

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Bureau of Air Quality

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TITLE: Guidance for Application of Regional Civil Assessment Procedure

AUTHORITY: Act of January 8, 1960, P.L. (1959) 2119, No 787, as amended, known as The Air Pollution Control Act, (35 P.S. § 4001 et seq.)

EFFECTIVE DATE: (Revised) September 21, 2002

POLICY: Outlines the procedures to be followed for assessing civil penalties for various violations.

PURPOSE: Provides uniformity for the assessment of penalties for various violations.

APPLICABILITY: Staff/Regulated Public

DISCLAIMER:

The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect applicable statutory or regulatory requirements.

The policies and procedures herein are not adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework for the exercise of DEP's administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

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CIVIL PENALTY ASSESSMENT PROCEDURE

BUREAU OF AIR QUALITY

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I. INTRODUCTION

A. Assessment of Penalties under the Air Pollution Control Act

The 1992 Amendments to the Pennsylvania Air Pollution Control Act (APCA) enable the Department to assess civil penalties for violations. The APCA provides for assessment of a penalty of \$25,000 per day for each violation. Section 9.1 of the APCA requires that:

In determining the amount of the penalty, the Department shall consider the willfulness of the violation; damage to air, soil, water or other natural resources of the Commonwealth or their uses; financial benefit to the person in consequence of the violation; deterrence of future violations; cost to the department; the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the owners or operator of the source or facility; and other relevant factors.

35 P.S. §4009.1

The procedure set forth in this document is designed to assist regional staff in applying the Section 9.1 factors in assessing civil penalties. Each of the listed factors must be considered in assessing a civil penalty. This document provides guidance for incorporation of those factors into the assessment.

While the guidance is intended to promote consistency in the assessment of penalties, a particular case may involve unique factors that warrant a penalty different from that indicated by the guidance. The penalty calculated may never exceed the statutory maximum of \$25,000 per day for each violation.

This policy was originally published October 1992, and revised May 1996 and September 2002.

B. Relationship to Stipulated Penalties in Consent Orders

This procedure should not be used to calculate stipulated penalties for purposes of a Consent Order and Agreement or operating permit containing stipulated penalties. This policy addresses violations of the Act and regulations there under.

C. Relationship to Settlement Offers and Agreements

This policy is used to calculate the penalty that is or would be assessed unilaterally by the Department. If the Department and the violator are able to reach agreement on a penalty assessment, a lower figure may be appropriate to reflect the value of avoiding litigation. There is no current policy dictating a particular relationship between the penalty indicated by this policy and a reasonable settlement value.

II. VIOLATIONS OF AN OPERATING PERMIT OR PLAN APPROVAL

This section provides guidance for violations of 25 Pa. Code §§ 127.25 and 127.444, which are not addressed elsewhere in this policy. This section may also be used in lieu of other sections of this policy for permit violations, but it should be used only in the event that the other applicable sections yield an assessment amount, which appears obviously inappropriate based on the unique factors of a case.

This section may also be used as a resource for evaluating penalties for violations involving unpermitted sources, in the event that no other section of the policy is applicable to those violations.

This section does not apply to construction, installation or modification of a source without a Plan Approval or Operating Permit, 25 Pa. Code §§ 127.11 and §127.443. Civil penalties for such unauthorized installation, modification and/or operation should be calculated in accordance with Section XI., Installation/Operation without Plan Approval/Operating Permit.

Sections 127.25 and 127.444 require that the source and air cleaning devices must be "operated and maintained in accordance with specifications in the application and conditions in the plan approval or operating permit issued by the Department. No person may cause or permit the operation of an air contamination source subject to this chapter in a manner inconsistent with good operating practices."

The range of possible violations of this provision is virtually infinite, due to the large number of sources and source types, large number of and varieties of air cleaning devices and variety of permit conditions and source specifications. Accordingly guidance for violations of Sections 127.25 and 127.444 will be less quantifiable, and will require the user to use more judgment and discretion.

Violations of Sections 127.25 and 127.444, penalties should range from \$100 to 25,000 per day for each violation. The civil penalty should be calculated using the following process.

Penalty Derivation

Step 1: The following guidance should generally be followed for the specific types of violations listed:

A. Late, Absent or Incomplete Reports/Notifications

The following table is a guide for assessing base penalties for violations involving reports and notifications. Degree of Willfulness and Compliance History, as defined in Section X., Penalty Calculation Worksheet, should be used as the primary criteria for setting the penalty in the ranges. These factors would then be excluded from consideration when calculating the Adjustment (F) Factor for Step 3 in Section X., Penalty Calculation Worksheet.

VIOLATION TYPE	Severe/Moderate Environmental Impact	No/Low Environmental Impact
Failure to Report or Notify	The failure to report or notify impacted the Department's timely awareness of violations with moderate or severe environmental impact, and/or influenced the Department's decision to conduct an inspection or observation.*	Reports would have revealed violations with no or low environmental impact, and did not influence the Department's decision to conduct an inspection or observation.*
	\$8,000 - 25,000/month/report**	\$1,000 - 8,000/year/report***
Late Reports	The late report impacted the Department's timely awareness of violations with moderate or severe environmental impact.*	The late report revealed no violations, or violations with low environmental impact.*
	\$1,000 - 8,000/month/report**	\$1,000 - 8,000/year/report***
Incomplete Report or Notifications	The incomplete report failed to reveal violations with moderate or severe environmental impact.*	No violations occurred during the time period of the incomplete report or the report failed to reveal violations with low environmental impact.*
	\$8,000 - 25,000/month/report**	\$1,000 - 8,000/year/report***

* If a company persists in not submitting a required report, despite documented reminders from DEP, it should be presumed that the unsubmitted report would have revealed significant violations unless and until the report is actually submitted and shows otherwise.

** Or part of month if the lateness was <1 month

*** Or part of year if the lateness was <1 year

B. Failure to Conduct Required Monitoring or Recordkeeping

Recordkeeping/monitoring violations determined to be significant enough to warrant a penalty, should be assessed a base penalty of \$100-\$1,000 per recordkeeping/monitoring increment. The increment used should not be more frequent than daily. For instance, failure to conduct weekly pressure drop monitoring, would have a weekly penalty increment.

Environmental Impact, Willfulness and Compliance History should be used as the primary criteria for setting the penalty in the range. These factors would then be excluded from consideration in the Section X., Penalty Calculation Worksheet.

Failure to conduct required stack testing should be viewed as a monitoring violation, and may be assessed a weekly or daily penalty increment depending on purpose and environmental significance of the testing. The results of the next stack test actually completed may be relevant in assessing the likely environmental impact of late stack testing.

C. Operating a Source in a Manner Inconsistent with Good Operating Practices

There are many possible varieties of this type of violation. The penalty time increment chosen would normally be daily, unless some other time increment is appropriate. A penalty range of \$200 - 8,000 per penalty time increment (or per incident, as applicable), should generally be used.

Environmental Impact, Willfulness and Compliance History should be used as the primary criteria for setting the penalty in the range. These factors would then be excluded from consideration in the Section X., Penalty Calculation Worksheet.

The user should assess penalties for other Sections 127.25 and 127.444 violations (not described above) considering all facts available and the criteria described above.

Step 2: Calculate a penalty for each incident or case, as described above.

Step 3: Calculate the Adjustment (F) Factor and remainder of penalty for each incident or case using relevant sections of Section X., Penalty Calculation Worksheet.

III. SOURCE TESTING VIOLATIONS

Penalty Derivation

Step 1: Establish the time period of the violation (This reflects the duration of the violation).

Time Period = Days of operation from the date of the failed source test to the date of the next compliant source test, or other appropriate compliance date (such as permanent source shutdown).

Step 2: Determine the environmental impact by calculating the actual excess emissions over the duration of the violation, based on the source test results.

Example: If a control device is required to achieve 98% overall efficiency and the stack test reveals that it is only reaching 90%, calculate the excess emissions caused by the 8% reduction of overall efficiency from the date of the failed source test to the date of the next compliant source test.

Step 3: Determine base penalty by multiplying pounds (lbs) of emissions over the limit by the appropriate amount below:

Volatile Organic Compound (VOC) and Nitrogen Oxides (NOX)

Attainment Classification	Ozone Season	Non-Ozone Season
	(Apr-Oct)	(Nov-Mar)
Severe	\$3.75/lb	\$3.00/lb
Serious/Moderate	\$3.00/lb	\$2.25/lb
Marginal/Attainment	\$2.25/lb	\$1.50/lb

PM 2.5 and Sulfur Oxides (SOX)

Attainment Classification	
Non-attainment	\$3.75/lb
Attainment	\$2.25/lb

Hazardous Air Pollutants (HAPs) and Air Toxics

\$6.00/lb

All Other Pollutants

1.50/lb

Step 4: Calculate the Adjustment (F) Factor and remainder of the penalty using relevant sections of the Section X., Penalty Calculation Worksheet.

IV. EMISSION VIOLATIONS

Penalty Derivation

Step 1: Determine excess emissions using the equations below.

(Actual Emissions - Emission Limit = pounds (lbs) over the limit)

Note: To determine excess VOC emissions (lbs over the limit) from GRAPHIC ARTS facilities (Section 129.67) use the following equations:

publication rotogravure actual emissions* x 25%
 other rotogravure actual emissions x 35%
 flexographic actual emissions X 40%

*as determined from VOC content of ink and actual usage

Step 2: Determine base penalty by multiplying lbs of emissions over the limit by the appropriate amount below:

VOC and NOx

Attainment Classification	Ozone Season	Non-Ozone Season
	(Apr-Oct)	(Nov-Mar)
Severe	\$3.75/lb	\$3.00/lb
Serious/Moderate	\$3.00/lb	\$2.25/lb
Marginal/Attainment	\$2.25/lb	\$1.50/lb

PM 2.5 and SOX

Attainment Classification	
Non-attainment	\$3.75/lb
Attainment	\$2.25/lb

HAPs and Air Toxics

\$6.00/lb

All Other Pollutants

\$1.50/lb

Step 3: Calculate the Adjustment (F) Factor and remainder of the penalty using relevant sections of the Section X., Penalty Calculation Worksheet.

V. 12-MONTH ROLLING SUM EMISSION LIMIT VIOLATIONS

Violations of a 12-month rolling total emission limit, such as that set by permit condition and/or the limits for a synthetic minor source, may not be suitable for settlement utilizing the penalty scheme set forth in Section IV., Emission Violations.

Penalty Derivation

- Step 1:** Determine how many months exceeded the 12-month rolling total emission limit.
- Step 2:** Determine which month exceeded the 12-month rolling sum limit to the greatest extent. Calculate the excess pounds over the allowable for that month.
- Step 3:** Use Section IV., Emission Violations, Step 2 to determine the excess emission penalty (This reflects environmental impact).
- Step 4:** Add 1/12 (8.3%) of the base penalty for each month that exceeded the 12-month rolling sum emission limit (This reflects the duration of the violation).

Example: The facility exceeded the 12-month rolling sum CO emission limit for 7 months. The month with the highest exceedance was 2.5 tons over the limit. Base penalty = [5,000 pounds * penalty per pound] * [1 + (7 months * 0.083)]

- Step 5:** Calculate the Adjustment (F) Factor and remainder of the penalty using relevant sections of the Section X., Penalty Calculation Worksheet.

VI. AIR POLLUTANT RELEASE VIOLATIONS

This section applies to an accidental release, as that term is defined in the 1990 Clean Air Act, of air emissions and hazardous air pollutants except for asbestos. Emissions which are released over a longer time period should be addressed under Section IV., Emission Violations. Violations involving asbestos should be addressed using the asbestos penalty policy.

Penalty Derivation

- Step 1:** Categorize the Environmental Impact of the release using the definitions found in the Section X., Penalty Calculation Worksheet. In placing a release in the moderate or severe category, one should consider the toxicity of the pollutant(s), the amount released, and the duration of the release.
- Step 2:** Once a release is categorized, a daily base penalty should be determined from the following:
- | | | |
|----------------------|-----------|-------------------|
| Base Penalty: | Severe: | \$10,000 - 25,000 |
| | Moderate: | \$3,000 - 15,000 |
| | Low: | \$1,000 - 5,000 |
- Step 3:** Calculate the Adjustment (F) Factor and remainder of the penalty using relevant sections of Section X., Penalty Calculation Worksheet. Omit step (A) because the Environmental Impact has already been considered.

VII. VISIBLE/FUGITIVE/MALODOR VIOLATIONS

Penalty Derivation

Step 1: Determine Environmental Impact of the violation and degree of willfulness using the definitions found in the Section X., Penalty Calculation Worksheet.

Step 2: Establish daily penalty range according to Table.

Degree of Willfulness	ENVIRONMENTAL IMPACT		
	Severe	Moderate	Low
Knowing	\$3,750+	\$2,250 - 3,750	\$1,875 - 2,250
Negligent	\$2,250 - 3,750	\$1,875 - 2,250	\$1,500 - 1,875
Accidental	\$1,875 - 2,250	\$1,500 - 1,875	\$1,000 - 1,500

Step 3: Calculate the Adjustment (F) Factor and remainder of the penalty using relevant sections of the Section X., Penalty Calculation Worksheet. (Omit steps (A) and (E) as they have already been considered).

VIII.OPEN BURNING VIOLATIONS

Penalty Derivation

Step 1: Determine the Environmental Impact of the violation, using the definitions found in the Section X., Penalty Calculation Worksheet. The severity determination of an open burning operation should also consider the materials being burned, the size of the fire, the location of the fire and the fire's potential to pollute and endanger life and property.

Step 2: Establish penalty range per occurrence. Select the appropriate daily penalty from within the prescribed penalty range, on the basis of any factors relevant to the violation, not evaluated elsewhere under this section, as listed in Section 9.1(a) of the Act.

NON-AIR BASIN OPEN BURNING				Air Basin - Add to Amount
History	Severe	Moderate	Low	
None	\$1,500 +	\$750 - 1,500	\$250 - 750	\$750
Second	\$3,000 +	\$750 - 3,000	\$750	\$1,125
Third +	\$4,500 +	\$1,125-4,500	\$1,125	\$1,500

Step 3: Calculate the Adjustment (F) Factor and remainder of the penalty using relevant sections of the Section X., Penalty Calculation Worksheet. (Omit steps (A) and (D), as they have already been considered). When considering the savings or financial benefit from non-compliance, include the avoided cost of waste disposal of the burned portion of the material.

IX. SMALL SOURCE NOX VIOLATIONS

In accordance with Section 9 of the APCA, this procedure should be used to calculate a penalty whenever the owner or operator fails to surrender the required NOX allowances, for sources subject to the provisions of 25 PA Code Sections 129.201-204, by December 31 of any year in which actual NOX emissions exceeded the allowable.

Penalty Derivation

- Step 1.** Calculate a base penalty by multiplying 50% of the total amount paid for the allowances. (Note that this reflects environmental impact).
- Step 2.** Calculate the interest on the total amount paid for the allowances in accordance with 26 U.S.C.A. Section 6621(a)(2). [US CODE: Title 26,6621. Determination of rate of interest](#) Add this to the base penalty. [This acknowledges the duration of the violation (i.e., how late the company was in retiring the allowances), and economic benefit].
- Step 3.** Evaluate the degree of cooperation. No adjustment should be made to the base penalty unless there is poor response from the owner or operator upon discovery of the violation by the Department. In this case, up to 30% should be added to the base penalty calculated in step 1 depending on the facts in the case.
- Step 4.** Calculate the Adjustment (F) Factor and remainder of the penalty using relevant sections of the Section X., Penalty Calculation Worksheet.

X. PENALTY CALCULATION WORKSHEET

Part I Adjustment (F) Factor Calculation: Calculate the F Factor beginning with $F = 1.0$, as follows:

- (A) Degree of Environmental Impact (see definitions on page 15): low, moderate, severe. (0, +0.1, +0.2) If more than one component of the severe category tests is present, the escalator may exceed +0.2.
- (B) Degree of Cooperation:
 - Violator promptly notifies the Department: -0.1
 - Violator immediately corrects the violation: -0.1
 - Department discovers the violation: 0
 - Poor response upon receipt of NOV from the DEP: +0.1
- (C) Remedial Action and/or Emission Control results in lower emissions than the applicable standard (-0.1, if well beyond Department requirements).
- (D) Compliance History: If relevant, consider air quality violations committed by the same owner/operator at other sites within Pennsylvania. Use the following factors to increase the penalty:
 - Number of other violations
 - Frequency of the violation
 - These considerations are used only to raise a penalty. The total compliance history adjustment may reach +0.3.
- (E) Degree of "Willfulness" (see definitions on page 15):
 - Accidental: -0.2
 - Negligent: 0
 - Knowing: +0.3
- (F) Attainment Classification (if relevant)
 - Attainment
 - +0.1 Non-attainment or Transport Region (For example: VOC, NOX, PM2.5, SOX)
 - +0.2 Severe Ozone Non-attainment

Environmental Impact

SEVERE	MODERATE	LOW
Threat to public health or safety		
Direct Environmental damage to air, soil, water or other natural resources	Exceeding of an emission standard	Exceeding an emission standard for a source of low environmental significance as indicated by factors below:
Property damage	Emission of toxic air contaminants	Short duration
Contribute to exceeding of an ambient air quality standard	On-going violations Citizens complaints	No toxic air contaminants

Definitions for Degree of "Willfulness"

- Accidental:** A violation resulting from factors beyond the control of the responsible person or entity; a violation which occurred despite the responsible person or entity's exercise of due care, caution or diligence.
- Negligent:** A violation resulting from ignorance of legal or regulatory requirements or from the failure to exercise due care, caution or diligence.
- Knowing:** A violation that was intentional or that was done with knowledge that the relevant conduct or omission was unlawful or that resulted from a reckless disregard of applicable regulatory or legal requirement or good operating practices.

Toxic air contaminants are as defined in the 1990 Clean Air Act Amendments.

Part II Savings or financial Benefit from Non-Compliance: Such savings or benefits would include the value of delaying or avoiding expenditures for: fuel, power, control equipment, process modification, testing, etc. Add in the cost of borrowing money at 1.5% above the prime interest rate. The following EPA economic models can be consulted:

- **BEN** - Calculates a violator's economic savings from delaying or avoiding pollution control expenditures.

- **Beyond BEN Benefit** - Previously known as illegal competitive advantage (ICA), refers to four categories of cases that go beyond the benefits derived from delaying or avoiding compliance costs. These four categories are:
 - o Violator gains additional market share.
 - o Violator sells products or services prohibited by law.
 - o Violator initiates construction or operation prior to government approval
 - o Violator operated at higher capacity than it should have.

For more information on these models, refer to:

- <http://www.epa.gov/compliance/civil/econmodels/index.html>
- http://www.indecon.com/iec_web/practice/models.asp

Part III Cost to the Department: Extra monetary costs for the investigation and preparation of the case, such as source sampling costs and laboratory costs, should be identified.

Part IV Deterrent Penalty: If additional deterrent effect is justified by the circumstances of the case, an appropriate deterrent penalty should also be added to the adjusted penalty.

Part V Penalty Calculation: Use the following equation to determine the applicable penalties.

$$\text{Adjusted Penalty} = (\text{Penalty} \times F) + \text{Savings from non-compliance} + \text{Cost to the Department} + \text{Deterrent Penalty}$$

Other Relevant Factors: Other factors unique to the owners or operator of the source or facility and other relevant factors, such as size of the facility, should also be considered on a case-by-case basis. "Size of facility" relates to financial ability of an entity to pay a penalty. You may consult with a variety of sources, such as Dunn & Bradstreet or the following EPA models:

- **ABEL** - Evaluates a corporation's or partnership's ability to afford compliance costs, cleanup costs or civil penalties.
- **INDIPAY** - Evaluates an individual's ability to afford compliance costs, cleanup costs or civil penalties.
- **MUNIPAY** - Evaluates a municipality's or regional utility's ability to afford compliance costs, cleanup costs or civil penalties.

For more information on these models, refer to:

- <http://www.epa.gov/compliance/civil/econmodels/index.html>
- http://www.indecon.com/iec_web/practice/models.asp

XI. INSTALLATION/OPERATION WITHOUT PLAN APPROVAL/OPERATING PERMIT

Applicability

This policy is applicable to situations where a source or control device requiring a Plan Approval and/or Operating Permit is installed and/or operated without the required Plan Approval and/or Operating Permit.

General Approach

Using the penalty assessment procedures discussed below, determine the range of appropriate penalty from the Penalty Table.

Penalty Assessment

Sources Installed without a Plan Approval:

Determine the degree of willfulness associated with the installation of the source or control device. Determine installation penalty range from the Penalty Table. A substantial penalty should be assessed when a significant source is installed in a non-attainment area, when that pollutant is emitted, or in a PSD situation. The installation penalty is a one-time only penalty and not meant to be multiplied by time out of compliance.

Operation without an Operating Permit:

Determine the degree of willfulness associated with the operation of the source. Determine the Environmental Impact related to the operation of the source. Determine the penalty range to coincide with the appropriate period of noncompliance. The degree of willfulness may change during the operation; i.e. operation may initially be unaware or negligent and subsequently, after a NOV, be willful.

Other considerations:

Consider the company's previous record, their degree of cooperation, and other assessments, to set the penalty within the range.

Add any operating cost savings the company incurred by not having to operate a pollution control device when one should have been installed.

**Definitions for
Degree of "Willfulness"**

Accidental: Company had no prior knowledge of Chapter 127 requirements.

Negligent: Failure to recognize the need for a Plan Approval and/or Operating Permit coupled with failure to inquire. The company should have known about requirements due to previous Chapter 127 experience.

Knowing: Deliberate action with prior knowledge that the act constituted a violation of environmental statutes, regulation, etc., or a deliberate attempt to avoid or circumvent compliance with same, (i.e., action or continued action after receipt of NOV).

ENVIRONMENTAL IMPACT		
Severe	Moderate	Low
Non-complying major stationary source	Exceeding of an emission standard	Operation resulting in emissions which would be in compliance for any source
Environmental damage or Property damage	Opacity violations	
Emissions of Air Toxic compounds in excess of guidance	Emissions of Air Toxic Compounds	Exceeding of an emission standard for source of low environmental significance
Failure to provide emission offsets	Citizen complaints due to source operation	
Contributing to exceeding an ambient air quality standard	Emissions not in compliance with BAT requirements	Non-compliance with BAT for source of low environmental significance
Source located in a designated non-attainment area and emitting a pollutant for which that area is non-attainment		

PENALTY TABLE

Degree of Willfulness	Environmental Impact			Installation Only
	Severe	Moderate	Low	
Knowing	\$3,750 - 37,500 per week	\$3,750 - 37,500 per month	\$3,750 - 37,500 per year*	\$3,750 - 75,000**
Negligent	\$1,500 - 7,500 per week	\$1,500 - 7,500 per month	\$1,500 - 7,500 per year*	\$1,500 - 3,750
Accidental	\$750 - 3,000 per week	\$750 - 3,000 per month	\$750 - 3,000 per year	\$750 - 1,500

If installation and operation violations occur, calculate a penalty for both and combine.

* Total if less than a year

** To assess the entire \$75,000, there must have been at least three (3) days of construction without Plan Approval.