

## **STATIONARY SOURCES CHLOROFLUOROCARBON (CFC) PROGRAM**

### **NONCOMPLIANCE and CIVIL PENALTY POLICY and CALCULATION PROCEDURES**

#### APPLICATION

This document establishes the policies and procedures to be used by the CFC Program of the Stationary Sources Program of the Air Pollution Control Division (Division), when assessing penalties provided in the Colorado Air Pollution Prevention and Control Act (State Act), Colorado Revised Statutes, 1992.

Two types of penalties must be considered under the authority of the State Act for related violations which include:

- 1) Noncompliance Penalties,
- 2) Civil Penalties.

#### PURPOSE

The purpose of this document is to define how the Division shall determine, assess, and calculate penalties set forth in the State Act for purposes of enforcing rules and regulations pertaining to the uses of chlorofluorocarbons and hydrochlorofluorocarbons here to fore referred to as Ozone Depleting Compounds, "ODCs", in motor vehicle and stationary sources in Colorado.

The Division reserves the right at any time to modify and or change such policies to meet the intent of the related regulation(s). Such changes or modifications shall meet the requirements of notification and publications as required by statute.

If violations of related regulations are deemed to have occurred, established procedures found in this document shall be used to calculate and assess penalties in the issuance of compliance orders and final settlements. Final settlement agreements, compliance orders and or civil penalties and noncompliance penalties may be lower than actually calculated in this document.

#### BACKGROUND

Portions of the noncompliance and civil penalty calculations procedures found in the State Act reference specific sections and language in the Federal Act. As a result, portions of this document are taken directly from: 1) the U.S. E.P.A. Clean Air Stationary Sources Civil Penalty Policy, October 25, 1991, 2) U.S. E.P.A. Appendix X, Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerants, June 1, 1994, 3) U.S. E.P.A. Appendix IX, Clean Air Act

Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of the Stratospheric Ozone, Subpart B: Service of Motor Vehicle Air Conditioners, July 19, 1993.

## NONCOMPLIANCE PENALTY POLICY

### Background

Noncompliance penalties are imposed for violations of emissions regulations by sources and individuals. The State Act specifies that the violating source will submit calculations to the Division to determine the amount of noncompliance penalty to be assessed. The purpose of this penalty is to deprive the source of any economic benefit which may have been realized due to noncompliance.

Should the Division believe a source is in violation of any emission control regulation, SIP provision or Parts 1 through 4 of the State Act, the Act specifies that a Notice of Violation (NOV) may be issued to the source. If an NOV is issued, the source will be provided an opportunity to present data, views and arguments in its behalf regarding the alleged violations(s) through an informal conference. After the conference, should the Division determine that a violation did in fact take place, certain categories of violations and sources are subject to a noncompliance penalty. These penalties are described in the State Act in Section 25-7-115(5) (a)(I), C.R.S., which states:

(5)(a)(I) Any order issued pursuant to subsection (3) of this section which pertains to an alleged violation described in Section 120(a)(2)(A) of the federal act shall also require each person to who is subject to such order, within forty-five calendar days after the issuance of such order, to calculate the penalty owed in accordance with paragraph (b) of this subsection (5) and submit the calculation, together with a payment schedule and all information necessary for an independent verification thereof, to the Division. If the order has been stayed pursuant to subsection (4) of this section, the penalty calculation shall be submitted by the owner or operator to the Division within forty-five calendar days after issuance of a final determination of the commission that:

- (A) A violation or noncompliance occurred;
- (B) If a revision to the state implementation plan has been requested, that all or part of such request should be denied; the penalty calculation shall not be submitted for any aspect of the violation or noncompliance which is excused by reason of approval of a requested revision of the state implementation plan.
- (C) The violation is one described in section 120(a)(2)(A) of the federal act; and,
- (D) If an exemption pursuant to subsection (7) of this section has been claimed, that the owner or operator is not entitled thereto.

This section of the State Act refers to violations described in Section 120(a)(2)(A) of the Federal Act which states:

- (2)(A) Except as provided in subparagraph (B) or (C) of this paragraph, the State or the Administrator shall assess and collect a noncompliance penalty against every person who owns or operates:

- (iii) a stationary source which is not in compliance with any requirement of Title IV, V, or VI of this Act, or
- (iv) any source referred to in clause (i), (ii), or (iii) (for which an extension, order, or suspension referred to in subparagraph (B), or Federal or State consent decree is in effect), or a primary nonferrous smelter which has received a primary nonferrous smelter order under Section 119 which is not in compliance with any interim emission control requirement or schedule of compliance under such extension, order, suspension, or consent decree.

For purposes of subsection 120(d)(2) of the Federal Act, in the case of penalty assessed with respect to a source referred to in clause (iv) of subsection 120(a)(2)(A), the cost referred to in subsection (d) (2) shall be the economic value of noncompliance with the interim emission control requirement or the remaining steps in the schedule of compliance referred to in such clause.

### **NONCOMPLIANCE PENALTY ASSESSMENT PROCEDURE**

The noncompliance penalty assessment is that value represented by the economic benefit realized by a source due to its noncompliance with applicable requirements. The economic benefit gained by a person or source due to delayed or avoided costs shall be determined in accordance with the Stationary Source Civil Penalty Policy, using as appropriate, the BEN computer model. Economic benefit should be calculated from the earliest provable date of violation until the date that the violation is corrected.

For purposes of verifying the amount of noncompliance penalty for violations of state CFC regulations, the following procedures shall be used:

- 1) For all violations of CFC regulations which are similar or related to corresponding violations found in Section 608, Title VI of the Federal Act, the BEN computer model shall be used.
- 2) For all violations of CFC regulations which are similar or related to corresponding violations found in Section 609, Title VI of the Federal Act, the BEN computer model is not appropriate, and should not be used. Instead, the use of Economic Benefit Matrix shall be used, detailed in U.S. E.P.A., Appendix IX, Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82, Protection of the Stratospheric Ozone, Subpart B: Service of Motor Vehicle Air Conditioners, July 19, 1993.

Noncompliance penalties will be collected from sources where the violation:

- 1. Is an emission limitation or emission standards violation, or a violation of a compliance schedule and the violating source is a major stationary source (100 TPY), an NSPS source, a NESHAP or HAP source; or
- 2. Involves a stationary source in violation of Acid Deposition control, Operation Permit or Stratospheric Ozone Protection requirements (Title IV, V, or VI of the Federal Act) or in

violation of an order issued pursuant to emergency powers (7603).

The economic benefit calculations, where appropriate, presented to the Division by a source should be verified using the EPA computer software program called BEN. This program calculates noncompliance penalties based on a variety of factors which should be supplied by the source. Sources are responsible for calculating and submitting noncompliance penalties to the Division. Detailed descriptions of the BEN program can be found in the following documents included as appendices:

- 1) BEN, A Model to Calculate The Economic Benefit of Delayed Compliance for Civil Penalties, Appendix C,
- 2) BEN User's Manual, Appendix D.

When calculating economic benefit of noncompliance where the BEN model is not appropriate, sources shall use the Section 609 Economic Benefit Matrix, as referenced in this policy. The matrix calculates noncompliance penalties, assuming that sources should have acquired one piece of recovery equipment. Sources are responsible for calculations of noncompliance penalties and submitting such calculations to the Division. When using the Section 609 Economic Benefit Matrix, the date of noncompliance shall commence on January 30, 1993, (effective date of Colorado Air Quality Control Commission, Regulation No. 15).

Detailed descriptions of Section 609 Economic Benefit Matrix can be found in the following document:

- 1) Appendix IX, Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R Part 82, Protection of the Stratospheric Ozone, Subpart B: Servicing of Motor Vehicle Air Conditioners, July 19, 1993.

## **CIVIL PENALTY POLICY**

### Background

The Colorado Air Pollution Prevention and Control Act, 1992, authorizes the assessment and collection of civil penalties for violations of specific regulations. Section 25-7-122, C.R.S., Civil Penalties, details the determination and collection of civil penalties for any person who violates any requirement, prohibition, or provision of section 25-7-105, C.R.S., Duties of the Commission. 25-7-105(11)(a), et. seq., C.R.S., details the duties of the Commission in terms of regulations concerning CFCs and ozone depleting compounds.

Civil penalties are economic penalties established to discourage sources from operating in noncompliance with state regulations and rules. The Division's policy is to apply the authority granted in the State Act regarding civil penalties in order to deter noncompliance with statutory requirements.

When violations of the State CFC regulations have occurred, civil penalties will be assessed in an equitable and documented procedure. Final settlements of civil penalties may be lower than calculated, however, while meeting the requirements of the authority found in section 25-7-122 C.R.S., Civil Penalties.

## **CIVIL PENALTY ASSESSMENT PROCEDURE**

Section 25-7-122, C.R.S., Civil Penalties, authorizes the assessment of civil penalties of not more than fifteen thousand dollars (\$15,000.00) per day for each day of violation, for violations of related CFC regulations. Civil penalty calculations found in this policy were designed to discourage noncompliance with such regulations and represent equitable and reasonable costs associated with the administration and enforcement of the State CFC program.

### **BACKGROUND**

Air Quality Control Commission Regulation No. 15 establishes the standards and guidelines for the administration and enforcement of the State CFC Program. The program was authorized by the State Legislature to be consistent with the Federal CFC Program, Title VI, Section 608. Conformity is required regarding standards and requirements concerning the use and disposal of Class I and Class II ozone depleting compounds during service, repair, or disposal of appliances and industrial process refrigeration systems.

At the date of this original penalty policy for enforcement and penalty assessments of CFC violations, Title VI of the Federal Act is not a delegatable state program. As a result, certain penalty assessment limitations in the State of Colorado are present. However, it is the intent of this document to maintain consistency with the Title VI of the Federal Act, where possible, regarding penalty assessments and policy.

The civil penalty policies hereby set forth shall consider penalties for similar programs found in the Federal Act, specifically, violations of similar programs of Sections of 608 and 609, as they apply within the State of Colorado.

The Division reserves the right to modify as needed such policies for purposes of maintaining consistency and intent with regard to similar Federal Act CFC Programs.

With regard to this CFC Civil Penalty Policy, additional consideration shall also be given to: (1) the size and scope of a business or facility, (2) the occurrence of repeat violations, and (3) the cost of compliance.

- 1) Regarding size and scope of businesses or facilities, the following civil penalty addition shall be included:
  - A) For all sources with one to four employees, the civil penalty shall be the base penalty.
  - B) For all sources with five to ten employees, the civil penalty shall be increased by Five Hundred Dollars (\$500.00) or an amount equal to the base penalty, whichever is less.
  - C) For all sources with eleven or more employees, the civil penalty shall be increased by One Thousand Dollars (\$1,000.00) or an amount equal to the base penalty, whichever is less.
- 2) Regarding occurrences of repeat violations, the following conditions shall be assessed to previous violations:
  - A) All subsequent violations of similar occurrences shall increase the civil penalty

assessments by 50% where a compliance order or a final settlement has been issued.

- 3) All penalty assessments shall include the cost of compliance for violations where noncompliance was deemed to have occurred over any time frame, regarding fees (i.e. if a source or individual were found to be in noncompliance for two years, two years of fees would be included in the penalty assessment calculation).

Civil penalty assessments for fees are different from, and in addition to, penalties found in the BEN computer model for noncompliance fee assessments.

**CIVIL PENALTY CALCULATIONS FOR VIOLATIONS  
OF SECTION 608 (stationary) PROVISIONS  
(40 CFR, Part 82, Subpart F and 25-7-105, C.R.S.)**

- I Knowingly Venting  
Any person who knowingly allows the venting of any ODC may be assessed a base civil penalty of up to Five Thousand Dollars (\$5,000.00).
- II Technician Certification  
Failure of any person to possess EPA approved certification for the appropriate level of work which involves the refrigerant, may be assessed a base civil penalty of up to Two Thousand Five Hundred Dollars (\$2,500.00).
- III Facility Notification Registration  
Failure of any person to properly register with the Division, may be assessed a base civil penalty of up to Two Hundred Fifty Dollars (\$250.00).
- IV Equipment Registration  
Failure of any person to properly register equipment and/or maintain and/or submit required record keeping may be assessed a base civil penalty of up to Five Hundred Dollars (\$500.00) for each required item.
- V Record Keeping/Reporting Requirements  
Failure of any person to maintain required records or to report required records may be assessed a base civil penalty of up to Five Hundred Dollars (\$500.00) for each required item.
- VI Leakage Rates Exceedances  
Noncompliance of established leakage rates shall be considered knowingly venting.
- VII Installation, Service, Refrigerant Recovery  
Noncompliance with established installation, service and refrigerant recovery requirements shall be considered knowingly venting.
- VIII Sales of ODCs

Noncompliance regarding limitation of sales of ODCs to only certified technicians by any such person may be assessed a base civil penalty of up to Two Thousand Five Hundred Dollars (\$2,500.00).

Violations of 40 CFR Part 82, Subpart F shall be reviewed on a case-by-case basis and will generally be reviewed in the general areas of 1) required practices, 2) prohibitions, and 3) reporting and record keeping requirements. All violations which result in a loss of refrigerant(s) beyond the scope of allowable/acceptable losses will be considered to be knowingly venting.

All other violations not noted will be assessed at the statutory maximum unless otherwise determined by the Division. All cases will be reviewed and considered on a case-by-case basis.

**CIVIL PENALTY CALCULATIONS FOR VIOLATIONS OF  
SECTION 609 (motor vehicle) PROVISIONS  
(40 CFR, Part 82, Subpart B and 25-7-105, C.R.S.)**

- I     Knowingly Venting  
Any person who knowingly allows the venting of any ODC may be assessed a base civil penalty of up to Five Thousand Dollars (\$5,000.00).
  
- II    Facility Notification Registration  
Failure of any person to properly register with the Division may be assessed a base civil penalty of up to Two Hundred Fifty Dollars (\$250.00).
  
- III   Technician Certification  
Failure of any person to possess EPA approved certification and training when performing service which involves the refrigerant, may be assessed a base civil penalty of up to Two Thousand Five Hundred Dollars (\$2,500.00).
  
- IV    Use of Approved Recycle/Recovery Equipment  
Failure of any person to properly use or possess approved recycle/recovery equipment in the act of performing air conditioning service may be assessed a base civil penalty of up to Five Thousand Dollars (\$5000.00).
  
- V     Record Keeping/Reporting Requirements  
Failure of any person to maintain required records or to report required records may be assessed a base civil penalty of up to Five Hundred Dollars (\$500.00) for each required item.
  
- VI.   Leak Check  
Failure of any person to leak check motor vehicle air conditioning systems before ozone depleting compounds are added may be assessed a base fee of up to One Thousand Dollars (\$1000.00).

Section 25-7-122, C.R.S. Civil Penalties, identifies specific circumstances and factors to be considered when assessing civil penalties, which include:

- 1) The violator's compliance history;
  - 2) Good faith efforts on behalf of the violator to comply;
  - 3) Payment by the violator of penalties previously assessed for the same violation;
  - 4) Duration of the violation;
  - 5) Economic benefit of noncompliance to the violator;
  - 6) Impact on, or threat to, the public health or welfare or the environment as a result of the violation;
  - 7) Malfeasance; and
  - 8) Whether legal and factual theories were advanced for purposes of delay.
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- 1) Violator's compliance history shall be considered based upon occurrences of previous violations. In the event of previous violations, the civil penalty may be increased by 50% for previous violations where a compliance order was issued.
  - 2) Good faith efforts on behalf of the violator to comply shall be applicable only if the violator has made no attempt to comply after a determination of noncompliance has deemed to have occurred. If a violator has made any reasonable good faith effort after a determination of noncompliance (e.g. inspection), after a NOV is issued, or before a NOV conference is held, no additional adjustment to the civil penalty may be considered. However, if no attempt to comply is evident, an additional 20% may be added to the civil penalty.
  - 3) Payment by the violator of penalties previously assessed for the same violation shall be considered a previous violation, and the civil penalty may be doubled.
  - 4) Duration of violation shall be considered evidence of continued noncompliance by the violator after being notified that a violation has occurred. If after being notified, noncompliance is evident, the civil penalty may be increased by 20%.
  - 5) Economic benefit of noncompliance to the violator shall be considered in the noncompliance penalty provision of this policy statement and no additional civil penalty shall be included on the penalty for related violations.
  - 6) Impact on, or threat to, the public health or welfare or the environment as a result of the violation shall be considered on a case-by-case basis. If the Division determines an impact in fact did occur, and additional 25% may be applied to the civil penalty.
  - 7) Malfeasance shall be considered knowingly committing an act of wrongdoing in regards to the regulatory scheme. If the Division determines malfeasance has occurred by a violator, the civil penalty may be increased by 20%.
  - 8) Whether legal and factual theories were advanced for purposes of delay shall be considered situations which stall or delay compliance. If the Division determines such delays did in fact occur, the civil penalty may be increased by 20%.

In addition to the eight (8) factors set forth above, the following circumstances and factors are to be considered as

grounds for reducing or eliminating civil penalties:

- 1) The voluntary and complete disclosure by the violator of such violation in a timely fashion after discovery of the noncompliance;
- 2) Full and prompt cooperation by the violator following disclosure of the violation including, when appropriate, entering into a legally enforceable commitment to undertake compliance and remedial efforts;
- 3) The existence and scope of a regularized and comprehensive environmental compliance program or an environmental audit program;
- 4) Substantial economic impact of a penalty on the violator;
- 5) Nonfeasance; and
- 6) Other mitigating factors.

After an initial civil penalty has been calculated, the following reductions in penalties shall be considered in order to reduce a civil penalty. However, where applicable, the total reduction in civil penalties normally shall not exceed **50%** of the penalty for a related violation. The Division may suspend or defer all civil penalties after review on a case-by-case basis.

- 1) The voluntary and complete disclosure by the violator of such violation in a timely fashion after discovery of the noncompliance prior to receiving an NOV may reduce the civil penalty by up to 20%.
- 2) Full and prompt cooperation by the violator following disclosure of the violation including, when appropriate, entering into a legally enforceable commitment to undertake compliance and remedial efforts may reduce civil penalties by up to 20% for enforcement situations where violators acknowledge noncompliance(s) and are actively committed to rectifying such noncompliance.
- 3) The existence of and scope of a regularized and comprehensive environmental compliance program or an environmental audit program may reduce the civil penalties by up to 20% and may be combined with items 1) and 2) above. Environmental compliance programs and/or audits will be considered on a case-by-case basis by the Division, however, it shall be the responsibility of the violator to design, recommend or suggest such plans, with guidance from the Division. Environmental compliance and audits programs shall be made available to the Division during or after the NOV conference, but in no case after compliance order has been issued.
- 4) Substantial economic impact of a penalty on the violator may reduce the civil penalty by not more than the total allowable reduction (50%), if a violator provides economic information to substantiate the effects of economic impact for noncompliance. However, if no documentation is presented by the violator, no reduction to the base penalty shall be considered. Nonsubstantiated information shall not be a consideration for reductions in penalties.
- 5) Nonfeasance shall be considered an act of attempted compliance during the time when a violation was discovered and when the source was notified by the Division. If within thirty days of determination of a violation a source gains regulatory compliance, the civil penalty may be reduced by up to 20%.
- 6) Other mitigating factors may be considered by the Division on a case-by-case basis and may result in the

reduction or elimination of civil penalties.

The combination of the following items represents the complete civil penalty assessment:

- 1) Items 1-8 for assessment of penalties,
- 2) Items 1-6 for reducing/eliminating penalties,
- 3) Base penalty,
- 4) Size of facility,
- 5) Repeat occurrence penalty,
- 6) Noncompliance penalty, and
- 7) Cost of compliance.

### **Violations of Final Orders Issued by the Division or Commission**

Section 25-7-121, C.R.S, Injunctions, states that in the event any person fails to comply with a final order of the Division, or the Commission, that is not subject to stay pending administrative or judicial review, the Division may request the Attorney General to bring suit for injunctive relief. Section 25-7-115, C.R.S.(3)(b) authorizes the Division to assess penalties for failure to comply with a final order of the Division in accordance with Section 25-7-122, C.R.S., in the amount up to \$15,000 per day of violation.

### **ATTACHMENTS**

Attachments to this policy include Section 609 Economic Benefit Matrix. Additional information regarding penalty calculations and assessments may be obtained from the Division.

### SECTION 609 ECONOMIC BENEFIT MATRIX

Number of Months Since January 30, 1993 Economic Benefit Matrix					
# of Months	Economic Benefit	# of Months	Economic Benefit	# of Months	Economic Benefit
1-3	\$115	22-24	\$1103	43-45	\$2494
4-6	\$236	25-27	\$1274	46-48	\$2733
7-9	\$363	28-30	\$1454	49-51	\$2984
10-12	\$496	31-33	\$1642	52-54	\$3247
13-15	\$637	34-36	\$1840	55-57	\$3523
16-18	\$785	37-39	\$2048	58-60	\$3811
19-21	\$940	40-42	\$2266		