

CHAPTER SEVEN: ADMINISTRATIVE AND CIVIL CHARGE CALCULATIONS

SECTION I. AIR QUALITY MANAGEMENT PROGRAM

A. ADMINISTRATIVE ACTIONS

The Administrative remedies available to the Department include the authority to issue an administrative penalty pursuant to 7 Del. C. § 6005(b)(3), which may be assessed at not more than \$10,000 for each day of violation. Simultaneous violations of more than one pollutant or air contaminant parameter or of any other limitation or standard imposed under Chapter 60 are treated as single violations for each day. If this is viewed as a constraint to achieving penalties commensurate with situations involving numerous or multimedia violations, the Department may consider a civil remedy.

If a public hearing is requested on an administrative penalty and not quickly settled by negotiation, the Department has the option of proceeding with the administrative hearing, or to withdraw the order and file a civil action in Superior Court.

The Department may endeavor by conciliation to obtain compliance with the requirements of 7 Del. C. Chapter 60 by issuing a conciliation order pursuant to 7 Del. C. §6005(b)(2). A conciliation order gives written notice to the responsible party that specifies the complaint and proposes a reasonable time for its correction and compliance with Chapter 60.

The Department may issue a Cease and Desist Order to any person violating any rule, regulation, order, permit condition or provision of Chapter 60, pursuant to 7 Del. C. §6018. This type of Administrative action directly orders the violator to cease the action that is causing the violation. A Cease and Desist order may be issued by the Department as a first step before seeking an injunction. Cease and Desist orders expire 30 days from their issuance date unless it is withdrawn by the Secretary or suspended by injunction.

The Department may use its authority under 7 Del. C. §6308 to issue an imminent hazard order if the Secretary receives information that the storage, transportation, treatment or disposal of any hazardous waste may present an imminent and substantial hazard to the health of persons or to the environment. An imminent hazard order directs the violator to prevent or eliminate the activity constituting the hazard. The Secretary may also direct Department personnel to undertake cleanup of the site and recover costs of the cleanup from the responsible party.

B. CIVIL ACTIONS

The civil remedies available to the Department include an action in Superior Court where a civil penalty of not less than \$1,000 nor more than \$10,000 may be imposed for each completed violation, pursuant to 7 Del. C. §6005(b)(1). Each day of continued violation is considered a separate violation.

If the violation is completed and there is a substantial likelihood that it will recur, the Department may seek a permanent or preliminary injunction or a temporary restraining order in Chancery Court pursuant to 7 Del. C. §6005(b)(1). If the violation is continuing,

or threatening to begin, the Department may seek a temporary restraining order (TRO) or permanent injunction in Chancery Court pursuant to 7 Del. C. §6005(b)(2).

CRIMINAL ACTIONS

There are three levels of criminal remedies available to the Department as specified in 7 Del. C. §6013.

A person who willfully or negligently violates according to 7 Del. C. §6013(a) shall be punished by a fine of not less than \$2,500 nor more than \$25,000 for each day of violation. All criminal actions must be referred to the Enforcement Section. The Superior Court has jurisdiction of offenses under this subsection.

A person who knowingly makes any false statement, representation, etc., according to 7 Del. C. §6013(b) shall, upon conviction, be punished by a fine of not less than \$500 nor more than \$10,000 or by imprisonment for not more than 6 months, or both. The Superior Court has jurisdiction of offenses under this subsection.

The Department also has the option to charge the company/individual in a Justice of the Peace Court for violation of Chapter 60, or any rule or regulation promulgated thereunder. That person shall be punished by a fine not less than \$50, nor more than \$500 for each violation, pursuant to 7 Del. C. §6013(c).

D. FEDERAL IMPLICATIONS

The Department of Justice may share with EPA information and jurisdiction concerning criminal enforcement cases as appropriate.

The Department understands that EPA may assume the lead, or overfile in cases where it becomes apparent that the State is unable or chooses not to act in accordance with this guidance to resolve a violation in a timely and appropriate manner.

E. IMPEDIMENTS OR ENFORCEMENT CONSTRAINTS

Other than those previously identified, there are no other legal impediments that prevent the State of Delaware from adequately resolving a significant violation, even those such as the recovery of the economic benefit at state owned or operated facilities.

F. PENALTY DETERMINATIONS

Penalties against violators require consideration of the following factors pursuant to 7 Del. C. Section 6005(b)(3): nature, circumstances, extent and gravity, ability of a violator to pay, prior history of such violations, degree of culpability, and the economic benefit gained by the violator. The AQM Section takes these factors into consideration to determine the penalty that will be recommended to the Enforcement Panel.

The Department's recommendation of civil or administrative penalties reflects sufficient magnitude to maintain a credible deterrent effect. The Department considers the economic benefit of non-compliance. However, in some instances, the risks involved in litigating the case or the violator's inability to pay a penalty may justify not assessing a penalty that recaptures the full economic benefit. Legitimate litigation risks include

adverse legal precedent and evidentiary problems. The inability of a violator to pay a penalty may be demonstrated by the violator through financial information analyzed by the Department.

The penalty reflects the seriousness of the violation. Consideration of the seriousness of the violation takes into account violations that may not have a readily calculated economic benefit, but are critical to the program's integrity, such as monitoring, reporting, record keeping and testing violations. This amount may be adjusted in some instances to reflect the violator's history of compliance with air pollution laws and regulations, and the source's good faith efforts to comply.

AQM relies on the October 25, 1991 memo from EPA in determining the Clean Air Act Stationary Source Civil Penalty which was clarified on January 17, 1992 to address all violations that are not considered minor in nature regardless of whether the violation meets the definition of a HPV.

The Air Civil Administrative Penalty is broken down into three categories, which include subsets. These include the Benefit Component, the Gravity Component, and the Unique Adjustment Factors.

The Benefit Component:

The Benefit Component is included in order to ensure that penalties recover the significant economic benefit of noncompliance. The benefit of noncompliance can include but is not limited to the benefit the source received from delayed costs or the benefit the source received from avoided costs.

The Gravity Component:

The Gravity Component is used to deter future violations and reflect the seriousness of the violation. The economic gravity component takes into consideration a variety of factors and circumstances.

Adjusting the Gravity Component:

The goal of the administrative penalty is the equitable treatment of the regulated community. In order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts for each case. These factors include:

- Degree of willfulness or negligence
- Degree of cooperation
- Prompt reporting of noncompliance
- Prompt correction of environmental problems
- Cooperation during pre-filing investigation
- History of Noncompliance
- Environmental Damage

SECTION II. SOLID AND HAZARDOUS WASTE PROGRAM

Civil enforcement and related penalties for violation of solid waste program statutes and regulations are found in 7 Del. C., §6005(b)(1) and (2). As specified in Delaware Code, the solid waste program may impose civil penalties of not less than \$1,000 or more than \$10,000 for each completed violation. Each day of continued non-compliance is considered a separate violation. Penalties are calculated through the informal usage of EPA's "1990 RCRA Civil Penalty Policy" (RCPP), with modification to the penalty ranges as specified in state statute. Hazardous waste program civil and administrative enforcement and penalty procedures for violations of its statutes and regulations are set forth in 7 Del. C., §6309(b) and (d) of the Hazardous Waste Management Act. Hazardous Waste civil penalties may range from not less than \$1,000 or more than \$25,000 for each day of violation. The hazardous waste program utilizes the RCPP as written, for guidance when preparing administrative penalty calculations.

A. CONSENT ORDERS WITHOUT CIVIL PENALTIES

Consent Orders may be negotiated without civil penalty in instances where activities of regulatory violation had no or minimal environmental impact, or in instances where a facility is not a recalcitrant or chronic violator or demonstrates a good faith effort to comply. Solid and Hazardous Waste Management Branch (SHWMB) staff, based on evaluation of a case, may make recommendations for not imposing penalties. Recommendations along with justification are submitted through the Branch program managers to the Division's Paralegal for presentation to the Enforcement Panel.

B. CONSENT ORDERS WITH CIVIL PENALTIES

Consent Orders with civil penalties are levied in instances where solid or hazardous waste violations result in a release or have an environmental impact; when a site has a history of being recalcitrant or a chronic violator; or when there has been an economic benefit from non-compliance. For the hazardous waste program, civil penalties are calculated utilizing the RCPP, while the solid waste program utilizes a state-modified version of the document. The penalty for violations is calculated based on a determination of gravity based components, i.e., potential for harm and the extent of deviation from regulatory requirements, as well as economic benefits gained from non-compliance and penalty adjustments based on individual factors, for example, willingness to comply, history of non-compliance, or ability to pay. Recommendations along with justification are submitted through the Branch program managers to the Division's Paralegal for presentation to the Enforcement Panel.

C. GRAVITY BASED COMPONENTS

1. Potential for Harm

The "Potential for Harm" resulting from a violation is based on two factors. These factors are the risk of human or environmental exposure to a harmful solid waste or to a hazardous waste or its constituents posed by non-compliance, and the adverse effect of non-compliance on the statutory or regulatory purposes for implementing the solid and hazardous waste programs. There are three degrees of potential for harm:

- a. Major – The violation poses or may pose a substantial risk of exposure to harmful solid waste, hazardous waste or its constituents by humans or other receptors,
- b. Moderate – The violation poses or may pose a significant risk of exposure to harmful solid waste, hazardous waste or its constituents by humans or other receptors, and
- c. Minor – The violation poses or may pose a relatively low risk of exposure to harmful solid waste, hazardous waste or its constituents by humans or other receptors.

2. Extent of Deviation

The extent of deviation from the solid and hazardous waste statutory and regulatory requirements relate to the extent in which a violator deviates from the requirements. There are three degrees for extent of deviation.

- a. Major – The violator deviates from requirements of regulation or statute to an extent where most of the requirements are not met resulting in non-compliance;
- b. Moderate – A violator significantly deviates from requirements of regulation or statute, but some of the requirements are met; and
- c. Minor – The violator deviates somewhat from the requirements of regulation or statute, but most of the requirements are met.

D. MULTI-DAY COMPONENT

The solid and hazardous waste program may recommend multi-day penalties for violations of statute or regulation. If it is determined that a violation has continued for more than one day, the next step is to determine the length of time each violation continued and whether a multi-day penalty is warranted. Multi-day penalties are usually calculated for days 2 through 180 of continuing violation. Use of a multi-day component beyond 180 days is discretionary. On occasion, multi-day penalty assessments may be waived for good cause.

E. DEGREE OF CULPABILITY

Civil penalties may be increased significantly if there is evidence that the alleged violation was caused by facility negligence or a deliberate act.

F. COMPLIANCE HISTORY

Compliance history, or rather a pattern of continued non-compliance, is when applicable, a factor that results in an upward penalty adjustment. When a facility has previously violated solid or hazardous waste statutory, regulatory or permitting requirements only to do so again, establishes a pattern of non-compliance. Further, it demonstrates previous enforcement actions failed to act as a deterrent to non-compliance. Unless the current or previous violation occurred by factors outside the control of the facility, consideration is given to adjusting the penalty upward. In determining the necessity of an upward adjustment, solid and hazardous waste program staff consider how similar are the past and current violations, how recent was the previous violation, the number of previous violations and the violator's response in correcting problems.

G. ECONOMIC BENEFIT OF NON-COMPLIANCE

Civil penalty calculations take into consideration the economic benefit of non-compliance. Significant economic benefits are recaptured in the civil penalty, thereby removing economic incentives for non-compliance. In general, cases are not settled for penalty amounts less than the economic benefit of non-compliance, with four exceptions:

1. Economic benefit is less than \$2,500;
2. There are compelling public concerns that would not be served by taking a case to trial;
3. It is unlikely, based on facts of a case, that economic benefit will be recovered during litigation; and
4. The company has documented an inability to pay the total proposed penalty.

H. ADJUSTMENT FACTORS

Civil penalties, excluding the amount of penalty for the economic benefit of non-compliance, may be increased or decreased based on the factors of 1.) good faith efforts to comply, 2.) degree of willfulness or negligence, 3.) history of non-compliance, 4.) ability to pay or, 5.) other factors unique to the alleged violator. It should be noted that after all adjustment factors are considered, the resulting penalty may not exceed the statutory maximum of \$25,000 per day for hazardous waste or \$10,000 per day per violation for solid waste.

Adjustment factors are cumulative, e.g., there may be an upward adjustment factor of 10% for history of non-compliance and a 10% upward adjustment factor for degree of willfulness and/or negligence, for a total upward adjustment of 20%. Adjustments either up or down can be made by a factor of 25% in ordinary circumstances to 26% to 40% of the calculated penalty amount in unusual circumstances.

1. Good Faith Effort to Comply/Lack of Good Faith

Good faith efforts to comply are considered in a downward adjustment of a penalty if the alleged violator promptly identifies and reports non-compliance or begins taking measures to correct a violation prior to notification. Downward adjustments are not usually made if the good faith effort primarily consists of achieving compliance, or because the alleged violator lacks knowledge.

2. Degree of Willfulness and/or Negligence

While committing knowing violations might support a criminal action, there are many instances of culpability which do not meet the criteria of a criminal act. In cases where civil penalties are levied, the penalty may be adjusted upward for willfulness and/or negligence. Conversely, there may be instances where a penalty will be adjusted downward based on the lack of willfulness and/or negligence. Factors considered include how much control the alleged violator had over the events, whether the alleged violator took reasonable precautions against the event, whether the alleged violator knew or should have known the hazards associated with a specific conduct or whether the alleged violator knew or should have known the regulatory requirements. Lack of knowledge in itself is not used as the basis of penalty reduction as it only encourages ignorance of the regulations.

3. History of Non-Compliance

In circumstances where there is clear evidence that previous enforcement actions have not deterred an alleged violator, the history of non-compliance leads to an upward adjustment of penalties. Unless the alleged violations are entirely out of the control of the violator, an upward adjustment may be made. Factors considered before applying an adjustment include:

- a. How similar was the previous violation;
- b. How recent was the previous violation; and
- c. The number of previous violations and the alleged violator's response to the violations with regard to correction.

4. Ability to Pay

Penalties beyond the means of a violator are generally not assessed if it would put a facility out of business. It is unlikely, however, a penalty would be reduced for ability to pay if a facility refuses to correct a violation or there is a long history of previous violations. The burden to demonstrate inability to pay rests with the facility. Usually, "Ability to Pay" is considered at the settlement stage, but only if the issue is raised by the facility. If insufficient information is provided to support a claim, adjustment of the penalty is disregarded.

5. Other Factors

Every calculated penalty is reviewed for the potential of protracted litigation and the penalty amount most likely to be awarded from a trial or hearing. Every enforcement case is evaluated for the inherent strength of the case, e.g., the ability to prove violations, the probability legal arguments will be accepted, the availability of evidence, including witnesses, and the strength of the alleged violator's equitable and legal defense. When it is determined a significant litigative risk exists, taken into account is any disproportionate resource outlay involved with litigation that might be avoided by entering into a settlement. Thus, downward adjustments of a proposed penalty might be warranted depending on these litigation considerations.

SECTION III. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM

A. CHARGE PER VIOLATION/GRAVITY COMPONENT

If the violation has been completed, a civil penalty of not less than \$1,000 nor more than \$10,000 for each completed violation may be assessed. Each day of continued violation shall be considered a separate violation.

B. COST OF INJUNCTIVE REMEDY

The cost of injunctive remedy may be used to reduce the fine amount.

C. ECONOMIC BENEFIT

Any economic benefit or savings resulting from the violation can be used to increase the fine amount.

D. BASELINE CIVIL CHARGE

The baseline Civil Charge is \$1,000 for each completed violation.

E. ADJUSTMENTS

Adjustments to the fine amount may be made for efforts made by the facility to correct the problem in an expeditious manner.

F. FINAL RECOMMENDED CIVIL CHARGE

The final recommended civil charge is the sum of above components.

SECTION IV. ACCIDENTAL RELEASE PREVENTION (ARP) PROGRAM

A. TYPES OF VIOLATIONS The following is based on 7 Del. Code, Chapter 77:

1. Risk Management Plan. Failure to submit a substantially complete risk management plan is a violation.
2. Risk Management Program. Failure to implement a substantially complete risk management program is a violation.

B. ENFORCEMENT

1. The ARP group may issue a "Notice of Violation" explaining the potential violations, if the inspection identifies elements of the facility's risk program are in substantial non-compliance.
2. When the ARP group issues a "Notice of Violation," the ARP group presents the inspection findings and an enforcement action recommendation to the Enforcement Panel (see the discussion of the Enforcement Panel under Air Quality Management, Engineering and Compliance "Enforcement Resolution Procedure.") The Enforcement Panel makes the determination whether or not the Department will take an enforcement action. Several actions are to the Department for ARP enforcement:
 - a. For Risk Management Plan violations, when a facility fails to submit a risk management plan, the Department may seek an administrative penalty of up to \$10,000 per day of violation.
 - b. For Risk Management Program violations, when a facility does not have a substantially complete risk management program, the Department may seek an administrative penalty of up to \$10,000 per day of violation.
 - c. The Department may seek a civil penalty imposed by Superior Court of not less than \$1,000 or more than \$10,000 per day per violation.
 - d. The Department may proceed with a criminal investigation and seek a criminal penalty of not more than \$25,000 per day per violation or imprisonment for 1 year or both. All criminal actions must be referred to the Enforcement Section. These provisions apply when any person ". . . knowingly makes a false statement, representation or certification in any application, record report, plan or other document filed or required to be maintained under this chapter . . . or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter.
 - e. The Secretary may order those operations that present a real and imminent hazard to cease and the Secretary may seek injunctive or other relief in Chancery Court.

C. PENALTY MATRIX

1. For each proposed penalty, the ARP group prepares a penalty matrix that is presented to enforcement panel. The penalty matrix must address:
 - The nature, the circumstances, the extent and the gravity of the violation.
 - Ability of the violator to pay.
 - Prior history of violations.
 - Degree of culpability.
 - Economic benefit.
 - Other factors.
2. The penalty matrix is specific to each situation of noncompliance.

D. RELEASES OF REGULATED HAZARDOUS SUBSTANCES

Facilities that release regulated hazardous substances must report those releases to Department under 7 Del. Code, Section 6028. When the release is one of the regulated substances covered by the ARP regulation, the ARP group requests a written report from the facility that includes the results from the facility's accident investigation. We investigate most of these releases, once we have received the report.

We follow the enforcement guidelines outlined above, if deficiencies in the facility's risk management programs have contributed to the release. We must determine whether the factors resulting in a release are deficiencies or represent significant non-compliance. We seek fines for ARP program violations, not for the release itself.

SECTION V. UNDERGROUND STORAGE TANK PROGRAM

A. PENALTY ASSESSMENT

For UST violations, the penalties will be assessed based on the degree that the violation deviates from Delaware's requirements and the potential for harm to human health and the environment. The amount of the penalty will be determined per violation by determining if the violation is a major, moderate or minor deviation from the regulations and if it is a major, moderate or minor potential for harm. The penalty amount for a major, major violation is \$2,000 and a minor, minor violation is \$100. The penalty will be calculated from the day of notification of noncompliance and in the case of multiple violations, will not exceed \$25,000 per day per facility. Once the penalty has been determined, it may be increased or decreased up to 50% depending on the cooperation obtained from the owner, the owner's ability to pay, the willfulness of the violation, prior history of violations and other matters as justice may require.

The following are the definitions for each category of violation and potential threat.

- Major - The violation constitutes substantial noncompliance with the Delaware UST statute and regulations.
- Moderate - The violation results in noncompliance but the violator has implemented the requirements of the Delaware UST statute or regulations to some extent.
- Minor - The violator has met most of the requirements of the Delaware UST statute or the regulations but has deviated slightly from one or more requirements.
- Major - The violation is causing or may cause substantial or continuing risk to human health or the environment.
- Moderate - The violation is causing or may cause a significant risk to human health or the environment.
- Minor - The violation is causing or may cause low risk to human health or the environment.

B. PENALTY MATRIX

1. Extent of deviation from requirement

	MAJOR	MODERATE	MINOR
MAJOR	\$2,000	\$1,500	\$1,000
MODERATE	\$1,000	\$ 750	\$ 500
MINOR	\$ 200	\$ 150	\$ 100

2. Potential for harm

Examples of UST Violations are as follows:

- Major - Major Violations

- Failure to conduct Inventory Control
- Failure to conduct Release Detection
- Failure to Report a Release
- Failure to conduct an Investigation or Corrective Action

- Moderate - Moderate Violations

- Failure to provide notification of a Removal or Abandonment of a tank
- Failure to investigate inventory discrepancies
- Failure to contain a Release
- Failure to submit a Site Safety Plan

- Minor - Minor Violations

- Failure to post a Registration Certificate

For Vapor Recovery violations, penalties will be assessed based on the degree the violation deviates from the Delaware requirements and the potential for adverse impacts to human health or the environment. Each violation is assigned a weighted score on a sliding scale of one to five points with one point being minimal impact and five points being maximum impact. The scores for individual violations are summed and a multiplier is used to obtain the final violation points. The multiplier that is used will be determined by the maximum monthly throughputs will be assigned smaller multipliers than facilities with higher throughputs. For administrative violations such as record keeping where the impacts to human health or the environment are minimal, the lowest multiplier will be used regardless of the throughput of the facility. A penalty of \$100 per point per day of noncompliance will be used to calculate the amount of the fine.

The Vapor Recovery Penalty Matrix is as follows:

Regulation 24, Section 26 - Gasoline Dispensing Facility - Stage I Vapor Recovery

Applicable Regulation	Description of Violation	Points
Reg. 24; Sec. 26 a	Not constructed Stage I Controls	5
Reg. 24; Sec. 26 a	Improper fuel transfer operation	5
Reg. 24; Sec.26 c.1.i.	Absence of drop tube or fuel loading operation without a submerged fill	4
Reg. 24; Sec.26 c.1.ii.	Dry breaks not provided for vapor return line	4
Reg. 24; Sec.26 c.1.iii	Vapor return hose to truck damaged or frayed	3
Reg. 24; Sec.26 c.1.iv.	Absence of submerged drop tube for dedicated gauge wells	3
Reg. 24; Sec.26 c.1.v	Vapor tight caps not fitted on fill connections	2
Reg. 24; Sec.26 e	Failure to report excessive emissions	2
Reg. 24; Sec.26 d.	Failure to maintain daily records of deliveries for five years	1

Regulation 24; Section 36 - Stage II Vapor Recovery

Applicable Regulation	Description of Violation	Points
Reg. 24 Sec. 36 c. 1.	Failure to construct emission control device	5
Reg. 24 Sec. 36 c. 2.	Failure to construct/install CARB certified equipment	4
Reg. 24 Sec. 36 f. 1.	Failure to carry out performance testing requirements	4
Reg. 24 Sec. 36 i. 1.	Failure to tag and lock out defective equipment	4
Reg. 24 Sec. 36 d. 1. Sec. 36 d. 2. Sec. 36 d. 3.	Failure to meet the appropriate compliance deadline	4
Reg. 24 Sec. 36 g. 2.	Failure to report failures within Twenty-four hours	3
Reg. 24 Sec. 36 i. 3.	Failure to perform routine daily maintenance	3
Reg. 24 Sec. 36 d. 4.	Failure to retrofit systems with dual hoses and remote vapor check valves	3
Reg. 24 Sec. 36 i. 3.	Failure to provide adequate training and written instructions to the operator	2
Reg. 24 Sec. 36 j.	Failure to comply with record-keeping requirements	1
Reg. 24 Sec. 36 g. 1.	Failure to give written notification Prior to testing	1
Reg. 24 Sec. 36 h.	Failure to post operating instructions	1

Regulation 2, Section 2 - Construction, Installation Alteration and Operation Permits

Applicable Regulation	Description of Violation	Points
Reg. 2 Sec. 2.1	Failure to apply and obtain appropriate Permit for construction or alteration	3
Reg. 2 Sec. 2.2 Sec. 2.8	Failure to obtain operating permit	3

Table of Throughput Versus Multipliers

Throughput (gallons per month)	Multiplier
> 200,000	3
> 100,000 but ≤ 200,000	2
≤ 100,000	1