

AIR QUALITY DIVISION PENALTY GUIDANCE

This guidance is to be used by enforcement personnel in the Air Quality Division (AQD) to assist in determining if an administrative penalty is justified for an air quality violation and in determining the amount of the proposed penalty. The framework should help assure consistent responses by the AQD to similar violations. Escalating enforcement for continued noncompliance is essential to an effective program.

The DEQ's Standard Operating Procedure for Enforcement (SOP) dated January 2013 sets forth the goals guiding DEQ enforcement efforts. AQD enforcement actions are governed by the requirements of the SOP, together with the provisions of this guidance. This guidance also meets the SOP requirement that: "Each Division is responsible for creating an internal guidance document ... for each of its regulatory programs to help provide reasonable objectivity in determining penalty amounts." (SOP at Section II.F.4.).

The procedures set out in this document are intended solely for the guidance of Air Quality personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in any litigation with the State of Oklahoma. The DEQ reserves the right to act at variance with this guidance and to change it at any time without public notice.

PROCEDURE:

I. Determining significance

The SOP requires that the significance of violations be determined in accordance with the general criteria set forth in Section II.A, as Level 1 and Non-Level 1 violations. According to the SOP, Non-Level 1 violations may be classified into separate categories. AQD has classified Non-Level 1 violations into Level 2 and Level 3 violations. In addition, AQD makes every reasonable effort to meet the standards established by EPA for prioritizing which violations receive the highest scrutiny and oversight. EPA's standards are set forth in *The Timely and Appropriate Enforcement Response to High Priority Violations - Revised 2014*. High Priority Violations (HPVs) are usually considered Level 1 violations. However, if the pollutant in violation is minor or synthetic minor less than 80% of major source levels (SM<80), then it will typically be designated as a Level 2 violation, even if it triggers an HPV. AQD has also designated some Level 1 violations that are based on state criteria. Level 1 violations are summarized in Appendix A.

AQD will not normally seek penalties for Level 2 and Level 3 violations provided the source takes immediate corrective action. However, Level II violations may be escalated to Level 1 in the event of protracted failure to comply or if their cumulative effect meets the general criteria described for Level 1 violations.

II. Proposed penalty calculation.

Once a decision has been made that an administrative penalty is appropriate, the assigned Environmental Programs Specialist will calculate the “proposed penalty.” The proposed penalty is the amount to be inserted in an Administrative Compliance Order (ACO) if necessary. It consists of two primary components: the “*economic benefit*” gained through non-compliance and the “*gravity-based penalty*.”

A. Economic benefit component

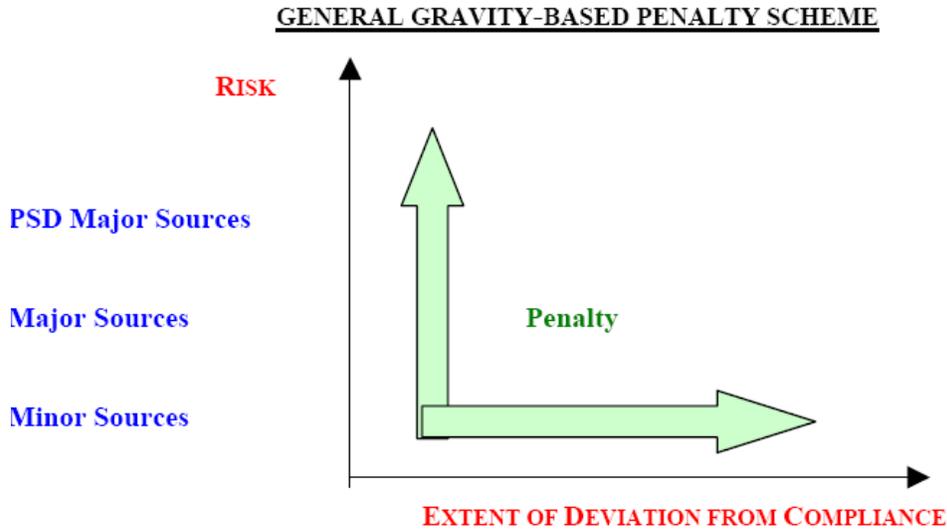
Economic benefit represents the financial gains that a violator accrues by delaying and/or avoiding compliance with applicable requirements. Recovery of the economic benefit from violators protects sources that choose to operate in compliance with air quality regulations; therefore the BEN amount is typically not subject to reduction for good faith, fast track, etc.

When there appears to be an economic benefit associated with a violation, AQD uses the latest version of EPA’s BEN computer model to determine the amount of economic benefit. The model can be downloaded from the EPA's web site at the following address: <http://www.epa.gov/enforcement/econmodels.html>. The use of the model by enforcement staff assures consistency and fairness regarding economic benefit calculations.

Note: AQD has implemented a policy wherein the BEN portion of the penalty is not included in the total penalty unless the BEN itself equals or exceeds \$5,000.

B. Gravity-based penalty

The gravity-based penalty is that amount which is deemed appropriate based solely on the seriousness of the violation. The seriousness of the violation involves two components: 1) the extent of deviation from compliance with statutory and regulatory requirements, and 2) the relative risk to human health and the environment caused by the violation(s). Whenever possible, this guidance considers both components when determining gravity-based penalty amounts. In general, the risk to human health and the environment increases with the size of the emission source and the length of time a source fails to comply with applicable requirements. Penalties increase with the size of the emission unit, the extent of deviation from compliance, and the length of time out of compliance. The following matrix is used to calculate the gravity-based penalty.



A gravity-based penalty calculation guide for all Level 1 violations is set forth at Appendix B. When applicable, adjustments to the gravity-based penalty should be made before finalizing the penalty. Adjustment factors are compliance history and good faith efforts to comply.

C. Compliance history. This factor may only be used to increase the amount of the penalty. Evidence that the owner/operator has violated an air quality requirement in the past clearly indicates that the party was not deterred by a previous enforcement response. If two Notices of Violation (NOV) or Alternate Enforcement Letters (AEL) were issued within the previous twenty-four (24) months for a similar violation, the gravity-based penalty may be increased by up to 20 percent. The gravity-based penalty may be increased by up to 35 percent if three or more similar violations have occurred within the last five years. Similar violations may include the following:

- (i) Violation of the same permit
- (ii) Violation of the same emission standard
- (iii) Violation of the same statutory or regulatory provision
- (iv) A similar act or omission.

If the violator has previously been fined for a similar violation, the final figure may be adjusted upward by an order of magnitude (not to exceed the statutory maximum). 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 noncompliance. It is up to the owner/operator to demonstrate to AQD that these types of previous violations are not valid or material.

D. Good faith efforts to comply. As stated in the SOP, the gravity-based portion of the penalty may be adjusted downward by up to 25 percent based on the violator's response to the violation once detected or brought to its attention. The amount of the reduction will be based upon the respondent's efforts to bring the facility into complete compliance with all applicable rules and regulations. Both the timeliness and the quality of the response

will be considered. Maximum reductions apply to situations in which the respondent takes action before an NOV or AEL is issued. Moderate reductions are warranted when the facility expeditiously takes steps to correct the violation upon receipt of the NOV or AEL, or in the case of self-disclosures that do not meet all criteria for full penalty mitigation.

The maximum penalty allowed by the Oklahoma Clean Air Act is \$10,000 per day per violation. If the sum of the economic benefit and the gravity-based penalty exceeds the statutory maximum, the proposed penalty must be adjusted downward.

APPENDIX A - LEVEL 1 VIOLATIONS

A) High Priority Violations: These criteria have been revised based on EPA's "Timely and Appropriate Enforcement Response to High Priority Violations – Revised 2014." Under the revised policy the violation is an HPV if it occurs at a *facility* that is a (1) Title V Major Source, or (2), a non-Title V major source that is part of DEQ's Compliance Monitoring Strategy (CMS) plan (i.e. SM 80). Where this policy differs significantly from the previous version is that rather than analyzing just pollutants for which the facility is major or SM 80, we are required to look at the following criteria for *all* pollutants at these sources.

HPV Criterion 1 – Failure to obtain a New Source Review (NSR) permit (for either attainment, under Prevention of Significant Deterioration (PSD) or non-attainment areas) and/or install Best Available Control Technology (BACT) or Lowest Achievable Emission Reductions (LAER) (and/or obtain offsets) for any new major source or major modification. This criteria includes a violation by a PSD/NSR synthetic minor source of an emission limit or permit condition such that the source's actual annual emissions exceed (or are expected to exceed) the major source thresholds as defined in the applicable NSR regulations.

HPV Criterion 2 - A violation of any federally enforceable emission limitation, emissions standard, or operating parameter, which is a surrogate for emissions, that was issued pursuant to Title I, Part C (*PSD*) or D (*non-attainment plans*), of the Clean Air Act (CAA) and the implementing regulations, or the equivalent provision(s) in an EPA-approved implementation plan (i.e. OAC 252:100-8, Part 7 and Part 9) where such violation continued (or is expected to continue) for at least seven *consecutive* days. This criterion includes violations that, while not necessarily continuous for 168 hours, recur (or recurred) regularly or intermittently for at least seven consecutive days. EPA presumes that the violation is continuing unless the enforcement agency can document sufficient evidence to conclude that the violation is no longer ongoing and is unlikely to recur.

HPV Criterion 3 – A violation of any emission limitation, emission standard or parameter that is a surrogate for emissions in an applicable Standards of Performance for New Sources (NSPS) (Part 60) relating to a pollutant where such violation continued (or is expected to continue) for at least seven *consecutive* days. This criterion includes violations that, while not necessarily continuous for 168 hours, recur (or recurred) regularly or intermittently for at least seven days. EPA presumes that the violation is continuing unless the enforcement agency can document sufficient evidence to conclude that the violation is no longer ongoing and is unlikely to recur.

HPV Criterion 4 – A violation of any emission limitation, emission standard or surrogate parameter (emission or operating) of an applicable National Emission Standards for Hazardous Air Pollutants (NESHAP) (Parts 61 and Parts 63) where such violation continued (or is expected to continue) for at least seven *consecutive* days. This criterion includes violations that, while not necessarily continuous for 168 hours, recur (or recurred) regularly or intermittently for at least seven consecutive days. The EPA presumes that the violation is continuing unless the enforcement agency can document sufficient evidence to conclude that the violation is no longer ongoing and is unlikely to recur.

HPV Criterion 5 – A violation that involves federally enforceable work practices, testing requirements, monitoring requirements, recordkeeping or reporting that substantially interferes with enforcement of a requirement or a determination of the source's compliance. The determination of what is substantial shall be part of a case-by-case analysis/discussion between the EPA Region and the enforcement agency.

HPV Criterion 6 – Any other violations specifically identified and communicated to enforcement agencies from time to time by the Director, Air Enforcement Division, U.S. EPA (general applicability) or as mutually agreed upon between the enforcement agency and corresponding EPA Region (case-by-case). For example, an enforcement agency believes an emission violation warrants designation as an HPV even though the violation lasted (or will last) for less than seven days.

B) State Criteria **Level 1 violations**. Only major sources and SM 80s qualify for Level 1 violations, except in the case of asbestos violations, or Chronic/Recalcitrant violations. (The pollutant in violation must be one for which the facility is major or SM 80, as applicable.)

- a) Failure to obtain a construction permit at a major source (non-PSD) prior to commencing construction.
- b) Late submittal of an *initial* Title V operating permit application (>60 days late), or allowing a TV operating permit to expire prior to submittal of a renewal application. (*Note: If the facility has an active major source construction permit containing all of the enforceable limits and requirements that will be in the operating permit, the violation will be Level 2.*)
- c) Failure to install BACT and/or operate it correctly at a major source (non-PSD). (OAC 252:100-8-5(d)(1)(A))

- d) Any failure to install, and/or operate correctly, emission controls required by the Oklahoma Administrative Code that is not covered elsewhere in the guidance. (The pollutant must be one for which the source is a major.)
- e) Emission violation at a major or SM 80 source, that continues, or is presumed to have continued, for seven or more consecutive days and is detected by any test method that the source uses to demonstrate compliance (e.g. PEA Test). (The *pollutant* must be one for which the source is a major or SM 80.) DEQ presumes that the violation is continuing unless the source can demonstrate sufficient evidence to conclude that the violation is no longer ongoing and is unlikely to recur.
- f) Asbestos – Substantial failure to provide timely and accurate notice, to adhere to work practices and visible emission limitations, and/or to conduct an inspection as required by 40 C.F.R. 61, Subpart M.
- g) Leak Detection and Repair- Failure to seal open ended lines, and/or failure to monitor components, as required by New Source Performance (NSPS) Subpart VV or VVa (Referenced via NSPS Subpart GGG, GGGa, KKK, or OOOO as well as 40 C.F.R. 63, Subparts CC and HH).
- h) Chronic and/or Recalcitrant – A consistent, long trend of violations not otherwise meeting Level 1 thresholds; or extreme stubbornness or failure to cooperate with DEQ in correcting violations.

APPENDIX B - AQD GRAVITY-BASED PENALTY CALCULATION GUIDE

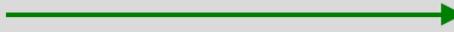
LEVEL 1 HPV

HPV Criterion 1: Failure to obtain a PSD/NSR permit, and/or install Best Available Control Technology (BACT) or Lowest Available Emission Reductions (LAER) for any new major stationary source, or major modification at a major stationary source.

A. The failure to obtain a pre-construction PSD/NSR permit is a one-time violation.

Failure to obtain a PSD/NSR construction permit for a new major source	\$10,000
Failure to obtain a permit for a major modification to a PSD/NSR major source	\$7,500

B. Failure to install Best Available Control Technology (BACT) or Lowest Achievable Emission Reductions (LAER) is a continuous emission violation that begins when the facility commences operation. The potential damage to the environment increases with time and with the size of the emission unit. Therefore, the penalty increases with the length of time the source operates without control equipment.

PSD Major Emission Unit	\$5,000		\$50,000			
Major Emission Unit	\$2,500		\$25,000			
Minor Emission Unit	\$1,000		\$10,000			
Months	1	12	24	36	48	60

PSD Major Emission Unit	(Number of months)(\$833.33)	\$5,000 minimum				
Major Emission Unit	(Number of months)(\$416.67)	\$2,500 minimum				
Minor Emission Unit	(Number of months)(\$166.67)	\$1,000 minimum				
Months	1	12	24	36	48	60

Gravity based penalty = A + B

HPV Criteria 2, 3, and 4 use similar language for similar violations in the different air programs; therefore, the calculations will be the same and will be covered under the table after HPV Criterion 4.

HPV Criterion 2: Violation of PSD or NSR permit requirements

Violation of a federally enforceable emission limitation, emissions standard, or operating parameter, which is a surrogate for emissions, that was issued pursuant to Title I, Part C (PSD) or D (*non-attainment plans*), of the Clean Air Act (CAA) and the implementing

regulations, or the equivalent provision(s) in an EPA-approved implementation plan (i.e. OAC 252:100-8, Part 7 and Part 9) where such violation continued (or is expected to continue) for at least seven *consecutive* days.

HPV Criterion 3: Violation of NSPS requirements

Violation of a emission limitation, emission standard or operating parameter that is a surrogate for emissions, pursuant to NSPS, that continues for seven or more consecutive days.

Note that if a company does not identify NSPS applicability for an affected source and operates without the proper emission controls or standard for the required time threshold, the emissions from the source are considered excess emissions and the source is considered an HPV.

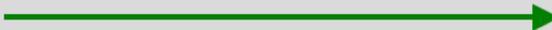
HPV Criterion 4: Violation of NESHAP requirements (Part 61 or Part 63)

A violation of any emission limitation, emission standard or surrogate parameter (emission or operating) of an applicable National Emission Standards for Hazardous Air Pollutants (NESHAP) (Parts 61 and Parts 63) where such violation is a continuing violation that occurred (or is expected to occur) for seven or more *consecutive* days.

Note that if a company does not identify Part 61 or Part 63 NESHAP applicability for an affected source and operates without the proper emission controls or standards, for the required time threshold, the emissions from the source are considered excess emissions and the source is considered an HPV.

Penalty Table for HPV Criteria 2, 3, and 4:

The potential damage to the environment and human health increases with the size of the emission unit and the extent of the deviation from compliance.

Major Emission Unit	\$2,500  \$10,000									
Minor Emission Unit	\$1,000  \$3,500									
Percent deviation from compliance	30	60	90	120	150	180	210	240	270	300

Penalty calculations:

Major Emission Unit	$(\% \text{ above limit})(25) + \$2,500$	\$2,500 minimum	\$10,000 maximum
Minor Emission Unit	$(\% \text{ above limit})(8.33) + \$1,000$	\$1,000 minimum	\$3,500 maximum

HPV Criterion 5 – A violation that involves federally enforceable work practices, testing requirements, monitoring requirements, recordkeeping or reporting that substantially interferes with enforcement of a requirement or a determination of the source’s compliance. The determination of what is substantial shall be part of a case-by-case analysis/discussion between the EPA Region and the enforcement agency.*

The size of the emission **unit** is considered when determining the penalty.

Size of emission unit (based on PTE)	Work practice violation	Improper testing or monitoring	Failure to conduct test or required monitoring*	Recordkeeping violations	Reporting violations
PSD major	\$2,500	\$5,000	\$7,500	\$2,500	\$2,500
Major	\$1,750	\$2,500	\$5,000	\$1,750	\$1,750
Minor	\$1,000	\$1,000	\$2,500	\$1,000	\$1,000

* Note: Does not include LDAR monitoring violations, which are handled as Level I Non-HPV, Section 3.

HPV Criterion 6 – Any other violations specifically identified and communicated to enforcement agencies from time to time by the Director, Air Enforcement Division, U.S. EPA (general applicability), or as mutually agreed upon between the enforcement agency and corresponding EPA Region (case-by-case).

To determine the penalty under this Criterion, refer to similar violations in the above tables and apply the penalty as appropriate.

LEVEL 1 NON-HPV

Only major sources and SM 80s qualify for Level 1 violations, except in the case of asbestos violations, or chronic or recalcitrant violations.

1. State Criteria Level 1 Violations not covered by the HPV policy

Use the appropriate penalty scale(s) to calculate the gravity-based penalty for Level 1 violations that are not considered HPVs.

A.

Failure to obtain a construction permit (major source, non-PSD)	\$5,000
Failure to apply/late application for a TV permit, or expired TV	\$5,000 - \$10,000
Failure to install/operate BACT (non-PSD major source)	\$2,500
Improper operation of permitted control equipment	\$2,500

B.

Major emission unit	\$2,500						\$25,000
Minor emission unit	\$1,000						\$10,000
Months	1	12	24	36	48	60	

Major Emission Unit	(Number of months)(\$416.67)						\$2,500 minimum
Minor Emission Unit	(Number of months)(\$166.67)						\$1,000 minimum
Months*	1	12	24	36	48	60	

*Any portion of a month is considered 1 month.

C.

Size of emission unit (based on PTE)	Penalty (per pollutant)
PSD major	\$7,500
Major	\$5,000
Synthetic Minor	\$3,500
Minor	\$2,500

D. Source emissions

Actual emissions equal or exceed the major source threshold (MST).	\$10,000
Actual emissions were below the MST each of the last three years.	\$7,500
Actual emissions were below 50 percent of the MST each of the last three years.	\$5,000

Length of violation

Scale

Emissions >= MST	\$500.00						\$30,000
Emissions < MST	\$333.33						\$20,000
Emissions < 50 percent of MST	\$166.67						\$10,000
Months	1	12	24	36	48	60	

Emissions >= MST	(Number of months)(\$500.00)					
Emissions < MST	(Number of months)(\$333.33)					
Emissions < 50 percent of MST	(Number of months)(\$166.67)					
Months	1	12	24	36	48	60

*Any portion of a month is considered 1 month.

- a) Failure to obtain a construction permit at a major source (non-PSD) prior to commencing construction.

Gravity-based penalty = (A+B)

- b) Late submittal of an initial Title V operating permit application (>60 days late), or allowing an existing TV operating permit to expire prior to submitting a renewal application. *(See example calculation at the end of the guide.) (Note: If the facility has an active construction permit with enforceable limits, the violation will not be Level 1.)*

Gravity-based penalty = (D)

- c) Failure to install BACT and/or operate it correctly at a major source (non-PSD).

Gravity-based penalty = (A+B)

- d) Any failure to install, and/or operate properly, emission controls required by the Oklahoma Administrative Code that is not covered elsewhere in the guidance. (The pollutant must be one for which the source is a major.)

Gravity-based penalty = B

- e) Emission violation at a major or SM 80 source detected by any test method that the source uses to demonstrate compliance (e.g. PEA Test), that continues for seven or more consecutive days. (The *pollutant* must be one for which the source is a major or SM 80.)

Gravity-based penalty = C

- f) Asbestos – Substantial failure to provide timely and accurate notice, to adhere to work practices and visible emission limitations, and/or to conduct an inspection as required by 40 C.F.R. 61, Subpart M. *(Note: the penalty for this part is under Section 2, below.)*

- g) Leak Detection and Repair- Failure to seal open ended lines, and/or failure to monitor components, as required by New Source Performance (NSPS) Subpart VV or VVa (Referenced via NSPS Subpart GGG, GGGa, KKK, or OOOO as well as 40 C.F.R. 63, Subparts CC and HH). *(Note: the penalty for this part is under Section 3, below.)*

h) Chronic and/or Recalcitrant – A consistent, long trend of violations not otherwise meeting Level 1 thresholds; or extreme stubbornness or failure to cooperate with DEQ in correcting violations. *(Note: the penalty for this part is under Section 4, below.)*

2. Asbestos: Notice and Work Practice Violations

(Facility does not have to be a major source of asbestos for these penalties to apply.)

A. Notice:

Failure to provide notice	\$1,000
Substantially late, inaccurate or incomplete notice	\$500

(Note: If the contractor confirms to AQD’s satisfaction that no regulated asbestos was present, these will be considered Level II violations.)

B. Work Practice:

Substantive violations have the potential to cause serious bodily harm, property damage or environmental damage. Each substantive violation is considered a separate offense.

Work Practices	\$2500 per violation
Visible Emissions	\$2500 per violation

C. Inspections:

Failure to conduct inspection	\$1,000
Late or incomplete inspection, where asbestos is confirmed.	\$500

D. Procedural:

Failure to properly handle, store or transport friable asbestos	\$1,000
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3. Leak Detection and Repair*

(These criteria apply to SM 80 and major sources.)

A. Open ended lines (OEL)

Leak Determination

OEL found to be above the leak definition - Level 1

OEL found to be below the leak definition - Level 2

If an OEL is found during a walkthrough of the process unit but is not monitored it will be considered below the leak definition.

Number of OEL found within an associated process unit triggering a Level 1 Violation

≤ 100 components	2 OEL
101-500 components	3 OEL
501-1000 components	4 OEL
> 1000 components	5 OEL

Violation	Major Source	SM 80 Source
Leaking OEL	\$2,500	\$1,000
Non-leaking OEL	\$1,000	\$500

B. Failure to Monitor

This violation will be a Level 1 if the facility fails to monitor five (5) components in the facility (not in a process unit) during a reporting period. If this threshold is met, the penalty will be calculated using the formula in the table below.

Penalties will be assessed per non-monitored component, multiplied by the monitoring frequency required for that component, up to a maximum of \$50,000.

Major Source (facility wide)	(No. of components)(\$30)(No. of monitoring periods)	\$2,000 Minimum
Synthetic Minor 80 Source (facility wide, based on permit limits)	(No. of components)(\$15)(No. of monitoring periods)	\$1,000 Minimum

*Note: If the facility discovers the OELs or failures-to-monitor on its own and reports them in an ACC, SAR or Periodic Report, the amount can be reduced by *up to 25%*. Even though these reports may be required, this saves the Department time and effort needed to discover them, and expedites the enforcement process.

4. Chronic or Recalcitrant Violation

If a source has a consistent, long trend of violations not otherwise meeting Level 1 thresholds (HPV or non-HPV), that source may be assessed a penalty. In addition, if the source fails to cooperate with the Division during the investigation of specific violations, or fails to make good faith efforts to rectify problems causing excess emissions, a penalty may be assessed.

This criterion may also be applied for substantial failure or refusal to respond to an enforcement document issued by the AQD (i.e. AEL, NOV or RFI), or a substantial failure to meet timelines submitted in a compliance plan.

To calculate the penalty, use the underlying violation and the corresponding criterion that would apply. If there is not an applicable criterion, use the following:

True Minor	\$1,000
Synthetic Minor <80%	\$1,500
Synthetic Minor 80%	\$2,000
Major Source (non-PSD)	\$2,500
PSD Major Source	\$5,000

Example calculation for Table D. Source Emissions

Calculate the penalty by adding the emission-based component to the time-based component (minus the 60 day grace period). For example, if the source's actual emissions were 80 percent of the major source threshold or less for each of the last three years and the source submitted an application 23 months after a Title V permit application was due, the gravity based penalty would be calculated for 21 months, as follows:

$$\$7,500 + (21 \text{ months})(\$333.33 \text{ per month}) = \$7,500 + \$7,000 = \$14,500$$

For calculation purposes, any portion of a month is considered a whole month. (Example: Day 61 after the submittal deadline equals one month in the penalty calculation.)

If the permit application is submitted by the source before the violation is discovered by the DEQ, a downward adjustment of up to 50 percent may be applied to the gravity-based penalty.