

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 August 30, 2007 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.).

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 I and Non-Level I violations. According to the SOP, Non-Level I violations may be classified into separate categories, Level II and Level III violations. In addition, Air Quality Division enforcement must 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 (1999)*. All High Priority Violations (HPVs) are considered Level I violations. Level I violations are summarized in Appendix A.

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

II. Proposed penalty calculation.

Once a decision has been made that an administrative penalty is appropriate, the enforcement officer 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*."

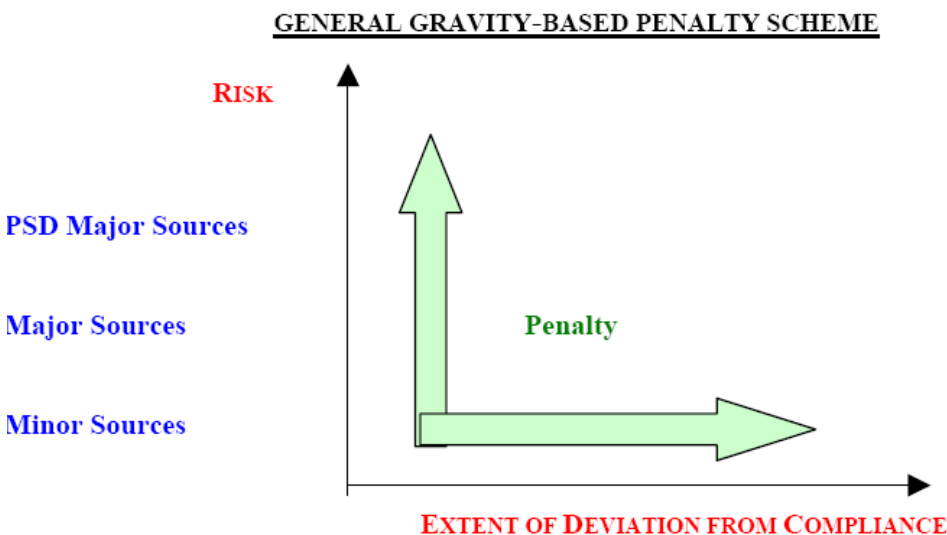
A. Economic benefit component

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.

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/Compliance/civil/econmodels>. The use of the model by enforcement staff assures consistency and fairness regarding economic benefit calculations.

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: the extent of deviation from compliance with statutory and regulatory requirements, and the relative risk to human health and the environment and/or the effectiveness of the regulatory system 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 proposed 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 Notice of Violations (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 two or more similar violations have occurred within the last five years. Similar violations 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 the same violation, the final figure generally should 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 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 is issued. Moderate reductions are warranted when the facility expeditiously takes steps to correct the violation upon receipt of the NOV or AEL.

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 I VIOLATIONS

A) High Priority Violations: (See the Workbook for “The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs)” for more complete explanation of each criterion.)

i). **General Criteria:** These criteria apply to the pollutant(s) of concern at major sources except where the criterion itself indicates otherwise, e.g. synthetic minor sources at or above 80% of Title V potential to emit threshold (SM 80):

- (1) Failure to obtain a PSD permit (and/or install BACT), or NSR permit (and/or install LAER or obtain offsets), and/or permit for a major modification of either.
- (2) Violation of an air toxics requirement (i.e., NESHAP, MACT) that either results in excess emissions or violates operating parameter restrictions.
- (3) Violation by a synthetic minor of an emission limit or permit condition that affects the source's PSD, NSR, or Title V status.
- (4) Violation of a substantive term of any Local, State, or Federal order, consent decree, or administrative order.
- (5) Substantial violation of the source's Title V certification obligations.
- (6) Substantial violation of the source's obligation to submit a Title V permit application.
- (7) Violations that involve testing, monitoring, recordkeeping, or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits.
- (8) Violation of an allowable emission limit detected during a reference method stack test.
- (9) Clean Air Act (CAA) violations by chronic or recalcitrant violators.

ii). **Matrix Criteria:** The HPV Matrix Criteria are designed to address situations for which it is possible to examine the severity of the excess emissions resulting from the violation.

- (1) Violation of allowable emissions limitations, detected by stack testing.

- (2) Violation of applicable emissions limitation, detected by coatings analysis, fuel samples, other process materials sampling, or raw/process materials usage reports.
- (3) Violation of parameter limits where parameter is a direct surrogate for an emissions limitation, detected by continuous/periodic parameter monitoring.
- (4) Exceedance of an applicable non-opacity standard, detected by CEMS.
- (5) Exceedance of an applicable opacity standard (detected by COMS or by VE).

B) **Level I violations** that are not considered HPVs. Only major sources and SM 80s qualify for Level I violations, except in the case of asbestos violations.

- i). Failure to obtain a construction permit and/or install and operate correctly BACT at a major source (non-PSD) (OAC 252:100-8-5(d)(1)(A))
- ii). Failure to apply for a permit in a timely manner after the Department issues an affirmative applicability determination (Major source)
- iii). Any failure to install and 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)
- iv). Emission violation at a major source detected by any test method that the source also uses to demonstrate compliance (The pollutant must be one for which the source is a major)
- v). Asbestos - Failure to provide timely, accurate and complete notice as required by 40 C.F.R. §61. Failure to adhere to work practices and visible emission limitations as required by 40 C.F.R. §61, Subpart M. Failure to conduct an inspection as required by 40 C.F.R. 61, Subpart M.
- vi). Leak Detection and Repair- Failure to seal open ended lines as required by New Source Performance (NSPS) Subpart VV (Referenced via NSPS Subpart GGG or KKK as well as 40 C.F.R. 63, Subparts CC and HH) 40 C.F.R. §60.428-6. (The pollutant must be one for which the source is major).
- vii). Failure to conduct testing and/or monitoring at a SM 80 source as required by permit.

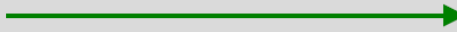
APPENDIX B - AQD GRAVITY-BASED PENALTY CALCULATION GUIDE

1. General HPV Criterion 1: Failure to obtain A PSD permit

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

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

B. Failure to install Best Available Control Technology (BACT) 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.

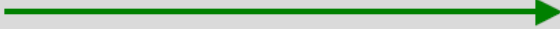
PSD Major Emission Unit	\$5,000		\$50,000			
Major Emission Unit	\$2,500		\$25,000			
Minor Emission Unit	\$1,000		\$10,000			
Months	1	12	24	36	48	60

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

$$\text{Gravity based penalty} = A + B$$

2. General HPV Criterion 2: Violation of air toxics requirements

Violating a NESHAP or MACT requirement that either results in excess emissions OR violates operating parameter restrictions. 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

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

3. General HPV Criterion 3: Violation that affects synthetic minor status

Violation by a synthetic minor of an emission limit or permit condition that affects the source's PSD, NSR, or Title V status. This violation type covers the situation in which a source fails to comply with permit restrictions that limit the source's potential emissions below the appropriate threshold. This can also include situations where the facility failed to maintain records, where the failure substantially interfered with our ability to determine compliance with the limiting permit condition.

Source exceeds PSD threshold level	\$10,000
Source violates permit condition but does not exceed PSD threshold	\$7,500
Source exceeds major source threshold	\$7,500
Source violates permit condition but does not exceed major source threshold	\$5,000

PSD synthetic minors are likely Title V major sources. Therefore, the emission violations may also need to be addressed on a per violation basis.

4. General HPV Criterion 4: Enforcement violation

Violation of any substantive term of an order issued by the Department – Use the amount stipulated in the order. If an amount is not stipulated, the penalty range will be \$1,000 to \$5,000 per violation.

5. General HPV Criterion 5: Title V certification violation

Late Annual Compliance Certification (>60 days)	\$5,000
Improper certification	\$2,500

Improper certification should only be an HPV if the underlying violation is also an HPV. (Example: a facility failed to conduct a quarterly test and then certifies compliance.)

6. General HPV Criterion 6: Title V permit application violation

Substantial violation of the source's obligation to submit a Title V permit application. The gravity-based penalty for Title V permit violations varies with the source's actual emissions and the length of time the source operated without a Title V permit.

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	<i>1</i>	<i>60</i>

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

Calculate the penalty by adding the emission-based component to the time-based component. For example, if the source's annual emissions were 80 percent of the major source threshold or less for each of the last three years and the source operated without a Title V permit for 21 months, the gravity based penalty would be calculated as follows:

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

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.

7. General HPV Criterion 7: Testing, monitoring, record keeping, or reporting violation

Violations that involve testing, monitoring, record keeping, or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits. Substantial interference violations include, but not limited to, failure to install a monitor where required, failure to certify the monitor or to conduct proper quality assurance procedures, failure to keep accurate or adequate coating formulation and usage data, failure to submit timely malfunction reports involving significant excess emission incidents, failure to repair promptly a broken monitor where excess emissions are likely to have been occurring and failure to conduct a stack test on time. The definition of what is substantial interference should be made on a case-by-case basis.

For testing and monitoring violations, the size of the emission unit is considered when determining the penalty.

Size of emission unit (based on PTE)	Improper testing or Monitoring	Failure to conduct test or required monitoring
PSD major	\$5,000	\$7,500
Major	\$2,500	\$5,000
Minor	\$1,000	\$2,500

Recordkeeping violations	\$1,000 - \$2,500
Reporting violations	\$1,000 - \$2,500

8. General HPV Criterion 8: Emission violation

Violation of an allowable emission limit detected during a reference method stack test. A penalty may not be assessed if the total exceedance is less than ten (10) percent of the applicable limit or standard, and less than two hundred (200) pounds of a single pollutant. The total emissions must not exceed PSD or TV thresholds.

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

Minor	\$2,500
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9. General HPV Criterion 9: Chronic or Recalcitrant Violation

Chronic or Recalcitrant Behavior. If a source is classified as a true minor or a synthetic minor with actual emissions less than 80% of the major source threshold and the source has a consistent, long trend of violations not meeting HPV thresholds, 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.

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

True Minor	\$1,000
Synthetic Minor <80%	\$2,000

10. Matrix HPV Criterion 1: Emission violation detected by stack test

This violation is identical to General HPV Criterion 8.

11. Matrix HPV Criterion 2: Emission violation using process/formulation data

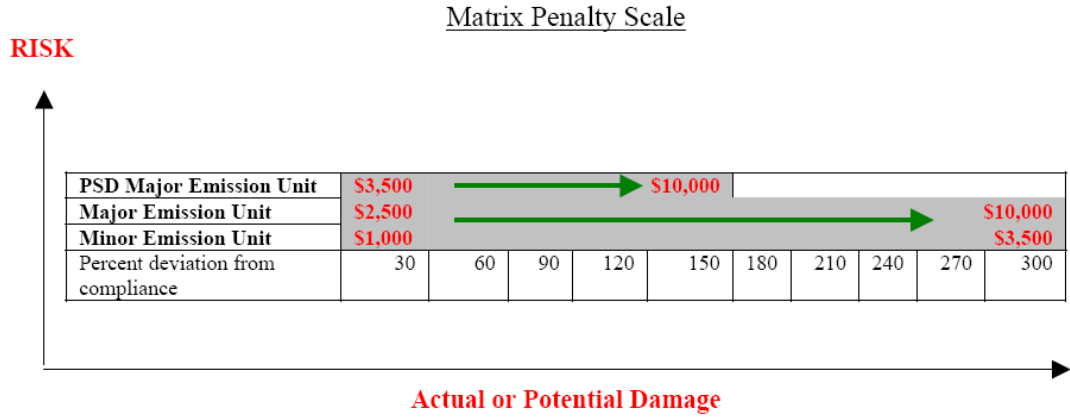
This type of violation is detected by methods such as coatings analysis, fuel samples, other process materials sampling, or raw/process materials usage reports. The risk increases with the size of the emission unit and the actual or potential damage to human health and the environment increases with the extent of deviation from compliance. After it is determined that the violation is High Priority, use the Matrix Penalty Scale to determine the gravity-based penalty per violation or reporting period. A penalty may not be assessed if the total exceedance is less than ten (10) percent of the applicable limit or standard, and less than two hundred (200) pounds of a single pollutant. The total emissions must not exceed PSD or TV thresholds.

12. Matrix HPV Criterion 3: Surrogate limit violation

Violation of parameter limits where the parameter is a direct surrogate for an emission limitation. This type of violation can be detected by continuous or periodic parameter monitoring (including indicators of control device performance). After it is determined that the violation is High Priority, use the Matrix Penalty Scale to determine the gravity-based penalty per violation or reporting period. A penalty may not be assessed if the total exceedance is less than ten (10) percent of the applicable limit or standard, and less than two hundred (200) pounds of a single pollutant. The total emissions must not exceed PSD or TV thresholds.

13. Matrix HPV Criterion 4: CEM detected violation

Exceedances of an applicable non-opacity standard that are detected CEMs. After it is determined that the violation is High Priority, use the Matrix Penalty Scale to determine the gravity-based penalty per violation or reporting period.



Penalty Calculations:

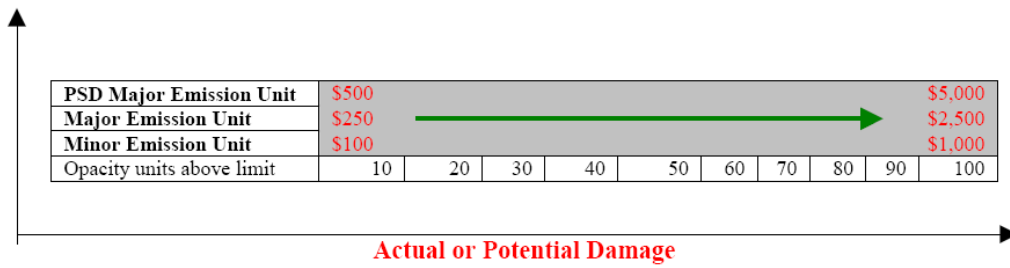
PSD Major Emission Unit	$(\% \text{ above limit})(43.33) + \$3,500$	\$3,500 minimum	\$10,000 maximum
Major Emission Unit	$(\% \text{ above limit})(25) + \$2,500$	\$2,500 minimum	\$10,000 maximum
Minor Emission Unit	$(\% \text{ above limit})(8.33) + \$1,000$	\$1,000 minimum	\$3,500 maximum

14. Matrix HPV Criterion 5: Opacity violations

For visible emissions that exceed an applicable opacity standard, use the Opacity Penalty Scale to calculate the penalty per violation. The source must be major for particulates for an opacity violation to be considered a High Priority Violation.

Opacity Penalty Scale

RISK



Penalty Calculations:

PSD Major Emission Unit	$(\text{units above limit})(45) + \500	\$500 minimum
Major Emission Unit	$(\text{units above limit})(22.5) + \250	\$250 minimum
Minor Emission Unit	$(\text{units above limit})(9) + \100	\$100 minimum

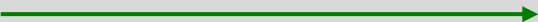
15. Level 1 Violations not covered by the HPV policy

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	\$5,000
Operating without a permit	\$2,500 - \$7,500
Failure to install BACT	\$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

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

- a. Failure to obtain a construction permit (non-PSD) (OAC 252:100-8-5(d)(1)(A))

Gravity-based penalty = (A+B)

- b. Failure to install BACT and/or operate it correctly at a major source

Gravity-based penalty = (A+B)

- c. Failure to apply for a permit in a timely manner after the Department issues an affirmative applicability determination (Major source)

Gravity-based penalty = (A+B)

d. Any failure to install 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 source detected by any test method that the source also uses to demonstrate compliance (The pollutant must be one for which the source is a major)

Gravity-based penalty = C

f. Failure to conduct testing and/or monitoring at a synthetic minor source as required by permit.

Gravity-based penalty = C

16. Asbestos: Notice and Work Practice Violations

A. Notice:

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

B. Work Practice:

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

Work Practices	\$2500 minimum
Visible Emissions	\$2500 minimum

C. Inspections:

Failure to conduct inspection	\$1,000
Late or incomplete inspection	\$500

Penalty Calculation:

(Number of days)(\$500) + (number of repeat violations)(\$750) + fine listed in schedule above =

D. Procedural:

Failure to provide records upon request, failure to comply with written requests	\$1,000
Failure to properly handle, store or transport friable asbestos	\$1,000

Gravity:

The gravity component is based on the duration (number of days) the violation persists and repetition (whether the violation is a first, second or subsequent one).

17. Leak Detection and Repair (Open ended lines)

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

0-100 components	2 OEL
100-500 components	3 OEL
500-1000 components	4 OEL
>1000 components	5 OEL

Recalcitrant Violators

If a COMPANY has been issued more than two level 2 NOV's or AELs within the previous twenty-four months, the level may be elevated to a Level 1.

Penalties

Penalties will only be associated with Level 1 violators.

Violation	Major Source	Syn-Min Source
Leaking OEL	\$2,500	\$1,000
Non-leaking OEL	\$1,000	\$500