

CITY OF PHOENIX CIVIL PENALTY POLICY

INTRODUCTION

The purpose of the civil penalty policy is to (1) deter potential violators, (2) to provide fair and equitable treatment of the regulated community, (3) to facilitate swift resolution of environmental problems, (4) to deter future noncompliance by providing an incentive for users to remain in compliance, and (5) to remove the economic benefit a user gains over others by not complying. Any civil penalty associated with pretreatment violations must reflect the seriousness, frequency and persistence of each and every violation. The penalty amount should be such that it deters the violator from making future violations while sending a general message of deterrence to the regulated community. For purposes of arriving at a settlement with a violator, the City has devised a mathematical formula for computing a penalty amount for pollutant and reporting violations. It should be noted that **ANY COSTS ASSOCIATED WITH THE VIOLATION(S) (SUCH AS SAMPLING, ANALYSIS, INVESTIGATION, SURVEILLANCE) AND ANY HARM DONE TO THE ENVIRONMENT OR DAMAGE TO THE CITY IS NOT TAKEN INTO ACCOUNT IN ARRIVING AT A PENALTY. THESE COSTS CAN BE RECOVERED** under the authorities contained in various sections of the Phoenix City Code, including Chapter 28, and **MUST BE** recovered in addition to any civil penalty.

The City has developed a Civil Penalty Policy (CPP) that contains detailed procedures as to how the City of Phoenix Pollution Control Division will calculate civil penalties for instances of industrial user noncompliance. The CPP is intended for the use of City personnel and does not create any rights or obligations nor should it be used or relied upon by non-city personnel for any purpose. The City of Phoenix Pollution Control Division reserves the right to act at variance with the CPP and to change it at any time without public notice.

CRIMINAL PENALTY FINE AUTHORITY

Any violation of Chapter 28 of the Phoenix City Code is a Class 1 misdemeanor punishable by up to \$2,500 for each violation in addition to a maximum prison term of 6 months. This is authorized by Section 28-62 of the Phoenix City Code and Section 9-240 of the Arizona Revised Statutes.

CIVIL PENALTY AUTHORITY

Civil Penalties are authorized under Section 28-83 of the Phoenix City Code and Section 49-391 of the Arizona Revised Statutes. The maximum amount that can be imposed is \$25,000 per day for each violation. For continuing violations, each day may constitute a separate offense.

SEEKING CIVIL PENALTIES

Pretreatment violations are not created equally. This requires a review of all surrounding facts in order to determine the appropriate enforcement response. Civil and criminal penalties can be sought for a single pretreatment violation. You do not have to wait until a specific number of pretreatment violations is reached before seeking these penalties. A single violation may be such that the imposition of civil and or criminal penalties is necessary. Generally the City will seek civil penalties under the following circumstances:

- (1) two or more effluent violations have occurred within a ninety (90) day period.
- (2) Unpermitted discharges:
 - Failure to comply; continues after notice by the POTW
 - Discharge continues after expiration, termination or revocation of permit.
- (3) Reporting violation
 - Two or more reports are late within a 180 day period.
 - Any single report thirty days or more late.
 - Failure to correct report with missing or incomplete information.
 - Failure to report spill or changed discharge.
- (4) Recurring failure to monitor correctly.
- (5) Recurring improper sampling.
- (6) Recurring missed milestones in an enforceable compliance schedule.
- (7) Failure to start construction, complete construction, or achieve compliance within 90 days of the date specified in an enforceable order.
- (8) Recurring wastestreams diluted in lieu of treatment.
- (9) Failure to mitigate noncompliance or halt production, aware of noncompliance in progress.
- (10) Failure to comply with a requirement to cease discharge.
- (11) Recurring to properly operate and maintain pretreatment facility.
- (12) Recurring failure to provide free access.
- (13) Recurring inadequate record keeping.
- (14) Recurring failure to report additional monitoring.
- (15) Any other situation in which civil penalties are necessary or legal action is contemplated, or
- (16) Any instance of Significant (SNC).

CIVIL COMPLAINT TO OBTAIN CIVIL PENALTY

If the City and violator cannot arrive at a settlement for past pretreatment violations, then a lawsuit may be filed by the City Attorney in Maricopa County Superior Court. The amount of civil penalty is determined by the judge, after a consideration of the following statutory factors:

1. "The seriousness of the violation,
2. The economic benefit, if any, resulting from the violation,
3. Any history of such violation,
4. Any good faith efforts to comply with the applicable requirements,
5. The economic impact of the penalty on the violator, and
6. Such other factors as justice may require."

ARS §49-391C.

Determination of Civil Penalty

The determination of the Civil Penalty is accomplished by calculating the economic benefit a violator is expected to have realized by delaying installation or improper operation of pretreatment equipment and adding this amount to the gravity component determined by the Civil Penalty Formula discussed below. Economic Benefit is calculated by following the procedures of the EPA Manual Dated September 5, 1990 entitled Guidance Manual for POTWs to Calculate the Economic Benefit of Noncompliance.

GRAVITY COMPONENT OF CIVIL PENALTY FORMULA

Violations of Permit Conditions

The penalty for permit conditions is not easy to calculate because it is not as susceptible to exact mathematical precision as are discharge limits and reporting violations. Therefore, a general common sense approach focusing on the seriousness, frequency and persistence of the problem must be used to arrive at an amount somewhere between \$1.00 and \$25,000. The following penalty amounts should be considered minimum, and represent the normal penalty for this type of violation:

pH analysis	\$100
Cyanide	\$200
Metals analysis	\$300
TTO	\$600

Discharge Limit

The penalties for discharge limitation violations are computed from the formula shown below. **FOR SETTLEMENT PURPOSES:** The City uses a monetary multiplier of \$300 multiplied by the total factor to arrive at a penalty amount for daily average or instantaneous limit effluent violations. The monetary multiplier for monthly average effluent violations is \$50 multiplied by the total factor and the number of production days in the month.

FOR EACH VIOLATION, a separate calculation is performed. The formula represents a base amount* multiplied by a sum of factors:

DAILY LIMIT

$$\text{\$ Penalty} = \text{\$300} \times (1+A+B+C+D)$$

MONTHLY AVERAGE

$$\text{\$ Penalty} = \text{\$50} \times (1+A+B+C+D) \times 30$$

4-DAY AVERAGE

$$\text{\$ Penalty} = \text{\$300} \times (1+A+B+C+D) \times 4$$

* Base amount for Daily Limit violations of Copper and Lead is \$600, and \$100 for monthly average violations.

Magnitude Component

A. (i) Significance of Discharge Limit Violation

<u>% Exceedance of Daily or Slug Limit</u>	<u>% Exceedance of Average Limit</u>	<u>Factor</u>
1 - 50	1 - 20	1
51 - 100	21 - 40	2
101 - 200	41 - 100	3
201 - 600	101 - 300	4
601 - 1000	301 - 500	5
1001 - 2000	501 - 1000	6
2001 - 3000	1001 - 1500	7
3001 - 4000	1501 - 2000	8
4001 - 5000	2001 - 2500	9
> 5000	> 2500	10

(ii) Significance of pH Violation

<u>Low pH Range</u>	<u>High pH Range</u>	<u>Factor</u>
4.50 - 4.99	10.51 - 10.99	0
4.00 - 4.49	11.00 - 11.49	1
3.50 - 3.99	11.50 - 11.99	3
3.00 - 3.49	12.00 - 12.49	6
<3.0	12.50	10

B. Health and Environmental Harm or Potential Harm

<u>Discharge Volume (gpd)</u>	<u>Health Effects*</u>	<u>Aquatic or Sludge</u>
to 10,000	0.2	0.1
10,000 - 25,000	0.4	0.2
25,001 - 50,000	0.8	0.4
50,001 - 100,000	1.2	0.6
100,001 - 250,000	2.0	1.0
> 250,000	4 - 10	2 - 10

*Applies to pH, Cyanide, Sulfides, residual Chlorine, VOCs, or any other material posing a threat to workers in the system, or the public.

C. Number of Violations

This factor accounts for the number of violations occurring in a given month, or the frequency of the violations. For violations of both an average limit and daily limit(s), the same factor should be applied.

Determine the percentage of the number of measurements which were violations and multiply this percentage by 2.5. Repeat this calculation for the average limit and then add the two results to arrive at a factor.

Example:

Four (4) violations of the daily copper limit and one (1) violation of the monthly copper limit occur in March. There were eight (8) daily measurements made and one (1) computation (measurement) of the monthly average.

NOTE: This frequency computation is performed separately for self-monitoring and City monitoring. Do **NOT** combine either the number of violations or the number of measurements.

$$\begin{array}{rcl}
 4 \text{ daily violations} / 8 \text{ measurements} & = & 50\% \\
 1 \text{ average violation} / 1 \text{ measurement} & = & 100\%
 \end{array}$$

$$\begin{array}{rcl}
 2.5 \times 0.50 & = & 1.25 \\
 2.5 \times 1.00 & = & \underline{2.50}
 \end{array}$$

$$\text{The factor then} = 3.75$$

D. Duration of Non-Compliance

$$\text{Factor} = 0 - 5$$

This factor addresses the length of time the violator has been in noncompliance. Count the number of months in the penalty period (18 months) in which the parameter limit was violated one or more times and divide this count by the total number of months in the penalty period. This fraction is then multiplied by 5.0 and rounded to one decimal place to arrive at this "Duration Factor".

Example:

Violations from April through December are being addressed in a Show Cause Hearing for copper, lead and zinc. Copper violations occurred in April, October and November.

$$\begin{array}{l}
 \underline{3 \text{ months of violations}} \\
 9 \text{ month penalty period} \quad \times 5.0 = 1.7 \text{ factor}
 \end{array}$$

ALL REPORTING VIOLATIONS

One of the more common types of pretreatment violations is in the area of late reporting. This occurs when a reporting deadline passes and the report is filed late or not at all. These types of violations should not occur because compliance with reporting deadlines is generally within the absolute control of the Permittee. The amount of civil penalty for reporting violations can be derived from the following table.

Significance of Reporting Violations

A. Reports Not Showing Discharge Limit Violation

No. Of Days A Report Is Late	Amount
1 - 29	\$ 30.00 Day (1-29 days)
30 - 59	\$ 50.00 Day (1-59 days)
60 - 89	\$ 100.00 Day (1-89 days)
90 - 179	\$ 200.00 Day (1-179 days)
180 or more	\$ 400.00 Day (each day)

B. Report Showing Discharge Limit Violation

No. Of Days A Report Is Late	Amount
1 - 29	\$ 60.00 Day (1-29 days)
30 - 59	\$ 100.00 Day (1-59 days)
60 - 89	\$ 200.00 Day (1-89 days)
90 - 179	\$ 400.00 Day (1-179 days)
180 or more	\$ 800.00 Day (each day)

ADJUSTMENT FACTORS

After the economic benefit and gravity elements have been calculated, the next and final step is to apply certain adjustment factors that may increase or decrease the amount calculated thus far. These adjustment factors are:

- * The ability of the violator to pay may be considered in order to decrease the amount of the total penalty to be paid.
- * The history of recalcitrance of the violator may be considered to make an increase in the total penalty to be paid.
- * Litigation considerations may be used to make a decrease in the total penalty to be paid.

IN SUMMARY, THE PENALTY CALCULATION EQUALS THE SUM OF THE ECONOMIC BENEFIT AND THE GRAVITY COMPONENTS PLUS OR MINUS ANY ADJUSTMENTS.

REPEAT VIOLATORS

There may be instances when industries who have previously paid civil penalties for pretreatment violations and or were required to perform under a compliance schedule later commit new violations after payment of penalties or after completion of the compliance schedule. Repeat violators must be addressed and handled as described in this section. If all violations occur after six (6) consecutive months in which the industry was in full compliance with pretreatment requirements, then calculate the economic benefit and the civil penalty amounts using the Determination of Civil Penalty formula previously described above. However, if any pretreatment violation occurs prior to achieving six (6) consecutive months of compliance, then the base amount of the formula is **doubled** and the dollars per day amount for reporting violations is calculated by the formula shown below. Continue the calculation using the remaining elements of the formula. If, after the penalty amount has been calculated and the total is less than the maximum amount that could be imposed under the law, the recalcitrance adjustment factor shall be carefully analyzed to determine its applicability in this instance. In summary, for repeat violators, the penalty amount is determined as follows:

\$ Penalty = Economic Benefit + \$600(1+A+B+C+D) + reporting violations ± adjustment factors:

A. Reports Not Showing Discharge Limit Violation

No. Of Days A
Report Is Late Amount

1 - 29	\$ 60.00 Day (1-29 days)
30 - 59	\$ 100.00 Day (1-59 days)
60 - 89	\$ 200.00 Day (1-89 days)
90 - 179	\$ 400.00 Day (1-179 days)
180 or more	\$ 800.00 Day (each day)

B. Report Showing Discharge Limit Violation

No. Of Days A
Report Is Late Amount

1 - 29	\$ 120.00 Day (1-29 days)
30 - 59	\$ 200.00 Day (1-59 days)
60 - 89	\$ 400.00 Day (1-89 days)
90 - 179	\$ 800.00 Day (1-179 days)
180 or more	\$1600.00 Day (each day)