

# DAR-24

## Calculation of Penalties for Article 19 Violations at Stationary Sources

New York State Department of Environmental Conservation

### DEC Program Policy

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**Signature:**



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**Unit:** Bureau of Stationary Sources

- I. Summary:** This policy document, issued by the New York State Department of Environmental Conservation (DEC) Division of Air Resources, provides guidance to DEC staff when calculating recommended civil penalties for violations of New York State Environmental Conservation Law (ECL) Article 19 (air) violations at stationary sources for the purpose of administrative settlement.<sup>1</sup> This document is not intended to be used in cases involving potential criminal liability. Additionally, this policy will provide the regulated community with greater certainty regarding penalties for Article 19 (air) violations at stationary sources.
- II. Policy:** Appropriate enforcement of Article 19 (air) pollution control requirements is a critical component of DEC's mission to safeguard the state's air resources. It is essential that DEC staff take prompt and consistent action to deter noncompliance and address any violations that have been identified. This policy provides guidance to DEC staff when calculating recommended civil penalties for the purpose of reaching administrative settlement of air pollution control violations at stationary sources. Further, this policy is not intended to be used in matters subject to an administrative hearing or trial, or for matters involving potential criminal liability.
- III. Purpose and Background:** The calculation of reasonable and consistent civil penalties for violations of air pollution control requirements is an important part of the regulation of

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<sup>1</sup>This Policy applies to administrative settlements of DEC enforcement actions involving major violations of NYS ECL Article 19, the implementing regulations set forth in Part 200 et seq. and Part 494 of Title 6 of the New York Codes, Rules and Regulations, and the Clean Air Act, 42 U.S.C. 7401 et seq., as amended by Public Law 101-549, November 15, 1990, to the extent incorporated by reference into State law.

air emissions from stationary sources. Such penalties ensure that DEC is successful when pursuing civil enforcement action and that similar issues are treated fairly and consistently across the state.

While this document provides suggested penalty amounts specific to the air program, it is not the only guidance available on this topic. The procedures described herein are based on the guidance found in the Department's *DEE-1: Civil Penalty Policy (DEE-1)*, *OGC-11: Order on Consent Enforcement Policy (OGC-11)*, and *Commissioner's Policy-49: Climate Change and DEC Action (CP-49)*. Recommendations for High Priority Violations (HPV) are based on the EPA Policy *Timely and Appropriate Enforcement Response to High Priority Violations – 2014* (HPV policy). Department staff should consult the HPV policy to determine whether treatment of a specific violation as an HPV is appropriate. If so, the violation must be tracked as described in that document.

Violations where the potential for harm and any actual harm to public health, the environment, or the regulatory structure is minor should be addressed using the guidance provided in *DAR-23: Air Violation Penalty Policy for Short-Form Orders on Consent* instead of the procedures described in this document. In addition, this policy should not be used to address violations subject to an administrative hearing or trial.

As discussed in **DEE-1**, the calculations prepared pursuant to this document are in anticipation of litigation and are therefore exempt from disclosure under the Freedom of Information Law.

- IV. Responsibility:** The Division of Air Resources (DAR)<sup>2</sup> is responsible for implementing the procedures described in this policy. The Office of General Counsel (OGC) is responsible for advising Department staff regarding compliance with this and other DEC policies, including but not limited to the policies referenced in this policy.
- V. Procedure:** The first step in any penalty calculation is determining the statutory maximum penalty for the alleged violation(s). ECL § 71-2103 indicates that the civil penalty for a first violation of air pollution control requirements under Article 19 (i.e., a violation that has not previously occurred at this facility) shall be no less than \$500 and no more than \$18,000 per day and per violation. Further, for violations that continue beyond the first day, the penalty shall not exceed \$15,000 for each subsequent day that the violation continued. For second or subsequent violations, the penalty shall not exceed \$26,000 with an additional amount of \$22,500 for each subsequent day the violation continued. Accordingly, to calculate the statutory maximum penalty for a first violation, Department staff would multiply the number of alleged violations by \$18,000. If any of the alleged violations continued for more than one day, an additional amount of \$15,000 times the number of days the violations continued should be added to the initial calculated sum.

For example, if two alleged first violations have been identified, the statutory maximum penalty would be \$18,000 x 2, or \$36,000. If one of the alleged violations continued for a

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<sup>2</sup> Or, for certain regulations implemented pursuant to Article 19, the Office of Climate Change.

total of two days, the statutory maximum penalty would be increased by \$15,000 for a total of \$51,000.

Once the statutory maximum penalty has been determined, the next step in any penalty calculation is the calculation of the recommended penalty. There are several steps in this process as described below.

#### **A. The Gravity Component**

As discussed in **DEE-1**, the gravity component of the penalty reflects the seriousness of the violation with consideration for the potential harm and actual damage caused by the violation and the relative importance of the violation to the overall regulatory scheme. In addition to the factors discussed in **DEE-1**, EPA's HPV policy indicates that penalties for HPVs should be sufficient to achieve effective deterrence for the facility and the regulated community.

The tables provided below describe various types of violations that may be encountered by Department staff. Consideration for the factors described above has been applied to the suggested amounts. In cases where the violation(s) persist for more than one day, Department staff should consider increasing the gravity component of the penalty as appropriate.

Where applicable, the suggested amounts for HPVs have been increased to be consistent with the HPV policy and to account for the seriousness of violations identified as HPVs. Department staff should carefully evaluate the circumstances surrounding HPVs and consider assessing higher penalties, as allowed by statute, to provide deterrence for violations meeting the criteria described in the HPV policy. If a case involving one or more HPVs warrants a penalty that could exceed the statutory maximum penalty, Department staff may consider entering a joint enforcement action with the EPA as discussed in the 1984 *State/EPA Enforcement Agreement* between DEC and the EPA.

It is important to note that the monetary values illustrated below were developed for first-time violations. Repeat offenses or violations resulting in a high degree of harm or damage should be assessed a higher penalty that is proportional to the seriousness of the situation. In such cases, the justification for the adjustment should be documented as part of the penalty calculation.

With respect to emissions violations, a higher penalty amount is appropriate in situations that resulted in a greater percent violation of the applicable emission standard or that resulted in excess emissions of Hazardous Air Pollutants (HAP) or High Toxicity Air Contaminants (HTACs). These situations represent a higher degree of both actual and potential harm and should be penalized accordingly.

<b>Emissions Violations</b>			
<b>Percentage Above Standard</b>	<b>Recommended Penalty</b>		
	<b>Criteria Pollutants</b>	<b>HAPs and HTACs</b>	<b>High Priority Violations</b>
1-30%	\$1,500	\$2,000	\$4,500
31-60%	\$3,000	\$3,500	\$6,000
61-90%	\$4,500	\$5,000	\$7,500
91-120%	\$6,000	\$6,500	\$9,000
121-150%	\$7,500	\$8,000	\$10,500
151-180%	\$9,000	\$9,500	\$12,000
181-210%	\$10,500	\$11,000	\$13,500
211-240%	\$12,000	\$12,500	\$15,000
241-270%	\$13,500	\$14,000	\$16,500
271-300%	\$15,000	\$15,500	\$18,000

<b>Emission Control Equipment Violations</b>		
<b>Situation</b>	<b>Violation</b>	<b>High Priority Violation</b>
Failure to operate and/or maintain control equipment	\$5,000	\$15,000
Intermittent or improper operation or maintenance	\$3,500	\$12,000
Failure to install control equipment	\$7,500	\$18,000

<b>Performance Testing Violations</b>		
<b>Situation</b>	<b>Violation</b>	<b>High Priority Violation</b>
Failure to conduct performance testing	\$5,000	\$15,000
Late performance test	\$1,500	\$7,500
Exceedance of emission standard during performance testing	See Emissions Violations	

<b>Periodic Monitoring Violations</b>		
<b>Situation</b>	<b>Violation</b>	<b>High Priority Violation</b>
Failure to perform a work practice requirement	\$5,000	\$15,000
Failure to monitor as required	\$5,000	\$15,000
Exceedance of an emissions cap	N/A	\$18,000

Permitting Violations		
Situation	Violation	High Priority Violation
Begin construction without a permit	\$5,000	\$15,000
Begin operation without a permit	\$5,000	\$15,000
Failure to obtain a Title V permit	N/A	\$18,000
Failure to obtain a state facility permit	\$10,000	N/A
Failure to obtain an air facility registration	See <b>DAR-23</b>	N/A
Failure to address PSD/NSR	N/A	\$18,000

Recordkeeping and Reporting Violations		
Situation	Violation	High Priority Violation
Failure to report or notify as required	\$5,000	\$7,500
Late reports or notices	\$1,500	\$5,000
Incomplete reports or notices	\$3,000	\$5,000
Failure to keep required records	\$3,000	\$7,500
Incomplete records	\$3,000	\$5,000

The total gravity component of the recommended penalty is simply the sum of the individual amounts appropriate for each alleged violation plus any additional amount due based on the duration of the violation(s). For example, the gravity component for a facility that failed to operate its regenerative thermal oxidizer and that failed to notify the Department as required by its permit would be \$5,000 + \$5,000, or \$10,000. **It is important to note that this portion of the penalty cannot exceed the statutory maximum penalty calculated above.** If a case involving one or more HPVs warrants a penalty that could exceed the statutory maximum penalty, Department staff are encouraged to consider entering a joint enforcement action with the EPA.

### **B. Adjustments to the Gravity Component**

As discussed in **DEE-1**, the gravity component of the penalty may be adjusted in certain circumstances. Department staff should consider the criteria for increasing and decreasing the penalty described in **DEE-1** and apply them to the gravity component calculated in Section A above. The tables below provide suggested adjustment ranges for certain situations. However, higher amounts are possible where justified based on the specifics of the case. Finally, a reduction should not be considered where the respondent refuses to correct the alleged violations or otherwise acts in bad faith during the settlement process.

<b>Bases for Increasing a Penalty</b>	
Criteria	Adjustment Range
Degree of Willfulness or Negligence	0-20%
History of Noncompliance	0-20%
Other Factors as Justified <sup>3</sup>	0-20%

<b>Duration of Noncompliance</b>		
Time	Violation	High Priority Violation
0-6 Months	5%	10%
6-12 Months	10%	15%
1-3 Years	15%	20%
3-5 Years	20%	25%

<b>Mitigating Aspects of a Penalty</b>	
Criteria	Adjustment Range
Degree of Cooperation	0-30%
Ability to Pay <sup>4</sup>	0-100%
Litigation Risk <sup>5</sup>	0-100%

It is possible to apply both an increase and decrease to the gravity component of a penalty. In this situation, any decrease due to mitigating factors would be applied to the increased penalty amount. For example, the gravity component of a penalty for a facility is initially calculated as \$5,000. The inspector determines that the facility owner was aware of the issue and delayed taking corrective action. Therefore, the inspector believes a 10% increase is warranted due to the degree of negligence displayed by the facility owner, increasing the gravity component to \$5,500. However, the facility in question is a small business and the respondent has demonstrated that they have a reduced ability to pay. Accordingly, the inspector believes that a reduction of 40% is appropriate, reducing the gravity component from \$5,500 to \$3,300.

### **C. The Benefit Component**

<sup>3</sup> An explanation of these factors must be included with the penalty calculations when applying this adjustment. Other factors that may serve as justification for increasing a penalty may include, but are not limited to, the violation's relation to the social cost of carbon as discussed in CP-49 and ECL § 75-0113.

<sup>4</sup> The burden is on the respondent to make a showing of reduced ability to pay. Acceptable proof must be provided as discussed in DEE-1.

<sup>5</sup> An explanation of the potential litigation risk must be included with the penalty calculations when applying this adjustment.

The benefit component of the penalty captures any economic benefit the facility enjoyed due to noncompliance. It is intended to put violators in the same financial position as they would have been in had they complied as required. As described in **DEE-1**, economic benefit includes capital and operating costs which would otherwise have been expended if compliance occurred when required. It should also include other avoided costs such as annual permit and/or emissions fees.<sup>6</sup>

Calculating the economic benefit is an essential and often challenging component of determining the total recommended penalty. There are several resources available to Department staff to assist in this effort:

1. The EPA Air Pollution Control Cost Manual provides information on the sizing and cost of various types of air pollution control equipment;
2. EPA's BEN model for the calculation of economic benefit; and
3. Data collected from the facility showing costs associated with certain control equipment (e.g., Reasonably Available Control Technology (RACT)/Best Available Control Technology (BACT)/Lowest Achievable Emission Rate (LAER) documentation, permit applications, etc.).

It is important to note that the benefit component of a penalty is separate from the gravity component. Accordingly, it should not be increased or decreased even if such changes were applied to the gravity component. As described in **DEE-1**, every effort should be made to calculate and recover the economic benefit of non-compliance. **This means that the total recommended penalty should not be less than the benefit component.**

In some cases, it may not be possible to calculate the full economic benefit. It is important that this is documented within the penalty calculations, and further that an explanation for the difficulty is provided. Appropriate documentation is discussed in greater detail in Section E below.

Appendix A of this document contains additional information for calculating the economic benefit of certain violations.

#### **D. Total Recommended Penalty**

The total recommended penalty for a given case is the sum of the adjusted gravity and benefit components. **As discussed above, the total recommended penalty should not be less than the benefit component.**

#### **E. Documentation**

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<sup>6</sup> If applicable to a case, an Order on Consent must reserve the right to collect any regulatory fees owed pursuant to the Order on Consent Enforcement Policy (**OGC-11**). However, it must be noted that regulatory fees are required and collected separate and apart from any civil penalty imposed. If regulatory fees are owed, Department Staff conducting the enforcement action should coordinate with Management and Budget Services to ensure that the proper amount of regulatory fee is collected via a separate invoice. In addition, Department Staff should alert the Office of General Counsel if total regulatory fees, when combined with the total payable penalty, amounts to fifty-thousand dollars or more for tax form purposes.

Developing and maintaining appropriate documentation is a critical step in the penalty calculation process. While penalty calculations are prepared in anticipation of litigation and are therefore not subject to disclosure under the Freedom of Information Law, appropriate documentation helps to ensure penalties are applied fairly and consistently for similar issues. Further, the Department's penalty assessments are periodically audited for conformance with both state and federal policy and statute.

EPA has developed the 1993 memorandum titled *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements* (EPA policy) which discusses procedures for proper consideration and documentation of penalty calculations. In addition to basic documentation of the penalty sought, the EPA policy specifically requires that:

1. All penalty files must include an economic benefit and gravity calculation or **clearly** document why it is missing. Potential justifications for excluding the economic benefit component include:
  - a. The benefit component is a de minimis amount;
  - b. The violator sufficiently demonstrates an inability to pay<sup>7</sup>;
  - c. There is a compelling public concern (e.g. substantial risk of adverse precedent, settlement to avoid or end an imminent risk to human health of the environment, or the need to avoid damaging an important public interest in continuing operation of a plant or business where alternative penalties are unavailable);
  - d. There are litigation-related reasons for the settlement; and
  - e. It is not possible to calculate the benefit component.
2. All cases where the penalty has been reduced must document both the original penalty amount and the reduced penalty with a description of the reason for the reduction.

## VI. Conclusion

Prompt and consistent action to address noncompliance with air pollution control requirements is an essential component of the regulation of emissions from stationary sources. The procedures outlined in this policy document and the documents referenced throughout provide Department staff with the tools necessary to effectively address violations and ensure the fulfillment of DEC's mission to safeguard the state's air resources.

## VII. Related References

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<sup>7</sup> The burden is on the respondent to make a showing of reduced ability to pay. Acceptable proof must be provided as discussed in DEE-1.



DEE-1: Civil Penalty Policy

DAR-23: Article 19 Violation Penalty Policy for Short-Form Orders on Consent

Commissioner's Policy 49 "Climate Change and DEC Action" (CP-49) (issued 10/22/2010, last revised 12/14/2022)

Timely and Appropriate Enforcement Response to High Priority Violations – 2014

ECL §71-2103

EPA Air Pollution Control Cost Manual

EPA BEN Model

Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements – 1993

State/EPA Enforcement Agreement Between The New York State Department of Environmental Conservation and The United States Environmental Protection Agency Region II – 1984

## Appendix A – Economic Benefit Calculations

The following information can be used to calculate the economic benefit of failing to install air pollution control equipment or monitoring devices:

1. Cost of Unit Installed = Purchase Price x Capital Recovery Factor (CRF)

$$CRF = (I_i (1 + I_i)^n) / ((1 + I_i)^n - 1)$$

Where:  $I_i$  = The annual investment interest rate

= Equipment or replacement parts useful life in years

2. Financed Amount = Cost of Unit Installed – Down Payment (if any)
3. Interest Amount = Financed Amount x Loan Interest Rate
4. Operating Costs are the sum of:
  - a. Electricity\*
  - b. Natural gas or other fuel\*
  - c. Catalyst, carbon, or other consumable items
  - d. Maintenance
  - e. Indirect costs

\*Energy costs are only associated with the operation of the unit that the respondent failed to install

5. Pre-tax Cost of Controls = Cost of Unit Installed + Interest Amount + Total Operating Costs
  6. Tax Savings = Pre-tax Cost of Controls x 0.35
  7. Annual Economic Benefit = Pre-tax Cost of Controls – Tax Savings
  8. Total Economic Benefit = Annual Economic Benefit x Number of Years Violation
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