

# LANE REGIONAL AIR PROTECTION AGENCY

## TITLE 15

### ENFORCEMENT PROCEDURE AND CIVIL PENALTIES

#### Section 15-001 Policy

- (1) The goals of enforcement are to:
  - (a) Obtain and maintain compliance with LRAPA's statutes, rules, permits and orders;
  - (b) Protect the public health and the environment;
  - (c) Deter future violators and violations; and
  - (d) Ensure an appropriate and consistent enforcement program.
- (2) As required by this title, LRAPA will endeavor by conference, conciliation and persuasion to solicit compliance.
- (3) LRAPA shall address all documented violations in order of seriousness at the most appropriate level of enforcement necessary to achieve the goals set forth in subsection (1).
- (4) Violators who do not comply with an initial enforcement action shall be subject to increasing levels of enforcement until compliance is achieved.

#### Section 15-003 Scope of Applicability

These amendments shall apply to violations occurring on or after the effective date of such amendments. They shall not apply to cases pending. For purposes of determining Class and Magnitude of violation, only, LRAPA rules and regulations in effect prior to these amendments shall apply to violations occurring before the effective date of these amendments. For purposes of determining number and gravity of prior violations, these amendments will apply.

#### Section 15-005 Definitions

Words and terms used in this title are defined as follows, unless the context requires otherwise:

- "Alleged Violation" means any violation cited in a written notice issued by LRAPA or other government agency.
- "Class I Equivalent" or "Equivalent," which is used only for the purposes of determining the value of the "P" factor in the civil penalty formula, means two Class II violations, one Class II and two Class III violations, or three Class III violations.

- "Compliance" means meeting the requirements of LRAPA's or DEQ's, EQC's or EPA's rules, permits, permit attachments or orders.
- "Conduct" means an act or omission.
- "Documented Violation" means any violation which LRAPA or other government agency records after observation, investigation or data collection.
- "Enforcement" means any documented action taken to address a violation.
- "Federal Operating Permit Program" means a program approved by the DEQ Administrator under 40 CFR part 70.
- "Flagrant" means any documented violation where the Respondent had actual knowledge of the law and consciously set out to commit the violation.
- "Formal Enforcement Action" means an administrative action signed by the Director or authorized representative which is issued to a Respondent for a documented violation. A formal enforcement action may require the Respondent to take specific action within a specified time frame and/or state the consequences for previous and continued non-compliance.
- "Intentional" means conduct by a person with a conscious objective to cause the result of the conduct.
- "Magnitude of the Violation" means the extent of a violator's deviation from federal, state and LRAPA's statutes, rules, standards, permits or orders.
- "Negligence" or "negligent" means failing to take reasonable care to avoid a foreseeable risk of committing an act or omission constituting a violation.
- "Notice of Civil Penalty Assessment" (NCP) means a notice provided under LRAPA 15-020(3) to notify a person that LRAPA has initiated a formal enforcement action that includes a financial penalty.
- "Order" means a notice provided under subsection 15-020(4).
- "Person" means any individual, public or private corporation, political subdivision, agency, board, department, or bureau of the state, municipality, partnership, association, firm, trust, estate, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties.
- "Prior Violation" means any violation established, with or without admission, by payment of a civil penalty, by an order of default, or by a stipulated or final order of LRAPA.

- "Reckless" or "recklessly" means conduct by a person who is aware of and consciously disregards a substantial and unjustifiable risk that the result would occur or that the circumstance existed. The risk must be of such a nature and degree that disregarding that risk constitutes a gross deviation from the standard of care a reasonable person would observe in that situation.
- "Residential Owner-Occupant" means the natural person who owns or otherwise possesses a single family dwelling unit, and who occupies that dwelling at the time of the alleged violation. The violation must involve or relate to the normal uses of a dwelling unit.
- "Respondent" means the person named in a formal enforcement action (FEA).
- "Violation" means a transgression of any statute, rule, order, license, permit, permit attachment, or any part thereof, and includes both acts and omissions.
- "Willful" means the respondent had a conscious objective to cause the result of the conduct and the respondent knew or had reason to know that the result was not lawful.

### **Section 15-010 Consolidation of Proceedings**

Notwithstanding that each and every violation is a separate and distinct offense and that, in cases of continuing violation, each day's continuance is a separate and distinct violation, proceedings for the assessment of multiple civil penalties for multiple violations may be consolidated into a single proceeding.

### **Section 15-015 Notice of Violation**

When the Director or the Board has cause to believe that a violation has occurred, the Director or authorized representative may document the violation and initiate any of the enforcement actions described in sections 15-018 and 15-020 by serving the appropriate notice to the responsible party or Respondent according to ORS 183 and these rules and regulations. Cause to believe a violation has occurred can be prima facie evidence based on first-hand observations, reports of observations by citizens or government officials, results of tests, instrument reading or any other evidence which the Director finds, in his discretion, to be sufficient to constitute cause to believe.

### **Section 15-018 Notice of Permit Violations (NPV) and Exceptions**

- (1) Prior to assessment of a civil penalty for a violation of the terms or conditions of an Air Contaminant Discharge Permit (ACDP), LRAPA shall provide a Notice of Permit Violation to the permittee. The Notice of Permit Violation shall be in writing, specifying the violation and stating that a civil penalty will be imposed for the permit violation unless the permittee submits one of the following to LRAPA within 5 working days of receipt of the Notice of Permit Violation:
  - (a) A written response from the permittee acceptable to LRAPA certifying that the permitted facility is complying with all terms of the permit from which the violation is

cited. The certification shall include a sufficient description of the information on which the permittee is certifying compliance to enable LRAPA to determine that compliance has been achieved.

- (b) A written proposal, acceptable to LRAPA, to bring the facility into compliance with the permit. An acceptable proposal under this rule shall include at least the following:
  - (A) Proposed compliance dates;
  - (B) Proposed date to submit a detailed compliance schedule;
  - (C) A description of the interim steps that will be taken to reduce the impact of the permit violation until the permitted facility is in compliance with the permit;
  - (D) A statement that the permittee has reviewed all other conditions and limitations of the permit, and no other violations of the permit were discovered by the permittee.
- (c) In the event that any compliance schedule to be approved by LRAPA, under paragraph (1)(b), provides for a compliance period of greater than 6 months, LRAPA shall incorporate the compliance schedule into an Order described in paragraph 15-020(4)(a) which provides for stipulated penalties in the event of any non-compliance therewith. Stipulated penalties shall not apply to circumstances beyond the reasonable control of the permittee. Stipulated penalties may also be required for compliance periods of less than or equal to 6 months. The stipulated penalties shall be set at amounts consistent with those established under section 15-045.
- (d) The certification allowed in paragraph (1)(a) shall be signed by a Responsible Official, based on information and belief after making reasonable inquiry. For purposes of this rule, "Responsible Official" of the permitted facility means one of the following:
  - (A) For a corporation, a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities, if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.
  - (B) For a partnership or sole proprietorship, a general partner or the proprietor, respectively.
  - (C) For a municipality, state, federal, or other public agency, either a principal executive officer or appropriate elected official.
- (2) No advance notice prior to assessment of a civil penalty shall be required under subsection (1), and LRAPA may issue a Notice of Civil Penalty Assessment (NCP), without any preconditions, if:

- (a) The violation is intentional;
- (b) The violation would not normally occur for 5 consecutive days;
- (c) The permittee has received a Notice of Permit Violation or other formal enforcement action with respect to any violation of the permit within 36 months immediately preceding the alleged violation;
- (d) The permittee is subject to the Oregon Title V operating permit program and violates any rule or standard adopted or any permit or order issued under ORS 468.A and applicable to the permittee; or
- (e) The requirement to provide an NPV would disqualify a state program from federal approval or delegation. The permits and permit conditions to which this NPV exception applies include:
  - (A) Air Contaminant Discharge Permit (ACDP) conditions that implement the State Implementation Plan under the Federal Clean Air Act (FCAA);
- (f) The permittee has an ACDP and violates any New Source Performance Standard (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP) requirement contained in the permit.

For purposes of this section, "permit" includes permit renewals and modifications, and no such renewal or modification shall result in the requirement that LRAPA provide the permittee with an additional advance warning if the permittee has received a Notice of Permit Violation or other formal enforcement action with respect to the permit within 36 months immediately preceding the alleged violation.

**Section 15-020 Enforcement Actions**

(1) Notice of Non-compliance (NON):

- (a) Informs a person of a violation and the consequences of the violation or continued non-compliance. The notice may state the actions required to resolve the violation and may specify a time by which compliance is to be achieved. The notice may state that further enforcement action may, or will be taken.
- (b) Shall be issued under the direction of the Director or authorized representative.
- (c) Shall be issued for, but is not limited to, all classes of documented violations.
- (d) May be issued prior to issuance of a Notice of Civil Penalty or an Order.

(2) Notice of Permit Violation (NPV):

- (a) Is issued under section 15-018.
  - (b) Shall be issued by the Director or authorized representative.
  - (c) Shall be issued for, but is not limited to, the first occurrence of a documented Class I permit violation which is not excepted under subsection 15-018(2), or the repeated or continuing occurrence of documented Class II or III permit violations not excepted under subsection 15-018(2), or where a NON has failed to achieve compliance or satisfactory progress toward compliance. A permittee shall not receive more than three NONs for Class II violations of the same permit within a 36 month period without being issued an NPV.
- (3) Notice of Civil Penalty Assessment (NCP):
- (a) Is issued under ORS 468.130, ORS 468.140, and sections 15-015, 15-025 and 15-030.
  - (b) Shall be issued by the Director or authorized representative.
  - (c) May be issued for, but is not limited to, the occurrence of any class of documented violation that is not limited by the NPV requirement of section 15-018.
- (4) Order:
- (a) Is issued under ORS Chapters 183, 468, or 468A, and title 14;
  - (b) May be in the form of a Board or Director Order or a Stipulation and Final Order (SFO):
    - (A) Board Orders shall be issued by the Board, or by the Director on behalf of the Board;
    - (B) Director Orders shall be issued by the Director or authorized representative;
    - (C) All Other Orders:
      - (i) May be negotiated;
      - (ii) Shall be signed by the Director or authorized representative and the authorized representative of each other party.
  - (c) May be issued for any class of violations.
- (5) The enforcement actions described in subsections (1) through (4) shall not limit the Director or Board from seeking legal or equitable remedies as provided by ORS Chapters 468 and 468A.

**Section 15-025 Civil Penalty Schedule Matrices**

(1) In addition to any liability, duty or other penalty provided by law, the Director may assess a civil penalty for any violation pertaining to the Board's and Director's authorizing rules, regulations, permits or orders by service of a written Notice of Civil Penalty Assessment upon the Respondent. Except for civil penalties assessed under sections 15-045 and 15-050 (stipulated or intentional/reckless), or title 16, the amount of any civil penalty shall be determined through the use of the following matrices, in conjunction with the formula contained in section 15-030:

(a) \$12,000 Penalty Matrix:

| Magnitude | Major    | Moderate | Minor   |
|-----------|----------|----------|---------|
| Class I   | \$12,000 | \$6,000  | \$3,000 |
| Class II  | \$6,000  | \$3,000  | \$1,500 |
| Class III | \$1,000  | \$1,000  | \$1,000 |

(A) The \$12,000 penalty matrix applies to the following:

- (i) Any violation of an air quality statute, rule, permit, permit attachment, or related order committed by a person that has or should have a Title V permit or an Air Contaminant Discharge Permit (ACDP) issued under New Source Review (NSR) regulations or Prevention of Significant Deterioration (PSD) regulations, or section 112(g) of the Federal Clean Air Act.
- (ii) Outdoor burning violations as follows:
  - (I) Any violation of OAR 340-264-0060(3) committed by an industrial facility operating under an air quality permit;
  - (II) Any violation of paragraph 47-015(1)(e) in which 25 or more cubic yards of prohibited materials or more than 15 tires are burned, except when committed by a residential owner-occupant.

(b) \$8,000 Penalty Matrix:

| Magnitude | Major   | Moderate | Minor   |
|-----------|---------|----------|---------|
| Class I   | \$8,000 | \$4,000  | \$2,000 |
| Class II  | \$4,000 | \$2,000  | \$1,000 |
| Class III | \$700   | \$700    | \$700   |

(A) The \$8,000 penalty matrix applies to the following:

- (i) Any violation of an air quality statute, rule, permit, permit attachment, or related order committed by a person that has or should have an ACDP, except for NSR, PSD, and Basic ACDP permits unless listed under another penalty matrix;
- (ii) Any violation of an asbestos statute, rule, permit or related order except those violations listed in sub-subparagraph (d)(A)(ii) of this rule.

(c) \$3,000 Penalty Matrix:

| Magnitude | Major   | Moderate | Minor |
|-----------|---------|----------|-------|
| Class I   | \$3,000 | \$1,500  | \$750 |
| Class II  | \$1,500 | \$750    | \$375 |
| Class III | \$250   | \$250    | \$250 |

(A) The \$3,000 penalty matrix applies to the following:

- (i) Any violation of an air quality statute, rule, permit, permit attachment, license, or related order committed by a person not listed under another penalty matrix;
- (ii) Any violation of an air quality statute, rule, permit, permit attachment, or related order committed by a person that has or should have a Basic ACDP or an ACDP or registration only because the person is subject to Area Source NESHAP regulations; or
- (iii) Any violation of paragraph 47-015(1)(e) in which 25 or more cubic yards of prohibited materials or more than 15 tires are burned by a residential owner-occupant.

(d) \$1,000 Penalty Matrix:

| Magnitude | Major   | Moderate | Minor |
|-----------|---------|----------|-------|
| Class I   | \$1,000 | \$500    | \$250 |
| Class II  | \$500   | \$250    | \$125 |
| Class III | \$100   | \$100    | \$100 |

(A) The \$1,000 penalty matrix applies to the following:

- (i) Any violation of an outdoor burning statute, rule, permit or related order committed by a residential owner-occupant at the residence, not listed under



another penalty matrix;

- (ii) Any violation of an asbestos statute, rule, permit or related order committed by a residential owner-occupant.
- (iii) Any violation of OAR 340-262-0900(1) or OAR 340-262-0900(2) committed by a residential owner-occupant at the residence.

**Section 15-030 Civil Penalty Determination Procedure (Mitigating and Aggravating Factors)**

(1) When determining the amount of civil penalty to be assessed for any violation, other than violations of title 16 which are determined in title 16, and of ORS 468.996 which are determined according to the procedure set forth below in section 15-050, the Director or authorized representative shall apply the following procedures:

- (a) Determine the class and the magnitude of each violation;
- (b) Choose the appropriate base penalty (BP) established by the matrices of section 15-025 after determining the class and magnitude of each violation;
- (c) Starting with the base penalty (BP), determine the amount of penalty through application of the formula:

$BP + [(.1 \times BP)(P + H + O + M + C)] + EB$  where:

(A) "P" is whether the Respondent has any prior violations of statutes, rules, orders and permits pertaining to environmental quality or pollution control. For the purpose of determining "P," Class I violation or equivalent means two Class II violations, one Class II and two Class III violations, or three Class III violations. The values for "P" and the finding which supports each are as follows:

- (i) 0 if no prior violations or there is insufficient information on which to base a finding;
- (ii) 1 if the prior violation is one Class II or two Class III's; or
- (iii) 2 if the prior violation(s) is one Class I or equivalent.
- (iv) For each additional Class I violation or Class I equivalent, the value of "P" is increased by 1.
- (v) 10 if the prior violations are nine or more class I violations or equivalents, or if any of the prior violations were issued for any violation of ORS 468.996 (Civil Penalty for Intentional or Reckless Violation);

- (vi) The value of "P" will not exceed 10.
  - (vii) In determining the appropriate value for prior violations as listed above, LRAPA shall reduce the appropriate factor by:
    - (I) 2 if all the prior violations were issued more than 3 years before the date the current violation occurred;
    - (II) 4 if all the prior violations were issued more than 5 years before the date the current violation occurred.
  - (viii) Include all prior violations at all facilities owned or operated by the same violator within the state of Oregon;
  - (ix) The value of "P" may not be reduced below 0;
  - (x) Any prior violation which occurred more than 10 years prior to the time of the present violation shall not be included in the above determination.
- (B) "H" is past history of the Respondent in taking all feasible steps or procedures necessary or appropriate to correct any prior violations. The sum of the values for "P" and "H" may not be less than one unless the Respondent took extraordinary efforts to correct or minimize the effects of all prior violations. In no case shall the combination of the "P" factor and the "H" factor be a value less than zero. In such cases where the sum of the "P" and "H" values is a negative numeral, the finding and determination for the combination of these two factors shall be zero. The values for "H" and the finding which supports each are as follows:
- (i) -2 if Respondent corrected each prior violation;
  - (ii) -1 if violations were uncorrectable and Respondent took reasonable efforts to minimize the effects of the violations cited as prior violations;
  - (iii) 0 if there is no prior history or if there is insufficient information on which to base a finding;
- (C) "O" is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation and each day of a violation with a duration of more than one day is a separate occurrence when determining the "O" factor. Each separate violation is also a separate occurrence when determining the "O" factor. The values for "O" and the finding which supports each are as follows:
- (i) 0 if there was only one occurrence of the violation or if there is insufficient information on which to base a finding under sub-subparagraphs (C)(ii)

through (C)(v);

- (ii) 2 if there were more than one but less than seven occurrences of the violation;
  - (iii) 3 if there were from seven to 28 occurrences of the violation;
  - (iv) 4 if there were more than 28 occurrences of the violation;
  - (v) LRAPA may, at its discretion, assess separate penalties for each occurrence of a violation. If LRAPA does so, the "O" factor for each affected violation will be set at 0. If LRAPA assesses one penalty for multiple occurrences, the penalty will be based on the highest classification and magnitude applicable to any of the occurrences.
- (D) "M" is the mental state of the Respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply. The values for "M" and the finding that supports each are as follows:
- (i) 0 if there is insufficient information on which to base a finding under subparagraphs (D)(ii) through (D)(iv).
  - (ii) 2 if the Respondent had constructive knowledge (reasonably should have known) that the conduct would be a violation.
  - (iii) 4 if the Respondent's conduct was negligent.
  - (iv) 8 if the Respondent's conduct was reckless or the Respondent acted or failed to act intentionally with actual knowledge of the requirement.
  - (v) 10 if the Respondent acted flagrantly.
- (E) "C" is the Respondent's efforts to correct or mitigate the violation. The values for "C" and the finding which supports each are as follows:
- (i) -5 if the Respondent made extraordinary efforts to correct the violation or to minimize the effects of the violation, and made extraordinary efforts to ensure the violation would not be repeated.
  - (ii) -4 if the Respondent made extraordinary efforts to ensure that the violation would not be repeated.
  - (iii) -3 if the Respondent made reasonable efforts to correct the violation, or took reasonable affirmative efforts to minimize the effects of the violation.
  - (iv) -2 if the Respondent eventually made some efforts to correct the violation, or

to minimize the effects of the violation.

- (v) -1 if the Respondent made reasonable efforts to ensure that the violation would not be repeated.
  - (vi) 0 if there is insufficient information to make a finding under sub-subparagraphs (E)(i) through (E)(v) or (E)(vii) or if the violation or the effects of the violation could not be corrected or minimized.
  - (vii) 2 if the Respondent did not address the violation as described in sub-subparagraphs (E)(i) through (E)(v) and the facts do not support a finding under sub-subparagraph (E)(vi)
- (F) "EB" is the approximated dollar value of the economic benefit gained and the costs avoided or delayed (without duplication) as a result the Respondent's noncompliance. The EB may be determined using the U. S. Environmental Protection Agency's BEN computer model. LRAPA may make, for use in the model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent.
- (i) Upon request of the Respondent, LRAPA will provide the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model. The model's standard values for income tax rates, inflation rate and discount rate are presumed to apply to all respondents unless a specific Respondent can demonstrate that the standard value does not reflect the Respondent's actual circumstance.
  - (ii) LRAPA need not calculate EB if LRAPA makes a reasonable determination that the EB is de minimis or if there is insufficient information on which to make an estimate under this rule.
  - (iii) LRAPA may assess EB whether or not it assesses any other portion of the civil penalty using the formula in section 15-030.
  - (iv) LRAPA's calculation of EB may not result in a civil penalty for a violation that exceeds the maximum civil penalty allowed by rule or statute. However, when a violation has occurred or been repeated for more than one day, LRAPA may treat the violation as extending over at least as many days as necessary to recover the economic benefit of the violation.
- (K) Regardless of any other penalty amount listed in this title, the Director has the discretion to increase the penalty to \$25,000 per violation per day of violation based upon the facts and circumstances of the individual case.

(2) In addition to the factors listed in subsection (1), the Director may consider any other

relevant rule of LRAPA and shall state the effect the consideration had on the penalty. On review, the Board or hearings officer shall consider the factors contained in subsection (1) and any other relevant rule of LRAPA.

- (3) The Director or Board may reduce any penalty based on the Respondent's inability to pay the full penalty amount. If the Respondent seeks to reduce the penalty, the Respondent has the responsibility of providing to the Director or Board documentary evidence concerning Respondent's inability to pay the full penalty amount.
  - (a) When the Respondent is currently unable to pay the full amount, the first option should be to place the Respondent on a payment schedule with interest on the unpaid balance for any delayed payments. The Director or Board may reduce the penalty only after determining that the Respondent is unable to meet a long-term payment schedule.
  - (b) In determining the Respondent's ability to pay a civil penalty, LRAPA may use the U.S. Environmental Protection Agency ABEL computer model to determine a Respondent's ability to pay the full civil penalty amount. With respect to significant or substantial change in the model, LRAPA shall use the version of the model that LRAPA finds will most accurately calculate the Respondent's ability to pay a civil penalty. Upon request of the Respondent, LRAPA will provide Respondent the name of the version of the model used and respond to any reasonable request for information about the content or operation of the model.
  - (c) In appropriate circumstances, the Director or Board may impose a penalty that may result in a Respondent going out of business. Such circumstances may include situations where the violation is intentional or flagrant or situations where the Respondent's financial condition poses a serious concern regarding its ability or incentive to remain in compliance.

#### **Section 15-035 Written Notice of Civil Penalty Assessment--When Penalty Payable**

- (1) A civil penalty shall be due and payable 10 days after the order assessing the civil penalty becomes final and the civil penalty is thereby imposed by operation of law or on appeal. A person against whom a civil penalty is assessed shall be served with a notice in the form and manner provided in ORS 183.415 and section 14-170.
- (2) The written Notice of Civil Penalty Assessment shall comply with ORS 468.135(1) and ORS 183.090, relating to notice and contested case hearing applications, and shall state the amount of the penalty or penalties assessed.
- (3) The rules prescribing procedure in contested case proceedings contained in title 14 shall apply thereafter.

#### **Section 15-040 Compromise or Settlement of Civil Penalty by Director**

- (1) Any time after service of the written Notice of Civil Penalty Assessment, the Board or

Director may, in their discretion, compromise or settle any unpaid civil penalty at any amount that the Board or Director deems appropriate. A refusal to compromise or settle shall not be subject to review. Any compromise or settlement executed by the Director shall be final, except for major Class I violations with penalties calculated under paragraph 15-025(1)(a), which must be approved by the Board.

- (2) In determining whether a penalty should be compromised or settled, the Board or Director may take into account the following:
  - (a) New information obtained through further investigation or provided by Respondent which relates to the penalty determination factors contained in section 15-030;
  - (b) The effect of compromise or settlement on deterrence;
  - (c) Whether Respondent has or is willing to employ extraordinary means to correct the violation or maintain compliance;
  - (d) Whether Respondent has had any previous penalties which have been compromised or settled;
  - (e) Whether the compromise or settlement would be consistent with LRAPA's goal of protecting the public health and environment;
  - (f) The relative strength or weakness of LRAPA's case.

#### **Section 15-045 Stipulated Penalties**

Nothing in title 15 shall affect the ability of the Board or Director to include stipulated penalties in a Stipulation and Final Order, Consent Order, Consent Decree or any other agreement issued under ORS Chapter 468, 468.A or these rules and regulations.

#### **Section 15-050 Additional Civil Penalties**

LRAPA may assess additional civil penalties for the following violations as specified below:

LRAPA may assess a civil penalty of up to \$250,000 to any person who intentionally or recklessly violates any provision of ORS 468, 468A, or any rule or standard or order of the Director or Board which results in or creates the imminent likelihood for an extreme hazard to public health or which causes extensive damage to the environment. When determining the civil penalty sum to be assessed under this section, the Director will use the procedures set out below:

- (1) The base penalties listed in subsection 15-050(2) are to be used in lieu of the penalty method in under paragraphs 15-025(1)(a) and (b).
- (2) The following base penalties apply:

- (a) \$100,000 if the violation was caused intentionally;
  - (b) \$150,000 if the violation was caused recklessly;
  - (c) \$200,000 if the violation was caused flagrantly.
- (3) The civil penalty is calculated using the following formula:
- $$BP + (.1 \times BP)(P + H + O + C) + EB, \text{ in accordance with the applicable subsections of section 15-030.}$$

### **Section 15-055 Air Quality Classification of Violation**

Violations pertaining to air quality shall be classified as follows:

- (1) Class I
  - (a) Violating a requirement or condition of EQC, DEQ or LRAPA, consent order, agreement, consent judgment (formerly called judicial consent decree), compliance schedule contained in a permit or permit attachment, or variance;
  - (b) Submitting false, inaccurate or incomplete information to LRAPA where the submittal masked a violation, caused environmental harm, or caused LRAPA to misinterpret any substantive fact;
  - (c) Failing to provide access to premises or records as required by statute, permit, order, consent order, agreement or consent judgment (formerly called judicial consent decree);
  - (d) Using fraud or deceit to obtain LRAPA approval, permit, permit attachment, certification, or license;
  - (e) Constructing a new source or modifying an existing source without first obtaining a required New Source Review/Prevention of Significant Deterioration (NSR/PSD) permit;
  - (f) Constructing a new source, as defined in OAR 340-245-0020, without first obtaining a required Air Contaminant Discharge Permit required under OAR 340-245-0005 through 340-245-8050 or without complying with Cleaner Air Oregon rules under OAR 340-245-0005 through 340-245-8050;
  - (g) Failing to conduct a source risk assessment, as required under OAR 340-245-0050;
  - (h) Modifying a source in such a way as to require a permit modification under OAR 340-245-0005 through 340-245-8050, that would increase risk above permitted levels under OAR 340-245-0005 through 340-245-8050 without first obtaining such approval from

LRAPA;

- (i) Operating a major source, as defined in title 12, without first obtaining the required permit;
- (j) Operating an existing source, as defined in OAR 340-245-0020, after a submittal deadline under OAR 340-245-0030 without having submitted a complete application for a Toxic Air Contaminant Permit Addendum required under OAR 340-245-0005 through 340-245-8050;
- (k) Exceeding a Plant Site Emission Limit (PSEL);
- (l) Exceeding a risk limit, including a Source Risk Limit, applicable to a source under OAR 340-245-0100;
- (m) Failing to install control equipment or meet emission limits, operating limits, work practice requirements, or performance standards as require by New Source Performance Standards under title 46 or National Emission Standards for Hazardous Air Pollutant Standards under title 44;
- (o) Exceeding a hazardous air pollutant emission limit;
- (p) Failing to comply with an Emergency Action Plan;
- (q) Exceeding an opacity or emission limit (including a grain loading standard) or violating an operational or process standard that was established under New Source Review/Prevention of Deterioration (NSR/PSD);
- (r) Exceeding an emission limit or violating an operational or process standard that was established to limit emissions to avoid classification as a major source, as defined in title 12;
- (s) Exceeding an emission limit or violating an operational limit, process limit, or work practice requirement that was established to limit risk or emissions to avoid exceeding an applicable Risk Action Level or other requirement under OAR 340-245-0005 through 340-245-8050;
- (t) Exceeding an emission limit, including a grain loading standard, by a major source, as defined in title 12, when the violation was detected during a reference method stack test;
- (u) Failing to perform testing or monitoring required by a permit, permit attachment, rule or order, that results in failure to show compliance with a Plant Site Emission Limit or with an emission limitation or performance standard established under New Source Review/Prevention of Significant Deterioration, National Emission Standards for Hazardous Air Pollutants, New Source Performance Standards, Reasonably Available



Control Technology, Best Available Control Technology, Maximum Achievable Control Technology, Typically Achievable Control Technology, Lowest Achievable Emission Rate, or adopted under section 111(d) of the Federal Clean Air Act;

- (v) Causing emissions that are a hazard to public safety;
  - (w) Violating a work practice requirement for asbestos abatement projects;
  - (x) Improperly storing or openly accumulating friable asbestos material or asbestos-containing waste material;
  - (y) Conducting an asbestos abatement project by a person not licensed as an asbestos abatement contractor;
  - (z) Violating a title 43 disposal requirement for asbestos-containing waste material;
  - (aa) Failing to hire a licensed contractor to conduct an asbestos abatement project;
  - (bb) Openly burning materials which are prohibited from being outdoor burned anywhere in Lane County, Oregon by paragraph 47-015(1)(e) or burning materials in a solid fuel burning device, fireplace, trash burner or other device as prohibited by OAR 340-262-0900(1); or
  - (cc) Failing to install or use certified vapor recovery equipment.
- (2) Class II
- (a) Violating any otherwise unclassified requirement;
  - (b) Constructing or operating a source required to have an Air Contaminant Discharge Permit (ACDP), ACDP Attachment, or registration without first obtaining such permit or registration, unless otherwise classified;
  - (c) Violating the terms or conditions of a permit, permit attachment or license, unless otherwise classified;
  - (d) Modifying a source in such a way as to require a permit or permit attachment modification from LRAPA without first obtaining such approval from LRAPA, unless otherwise classified;
  - (e) Exceeding an opacity limit, unless otherwise classified;
  - (f) Failing to timely submit a complete ACDP annual report or permit attachment annual report;
  - (g) Failing to timely submit a certification, report, or plan as required by rule, permit or

permit attachment, unless otherwise classified;

- (h) Failing to timely submit a complete permit application, ACDP attachment application, or permit renewal application;
- (i) Failing to submit a timely and complete air toxic contaminant emission inventory as required under OAR 340-245-0005 through 340-245-8050;
- (j) Failing to comply with the outdoor burning requirements for commercial, construction, demolition, or industrial wastes in violation of title 47;
- (k) Failing to comply with outdoor burning requirements in violation of any provision of title 47, unless otherwise classified or burning materials in a solid fuel burning device, fireplace, trash burner or other device as prohibited by OAR 340-262-0900(2);
- (l) Failing to replace, repair, or modify any worn or ineffective component or design element to ensure the vapor tight integrity and efficiency of Stage I or Stage II vapor collection system;
- (m) Failing to provide timely, accurate or complete notification of an asbestos abatement project; or
- (n) Failing to perform a final air clearance test or submit an asbestos abatement project air clearance report for an asbestos abatement project.

(3) Class III

- (a) Failing to perform testing or monitoring required by a permit, permit attachment, rule or order where missing data can be reconstructed to show compliance with standards, emissions limitations or underlying requirements;
- (b) Constructing or operating a source required to have a Basic Air Contaminant Discharge Permit without first obtaining the permit;
- (c) Modifying a source in such a way as to require construction approval from LRAPA without first obtaining such approval from LRAPA, unless otherwise classified;
- (d) Failing to revise a notification of an asbestos abatement project when necessary, unless otherwise classified; or
- (e) Submitting a late air clearance report that demonstrates compliance with the standards for an asbestos abatement project.

**Section 15-057 Determination of Violation Magnitude**

- (1) For each civil penalty assessed, the magnitude is moderate unless:

- (a) A selected magnitude is specified in section 15-060 and information is reasonably available to LRAPA to determine the application of that selected magnitude; or
  - (b) LRAPA determines using information reasonably available to it, that the magnitude should be major under subsection (3) or minor under subsection (4).
- (2) If LRAPA determines, using information reasonably available to LRAPA, that the general or selected magnitude applies, LRAPA's determination is the presumed magnitude of the violation, but the person against whom the violation is alleged has the opportunity and the burden to prove that a magnitude under subsection (1), (3), or (4) is more probable than the alleged magnitude regardless of whether the magnitude is alleged under sections 15-057 or 15-060.
- (3) The magnitude of the violation is major if LRAPA finds that the violation had a significant adverse impact on human health or the environment. In making this finding, LRAPA will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or EQC or DEQ and LRAPA rules standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, LRAPA may consider any single factor to be conclusive.
- (4) The magnitude of the violation is minor if LRAPA finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or the environment. In making this finding, LRAPA will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission or department of LRAPA rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration volume, or toxicity of the materials involved; and the duration of the violation.

### **Section 15-060 Selected Magnitude Categories**

Magnitudes for selected violations will be determined as follows:

- (1) Opacity limit violations:
- (a) Major— opacity measurements or readings of 20 percent opacity or more over the applicable limit; or an opacity violation by a federal major source as defined in title 12;
  - (b) Moderate— opacity measurements or readings of greater than 10 percent opacity and less than 20 percent opacity over the applicable limit;
  - (c) Minor— opacity measurements or readings of 10 percent opacity or less opacity over the applicable limit.

- (2) Operating a major source, as defined in title 12, without first obtaining the required permit: Major – if a Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) analysis shows that additional controls or offsets are or were needed, otherwise apply section 15-057.
- (3) Exceeding an emission limit established under New Source Review/Prevention of Significant Deterioration (NSR/PSD): Major – if exceeded the emission limit by more than 50 percent of the limit, otherwise apply section 15-057.
- (4) Exceeding an emission limit established under federal National Emission Standards for Hazardous Air Pollutants (NESHAPs): Major – if exceeded the Maximum Achievable Control Technology (MACT) standard emission limit for a directly-measured hazardous air pollutant (HAP), otherwise apply section 15-057.
- (5) Exceeding a cancer or noncancer risk limit that is equivalent to a Risk Action Level or a Source Risk Limit if the limit is a Risk Action Level established under OAR 340-245-0005 through 340-245-8050: Major, otherwise apply section 15-057.
- (6) Air contaminant emission limit violations for selected air pollutants: Magnitude determinations under this subsection shall be made based upon significant emission rate (SER) amounts listed in title 12 (Tables 2 and 3):
  - (a) Major:
    - (A) Exceeding the annual emission limit as established by permit, rule or order, by more than the annual SER; or
    - (B) Exceeding the short-term (less than one year) emission limit as established by permit, rule or order by more than the applicable short-term SER.
  - (b) Moderate:
    - (A) Exceeding the annual emission limit as established by permit, rule or order by an amount from 50 up to and including 100 percent of the annual SER; or
    - (B) Exceeding the short-term (less than one year) emission limit as established by permit, rule or order by an amount from 50 up to and including 100 percent of the applicable short-term SER.
  - (c) Minor:
    - (A) Exceeding the annual emission limit as established by permit, rule or order by an amount less than 50 percent of the annual SER; or
    - (B) Exceeding the short-term (less than one year) emission limit as established by permit, rule or order by an amount less than 50 percent of the applicable short-

term SER.

- (7) Violation of Emergency Action Plans: Major magnitude in all cases.
- (8) Asbestos violations—These selected magnitudes apply unless the violation does not cause the potential for human exposure to asbestos fibers:
  - (a) Major – more than 260 linear feet or more than 160 square feet asbestos-containing material or asbestos-containing waste material;
  - (b) Moderate – from 40 linear feet up to and including 260 linear feet or from 80 square feet up to and including 160 square feet asbestos-containing material or asbestos-containing waste material;
  - (c) Minor – less than 40 linear feet or 80 square feet of asbestos-containing material or asbestos-containing waste material;
  - (d) The magnitude of the asbestos violation may be increased by one level if the material was comprised of more than 5 percent asbestos.
- (9) Outdoor burning violations:
  - (a) Major – Initiating or allowing the initiation of outdoor burning of 20 or more cubic yards of commercial, construction, demolition and/or industrial waste; or 5 or more cubic yards of prohibited materials (inclusive of tires); or 10 or more tires;
  - (b) Moderate – Initiating or allowing the initiation of outdoor burning of 10 or more, but less than 20 cubic yards of commercial, construction, demolition and/or industrial waste; or 2 or more, but less than 5 cubic yards of prohibited materials (inclusive of tires); or 3 to 9 tires; or if LRAPA lacks sufficient information upon which to make a determination of the type of waste, number of cubic yards or number of tires burned;
  - (c) Minor – Initiating or allowing the initiation of outdoor burning of less than 10 cubic yards of commercial, construction, demolition and/or industrial waste; or less than 2 cubic yards of prohibited materials (inclusive of tires); or 2 or less tires;
  - (d) The selected magnitude may be increased one level if LRAPA finds that one or more of the following are true or decreased one level if LRAPA finds that none of the following are true:
    - (A) The burning took place in an outdoor burning control area;
    - (B) The burning took place in an area where outdoor burning is prohibited;
    - (C) The burning took place in a non-attainment or maintenance area for PM<sub>10</sub> or PM<sub>2.5</sub>; or

(D) The burning took place on a day when all outdoor burning was prohibited due to meteorological conditions.

**Section 15-065 Appeals**

- (1) Any person who is issued a corrective action order or who is assessed with a civil penalty under title 15 may appeal such order or penalty to LRAPA within 21 days of the date of mailing of the notice. The hearing and appeal shall be conducted according to title 14 of these rules.
- (2) In reviewing the order or the penalty assessed by the Director, the Hearings Officer shall consider the factors set forth in section 15-030, the findings of the Director and the evidence and argument presented at the hearing. The Hearings Officer shall make findings as to those factors deemed to be significant.
- (3) Unless the issue is raised in Respondent's answer to the order or notice of assessment of civil penalty, the Hearings Officer may presume that the economic and financial conditions of Respondent would allow imposition of the penalty assessed by the Director. At the hearing, the burden of proof and the burden of coming forward with evidence regarding the Respondent's economic and financial condition shall be upon the Respondent.
- (4) If a timely request for a hearing is not received by LRAPA, the Director may issue a final order upon default based upon a prima facie case as provided in paragraph 14-175(4)(c) and subsection 14-205(2). If the penalty is not paid within 10 days of issuance of the final order, the order shall constitute a judgment and may be filed as provided in ORS 468.135(4).