

Appendix IV-1

MPCA Penalty Guidelines

MPCA CIVIL PENALTY GUIDELINES FOR INDIVIDUAL CIVIL SETTLEMENT NEGOTIATIONS FOR VIOLATIONS OF MINNESOTA ENVIRONMENTAL LAWS

I. INTRODUCTION

The Minnesota Pollution Control Agency (MPCA) is committed to protecting the environment and citizens of the State of Minnesota. While the MPCA plays a variety of roles in reaching that objective, compliance determinations and subsequent enforcement remedies are integral to that effort. This document reflects the MPCA's guidelines for consideration of the appropriate factors when making penalty determinations relative to negotiated settlements.

One of the tasks of the MPCA staff is to resolve violations of State and Federal environmental laws. To accomplish this task, the MPCA will often negotiate an agreement with the Regulated Party. This agreement, most often a document called a Stipulation Agreement, stands in lieu of other remedies available to the MPCA, including the right to request the Attorney General to commence a lawsuit.

The authority to enforce environmental laws is based on a combination of authorities of the MPCA and the Attorney General. The MPCA has authority to enter into and enforce stipulation agreements. However, to the extent enforcement is dependent on utilizing the courts, the Attorney General assists in determining whether or not litigation will commence. This document does not attempt to separate these authorities but simply recognizes the required mutual involvement of the MPCA staff and attorneys assigned to the Attorney General's Environmental Protection Division (EPD).

The fundamental enforcement objective is to ensure that Regulated Parties achieve and maintain compliance with applicable environmental laws. To achieve this objective, penalties must be sufficient to deter future noncompliance. The basic intent is to settle matters upon reasonable terms that are consistent with legislative mandates and public responsibilities, and MPCA goals and objectives.

The Minnesota Legislature has declared that a civil penalty may be assessed for violations of the pollution control laws under Minn. Stat. § 115.071, subd. 3. This penalty may be up to \$25,000 per day per violation for violations involving hazardous waste. For other violations the statute allows for a civil penalty of up to \$10,000 per day per violation.

In any administrative enforcement action, an appropriate civil penalty will be determined for the violations involved. The civil penalty may include a gravity-based component, recovery of economic benefit and adjustments as warranted.

The penalty can also include natural resource damages or costs incurred by the MPCA for enforcement or cleanup. This document is also intended to provide information on how a

reasonable and defensible penalty is established for settling an enforcement action prior to the initiation of litigation. However, it is understood that a final civil penalty figure settling an enforcement action is one reached by negotiation and mutual agreement between the Regulated Party and the State of Minnesota, by the MPCA and the Attorney General.

These guidelines are based on the MPCA's experience in negotiating and settling past enforcement actions. These guidelines are also informed by penalty policy guidance from the United States Environmental Protection Agency (EPA).

II. ENFORCEMENT OBJECTIVES

The following seven enforcement objectives guide the development of a civil penalty to resolve violations:

- A. Penalties should be based on the gravity of the violation. The degree of that gravity should be based upon the severity of the violation, as well as impacts and potential impacts to human health and the environment.
- B. Penalties should be large enough to deter noncompliance.
- C. The gravity portion of the penalty should be distinct from, and in addition to, any economic benefit of noncompliance.
- D. Penalties should recover any economic benefit or excess profits resulting from noncompliance. The MPCA should make all attempts to consider competitive advantages that might result from noncompliance.
- E. Penalties should be consistent with penalties proposed for such violations by similarly situated Regulated Parties, to the extent possible, in order to provide equitable treatment to the regulated community.
- F. Penalties should be reviewed from time to time to recognize changing regulatory factors and to ensure that the environment is fully protected.
- G. Penalties should reflect any previous enforcement history with the Regulated Party, and any indication that violations were willful or especially culpable, such as may be indicated by the Regulated Party's failure to correct violations after becoming aware of them.

III. PENALTY CALCULATION METHODOLOGY

The civil penalty proposed to settle an enforcement action will consider the following three elements:

- A. Gravity-Based Component
- B. The Economic Benefit
- C. Appropriate Adjustments

Generally, the proposed civil penalty for settlement should be the sum of the gravity-based figure adjusted in accordance with the applicable adjustments discussed in Section C, below, and the recovery of economic benefits.

- A. Gravity-Based Component.** The gravity-based component is a dollar figure that is intended to reflect the seriousness of the violation. The more serious the violation the higher the

figure. Recovery of only the economic benefits associated with the violation would result in placing the Regulated Party in the same position as it would have been if noncompliance had not occurred. The purpose of the gravity-based component is to ensure that the Regulated Party pays a penalty and thus bears consequences for noncompliance with the law.

The following factors are used to assess a gravity-based amount:

1. Severity:
 - a. Extent of deviation from the regulatory or statutory requirement.
 - b. Duration of noncompliance.
 - c. Number of violations.
2. Impact or potential impact:
 - a. Harm or potential harm to public health.
 - b. Harm or potential harm to the environment.
 - c. Extent of irreparable harm caused by the violation(s).

The more significant the violation, the greater the actual harm or potential for harm, the larger the number of violations, the longer the duration of noncompliance, and the failure to correct violations, the higher the gravity-based component will be.

There are some regulatory or statutory requirements which, if violated, may not appear to give rise as directly or immediately to a significant potential of harm to public health or the environment. Noncompliance with these requirements, however, can impact the effectiveness or integrity of the regulatory program through which MPCA protects the environment and, in so doing, merits substantial penalties.

In addition to the authority to negotiate stipulated settlements, the MPCA has the authority to issue Administrative Penalty Orders (APOs). Pursuant to Minn. Stat. § 116.072, the MPCA has the authority to impose an administrative penalty of up to \$10,000. To implement this authority, the MPCA has adopted an enforcement response plan for calculating administrative penalties that it imposes through an APO. The enforcement response plan includes a “penalty matrix” that assists staff in deciding an appropriate penalty up to \$10,000.

The MPCA uses the administrative penalty authority to determine penalties in cases that warrant an administrative penalty, i.e., a penalty (equal to or) less than \$10,000. Where the violations are extensive or serious, or when corrective actions likely cannot be completed within the statutory limit prescribed for APOs, or in other circumstances where the MPCA determines that the APO is unsuitable to the circumstances in the enforcement case, it is not appropriate for the MPCA to limit its settlements to the amount that it might have collected had the matter been considered for an administrative penalty.

Instead, the MPCA will use the considerations identified in this memorandum to establish a reasonable penalty proposal. The legislative “factors” set out in Minn. Stat. § 116.072 can, however, be considered in determining an appropriate penalty amount.

B. The Economic Benefit Component. Subject to limited exceptions, where a Regulated Party has derived economic benefit from failure to comply with applicable laws and rules, the

economic benefit should be considered in all cases and calculated and added to the base penalty in an enforcement case, because:

1. A significant reason for noncompliance is avoidance of the cost of compliance (i.e. the economic benefit to be derived from noncompliance);
2. The Regulated Party may have violated the laws, rules or permit limitations because of economic gain, such as where permit limits are exceeded in connection with increased production;
3. It is inequitable to those who incur the costs of compliance if the MPCA does not recover economic benefit from those who choose not to incur the costs of compliance; and
4. Both the EPA penalty policies and the MPCA penalty calculation guidance state the importance of recovering economic benefit gained by noncompliance.

If the MPCA has only limited information about the actual costs that would have been incurred if the Regulated Party would have complied with applicable requirements, it may be difficult to accurately ascertain economic benefit. In addition, researching the matter and making the calculations can absorb significant staff time. For that reason, it is acceptable for the MPCA to rely on typical or generic cost items for employee labor and other common costs as a basis for economic benefit calculations.

In some cases, economic benefit is actually nonexistent, because a cost is only delayed, not avoided. Examples of “erased” economic benefit would include a permit fee that is eventually paid (with interest) when the Regulated Party is required to apply for the permit, or when the costs of correcting the violation exceed the cost of initial compliance. In these cases, the MPCA will not generally include economic benefit from the noncompliance in the penalty proposal. If interest is *not* paid, or the amount paid to correct a violation does *not* exceed the cost of initial compliance, the Regulated Party has enjoyed an economic benefit in the form of “avoided cost of capital” and the MPCA will generally try to recapture this benefit with its penalty. Economic Benefit should be determined for the entire period of noncompliance.

C. Adjustments. The gravity-based component may be adjusted either up or down based on a number of factors. These factors are called “Adjustment Factors” and include at least the following:

1. **History of Noncompliance.** A history of noncompliance should be considered and may be relied on by the MPCA staff to increase a penalty. Such historical factors may include past violations and similarity to past violations. MPCA may consider violations from other media and other government entities, including other state agencies, federal agencies and local units of government.
2. **Willfulness or Culpability.** Although Minnesota law imposes strict liability for pollution violations, the intent or carelessness of the Regulated Party may be considered to justify an upward adjustment to the amount of a penalty. A knowing or willful violation, for example, may result in the penalty being adjusted upward. An indication that a violation was willful or culpable is a failure to correct a violation of which the Regulated Party is aware or an unjustified delay in correcting a violation or a failure to provide timely and full information as may be requested or required. The

way in which the Regulated Party responded when it learned of the violation is a consideration. Cooperation throughout the process is expected of the Regulated Party and should not be cause, alone, to reduce a penalty.

3. **Deterrence.** Consideration may be given to ensuring that the civil penalty is sufficient to deter future noncompliance. To be an effective deterrent, the size or resources of a Regulated Party may need to be taken into account. An adjustment may be warranted if it reduces the disparity of impact from civil penalties.
4. **Inability to Pay.** The financial status of the Regulated Party may be considered in calculating or collecting a penalty. The MPCA will generally agree to extend the payments over a limited period of time, with interest being added if the schedule is extended more than 6 months. In rare cases, an established inability to pay may warrant reduction of a penalty. The burden is on the Regulated Party to establish that a particular penalty cannot be paid by the Regulated Party, or that an extended schedule is required, and this claim must be confirmed by the MPCA based on economic data submitted by the Regulated Party. This factor will not, however, excuse a Regulated Party from complying with the law.
5. **Penalties in Other Enforcement Actions.** Consideration will also be given to how a civil penalty compares with other civil penalties that persons have paid to the State for similar violations because the MPCA strives to ensure that its enforcement penalties are fair and consistent between similar violators. Still, since each situation is unique, a civil penalty should not be reduced simply because other penalties have been lower. The MPCA may need to increase penalties over time to reflect changed conditions, new information, or changed program priorities. Penalties imposed in enforcement actions by other regulatory bodies such as the EPA may be considered.
6. **Litigation.** Litigation is expensive and time-consuming. The likelihood of success on the merits in court and the amount of time and expense involved in litigating the case may be considered in adjusting a proposed civil penalty.
7. **Statutory Maximum.** As noted above, in any case settled by the MPCA involving payment of a civil penalty, the basis of the settlement is the penalty authorized by Minn. Stat. § 115.071. For this reason, the MPCA may consider the amount that could be imposed by a court when determining an appropriate penalty, as the MPCA will not seek a penalty in a settlement that exceeds the amount that could be assessed by the court under Minn. Stat. § 115.071.
8. **Other Factors.** In any case there may be unique factors that lead to a conclusion that a civil penalty should be adjusted up or down. The MPCA reserves the right to rely on other factors to adjust a penalty. In each case these factors will be identified and the appropriate adjustment made.

The MPCA has increasingly applied a multimedia approach in carrying out compliance review strategies. When taking a multimedia enforcement approach in

calculating a penalty the MPCA should be cognizant of the environmental impact over more than one media.

Consideration of these Adjustment Factors may result in a penalty being increased, decreased, or not changed at all. Adjustment of a penalty may take place before submitting a proposed penalty to a Regulated Party, or after negotiations have commenced.

Adjustments to a civil penalty may be appropriate, but the amount of any adjustment will be determined on a case-by-case basis.

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

In furtherance of MPCA's mission to work with Minnesotans to protect, conserve and enhance our environment, the MPCA encourages the inclusion of Supplemental Environmental Projects (SEPs) in its settlements. SEPs are environmentally beneficial projects which a Regulated Party agrees to undertake in settlement of an enforcement action, but which the Regulated Party is not otherwise legally required to perform. In general, a Regulated Party may undertake a SEP to offset a portion of the civil penalty associated with an enforcement action, but not the entire civil penalty.

The following guidance is provided to assist in determining whether a particular SEP is acceptable:

- SEPs must be thoroughly reviewed to determine their appropriateness, legality, and the costs to the MPCA to provide oversight of implementation. SEPs are not appropriate in every enforcement action.
- The SEP must be above and beyond compliance obligations set out in applicable law, rule, or permit condition. The SEP cannot be a substitute for full compliance.
- The SEP must be beneficial in protecting or enhancing the environment within the State of Minnesota. It is preferable for there to be a "nexus" or relationship between the nature of the violation or resource impacted and the environmental benefits to be provided by the SEP.
- SEPs must be funded by the Regulated Party and usually will not mitigate the entire penalty. Dollar for dollar credit against the penalty is inappropriate except in unusual circumstances and within the discretion of the MPCA.
- Provision should be made in the settlement agreement for measurement and oversight to ensure that the SEP is being properly carried out by the Regulated Party. The need for MPCA oversight must be minimized but there must be a means to assure the MPCA that there is compliance.
- Categories for consideration as SEPs may include: pollution prevention, pollution reduction, environmental restoration, and public awareness.
- If a SEP is not satisfactorily completed within the timelines specified in the stipulation agreement, or if the Regulated Party fails to implement the terms of the SEP for the entire life of the agreement, the cost of the SEP should be paid to the MPCA as a civil penalty. In determining the civil penalty amount for SEP abandonment, the MPCA may take into account the Regulated Party's good faith efforts to complete the SEP and any environmental benefit received from the partially completed SEP.
- A list of potential projects is maintained by the MPCA.

V. ADDITIONAL COSTS

- A. Settlement of violations of environmental laws may include additional costs to be recovered by the State. These costs are separate from, and in addition to, the civil penalty, and include the following:
1. The reasonable cost of cleanup after an unauthorized discharge of pollutants, and other expenses incurred by the State. Minn. Stat. § 115.071, subd. 3(a).
 2. In cases where the noncompliance resulted in an actual impact to the environment, the MPCA may require a Regulated Party to pay a sum to compensate the State for damages to State resources arising from the violations as part of the settlement. Minn. Stat. § 115.071, subd. 3(b) provides that a district court may require a defendant to “forfeit and pay to the state an additional sum to constitute just compensation for any loss or destruction to wildlife, fish or other aquatic life and for other actual damages to the state caused by an unauthorized discharge of pollutants.” Minn. Stat. § 115B.04, subd. 1 provides that “any person who is responsible for a release . . . of a hazardous substance from a facility is strictly liable, jointly and severally, for . . . (3) all damages for any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss.” In addition, certain federal statutes including the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601, 9607) (Federal Superfund), and the Federal Water Pollution Control Act/Oil Pollution Act (33 U.S.C. 1251, 1321) provide for the recovery of natural resource damages from liable persons.

The MPCA and the DNR have been designated as joint trustees for natural resources for purpose of recovering damages under these authorities. Thus, prior to settling any case involving natural resource damages, the MPCA may consult with the DNR to determine whether it has any interest in participating in the settlement process. There are formal and informal procedures for assessing natural resource damages. The MPCA reserves the right to use a formal or informal assessment process to determine the value of the resources affected by the violations.

If the MPCA settles a case where actual environmental harm has occurred but the MPCA has not required a Regulated Party to pay a separate sum as damages for natural resource losses, the settlement document must reserve the right for the natural resource trustees to assess and seek compensation for the damages at a later time, in addition to all other sums paid pursuant to the settlement agreement.

- B. Settlements that occur after litigation has commenced may include the reasonable value of all or part of litigation expenses incurred by the State, if violations are willful. Minn. Stat. § 115.072. These costs will be separate from, and in addition to, the civil penalty.

VI. FINAL CIVIL PENALTY

The final civil penalty proposed for settlement will be the sum of the gravity-based component after application of adjustment factors, the economic benefit, and additional costs, if any. The final civil penalty cannot exceed the statutory maximum for the violations involved.

VII. PUBLIC DISCLOSURE

- A. **Minnesota Data Practices Act.** In accordance with the Minnesota Data Practices Act, Minn. Stat. ch. 13, this document is public and available to any person upon request.
- B. **Specific Penalties.** Upon request, an explanation will be provided to a Regulated Party during negotiations regarding how a proposed settlement penalty was determined.

VIII. CRIMINAL PROSECUTIONS

Some violations of environmental laws are criminal offenses. These violations may be felonies or gross misdemeanors (Minn. Stat. § 609.671), or misdemeanors (Minn. Stat. § 115.071, subd. 2). Nothing in this document is intended to preclude the appropriate governmental entity, such as the county attorney, from commencing a criminal prosecution for violation of environmental laws. Any settlement of civil enforcement actions will be made without any prejudice to a possible criminal prosecution.

IX. APPLICABILITY

The process set out in this document is intended solely for describing how civil penalties are established when negotiating proposed settlements of enforcement actions prior to litigation. These guidelines are not intended, and cannot be relied upon, to create any rights, substantive or procedural, that can be enforced in litigation or any administrative proceeding with the State of Minnesota. The MPCA staff and the EPD attorneys reserve the right to act at variance with the process outlined in this document, and to change the process at any time or to commence litigation without prior initiation of settlement discussions based upon applicable law and relevant facts of a specific case. In particular, there may be circumstances such as an imminent and substantial danger to the public health and welfare or to the environment that require immediate, injunctive action.

Moreover, this document is not binding upon the MPCA in passing upon any settlement proposed in an enforcement action. The MPCA Commissioner reserves his or her full rights as final decision maker for the MPCA, to reject or modify any proposed settlement recommended. This document does not alter established procedures or manner of presentation of proposed settlements to the Commissioner by MPCA staff and EPD attorneys.

Nothing in this document should be construed to restrict any action that may be taken by the MPCA or the Attorney General, on behalf of the State of Minnesota, in any litigation that is commenced for violations of environmental laws. If no settlement is reached, the MPCA and the Attorney General maintain their full rights under the law to seek appropriate civil penalties or other available remedies in a court of law having competent jurisdiction. The penalty

determination process outlined in this document is applicable only to settlement prior to litigation.

Members of the MPCA staff and the EPD attorneys involved with any enforcement action should coordinate and consult with each other to develop a reasonable settlement position for that action based on the law and facts, and the considerations described in this document. This document is intended to only describe the internal process utilized to develop stipulated settlements voluntarily agreed to by regulated parties.