

## SUBSTANTIVE POLICY STATEMENT

This Substantive Policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties, you may petition the agency under Arizona Revised Statutes section 41-1033 for a review of the statement.

### 0015.000 CIVIL PENALTY POLICY

**Level One** Arizona Department of Environmental Quality

**Originator:** Mark R. Santana, Administrative Counsel  
Office of Administrative Counsel

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#### PURPOSE

The ADEQ Penalty Policy provides direction for calculating civil penalties utilizing factors similar to those found in A.R.S. §49-288.G, §49-463.C and §49-513.C. This policy is to be utilized for negotiated settlements only.

This policy will insure that divisions meet common goals without sacrificing individual program requirements. The fundamental considerations and factors of this policy shall be followed when calculating civil penalties.

Each program may modify the policy to meet its individual needs, but must develop a consistent written procedure for application of the adjustment factors. The procedures must be implemented within sixty days of adoption of the policy.

#### POLICY

##### 1. FUNDAMENTAL CONSIDERATIONS

- A. Once a civil penalty lawsuit has been filed there will be no settlement without payment of a significant penalty. What constitutes an appropriate penalty is to be determined on a case by case basis. The penalty must recapture any identifiable economic gain, and have a deterrent impact on the violator.
- B. Each program shall develop a list of violations for which a specific dollar penalty must be paid.
- C. Penalties should be calculated from one of the following occurrences and presumably the earliest in time:
  1. The date when the violator knew or should have known of the violation.
  2. The date of discovery of the violation by ADEQ.
  3. The date of issuance of a formal Notice of Violation.
- D. Civil cases referred to the Attorney General shall

include a calculated settlement penalty. However, the penalty amount claimed in the court complaint shall be the calculated statutory maximum penalty, if ADEQ requests a set amount.

- E. The factors outlined in this policy are to be utilized in calculating a penalty. The weight given to each factor is to be determined by the individual program. Not all factors may be applicable in each situation. There is no minimum amount for any given penalty, except that the penalty must recapture any economic gain. The statutory maximum civil penalty should be reasonably proportionate to the maximum civil penalty.

## 2. PENALTY POLICY ADJUSTMENT FACTORS

### A. Culpability Factors

- (1) Seriousness of violation: includes threat or actual harm to human health and/or the environment and/or ADEQ's regulatory program.
- (2) History of repeated violations: a history of repeated violations of the same rules or statutes or payment of previous penalties for the same violations or similar violations.
- (3) Record of noncompliance: a history of violation of other environmental laws and regulations, whether federal, Arizona or local.
- (4) Recalcitrance: refusal to comply with ADEQ requirements or directives. Deliberate attempts to delay the settlement process by unnecessarily extending negotiations.
- (5) Duration of violation: the violation has continued over a period of time, with the violator's knowledge and no or minimal attempts have been made to correct the violation.
- (6) Other evidence of bad faith: unique bad faith factors, such as past efforts to acquaint the violator with applicable requirements or acts of willful or gross negligence.

### B. Mitigating Factors

- (1) Good faith efforts: timely corrective action or other evidence of good faith that results in progress towards compliance.
- (2) Fault shared by other violator: if more than one responsible party is responsible for the violation,

the penalty may be apportioned based on ADEQ's knowledge of the facts and professional judgment.

- (3) Other mitigating factors: ADEQ shall consider other factors which require a reduction in penalty. For example, conflicting guidance from ADEQ or other regulatory agencies concerning the particular activity may be considered.

#### C. Deterrence Factors

- (1) Economic impact of the penalty: the penalty must be sufficiently harsh to deter the violator from repeated violations and recapture any identifiable economic gain.
- (2) Deterrence value to other potential violators: consideration should be given as to whether the penalty will deter other potential violators from similar acts.

### 3. SETTLEMENT CRITERIA

The following settlement criteria are not considered in calculating the initial settlement penalty amount but should be considered in determining a final settlement amount:

- A. Likelihood of success: in conjunction with advice from the AGO, ADEQ should assess its chances of prevailing in litigation and whether the penalties will be collectible if a judgment is obtained.
- B. Relevant judicial precedent: ADEQ, in conjunction with AGO should consider an available judicial precedent to determine whether the courts have imposed and the typical amount for assessing penalties.
- C. Ability to pay penalty: the penalty should not bankrupt the violator. Inability to pay may be considered. However, inability to pay must be established by clear and convincing evidence. Payment schedules are preferred over a reduction in penalties. Except for extraordinary circumstances, a penalty payment schedule shall not exceed three calendar years. Where a payment schedule is agreed upon, interest should be included. Interest should be at 10% per annum, unless the imposition of that rate would impose an extraordinary hardship upon the violator. If the 10% rate would impose such a hardship, a lesser amount may be negotiated.

### 4. SUPPLEMENTAL ENVIRONMENTAL PROJECTS (SEP)

- A. A supplemental environmental project (SEP) may be substituted for a portion of the calculated penalty or settlement amount. However, some penalty must be paid. Generally, the dollar value of the SEP should be the equivalent of twice the remaining unpaid balance of the calculated penalty or settlement amount. Other ratios can be imposed based upon the facts and the type of SEP imposed.
- B. Preference will be given to SEPs that address the original violation.
- C. The SEP must create a net environmental benefit beyond ordinary compliance.

#### 5. STIPULATED PENALTIES

Stipulated penalties may be utilized by the programs as they may determine to be appropriate.

#### RESPONSIBILITY

Responsibility for the policy lies with the division directors.

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