UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

January 18, 2021

MEMORANDUM

SUBJECT: Clean Air Act Title II Vehicle & Engine Civil Penalty Policy

FROM: Susan Parker Bodine

TO: Regional Counsels
Regional Enforcement and Compliance Assurance Division Directors
Vehicle & Engine Enforcement Personnel

Attached is the final Clean Air Act Title II Vehicle & Engine Civil Penalty Policy. This policy is intended to be used by the EPA in calculating the penalty that the Agency will seek in administrative enforcement actions for violations of the vehicle and engine requirements under Title II of the Clean Air Act. Notice of this policy will be provided to the public through publication in the Federal Register.

This policy establishes a framework the EPA expects to use in exercising its enforcement discretion in determining an appropriate penalty amount for cases to which it applies. It is immediately effective, and supersedes the Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements (Jan. 16, 2009). The policy applies to all administrative actions initiated after this date, and all pending actions in which the government has not yet transmitted a proposed settlement penalty amount. It may be applied in pending cases in which penalty negotiations have commenced, at the discretion of the litigation team.

If you have any questions about this policy, please contact Meetu Kaul (202-564-5472) in the Air Enforcement Division of the Office of Civil Enforcement.

cc: Tom Mariani, Chief, DOJ-EES
Environmental Appeals Board
Susan Biro, Chief Administrative Law Judge
Regional Judicial Officers

Attachment: Clean Air Act Title II Vehicle & Engine Civil Penalty Policy

Clean Air Act Title II

Vehicle & Engine Civil Penalty Policy

January 2021

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I. Introduction & Applicability

This document sets forth the policy of the U.S. Environmental Protection Agency (the "EPA" or the "Agency") for assessing administrative civil penalties for violations of certain Clean Air Act provisions concerning motor vehicles and motor vehicle engines, and nonroad vehicles, engines, and equipment ("Penalty Policy" or "Policy"). This Penalty Policy adheres to the EPA's *Policy on Civil Penalties* (EPA General Enforcement Policy #GM-21, Feb. 16, 1984) ("Policy on Civil Penalties"), and *A Framework for Statute-Specific Approaches to Penalty Assessments* (EPA General Enforcement Policy #GM-22, Feb. 16, 1984) ("Penalty Assessment Framework").

The purpose of this Penalty Policy is to ensure that: (1) civil administrative penalties are assessed in accordance with the Clean Air Act in a fair and consistent manner; (2) penalties are appropriate for the gravity of the violation; (3) penalties are sufficient to deter both individual violators and the regulated community as a whole from committing violations; (4) economic incentives for noncompliance are eliminated; and (5) compliance is expeditiously achieved and maintained.

This Penalty Policy applies to violations arising under Title II of the Clean Air Act (the "Act" or the "CAA"), 42 U.S.C. §§ 7521–7590, and regulations promulgated thereunder (collectively "Title II"), that pertain to vehicles, engines, and equipment. More specifically, this Policy applies to violations that pertain to:

- Certification
  (Section 203(a)(l) of the Act, 42 U.S.C. § 7522(a)(1));
- Inspection, Testing, Records, Reports, & Information
  (Section 203(a)(2) of the Act, 42 U.S.C. § 7522(a)(2));
- Tampering & Defeat Devices
  (Section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3));
- Labeling, Recall, & Warranty
  (Section 203(a)(4) of the Act, 42 U.S.C. § 7522(a)(4));
- Nonroad Engines & Vehicles
  (Section 213(d) of the Act, 42 U.S.C. § 7547(d); *see also* 40 C.F.R. § 1068.101); and
- Vehicle and engine regulations promulgated under the Act.[1]

The effective date of this Policy is January 18, 2021. This Policy supersedes the *Clean Air Act Mobile Source Civil Penalty Policy—Vehicle and Engine Certification Requirements* (Jan. 16, 2009). This Policy applies to all administrative proceedings initiated after this date, and all

[1] References to the provisions of Section 203(a) of the Act, 42 U.S.C. § 7522(a), should be understood to include reference to analogous provisions in the Code of Federal Regulations, unless context suggests otherwise. For example, both Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1), and 40 C.F.R. § 1068.101(a)(1), prohibit the sale of new vehicles or engines not covered by a certificate of conformity. This Policy's method for calculating an appropriate civil penalty for a violation of 42 U.S.C. § 7522(a)(1) would also be the method used to calculate a penalty for a violation of 40 C.F.R. § 1068.101(a)(1).

administrative proceedings in which the government has not yet transmitted a proposed settlement penalty amount. It may be applied in pending cases in which penalty negotiations have commenced, at the discretion of the litigation team.

This Penalty Policy should be used to calculate administrative penalties assessed under Section 205(c) of the Act, 42 U.S.C. § 7524(c)[2] either through an administrative settlement agreement or a proceeding under the Consolidated Rules of Practice codified at 40 C.F.R. Part 22.[3] This Policy is not intended to and does not control the penalty amount sought by the government in civil judicial actions. Cases referred to the United States Department of Justice for civil action may involve factors that make administrative resolution, and use of this Policy, inappropriate. Therefore, after a case has been referred to the Department of Justice, use of this Policy is limited to internal deliberations regarding settlement, unless the litigation team determines otherwise.

This Policy is intended to provide guidance solely for EPA personnel. This Policy creates no obligations on regulated parties, and is not intended to have substantial future effect on the behavior of regulated parties. This Policy instead describes how the EPA will exercise its enforcement discretion in determining an appropriate penalty amount for violations to which this Policy applies. This Policy is not a rule, nor is it a "guidance document" as defined by Executive Order 13891, *Promoting the Rule of Law Through Improved Agency Guidance Documents* (Oct. 9, 2019). This Policy does not, nor is it intended to, create a right or benefit, substantive or procedural, enforceable at law or in equity, in any person or company. The EPA reserves the right to act at variance with this Policy and to change it at any time without public notice. Although this Policy provides guidance regarding the assessment of proposed penalties, the EPA retains discretion to assess the full range of penalties authorized by statute in any particular case.

II. Statutory Background & Enforcement Framework

Title II of the Act requires the EPA to establish emissions standards for different categories and sizes of vehicles and engines. New and imported vehicles and engines must be covered by EPA-issued certificates certifying that the vehicles or engines conform to applicable emissions

[2] The EPA may in some circumstances proceed under the authority of Section 114 of the Act, 42 U.S.C. § 7414, in carrying out the vehicle, engine, and equipment provisions of Title II. Violations of Section 114 are enforced through Section 113 of the Act, 42 U.S.C. § 7413. Where such violations of Section 113 arise in connection with the provisions of Title II of the Act, administrative penalties should be calculated in the manner set forth in this Penalty Policy for violations of Section 203(a)(2) of the Act, 42 U.S.C. § 7522(a)(2).

[3] A description of how the Penalty Policy was applied to specific facts to calculate a penalty amount should be documented. Preliminary, draft, or confidential documents, such as those establishing a settlement penalty amount, may be exempt or excluded from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, or otherwise subject to privilege, and generally should not be released. See the EPA's *Guidance on Use of Penalty Policies in Administrative Litigation* (Dec. 15, 1995), for more information.

standards. The Act and its implementing regulations also contain requirements for, among other things, record-keeping, testing, inspection, labeling, reporting of emissions control defects, and warranties of vehicle and engine emissions-related components. The Title II provisions also prohibit tampering with, or installing devices to defeat, the emissions controls of new or used motor vehicles, motor vehicle engines, nonroad engines, nonroad vehicles, and equipment.

Sections 204 and 205(b) of the Act, 42 U.S.C. §§ 7523, 7524(b), allow the EPA, acting with the United States Department of Justice, to commence a civil action in federal district court to obtain civil penalties and injunctive relief for violations of Title II. Section 205(c) of the Act, 42 U.S.C. § 7524(c), authorizes the EPA to assess civil penalties for violations of Title II administratively in lieu of commencing a civil action. Administrative civil penalties may not exceed an inflation-adjusted[4] cap from each violator, unless the EPA and the Department of Justice jointly determine that a matter involving a larger penalty is appropriate for administrative penalty assessment. Administrative enforcement proceedings are governed by the Consolidated Rules of Practice codified at 40 C.F.R. Part 22.

EPA policy favors settlement so long as the settlement agreement is consistent with the provisions and objectives of the Act and does not undermine deterrence. The EPA's administrative enforcement of Title II of the Act may result in an administrative settlement agreement such as a consent agreement and final order ("CAFO") or expedited settlement agreement ("ESA")[5] before an administrative complaint is filed pursuant to 40 C.F.R. Part 22. In these agreements, the violator typically agrees to pay a penalty and to undertake specific remedial actions. If the violator complies with the terms of the agreement, the EPA agrees to treat the case as resolved and to forego further enforcement. An administrative settlement agreement also specifies that if the violator does not comply with the terms of the agreement, the EPA reserves the right to seek additional enforcement based on the violation or to enforce the terms of the agreement.

Section 205(a) of the Act, 42 U.S.C. § 7524(a) sets forth the maximum penalty amounts for violations arising under Title II of the Act. These maximum penalty amounts are increased

[4] Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the "2015 Act"), EPA and other federal agencies are required to adjust their maximum and minimum statutory civil penalty amounts by January 15 each year to account for inflation. *See* Civil Monetary Penalty Inflation Adjustment Rule, 85 Fed. Reg. 1751 (Jan. 13, 2020). The purpose of the 2015 Act is to maintain the deterrent effect of civil penalties by translating originally enacted statutory civil penalty amounts to today's dollars and rounding statutory civil penalties to the nearest dollar.

[5] Certain cases may qualify for expedited resolution and an alternative penalty calculation approach, which generally results in a reduced penalty amount compared to amounts calculated using this Penalty Policy. *See Expedited Settlement Agreement Pilot for Clean Air Act Vehicle and Engine Violations - Tampering/Defeat Devices* (Jun. 21, 2019); *Expedited Settlement Agreement National Program for Clean Air Act Vehicle and Engine Violations - Imports* (Jun. 21, 2019).

annually for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461 note. Consult 40 C.F.R. § 19.4 for current maximum penalty amounts.

Subsections (b) and (c)(2) of Section 205 of the Act, 42 U.S.C. § 7524(b), (c)(2), provide the factors that should be taken into account when determining the amount of any civil penalty under Title II of the Act:

> In determining the amount of any civil penalty to be assessed under this subsection, the court [or the EPA] shall take into account the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with [Title II of the Act], action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require.

42 U.S.C. § 7524(b), (c)(2).

The Policy on Civil Penalties and Penalty Assessment Framework establish a framework to ensure that the statutory penalty factors are taken into account and to guide their implementation. In brief, the Penalty Assessment Framework divides civil penalties into two fundamental components: the economic benefit penalty component and the gravity penalty component. The economic benefit component accounts for the economic benefit or savings resulting from the violation. The gravity penalty component accounts for the gravity of the violation, action taken to remedy the violation, the size of the violator's business, the violator's history of compliance, and other matters such as the violator's degree culpability and cooperation.

When added together, the "economic benefit penalty component" and the "gravity penalty component" result in the "preliminary deterrence amount." The "preliminary deterrence amount" may be adjusted based on consideration of the effect of a penalty on the violator's ability to continue in business (i.e., the violator's ability to pay), and of other unique factors. The Policy on Civil Penalties and Penalty Assessment Framework describe the adjusted "preliminary deterrence amount" as the "initial penalty target figure." The initial penalty target figure is "essentially an internal settlement goal" in a civil action, and in an administrative action "generally is the penalty assessed in the complaint." Penalty Assessment Framework at 2. The "initial penalty target figure" may be subject to further adjustment after negotiations commence as additional relevant information becomes available, known information or evidence is re-evaluated, or violations continue unabated.

This Penalty Policy adheres to the Policy on Civil Penalties and Penalty Assessment Framework. This Policy first describes how to calculate the economic benefit penalty component and the gravity penalty component for each violation. When combined, the economic benefit penalty component and the gravity component calculated under this Policy yield the preliminary penalty. The Policy then discusses adjustment factors that are applied to the preliminary penalty to obtain the initial penalty target figure.

III. The Economic Benefit Penalty Component

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment, and provides that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance. That portion of the penalty which recovers the economic benefit of noncompliance is referred to as the "economic benefit component."

A. Forms of Economic Benefit

The term "economic benefit" is not statutorily defined, but is understood to mean the extent to which a violator is financially better off because of its noncompliance.[6] The EPA has recognized that economic benefit may accrue in three basic ways. A violator may: (1) delay costs necessary to achieve compliance; (2) avoid costs necessary to achieve compliance; or (3) obtain benefits other than those derived from delayed or avoided compliance costs. This third form of economic benefit is a catch-all category that may be referred to as "illegal competitive advantage," "competitive advantage," "illegal profits," "wrongful profits," or, collectively, "beyond BEN benefits" (or "BBBs"). Profit from the sale of illegal products is an example of a BBB.

B. Calculating Economic Benefit

Calculating a violator's economic benefit typically requires comparison between two scenarios: a reasonable and defensible hypothetical compliance scenario, and the actual noncompliance scenario. In cases where it is reasonable to assume that the violator's sales and revenue would be identical under the compliance scenario and noncompliance scenario, it may be appropriate to use EPA's economic benefit ("BEN") methodology and computer model[7] to calculate the economic benefit. BEN is typically the appropriate calculation for determining the economic

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[6] Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 70 Fed. Reg. 50326, 50327 (Aug. 26, 2005).

[7] The BEN model was developed for use in settlement. At trial or in an administrative hearing, the Agency typically relies on an expert to provide an independent analysis. The EPA has four models for evaluating civil penalties during settlement negotiations:

- BEN - Calculates a violator's economic benefit from delayed or avoided costs;
- ABEL - Evaluates a corporation's or partnership's ability to afford penalties and compliance costs;
- INDIPAY - Evaluates an individual's ability to afford penalties and compliance costs; and
- MUNIPAY - Evaluates a municipality's ability to afford penalties and compliance costs.

Information about these models is available at: https://www.epa.gov/enforcement/penalty-and-financial-models.

benefit from delayed and avoided compliance costs.[8] However, the BEN methodology is not designed to calculate the economic benefit from BBBs. BEN relies on the assumption that a violator's revenues would be identical regardless of whether it complied with the law or not. Under this assumption, "the violator's revenues from the compliant and noncompliant states simply cancel each other out, allowing BEN to measure economic benefit through a calculation involving only the costs that would have differed had the violator been in compliance."[9] Beyond BEN provides the appropriate approach in cases where this assumption is not valid.

EPA has not developed a model for calculating BBBs, and therefore they must be calculated on a case-by-case basis. In cases with BBBs, the litigation team should develop and use a case-specific method of calculating the economic benefit component, which should be described and supported in the case documents. For example, in developing a case-specific method, the litigation team could contact the Penalty and Financial Models Help Line at (888) 326-6778, or obtain expert support to develop the appropriate model for the calculation.

C. Economic Benefit in Vehicle & Engine Cases

All three forms of economic benefit may be present in vehicle and engine cases, though avoided costs and BBBs are most common.

Delayed costs are expenditures that have been deferred by the violator's failure to comply in a timely manner. Avoided costs are expenditures completely averted by the violator's failure to comply.

BBBs include all benefits other than those obtained from delayed or avoided compliance costs. In vehicle and engine cases, BBBs frequently take the form of profit from sales that would not have occurred in a reasonable and defensible hypothetical compliance scenario. Examples include, but are not limited to cases: involving vehicles or engines that could not reasonably be made compliant; vehicles or engines that offer features or performance not possible with compliant vehicles or engines; where the manufacturer likely would not obtain a certificate of conformity covering the vehicles or engines for any reason; or where the manufacturer is able to produce or sell in volumes not reasonably achievable under compliance, such as through stockpiling. Examples also include cases involving the sale of services that constitute illegal tampering, or aftermarket parts or components that are illegal defeat devices. In such cases, the

[8] The normal avoided costs BEN addresses are costs that occur annually such as electricity, labor, materials, and insurance premiums. However, most avoided costs in the vehicle and engine program fall into the category of one-time, non-depreciable expenditures that are avoided, not delayed, which requires a specific setting in the BEN model. After entering the required information on the run inputs screen, select [Options], and then uncheck the "Delayed, Not Avoided" box.

[9] Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 70 Fed. Reg. 50326, 50331 (Aug. 26, 2005).

profit from the illegal or noncompliant sales would be the appropriate measure of economic benefit.[10]

In all cases, the EPA reserves the right to use any measure of economic benefit that is appropriate to the situation.

D. Reasonable Approximation of Economic Benefit

Eliminating the benefit of noncompliance is an essential element of deterrence. The economic benefit does not need to be established with precision; a reasonable approximation of the benefit may suffice.[11] In its enforcement of Title II of the Act, the EPA has developed a substantial amount of experience in calculating the economic benefit that results from certain types of violations. This experience indicates that it is possible to calculate a reasonable approximation of the economic benefit through the use of simple formulas and assumptions when more precise information is not available to the Agency or a case-specific analysis of economic benefit is unduly burdensome.

1. *Approximation of Avoided Costs for Certification Violations*

Engines regulated under Title II of the Act range in size from very small (e.g., a one horsepower string trimmer) to very large (e.g., marine diesel engines can be 100,000 horsepower or larger). When the EPA establishes new emissions standards, it often calculates the anticipated cost of meeting the new standards on a per-engine basis. These calculations show that the cost increment to manufacture a certified engine versus an engine that does not conform to emissions standards is roughly proportional to the engine's size. This is true regardless of the engine type (gasoline or diesel). For purposes of this Policy, a reasonable, conservative approximation of the avoided cost associated with violations of the certification provisions under Section 203(a)(1) of the Act, 42 U.S.C. § 7522(a)(1) may be calculated as $1 per unit of horsepower. This figure may be used in conjunction with the BEN model to calculate the economic benefit from certification violations where avoided cost is the appropriate measure of benefit.

In the alternative, litigation teams have discretion to calculate the approximate avoided cost using the cost of compliance presented in the regulatory analysis for current emissions standards applicable to the violative vehicle or engine, adjusted for inflation. A copy of the regulatory analysis and an explanation of how it was used to calculate the approximate economic benefit should be placed in the case file.

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[10] The EPA reserves the right to treat the gross proceeds or gross profits as the measure of economic benefit in appropriate cases, or any other appropriate measure.

[11] *See* United States v. Muni. Auth. of Union Twp., 150 F.3d 259, 264 (3d. Cir. 1998) (discussing penalties under the Clean Water Act); In re: B.J. Carney Indus., Inc., 7 E.A.D. 171 (EAB 1997) ("It is sufficient that the complainant establish a 'reasonable approximation' of the benefit.").

2. *Approximation of Benefit for Aftermarket Defeat Device Violations*

For violations of Section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), the economic benefit is often based on profits from the sale of unlawful parts or components. A reasonable approximation of the economic benefit may be calculated as a percentage of the part's or component's sale price. Experience has shown that manufacturers of violative parts and components typically obtain a significantly larger profit on sales than do entities who only distribute the parts and components or sell them at retail. Therefore, the approximate economic benefit for violations of Section 203(a)(3)(B), 42 U.S.C. § 7522(a)(3)(B), may be calculated as 20 percent of the part or component's sale price where the part or component was manufactured by the violator, and as 4 percent of the violative part or component's sale price in other cases. The calculation may be based on suggested or advertised sale prices if the actual sale price is not available.

3. *Approximation of Benefit for Labeling Violations*

For violations of Section 203(a)(4)(A), 42 U.S.C. § 7522(a)(4)(A), where the violation at issue is a missing or defective emissions control label, the approximate economic benefit is $5 per label. The case team should adjust this amount based on the latest gravity-based multiplier for this penalty policy found in the memorandum that OECA issues every other year globally amending penalty policies to account for inflation.[12]

4. *Situations Where Approximation Methods in this Policy are Inappropriate*

Pursuing a reasonable approximation of the economic benefit ensures that a portion of the economic incentive of noncompliance is removed. The approximation methods provided in this Policy generally should not be used in any of the following circumstances:

- Case-specific information sufficient to calculate actual economic benefit has been provided by the violator or is otherwise available; or

- The litigation team identifies economic benefit factors that are unique to the case and would cause the approximation methods provided in this Policy to produce a substantially inaccurate estimate. In such cases, the litigation team may consider other methods of determining a reasonable approximation of economic benefit.

IV. The Gravity Penalty Component

The Policy on Civil Penalties specifies that for a penalty to achieve deterrence it should, in addition to recovering any economic benefit of noncompliance, recover an additional amount to

[12] *See, e.g.*, *Memorandum from the Assistant Administrator for Enforcement and Compliance Assurance, Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2020) and Transmittal of the 2020 Civil Monetary Penalty Inflation Adjustment Rule* (Jan. 15, 2020) (*available at* https://www.epa.gov/sites/production/files/2020-01/documents/2020penaltyinflationruleadjustments.pdf).

reflect the seriousness of the violation. This additional amount is the "gravity component" of the penalty. This section of the Penalty Policy establishes a method that quantifies the gravity component of the penalty.

A. Gravity Factors

This Policy uses objective factors to calculate the gravity component of a penalty. The factors reflect concerns described in the Policy on Civil Penalties and Penalty Assessment Framework that are common to all violations to which this Policy applies, though application of the factors varies depending on the type of violation at issue. These factors are the potential harm the violation poses; the likelihood of harm or extent of harm that occurred; the effectiveness of efforts to correct the violation; the size of the violator; the violator's culpability; the violator's degree of cooperation; and the violator's compliance history. The penalty calculation methods set forth in this Policy reflect consideration of these concerns and provide a consistent way to measure the seriousness of like violations.

1. *Harm*

Title II of the Act controls pollution from vehicles and engines by directing the EPA to establish emissions standards, and requiring manufacturers to obtain from the EPA certificates confirming that their vehicles and engines conform to such standards. The certification program is based on design review and prototype testing. If, based on a review of the vehicle or engine design and testing conducted on a prototype, the EPA determines that vehicles or engines built to that design will conform to emissions standards, then the EPA will issue a certificate covering the design for one model year. Emissions standards tend to become more strict over time as technology improves, leading to cleaner air.

The Act and its implementing regulations contain provisions to implement this regulatory scheme and maintain a level playing field for the regulated community. New vehicles and engines must go through the certification process, be built to their certified design, and be labeled both to facilitate proper maintenance and to enable any person to identify whether they are certified and legal for sale. After being placed in service, vehicles and engines must remain in their certified design, and manufacturers must warrant against emissions defects during the useful life of the vehicle. At all times persons subject to the Act must provide complete, accurate, and timely information to the EPA when required. Violations of the Act undercut Title II's comprehensive program for emissions control and reduction, increasing the risk to human health and the environment. Harm is thus inherent in each violation, though the precise nature and degree of harm may vary depending on the circumstances of the case. Proof that a violation resulted in actual harm to human health or the environment is not necessary; it is sufficient to demonstrate the potential for harm.

2. *Egregiousness*

Under this Penalty Policy, the egregiousness of a violation refers to the likelihood that the violation will result in harm to the regulatory scheme, harm to human health and the environment in the form of excess emissions,[13] or both.

The most egregious violations are those where the EPA's ability to administer the regulatory program is significantly impaired, excess emissions are likely to occur, or where there is no reliable information about vehicle or engine emissions. Less egregious violations are those where the EPA's ability to administer the regulatory program is impaired, or where excess emissions are not likely to occur. The least egregious violations are found in the unusual case where the EPA's ability to administer the regulatory program is not impaired and there is little or no risk of excess emissions. Appendices A through D provide further information regarding this factor.

The litigation team should use all available information to determine the egregiousness of a violation. The characterization of any particular violation can be changed during the course of settlement discussions or litigation based on new information.

3. *Remedial Action*

In general, penalties should be smaller for violations that have been remediated. This Policy provides litigation teams with discretion to reduce the gravity penalty component for remedial action taken before a final settlement of the case is negotiated, or if the remedial actions are a requirement of a settlement agreement. Remedial action is one of the Act's enumerated penalty factors. 42 U.S.C. § 7524(c)(2).

4. *Volume Scaling*

The mass-production of vehicles, engines, and parts allows violations under Title II of the Act to be easily replicated. As a consequence, violations for which penalties are calculated under this Penalty Policy can involve a very large range in terms of number of violations, types of violations, and engine sizes at issue. The penalty calculation methods set forth in this Policy may utilize a scaling equation to maintain proportion between cases of different size. This scaling results in gravity penalty components that are appropriate for a large range of cases.

5. *Business Size*

The Policy on Civil Penalties sets deterrence as a goal of penalty assessment. The size of the violator's business is relevant to determining whether the penalty will have a sufficient deterrent effect. The amount of the gravity penalty component calculated under this Penalty Policy is intended to be sufficiently large to create an appropriate deterrent for violations committed by a range of companies. For larger companies, however, a larger penalty is necessary to create an

[13] Excess emissions refer to emissions in excess of certified levels (such as family emission limits) or, where no certification applies, applicable standards.

appropriate deterrent. The size of the violator's business is one of the Act's enumerated penalty factors. 42 U.S.C. § 7524(c)(2).

6. *Culpability*

The requirements of many provisions of Title II of the Act and the implementing regulations impose strict civil liability, but this does not render the violator's culpability irrelevant. The violator's degree of culpability should be reflected in the gravity-based portion of the penalty.[14]

7. *Degree of Cooperation*

The degree of cooperation or noncooperation of the violator in resolving the violation is an appropriate factor to consider in adjusting the gravity-based portion of the penalty. Such adjustments are based on both the goals of equitable treatment and swift resolution of environmental problems. Relevant considerations include whether a violator has self-reported violations, taken voluntary action to promptly correct violations, come into compliance without delay, and been forthcoming with investigators.

8. *History of Noncompliance*

Where a person has violated a similar environmental requirement before, this is usually clear evidence that the person was not deterred by the Agency's previous enforcement response. Unless the current violation was caused by factors entirely outside of the violator's control, this is an indication that the gravity-based portion of the penalty should be adjusted upward. The violator's history of compliance with Title II is one of the Act's enumerated penalty factors. 42 U.S.C. § 7524(c)(2).

B. Calculating the Gravity Penalty Component

This Penalty Policy uses the factors described above to calculate the gravity penalty component in the following manner:

- Step 1: Calculate the initial gravity penalty amount by using the violation-specific method set forth in the appropriate Appendix.
- Step 2: Modify the amount calculated in Step 1 to account for remedial action, inflation, and the size of the violator.
- Step 3: Adjust the amount calculated in Step 2 for the violator's degree of culpability, degree of cooperation, and history of noncompliance.

[14] Knowing or willful violations may also give rise to criminal liability. *See* 18 U.S.C. § 1001 (fraud and false statements); 42 U.S.C. § 7413(c)(2) (criminal liability under the Clean Air Act).

1. *Step 1: Harm, Egregiousness, & Scaling*

The initial gravity penalty amount reflects a violation's harm and egregiousness, and the impact of scaling factors where appropriate. The amount is calculated using the method provided in the appropriate Appendix to this Penalty Policy:

- Certification Violations — Appendix A
  Section 203(a)(l) of the Act, 42 U.S.C. § 7522(a)(1)
- Inspection, Testing, Records, Reports, & Information Violations — Appendix B
  Section 203(a)(2) of the Act, 42 U.S.C. § 7522(a)(2)
- Tampering & Defeat Device Violations — Appendix C
  Section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3)
- Labeling, Recall, & Warranty Violations — Appendix D
  Section 203(a)(4) of the Act, 42 U.S.C. § 7522(a)(4)

Each Appendix includes a worksheet to assist the calculation.

2. *Step 2: Remedial Action, Inflation, & Business Size*

The initial gravity penalty amount calculated in Step 1 may be reduced to reflect the benefit of appropriate remedial action taken by a violator. The amount should also be increased to reflect inflation, and increased to ensure that it has a deterrent effect against large violators.

a. Remedial Action

This Penalty Policy is intended to provide incentives for violators to remedy violations. Remedial actions may be considered when calculating the gravity component if they are completed before a final settlement of the case is negotiated, or if the remedial actions are a requirement of a settlement agreement. In cases where violations have been appropriately remediated, the amount of the gravity penalty calculated in Step 1 may be reduced as part of a settlement. This adjustment requires the litigation team to specify the number of violations that are the subject of remedial action, and the percentage by which the penalty decreases for those violations. The litigation team may apply up to a 30 percent decrease for prompt, voluntary, and comprehensive remedial action.[15] Percentages between zero and 30 percent are appropriate where some but not complete remedial actions are taken or where the remedial action was delayed.

[15] Remedial action must target the actual vehicles, engines, or other products that are the subject of the violation(s). Remedial action is distinct from mitigation or other environmentally beneficial action.

To make this adjustment, calculate the average gravity penalty amount for each violation calculated in Step 1. Multiply the average per-violation gravity penalty by the number of violations remediated, times the percentage decrease assigned by the litigation team, and round the result to the nearest dollar.

> Remediation Discount = (Step 1 Gravity Penalty ÷ # Violations) * (# Violations Remediated) * (% Decrease)

The result of this calculation should be subtracted from the gravity penalty calculated in Step 1. This adjustment should be made before increasing the gravity penalty for business size.

For example, consider a violation involving five 125-horsepower forklifts, with a Step 1 gravity penalty amount of $54,360. The average per-violation gravity penalty is $10,872, or $54,360 ÷ 5, rounded to the nearest dollar. Assume that two of the violations were remediated, and that three were not remediated. Assume further that the litigation team assigned a decrease of 20 percent. The remediation discount would be $10,872 * 2 * 0.2 = $4,348.8, rounded to $4,349.

The gravity penalty amount modified for remediation would be: $54,360 - $4,349= $50,011.

b. Inflation

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015[16] was signed into law on November 2, 2015, to improve the effectiveness of statutory penalties and to maintain their deterrent effect, thereby promoting compliance with the law. The EPA's Office of Enforcement and Compliance Assurance ("OECA") periodically issues memoranda to amend its penalty policies to account for inflation. The litigation team should determine whether OECA has issued a memorandum amending this Penalty Policy to account for inflation, and if it has, follow that memorandum's guidance to increase the gravity penalty amount calculated in Step 1 for inflation before applying any increase for business size.

c. Business Size

The gravity penalty amount calculated in Step 1 should be increased to account for the size of the violator. The increase for the violator's business size should typically be based on the violator's annual revenue, in whatever form received or accrued from whatever source, and may generally be considered "gross profit" plus "cost of goods sold," "total income," or "gross receipts."

Where a violator's annual revenue for the most recently completed year is $30 million[17] or more, the gravity penalty calculated in Step 1 should be increased by an amount equal to 0.15 percent

[16] 28 U.S.C. § 2461 note, Pub. L. 114-74.

[17] When calculating the increase for business size, the litigation team should determine whether OECA has issued a memorandum amending this Penalty Policy to account for inflation, and if it has, increase the $30 million threshold using the inflation factor provided for this Policy.

of the violator's annual revenue, rounded to the nearest dollar. Where the business size component represents over 50 percent of the gravity penalty amount calculated in Step 1, the litigation team has discretion to reduce the business size component if doing so will still achieve the penalty's deterrent effect.

The size of the violator's business should be assessed using the best information available regarding the prior year at the time the penalty is calculated. Where available, corporate filings with the U.S. Securities and Exchange Commission or audited financial documentation provided by the violator may be sources of reliable information. Where such sources are not available, the litigation team has discretion to calculate size on the basis of estimated annual revenue, sales, or comparable information obtained from publicly available sources. There also may be instances where business size is more appropriately determined on some other basis (e.g., gross profits, number of employees, etc.). The litigation team also has discretion to forego increasing the gravity in the absence of reliable information. The litigation team may reevaluate a violator's business size if it obtains relevant information after calculating the penalty.

In the case of a company with more than one facility or location, the size of the violator's business is determined based on the company's entire operation, and not solely the size of the facility or location at which the violation occurred. With regard to parent and subsidiary operations, or affiliated corporations, only the violative entity should be considered, unless the litigation team determines that the parent company, or common owner, was involved with or directly oversaw the activities that gave rise to the violation, or the violation occurs in connection with a regulatory program that treats the entities as a group.

For example, assume the violator responsible for the forklifts in the previous example had annual receipts totaling $34.9 million in the year preceding the penalty calculation. The gravity penalty calculated in Step 1, adjusted for remediation, is $50,011. The gravity penalty would be increased for the size of the violator's business by 0.15 percent of $34.9 million, calculated as: $34,900,000 * 0.0015 = $52,350, raising the gravity penalty amount to $102,361.[18]

3. *Step 3: Culpability, Cooperation, & History of Noncompliance*

Additional adjustment factors may be applied to the gravity penalty amount calculated in Step 2 to promote flexibility and consistency in the gravity penalty component. These factors are: the violator's culpability; degree of cooperation or noncooperation; and history of noncompliance. Adjustments are calculated as a percentage of the gravity penalty amount calculated in Step 2. The application of these adjustments to the amount calculated in Step 2 yields the gravity penalty component. Appendix E provides a worksheet to assist with the calculation of the gravity penalty component.

This Penalty Policy specifies the range of percentages by which the gravity penalty amount calculated in Step 2 may be adjusted for each factor. The litigation team has discretion to select

[18] Because the increase for business size is greater than 50 percent of the Step 1 gravity penalty amount, the litigation team would have the discretion to reduce the business size component.

the adjustment percentage for each factor within a specified range, based on facts unique to each case. Greater adjustments or adjustments for other unique gravity factors are possible with the approval of the Air Enforcement Division Director.[19] Where a violator proposes mitigating adjustments based on these factors, the violator bears the burden of justifying each proposed adjustment.

a. Culpability

Though the requirements of Title II and the implementing regulations impose strict liability, the violator's degree of culpability should be reflected in the gravity-based portion of the penalty.

Violations can occur through no fault of the violator, or as a result of conduct that is negligent, reckless, knowing, or willful. The gravity penalty calculated in Steps 1 and 2 presumes that violations resulted through no fault of the violator or as a result of ordinary negligence.

In assessing the degree of culpability, the litigation team should consider the following points in most cases:

- How much control the violator had over the events constituting the violation;
- The foreseeability of the events constituting the violation;
- Whether the violator took reasonable precautions against the events constituting the violation;
- Whether the violator knew or should have known of the hazards associated with the conduct;
- The level of sophistication within the industry in dealing with compliance issues; and
- Whether the violator in fact knew of the legal requirement that was violated.

It should be noted that this last factor, lack of knowledge of the legal requirement, may never be used as a basis to reduce the gravity-based portion of the penalty. To do so would encourage ignorance of the law.

The litigation team has discretion to increase the gravity amount by up to 20 percent of the amount calculated in Step 2 to reflect the violator's culpability.

[19] Additional consultation or concurrence requirements may apply in civil judicial enforcement actions referred to the United States Department of Justice. The litigation team should refer to the appropriate delegations of authority for more information.

b. Cooperation

The gravity penalty component should reflect the degree of cooperation or noncooperation of the violator in resolving the violation. Such adjustments are based on both the goals of equitable treatment and swift resolution of environmental problems.

Actions or behavior bearing upon a violator's degree of cooperation include whether the violator self-reported its noncompliance to the EPA, cooperated with the EPA's requests, and was forthcoming with information required by the EPA to assess compliance and resolve the case without litigation.

A violator may demonstrate noncooperation by, among other things, delaying compliance or remedial action. Other actions demonstrating noncooperation include attempting to avoid detection, attempting to interfere with the EPA's investigation, withholding information, or other actions demonstrating bad faith.

There may be other indicia or facts indicating a violator's degree of cooperation or noncooperation. Note that the benefit of voluntary actions taken to correct a violation are addressed in Step 2 and should not be duplicated or enlarged under this adjustment factor.

Under this Penalty Policy, the litigation team has discretion to increase the gravity amount by up to 20 percent of the amount calculated in Step 2 for noncooperation. In cases resolved through settlement before a complaint is filed, the litigation team has discretion to decrease the gravity amount by up to 20 percent of the amount calculated in Step 2 for cooperation. After a complaint is filed, the litigation team has discretion to decrease the gravity amount by up to 10 percent of the amount calculated in Step 2 for actions demonstrating cooperation.

c. History of Noncompliance

The gravity penalty component should be increased where a violator has a history of violating similar environmental requirements. For purposes of this Penalty Policy, a prior violation includes any act or omission for which an enforcement response has occurred and resulted in a settlement agreement, consent agreement, consent decree, final order, or judgment establishing liability.

A violation generally should be considered "similar" if the Agency's previous enforcement response should have alerted the violator to a particular type of compliance problem. In the case of violations involving uncertified vehicles or engines, a "similar" violation is one that involves any violation of the vehicle and engine requirements under Title II or the regulations implementing those requirements.

Under this Policy, the EPA will presume that a violation committed by one corporation or other business entity applies as a prior violation against another corporation or other business entity where the two corporations or business entities are effectively owned or controlled by the same person or persons. The EPA will also presume that a violation committed by one corporation or other business entity applies as a prior violation against the corporation or business entity's

owner or responsible corporate officers. The violator may rebut this presumption by demonstrating that the prior violation would not have alerted the violator to the compliance problem.

In the case of a large corporation with many divisions or wholly owned subsidiaries, it is sometimes unclear whether a previous instance of noncompliance should trigger the adjustment for previous violations. In general, the litigation team should begin with the assumption that if the same parent corporation controlled both the corporate organization with the prior violation and the organization with the current violation, the adjustment for history of noncompliance should apply, unless the violator can demonstrate there was no corporate control or oversight linkage between the two organizations.

In deciding how large an adjustment for this factor should be, the litigation team should consider the following points:

- How similar the previous violation was (more similar prior violations should result in a larger penalty increase);

- How recent the previous violation was (more recent prior violations should result in a larger penalty increase);

- The number of previous violations (more prior violations should result in a larger penalty increase); and

- The violator's efforts to remedy previous violations(s) (prior violations that were not corrected should result in a larger penalty increase).

Under this Penalty Policy, the litigation team has discretion to increase the gravity amount up to 35 percent of the amount calculated in Step 2 for one prior violation, and up to 70 percent for more than one prior violation.

V. The Preliminary Penalty & The Initial Penalty Target Figure

The combined economic benefit penalty component and gravity penalty component yield the preliminary penalty amount. Because the preliminary penalty includes the economic benefit amount, which is a factual matter, the preliminary penalty may only be downwardly adjusted for four reasons: if the preliminary penalty exceeds the maximum penalty allowed by the Act; if the violator demonstrates an inability to pay the full penalty amount; to reflect litigation risk; or other unique equities. Application of these adjustments to the preliminary penalty yields the initial penalty target figure.

A. Statutory Maximum

If the preliminary penalty calculated under this Policy exceeds the maximum penalty allowed by the Act, then it is appropriate to reduce the penalty to the statutory maximum penalty allowable under the Act.

B. Ability to Pay

In administrative enforcement actions for violations under Title II of the Act, the EPA must demonstrate that it adequately considered the effect of a penalty on the violator's ability to continue in business when determining the appropriate penalty.[20] As described in the Penalty Assessment Framework, and expanded upon in the 1986 *Guidance on Determining a Violator's Ability to Pay a Civil Penalty* (Dec. 16, 1986) and 2015 *Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action* (Jun. 29, 2015), the Agency will generally not request penalties that are clearly beyond the means of the violator unless the violations are egregious or the violator refuses to provide requested financial information on a timely basis. Therefore, under this Policy, the violator's ability to pay a penalty will be considered in arriving at a specific final penalty amount.

To meet this burden, the EPA must "produce some evidence regarding the [violator's] *general* financial status from which it can be *inferred* that the [violator's] ability to pay should not affect the penalty amount."[21] The litigation team should therefore obtain enough information to demonstrate the violator's ability to pay was adequately considered when the penalty was calculated. This information can be obtained from the violator, or from publicly available sources such as financial reports or market analyses. If a violator refuses to provide financial information in response to an EPA request, the litigation team may in an ensuing administrative proceeding request the judge infer that the violator has the ability to pay the penalty.[22]

It is important that the regulated community not see a discount based on inability to pay as the EPA sanctioning the efforts of a financially troubled company to gain an unfair competitive advantage by violating the vehicle and engine requirements.[23] Therefore, the EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company in severe financial distress.[24] For example, it normally would not be appropriate to reduce a penalty for a company with multiple previous violations. That history would demonstrate that less severe

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[20] 42 U.S.C. § 7524(c)(2); *see* In re: New Waterbury, 5 E.A.D. 529 (1994).

[21] In re: New Waterbury, 5 E.A.D. at 541 (emphasis in original).

[22] *See* 40 C.F.R. § 22.19(g)(1) (presiding officer may infer information is adverse to the withholding party).

[23] *See A Framework for Statute-Specific Approaches to Penalty Assessments* (EPA General Enforcement Policy #GM-22, Feb. 16, 1984), at 23.

[24] *Id.*

measures are ineffective. Similarly, a reduced penalty would not be appropriate if a company's business is viable only if the company is able to continue violating the law.

After the EPA has met its initial burden of demonstrating that it considered the effect of the proposed penalty on the violator's ability to continue in business, where a violator asserts that a penalty should be reduced due to its financial condition, the burden to demonstrate inability to pay rests with the violator, as does the burden of demonstrating the presence of any other mitigating circumstances. If the violator fails to provide information sufficient to allow the EPA to assess the violator's financial condition, then the litigation team should disregard this factor in adjusting the penalty in negotiation.

The litigation team may reevaluate a violator's ability to pay if it obtains relevant information after calculating the penalty.

When it is determined that a violator cannot afford the penalty prescribed by this Penalty Policy, and that a reduction for this factor is appropriate, the following options should be considered:

- Delayed payment schedule: A violator may not have the financial resources necessary to pay the full penalty amount as a one-time payment, but would be able to pay this amount over a period of months or years, in accordance with Section V of the 2015 *Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action* (Jun. 29, 2015). However, administration of time-payments is a burden on the Agency, so this option should be considered only if the Agency is convinced it is not possible for the violator to obtain the funds necessary to pay the full penalty through borrowing money or the sale of assets. If time-payments are used, the violator should pay the largest possible amount of the penalty at the time the case is resolved to reduce the amount of the delayed payments, and the duration of the time-payments should be no longer than is necessary. In any case where time-payments are used, the amount of any delayed payments should be increased to include interest on the delayed payments.

- Straight penalty reductions as a last resort: If this approach is necessary, the reasons for the litigation team's conclusions as to the size of the necessary reduction should be made a part of the case file.

C. Litigation Risk or Other Unique Factors

A case may present litigation risk or other unique factors that the litigation team believes justify adjustments to the preliminary penalty amount. For example, as described in the Penalty Assessment Framework, there may be cases where the Agency cannot realistically obtain a penalty in litigation that would remove the economic benefit due to: applicable precedent; competing public interest considerations; or case-specific facts, equities, or evidentiary issues. Penalty Assessment Framework at 13. For example, a case might present a substantial risk of creating precedent that will have a significant adverse effect on the Agency's ability to enforce the law. There may be other circumstances in which the facts of a particular case warrant

consideration of factors not specifically identified or discussed in this Penalty Policy, or of the listed factors in a manner different than described in this Policy.

The litigation team has discretion to reduce the preliminary penalty by up to 10 percent to reflect litigation risk or other unique factors not reflected in other areas of this Penalty Policy. Greater adjustments are possible with the approval of the Air Enforcement Division Director.[25]

VI. Adjustments to the Initial Penalty Target Figure after Negotiations Have Begun

During the course of settlement negotiations or litigation, the litigation team may discover additional information that will cause the litigation team to further evaluate the initial penalty target figure for the case. The penalty should be recalculated to reflect newly discovered information when appropriate.

[25] Additional consultation or concurrence requirements may apply in civil judicial enforcement actions referred to the United States Department of Justice. The litigation team should refer to the appropriate delegations of authority for more information.

APPENDIX A

Certification Violations

Step 1 Gravity Calculation for
Violations of § 203(a)(1), 42 U.S.C. § 7522(a)(1)

Typically, an engine's or vehicle's potential to cause harm is proportional to the engine's size. In addition, the size of engines that are the focus of enforcement actions normally is known from commercial documents or importation records. As a result, the gravity penalty amount under this Penalty Policy for violations involving uncertified vehicles and engines is calculated on the basis of engine size.

A. Calculate the Penalty for Each Violation

First calculate the penalty for each violation based on the engine size, in horsepower. In the case of automobiles and light-duty trucks, gravity may be calculated based upon an engine size of 250 horsepower. If the engine size is expressed in kilowatts ("kW"), convert kilowatts to horsepower ("HP") using a conversion factor of 1 kW = 1.341 HP. If an engine family[26] has more than one size engine, use the average engine size within the family.

To calculate the penalty, use the following equation and round the result to the nearest dollar:

$$\text{Penalty} = 300 * HP^{0.6}$$

For example, consider a company that imported forklifts powered by uncertified 125 horsepower engines that were missing the catalytic converter. The gravity penalty for one of these engines would be: $300 * 125^{0.6} = \$5,436$.

B. Adjust the Penalty to Reflect Egregiousness

Determine the violations' egregiousness tier and adjust the penalty using the appropriate multiplier in Table A1.

Tier 1 is limited to unusual cases where the EPA's ability to administer the regulatory program is not impaired, and there are no excess emissions. For example, a company may have obtained an emissions certificate from the EPA for a particular engine family, but these engines were produced and sold prior to the effective date of the certificate. The engines might not be covered

[26] As used in this Penalty Policy, the term "engine family" refers to any unit EPA uses to identify a group of vehicles or engines for certification and compliance purposes, including engine families, test groups, vehicle families, evaporative emission families, and durability groups.

by the certificate, but the company may be able to show the subject engines are identical to engines covered by the certificate.[27]

Tier 2 applies to violations where the EPA's ability to administer the regulatory program is impaired, or where excess emissions are not likely to occur. For example, a company may manufacture vehicles with emission-related parts different from those described in an application for certification. The vehicles would not be covered by the certificate of conformity, but there may be evidence that the vehicles' emissions are materially identical to those of vehicles covered by the certificate.

The most egregious category of violations, Tier 3, applies to violations where excess emissions are likely to occur, or where vehicles or engines are uncertified and there is no reliable information about the emissions from the vehicles or engines. Engines with missing or defective emission-related parts would be expected to have emissions that are greater than those on which proper parts had been installed.

Violations are presumed to be Tier 3 violations unless available information shows that a lesser egregiousness category is appropriate.

Table A1 Adjustments to Reflect Egregiousness	
Egregiousness Tier	Adjustment Multiplier
Tier 1	0.5
Tier 2	1.0
Tier 3	2.0

To use Table A1, multiply the penalty calculated using engine size by the appropriate adjustment multiplier from Table A1.

In the previous example, the per-violation gravity penalty for each uncertified forklift was calculated to be $5,436. A missing catalytic converter would be expected to result in excess emissions. As a result, the egregiousness of these violations would be classified as Tier 3. The gravity penalty for each violation adjusted to reflect Tier 3 egregiousness would be: $5,436 * 2 = $10,872.

C. Calculate the Penalty for Multiple Violations

Where a case features multiple violations of Section 203(a)(1), the litigation team should group the violations based on the penalty calculated using Table A1. The penalty calculated using Table A1 should be the same for all the violations in a group. Where there are 50 or fewer violations in a group, the total penalty for those violations is calculated by multiplying the

[27] Producing vehicles or engines after the end of a model year would give rise to more egregious violations, particularly in years when new or changed emission standards are scheduled to take effect.

number of violations in the group by the applicable penalty calculated using Table A1. This is expressed in the following linear equation, where the number of violations in the group is represented as "# Violations" and the penalty calculated using Table A1 is represented as "P_1":

$$\text{Group Penalty} = \text{\# Violations} * P_1$$

Where the number of violations in a group exceeds 50, the litigation team may calculate the group penalty using the linear equation, or the litigation team has discretion to calculate the penalty for violations in the group using a scaling equation that incrementally reduces the per-violation penalty starting with the 51st violation. The result should be rounded to the nearest dollar. The scaling equation is:

$$\text{Group Penalty} = (49 * P_1) + [(\text{\# Violations} - 49)^{0.55} * P_1]$$

The litigation team has discretion to separate violations that could otherwise be grouped together based on appropriate facts or case-specific factors.

Assume in the example case that the company imported 1,200 uncertified forklifts. The forklifts were identical and therefore placed in a single group. The gravity penalty calculated using Table A1 was $10,872. The scaled penalty for the violations in the group would be calculated as follows:

$$\text{Group Penalty} = (49 * \$10{,}872) + [(1{,}200 - 49)^{0.55} * \$10{,}872] = \$1{,}057{,}416$$

Assume the company that imported the forklifts also imported 2,000 uncertified lawn tractors with a Table A1 penalty of $2,389. The lawn tractors would be grouped separately from the forklifts, and the scaled penalty calculated as follows:

$$\text{Group Penalty} = (49 * \$2{,}389) + [(2{,}000 - 49)^{0.55} * \$2{,}289] = \$271{,}181$$

The total Step 1 gravity penalty is the sum of all the group penalties. For the company in the example case that imported uncertified forklifts and lawn tractors, the total Step 1 gravity penalty would be $1,057,416 + $271,181 = $1,328,597.

APPENDIX A WORKSHEET

Certification Violations – Step 1 Gravity Calculation Worksheet

A. Calculate the Penalty for Each Violation Using Horsepower

	Description	HP	300 * $HP^{0.6}$	Penalty
Example	*Forklifts*	*125HP*	*300 * $125^{0.6}$*	*$5,436*

B. Adjust the Penalty to Reflect Egregiousness Using Table A1

	Penalty	Egregiousness Tier	Multiplier	Adjusted Penalty
Example	*$5,436*	*3*	*2*	*$10,872*

C. Calculate the Penalty for Multiple Violations

Group #	Adjusted Penalty (P_1)	# of Violations	If # Violations ≤ 50 # Violations * P_1	If # Violations > 50 (49 * P_1) + [(# Violations - 49)$^{0.55}$ * P_1]	Scaled Group Penalty
Example	*$10,872*	*1200*	*n/a*	*(49 * $10,872) + [(1200-49)$^{0.55}$ * $10,872]*	*$1,057,416*
1					
2					
3					
4					
5					

Total Step 1 Gravity Penalty: _____

APPENDIX B

Inspection, Testing, Records, Reports, & Information Violations

Step 1 Gravity Calculation for
Violations of § 203(a)(2), 42 U.S.C. § 7522(a)(2)

The Agency must have timely access to accurate information to successfully implement and enforce Title II of the Clean Air Act. Section 203(a)(2) of the Act prohibits, among other things, any person from failing or refusing to make reports, provide information, permit inspection, or permit access to or copying of records required under Section 208 of the Act, 42 U.S.C. § 7542. Failure to provide timely, accurate information, conduct testing, or permit inspection as required by law may cause significant harm by leading the Agency to make decisions on the basis of incorrect or false information, or by allowing instances of noncompliance to go undetected.

Violations of Section 203(a)(2), 42 U.S.C. § 7522(a)(2), are separated into three egregiousness tiers based on the risk of harm. The degree of risk may depend on case-specific factors, including but not limited to:

- the importance of the information to assessing compliance;
- the nexus between the information and emissions, human health, or the environment;
- the time-sensitivity of the information;
- whether the violation involves information routinely reported to the EPA or information sought through an EPA-initiated request or inspection;
- whether the EPA would likely discover or learn the information absent compliance.

Tier 1 violations are those that pose low risk of excess emissions occurring or going undiscovered,[28] or of harm to the EPA's ability to administer the regulatory program. An example of a Tier 1 violation might be one in which information or a report expected by the Agency, such as an end-of-year report, is submitted late, and the untimeliness does not significantly impair the EPA's administration of the program.

Tier 2 violations are those that pose moderate risk of excess emissions occurring or going undiscovered, or of harm to the EPA's ability to administer the regulatory program. An example of a Tier 2 violation might be untimely submission of a running change notification. The Agency might not discover the running change absent the notification, and delaying the notification

[28] If the violation results in excess emissions, this would suggest that a more egregious tier and/or a penalty in the upper end of the provided range may be appropriate.

would have an adverse impact on the Agency's opportunity to evaluate whether the change requires additional testing.[29]

Tier 3 violations are those that pose high risk of excess emissions occurring or going undiscovered, or of harm to the EPA's ability to administer the regulatory program. Examples of Tier 3 violations might be submission of an incorrect vehicle or engine description in an application for a certificate of conformity, failure to perform appropriate tests, failure to file a timely emission defect report, or failure to respond to an EPA request. Such violations undermine the EPA's ability to perform a meaningful review of the information provided or to assess compliance with the Act and regulations promulgated thereunder. Violations occurring in connection with an EPA inspection are presumed to be Tier 3 violations.

Table B1 sets forth the penalty range for each tier. When determining the appropriate penalty amount, there is a presumption that the appropriate penalty is the midpoint of the range. The case team may increase or decrease the penalty within the range provided based on the risk posed by the violation, the magnitude of the potential or actual harm, and the extent of deviation from what the law required.

Table B1	Penalty Amounts (Information Reporting)	
Egregiousness Tier	Penalty Range	Midpoint
Tier 1	$100 - $18,000	$9,000
Tier 2	$12,000 - $30,000	$21,000
Tier 3	$24,000 - $42,000	$33,000

Section 205(a) of the Act provides that any person who violates section 203(a)(2), 42 U.S.C. § 7522(a)(2), may be subject to a civil penalty "per day of violation." In cases where the litigation team determines that a violation of section 203(a)(2) results in more than one day of violation, the team should use Table B1 to calculate the penalty for the first day of violation, and assess a penalty of 3.3% of the first-day penalty for each additional day. With the Air Enforcement Division Director's approval, the litigation team may assess a larger penalty for each additional day of violation up to the amount assessed for first-day penalty. When a violation results in fewer than 60 days of violation, the litigation team has discretion to assess the violation on a one-day basis and forego penalties for additional days.

[29] If the Agency discovered that the running change resulted in excess emissions, or the notification contained incorrect information such that the Agency could not perform a meaningful review, the violation may be assessed as Tier 3 rather than Tier 2.

APPENDIX B WORKSHEET

Inspection, Testing, Records, Reports, & Information Violations
– Step 1 Gravity Calculation Worksheet

A. Calculate the Penalty for Each Violation Using Table B1

Violation	Description	Egregiousness Tier	Day 1 Penalty	# Add'l Days	Daily Penalty	Total Penalty
Example	*Example*	*Tier 3*	*$33,000*	*62*	*$1,089*	*$100,518*
1						
2						
3						
4						
5						

Total Step 1 Gravity Penalty: _____

APPENDIX C

Tampering & Defeat Device Violations

Step 1 Gravity Calculation for
Violations of § 203(a)(3), 42 U.S.C. § 7522(a)(3)

Tampering and defeat device violations create the potential for harm by changing or removing a vehicle or engine's emission-related devices or elements of design so they no longer match the configuration certified by the original manufacturer. These violations undermine the certification program and are likely to result in emissions increases.

NOTE: Where a manufacturer or dealer as defined by Section 216 of the Act, 42 U.S.C. § 7550, is liable for a violation of Section 203(a)(3)(A) of the Act, 42 U.S.C. § 7522(a)(3)(A) (tampering), the gravity penalty should be calculated in the manner used to calculate the penalty for Tier 3 certification violations set forth in Appendix A.

A. Determine the Egregiousness of Each Violation

First, determine the egregiousness of each violation. A significant concern in determining the gravity of tampering or defeat device violations is the likely increase in vehicle emissions that may result from the violation. Tampering and defeat device violations are therefore separated into two tiers of egregiousness.

Violations of Section 203(a)(3) that leave the Onboard Diagnostic system ("OBD system"), exhaust gas recirculation system ("EGR system"), and all aftertreatment[30] systems in place and functioning in their certified configuration are generally Tier 1 violations, unless evidence or good engineering judgment indicates that the violations are likely to cause a significant increase in emissions. All other violations of Section 203(a)(3) are Tier 2 violations, unless reliable emissions testing shows that the violations do not increase tailpipe emissions.

Violations affecting the OBD system are Tier 2 violations. The OBD system is a monitoring device required by the Clean Air Act. *See* 42 U.S.C. § 7521(m). Altering the OBD system permits a failure in the vehicle's emissions control equipment or system to go undetected and uncorrected, and may be a prerequisite to tampering with other emissions controls or emission-related elements of design.

Where an unlawful part or component may affect multiple devices or elements of design, or be used in different configurations or modes, egregiousness should be determined based on the worst-case, or most polluting, configuration.

[30] "Aftertreatment" refers collectively to emission-related elements of design "mounted downstream of the exhaust valve . . . whose design function is to reduce emissions in the engine exhaust before it is exhausted to the environment." *See* 40 C.F.R. § 1068.30.

B. Determine the Size Category of Affected Vehicles & Engines

After determining whether the violation is Tier 1 or Tier 2, use Table C1 to determine the size category of vehicles or engines that are the subjects of the violation. Typically, larger vehicles or engines have more potential to cause harm in the form of increased emissions, making larger penalty amounts appropriate. Further, the size category of the vehicles or engines involved in tampering or defeat device violations can usually be readily determined.

The vertical axis in Table C1 is split into four different categories of vehicles or engines on the basis of their size. The size categories in Table C1 tend to track certification categories. Where an unlawful part or component may be used with multiple size categories of vehicles or engines, the penalty should be calculated on the basis of the largest size category with which the part or component may be used.

C. Calculate the Penalty for Each Violation

Table C1 reflects the foregoing factors, and specifies penalty amounts for violations of Section 203(a)(3). To determine the appropriate penalty for each violation, locate the matrix value given for the appropriate tier and size category.

Table C1 Penalty Amounts (Tampering / Defeat Device)		
	Egregiousness Tier	
Size Category	Tier 1	Tier 2
Size Category A • Highway Motorcycles • Nonroad Recreational Vehicles & Engines • Nonroad Small Spark-Ignition Engines	$500	$1,000
Size Category B • Light-Duty Vehicles • Non-Diesel Light-Duty Trucks • Nonroad Large Spark-Ignition Engines • Marine Spark-Ignition Engines • Nonroad Compression Ignition Engines < 75	$750	$1,500
Size Category C • Diesel Light-Duty Trucks • Class 2b/3 Heavy-Duty Vehicles & Engines (GVWR[31] 8,500 < lbs ≤ 14,000) • Medium-Duty Passenger Vehicles • Nonroad Compression Ignition Engines 75 ≤ kW < 450	$1,500	$3,000
Size Category D • Class 4 and higher Heavy-Duty Vehicles & Engines (GVWR > 14,000 lbs) • Marine Compression-Ignition Engines • Nonroad Compression Ignition Engines kW ≥ 450 • Locomotives	$2,250	$4,500

For example, consider a company that sold eleven electronic devices that allow a user to advance fuel injection timing and interfere with the OBD system's ability to detect increases in exhaust emissions. Five of the devices, "Device X," are compatible with light-duty vehicles ("LDVs"). The other six devices, "Device Y", are compatible with Class 2b/3 heavy-duty pickup trucks. All eleven violations are assigned Tier 2 because the devices are capable of affecting a vehicle's OBD system. LDVs are in Size Category B, so the gravity penalty for violations pertaining to Device X would be $1,500. Class 2b/3 heavy-duty pickup trucks are in Size Category C, so the gravity penalty for violations pertaining to Device Y would be $3,000. The total gravity penalty would be (5 violations * $1,500 = $7,500) + (6 violations * $3,000 = $18,000) = $25,500.

In some instances, a violator may have violated both the tampering and the defeat device prohibition. Where the separate violation is an integral part of the other, the litigation team has

[31] "*Gross vehicle weight rating* (GVWR) means the value specified by the manufacturer as the maximum design loaded weight of a single vehicle, consistent with good engineering judgment." 40 C.F.R. § 1803-01.

discretion to merge the violations for purposes of penalty calculation or to assess separate penalties for the tampering and each defeat device.

D. Calculate the Penalty for Multiple Violations

Where a case features multiple violations of Section 203(a)(3), the litigation team should group the violations based on the penalty calculated using Table C1. The penalty calculated using Table C1 should be the same for all the violations in a group. Where there are 50 or fewer violations in a group, the total penalty for those violations is calculated by multiplying the number of violations in the group by the applicable penalty calculated using Table C1. This is expressed in the following linear equation, where the number of violations in the group is represented as "# Violations" and the penalty calculated using Table C1 is represented as "P_1":

$$\text{Group Penalty} = \text{\# Violations} * P_1$$

Where the number of violations in a group exceeds 50, the litigation team may calculate the group penalty using the linear equation, or the litigation team has discretion to calculate the penalty for violations in the group using a scaling equation that incrementally reduces the per-violation penalty starting with the 51st violation. The result should be rounded to the nearest dollar. The scaling equation is:

$$\text{Group Penalty} = (49 * P_1) + [(\text{\# Violations} - 49)^{0.7} * P_1]$$

The litigation team has discretion to separate violations that could otherwise be grouped together based on appropriate facts or case-specific factors.

To illustrate, assume the company described in the previous example sold 500 of Device X and 600 of Device Y. The penalty for Device X was $1,500, and the penalty for Device Y was $3,000. The violations pertaining to Device X would be placed in a group, and the violations pertaining to Device Y would be placed in a separate group. The scaled penalty for the violations in each group would be calculated as follows:

$$\text{Device X Group Penalty} = (49 * \$1{,}500) + [(500 - 49)^{0.7} * \$1{,}500] = \$181{,}647$$

$$\text{Device Y Group Penalty} = (49 * \$3{,}000) + [(600 - 49)^{0.7} * \$3{,}000] = \$395{,}844$$

The total Step 1 gravity penalty is the sum of all the group penalties. For the company in the example case, the total Step 1 gravity penalty for 1,100 violations of Section 203(a)(3) would be $181,647 + $395,844 = $577,491.

APPENDIX C WORKSHEET

Tampering & Defeat Device Violations – Step 1 Gravity Calculation Worksheet

A. Calculate the Penalty for Each Violation Using Table C1

	Description	Egregiousness Tier	Size Category	Penalty
Example	*EGR Delete Kit*	*2*	*B*	*$1,500*

B. Calculate the Penalty for Multiple Violations

Group #	Penalty (P_1)	# of Violations	If # Violations ≤ 50 # Violations * P_1	If # Violations > 50 (49 * P_1) + [(# Violations - 49)$^{0.7}$ * P_1]	Scaled Group Penalty
Example	*$1,500*	*500*	*n/a*	*(49 * $1,500) + [(500 - 49)$^{0.7}$* $1,500]*	*$181,647*
1					
2					
3					
4					
5					

Total Step 1 Gravity Penalty: _____

APPENDIX D

Labeling, Recall & Warranty Violations

Step 1 Gravity Calculation for Violations of § 203(a)(4), 42 U.S.C. § 7522(a)(4)

The Act places requirements on manufacturers to ensure that vehicles and engines in use continue to conform to standards. These requirements include warranty provisions, maintenance instructions, labeling requirements, and an obligation to remedy substantial nonconformity.

The gravity penalty for violations involving failure to remedy nonconforming vehicles, including denials of valid warranty claims or failures to reimburse valid warranty claims, is calculated in the manner set forth in Appendix A used to calculate the gravity penalty for Tier 3 violations of Section 203(a)(1), 42 U.S.C. § 7522(a)(1).

Manufacturers are required to communicate information about maintenance requirements and the Act's mandated warranty coverage in product manuals, warranty booklets, or other literature. Regulations specify each element of information that must be communicated. Failing to provide accurate, clear information regarding maintenance and warranty undermines the value of the certification program, harms consumers, and may result in excess emissions. The gravity penalty for violations involving failure to provide such information is calculated in the manner set forth in Appendix A for Tier 2 violations. In cases where a manufacturer provides incorrect or misleading warranty information, such as a statement placing unlawful conditions on warranty coverage, the gravity penalty is calculated in the manner set forth in Appendix A for Tier 3 violations.

Emissions control information labels provide information about emissions controls and allow the EPA, the U.S. Customs and Border Protection, and others to identify whether engines or vehicles are certified and legal for sale and distribution in the United States. Regulations specify each element of information that must appear on a label. Noncompliance with the emissions labeling requirements compromises the ability of importers and inspectors to exclude illegal, uncertified engines from the United States. Where an emissions control information label is incomplete but the certification status of the vehicle or engine can still be readily determined, the gravity penalty is calculated in the manner set forth in Appendix A for Tier 1 violations. Where a label is missing, can be removed without being defaced, or the certification status of the vehicle or engine cannot be readily determined, the gravity penalty is calculated in the manner set forth in Appendix A for Tier 2 violations.

APPENDIX D WORKSHEET

Labeling, Recall & Warranty Violations – Step 1 Gravity Calculation Worksheet

A. Calculate the Penalty for Each Violation Using Horsepower

	Description	HP	$300 * HP^{0.6}$	Penalty
Example	*Forklifts*	*6.2HP*	*$300 * 6.2^{0.6}$*	*$914*

B. Adjust the Penalty to Reflect Egregiousness Using Criteria in Appendix D and Multiplier from Table A1

	Penalty	Egregiousness Tier	Multiplier	Adjusted Penalty
Example	*$914*	*1*	*0.5*	*$457*

C. Calculate the Penalty for Multiple Violations

Group #	Adjusted Penalty (P_1)	# of Violations	If # Violations ≤ 50 # Violations * P_1	If # Violations > 50 $(49 * P_1) + [(\#\text{ Violations} - 49)^{0.55} * P_1]$	Scaled Group Penalty
Example	*$457*	*52*	*n/a*	*$(49 * \$457) + [(52-49)^{0.55} * \$457]$*	*$23,229*
1					
2					
3					
4					
5					

Total Step 1 Gravity Penalty: _____

APPENDIX E

Gravity Penalty Calculation Worksheet

Name of Alleged Violator(s): _____

Description of Alleged Violation: _____

Case / Docket Number: _____

See pages 12 through 20 for instructions on calculating the gravity penalty component. Separate worksheets may be required for cases involving multiple counts of violation.

Gravity Penalty Component					
STEP 1	1	Gravity Penalty Calculated in Step 1			$
STEP 2	2	Remediation Discount Divide Line 1 by Line 2a and record the result on Line 2b. Then multiply Line 2b by Lines 2c and 2d, and record the result in the column to the right on Line 2.	2a # Violations		
			2b Avg. Penalty	$	
			2c # Remediated	#	
			2d % (Discount)	_____%	$( )
	3	Add Lines 1 and 2			$
	4	Inflation Factor _____		x	
	5	Multiply Line 3 by the Inflation Factor from Line 4			$
	6	Size of Violator Increase			$
	7	Step 2 Gravity Penalty Amount - Add Lines 5 and 6			$
STEP 3	8	Culpability Increase Calculate as % of line 7	% Increase	_____%	$
	9	Cooperation Discount Calculate as % of line 7	9a % (Discount)	_____%	$( )
	9	Noncooperation Increase Calculate as % of line 7	9b % Increase	_____%	$
	10	History of Violation Increase Calculate as % of line 7	% Increase	_____%	$
	11a	Other Factors Adjustment Calculate as % of line 7	11a % (Discount)	_____%	$( )
	11b	*Requires AED Director Approval	11b % Increase	_____%	$
	12	Gravity Penalty Component Add lines 7 thorough 11b			$

Name: _____

Date: _____