty;
- (3) The Gravity Component comprises the gravity-based and multiple-day penalties multiplied by adjustment factors as set forth in Appendix B;
- (4) The AQB uses the Policy to recover the Gravity Component and the economic benefit of noncompliance; and
- (5) The AQB does not adjust downward the civil penalty calculation except as authorized by the Policy.

V. DISCLAIMER

The Policy guides the AQB in determining the amount of a civil penalty for violation of the AQCA and AQCR. This policy is not a final agency action, and is intended as guidance. The 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.

VI. CALCULATION OF CIVIL PENALTIES

A. OVERVIEW

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

- (1) Determine the gravity factors: a) Potential for Harm and b) Extent of Deviation;
- (2) Determine the number of claims, including the multiple day component;
- (3) Determine the adjustment factors;
- (4) Calculate the Gravity Component of the penalty; and
- (5) 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 regulation or permit condition. This option is described in more detail in section VI.C.5 below.

The civil penalty shall not exceed the statutory maximum per violation per day (\$15,000) 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.

B. MULTIPLE VIOLATIONS

Some sources may violate more than one requirement or violate the same requirement more than one time. The AQB assesses a separate civil penalty for each violation that results from an independent act or failure to act, and for each violation that is distinguishable from another violation. A violation results from an independent act or failure to act or is distinguishable from another violation when the violation requires at least one element of proof not required to prove the other violation. For instance, the AQB assesses a separate civil penalty for each violation and adds the amounts calculated to determine the total civil penalty when:

- (1) the source violates a different requirement of the AQCA or AQCR;
- (2) the source violates the same requirement of the AQCA or AQCR on more than one occasion; or

- (3) the owner or operator violates the same or different requirement of the AQCA or AQCR at different sources.

Notwithstanding the above discussion, the AQB declines to assess separate civil penalties for the following types of related violations:

- (1) violation of a regulation and violation of a permit condition which repeats the regulation;
- (2) violation of more than one permit condition which imposes the same legal duty; and
- (3) violation of a NSPS, state regulation, and permit condition which impose the same legal duty.

The AQB declines to calculate a separate civil penalty when the violation of one requirement results in the violation of a second requirement. For example, the failure to perform a compliance test results in the failure to timely submit compliance test report. A related example involves the construction and operation of a source without submitting a Notice of Intent ("NOI") or obtaining a construction permit. In this example, the Department may assess a civil penalty for the failure to obtain a construction permit, but decline to assess a civil penalty for the failure to submit a NOI.

C. CALCULATION METHOD

1. GRAVITY-BASED PENALTY AMOUNT

The gravity-based penalty amount is the measure of the seriousness of a violation. The gravity-based penalty amount consists of two components:

- (1) the potential for harm; and
- (2) the extent of deviation from the AQCA or AQCR.

Appendix B contains more specific information for evaluating the gravity of a violation.

a. POTENTIAL FOR HARM

The AQCA and AQCR are intended to prevent harm to human health or environment. Some violations of the AQCA or AQCR create the potential for direct harm to human health or

environment (e.g., the violation of emission limits or air quality standards). Other violations of the AQCA or AQCR create the potential for indirect harm to human health or environment by jeopardizing the integrity of the regulatory program by impeding the ability to evaluate compliance with regulations and/or permit conditions (e.g., non-compliance with monitoring, reporting, and recordkeeping requirements). Finally, some violations of the AQCA or AQCR create the potential for both direct and indirect harm to human health or environment (e.g., failure to obtain a permit or conduct a compliance test).

The AQB evaluates the potential for harm to human health or environment by considering the following factors:

1) Harm to Human Health or Environment

The potential for harm to human health or environment depends on the probability and seriousness of exposure of a human or environmental receptor to a pollutant. Actual harm is not required. A violator cannot always control whether the violation will result in actual harm. A violator who, by chance, does not cause actual harm will not be rewarded with a lower civil penalty.

a) Probability of Exposure

The civil penalty reflects that the violation caused or could have caused the release of a pollutant. A violation caused or could have caused the release of a pollutant when the integrity of a procedure, process, or facility is compromised. Evidence of an actual or potential release of a pollutant includes:

- (1) detection of a pollutant in environmental media; or
- (2) inadequate provisions for the detection of a release of a pollutant (e.g., lack of monitoring equipment, inadequate or improper maintenance of monitoring equipment, and incomplete or inaccurate records).

b) Seriousness of Exposure

The potential for harm to human health or environment reflects the seriousness of exposure to the pollutant. In determining the seriousness of exposure, the AQB considers the following factors:

- (1) the emission rate, amount, and toxicity of the pollutant;
- (2) the likelihood of transport by environmental media; and
- (3) the proximity and sensitivity of human or environmental receptors, such as human populations, domestic animals, fish, wildlife, crops, vegetation, Class I visibility areas, and PSD increment or nonattainment areas.

2) Harm to Regulatory Program

Every requirement of the AQCA and AQCR is fundamental to the integrity of the regulatory program. The violation of these requirements undermines the AQCA and AQCR, and may preclude the AQB from determining whether a violator is complying with other applicable requirements.

3) Classification of Potential for Harm

a) Minimal

- (1) the violation poses or may pose a relatively low potential for harm to human or environmental receptors; or is otherwise listed as a minimal potential for harm in Appendix F, Tables 1 and 2; or
- (2) the violation has or may have a limited adverse effect on the regulatory program.

b) Significant

- (1) the violation poses or may pose a significant potential for harm to human or environmental receptors; or is otherwise listed as a significant potential for harm in Appendix F, Tables 1 and 2; or
- (2) the violation has or may have a significant adverse effect on the regulatory program.

c) Severe

- (1) the violation poses or may pose a substantial potential for harm to human or environmental receptors; or is otherwise listed as a severe potential for harm in Appendix F, Tables 1 and 2 or
- (2) the violation has or may have a substantial adverse effect on the regulatory program.

b. EXTENT OF DEVIATION

The extent of deviation considers the degree that a violation deviates from or renders inoperative a requirement of the AQCA or AQCR.

- 1) Minor. The violation is a deviation from a required parameter of no more than 25 percent, is a minor deviation from a regulatory requirement, or is otherwise listed as a minor extent of deviation in Appendix F, Tables 1 and 2.
- 2) Moderate. The violation is a deviation from a required parameter of between 25 and 100 percent, is a significant deviation from a regulatory requirement, or is otherwise listed as a moderate extent of deviation in Appendix F, Tables 1 and 2.
- 3) Major. The violation is a deviation from a required parameter of more than 100 percent, is substantial deviation from a regulatory requirement, is violation of more than one element of a requirement, or is otherwise listed as a major extent of deviation in Appendix F, Tables 1 and 2.

2. MULTI DAY COMPONENT

The multiple day component accounts for the duration of a violation. The duration of the violation is the number of consecutive instances of the violation. This component may be assessed on a per day basis; however, an instance of a violation is defined by the applicable monitoring or compliance period, e.g., an hour, day, month, or other unit of time. The first instance of a violation is assessed in the gravity-based 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.

The AQB assesses a civil penalty for the number of instances of a violation 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 credible evidence. After establishing the number of instances of a violation, the AQB selects the appropriate multiplier from the multiple day penalty matrices as established in Appendix B. A multiple day penalty may be capped at 60 instances and is discretionary for more than 60 instances of any violation.

3. 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 AQB applies the adjustment factors to the gravity-based penalties assessed per Appendix B to arrive at the Gravity Component. The range for each adjustment factor is specified in Appendix B.

a. EFFORT TO COMPLY

Effort to Comply refers to the violator's response to the violation once detected or brought to its attention. The AQB may apply a downward adjustment to the Gravity Component for a violator's good faith effort to comply with the requirement or to mitigate or prevent harm from the violation. The AQB may apply an upward adjustment for a violator's delay or refusal to take such action. Such delay or refusal may constitute bad faith when the violator knew or should have known about the violation or when the violation poses a threat to human health or environment. For violations involving bad faith, the AQB may apply an upward adjustment larger than specified by the penalty calculation worksheet.

b. NEGLIGENCE/WILLFULNESS

Negligence/Willfulness refers to the violator's culpability for violation of the requirement. Negligence means an action that results from the failure to use such care as a reasonable and

prudent person would use in similar circumstances. The AQB shall apply an upward adjustment for a violation that is negligent or willful. The AQB determines the upward adjustment by evaluating the following factors:

- (1) the violator's degree of control over the event giving rise to the violation;
- (2) the foreseeability of the event giving rise to the violation;
- (3) the reasonable precautions that the violator could have undertaken to prevent or mitigate the event giving rise to the violation;
- (4) the violator's knowledge, or obligation to obtain knowledge, regarding the requirement;
- (5) the violator's knowledge, or obligation to obtain knowledge, regarding the possibility of violating the requirement;
- (6) the violator's level of sophistication; and
- (7) the level of sophistication in the industry regarding compliance with the requirement.

Prior notice regarding the same or similar requirement, including a prior notice of violation, is evidence of knowledge regarding the requirement. Prior notice to the violator's parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control may constitute prior notice to the violator. A violator who disputes an upward adjustment based on prior notice to its parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control bears the burden to demonstrate the absence or immateriality of such relationship.

The violator's knowledge regarding the requirement may result in an upward adjustment; however, the violator's lack of knowledge regarding the requirement does not excuse the violation because ignorance of the law is not a defense to liability. 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 environment.

c. HISTORY OF NONCOMPLIANCE

History of Noncompliance refers to the violator's previous compliance with environmental laws during the preceding three (3) years. The AQB may apply an upward adjustment for a history of noncompliance. The AQB determines the upward adjustment by evaluating the following factors:

- (1) previous violation of the same or similar requirement;
- (2) previous violation of requirement of the air quality program;
- (3) the frequency, how recent, and severity of the previous violation; and
- (4) the violator's response to the previous violation.

For the purpose of evaluating history of noncompliance, previous violations may include violations alleged by the AQB and resolved through settlement agreements regardless of whether the alleged violator conceded the existence of the violation(s). Prior violations disclosed in accordance with Appendix D of this Policy shall not be considered when evaluating history of noncompliance.

A prior violation by the violator's parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control may constitute a history of noncompliance. A violator who disputes an upward adjustment based on history of noncompliance of its parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control, bears the burden to demonstrate the absence or immateriality of such relationship.

d. FINANCIAL CONDITION

Financial Condition refers to a violator's ability to pay a civil penalty, taking into account its size and solvency. To be an effective deterrent, a civil penalty should be matched to the size of the violator, with larger violators being assessed a larger penalty. In essence, the civil penalty should be large enough to change the violator's perception of the risk attendant in violating the

law. The AQB may consider the parent corporation's size when assessing a civil penalty to its subsidiary.

In cases where the civil penalty may result in bankruptcy, preclude a violator from implementing a measure to achieve compliance or to prevent, or mitigate harm to human health or environment, the AQB may consider installment payments, delayed payments (including delayed payments contingent on improved financial condition), and abatement.

However, the AQB must ensure that the regulated community does not perceive installment or delayed payments or abatement as methods for operating a financially troubled business. Accordingly, the AQB may seek a civil penalty that may ultimately result in bankruptcy, in the following circumstances:

- (1) the violator refuses to correct a violation;
- (2) the violator has a significant history of noncompliance; or
- (3) the violation is willful, or created a serious threat to human health or environment.

In some cases, AQB may seek penalties that have the potential to close a business where the violator exceeds one or more of the above mentioned circumstances, rather than allowing it to continue to violate the law or harm public health or 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 environment.

Accordingly, the AQB will not consider such information until the settlement phase. The AQB may use the EPA ABEL model or any other method within its sole discretion to verify financial data information provided by a violator regarding its ability to pay a civil penalty.

e. VOLUNTARY ENVIRONMENTAL SELF-EVALUATION POLICY

The AQB may adjust a civil penalty in light of the policy for violations detected during voluntary environmental self-evaluations pursuant to Appendix D.

4. ECONOMIC BENEFIT OF NONCOMPLIANCE

The AQB must obtain a civil penalty that recovers the economic benefit of noncompliance. The economic benefit of noncompliance includes delayed and avoided costs. The AQB adds the economic benefit of noncompliance to the adjusted preliminary deterrent amount in order to determine the total civil penalty.

a. DELAYED COST

A delayed cost is an expenditure that the violator has deferred by violating the requirement. The economic benefit of a delayed cost is the interest on the dollar amount of the deferred expenditure for the length of time of the violation. For instance, a source that fails to install air pollution control equipment eventually will have to pay the cost of installation. By delaying the cost of installation, the source receives an economic benefit equal to the interest on the deferred expenditure. Examples include: failure to install equipment to meet emission or technology standards; failure to change industrial processes to reduce emissions; failure to conduct compliance tests; failure to install monitoring equipment; and failure to submit permit applications.

b. AVOIDED COST

An avoided cost is an expenditure that the violator will never incur by violating the requirement. The economic benefit of an avoided cost is the expenditure that the violator would have incurred to comply with the requirement, plus the interest on the dollar amount of the deferred expenditure for the length of time of the violation. For instance, a source that fails to install (or installs and then disconnects) air pollution control equipment will never have to pay the cost of operating and maintaining the equipment, and will achieve an economic benefit equal to the interest on the deferred expenditure. Examples include: failure to employ a sufficient number of trained employees; failure to conduct a compliance test; and failure to monitor, keep records, and report data.

c. WRONGFUL PROFIT

A wrongful profit is a profit (or additional profit) earned by violating the requirement. For instance, a violator may earn a profit by constructing or operating a source without a permit, violating an emission limitation, or failing to install air pollution control equipment. The AQB may calculate and consider wrongful profit when calculating the economic benefit of noncompliance.

d. CALCULATION OF ECONOMIC BENEFIT

The economic benefit of delayed and avoided costs will be included on the penalty calculation worksheet. The AQB may use the EPA BEN Model, as appropriate to calculate the economic benefit.

e. EXEMPTION FROM CALCULATION OF ECONOMIC BENEFIT

Some violations have no or minimal economic benefit to the violator. In the interest of simplifying and expediting enforcement, the AQB may decline to calculate the economic benefit of noncompliance for such violations.

5. ALTERNATIVE ASSESSMENT FOR EXCESS EMISSION VIOLATIONS

In cases involving emissions of air contaminants in excess of applicable limits, where the quantity of excess emissions is known directly through emissions monitoring or can be reliably estimated based on operational parameters, the AQB may determine the Gravity Component on a dollar-per-pound basis using the values in Table 3 of Appendix F and then add in economic benefit consideration. The AQB has determined through experience that these values result in a penalty proportional to the gravity of the violation. Penalty calculations based solely on Tables 1 or 2 of Appendix F were not always proportional to the gravity of the violation or reflective of the actual harm to the environment, periodically resulting in violations of long duration with a small amount of excess emissions being assessed a larger relative penalty than violations of short duration with a larger relative quantity of excess emissions.

The values in Table 3 of Appendix F are also sufficient to serve as a deterrent in most cases, and the use of Table 3 provides for the fair and consistent determination of civil penalties

for similar violations. 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.

The AQB may add any applicable economic benefit of non-compliance.

VII. SETTLEMENT

A. INTRODUCTION

The Policy 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 regarding liability for the violation or the amount of the civil penalty.

The AQB may adjust the civil penalty on the basis of such information. However, the AQB should ensure that the settlement penalty recovers the economic benefit of noncompliance and a significant portion of the Gravity Component. The violator and the regulated community must perceive that the civil penalty places the violator in a worse position than a person who complies with the requirement. A civil penalty lower than the economic benefit of noncompliance punishes a person who complies with the requirement by placing him at a competitive disadvantage. A civil penalty lower than the Gravity Component undermines the deterrent effect of the civil penalty.

The settlement process should not affect or delay the violator's obligation to comply fully and promptly with the requirement.

B. SETTLEMENT PROCESS

1. ESTABLISHMENT OF A SETTLEMENT POSITION

The AQB may establish a settlement position lower than the civil penalty calculated under the Policy. The AQB establishes a settlement position by evaluating the following factors:

- (1) the maximum civil penalty likely to be awarded by the administrative or judicial tribunal;

- (2) any information obtained by the AQB, including any new information provided by the violator; and
- (3) the risk of litigation:
 - a) the legal basis for a violation;
 - b) the violator's legal and equitable defenses;
 - c) the availability, reliability, and admissibility of evidence of a violation;
 - d) the availability and credibility of witnesses;
 - e) the records and decisions in similar enforcement actions;
 - f) the possibility of adverse precedent from prosecution of the violation;
 - g) the enforcement message to the regulated community;
 - h) the effect on third parties of different resolutions of a violation;
 - i) unusual expense, delay, or personnel commitment to prosecute the violation (see discussion below);
 - j) the cost of litigation to taxpayers; and
 - k) the public interest.

The AQB does not consider the following factors in determining the risk of litigation:

- (1) the desire or philosophy to avoid litigation;
- (2) existing environmental contamination;
- (3) delay in the AQB's enforcement action;
- (4) the AQB's past decision to forego or reduce enforcement or civil penalty for the same or similar violation.

2. RECALCULATION OF THE CIVIL PENALTY

The AQB recalculates the civil penalty whenever it obtains new information affecting the basis for the Civil Penalty, including the following types of information:

- (1) the violation is more or less serious than previously believed;

- (2) additional violations or multiple days of violation have occurred;
- (3) the violator's remedial measures are inadequate or ineffective;
- (4) the violator's history of noncompliance is more extensive than previously believed;
- (5) the violator is more sophisticated than previously believed; or
- (6) the violation was willful.

3. DOCUMENTATION OF SETTLEMENT PENALTIES

All civil penalties that are issued by the AQB as part of a settlement must be documented and maintained in the enforcement case file. Except for the final penalty calculation, settlement offers are confidential material.

VIII. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

With prior approval from the Cabinet Secretary, the AQB will allow the use of a supplemental environmental project in lieu of a portion of a civil penalty, when the AQB determines that such a project aligns with the mission statement of the New Mexico Environment Department, which is "to protect and restore the environment, and to foster a healthy and prosperous New Mexico for present and future generations." No member of the New Mexico Environment Department, including any members of the AQB, may propose a supplemental environmental project. Violators may propose a supplemental environmental project to the AQB, which shall evaluate and, if appropriate, approve the project provided it meets the criteria established below:

A. DEFINITIONS

1. SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) means an environmentally beneficial project that a violator voluntarily agrees to undertake in settlement of an enforcement action, but which is not otherwise legally required by law.
2. ENVIRONMENTALLY BENEFICIAL means to improve, protect, or reduce risk to public health or environment. A SEP must primarily benefit public health or environment.

3. IN SETTLEMENT OF AN ENFORCEMENT ACTION means the violator did not initiate the project before the AQB commenced the enforcement action at issue, and the AQB had an opportunity to consider and approve the scope of the project before it is initiated.

4. NOT OTHERWISE REQUIRED BY LAW means the project is not required by federal, state, or local law or regulation, except that a SEP

- a) may include a project which the violator may be legally obligated to perform two or more years in the future, unless early compliance provides a benefit to the violator;
- b) the project has not commenced; the project is not required as injunctive relief in the enforcement action; and the project is not required as part of an order or settlement in another enforcement action.

B. SEP CRITERIA

The AQB uses the following criteria to determine whether to accept a project in settlement of an enforcement action:¹

- (1) The project satisfies the SEP definition;
- (2) The project advances the objectives of the AQCA and CAA;
- (3) The project is consistent with the requirements of the AQCA and CAA;
- (4) The project is not an action that the AQB or violator is required to perform by law;
- (5) The project does not directly or indirectly implement or expand an existing air program administered by the AQB;
- (6) The project does not involve any donation or gift of any kind to any individual or entity, including a non-profit organization, or a federal, state or local government entity;
- (7) The project falls within one or more SEP categories described below;

¹ The AQB reserves the right to reject a project without regard to these criteria. Further, the AQB reserves the right to rely on a violator's past history of noncompliance to reject a project.

- (8) The project has a nexus to the violation. Determination of a nexus is within the sole discretion of the AQB. Geographical proximity is not a factor considered in evaluating nexus due to the fence line requirement of paragraph 12 below.
- Projects must relate to the underlying violations at issue in the enforcement action. The project must demonstrate that it is designed to reduce:
- a) the likelihood that similar violations will occur in the future;
 - b) the adverse impact to public health and/or the environment to which the violation at issue contributes; or
 - c) the overall risk to public health and/or the environment potentially affected by the violation at issue.
- (9) The project achieves a significant environmental benefit;
- (10) The project is fully described (including a schedule of completion and evaluation) in a binding and enforceable settlement document signed by the violator;
- (11) The project does not involve the management or administration of the project or funds by the AQB;
- (12) The project occurs within the fence line of the violator's facility, or at facilities that are functionally related to the violating facility and under common operational control, and
- (13) The settled civil penalty exceeds \$25,000.

C. SEP CATEGORIES

1. POLLUTION PREVENTION

A Pollution Prevention SEP prevents the generation of pollution by reducing the amount or toxicity of an air pollutant during the production process. A Pollution Prevention SEP cannot transfer pollution to another medium. Examples of acceptable Pollution Prevention SEPs include:

- (1) equipment modifications;

- (2) process modifications;
- (3) redesign or reformulation of products;
- (4) operation and maintenance;
- (5) inventory control; and
- (6) training.

2. POLLUTION REDUCTION

A Pollution Reduction SEP reduces pollution by decreasing the amount or toxicity of an air pollutant already generated before emission (e.g., air pollution control equipment).

3. ASSESSMENT/AUDIT

a. POLLUTION PREVENTION ASSESSMENT

A Pollution Prevention Assessment is 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. A Pollution Prevention Assessment must be conducted using a recognized, AQB-approved pollution prevention assessment or waste minimization procedure.

b. ENVIRONMENTAL MANAGEMENT SYSTEM AUDIT

An Environmental Management System Audit is an independent evaluation of a violator's environmental infrastructure, including:

- (1) formal and informal corporate environmental compliance policies, practices and procedures;
- (2) formal and informal corporate policies, practices, and procedures that affect environmental compliance;
- (3) educational and training programs for managers and employees;
- (4) equipment purchase, operation and maintenance, and inventory control programs;
- (5) policies, practices, and procedures regarding communication and coordination between production and environmental compliance personnel;
- (6) environmental compliance officer programs;

- (7) budgeting and planning systems for environmental compliance;
- (8) monitoring, record keeping, and reporting systems;
- (9) in-plant and community emergency plans;
- (10) other internal communication and control systems; and
- (11) systems for hazard identification and risk assessment.

c. ENVIRONMENTAL COMPLIANCE AUDIT

An Environmental Compliance Audit is an independent evaluation of a violator's compliance with all environmental requirements by a third party. The violator may receive credit only for the cost of conducting the audit. The violator receives no credit for resolving any violation discovered during the audit.

D. PENALTY MITIGATION

1. INTRODUCTION

The AQB follows a three-step process to determine whether a violator is entitled to penalty mitigation for a SEP. First, the AQB calculates the net-present after-tax cost of the SEP (SEP Cost). Second, the AQB evaluates the benefits of the SEP (SEP Benefit) to determine the percentage of the SEP Cost to be applied against the Gravity Component. Third, the AQB applies the percentage against the Gravity Component and calculates the amount of the settlement penalty.

2. CALCULATING THE SEP COST

The AQB calculates the SEP Cost based on the following costs associated with the performance of a SEP:

- (1) capital costs (e.g., new equipment or modifications, air pollution control equipment, buildings);
- (2) one-time, non-depreciable costs (e.g., removing contaminated materials, purchasing land, developing a compliance promotion seminar, purchasing audit software); and

- (3) annual operation and maintenance costs or savings for the number of years that such costs will be expended to perform the SEP (e.g., labor, power, water, chemicals, raw materials). The AQB may use the EPA PROJECT model to calculate the SEP Cost. If the violator waives the right to claim a tax deduction for the SEP, the AQB adjusts the marginal tax rate in the PROJECT model. If the PROJECT model indicates a negative cost for the project, the AQB will not accept the project as a SEP.²

3. EVALUATING THE SEP BENEFIT

The AQB evaluates the SEP Benefit in light of:

- (1) Benefits to Public Health or Environment. Whether the SEP results in a significant and quantifiable reduction in the emission of air pollutants or the risk to public health or environment.
- (2) Innovativeness. Whether the SEP furthers the development and implementation of innovative processes, technologies, or methods which:
- (a) reduce the production or emission of air pollutants;
 - (b) develop or evaluate new technology which may establish a new regulatory benchmark;
 - (c) promote compliance.
- (3) Environmental Justice. Whether the SEP mitigates damage or reduces risk to minority or low income populations that may have been disproportionately exposed to the emission of air pollutants or other environmental risks.
- (4) Multimedia Impacts. Whether the SEP reduces the emission or discharge of pollutants to more than one medium.

² A negative cost indicates a positive cash flow (e.g., profit) for the violator. A violator should implement a profitable project based on economic interest. However, though the AQB encourages businesses to undertake environmentally beneficial projects, violators should not receive a bonus in the form of penalty mitigation for undertaking such projects to settle enforcement actions.

(5) Pollution Prevention. Whether the SEP develops and implements pollution prevention equipment, techniques, or practices.

(6) The mitigation percentage should not exceed eighty percent (80%) of the SEP Cost.

The AQB may reduce the mitigation percentage for any project if the AQB must allocate significant resources to monitor or review the implementation of the SEP. For governmental agencies, political subdivisions, or nonprofit organizations the mitigation percentage may equal one hundred percent (100%) of the SEP Cost.

4. CALCULATING THE SETTLEMENT PENALTY

In settlements involving a SEP, the AQB should collect a civil penalty that equals or exceeds either:

(a) The economic benefit of noncompliance plus ten percent (10%) of the Gravity Component; or

(b) Twenty-five percent (25%) of the Gravity Component, whichever is greater.

For governmental agencies, political subdivisions, or nonprofit organizations, the AQB may collect, based on the circumstances and the proposed SEP, a civil penalty less than the economic benefit of noncompliance.

5. STIPULATED PENALTIES FOR SEP FAILURE

The settlement document must contain a provision for stipulated penalties in the event of SEP failure. The AQB will determine, in its sole discretion, the type of provision required for settlement, including but not limited to flat rates, graduated schedules, and cash payments for partial or full SEP Costs.

IX. FIELD CITATIONS

The Air Quality Control Act, Section 74-2-12 (D) authorizes the implementation of a Field Citation program for minor violations and limits civil penalties for field citations to one thousand dollars per day of violation.

A. MINOR VIOLATIONS ONLY

Field citations are only issued for minor violations. The state regulation for Field

Citations, located at 20.2.90.7.(G) NMAC, defines a minor violation as a:

...failure of a person to comply with any requirement or condition of any applicable provision of the Air Quality Control Act, air quality regulations, or a permit issued under the act or regulations that, with the exception of minor violations of 20.2.60 NMAC, Open Burning, and 20.2.65 NMAC, Smoke Management, meets all of the following criteria:

- (1) does not result in or contribute to, an increase in emissions of any air contaminant;
- (2) does not cause an increase in emissions of any toxic air contaminant in excess of any emission standard or limitation or other state or federal requirement that is applicable to that toxic air contaminant,
- (3) does not cause or contribute to the violation of any state or federal ambient air quality standard; and
- (4) does not hinder the ability of the department to determine compliance with any other applicable air quality state or federal law, rule, regulation, information request, order, variance, permit or other requirement.

B. CIVIL PENALTIES

In accordance with AQCA, the penalty for a field citation shall take into account the effort to comply with the requirement and other relevant factors. The penalty matrix below establishes per violation penalties based on the violator's demonstration of cooperation and history of previous violations and is consistent with 20.2.90.111 NMAC.

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

First-time violators who are cooperative may be assessed a minimal penalty up to \$100 per violation. If circumstances warrant, the penalty can be waived for first time offenders and the citation issued as a warning. Repeat offenders that demonstrate no cooperation may be fined up to \$1,000 per violation. Penalties assessed in a field citation shall not exceed \$1,000 per day per

violation or a maximum of \$15,000. Failure to correct a violation may result in issuance of an administrative compliance order.

C. HEARING REQUESTS

Any person or entity who receives a field citation from the NMED AQB may request a hearing before the Department pursuant to 20.2.90.110 NMAC.

X. RELEASE OF INFORMATION

The Inspection of Public Records Act (IPRA), NMSA 1978 Sections 14-2-1 *et seq.*, and the NMED Inspection of Public Records Policy govern the release of public records relating to civil penalties. Public records relating to civil penalties include this Policy, Penalty Calculation Worksheets, and supporting documentation.

The AQB releases public records relating to civil penalties in accordance with IPRA and Department Policy. Applicable exemptions from disclosure under IPRA may include, but are not limited to, attorney-client privilege, attorney work-product privilege, and confidential settlement documents (final settlement agreements are not confidential).


RICHARD GOODYEAR
AIR QUALITY BUREAU CHIEF

DATE: OCT 19 2016

APPENDIX A: SAMPLE PENALTY CALCULATION WORKSHEET

Company:	Sample Company	Calculations by:	Staff
Facility:	Sample Facility	Reviewed by:	Manager
NOV #:	SAM-0000-0501	Date of Calculation:	Sample Date
Permit#:	None	Source Class:	Minor

Sample Penalty Calculation

20.2.72.200.A and 200.E NMAC, Construction Permits: Operating a 225 TPH portable rock crusher facility without a permit.

VIOLATION 1

A. Gravity Component

	Potential for Harm Significant	Extent of Deviation Major	Quantity 1	Penalty \$4,000.00
Basis:	The Potential for Harm is Significant and the Extent of Deviation is Major, as detailed in the Bureau's Civil Penalty Policy Sections C.1.a, C.1.b, and Appendix F.			

(More specific details about the gravity component of the violation can be included here.)

A.1 Multi-Day Component

	Number of Days 60	Multiplier 220.00	Quantity 1	Penalty \$13,200.00
Basis:	The violation continued between January 01, 2004 and January 10, 2005 for a total of 375 days. At the Bureau's discretion, 60 days were used for calculating the multi-day component of the penalty. (More specific details about the multi-day component of the violation can be included here.)			

A.2 Adjustment Factors

Basis:	I. Effort to Comply	Cooperation	0.0
	The Bureau has no information to aggravate or mitigate this adjustment factor.		
Basis:	II. Negligence/Willfulness	Negligent	0.2
	The company violated a clear condition of the New Mexico Administrative Code (NMAC) and/or Permit None. The Department considers such a violation to be negligent in that the company is reasonably presumed to have knowledge of these conditions.		
Basis:	III. History of Non-Compliance	No History of Non-Compliance	0.0
	No history of non-compliance within the most recent three (3) years.		
Basis:	IV. Financial Condition		
	Most Recent Reference USA Financial Report	Gross Sale Between \$1,000,000-\$5,000,000	
Basis:	Most Recent Reference USA Report	Gross Sales Between \$1,000,000-\$5,000,000	0.2
Basis:	V. Unique Adjustment Basis	Factor Total = (1 + I + II + III + IV) * V	1.4
	N/A		

B Economic Benefit

Basis: The Bureau reserves the right to assess an economic benefit if one is found to exist.

\$0.00

Violation Total:

\$24,080.00

APPENDIX B: GRAVITY-BASED AND MULTIPLE DAY PENALTY MATRICES AND ADJUSTMENT FACTOR MATRIX

Potential for Harm Vs. Extent of Deviation from Requirements

POTENTIAL FOR HARM	EXTENT OF DEVIATION FROM REQUIREMENTS		
	MAJOR 100+% Greater than Emission Limitation, Permit Condition, or	MODERATE 25 - 100% Greater than Emission Limitation, Permit Condition, or	MINOR 0 - 25% Greater than Emission Limitation, Permit Condition, or
Severe	\$6,000	\$5,000	\$4,000
Significant	\$4,000	\$3,000	\$2,000
Minimal	\$2,000	\$1,500	\$1,000

MULTI-DAY PENALTY MATRIX Extent of
Deviation from Requirements MAJOR
SOURCE

POTENTIAL FOR HARM	MAJOR	MODERATE	MINOR
Severe	\$800	\$640	\$560
Significant	\$480	\$400	\$320
Minimal	\$240	\$160	\$100

MULTI-DAY PENALTY MATRIX Extent of
Deviation from Requirements MINOR
SOURCE

POTENTIAL FOR HARM	MAJOR	MODERATE	MINOR
Severe	\$320	\$280	\$240
Significant	\$220	\$200	\$180
Minimal	\$160	\$80	\$40

ADJUSTMENT FACTOR MATRIX

<u>A. Effort to Comply (Range -0.4 to 0.4) -</u>	
Self-Reported Violation	-0.4
Excellent Cooperation / Exceeds Compliance	-0.2
Cooperation	0.0
Minimal Cooperation / Minimal Compliance	0.2
No Cooperation / No Compliance	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: RESERVED

APPENDIX D: VOLUNTARY ENVIRONMENTAL DISCLOSURE POLICY

A. **PURPOSE.** This policy sets forth internal guidelines designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of state environmental laws. This policy amends, but does not supersede, Air Quality Bureau (AQB) civil penalty policy to assist NMED personnel in proposing appropriate penalties or negotiating settlements in administrative and judicial enforcement actions involving voluntary self-evaluation, disclosure, correction and prevention. This policy is consistent with the U.S. Environmental Protection Agency audit policy, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* and Small Business Compliance Policy.

B. **APPLICABILITY.** This policy is applicable to NMED AQB staff when proposing penalties and negotiating settlements in administrative and judicial enforcement actions, including enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy. This policy is not a final agency action, and is intended as guidance. It does not create any rights, duties or obligations, or defenses, implied or otherwise, in any third parties.

C. **DEFINITIONS.**

For purposes of this policy, the following definitions apply:

1. Environmental audit means a systematic, documented, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.
2. Due diligence means the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect, and correct violations through all of the following:
 - a. Compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, and other sources of authority for environmental requirements;
 - b. Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
 - c. Mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out, including monitoring and auditing systems reasonably designed to be effective to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
 - d. Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

e. Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards, including consistent enforcement through appropriate disciplinary mechanisms; and

f. Procedures for the prompt and appropriate corrections of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

3. Regulated entity means any entity, including a federal, state, and municipal facility, regulated under the Air Quality Control Act by NMED.

4. Violation means noncompliance with a requirement of a statute, regulation or air quality permit.

5. Voluntary means an act or action not required by statute, regulation, air quality permit, order or agreement.

D. **CONDITIONS.** The conditions for reducing civil penalties in accordance with Section E of this policy are as follows:

1. **Systematic Discovery.** The violation was discovered through an environmental audit or a systematic procedure or practice that reflects the regulated entity's due diligence in preventing, detecting, and correcting violations. When a violation is discovered through a systematic procedure or practice, the regulated entity must provide accurate and complete documentation to NMED as to how systematic procedures or practices meet the definition for due diligence;

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;

3. **Prompt Disclosure.** The regulated entity 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 entity may contact AQB in writing before the 21 day period has passed to propose alternative disclosure terms.

4. **Prompt Correction and Remediation.** The regulated entity corrects the violation expeditiously and in no event later than within 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;

5. Remediation of Imminent and Substantial Endangerment. The regulated entity 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 regulated entity implements appropriate measures to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts. The implementation of measures should be completed within a reasonable amount of time given the nature of the violation and type of measure;

7. No Repeat Violations. The specific violation, has not occurred more than once 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; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from the EPA or NMED;

8. Cooperation. The regulated entity cooperates and provides such information as is 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 employees and assistance in any further investigations into the violation and other related compliance problems of the regulated entity;

9. Written Agreement. "Where appropriate, NMED may require that to satisfy any of these conditions, a regulated entity must 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; and

10. Excluded Violations. The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to human health or the environment, or (ii) violates the specific terms of any judicial or Administrative order, or consent agreement.

E. CIVIL PENALTIES. Regulated entities will be eligible for the following adjustments in civil penalties:

1. Elimination of Gravity-Based Penalties. If a regulated entity satisfies all of the conditions of Section D, NMED will eliminate the gravity component from the penalty policy.

2. Reduction of Gravity-Based Penalties. NMED may reduce by 75% the gravity-based component of the penalty in cases in which all of the conditions in Section D.2 through 10 are met.

3. Economic Benefit. NMED retains its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage through noncompliance.

F. **HISTORY OF NONCOMPLIANCE.** NMED may exclude self-disclosed violations which meet all of the conditions in Section D.2 through 10 when determining an entity's adjustment factor for history of noncompliance under the AQB Civil Penalty Policy.

G. **CRIMINAL ACTIVITIES.** This policy does not apply to the disclosure of potentially criminal violations.

H. **NO ROUTINE REQUESTS FOR AUDITS.**

1. NMED will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, NMED will not request an audit in routine inspections. If NMED has independent reason to believe a violation has occurred, NMED may seek any information relevant to identifying violations or determining liability or extent of harm including any existing audits.

2. With respect to federal, state, or municipal facilities, although governmental facility environmental audit reports may be accessible to the public under the federal Freedom of Information Act (FOIA) or the state Inspection of Public Records Act in certain circumstances, NMED will not utilize FOIA or the State Inspection of Public Records Act to request information from governmental agencies. NMED will apply this policy on requests for audit reports to federal, state and municipal facilities the same as it does for other regulated entities.

APPENDIX E: RESERVED

APPENDIX F: GRAVITY DETERMINATION TABLE GRAVITY DETERMINATION - EXAMPLES

Table 1: PSD/MAJOR/NON-ATTAINMENT/SYNTHETIC MINOR > 80% TITLE V SOURCES

EXTENT OF DEVIATION			
MAJOR		MODERATE	MINOR
POTENTIAL FOR HARM	SEVERE	- 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 conduct a valid initial or RATA compliance test: late > 60 days - Failure to submit TV ACC or S-A: late > 60 days - Any violation of emission limitation*	- 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 TV ACC or S-A: late ≤ 30 days
	SIGNIFICANT	- NSPS, NESHAP, BACT, MACT Violations** - NMAC Violations** - Relocation without prior approval*	Failure to submit semi-annual and/or quarterly report: late ≤ 30 days
	MINIMAL	- Failure to control fugitive emissions* - Failure to submit non-TV 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 final excess emissions report - Failure to provide information required by permit or regulation	- Failure to post permit - Failure to submit non-federal, non-TV report: late ≤ 30 days - Failure to submit initial excess emission report - Failure to pay annual permit fees: < 60 days late

* Multi-day Component applies
** Multi-day Component may apply

Table 2: SYNTHETIC MINOR <80% /MINOR SOURCES/UNPERMITTED SOURCES SUBJECT TO FEDERAL AND/OR STATE REGULATIONS

EXTENT OF DEVIATION			
MAJOR		MODERATE	
MINOR			
POTENTIAL FOR HARM	SEVERE		
	SIGNIFICANT	- 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* - 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*	- 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 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 final excess emissions report - Failure to provide information required by permit or regulation
	MINIMAL	- Construction without a Notice of Intent (NOI) - Operation without a Notice of Intent (NOI)*	- Failure to post permit - Failure to submit non-federal report: late ≤ 30 days - Failure to submit initial excess emission report - Failure to pay annual permit fees: late < 60 days

* Multi-day Component applies

**Multi-day Component may apply

Table 3: EXCESS EMISSIONS			
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	\$3.00	\$2.00	\$1.00