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NWCAA Civil Penalty Policy

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1. Goals and Objectives

This policy facilitates agency penalty decisions by providing a framework for fair and consistent assessment of administrative civil penalties addressing violations of air pollution control laws and regulations.

The goal of the NWCAA enforcement program is to promote compliance with applicable rules and regulations in place to protect human health and the environment. NWCAA enforcement program activities include:

- Responding to concerns from the public when they are being impacted by a violation
- Providing compliance assistance to regulated entities
- Conducting inspections and investigations to gather compliance information
- Requiring corrective actions
- Issuing penalties

In these activities, including penalty decisions, NWCAA staff consider and prioritize response to noncompliance issues that may further impact overburdened and disproportionately impacted communities.

Monetary penalties are one enforcement tool, and are used to ensure that noncompliance is recognized, as a motivation for future compliance, and to assign a cost for noncompliance. Monetary penalties ensure that no economic or competitive benefit is obtained by ignoring the rules.

This guidance is intended as a working document. As such, the monetary values, categories, and considerations should be reviewed and updated at least every three years.

2. Authority and Discretion

The NWCAA enforcement program must operate within the bounds of authority provided by federal, state, and agency statutes, regulations, and rules. This guidance cannot exceed the authority granted by any of the statutes, regulations and rules. Nothing in this guidance is meant to change any rules in place at the time this policy was adopted. A list of the pertinent NWCAA regulations in place at the time this policy was adopted is provided in Appendix A.

Within the limits of the regulations, NWCAA has significant discretion to decide whether to impose a penalty and to determine appropriate penalties. Each investigation and enforcement action is unique and addressed by the agency on a case-by-case basis. It is possible that

situations will arise that this guidance does not address completely, so it is the responsibility of NWCAA staff to recommend penalties not addressed in this Policy. Nothing in this guidance shall be construed to limit or obligate the NWCAA in any action. Deviations from this policy will be documented in the enforcement case record.

3. Implementation

3.1 Enforcement Case Tracking and Process

Enforcement cases are considered “opened” at the time a Notice of Violation (NOV) is issued to the alleged violator. NWCAA enforcement cases and associated records are identified and tracked by the case number assigned to the Notice of Violation.

Notices of Violation may be initiated by staff or the compliance manager for non-compliant situations based on inspections, investigations, referrals from associated agencies (i.e., fire marshals), or reports from regulated facilities.

Not sooner than 30 days following service of a Notice of Violation to an alleged violator, agency actions addressing those violations may be initiated by staff or the compliance manager. Some actions, including penalties, are identified by regulation as “formal” enforcement actions and are appealable to the Pollution Control Hearings Board (PCHB).

All enforcement actions are reviewed prior to being served upon the alleged violator. The compliance manager serves as the project manager for enforcement actions, reviews all actions for completeness and consistency with agency policy and legal standards, and engages agency council when appropriate. The Control Officer has final decision authority over all enforcement actions, including penalty assessments.

3.2 Calculation of Penalty

Monetary penalties have two components that when added together, level the playing field economically and incur additional cost to the violator:

- Economic benefit
- Gravity

3.2.1 Economic Benefit

Economic benefit determinations include the monetary savings or time-value of money gained by avoided or delayed installation of controls, cost of goods or services, or other avoided capital expenditures and operational costs. The EPA BEN model¹ may be used for calculating economic benefit of long-term violations and avoided large capital expenses in accordance with EPA policy.

¹ <https://www.epa.gov/enforcement/penalty-and-financial-models>

The economic benefit of the non-compliant activity must be considered² in all penalty calculations. Economic benefits in excess of \$1,000 will be assessed. Below the \$1,000 threshold, economic benefits may be included where data are readily available.

3.2.2 Gravity Penalty

Gravity penalty imposes the “fine” or deterrent amount of the penalty and reflect all facts of the case, including the components outlined in this policy. The gravity penalty calculation addresses harm; generally categorized in air quality enforcement as:

- Injury to air quality, property or persons (i.e., actual or likely emissions)
- Importance to regulatory program.

Below are suggested initial gravity penalties for commonly and/or reasonably foreseeable cited illegal activities/impacts/failures. These initial penalties provide a consistent starting point for gravity calculations for common violation types and then are adjusted using applicable criteria below.

Violation Types	Initial Gravity Penalty
General requirements:	
<i>Nuisance</i>	
Nuisance odor	\$2,500
Nuisance dust	\$1,000
<i>Procedural</i>	
Failure to notify, report emissions/throughput ³	\$500
Failure to obtain NSR permit prior to construction/operation	\$3,000
<i>Pollutant release incidents⁴</i>	
Emissions release causing a measurable (i.e., ambient monitor measurement) or discernable impact (i.e., FLIR detected, or visual, olfactory, or other sensory – separate from nuisance).	\$5,000
Excess emissions ⁵ : criteria 100 lb to 1 ton or toxics < 50% RQ	\$2,000
Excess emissions: criteria > 1 ton to 40 tons or toxics > 50% to 100% RQ	\$5,000 +\$1/lb
Excess emissions: criteria > 40 tons or toxics > 100% RQ	\$10,000 +\$1/lb

² EPA-Ecology Performance Partnership Agreement

³ NWCAA regulations may allow the assessment of 3X fees or the use of potential to emit (PTE) to calculate fees, based on circumstances of the violations.

⁴ Release incident related violations may be addressed by pollutant release penalties, nuisance provisions, and/or failure to meet permit or rule provisions or combinations of these line items, on a case-by-case basis.

⁵ Excess emissions are those pollutants emitted beyond allowable standards or permit limits. Where multiple limits of a single pollutant are violated, the largest excess emission should be considered. RQ= reportable quantity under Superfund (CERCLA) regulations.

Failures to meet permit conditions – (baseline is Non-AOP provisions)	
Failure to meet permit condition, local, state, or federal rule: recordkeeping, reporting, notification	\$500
Failure to meet permit condition, local, state, or federal rule: emission monitoring or testing	\$1,000
Failure to meet permit condition, local, state, or federal rule: emission limit, operational limit, installation or operation of control device, follow work practice standards minimizing emissions	\$1,000
Title 5/AOP provisions	X3
Failure to operate and maintain process and control equipment in accordance with good air pollution control practices⁶	
	\$19,000 (Statutory max)
Asbestos containing materials (ACM): (baseline is homeowner/resident)	
Failure to submit notification of demolition/asbestos removal. Failure to survey.	\$250
Failure to abate ACM/disturbance of ACM – cement board or similar	\$500
Failure to abate ACM/disturbance of ACM – friable material - unlikely public exposure	\$1,000
Failure to abate ACM/disturbance of ACM – friable material – likely public exposure	\$2,000
Failure to control the work area. Failure to properly manage ACM during disturbance. Failure to properly dispose of ACM.	\$500
Uncertified worker, per individual	\$500
Contractor/commercial activity, rental property, business	X1.5
Licensed asbestos contractor	X2
Illegal outdoor burning: (baseline is homeowner/residential)	
Failure to obtain permit	\$250
Prohibited materials burn barrel or pile <100 ft ³	\$750
Prohibited materials pile ≥100 ft ³	\$1,500
Hauled materials	\$500
Municipality/UGA, fire safety or air quality burn ban	\$500
Commercial/business	X1.5

⁶ Failure to operate and maintain process and control equipment in accordance with good air pollution control practices (a.k.a. general duty clause) violations are tied to both actual harm and importance to the regulatory program. To that end and reflecting the seriousness of a failure of the general duty clauses of either NWCAA regulations or federal regulations, these violations should be considered for statutory maximum penalty. General duty violations are alleged to facilities with a history of non-compliance that have failed to take effective preventative and/or corrective actions to address conditions that caused or contributed to emissions.

Wood heating devices: (baseline is homeowner/residential)	
Installation/sale of an illegal wood-burning heating device	\$1,000
Illegal operation of wood-burning heating device during an air quality burn ban	\$250
Excess opacity from wood-burning heating device	\$250
Prohibited materials	\$500
Commercial/business	X1.5

Penalties may be applied to each violation per day of violation. Not all cited violations must have penalties associated with them. All relevant facts use to determine initial gravity penalties should be documented in the penalty recommendation.

3.2.3 Gravity Penalty Adjustments

Each enforcement action is unique. Adjustment of the initial penalty amount may be appropriate to assure that each enforcement action considers case-by-case facts in penalty decisions. All relevant facts considered in adjustment decisions should be documented in the penalty recommendation, including those not specifically addressed by this policy.

Emissions-based penalty adjustment considerations:

- Quantity of emissions in excess of the regulatory standard in mass (pounds) and/or in relative terms (% over), if available.
- Type of emissions – air toxics or criteria pollutants. In general, air toxics are considered at lower thresholds than criteria pollutants.
- Length or duration of violation (number of days).
- Offsite impact of emissions (e.g., complaints, track-out).
- Context of impacts including identifying overburdened communities and overlapping regulatory impacts, where known.

Importance to regulatory program penalty considerations:

- How the violation interfered with the agency’s ability to determine compliance, resulting emissions, and/or broader offsite impacts.
- How the violation could contribute or lead to non-compliance, excess emissions, or offsite impacts.
- How the violation incurs extensive investigation resources that undermines the regulatory framework of the program.

Degree of negligence or willfulness: What level of knowledge or control did the violator have over the violation occurrence and duration?

- Property owners in process for eviction of tenants/ squatters/trespassers have legal waiting periods – When and why did they start the process may provide insight into control.

- Title V/Air operating permit (AOP) sources are mandated to self-certify compliance status for all permit conditions. Failure to make “reasonable inquiry” into compliance under AOPs is a violation in itself.
- Large industrial facilities (i.e., refineries) must follow rigorous “management of change” procedures that are well documented and may provide insight as to degree of knowledge of underlying conditions that contribute to a violation.

History of non-compliance: Has the violation or a similar violation occurred previously (verbal warning, NOV, previous penalty and AOD) and if so when? This prior history should increase the gravity penalty proportionally to historical violations.

- Prior history for violators who re-organize business entities, but decision-makers remain consistent and/or enforcement history in another jurisdiction may be considered.
- Prior history of impacts to a community or ecological area should be considered. Where a violation has direct or indirect community impacts, consider previous and/or current impacts that may be cumulative or compounding.

Degree of cooperation: was the agency notified immediately?

- Was the violation self-disclosed or did the agency find it?
- Did the violator respond to the NOV promptly?
- Did the violator provide information proactively or only when requested?

Degree of preventative efforts taken, or innovative nature and magnitude of effort required to comply:

- What preventative and corrective actions were taken?
- What investments in control and/or prevention has the facility made?
- Are workers trained adequately to prevent conditions causing excess emissions?
- Were those actions beyond industry norms?
- How difficult were they and how quickly were they implemented?
- How successful were the actions?

Other financial burden factors specific to the case and monetarily significant:

- Size of business in terms of cash flow/net worth – within each category of non-major and major, there is a broad spectrum of business value/cash flow/size. The relative size of business should be considered and adjusted accordingly.
- Property loss
- Income loss

The gravity portion of penalties may be reduced significantly or entirely, depending on the situation and in accordance with other NWCAA policies, for example:

- No emission impacts
- No interference with compliance determinations
- The issue has been corrected expeditiously and in cooperation with the agency

3.3 Penalty Constraints

Statutory Maximum: NWCAA Regulation 133.1 limits penalties to a statutory maximum *per day, per violation*. This amount includes economic benefit when applied to an enforcement action.

Statute of limitations: The statute of limitations for addressing violations is 2 years from the date of violation or the date the agency could have reasonably known about the violation (RCW 4.16.100). The agency may seek penalties for ongoing violations beyond 2 years.

Reasonableness: Practically, the agency must balance the deterrent effect of penalty amounts with “reasonableness” of the penalty amount triggering a violator to appeal an action. Case law shows that penalty reasonableness is evaluated by PCHB on three factors:

Nature of the violation,
Prior history of the violator, and
Remedial actions taken by the violator.

Litigation risk: Appeals are costly and settlement of penalty amounts may be appropriate.

Appendix A – Pertinent NWCAA Regulations

NWCAA SECTION 131 – Notice to Violators

131.1 At least 30 days prior to the commencement of any formal enforcement action under RCW 70.94.430 or 70.94.431, or NWCAA 132 or 133, the NWCAA shall cause written notice of violation to be served upon the alleged violator. The notice shall specify the provisions of chapter 70.94 RCW or the orders, rules, or regulations adopted pursuant thereto alleged to be violated, and the facts alleged to constitute a violation thereof, and may include an order pursuant to NWCAA 121 directing that necessary corrective action be taken within a reasonable time. In lieu of an order, the Control Officer may require that the alleged violator appear before the Board for a hearing pursuant to NWCAA 120. Every notice of violation shall offer to the alleged violator an opportunity to meet with the NWCAA prior to the commencement of enforcement action.

131.2 The NWCAA, upon issuance of notice of violation, may require the alleged violator to respond in writing or in person within thirty (30) days of the notice and specify the corrective action being taken. Failure to respond shall constitute a prima facie violation of this Regulation and the NWCAA may initiate action pursuant to Sections 132, 133, 134, 135 of this Regulation.

NWCAA Section 133- Civil Penalties

133.1 In addition to or as an alternate to any other penalty provided by law, any person who violates any of the provisions of chapter 70.94 RCW, or any of the rules in force pursuant thereto, including the Regulation of the NWCAA may incur a civil penalty in an amount not to exceed \$19,000 per day for each violation. Each such violation shall be a separate and distinct offense, and in the case of a continuing violation, each day's continuance shall be a separate and distinct violation.

Any person who fails to take action as specified by an order shall be liable for a civil penalty of not more than \$19,000 for each day of continued noncompliance.

133.2 The penalty is due and payable 30 days after a notice is served unless an appeal is filed with the Pollution Control Hearings Board (PCHB).

(A) Within 30 days after the Notice is served, the person incurring the penalty may apply in writing to the Control Officer for the remission or mitigation of the penalty. Upon receipt of the application the Control Officer shall remit or mitigate the penalty only upon a demonstration of extraordinary circumstance such as the presence of information or factors not considered in setting the original penalty.

(B) If such penalty is not paid to the NWCAA within 30 days after such payment is due, the Board or Control Officer may direct the attorney for the NWCAA to bring an action to recover the penalty in Superior Court.

(C) Any judgment will bear interest as provided by statute until satisfied.

133.3 Penalties incurred but not paid shall accrue interest, beginning on the 91st day following the date that the penalty becomes due and payable, at the highest rate allowed by RCW 19.52.020. If penalties are appealed, interest shall not begin to accrue until the 31st day following final resolution of the appeal.

The maximum penalty amounts established in this section may be increased annually to account for inflation as determined by the State Office of the Economic and Revenue Forecast Council.

133.4 In addition to other penalties, persons knowingly under-reporting emissions or other information used to set fees, or persons required to pay emission or permit fees who are more than 90 days late with such payments, may be subject to a penalty equal to three times the amount of the original fee owed.

133.5 The suspended portion of any civil penalty, issued under Section 133 of this Regulation, shall be due and payable in the event of future penalties against the same person within five years from the date of said suspension. After five years the suspended portion of the Penalty shall be considered void and of no force or effect.

NWCAA SECTION 135 – ASSURANCE OF DISCONTINUANCE

135.1 The NWCAA may accept an assurance of discontinuance of any act or practice deemed in violation of these Regulations from any person engaging in, or who has engaged in, such an act or practice. Any such assurance shall specify a time limit during which such discontinuance is to be accomplished. Failure to perform the terms of any such assurance shall constitute prima facie proof of a violation of these Regulations or an order issued which makes the practice unlawful for the purpose of securing an injunction or other relief from the Superior Court as provided in Section 134.