

City of Albuquerque
Environmental Health Department
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Fugitive Dust Control Civil Penalty Policy-Administrative Enforcement

- I. INTRODUCTION.** The New Mexico Air Quality Control Act, Chapter 74, Article 2 NMSA 1978 (NM Air Act), in combination with the parallel City of Albuquerque and Bernalillo County Joint Air Quality Control Board Ordinances and the Albuquerque/Bernalillo County Air Quality Control Board Regulations (the Regulations), authorize the City of Albuquerque Environmental Health Department (EHD) to be the local agency with authority to administer and enforce the air quality laws, permits and programs within Bernalillo County. The NM Air Act authorizes EHD to pursue administrative (74-2-12 NMSA), civil (74-2.12.1 NMSA) and criminal (74-2-14 NMSA) enforcement actions. The EHD Air Quality Division (AQD) may use any policy in the EPA Enforcement Compendium to calculate a civil penalty under this policy.
- II. EFFECTIVE DATE.** This policy is effective upon signature by the AQD manager
- III. OBJECTIVE.**
- A. The objective of this Policy is to deter non-compliance, which is achieved by:
1. a credible likelihood of AQD detecting non-compliance;
 2. a timely enforcement response;
 3. the likelihood and appropriateness of sanctions, including injunctions and civil penalties; and
 4. the perception of these factors in the regulated community;
- and**
- B. The Policy is intended to provide appropriateness of sanctions through:
1. the fair and consistent determination of civil penalties;
 2. civil penalties in proportion to the gravity of the violation;
 3. recovery of the economic benefit of violating the New Mexico Air Quality Control Act (AQCA) and the Regulations;
 4. a level playing field for economic competitors;
 5. a defensible basis for civil penalties in enforcement actions; and
 6. a basis for calculating civil penalties in administrative actions and proposing penalties in judicial tribunals.
- IV. DISCLAIMER.** This Policy establishes a four step process that may be used to determine the amount of a civil penalty. The Policy does not create any right, duty, obligation, or defense for any person. The AQD may revise, amend, supplement, or revoke all or part of this Policy without public notice or comment.

V. CALCULATION OF CIVIL PENALTIES.

A. **Overview.** This Policy establishes a four step process that may be used to determine the amount of a civil penalty that establishes the preliminary calculated penalty amount:

1. determine the gravity based component by applying the calculation method in V.C.1 of this policy;
2. determine the multiple day component by applying the calculation method in V.C.2 of this policy;
3. adjust the total of the gravity based component multiplied by the multiple day component to account for case-specific factors by applying the adjustment factor component calculation method in V.C.3 of this policy; and
4. add the economic benefit of non-compliance component by applying the calculation method in V.C.4 of this policy.

The total per day civil penalty shall not exceed the statutory maximum per violation per day (\$15,000) as authorized by AQCA Section 74-2-12.B NMSA. The statutory maximum may constitute the appropriate civil penalty for violations involving harm to human health or the environment (as “the environment” is defined in V.C.1.a.2) of this policy, willful violation, and other relevant factors as determined in the sole discretion of the AQD.

B. **Multiple Violations.** A person may have violated more than one requirement or have violated the same requirement more than one time. The AQD may assess a separate civil penalty for each violation.

1. A violation results from an independent act or failure to act or is distinguishable from another violation when the violation requires at least one element of proof not required to prove the other violation. The AQD may assess a separate civil penalty for each violation and total the individual penalties to determine the total civil penalty when:
 - a. the person violates a different requirement of the AQCA or the Regulations;
 - b. the person violates the same requirement of the AQCA or the Regulations on more than one occasion; or
 - c. the person violates the same or different requirement of the AQCA or the Regulations at different locations.
2. Notwithstanding the above discussion, the AQD may decide not to assess separate civil penalties for the following types of related violations:
 - a. violation of a regulation and violation of a permit condition if the violations imposes the same legal duty; or
 - b. violations of separate permit conditions that impose the same legal duty.

Notwithstanding the above discussion, the AQD may decide not to calculate a separate civil penalty when violation of one requirement results in violation of a second requirement. For example, a person commences operations without submitting and obtaining a fugitive dust permit and fails to pay the required fees. In this example, the AQD may assess a civil penalty for the failure to obtain a fugitive dust permit, but may decide not to assess a civil penalty for the failure to submit the fugitive dust fees.

C. Calculation Method

1. **Gravity Based Component.** The gravity-based penalty amount is the measure of the seriousness of a violation. The gravity-based penalty amount consists of two components; a) the potential for harm; and b) the importance to the regulatory scheme of AQCA or the Regulations.
 - a. **Potential for Harm.** The purpose of the AQCA and the Regulations is to prevent or abate air pollution that may with reasonable probability injure, 1.) human health; or 2.) animal or plant life or may unreasonably interfere with the public welfare, visibility, or the reasonable use of property (in this Policy, the words in V.C.1.a.2 shall be referred to in short as “the environment”). Some violations of the AQCA or the Regulations create the potential for harm to human health or the environment (e.g., the violation of emission limits or air quality standards). Other violations of the AQCA or the Regulations create the potential for harm to human health or the environment by jeopardizing the integrity of the regulatory program (e.g., monitoring, reporting, and recordkeeping). Some violations of the AQCA or the Regulations cause both potential harm to human health and the environment (e.g., failure to obtain a fugitive dust permit or implement reasonable achievable control measures).

The AQD evaluates the potential for harm by considering the following factors:

- 1.) **Harm to human health and the environment.** The potential for harm to human health or the environment may depend on the probability and seriousness of exposure to a pollutant by a human receptor, or a receptor in the environment, and may including consideration of the amount above standard, sensitivity of the environment (i.e. attainment or non-attainment area), or length of time of violation. Actual harm is not required. If an alleged violator, hereafter the “violator”, could have, but did not cause actual harm, it may not be appropriate to reward the violator with a lower civil penalty.
 - a) **Probability of Exposure.** The civil penalty reflects that the violation caused or could have caused the release of a pollutant. A violation caused or could have caused the release of a pollutant when the integrity of a procedure, process, or location is compromised. Evidence of an actual or potential release of a pollutant includes:
 - i. detection of a pollutant in environmental media; or
 - ii. inadequate provisions for the detection of a release of a pollutant (e.g., inadequate or improper maintenance of monitoring equipment, or incomplete or inaccurate records).
 - b) **Seriousness of Exposure.** The potential for harm to human health or the environment includes consideration of the seriousness of exposure to the pollutant. In determining the seriousness of exposure, the AQD may consider the following factors:
 - i. the emission rate and amount of the pollutant;
 - ii. the likelihood of transport by environmental media; and
 - iii. the proximity and sensitivity of human or environmental receptors, such as human populations, domestic animals, fish, wildlife, crops, vegetation, Class I visibility areas, and PSD increment or non-attainment areas.

b. **Harm to regulatory program.** Every requirement of the AQCA and the Regulations is fundamental to the integrity of the regulatory program. Violation of these requirements undermines the AQCA and the Regulations, and may make it more difficult for the AQD to determine whether the violator is complying with other applicable requirements.

1) **Classification of potential for harm**

a. **Minimal**

- i. the violation poses a relatively low potential for harm to human or environmental receptors; or
- ii. the violation does not undermine or minimally undermines the regulatory program.

b. **Significant**

- i. the violation poses a significant potential for harm to human or environmental receptors; or
- ii. the violation significantly undermines the regulatory program.

c. **Severe**

- i. the violation poses a substantial potential for harm to human or environmental receptors; or
- ii. the violation substantially undermines the regulatory program.

2) **Importance to Regulatory Scheme.** The importance to the regulatory scheme refers to the extent a violation deviates from or renders inoperative a requirement of the AQCA or the Regulations.

a. **Minor.** The violator violates by less than 50% an element of a requirement or an emission rate, standard, limitation, or permit condition.

b. **Moderate.** The violator violates by at least 50%, but less than 100%, an important element of a requirement or an emission rate, standard, limitation, or permit condition.

c. **Major.** The violator substantially violates the requirement, violates more than one element of a requirement, or violates the important element(s) of the requirement, or the emission rate, standard, limitation, or permit condition by 100% or greater (*e.g.*, exceed 10% of maximum emission rate).

**Table 1
Gravity Based Penalty Matrix
Potential for Harm versus Importance to Regulatory Scheme**

Potential for Harm	Importance to regulatory scheme		
	Major	Moderate	Minor
Severe	\$4,000	\$3,500	\$3,000
Significant	\$2,500	\$2,000	\$1,500
Minimal	\$1,000	\$750	\$500

2. **Multiple Day Component.** The multiple day penalty component accounts for the duration of a violation. The duration of the violation is the number of hours or days of a violation. The AQD may assess a civil penalty for the number of hours or days of violation, as supported by credible evidence. The AQD may determine that a person violated a requirement from the first provable hour or day of violation until the source demonstrates compliance through credible evidence. After establishing the number of hours or days of violation, the AQD may determine whether the multiple day penalty is mandatory, presumptive, or discretionary, and selects the appropriate multiplier from the multiple day penalty matrix in Table 3.

a. **Mandatory.** A multiple day penalty may be required for days 2-60 for a violation with the following gravity-based classifications:

- 1) Severe-Major
- 2) Severe-Moderate; and
- 3) Significant-Major

b. **Presumptive.** A multiple day penalty may be presumed to be appropriate for days 2-60 for a violation with the following gravity-based classifications:

- 1) Severe-Minor
- 2) Significant-Moderate; and
- 3) Minimal-Major

A source may overcome a presumption by submitting admissible evidence demonstrating that the violation did not continue during days 2-60. Based on such demonstration, the AQD may decide to reduce the presumption by one or more days.

c. **Discretionary.** A multiple day penalty is discretionary for all days for a violation with the following gravity-based classifications:

- 1) Significant-Minor
- 2) Minimal-Moderate
- 3) Minimal-Minor

A multiple day penalty is discretionary for days 61+ for any violation.

Table 3
Multiple Day Penalty Matrix

Potential for Harm	Importance of the regulatory scheme		
	Major	Moderate	Minor
Severe	\$900	\$800	\$700
Significant	\$600	\$500	\$400
Minimal	\$300	\$200	\$100

3. **Adjustment Factor Component.** The adjustment factor component allows the AQD to adjust the civil penalty to reflect violations of the same requirement committed by violators with different enforcement histories and approaches to compliance. **The AQD applies the adjustment factors to the preliminary calculated penalty amount.**

a. **Negligence/Willfulness.** Negligence/Willfulness refers to the appropriate level of blame that should be assigned to the violator for violation of the requirement(s). Negligence means an action that results from the failure to use the care a reasonable and prudent person would use in similar circumstances. The AQD may apply an upward adjustment for a violation that is negligent or willful. The AQD determines the upward adjustment by evaluating the following factors:

- 1) the violator's degree of control over the events constituting the violation;
- 2) the violator's ability to foresee the event that caused the violation;
- 3) the reasonable precautions that the violator could or should have undertaken to prevent or mitigate the event that caused the violation;
- 4) the violator's knowledge of, or obligation to obtain knowledge, regarding the requirement;
- 5) the violator's knowledge of, or obligation to obtain knowledge regarding the possibility of violating the requirement;
- 6) the violator's level of sophistication regarding regulatory compliance; and
- 7) the level of sophistication in the violator's industry regarding compliance with the requirement.

Prior notice regarding the same or similar requirement, including a prior notice of violation, is evidence of knowledge regarding the requirement. Prior notice to the violator's parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control may constitute prior notice to the violator.

A violator who disputes an upward adjustment of the penalty based on prior notice to its parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control bears the burden of demonstrating the absence or immateriality of the relationship. The violator's knowledge regarding the requirement may result in an upward adjustment, but the violator's lack of knowledge regarding the requirement does not excuse the violation because ignorance of the law is not a defense to liability. The AQD may refer any violation for criminal prosecution, especially if there is evidence of a willful violation or reckless disregard for human health or the environment. The adjustment factors associated with the level of negligence/willfulness is provided below.

<u>Negligence/Willfulness</u>	<u>Adjustment Factor</u>
Not negligent or Willful	0
Negligent	+0.2
Very Negligent	+0.4
Possibly Willful	+0.6

b. Degree of cooperation. Degree of cooperation refers to the violator's response to the violation once detected by AQD and brought to the violator's attention. The AQD may apply a downward adjustment for a violator's good faith effort to comply with the requirement or to mitigate or prevent harm from the violation. However, a downward adjustment is usually only allowed under three situations: 1) prompt reporting of non-compliance; 2) prompt correction of environmental problems; or 3) cooperation during the investigation, before a formal enforcement action begins. The AQD may apply an upward adjustment for a violator's delay or refusal to take such action. Delay or refusal may constitute bad faith when the violator knew or should have known about the violation or when the violation poses a threat to human health or the environment. For violations involving bad faith, the AQD may apply a larger upward adjustment to the preliminary penalty calculation. The adjustment factors associated with the degree of cooperation is provided below.

<u>Degree of cooperation</u>	<u>Adjustment Factor</u>
Excellent cooperation/Self reporting	-0.1 to -0.3
Some cooperation	0
Minimal cooperation	+ 0.4
No cooperation	+ 0.6

c. History of non-compliance. History of non-compliance refers to the violator's compliance with environmental laws during the preceding ten years. The AQD may apply an upward adjustment of the penalty for a history of non-compliance. The AQD may determine the upward adjustment by evaluating the following factors:

- 1) previous violation of the same or similar requirement or permit condition;
- 2) previous violation of requirement of the air quality program;
- 3) previous violation of requirement of another environmental regulatory program;
- 4) the number, frequency, and severity of the previous violation, and how recently a violation occurred; and
- 5) the violator's response to the previous violation(s), specifically regarding correcting a problem.

A prior violation may demonstrate that the violator was not deterred by a prior enforcement action. To avoid an upward adjustment in the penalty, the violator must demonstrate, through admissible evidence that the notice of violation was rescinded or the violation was beyond the control of the violator. A prior violation by the violator's parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control may constitute a history of non-compliance. A violator who disputes an upward adjustment based on history of non-compliance of its parent company, sister company, subsidiary, or other person or entity with ownership interest, responsibility, or control bears the burden of demonstrating the absence or immateriality of the relationship. The adjustment factors associated with a history of non-compliance are provided below.

<u>History of non-compliance</u>	<u>Adjustment Factor</u>
No history	0
History of non-compliance with other environmental regulations	+ 0.2
History of non-compliance with air quality regulations	+ 0.4
Substantial history of non-compliance	+ 0.6

4. **Economic Benefit of Non-Compliance Component.** The AQD penalty policy goal is to obtain a civil penalty that recovers the economic benefit of non-compliance. The economic benefit of non-compliance includes delayed and avoided costs. The AQD adds the economic benefit of non-compliance to the adjusted preliminary deterrent amount to determine the total civil penalty. The economic benefit of delayed and avoided costs may be calculated by the AQD on the penalty calculation worksheet. The AQD may use the EPA BEN Model, or other models and methods as appropriate.

a. **Delayed Cost.** A delayed cost is an expenditure which the violator has deferred as a result of violating a requirement. The economic benefit of a delayed cost is the interest on the dollar amount of the deferred expenditure for the length of time of the violation. For instance, a person who fails to implement any reasonably available control measures (RACM) for fugitive dust eventually will have to pay the cost of implementing. By delaying the cost, a person achieves an economic benefit equal to the interest on the deferred expenditure. To remove the economic benefit of non-compliance, AQD may add the delayed cost to the penalty.

Examples include: failure to implement an RACM; failure to change an RACM to reduce emissions; and failure to submit permit applications.

b. **Avoided Cost.** An avoided cost is an expenditure that the violator will never incur because the violator has committed a violation. If a person fails to implement a RACM, implements and then discontinues implementation, fails to properly implement or maintain a RACM, fails to establish or follow precautionary methods required by regulation or permit, or removes a RACM, and the failure results in process, operational, or maintenance savings, then that person will have avoided paying the cost of implementing and maintaining the RACM or other cost. To remove the economic benefit of non-compliance, AQD may add the avoided cost to the penalty.

Examples include: failure to employ a sufficient number of trained employees or failure to continue to use a RACM.

Exemption from Calculation of Economic Benefit. Some violations have no or minimal economic benefit to the violator. In the interest of simplifying and expediting enforcement, the AQD may decide not to calculate the economic benefit of non-compliance for such violations

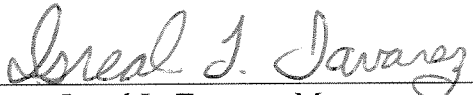
Unique Factors. The AQD may consider additional relevant factors not specifically addressed by the Policy.

VI. SETTLEMENT OF AN ENFORCEMENT ACTION. The Policy encourages settlement at any time during an enforcement action, if the settlement is consistent with the objectives and requirements of the Regulations, the AQCA and the CAA. The violator may request a settlement conference to provide information regarding liability for the violation or the amount of the civil penalty. The AQD may adjust the civil penalty on the basis of the information provided and confirmed. The settlement penalty may include recovery of the economic benefit of non-compliance and a significant portion of the preliminary calculated penalty. The violator and the regulated community should be able to conclude that the civil penalty places the violator in a worse position than a person who complies with the requirements. A civil penalty lower than the economic benefit of non-compliance may place an individual who complies with the requirement at a competitive disadvantage. A civil penalty lower than the preliminary calculated penalty may undermine the deterrent effect of the civil penalty. The settlement process shall not affect or delay the violator's obligation to comply fully and promptly with the requirement. If the settlement conference affects or delays full and prompt compliance with the requirement, the AQD may apply an upward adjustment to the civil penalty. The settlement process is described below:

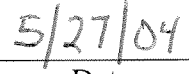
- A. Overview.** The AQD may establish a settlement penalty that is less than the civil penalty that otherwise would have been calculated under the Policy. The AQD establishes a settlement penalty by evaluating the following factors:
1. the maximum civil penalty likely to be awarded by the administrative or judicial tribunal;
 2. any information obtained by the AQD, including any new information provided by the violator; and
 3. the risk of litigation:
 - a. the legal basis for a violation;
 - b. the violator's legal and equitable defenses;
 - c. the availability, reliability, and admissibility of evidence of a violation;
 - d. the availability and credibility of witnesses;
 - e. the records and decisions in similar enforcement actions;
 - f. the possibility of precedent established by prosecution of the violation;
 - g. the enforcement message to the regulated community;
 - h. the effect on third parties of different resolutions of a violation;
 - i. unusual expense, delay, or personnel commitment to prosecute the violation (see discussion below); and
 - j. the public interest.
- B. Settlement Process.** The AQD may recalculate the civil penalty whenever it obtains new information that affects the basis for the civil penalty, including the following types of new information:
1. the violation is more or less serious than previously believed;
 2. additional violations or multiple days of violation have occurred;
 3. the violator's remedial measures are inadequate or ineffective;
 4. the violator's history of non-compliance is more extensive than previously believed;
 5. the violator is more sophisticated/knowledgeable about compliance requirements than previously believed; or
 6. the violation was willful.

VII. INSPECTION AND COPYING OF PUBLIC RECORDS. The Inspection of Public Records Act (IPRA), NMSA 1978 Section 14-2-1 *et seq.*, and the City of Albuquerque Inspection of Public Records policy govern the inspection and copying of public records related to civil penalties. Public records related to civil penalties include this Policy, Penalty Calculation Worksheets, and supporting documentation. The AQD allows inspection and copying of public records related to civil penalties as follows:

- A. After receiving a written request, the AQD will provide a copy of this Policy without charge;
- B. Except as exempted by the IPRA and the NM Air Act, when the AQD received a written request and receipt of the fee authorized by the IPRA, the AQD will arrange for inspection and copying of public records related to civil penalties;
- C. To determine whether public records related to civil penalties are exempted by the IPRA, the AQD will consult with the City of Albuquerque Legal Department; and
- D. As authorized by the IPRA and the NM Air Act, the AQD may withhold public records that;
 - 1. contain evidence received or compiled in connection with a criminal investigation or prosecution; or
 - 2. are confidential business records or methods or processes entitled to protection as trade secrets, as provided by 74-2-11 NMSA; and
 - 3. protected by the attorney-client, attorney-work product, or deliberative process privileges;



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Air Quality Division



Date