

STATE OF VERMONT

AGENCY OF NATURAL RESOURCES DEPARTMENT OF ENVIRONMENTAL CONSERVATION COMPLIANCE AND ENFORCEMENT DIVISION

CHAPTER 20 ENVIRONMENTAL ADMINISTRATIVE PENALTY RULES

Subchapter 1

Section 20-101 Authority

These rules are promulgated by the Secretary of the Agency of Natural Resources pursuant to the authority granted by 10 V.S.A. Section 8016.

Section 20-102 Purpose

It is the purpose of these rules to standardize the administrative penalties assessed by the Secretary through the establishment of penalty classes and ranges to assist in carrying out the goals established by the Legislature in Act 98 (1989 Session), as amended by Act 191 (2008 Session), 10 V.S.A. Chapter 201.

Section 20-103 Applicability

These rules apply to administrative penalties assessed pursuant to 10 V.S.A. Section 8010 for violations, as defined by 10 V.S.A. Section 8002(9), of the statutes listed in 10 V.S.A. Section 8003(a).

Where the Secretary is delegated a federal environmental program, these rules will apply to administrative penalty assessment under the delegated program.

Section 20-104 Definitions

As used in these rules:

1. "Compliance" means compliance with the statutes specified in Section 8003 of Title 10, and with any related rules, permits, assurances, or orders.
2. "Day" means calendar day - the 24 hour day as denoted on the calendar.
3. "Economic benefit" means a reasonable approximation of any gain, advantage, profit, or delayed/avoided cost, financial or otherwise, which accrues as a result of a violation. Economic benefit shall not be limited to only competitive advantage obtained. Economic benefit may include the estimated net income or net gain realized by a respondent through the use of facilities before all required environmental permits are obtained. In determining economic benefit, the cost of

returning to compliance and/or remediation shall be considered. Economic benefit may not be less than zero.

4. "Minor Violation" means a violation which causes some, but less than moderate, actual or potential harm to the public health, safety or welfare or to the environment and which constitutes more than a small deviation from the requirements of a statute, rule, permit, assurance of discontinuance or order.
5. "De minimis Violation" means a violation that causes little to no actual or potential harm to the public health, safety or welfare or to the environment and which constitutes a small deviation from the requirements of a statute, rule, permit, assurance of discontinuance, or order.
6. "Permit" means any permit, license, certification or transitional operational authority issued under any of the statutes specified in Section 8003 of Title 10, including air pollution orders issued under chapter 23 of Title 10.
7. "Respondent" means a person who has committed or is alleged to have committed a violation.
8. "Secretary" means, the Secretary of the Agency of Natural Resources, or the Secretary's duly authorized representative.
9. "State's Cost of Enforcement" means actual costs incurred and may include sampling and analysis, evaluation of the respondent's property or facility, preparation of enforcement documents and actions, investigation and attorney costs, and other costs as determined by the Secretary.
10. "Violation" means non-compliance with one or more of the statutes specified in Section 8003 of Title 10, or any related rules, permits, assurances, or orders.

Section 20-105 Continuing Violation

The Secretary may consider any violation of a statute listed in 10 V.S.A. Section 8003(a) or a rule promulgated under such statute or a condition of a related permit, order, or assurance of discontinuance, or the lack of a necessary permit that continues longer than one day as a continuing violation subject to additional penalties for each day the violation continues.

Subchapter 2

Section 20-201 Classification of Violations

There are four classes into which the Secretary may place violations. The criteria for placement into the classes are as follows:

- a. *Class I.* A Class I violation is one which meets one or more of the following criteria:
 1. More than a minor violation of:
 - A. an assurance of discontinuance; or
 - B. an order issued pursuant to 10 V.S.A. chapter 201; or

- C. an order issued pursuant to any statute listed in 10 V.S.A. Section 8003(a); or
 - 2. Presents a threat of substantial harm to the public health, safety, or welfare or to the environment or has caused substantial harm to the public health, safety, or welfare or to the environment.
- b. *Class II.* A Class II violation is one which meets one or more of the following criteria:
 - 1. Constitutes a minor violation of:
 - A. an assurance of discontinuance; or
 - B. an order issued pursuant to 10 V.S.A. Chapter 201; or
 - C. an order issued pursuant to any statute listed in 10 V.S.A. Section 8003(a).
 - 2. More than a minor violation of a statute listed in 10 V.S.A. Section 8003(a), a rule promulgated under a statute listed in 10 V.S.A. Section § 8003 (a), or a related permit.

Activity or construction initiated before the issuance of all necessary environmental permits shall be at least a Class II violation, and may, if warranted under subsection (a)(2) of this Section, be a Class I violation.
- c. *Class III.* A Class III violation is a minor violation of a statute listed in 10 V.S.A. Section 8003(a), a rule promulgated under a statute listed in Section 8003 (a), or a related permit.
- d. *Class IV.* A Class IV violation is a de minimis violation of a statute listed in 10 V.S.A. Section 8003(a), a rule promulgated under a statute listed in Section 8003 (a), or a related permit.

Subchapter 3

Section 20-301 Classification of Violations: Penalty Ranges

In conjunction with the provisions of Section 302 below:

- a. A Class I violation shall be subject to penalties ranging from \$0 to \$42,500 for the initial violation and \$0 to \$17,000 for each day that the violation continues.

- b. A Class II violation shall be subject to penalties ranging from \$0 to \$30,000 for the initial violation and \$0 to \$12,000 for each day that the violation continues.
- c. A Class III violation shall be subject to penalties ranging from \$0 to \$10,000 for the initial violation and \$0 to \$4,000 for each day that the violation continues.
- d. A Class IV violation shall be subject to penalties ranging from \$0 to \$3,000 for the initial violation and \$0 to \$1,200 for each day that the violation continues.

Section 20-302 Setting the Penalty Within the Class of Violation

- a. The requirements and procedures of this section shall be used to determine the penalty amount for each single violation, each group of violations which are treated as a single violation, the initial day of a continuing violation, and each subsequent day of a continuing violation.

b. Initial penalty calculation

The following criteria, on a scale of 0 to 3, will be considered by the Secretary in determining the initial amount of the penalty within the particular class of violation.

- 1. The degree of actual or potential impact on public health, safety, and welfare

- 0 no actual impact or minor potential impact,
- 1 minor actual impact or moderate potential impact,
- 2 moderate actual impact or major potential impact,
- 3 major actual impact.

- 2. The degree of actual or potential impact on the environment

- 0 no actual impact or minor potential impact,
- 1 minor impact or moderate potential impact,
- 2 moderate actual impact or major potential impact,
- 3 major actual impact.

- 3. Whether the respondent knew or had reason to know the violation existed:

Knowledge of the requirement

- 0 new requirement,
- 1 had reason to know about violated requirement,

- 2 had a permit or permit by rule,
- 3 repeated violation after notice

Knowledge of the facts of the violation

- 0 could not have reasonably known the violation existed,
- 1 should have reasonably known the violation existed,
- 2 some evidence that the respondent knew the violation existed,
- 3 Clear evidence that the respondent knew the violation existed.

The lowest numbered selection in either the "Knowledge of the requirements" or the "Knowledge of the facts of the violation" sections will be the score for this criterion.

- 4. The respondent's record of compliance with the statutes specified in 10 V.S.A. Section 8003 or related rules, permits, orders, or assurances of discontinuance

- 0 no prior violations,
- 1 prior violation,
- 2 prior violations,
- 3 or more prior violations.

- 5. The length of time the violation existed

- 0 immediate correction,
- 1 very short duration,
- 2 moderate duration,
- 3 long duration.

c. Initial Penalty Amount

- 1. The Secretary shall determine the initial penalty amount for a violation by assigning a score under each of the criteria in subsection (b) above, adding the scores together to arrive at a total score, and multiplying the maximum penalty for the Class of violation involved by the following percentages as derived from the total score:

Percentage Chart

Score	Percentage of maximum penalty
1 - 2	10 %
3 - 4	20 %
5 - 6	30 %
7 - 8	40 %
9 -10	50 %
11	60 %
12	70 %
13	80 %
14	90 %
15	100 %

2. Once the initial penalty amount has been determined, that amount shall be adjusted:
 - A. to 100% of the maximum penalty for the class of violation involved if a rating of 3 is assigned to either criterion one (public health) or two (environment) in Section 302(b) above; or
 - B. to a minimum of 70% of the maximum penalty for the class of violation involved if a rating of 3 is assigned to two or more of criterion three (knowledge), four (compliance record), or five (length of violation) in Section 302(b), above.

d. *Economic benefit and the state's costs of enforcement*

The initial penalty amount may be increased to reflect any economic benefit realized by the respondent as a result of a violation up to the maximum of \$170,000 and/or any costs of enforcement related to the violation which the state has incurred.

The Agency will treat any information provided by the respondent concerning potential economic benefit associated with the violation as confidential to the extent permitted by law and return such information to the respondent after the appeal period for any order involved has passed.

e. *Calculating the final penalty amount*

Once the initial penalty amount has been determined, the initial penalty adjustment, if any, has been made, and the Secretary has added the amount of economic benefit and/or the costs of enforcement, if any, to the penalty, the Secretary shall consider criteria (1) and (2) below before establishing the amount of the final penalty:

1. The presence of mitigating circumstances. The Secretary may reduce the penalty amount and in so doing may consider the following;
 - A. development and enforcement of a comprehensive written compliance policy by the respondent covering the type of violation(s) that occurred;
 - B. adequate staffing levels and training to assure future compliance;
 - C. thorough compliance testing with review and oversight by management;
 - D. adequate maintenance of facilities needed to assure future compliance;
 - E. regular assessment of facility improvement needs and implementation of corrections.
 - F. prompt actions by the respondent to correct the violation(s). These actions will have less value than actions taken ahead of time to prevent violations.
 - G. instances where an employee causes the violation(s) by acting counter to an established and enforced compliance policy.
 - H. unreasonable delay by the Secretary in seeking enforcement
 - I. other relevant factors as determined by the Secretary.
2. The deterrent effect of the penalty. The Secretary may increase the penalty up to the maximum amount for the Class of violation if the Secretary determines that a larger penalty is reasonably necessary to deter the respondent and/or the regulated community.
3. The final penalty amount for any single violation, or group of violations which are treated as a single violation, shall not exceed \$42,500. The final penalty amount for any continuing violation shall not exceed \$170,000.