



SOUTHERN UTE INDIAN TRIBE



Enforcement Procedures and Penalty Policy

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Enforcement Procedures and Penalty Policy

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I. Introduction

The Southern Ute Indian Tribe Environmental Programs Division Air Quality Program is responsible for administering the air quality programs that comprise the Reservation Air Program as part of its Southern Ute Indian Tribal Council-delegated responsibility to carry out the Tribe's obligations under the *Intergovernmental Agreement Between the Southern Ute Indian Tribe and the State of Colorado Concerning Air Quality on the Southern Ute Indian Reservation*, dated December 13, 1999.

The AQP strives to protect and improve air quality through a comprehensive air quality program for the benefit of the health and welfare of Southern Ute Indian Reservation residents. The Reservation Air Program is intended to reflect the environmental, economic, geographic and cultural interests of the Tribe in a manner that is compatible with Colorado air quality goals.

The AQP intends to enforce the Reservation Air Code fairly and consistently, initiating enforcement actions against tribal-permitted sources commensurate with the magnitude of noncompliance. The traditional tools of administrative, civil, or criminal (through referrals to EPA) enforcement actions and penalties will be combined with approaches which emphasize problem-solving and creative settlements to achieve positive environmental outcomes.

The AQP will use a full range of enforcement options to achieve prompt compliance and deter noncompliance or regulatory avoidance. Where a source in noncompliance has achieved a distinct economic advantage from noncompliance, the AQP will calculate penalties sufficient to offset the economic benefit gained by the source.

This policy is for information purposes and internal tribal guidance. It does not create any enforceable rights or obligations. Although it does not expect to or plan on doing so, the Tribe, in its sole discretion, reserves the right to take actions that may be inconsistent with this policy.

II. Goals

The goals of this Enforcement Procedures and Penalty Policy are to:

- Assure public health of the Reservation residents and environmental protection by maintaining the regulated community's compliance with the Reservation Air Code.
- Protect ecosystems and continually strive to improve the Tribal air shed.
- Provide fair, equitable, and consistent enforcement responses to all tribal-permitted sources in noncompliance.
- Provide timely resolution of enforcement actions.
- Promote environmental stewardship and deter noncompliance.

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- Encourage settlement negotiations and minimize litigation and prosecution of sources in noncompliance.
- Ensure uniform evaluation of enforcement cases and application of the U.S. Environmental Protection Agency's High Priority Violator (HPV) policy.

III. Authority

The Tribe pursues its inspections and enforcement actions under several authorities outlined in the RAC including:

1. Inspection and Information Collection

The authority for a Tribal AQP inspector or other authorized representative of the Tribe to enter a facility to inspect equipment and supporting compliance demonstration records, collect data, and sample for the purposes of assuring compliance with applicable requirements is RAC § 2-110(9)(b).

2. Enforcement Actions

The authority for civil enforcement, compromise, and settlement of violations is contained in RAC § 1-104 and §1-105 and RAC § 2-121. The EPA will exercise criminal enforcement jurisdiction on all lands within the Reservation boundaries for violations of the RAC in accordance with the *Memorandum of Agreement between the Southern Ute Indian Tribe and the United States Environmental Protection Agency Region 8 Concerning Criminal Enforcement Procedures for Clean Air Act Violations on the Southern Ute Indian Reservation* (RAC § 2-121(3)).

3. Penalties

The authority for assessing civil penalties and suing to recover damages for RAC violations is RAC § 2-121(2).

IV. Enforcement Screening

Enforcement screening is the process whereby potential violations identified by the Tribe during a compliance evaluation are reviewed to determine: 1) if an enforcement response is needed, 2) if a violation has occurred, identification of the factors affecting the severity of the violation, and 3) the appropriate response and enforcement pathway. The Tribe's AQP staff or the Tribe's legal counsel will review all documentation to determine whether there is a sufficient basis to conclude a violation has occurred and whether further investigation of an alleged violation is necessary.

1. Enforcement Evaluation

In determining the appropriate response, consideration is given to:

- The nature of the alleged violation(s):

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- a) Emission Standards – Did any exceedances of an emission standard result in potential or actual emissions to the atmosphere?
 - b) Pollutant type – Did potential or actual emissions to atmosphere include a hazardous air pollutant?
 - c) Monitoring – Was required monitoring of an emission unit or source not performed?
 - d) Recordkeeping and Reporting – Are records inadequate to demonstrate compliance or is a report late or deficient?
 - e) Pollution Control Equipment – Was any pollution control device required by a tribal or federal regulation or permit not installed, not used during normal operations, bypassed, or rendered inoperable?
 - f) Compliance Orders, Consent Decrees or other Enforceable Compliance Schedules – Is there an alleged violation(s) of an existing, enforceable order, decree or schedule?
 - g) The Size of the Source – Is the source considered a large facility or operator?
 - h) Other – Are there any additional extenuating circumstances relating to the alleged violation(s)?
- The duration of the alleged violation(s):
 - a) Frequency – Is the alleged violation(s) an isolated or recurring event?
 - b) Impact on Public Health and the Environment - Did the alleged violation(s) pose a potential or actual threat to public health or the environment?
 - c) Cooperation – Is the source responsive, cooperative, and taking immediate remedial steps to correct the alleged violation(s)?
 - d) Compliance History – Is the source in chronic violation?

2. Enforcement Responses

If, after review and any additional investigation or subsequent information requests from the source, the Tribe determines that no violation has occurred, no further action will be taken and the source will be notified in writing (reference attachment 10). However, if after review and additional investigation, the Tribe determines a violation has occurred, the Tribe will take one of the following actions:

- Issue a warning letter (reference attachment 7), if appropriate, to the source with documentation of the warning placed in the case file with no further enforcement action taken;
- Issue a compliance advisory letter (reference attachment 8) identifying the alleged violations and initiating the informal enforcement process in consultation with the AQP Program Manager;

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- Issue a Notice of Violation letter (reference attachment 9) summarizing the alleged violations and initiating the formal enforcement process in consultation with the Tribe's legal counsel; or
- Refer the case to the EPA for criminal enforcement in accordance with the *Intergovernmental Agreement Between the Southern Ute Indian Tribe and the State of Colorado Concerning Air Quality Control on the Southern Ute Indian Reservation* and the *Memorandum of Agreement Between the Southern Ute Tribe and the U.S. Environmental Protection Agency Region 8 Regarding Criminal Enforcement of the Clean Air Act within The Exterior Boundaries of the Southern Ute Reservation*. RAC § 2-121(3).

V. Enforcement Pathways

The Tribe will use a variety of enforcement pathways to achieve a maximum degree of compliance with the RAC. Based on the findings of a compliance evaluation and any subsequent communications with a source, the Tribe may determine it is appropriate to resolve the violations through either the informal settlement process or through formal enforcement action. The Tribe will attempt to resolve the majority of enforcement actions informally.

The Tribe's actions will be guided by this policy and the *Memorandum of Agreement between the Southern Ute Tribe and the U.S. Environmental Protection Agency Region 8 Regarding Criminal Enforcement of the Clean Air Act within The Exterior Boundaries of the Southern Ute Reservation*.

1. Informal Process

The Tribe's informal resolution process is more expeditious than the formal process and may result in the assessment of lower penalties. The Tribe provides an opportunity for the informal resolution of enforcement actions through the following steps and procedures:

a. No Further Action

The Tribe will close a case upon finding that no violation occurred and determining that no further action is necessary. A no further action determination will be based upon a review of the final compliance monitoring report, results of any additional investigation, written documentation from a source demonstrating compliance, and any other supporting documentation.

b. Written Warnings

The Tribe has the discretion to consider issuing a written warning to noncompliant sources for situations involving minor violations that have been resolved by a source. A written warning may not be appropriate when the source has a history of similar noncompliance or has demonstrated a pattern of noncompliance.

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c. Compliance Advisory

The Tribe issues a compliance advisory letter to provide notice of alleged violations to a source and may include notice that, after internal review, other issues documented during a compliance evaluation were not deemed violations. The compliance advisory letter may also notify a source that additional investigation may be required, outline any submittals or actions required of the source, and may propose a compliance schedule for correction of the violations.

A compliance advisory letter invites the source to submit counter-positions to alleged violations or information supporting the source's conclusion to the AQP. The letter is also used to schedule a compliance advisory meeting to discuss the alleged violations.

Finally, alleged violations described in a compliance advisory letter may or may not be pursued by the Tribe through formal enforcement action, depending on the type of violation and the response of the source to the advisory.

d. Compliance Advisory Meeting

A compliance advisory meeting provides an opportunity for the source to discuss both disputed and non-disputed alleged violations, pathways to resolve alleged violations, and any other relevant matters. The source may present information not previously available to the Tribe and discuss appropriate ways to correct the deficiencies. The meeting may also serve as a forum for establishing mutually agreed-upon compliance schedules and may include discussion of the administrative process to be used to resolve the compliance advisory, including informal enforcement settlement discussions and/or formal enforcement action initiation.

Although this meeting is informal, source representatives may include consultants and/or legal counsel, at the source's election. The Tribe may be represented by its enforcement personnel and, in appropriate cases, by the Tribe's legal counsel. If a source has questions regarding the Tribe's anticipated representation at a compliance advisory meeting, or otherwise in relation to the meeting, those questions may be directed to the AQP Manager, AQP Inspector, Enforcement Coordinator, or legal counsel.

e. Settlement Agreement

The Tribe may use a Settlement Agreement, a written mutual agreement between the Tribe and a source, to resolve both informal and formal enforcement actions. The Tribe, however, will only enter into a Settlement Agreement when the agreement enables the Tribe to achieve its enforcement objectives. The terms of a Settlement Agreement are mutually agreed upon between the Tribe and a source and may require: (1) corrective or remedial actions to resolve an alleged violation(s); (2) amendment of the source's air permit authorizations; (3) compliance schedules; and (4) negotiated penalty settlements.

A Settlement Agreement can serve as a resolution to an enforcement action. A Settlement Agreement is the minimum level enforcement action required to resolve an HPV enforcement case.

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2. Formal Process

The decision to resolve an alleged violation through the formal enforcement process will usually be based on: (1) an inability of the Tribe and source to resolve the matter through the informal process; (2) the failure or refusal by a recipient to return to compliance after entering into a Settlement Agreement; or (3) the seriousness or repetitive or continuing nature of the noncompliance. The decision whether to initiate a formal enforcement process will be made by the Tribe, in its sole discretion.

Formal enforcement actions may include any of the following:

a. Notice of Violation

The Tribe issues an NOV to communicate alleged violations to a source. As with the compliance advisory letter, the NOV summarizes background information and lists the specific alleged violations at issue. The NOV will also establish the date and time for the NOV conference, described below.

b. Notice of Violation Conference

At the NOV conference, the Tribe gathers and discusses the data, views, and arguments relating to the alleged violations as presented by the source. The Tribe will generally record these conferences. The source may, at its election, also provide certain data, information, and its arguments to the Tribe in advance of the NOV conference.

The Tribe is typically represented at an NOV conference by the Inspector(s), an Enforcement Coordinator, the Tribe's AQP Manager, and tribal legal counsel. Questions regarding the Tribe's anticipated representation at an NOV conference, or otherwise in relation to the conference, may be directed to the AQP Manager or Enforcement Coordinator.

c. Compliance Order

In addition to the Settlement Agreement pathway presented in 1(e) of this section, the Tribe may use a Compliance Order to resolve formal enforcement actions. A Compliance Order is a unilateral written directive from the Tribe that may require the source take one or more of the following actions: (1) To immediately cease and desist any non-compliant activity; (2) Take corrective or remedial actions to resolve an alleged violation(s); (3) Comply with applicable statutory or regulatory requirements by a specified deadline; (4) Revise the source's air permit authorizations; (5) Pay penalties for violations that have occurred and specify penalty amounts to be assessed for failure to comply with a mandatory compliance schedule.

The Compliance Order will describe the alleged violation(s), as determined by the Tribe, provide the corresponding penalty and any compliance requirements, and remind the source of its RAC § 1-105 appeal rights. The Tribe's legal counsel will review the Compliance Order for legal and factual adequacy before its issuance. It should be noted that the penalty assessment reflected in the Compliance Order will likely exceed any penalty assessment contained in an informal settlement proposal and a documented violation of a Compliance Order carries the potential for civil or criminal sanctions.

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d. Civil Court Enforcement Actions

The Tribe may refer a case to the Tribe's legal counsel for civil enforcement action after evaluating a potential enforcement case as outlined in Section IV.(1) of this policy. Such referrals normally will be based on a determination that the case is especially complex or that it is otherwise beyond the resources of AQP. If the Tribe's legal counsel determines the case is appropriate for filing in federal district court, the legal counsel will seek approval from Tribal Council to initiate the action. Under the IGA, Public Law No. 108-336 and RAC § 1-105, the Tribe and Commission may enforce compliance with the Reservation Air Code including, if necessary, through a civil action for declaratory or injunctive relief, or for other orders in aid of enforcement, in the United States District Court for the District of Colorado. Once a case is filed in court, the inspectors should assist the Tribe's legal counsel as requested.

e. Criminal Enforcement Actions

The EPA will exercise criminal enforcement jurisdiction over any persons on all lands within the Reservation boundaries for violations of the RAC in accordance with the *Memorandum of Agreement between the Southern Ute Indian Tribe and the United States Environmental Protection Agency Region 8 Concerning Criminal Enforcement Procedures for Clean Air Act Violations on the Southern Ute Indian Reservation* (RAC § 2-121(3)).

VI. Violation Categorization

The Tribe will evaluate the significance of alleged violations during the screening process as outlined in Section IV. of this policy. Each alleged violation will be categorized:

1. Minor Violations

Minor violations are generally administrative or clerical in nature and a source will be given an opportunity to come into compliance. Minor violations, at a minimum, will result in the issuance of either a warning letter or compliance advisory letter and compliance advisory meeting as described in Section V.(1) of this policy. Minor violations may require initiation of formal enforcement action if the source receives a written warning or compliance advisory letter for the same violation three times within the most recent five year period, including any current notification for an alleged violation. Decisions about whether to initiate enforcement action for initial or repeat minor violations remain at the discretion of the Tribe. A partial list of violations the Tribe considers to be minor violations are included in Attachment 2 of this policy.

If the Tribe initiates enforcement action, a settlement proposal letter will be sent to the source after the Compliance Advisory meeting. The settlement proposal letter will outline the Tribe's authority to assess monetary civil and economic benefit penalties under the RAC and propose the terms upon which the Tribe would be willing to resolve the violation. The terms contained in the settlement proposal letter should be mutually agreed upon between the Tribe and the source during the Compliance Advisory Meeting. The settlement proposal letter will specify the deadline for the source to consider and either accept or reject the settlement proposal.

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In the event the source accepts the Tribe's settlement proposal, the settlement will not be binding until the source signs and returns the settlement offer, makes the required demonstration of compliance, and pays the civil and economic benefit penalty amounts to the Tribe. Resolution through informal, mutual settlement will not be deemed an admission of liability by the source, but will be considered a part of the source's compliance history for any purpose for which such history is relevant under the RAC.

If no response is received from the source after the deadline specified in the settlement proposal letter, or a mutual Settlement Agreement cannot be reached, the Tribe shall deem the settlement offer rejected and may initiate formal enforcement action. An NOV will be issued after the end of the period specified in the settlement proposal letter and will establish a date and time for a required NOV conference. Any resulting Compliance Order shall not contain a reduced civil penalty in consideration of early settlement.

The Tribe may amend the initial proposed settlement if additional information or considerations are provided by the source. The amended settlement proposal will specify the time period and subsequent deadline which the source has to consider and either accept or reject the proposed settlement. If no response is received from the source within the specified time frame, the proposed settlement will be deemed rejected. If the source rejects the settlement proposal, or the Tribe deems that the source has rejected the settlement proposal, the Tribe will initiate the formal enforcement process.

2. Moderate Violations

Moderate violations are violations that are not considered minor violations and which have the potential to cause harm to public health, safety or welfare, or to the environment and constitute more than a small deviation from the requirements of the Reservation Air Code, a permit, or order. Moderate violations, at a minimum, will result in the issuance of either a compliance advisory letter or a notice of violation letter and scheduling of either a compliance advisory meeting or NOV conference as described in Section V.(1) of this policy. A partial list of violations that the Tribe considers to be moderate violations are included in Attachment 2 of this policy and the Tribe, at its sole discretion, may choose to follow the moderate violation process if a source has a history of repeat or continuing minor violations. Moderate violations must not meet the criteria for enforcement under the EPA's High Priority Violator policy.

If enforcement action is initiated, a settlement proposal letter will be sent to the source after the compliance advisory meeting specifying the Tribe's authority to assess monetary civil and economic benefit penalties under the RAC and propose the terms upon which the Tribe would be willing to resolve the violation. The terms contained in the settlement proposal letter should be agreed upon between the Tribe and the source during the compliance advisory meeting.

The settlement proposal letter will specify the deadline for the source to consider and either accept or reject the settlement proposal. In the event the source accepts the Tribe's settlement proposal, it will not be binding until the source signs and returns the settlement offer, makes the required demonstration of compliance, and pays the civil and economic benefit

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penalty amounts to the Tribe. Resolution through informal mutual settlement will not be deemed an admission of liability by the source, but will be considered a part of the source's compliance history for any purpose for which such history is relevant under the RAC.

If no response is received from the source after the deadline specified in the settlement proposal letter, or a mutual Settlement Agreement cannot be reached, the Tribe will deem the settlement offer rejected and may initiate formal enforcement action. An NOV will be issued after the end of the period specified in the settlement proposal letter and will establish a date and time for a required NOV conference. Any resulting CO shall not contain a reduced civil penalty in consideration of early settlement.

The Tribe may amend the initial proposed settlement if additional information or considerations are provided by the source. The amended settlement proposal will specify 15 days during which the source may consider and either accept or reject the proposed settlement, and if no response is received from the source within that time, the proposed settlement will be deemed rejected. If the source rejects the settlement proposal, or the Tribe deems that the source has rejected the settlement proposal, the Tribe will initiate the formal enforcement process.

3. Major Violations

Major violations are those violations that are continuing in nature, repeat violations, or that are otherwise deemed to be a substantial threat, result in actual harm to the public or the environment, or both. The Tribe will consider all violations meeting the criteria for enforcement under the EPA's HPV policy to be major violations. Major violations, at a minimum, will result in the issuance of a Notice of Violation letter and scheduling of an NOV Conference. A list of violations the Tribe considers to be major violations are included in Attachment 2.

After the NOV Conference the Tribe will send the source a settlement proposal letter specifying the Tribe's authority to assess monetary civil and economic benefit penalties under the RAC. The letter will also propose the terms upon which the Tribe would be willing to resolve the violation. The terms contained in the settlement proposal letter will generally reflect agreement between the Tribe and the source during the NOV conference. The settlement proposal letter will specify the deadline for the source to consider and either accept or reject the settlement proposal.

In the event the parties reach a settlement, the terms will be transcribed in a Settlement Agreement and signed by the source and the appropriate tribal representative. The Agreement will become binding only after both parties have signed it. Once the terms have been met, compliance demonstrated, and penalties paid, the agreement may then be considered concluded. In addition, resolution of a violation through the informal, mutual settlement process is not deemed an admission of liability by the source, except where otherwise agreed to during the negotiation process, but will constitute a part of the source's compliance history for any purpose for which compliance history is relevant under the RAC.

In the event that the source rejects either the NOV conference or settlement offer, or if the mutual settlement process does not result in a prompt resolution of the violations, the Tribe will

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proceed with the formal enforcement process including the issuance of a unilateral directive from the Tribe in the form of a Compliance Order or referral to the Tribe's legal counsel for civil court enforcement action. Any resulting CO shall not contain a reduced civil penalty in consideration of early settlement. All criminal matters will be referred to the EPA in accordance with the *Memorandum of Agreement between the Southern Ute Indian Tribe and the United States Environmental Protection Agency Region 8 Concerning Criminal Enforcement Procedures for Clean Air Act Violations on the Southern Ute Indian Reservation*.

VII. Federally Reportable Violations (FRV)

The FRV policy outlines the types of violations that enforcement agencies are to report to EPA. The FRV are limited to those Clean Air Act programs with federally enforceable requirements including NSPS, NESHAP, MACT, NSR, PSD, EPA approved SIP, specific to:

- Title V Major Sources: Major sources as defined in CAA 501(2);
- SM-80 Sources: Minor sources that have taken an enforceable limit to remain minor sources, called synthetic minor sources, that emit or have the potential to emit (PTE) at or above 80 percent of the Title V major source threshold;
- Sources included in an alternative CAA Stationary Source Compliance Monitoring Strategy (CMS) plan;
- Any source at which a HPV has been identified.

Examples of source FRV include the following:

- Violations of any emission limitation, emission standard, or surrogate parameter
- Failure to maintain reports and records as required by the permit such as
 - Continuous emissions monitoring
 - Malfunctions
 - Excess emissions
 - Semi-annual and periodic monitoring
- Failure to timely test (performance test)
- Failure to timely report A-COMP
- Failure to construct/operate equipment in accordance with permit conditions
- Failure to obtain or maintain permit (e.g. expired)

A FRV is to be reported within 60 days of the determination and linked to a Case File in ICIS-Air. The Tribe may elect to identify the Case File as "enforcement sensitive" regarding legal constraints or enforcement strategies. In addition, a formal notice of violation is an MDR that is to be reported in the Enforcement Action Module of ICIS-Air.

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VIII. High Priority Violations (HPV)

In 2014, EPA revised enforcement response policy guidance for High Priority Violations (HPV), which are significant to human health, the environment, and for the maintenance of strong CAA programs. Titled: *Timely and Appropriate Enforcement Response to High Priority Violations – Revised 2014*. As a subset of FRV, the policy applies to major sources, minor or sources subject to a Compliance Monitoring Strategy plan.

1. HPV Applicability Determination

If the Tribe identifies a violation during an inspection (or as the result of self-reporting), the AQ Technical Manager will examine the facts to determine if it fits one of the following six general criteria.

Criterion 1 – Failure to Obtain NSR permit

Criterion 2 – A violation of any federally enforceable emission limitation, standard, or operating parameter pursuant to CAA Title I or equivalent FIP provisions

Criterion 3 – A violation of any emission limitation, standard, or operating parameter surrogate for emissions in NSPS Part 60

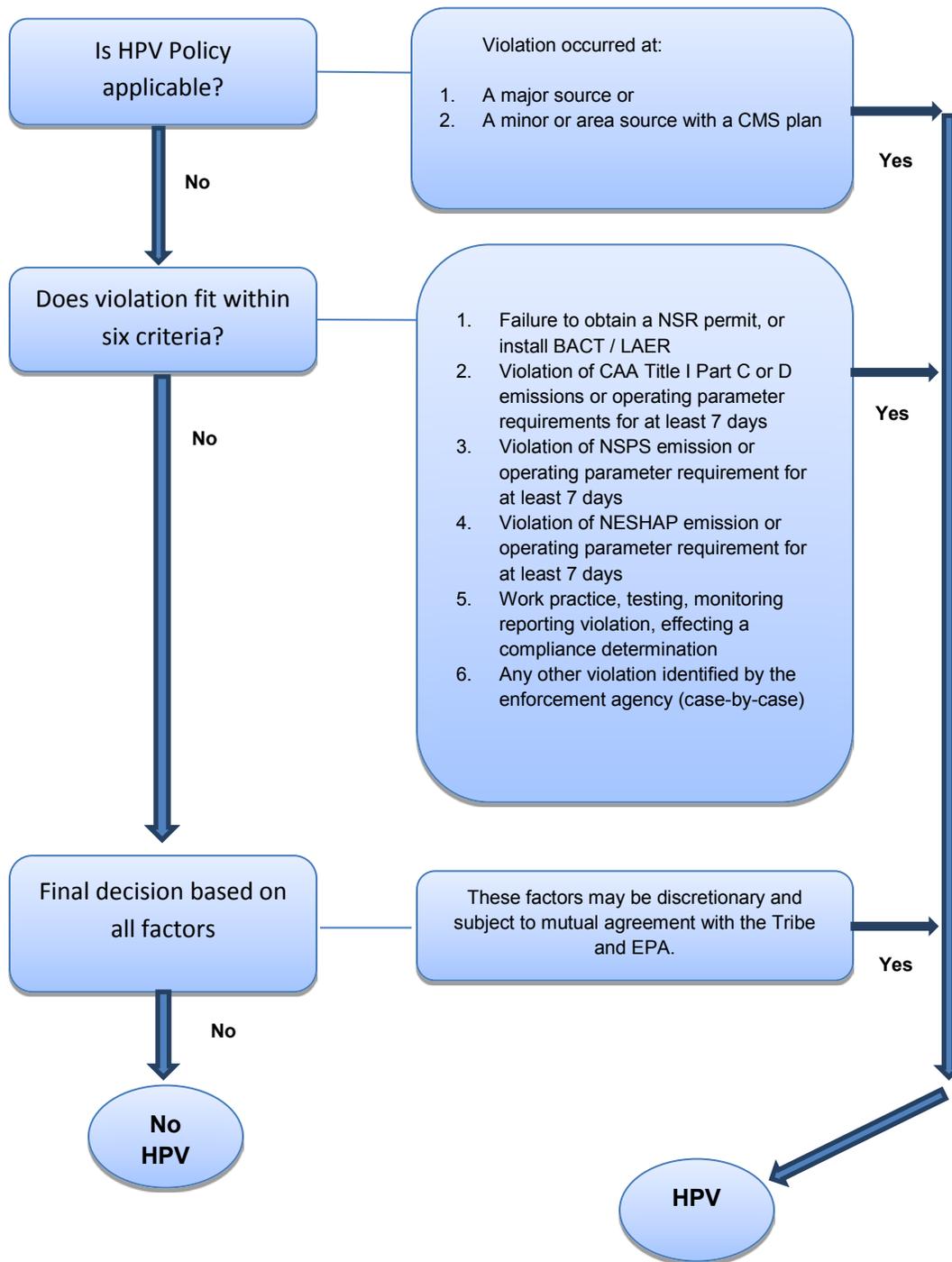
Criterion 4 – A violation of any emission limitation, standard, or operating parameter surrogate for emissions in NESHAP Part 61 and 63

Criterion 5 – A violation that involves federally enforceable work practices, testing requirements, monitoring, recordkeeping, reporting, effecting enforcement or compliance

Criterion 6 – Any other violations an enforcement agency warrants even if the duration is less than seven days

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Figure 1: HPV Applicability Determination Flow Chart



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2. HPV Resolution Timelines

HPV enforcement cases must meet specific timelines for resolution. The date of the initial identification of a violation Day Zero, which is the earlier of either (1) the date the agency has sufficient information to determine that a violation occurred or (2) 90 days after the compliance monitoring activity that first provides information indicating a violation. At this point, the AQP must record the HPV in ICIS-Air. After the case file is saved, it should be linked to the Discovery Action/s. Other MDR's for ICIS-Air include Addressing Action and Resolving Action.

Appropriate resolution timelines for enforcement actions are calculated from Day Zero. After 45 days, the AQP must advise a source of a violation. This may include a notice of violation. If the initial timeline needs revision, a new assessment may be addressed with EPA, as long as it is within 180 days.

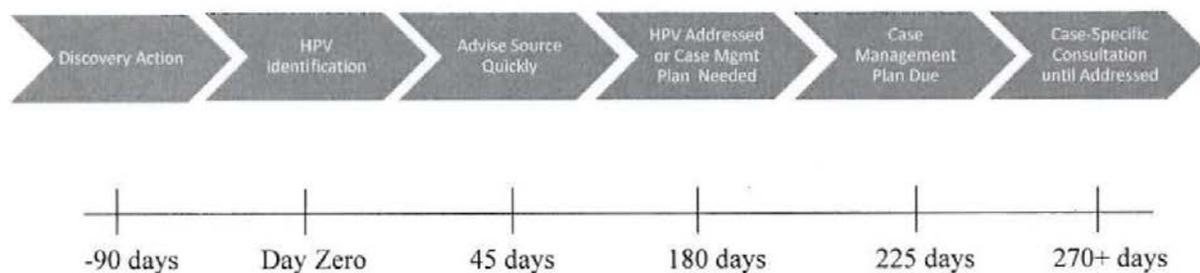
3. Penalties

All civil penalties should be sufficient to achieve effective deterrence, recover economic benefit, and reflect the seriousness (gravity) of the violation.

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Figure 2: Appropriate Enforcement Response for HPV

The following figure presents the enforcement timeline as required by EPA's HPV Policy:



Notes:

1. A regularly scheduled EPA Region consultation should be held at least quarterly.
2. The timeline applies to the agency initiating the action. Parallel actions and lead changes may occur at any time.
3. Timeline may be extended in a complex case. Also, follow-up may be necessary to complete the case or to monitor compliance schedule.

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IX. Penalty Assessment Criteria

The Tribe has the authority to collect civil penalties under RAC 2-121(2) for the violation of any applicable requirement; any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; or any regulation or orders issued by the Tribe. RAC 2-121(2) provides that:

- Civil penalties or damages assessed, sought, or agreed upon by the Tribe shall be appropriate to the violation; and
- Penalties or damages shall be separately recoverable in an amount not to exceed \$10,000 per day per violation.

This policy is intended, in part, to provide guidance on how the Tribe will calculate the gravity of the violation (the “gravity component”) and remove any significant economic benefit (the “economic benefit component”) of noncompliance. The gravity component and the economic benefit component are determined separately for each violation and then added together to determine the initial penalty amount. Specific penalty calculation examples and methodologies are contained in the *Southern Ute Indian Tribe – Reservation Air Program, Compliance and Enforcement Penalty Calculation Worksheet*.

1. Calculating the Gravity Component

Once an alleged violation has been evaluated and categorized as described in Sections IV. (1) and VI. of this policy, objective factors consistent with the EPA’s Clean Air Act Civil Penalty Policy will be evaluated and assessed as outlined below:

a. Actual or Potential Harm

- Actual or Potential Release** - A violation will be evaluated to determine whether there has been a release to the atmosphere and will be categorized as either an actual release or a potential release. Actual is defined as "existing in fact or reality; not merely potential." Potential is defined as "existing in possibility; capable of development into actuality."
- Amount of Pollutant** - A violation will be evaluated to quantify the percent above a permit or regulatory standard a pollutant was emitted or the total amount of pollutant emitted above a permit or regulatory standard. This factor will only be evaluated for actual violations of emission standards.
- Sensitivity of the Environment** - A violation will be evaluated to determine sensitivity of the environment where the violation occurred. For example, excessive emissions near a Mandatory Class 1 Federal Area (40 CFR Part 81) may have substantially more impact on the environment. This factor will only be used when evaluating Tribal Implementation Plan and New Source Performance Standards cases only.
- Toxicity of the Pollutant** - A violation will be evaluated for the toxicity of the pollutant involved. Violations involving toxic pollutants regulated by a National Emission Standard

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for Hazardous Air Pollutants or listed under Section 112(b)(1) of the CAA will be considered more serious violations.

- v. **Length of Time a Violation Continues** - A violation will be evaluated to determine the length of time the violation continues uncorrected. The longer the duration, the greater the risk of harm.

b. Importance to the Regulatory Scheme

- i. **Work Practice Standards** – A violation will be evaluated for the extent to which it deviates from a work practice standard outlined in any Tribal permit or applicable requirement.
- ii. **Monitoring** – A violation will be evaluated considering any partial or full failure to install, maintain, or operate monitoring equipment required by any Tribally-issued permit or applicable requirement.
- iii. **Testing** – A violation will be evaluated considering any partial or full failure to conduct a performance test, or failure to conduct a performance test within any required timeframe, or use of the proper test or reference method to complete a performance test required by any Tribal permit or applicable requirement.
- iv. **Recordkeeping** – A violation will be evaluated considering any partial or full failure to maintain records required by any Tribal permit or applicable requirement.
- v. **Reporting and Notification** – A violation will be evaluated considering any partial or full failure to provide a notification or report, submit a report or notification by the specified timeframe, and/or submit an incomplete notification or report required by any Tribal permit or applicable requirement. This factor includes compliance certification reporting.
- vi. **Permitting** – A violation will be evaluated considering any partial or full failure to obtain any permit authorization or registration or partial or full failure to pay any subsequent permit authorization or registration fees required by the Reservation Air Code or other applicable requirement.
- vii. **Pollution Control Equipment** – A violation will be evaluated considering any partial or full failure to install, maintain, or operate a pollution control device required by any Tribal permit or applicable requirement.
- viii. **Administrative Orders** – A violation will be evaluated to determine if it constitutes a deviation from an existing Settlement Agreement, Compliance Order, or any other Administrative Order.
- ix. **Compliance Schedules** - A violation will be evaluated considering any partial or full failure to meet a compliance schedule deadline, submit a notification or progress report within a specified timeframe, or submit a complete notification or progress report required by any Tribal permit or applicable requirement.
- x. **Requests for Information** - A violation will be evaluated considering any incomplete or full failure to respond to requests for information.

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c. Additional Considerations

- i. **Size of Source** - A violation will be analyzed and assessed based on the size of the company's entire operations, not just the facility in violation. A company's net worth or net current assets will be considered an adjusting factor when assessing penalties.

- ii. **Compliance History** – The compliance history of a source will be considered when evaluating a violation and assessing a penalty. The Tribe will check for and consider prior violations under all environmental statutes when determining the amount of the adjustment to be made under this factor. Evidence that a source has repeated a violation of a Tribal permit or applicable requirement may indicate the source was not deterred by a previous enforcement response. In determining the size of this adjustment, the Tribe will consider the following factors:
 - Similarity of the violation in question to prior violations. A violation will generally be considered "similar" if a previous enforcement response should have alerted the source to a particular type of compliance problem. Some facts indicating a similar violation are: 1) Violation of the same permit or permit provision; 2) Violation of the same emissions standard; 3) Violation at the same process points of a source; 4) Violation of the same Reservation Air Code or applicable requirement provision; or 5) A similar act or omission.

 - The number of prior violations. For purposes of this section, a "prior violation" includes any act or omission resulting in a Tribal, State, or Federal enforcement response (warning letter, compliance advisory, notice of violation, administrative order, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Tribe unless subsequently dismissed or withdrawn on the grounds that the owner or operator was not liable. It also includes any act or omission for which the source has previously been given written notification, however informal, that the regulating agency believes a violation exists. In researching an owner or operator's compliance history, the Tribe will check to see if the owner or operator has been listed pursuant to section 306 of the CAA.

 - Time elapsed since the prior violation.

 - Source's response to prior violations with regard to correcting the previous problem and attempts to avoid future violations.

 - The extent to which the gravity component had already been increased in a previous enforcement action due to a repeat violation.

- iii. **Willfulness and/or Negligence** – The Clean Air Act is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal

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liability. However, this does not render the source's willfulness or negligence irrelevant in assessing an appropriate penalty. A violation will be assessed to determine the degree of willfulness or negligence, if applicable, considering the following factors:

- The degree of control the source had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
- The extent to which the owner or operator in fact knew of the legal requirement that was violated.

d. Other Factors that Justice May Require

AQP may recommend adjustment of the penalty amount, on a case-by-case basis, upon a consideration of factors unique to the situation. This adjustment may result in an increase or decrease of the penalty amount. For example, a downward adjustment may be appropriate when an owner or operator inherits an enforcement action or poor compliance history as a result of purchasing an existing facility. The resulting penalty may not reflect the compliance efforts of the new owner.

e. Mitigating Factors

The following objective factors have the combined potential to mitigate up to 30% of the gravity component of a civil penalty:

- Voluntary and Complete Reporting or Disclosure of Noncompliance** - The voluntary and complete disclosure by a source of a violation in a timely manner after the discovery of noncompliance may yield a reduction in the gravity component of a penalty.
- Prompt Correction of Environmental Problem** - Full and prompt cooperation with the Tribe to resolve an environmental problem following the self-disclosure of a violation or discovery of a violation as the result of an investigation, including, when appropriate, entering into a legally enforceable commitment to undertake compliance and remedial efforts may yield a reduction in the gravity component of a penalty.
- Existence and Scope of Environmental Compliance Program or Audit** – The existence and scope of a regularized and comprehensive environmental compliance program or environmental audit program may yield a reduction in the gravity component of a penalty.
- Economic Impact** - Consistent with the goal of providing fair and equitable treatment of the regulated community, the Tribe will consider a source's ability to pay a penalty, for both the gravity component and economic benefit components, when assessing the preliminary deterrence amount.

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The Tribe will not reduce a penalty, even when a source proves conclusively that it cannot afford to pay, in the following situations: 1) the source refuses to comply with pollution control requirements; 2) the source cannot afford to comply with pollution control requirements; or, 3) the source's conduct was egregious (e.g., willful violations, or violations that might have or actually endangered lives).

If a source claims an inability to pay a penalty, the Tribe will first consider a delayed payment schedule with interest as a first option. If the delayed payment schedule with interest is not a viable option, the burden to demonstrate an inability to pay, as with the burden of demonstrating the presence of any other mitigating circumstances, rests with the source.

The Tribe will initially assess a source's inability to pay, after disclosure and receipt of supporting financial statements, using the EPA's ABEL or INDIPAY computer models. These models will be used to assist the Tribe in assessing an owner or operator's ability to afford compliance costs, cleanup costs, or civil penalties. If the source fails to provide sufficient information, or the models do not demonstrate a financial inability to pay, the Tribe will disregard this factor in adjusting the penalty.

- v. **Early Settlement** – The early resolution of an enforcement action may yield a reduction in the gravity component of a penalty.

2. Calculating the Economic Benefit Component

A cornerstone of the Tribe's civil penalty program is recapture of the economic benefit a source may have gained from illegal activity. Economic benefit penalties help to level the economic playing field, preventing sources from obtaining an unfair financial advantage over their competitors who made timely and necessary investments in environmental compliance. Penalties serve as incentives to protect the environment and public health by encouraging the adoption of pollution prevention practices that limit exposure to pollutant discharges. Appropriate penalties help deter future violations by the source and by others similarly situated.

The economic benefit component focuses on the source's economic gain from noncompliance. Economic gain from noncompliance may occur in three basic ways. It may occur as a result of: 1) delays in necessary pollution control expenditures; 2) avoidance of necessary pollution control expenditures; or 3) an illegal competitive advantage gained during the period of noncompliance.

a. Economic Benefit from Delayed and/or Avoided Costs

Each violation will be evaluated to determine if an economic benefit was gained from a source's noncompliance. When there is evidence that an economic benefit exists, based on delayed or avoided costs, AQP will estimate the value of the economic benefit and include this amount in the proposed civil penalty RAC 2-121(2)(d) .

If the economic benefit is determined to exceed \$10,000, the Tribe will use EPA's BEN model as the method for calculating economic benefit from delayed and avoided expenditures.

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For economic benefit calculations of less than \$10,000, or where the owner or operator will not or cannot provide financial data in a timely manner, staff may make estimates based on available resources, including their best professional judgment.

BEN uses several data variables, most of which contain default values. The required variables include information about capital and non-capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. BEN allows a cooperative facility to provide actual financial data that may affect the civil penalty calculation. Finally, methods other than BEN may be used to calculate economic benefit of noncompliance, where the Tribe concludes that an alternative method provides more meaningful results.

A necessary first step when making a preliminary determination of economic benefit is to understand the costs avoided or delayed through noncompliance. A delayed cost is an expenditure that, through current noncompliance, can be put off until sometime in the future. An avoided cost is an expenditure not made, resulting in noncompliance. Examples of **delayed costs** include, but are not limited to:

- Failure to install equipment needed to meet emission control standards;
- Failure to effect process changes needed to reduce pollution;
- Failure to test where the test still must be performed; and
- Failure to install required monitoring equipment.

Many types of violations enable a violator to avoid permanently certain costs associated with compliance. Examples of **avoided costs** include, but are not limited to:

- Failure to employ a sufficient number of staff;
- Disconnecting or failing to properly operate or maintain existing pollution control equipment;
- Failure to adequately train staff;
- Failure to establish or follow precautionary methods required by regulations or permits;
- Removal of pollution equipment resulting in operational, or maintenance savings;
- Disconnecting or failing to properly operate or maintain required monitoring equipment; and
- Operation and maintenance of equipment that the source failed to install.

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b. Economic Benefit from Illegal Competitive Advantage

In some enforcement cases, the Tribe may determine that a source may have gained an illegal competitive advantage associated with noncompliance. The four categories of ICA are:

- Source gains additional market share;
- Source sells products or services prohibited by law;
- Source initiates construction or operation before meeting regulatory authorization requirements; and,
- Source operates at higher capacity than it should have.

The EPA BEN model will be used, when appropriate, to estimate economic benefit associated with an ICA. However, the BEN model does not include calculation methodologies to estimate every scenario associated with an economic benefit gained from ICA. The Tribe will use the EPA's policy *Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs (May 25, 2003)* when calculating penalties involving an ICA that are not addressed by the BEN model.

c. Considerations for Adjusting the Economic Benefit Penalty

The following factors may be considered by the Tribe when settling the total civil penalty for an amount less than the economic benefit.

- The economic benefit component represents an insignificant amount of the total penalty. The discretion to forego the economic benefit component is generally limited to less than \$5,000. Considerations for pursuing the economic benefit component, even when considered an insignificant portion of the total penalty include: 1.) if the economic benefit component will have a noticeable effect on the source's competitive advantage or profits gained from noncompliance; and 2.) if the gravity component is small and by itself, does not provide adequate deterrence.
- There are compelling public concerns that justice would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, the Tribe will be able to recover the economic benefit in litigation; and
- The owner or operator has successfully documented an inability to pay the total proposed civil penalty.

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X. Administrative Appeal Procedures

1. Appealable Administrative Actions and Request for Hearing

Appealable administrative actions taken by the Tribe are subject to review in accordance with the administrative appeal procedures contained in the Southern Ute Indian Tribe/State of Colorado Environmental Commission's Procedural Rules (RAC §1-105).

2. Judicial Review

Any final order of the Commission that would be subject to appellate review if it were made by the EPA Administrator, is subject to judicial review by the United States Court of Appeals for the Tenth Circuit in accordance with Section 6 (1) of the *Southern Ute and Colorado Intergovernmental Agreement Implementation Act of 2004* (i.e., the Act of October 18, 2004, Pub. L. No. 108-336, 118 Stat. 1354-56).

XI. Supplemental Environmental Project

In all enforcement settlements, sources will be required to achieve and maintain compliance with all applicable regulations. In some instances, sources may receive some penalty relief resulting from their commitment to implement a Supplemental Environmental Project. A SEP is a project that the source agrees to undertake in settlement of an enforcement action that benefits either the environment or public health, or both, but the source is not otherwise legally required to perform.

The Tribe's sole interest in considering SEPs is to ameliorate the adverse public health and environmental impacts of violations. SEPs are not intended to reward the source for undertaking activities that are obviously in its economic self-interest. Therefore, although a SEP may indirectly benefit a source, there must be no doubt that the primary beneficiary is the public health or the environment. The Tribe may consider allowing a SEP if: (1) violations are corrected through actions to ensure future compliance; (2) deterrence objectives are served by payment of a monetary penalty, which must include the economic benefit accruing to the source for noncompliance; and (3) there is an appropriate relationship between the nature of the violation and the environmental benefits to be derived from the SEP.

The decision to accept a proposed SEP as part of a settlement is within the Tribe's sole discretion. Even though a project may appear to satisfy all of the provisions of this policy, the Tribe may decide for one or more reasons that a SEP is not appropriate. Factors that could influence such a decision include if the costs to the Tribe for reviewing or overseeing the SEP are excessive, the provisions of a SEP are not enforceable, or the Tribe believes the source may not have the ability or reliability to complete the proposed SEP. The AQP Part 70 permitting, compliance and enforcement program cannot accept SEP funds, nor can a SEP project fund activities the Tribe is already required to perform pursuant to delegated regulatory authority.

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1. SEP Basic Guidelines

A SEP will not be approved if the source is otherwise legally required to perform the proposed activity. For example, a SEP must not include actions required by any federal, tribal, state, or local law, regulation, administrative or court order or permit. A SEP cannot include actions the source may be required to perform as injunctive relief, as part of a settlement or order in another legal action, or by federal, tribal, state or local requirements.

SEPs may be used to mitigate some or all of a civil penalty in accordance with the following criteria:

- 1) A SEP may not be used to offset the economic benefit component of a monetary penalty. A SEP performed by a source for the benefit of a third party may be approved to mitigate a portion of a civil penalty at the Tribe's discretion;
- 2) The cost of a SEP will generally exceed the amount of penalty mitigation offered in exchange (see Section 3. Extent to Which a SEP Can Mitigate a Penalty);
- 3) Because deterrence objectives must be met, SEPs may only mitigate 80% of the gravity portion of a civil penalty;
- 4) Sources are precluded from seeking or receiving any tax benefit or favorable tax treatment associated with a SEP, including third party SEP donations; and
- 5) All SEPs must result in improvements to the environment or reduce the total risk burden posed to public health or the environment by the identified violations beyond what is required by law.

SEPs are not intended to reward the source for undertaking activities that are obviously in its economic self-interest (e.g., update or modernize a plant to become more competitive). Therefore, as a general rule, SEPs will usually not be approved when they represent a "sound business practice." For example, capital expenditures or management improvement for which the source, rather than the public, is likely to receive the substantial share of the benefits which accrue from it will not be approved. The exception to this general rule is for a "pollution prevention project." Although such projects are viewed as sound business practice since they are designed both to make production more efficient and reduce the likelihood of noncompliance, they also have the advantage of potentially providing significant long-term environmental and health benefits to the public.

If a proposed SEP is to benefit a medium other than air quality, (e.g. water quality or waste management and remediation), the Air Quality Program manager will consult with the Environmental Programs Division program managers before approval of the SEP.

The SEP should typically benefit the area or community adversely affected by the violation, and consideration of projects with a geographic nexus to the violation are given preference.

2. Categories of SEPs

The Tribe considers the following seven categories of projects for potential SEPs. Each project will be closely scrutinized to ensure that all aspects of the project fulfill the legitimate objectives of the Tribe's SEP policy in all respects.

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a. Pollution Prevention Projects

For the purposes of developing a SEP, a pollution prevention project is any project that substantially reduces or prevents the generation or creation of pollutants through:

- **Source reduction** - eliminating the source of pollution by changing industrial processes or substituting less polluting fuels or less toxic raw materials in existing processes;
- **Alternative/Renewable Energy, Energy Efficiency** – application of measures and technologies to reduce or eliminate dependency upon traditional resources. Examples include, but are not limited to: wind, solar, biomass and geothermal powered generation of electricity, ethanol-based (“E-85”) or bio-diesel fuels for vehicles, and sustainable building engineering;
- **Waste minimization** - conserving those materials that are sources of pollution; this includes application of closed-loop processes or other resource-efficiency measures;
- **In-process recycling** – returning waste materials produced during a manufacturing process directly to production within the same manufacturing process using dedicated, fixed, and physically integrated equipment so that no releases, including fugitive releases, occur;
- **Innovative recycling technologies** - substantially reducing the discharge of generated pollutants through innovative recycling technologies that keep the pollutants out of the environment in perpetuity; and
- **Conservation** - protecting natural resources through conservation or increased efficiency in the use of energy, water or other materials. A specific example of such a project that the Tribe encourages is an up-front capital investment in energy efficiency improvements and reinvestment of the resulting cost savings into a long-term green energy program either on-site or in a community-based program, or a combination of both.

In order for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount or toxicity of pollution released to the environment, not merely a transfer of pollution among media.

b. Pollution Reduction Projects

A pollution reduction project is defined as a project that goes substantially beyond compliance with permit or regulatory requirements to further reduce the amount of pollution discharged into the environment. Where a pollutant or waste stream already has been generated or released, a pollution reduction approach (recycling, treatment, containment, or disposal techniques) may be appropriate, so long as it does not create an increased or adverse cross-media impact on public health or the environment. Examples include: (1) a project that

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reduces the discharge of pollutants through more effective end-of-pipe or stack removal technologies; (2) improved operation and maintenance; and, (3) recycling of residuals for use as raw materials in production off-site, thereby reducing the need for treatment, disposal, or consumption of energy or natural resources.

c. Environmental Restoration and Protection Projects

The objective of an environmental restoration project is to repair damage done to the environment beyond the need to remediate the damage done by the violation. Cross-media projects are a preferred option for this type of project. Examples of approvable projects include: (1) reductions in discharges of pollutants that are not the subject of the violation or the subject of other regulatory requirements within an affected air basin or watershed; (2) development of a conservation program or protection of habitat critical to the well-being of a species' ecosystem; and (3) purchase and management of an open space buffer zone to protect sensitive species or drinking water supply and conservation easements.

Environmental restoration projects could also include, in appropriate circumstances, projects that involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal or mitigation of contaminated materials, such as contaminated soils, asbestos, and leaded paint, which are a continuing source of releases or threats to individuals.

d. Environmental Assessments

Two types of environmental assessment projects may be considered by the Tribe:

- **Pollution prevention assessments** are independent, systematic reviews of processes and operations conducted internally by a source. The goal of the assessment is to identify opportunities to reduce the use, production, and generation of hazardous and other pollutants; and
- **Environmental management system (EMS) assessments** are a systematic, independent and documented compliance and environmental management practices verification process, conducted by a third party EMS auditor. The auditor objectively obtains and evaluates evidence to determine whether an entity's EMS conforms to the EMS requirements which closely reflect the ISO 14001 (2004) criteria. This type of evaluation may identify the need for: A formal corporate environmental compliance policy and enforceable procedures for implementation of that policy; the need for planning processes as they pertain to an EMS, such as hazard identification and risk assessments, environmental programs, etc.; implementation and operation criteria including educational and training programs for employees, communication activities, EMS documentation requirements, operation and maintenance programs and in-plant and community emergency plans; checking and corrective action criteria, including monitoring and measurement systems, record keeping and reporting systems and internal audit criteria; and management review activities.

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These types of SEPs can only be approved where the source commits to provide the Tribe with copies of all assessments and reports and commits to implement technically feasible and economically reasonable steps identified in the assessments. If the source chooses not to implement all recommendations in the assessment, it must submit a justification for not implementing certain recommendations. Environmental audits that merely represent compliance-focused, general good business practices are not acceptable SEPs.

Any pollution prevention assessment or environmental management system development conducted as part of a SEP should include a materials accounting component that estimates the amounts of certain [or all] materials entering and exiting the facility.

The calculation of an appropriate mitigation for assessment projects will take place in two phases. In the first phase, the source will receive penalty mitigation for the cost of undertaking the assessment. Upon completion of the assessment, the source may receive further mitigation for implementation of activities recommended in the assessment, provided that such activities meet all other requirements for a SEP described elsewhere in this policy and are reviewed and approved by the Tribe. The SEP settlement shall establish a timeframe within which the second phase must be completed, but generally no later than 24 months from the effective date of the agreement. If the source opts not to complete the second phase, the balance of the unpaid penalty becomes due and payable to the Tribe.

e. Environmental Education and Training

- Environmental education projects are intended to improve environmental behavior, raise the public's awareness of actions it can take to prevent pollution, and promote environmental sustainability. Environmental education projects increase public awareness and knowledge about environmental issues and provide the skills necessary to make informed decisions and take responsible actions. The Tribe will give priority to projects that include an action component providing measurable and quantifiable outcomes. Education projects that focus on fostering environmentally beneficial behavior using social marketing tools or that follow National Guidelines for Excellence in Environmental Education (where applicable) are preferred. The source must contract with an appropriate external expert to develop and implement an environmental education project.
- Environmental training projects are defined as the use of publications, broadcasts, or seminars that underscore the importance of complying with environmental laws or that disseminate technical information about the means of complying with environmental laws. These projects provide necessary training and technical support to identify, achieve, and maintain compliance with applicable regulatory requirements; avoid violations; and, go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. Public awareness projects may include: (1) sponsoring industry-wide seminars directly related to correcting widespread or prevalent violations within an industry; or (2) organizing a conference on pollution prevention solutions for compliance in a particular sector. The source must contract with an

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appropriate external expert to develop and implement an environmental training project. Environmental training projects using social marketing techniques are encouraged.

f. Public Health

A public health project provides preventive, screening, diagnostic, therapeutic health care, or education related to actual or potential threats to human health. This may include epidemiological data collection and analysis, medical examinations of potentially at-risk or affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment, and rehabilitation therapy.

g. Other Types of Projects

Facilities may propose other types of projects as long as those projects meet all additional requirements of a SEP as described in this policy. Note: SEPs for research will only be allowed if the study investigates innovative practical pollution prevention or reduction solutions. In addition, the entity conducting the SEP must commit to implement the results of the study, as feasible, and make available the technology or solution to other interested facilities.

3. Extent to Which a SEP Can Mitigate a Penalty

There are two steps in determining the extent to which a SEP can mitigate a penalty. The first step is to calculate the minimum portion of the penalty assessment that must be collected in cash. The second step is to determine the amount of credit each dollar spent on the SEP will receive against the penalty.

- 1.) Penalties are comprised of a gravity component and, when applicable, an economic benefit component.
 - A SEP may generally be used to offset up to 80% of a civil penalty assessed. There are exceptions for small businesses (defined as having fewer than 50 employees), *and* nonprofit organizations in which case the percentage may be as high as 100%. The Tribe, however, retains the sole discretion to allow SEPs to mitigate penalties.
 - A SEP cannot be used to offset any portion of the economic benefit component.
- 2.) The extent to which penalty mitigation will be allowed by a SEP will depend on the Tribe's evaluation of how effectively it will achieve the six factors listed below. Only exceptional projects will be allowed the maximum mitigation.
 - **Benefits to the Public or Environment** - All SEPs must meet this objective. The extent to which a project reduces discharges of pollutants to the environment or reduces risk to the general public resulting in a higher positive environmental effect will rate higher in this factor.
 - **Innovativeness** - SEPs that further the development and implementation of innovative processes, technologies, or methods to more effectively reduce the

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use, generation, release, or disposal of pollutants; conserve natural resources; or, promote compliance will rate well in this factor.

- **Environmental Justice** - SEPs that mitigate damage or reduce risk to minority or low income populations that have been disproportionately exposed to pollution, or are at environmental risk, perform well in this factor.
- **Cross-media Impacts** - SEPs that reduce emissions in more than one medium (air, water, or soil) perform well in this factor.
- **Pollution Prevention** - SEPs that develop and implement pollution prevention techniques and practices perform well in this factor.
- **Community Input** - SEPs that perform well in this factor will have been developed taking into consideration input received from the affected community. No credit should be given for this factor if the respondent did not actively participate in soliciting and incorporating public input into the SEP.

In determining the amount of credit each dollar spent on a SEP should receive, the ratio of penalty mitigation to SEP cost shall typically be no less than 1 to 1.5 (e.g., to receive \$100,000 in penalty mitigation, a source must spend \$150,000 on a SEP). The 1 to 1.5 ratio of civil penalty mitigation recognizes the potential cost savings, public relations, and other benefits associated with SEP expenditures that may accrue to the source. SEP costs may be lower than 150% and, at times, as low as 100% of the amount of the penalty mitigation, if the source chooses a pollution prevention or energy efficiency SEP or can prove there is no benefit to the source associated with the expenditures. Credit for a SEP cannot be given for a project planned or initiated before the enforcement action because it credits a project that would otherwise occur.

4. Legal Guidelines for Negotiating SEPs

Before approving a SEP, the Tribe will also consider:

- Projects must have an adequate relationship, or nexus, between the violation and the proposed project. This relationship exists if the project remediates or reduces the probable overall environmental or public health impacts of risks to which the violation contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future.
- Projects with a geographic nexus to the violation are given preference.
- Projects cannot be inconsistent with any underlying statute and generally must advance at least one of the declared objectives of the Reservation Air Code.

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- Projects cannot involve the commitment of the source to do an activity or meet an objective the source is already mandated or required to do under any statutory or regulatory requirement.
- Projects cannot involve any initiative the source began or proposed to do before the commencement of the enforcement action.
- Projects must be set forth in sufficient detail in a signed Settlement Agreement. The Tribe will not enter into agreements where the source agrees to spend a certain sum of money on a SEP to be determined at a later time.

The Tribe may neither play a role in managing or controlling funds to be set aside or escrowed for performance of a SEP, nor retain authority to manage or administer the SEP. The Tribe may provide oversight to ensure that a project is implemented pursuant to the provisions of the settlement and will retain legal recourse if the SEP is not adequately performed.

5. Drafting Enforceable SEPs

The Settlement Agreement must accurately and completely describe the SEP, including the specific actions to be performed and provide a reliable and objective means to verify the source has completed the project in a timely manner. To the extent feasible, the source should be required to estimate, at the outset, the benefits associated with the SEP and to subsequently track, measure, and report those benefits to the Tribe. The source is ultimately responsible and legally liable for ensuring that a SEP is completed satisfactorily. The source may not transfer this responsibility and liability to a third party. The Settlement Agreement should require a source to clearly state that the project was undertaken as part of an enforcement action whenever the source publicizes the SEP and the results of the SEP.

6. Measurement

When feasible, the initial SEP proposal should include an estimate of all environmental benefits, a description of the methodology used to estimate those benefits, and baseline data regarding the relevant environmental impact in order to measure progress.

The source may be required to submit status reports as appropriate. A “SEP Completion Report” must be submitted to the Tribe no later than 2 months after project completion. If more time is needed for outcome measurements or project evaluation, a deadline extension should be requested in writing to the Tribe. At a minimum, the SEP Completion Report should include:

- 1) A detailed description of the project as implemented;
- 2) A description of any operating problems encountered and the solutions thereto;
- 3) Itemized costs, documented by copies of purchase orders and receipts or canceled checks;
- 4) Certification and demonstration that the SEP has been fully implemented pursuant to the provisions of the Consent Order; and

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5) A description of the environmental and public health benefits resulting from implementation of the SEP along with **quantification** of the outcomes and benefits.

The calculation of the cost and benefits of the SEP must include actual costs and economic benefits to the source. For example, the source must clearly document any benefits received by the sale of equipment being replaced by the SEP or benefits received from land donations.

7. Failure to Complete a SEP and Penalties

If a SEP is not completed to the satisfaction of the Tribe within the time periods specified, or the source fails to implement the terms of the SEP for the entire life of the agreement, the remaining penalty mitigation attributed to the SEP or a stipulated penalty must be paid to the Tribe as an administrative penalty. The Tribe may impose a stipulated penalty, in addition to the remaining penalty mitigation attributed to the SEP, for the source's failure to comply with the specific requirements of the SEP (e.g., failure to meet deadlines in the agreement or adequate completion of the SEP). The determination of whether a SEP has been satisfactorily completed is in the sole discretion of the Tribe. Although it is the source that is ultimately responsible for ensuring that a SEP is completed satisfactorily, third party SEP recipients should recognize that any failure on their part to complete a SEP or submit a SEP Completion Report would result in a loss of eligibility for receiving future SEP funding.

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XII. Definitions

As used in this policy, the terms below shall have the following meanings:

- 1) **A-COMP** – Annual compliance certification
- 2) **ABEL** - the EPA's financial model that assesses a corporation's or partnership's ability to afford compliance costs, cleanup costs or civil penalties.
- 3) **AQP** - the Air Quality Program of the Southern Ute Indian Tribe.
- 4) **BACT** – Best Available Control Technology
- 5) **BEN** - the EPA's financial model that assesses the economic benefit a source may have gained from a violation.
- 6) **CAA** - Clean Air Act
- 7) **Case** - the facts involved and parties responsible for violation(s) charged in a Compliance Advisory or a Notice of Violation.
- 8) **Commission or Environmental Commission** - the Southern Ute Indian Tribe/State of Colorado Environmental Commission.
- 9) **Compliance Order** - the formal Settlement Agreement between the recipient of a Compliance Advisory or Notice of Violation and the Tribe, resolving the instance of noncompliance.
- 10) **CO** - a Compliance Order.
- 11) **CMS** – Compliance Monitoring Strategy
- 12) **EPA** or **U.S. EPA** - the United States Environmental Protection Agency.
- 13) **FRV** – EPA Federal Reportable Violations
- 14) **HPV** – EPA High Priority Violations
- 15) **ICA** - illegal competitive advantage.
- 16) **ICIS** – EPA's Integrated Compliance Information System
- 17) **IGA** - the Intergovernmental Agreement Between the Southern Ute Indian Tribe and the State of Colorado Concerning Air Quality Control on the Southern Ute Indian Reservation.

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- 18) **INDIPAY** - the EPA's financial model that assesses an individual's ability to afford compliance costs, cleanup costs or civil penalties.
- 19) **Informal Notice of Noncompliance** - the notice to an owner or operator, before a formal Notice of Violation is sent, that a noncompliance event was discovered during a monitoring or inspection activity. The informal notice of noncompliance may result in the case being resolved through mutual Settlement Agreement procedures.
- 20) **Inspector** - a duly authorized representative of the Tribe charged with conducting inspections and determining the compliance status of sources. The inspector may also provide compliance assistance to a source in appropriate situations.
- 21) **LAER** – Lowest Available Emissions Reduction
- 22) **Mutual Settlement Procedures** - the process by which violations are informally resolved by the Tribe and a source as outlined in this policy.
- 23) **NCP** - a noncompliance penalty, assessed pursuant to RAC § 2-121, to ensure a source does not reap the economic benefit of noncompliance.
- 24) **NOV** - Notice of Violation issued by the Tribe.
- 25) **NSPS** - New Source Performance Standards as outlined in 40 CFR Subpart 60.
- 26) **Penalty** - the dollar value of an assessment calculated for a violation.
- 27) **Policy** - this Environmental Procedures and Penalty Policy.
- 28) **Pollution Prevention** - a practice which reduces any of the following: the use of any hazardous substance; the amount of any pollutant; a pollutant or contaminant prior to recycling, treatment, or disposal, or; the hazards to public health and the environment associated with the use.
- 29) **Regulations** - those regulations duly adopted by the Commission as part of the Reservation Air Program.
- 30) **Reservation Air Code (RAC)** - the Southern Ute Indian Tribe/State of Colorado Environmental Commission's Reservation Air Code.
- 31) **Reservation Air Program** - the Commission-adopted air quality programs that are applicable to all lands within the exterior boundaries of the Southern Ute Indian Reservation.

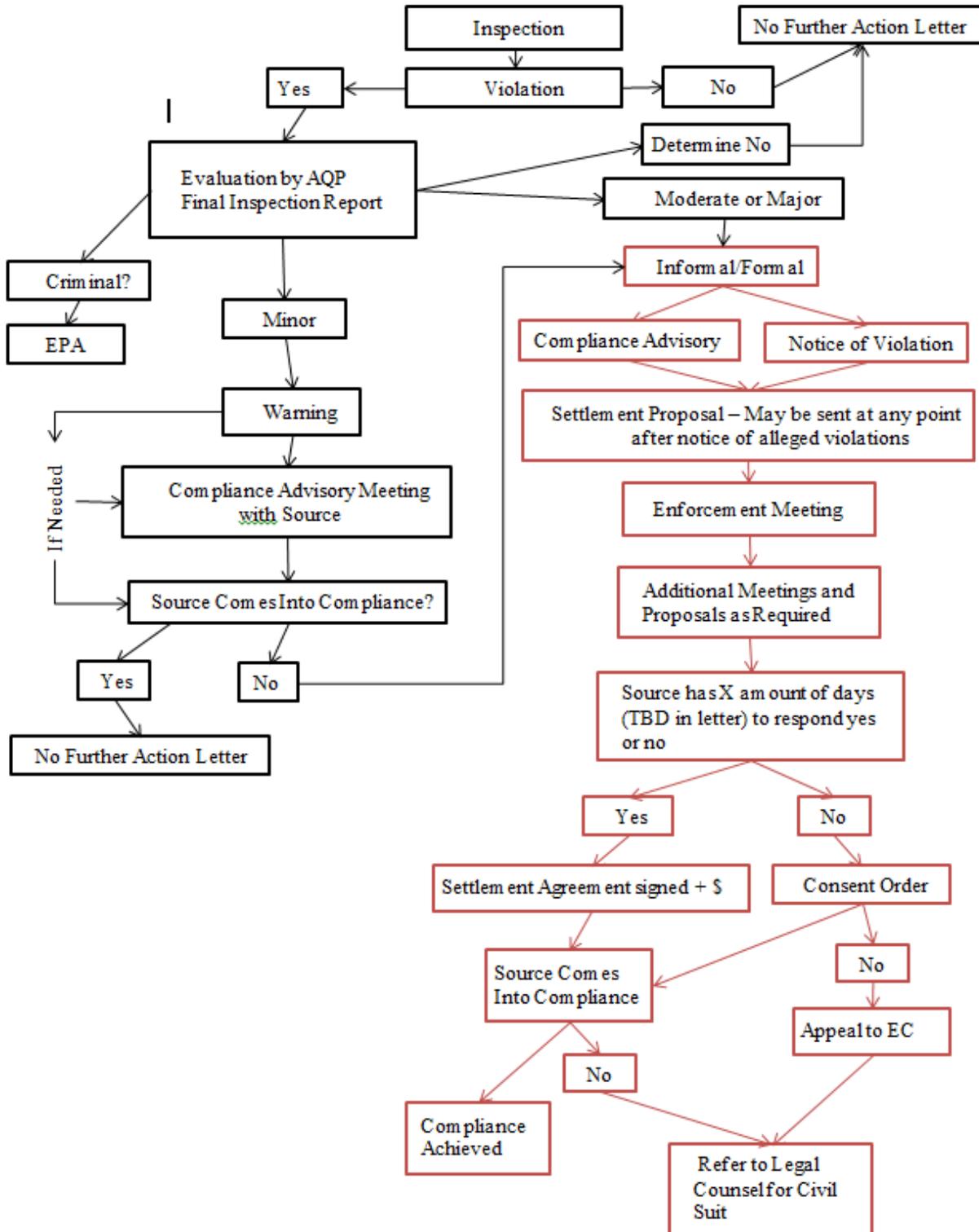
Enforcement Procedures and Penalty Policy

- 32) **Settlement Agreement** - the informal Settlement Agreement or express terms, mutually agreed upon in writing, between the recipient of a Compliance Advisory or Notice of Violation and the Tribe, resolving the instance of noncompliance.
- 33) **Settlement Conference** - a voluntary meeting between the Tribe and a source for the purpose of reaching a mutual settlement to resolve the informal notice of noncompliance or NOV.
- 34) **Settlement Proposal Letter** - the offers and proposed acceptance forms issued by the Tribe to resolve minor and moderate violations.
- 35) **Source** - any building, structure, facility or installation which emits or may emit any regulated air pollutant.
- 36) **Southern Ute Indian Tribe/State of Colorado Environmental Commission (Commission)** - the Commission established under the IGA through State and Tribal law which is empowered to establish rules and regulations for the Reservation Air Program and to review appealable administrative actions taken by the Tribe.
- 37) **SEP** - supplemental environmental project, an environmentally beneficial expenditure or activity undertaken by a source to mitigate some or all of a civil penalty in accordance with guidelines in this policy.
- 38) **Tribe** - the Southern Ute Indian Tribe.
- 39) **Violation** - any event of noncompliance by a source with the RAC or regulation enforced by the Tribe.
- 40) **Warning** - a written notification to the source that a violation was documented, that further recurrence could result in enforcement action being taken, but that no further enforcement action will result directly from the instant violation.

XIII. Attachments

Enforcement Procedures and Penalty Policy

Attachment 1 – Enforcement Process Flow



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Attachment 2 - Violation Categorization Matrix

Major (Class A)	Moderate (Class B)	Minor (Class C)
Violation of air toxics requirement (i.e., NESHAP, MACT) that either results in excess emissions OR violates operating parameter restrictions	Failure to submit a new or revised control plan upon request, or to implement the plan	Failure to file relocation notices (with no attendant permit, NSPS, or MACT violations)
Violation by a synthetic minor of an emission limit or permit condition that affects the source's Title V status	Emission violations at a synthetic minor source that does not jeopardize the synthetic minor status of the source	Not maintaining control equipment or failure to use control equipment, for a pollutant, at a true minor source, in a manner consistent with good air pollution control practices
Violation of any substantive term of any Tribal or Federal order, consent decree, or administrative order	Not maintaining control equipment or failure to use control equipment, for a pollutant, at a synthetic minor source, in a manner consistent with good air pollution control practices	Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is a true minor source
Violations that involve testing, monitoring, recordkeeping, or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits	Failure to conduct emissions tests, monitor, or maintain records necessary to demonstrate compliance with standards involving a pollutant for which the source is a synthetic minor	Partial violations of recordkeeping or reporting requirements
Substantial violation of the source's obligation to submit a Title V permit application		
Substantial violation of the source's Title V certification obligations		
Violation of an allowable emission limit detected during a reference method stack test		
Clean Air Act (CAA) violations by chronic or recalcitrant violators		
Substantial violation of CAA Section 112(r) requirements		
Violation of parameter limits where parameter is a direct surrogate for an emissions limitation, detected by continuous/periodic parameter monitoring		
Failure to install BACT and/or operate it correctly		
Any failure to install, and/or operate correctly, emission controls required by the Tribe		

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Attachment 3 – Clean Air Act Penalty Basis

The below referenced penalties were derived from the EPA's Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991.

A. Actual or Potential Harm

Actual Release	Percent Above Standard		Penalty	Additional Info
	Range but			
	<	≤		
	0%	30%	\$ 5,000.00	
	31%	60%	\$ 10,000.00	
	61%	90%	\$ 15,000.00	
	91%	120%	\$ 20,000.00	
	121%	150%	\$ 25,000.00	
	151%	180%	\$ 30,000.00	
	181%	210%	\$ 35,000.00	
	211%	240%	\$ 40,000.00	
	241%	270%	\$ 45,000.00	
	271%	300%	\$ 50,000.00	
	301%	and greater	\$50,000.00	+ 5,000 for each 30% or fraction increment above the standard

Notes - From CAA CPP Page 10

Toxicity of Pollutant	HAP or MACT Standard	Penalty	Additional Info
	Penalty is per HAP emitted or for each MACT Subpart with violations	\$ 15,000.00	

Notes - From CAA CPP Page 11

Sensitivity of the Environment	1. Non-attainment areas		Penalty	Additional Info
	Ozone			
		Extreme	\$ 18,000.00	
		Severe	\$ 16,000.00	
		Serious	\$ 14,000.00	
		Moderate	\$ 12,000.00	
		Marginal	\$ 10,000.00	
	CO and PM			
		Serious	\$ 14,000.00	
		Moderate	\$ 12,000.00	
	All other Criteria Pollutants		\$ 10,000.00	
	2. Attainment			
		PSD Class I	\$ 10,000.00	
	PSD Class II or III	\$ 5,000.00		

Notes - From CAA CPP Page 11

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Length of Time of Violation	Months of Duration			Penalty	Additional Info
	Range				
	<	but	≤		
	0		1	\$ 5,000.00	
	2		3	\$ 8,000.00	
	4		6	\$ 12,000.00	
	7		12	\$ 15,000.00	
	13		18	\$ 20,000.00	
	19		24	\$ 25,000.00	
	25		30	\$ 30,000.00	
	31		36	\$ 35,000.00	
	37		42	\$ 40,000.00	
	43		48	\$ 45,000.00	
	49		54	\$ 50,000.00	
	55		60	\$ 55,000.00	

Notes - From CAA CPP Page 12

B. Importance to the Regulatory Scheme:

Work Practice Standards	Deviation from Standard		Penalty	Additional Info
		Minimum		
		Maximum	\$ 15,000.00	

Notes - From CAA CPP Page 12

Reporting and Notification	Late, Partial or Complete Failure		Penalty	Additional Info
		Complete failure		
		Late	\$ 5,000.00	
		Incomplete Reports	Minimum	\$ 5,000.00
			Maximum	\$ 15,000.00

Notes - From CAA CPP Page 12
Includes compliance certifications

Recordkeeping	Partial or Complete Failure		Penalty	Additional Info
		Complete failure		
		Incomplete Records	Minimum	\$ 5,000.00
			Maximum	\$ 15,000.00

Notes - From CAA CPP Page 12

Testing	Incorrect, Partial or Complete Failure		Penalty	Additional Info
		Complete failure		
		Late	\$ 5,000.00	
		Incorrect test procedure	\$ 5,000.00	

Notes - From CAA CPP Page 13

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Permitting	Incorrect, Partial or Complete Failure		Penalty	Additional Info
	Permit Authorization	Complete failure	\$ 15,000.00	
	Fees	Failure to pay fee	50%	of total fee amount CAA 502(b)(3)(C)(ii)
		Current Daily Interest Rate		plus interest on amount unpaid
<i>Notes - From CAA CPP Page 13</i>				
Emission Control Equipment	Complete or Intermittent Failure		Penalty	Additional Info
		Complete failure	\$ 15,000.00	
	Intermittent operation	Minimum	\$ 5,000.00	
		Maximum	\$ 15,000.00	
<i>Notes - From CAA CPP Page 13</i>				
Monitoring	Late, Partial or Complete Failure		Penalty	Additional Info
		Complete failure to install	\$ 15,000.00	
		Late	\$ 5,000.00	
		failure to operate	\$ 15,000.00	
<i>Notes - From CAA CPP Page 13</i>				
Administrative Orders	Any Failure to Comply		Penalty	Additional Info
		Any violation	\$ 15,000.00	
	<i>Notes - From CAA CPP Page 13</i>			
Requests for Information	Failure to or Incomplete Respond		Penalty	Additional Info
		Complete failure to respond	\$ 15,000.00	
	Incomplete response	Minimum	\$ 5,000.00	
		Maximum	\$ 15,000.00	
<i>Notes - From CAA CPP Page 13</i>				
Compliance Schedules	Failure to Meet or Report		Penalty	Additional Info
		failure to meet deadlines	\$ 5,000.00	
	Progress Reports	failure to submit	\$ 15,000.00	
		Late	\$ 5,000.00	
		Incomplete min	\$ 5,000.00	
		Incomplete max	\$ 15,000.00	
<i>Notes - From CAA CPP Page 13</i>				

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C. Additional Aggravating Factors

Size of Source	Net Worth or Net Current Assets Units in USD x 1000		Penalty	Additional Info
	<	but ≤		
	\$ 1,000.01		\$ 10,000.00	\$ 2,000.00
	\$ 10,000.01		\$ 50,000.00	\$ 5,000.00
	\$ 50,000.01		\$ 200,000.00	\$ 10,000.00
	\$ 200,000.01		\$ 400,000.00	\$ 20,000.00
	\$ 400,000.01		\$ 700,000.00	\$ 35,000.00
	\$ 700,000.01		\$ 1,000,000.00	\$ 50,000.00
	\$1,000,000.01		\$ 70,000.00	+ \$25K for every \$3000K fraction thereof
Reduce penalty to 50% if total penalty for Size of Source is greater than 50% preliminary deterrence penalty.				
Notes - From CAA CPP Page 14				

Compliance History			Penalty	Additional Info
Notes - From CAA CPP Page ??				

Other Factors that Justice May Require			Penalty	Additional Info
Notes - From CAA CPP Page ??				

D. Mitigating Factors

Mitigating Factors	Percent Reduction		Not to Exceed	Additional Info
	Voluntary Disclosure of Non-Compliance		30%	
	Prompt Correction of Environmental Problem			
	Degree of Cooperation			
	Environmental Compliance Program or Audit			
	Early Settlement			
Notes - From CAA CPP Page				

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Attachment 4 – Clean Air Act Civil Penalty Policy

This document can be found at: <http://www2.epa.gov/enforcement/clean-air-act-stationary-source-civil-penalty-policy-october-25-1991>

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Attachment 5 – EPA High Priority Violator (HPV) Policy

This document can be found at: <http://www.epa.gov/reg3artd/enforce/mainenf/wrkbkv2.pdf>

Attachment 6 – EPA Economic Benefit Policy

**IDENTIFYING AND CALCULATING
ECONOMIC BENEFIT THAT GOES
BEYOND AVOIDED AND/OR DELAYED COSTS**

May 25, 2003

**U.S. Environmental Protection Agency
Office of Enforcement and Compliance Monitoring**

Enforcement Procedures and Penalty Policy

I. INTRODUCTION

One of the Environmental Protection Agency's (EPA) important responsibilities is ensuring compliance with the federal environmental laws. These laws, and their implementing regulations, set minimum standards for protecting human health and welfare and achieving environmental protection goals, such as clean air and clean water. EPA's Office of Enforcement and Compliance Assurance (OECA) upholds these laws through vigorous enforcement actions that correct the violations and appropriately penalize violators.

A cornerstone of the EPA's civil penalty program is recapture of the economic benefit that a violator may have gained from illegal activity, whenever EPA can effectively measure that gain. Recapture helps level the economic playing field, preventing violators from obtaining an unfair financial advantage over their competitors who timely made the necessary investment in environmental compliance. Generically, penalties serve as incentives to protection of the environment and public health by encouraging the adoption of pollution prevention and recycling practices that limit exposure to liability for pollutant discharges. Finally, appropriate penalties help deter future violations by the violator and by others similarly situated.

EPA has promulgated a generic civil penalty policy, as well as specific penalty policies tailored to suit the needs of particular programs. For example, there is a civil penalty policy specifically designed to address violations of the Clean Water Act. Civil penalties imposed by EPA usually have two components: gravity and economic benefit. The gravity component reflects the seriousness of the violation and is generally determined through the application of the appropriate EPA civil penalty policy.

The economic benefit component focusses on the violator's economic gain from noncompliance, which may occur in three basic ways. It can: 1) delay necessary pollution control expenditures; 2) avoid necessary pollution control expenditures; or 3) gain an illegal competitive advantage (ICA) during the period of noncompliance. This ICA may occur, for example, if a company sells banned products, or captures an extra market share through selling its products at a lower cost than its complying competitors.

The Agency designed the BEN computer model, for settlement purposes, to calculate the economic benefit from these first two types of economic gain. The Agency does not have a standard methodology for calculating the benefit gained from an ICA, which is currently considered on a case-by-case basis. The purpose of this paper is to develop some standard methodologies for identifying and calculating the economic benefit derived from illegal competitive advantage situations. It is anticipated that the EPA will utilize these methodologies, once the Agency is comfortable with their economic foundation, on a routine basis in appropriate cases. This paper outlines proposed methodologies for identifying and calculating the economic benefit derived from situations that go beyond the scope of the BEN model. The second section provides some background on the nature of economic benefit. Section three focuses on identifying cases that fall into these four broad ICA

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categories. It provides both examples and counter examples for each of the ICA categories. The fourth section suggests calculation methodologies for each type of case.

II. BACKGROUND: THE NATURE OF ECONOMIC BENEFIT

Compliance with environmental regulations usually entails a commitment of financial resources, both initially (in the form of a capital investment or one-time expenditure) and over time (in the form of continuing, annually recurring costs). These expenditures should result in better protection of public health or environmental quality, but they are unlikely to yield any direct financial return to the organization. If they would produce a financial return to the entity, then that entity should have already committed those financial resources even in the absence of such environmental regulations. If these financial resources are not used for compliance, then they presumably are invested in projects with an expected financial return to the organization. This concept of alternative investment — that is, the amount the violator would normally expect to make by investing in something other than pollution control — is the basis for calculating the economic benefit of noncompliance.

This background section provides an overview of economic benefit, and then explains how some cases do not fit within the simplifying paradigm of avoided and/or delayed costs.¹ Although economic benefit is not statutorily defined, it is commonly understood and accepted to mean the extent to which a violator is financially better off because of its noncompliance.

A. Economic Benefit From Delaying or Avoiding Compliance Costs

By delaying compliance costs, the violator can earn a return on the funds that should have been committed to the capital investment or one-time expenditure required for pollution control compliance. In other words, violators have the opportunity to invest their funds in projects other than those required to comply with environmental regulations. These other investments are expected to generate a financial return, as opposed to the required pollution control investments that typically generate no direct financial return for a company. Thus, by delaying compliance, the violator's economic benefit is the difference between investing in pollution control and investing in other projects.

Some costs can instead be avoided altogether, as opposed to merely delayed. Avoided costs typically include the continuing, annually recurring costs that a violator would have incurred had it complied with environmental regulations on time (e.g., the costs of labor, raw materials, energy, lease payments and any other expenditures directly associated with the operation and maintenance of pollution control equipment). Annual costs are thereby avoided entirely, as opposed to capital

¹ For further details on the BEN computer model, see EPA, *BEN User's Manual (1999)*. Both the BEN Users Manual and the actual BEN model can be found at: www.epa.gov/compliance/civil/programs/econmoels/index.html.

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investments and one-time expenditures that are usually only delayed (although these too may sometimes be avoided entirely.) Thus, the violator's economic benefit from avoided compliance costs is the sum of the total avoided annual costs plus the return that could be expected on the funds that were used for projects other than pollution control compliance.

The BEN model calculates economic benefit by focusing on the effect that these delayed and avoided pollution control costs have on an entity's cash flows. Cash flow analysis is a standard and widely accepted technique for evaluating costs and investments. In essence, cash flow calculations focus on the real, "out-of-pocket" cash effects resulting from an expenditure. Thus, noncash "paper" expenses, such as depreciation, are considered only to the extent that they affect cash flow.²

B. Economic Benefit from Additional Factors

As discussed previously, the BEN model calculates the economic benefit from delaying and/or avoiding required environmental expenditures. A relatively simple computer model like BEN is able to perform these calculations by implicitly assuming that the revenues in a noncompliant and compliant state are identical. BEN can therefore focus exclusively on a violator's pollution control costs, obviating the need for a detailed examination of a violator's business records or competitive market situation. The BEN model's widespread application is made possible by this simplifying assumption regarding revenues. But in some cases the violator's noncompliant actions have allowed (or will allow) it to attain a level of revenues that would have been unattainable had it always been in compliance.

In either type of situation (i.e., under BEN's simplifying assumption, or under more complicated cases), the fundamental definition of economic benefit is still the same: the difference in the net present values of the compliant/on-time and noncompliant/delay scenarios (i.e., the actions and cash flows — both historical and possibly also future — associated with the hypothetical compliance, and the actual noncompliance).³ In the cases amenable to BEN, 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

² BEN also adjusts these cash flows for their effects upon a company's tax liabilities, and then finally for the time value of money. The fundamental financial concept of the time value of money is based on the principle that a dollar today is worth more than a dollar a year from now, since today's dollar can be invested immediately to earn a return over the coming year. (Alternatively, a dollar last year is worth more than a dollar today because investment opportunities existed for last year's dollar.) Therefore, the earlier a cost (or benefit) is incurred, the greater its economic impact. BEN accounts for the time value of money by adjusting all estimated cash flows to their present value equivalents, using a discount or compound rate (depending on the direction of the adjustment) based on the company's cost of capital.

³ In some cases the economic benefit might be able to be estimated by a change in asset value (either for the company as a whole, or for a specific product, such as illegally developed land), since this in turn reflects projected cash flows.

violator been in compliance. This document addresses cases in which the revenues do not cancel out each other. Since the revenues were higher in the noncompliant state than they would have been in a compliant state, more detailed research and analysis is necessary, going beyond the scope of the BEN model.

III. IDENTIFYING CASES THAT GO BEYOND THE “DELAYED AND AVOIDED COSTS” PARADIGM

This section lays out four broad categories of such cases. For each type, this section provides:

- background information on how these cases can arise;
- the screening question(s) in the BEN model linked to that particular type of benefit; and,
- examples and counterexamples of each type.

EPA include such counterexamples since what does go beyond the BEN model’s simplifying paradigm can sometimes be best illustrated by what does not go beyond BEN. The four categories of cases are as follows:

- violator gains additional market share;
- violator sells products or services prohibited by law;
- violator initiates construction or operation prior to government approval; and,
- violator operates at higher capacity than it should have.

A. Violator Gains Additional Market Share

A violator might sell products at a lower price than its compliant competitors because it does not incur environmental compliance costs. By underpricing its competitors while in noncompliance, it can gain additional market share. This additional market share allows the company to generate additional revenue that it would not have been able to generate had it complied.⁴ The additional market share could even persist to some extent into the future once the company has come into compliance. Therefore, the benefit from additional market share could conceivably have both a relatively short-term component (i.e., during the compliance period) and a relatively long-term component (i.e., persisting into the future after compliance is achieved).

⁴ A violator could conceivably increase its market share without any revenue increase to date, yet somehow be “poised” to benefit at some point in the future by generating additional revenue. The economic benefit would stem from this future revenue expectation, which could also manifest itself in a greater asset value for the company.

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The Agency presumes that these situations do not arise very often, since compliance costs typically do not constitute a large proportion of total variable production costs, and since companies have flexibility in setting prices. Therefore, compliant companies should usually be able to match the prices of noncompliant companies, at least in the short-term (which the Agency assumes is typically the term of the noncompliance period). Nevertheless, some exceptions will occur, and the Agency leaves open the possibility of investigating those cases that go beyond the scope of the BEN model.

In most cases, the compliance costs' magnitude is not sufficient to create a significant change in cost structure and pricing. Furthermore, most compliance costs — whether capital investments or annually recurring operating costs — are of a generally fixed nature, invariant to production levels (with a certain broad range) and hence not affecting variable production costs. Even if cost structure and pricing changes do occur, a violator's compliant competitors may still be able to match its price-reduction strategies.

Specifying in advance the circumstances that would lead to market share gains from noncompliance is exceedingly difficult. One indicator might be the delay or avoidance of compliance costs that represent a significant percentage of variable production costs. (If the compliance costs are fixed with respect to the level of production, then they are most probably irrelevant to the market share issue regardless of their scope.) Unfortunately, the definition of "significant" would vary enormously by industry and market, and would also be difficult for the typical BEN user to estimate in advance on a routine basis. Even if the delayed and/or avoided costs were a significant percentage of the variable production costs (by any definition), the causation between the cost advantage and the market share would still probably need to be established before any analysis of the market share would make sense. The example and counterexample that follow below help illustrate these concepts.

The screening question in the BEN model linked to this category is:

Did noncompliance create a cost advantage that allowed market share gains?

Example #1: A potential contractor submits a bid under a government agency's Request for Proposals. The company does not have the discretion to bid any price, but rather must submit a proposal that reflects its costs plus a fixed fee. The proposal is subject to detailed scrutiny from the contracting agency for the realism of its price. The company has a cost advantage because of its existing or perhaps even planned noncompliance (unknown to the government agency, and perhaps even unknown to the company), which allows it to underbid its competitors and win the contract. The violator thereby gains additional market share from its successful contract bid — and consequently additional revenue — because of its noncompliance, in a manner that goes beyond what BEN would measure by focusing narrowly on the present value of the avoided and delayed costs.

Furthermore, if future government contracts emphasize the experience that the company has gained through its contract, then it conceivably may be able to continue to maintain some portion

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of its enhanced market share even when it raises prices (because of compliance). In this case, the cost difference between winning and second-place proposals is the key measure. If the avoided compliance costs equal or exceed the cost difference between the proposals, then the violator may have achieved increased market share and revenue because of its noncompliance.

Counterexample #1: An auto shop using illegal disposal methods charges the same prices as its competitors and spends its avoided costs on advertising. The money spent on advertising earns a positive return for the company, money that otherwise would not have earned a positive return had it been spent on proper disposal methods. But under a hypothetical on-time compliance scenario, the auto shop could have obtained the necessary additional funds both to advertise and to comply. Therefore, the company can generate the same level of revenues in either a noncompliant or compliant state. BEN captures the economic benefit, especially because it applies the company's cost of capital (i.e., its expected rate of return) to the avoided costs of proper disposal techniques. The extent of the cost advantage in this situation is unknown. If the violator is charging the same prices as its competitors, then clearly the increased market share is unrelated to any cost advantage from noncompliance. (Even if the violator is charging lower prices than its compliant competitors, the linkage between the auto shop's increased market share and its noncompliance is still not necessarily established.)

After considering the previous material, the analyst may wish to address the following additional screening questions if proceeding with an examination of market share. Positive answers to these questions still do not necessarily imply that any observed market share increase is the result of noncompliance — only the analyst's judgment in combination with case-specific facts can answer the central issue of causality.

- Did the violator's total revenues or number of units sold increase during the period of noncompliance? *Identifies potential short-term market share gains.*
- Did the price of the violator's products decrease during the period of noncompliance relative to the prices of competing products? *Identifies potential cost and price advantage associated with avoided compliance.*
- Does the violator sell products or services in a relatively price-sensitive market? (I.e., are customers likely to switch products if prices change?) *Identifies situation where short-term market share gains are possible.*
- Does the violator sell products or services that are associated with "brand loyalty" or high "switching costs"? (I.e., would customers be likely to continue buying the violator's product if the price advantage disappears?) *Identifies situation where long-term market share gain is possible (although, conversely, initial short-term gain is more difficult).*

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The first two questions address the actual changes in pricing strategy the company may have been able to pursue because of its noncompliance. A company with identifiable changes in pricing and identifiable increases in sales may enjoy an economic advantage from a change in market share. The remaining two questions address the violator's market. Relatively price-sensitive markets may yield considerable short-term market share advantages to a violator, but these advantages are unlikely to be sustainable in a competitive market once the cost advantage of noncompliance is removed. Products or services with brand loyalty or high switching costs may yield more lasting market share changes, although conversely such characteristics may impede a violator's ability to gain market share with lower prices.

B. Violator Sells Products or Services Prohibited by Law

EPA has the regulatory authority to prohibit the sale of certain products, or the performance of certain services, either permanently or until EPA reviews and approves them.⁵ If the violator produces and sells a prohibited product or service, it will generate additional revenues that it would not have been able to generate had it sold only compliant products or services. BEN is therefore incapable of calculating the economic benefit.

The screening question in the BEN model linked to this category is:

Did the violator sell prohibited products/services that no additional costs could have made legal?

This question identifies compliance scenarios requiring the violator to abstain entirely from the economic activity associated with noncompliance. This includes violations involving prohibited products or activities where no legal alternative would have produced the same revenues. The key consideration in answering this question is determining whether a traditional, alternative compliance scenario (typically entailing additional production costs) was available. The following example and counter example illustrate these principals.

Example #2: A company sells a highly effective pesticide, even though EPA has banned its domestic use. Since the product could not have been made legal simply by incurring additional environmental control costs, the company would not have been able to generate the revenue from

⁵ See, for example, the premanufacture notice program under the Toxic Substances Control Act, 15 U.S.C. Section 2604 and the stop sale, use and removal authority under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. Section 136(k). This differs from a company that produces an approved product through a prohibited process where the final product possesses all the same characteristics from the consumer's point of view, regardless of the production process (e.g., oil sold from a noncompliant underground storage tank, or a metal part finished with an illegal coating). The economic benefit in such cases would be based on a typical BEN run on the pollution control costs that the violator delayed and/or avoided by producing the approved product through the prohibited process (e.g., the delayed costs of proper tank inspection, or the avoided incremental costs of a legal — and presumably more expensive — coating).

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the pesticide's sales had it complied with EPA's ban. BEN is therefore incapable of calculating the economic benefit because there are no avoided or delayed expenditures of significance.

Counterexample #3: A company mixes overstock of a restricted agricultural chemical into one of its "improved" popular lawn care products. If the company had instead used an approved chemical, its production costs would have been higher, but the final product would have provided its customers with identical characteristics (leading to identical sales revenue).⁶ Therefore, BEN captures the economic benefit by focusing on the avoided incremental costs of the approved — and more expensive — chemical ingredient.

This question also addresses violators who perform prohibited services or actions, such as a developer who fills a protected salt marsh to build summer homes. If such filling could not have been legal under any circumstances, and if no other sufficiently comparable shoreline land was available for development, then the case is beyond BEN's scope. (By contrast, if the developer could have simply paid more money to purchase sufficiently comparable land nearby that did not require filling for construction, then the case is amenable to BEN.)

This question does not address any situation where the approval for a product or an activity was not — and could not have been — available at the time of the violation, but did — or will — become available at a later date. These situations fall under the category addressed by the next section, which focuses on early-mover advantage.

C. Violator Initiates Construction or Operation Prior to Government Approval

Some regulatory requirements prohibit construction or operation until EPA or another government agency issues a permit.⁷ When a violator initiates construction or operation prior to this approval, it can begin operating earlier than it would have been able to had it complied with the law (e.g., if operation begins earlier than it should have, the violator can generate sales it should not have made and thereby gain a head start in developing its market share). The violator may gain an "early mover" advantage in a new market, generating revenues earlier than would have been possible in a compliant state. BEN is therefore incapable of calculating the economic benefit.

Two of the BEN model's screening questions linked to this are:

Did noncompliance allow start of production/sales earlier than under hypothetical compliance?

⁶ If the substitute of an alternative chemical would not have provided customers with exactly identical characteristics in the marketplace, then this counterexample becomes instead a valid example.

⁷ Although the violator may obtain eventually governmental approval anyway (implying no environmental damage), a penalty based on benefit recapture is nevertheless necessary, as EPA's policy is designed to maintain incentives to comply promptly with regulations.

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Would permit have affected operations so significantly as to alter gross revenues?

The first question presents a simple screen for identifying violators who may gain by being an “early mover” as a result of avoiding regulatory or permitting processes. While BEN captures the delayed and/or avoided costs associated with obtaining a permit or installing equipment, the model does not address the potential advantage of a violator who has started operations ahead of a legal timetable. One key consideration in answering this question is determining whether the company realistically could have started the permit process earlier and then still proceeded on the same operations schedule. The following example and counterexample illustrate these issues:

Example #3: A telecommunications company must obtain a dredging permit to lay a previously unavailable type of cable between the mainland and an island. Because of competitive pressures to be the first on the island to offer the services from this type of cable, the company proceeds on an accelerated schedule. Had the company gone through the permitting process, it would have been delayed substantially. To comply, the company could not have incurred the permitting costs earlier (which would be amenable to a BEN analysis), since this type of cable did not even exist previously. Because a compliant company would not have been able to offer the new services so early, the company’s noncompliance allowed it to obtain a higher level of revenues than would have been possible had it complied. BEN is therefore incapable of calculating the economic benefit.

By being earlier to this market with the technology, the violator is able to generate revenues earlier than it would have been able to had it complied by waiting for the permit. (Obtaining the permit earlier was not an option, since the cable did not even exist at an earlier date.) Furthermore, the company may enjoy a future economic benefit from the lasting market share advantage it may gain over its compliant — and hence Johnny-come-lately — competitors.

Counterexample #3: A resource extraction company must obtain permits to site and then drill a series of wells over a several-year period. The company never does so and therefore avoids the permitting costs, an aspect of the economic benefit that BEN addresses. Had the company applied for these permits, it could have done so over an earlier time period that would have allowed the siting and drilling of the wells to proceed on the same schedule and in the same manner that they actually did (without any permit). Hence, no additional analysis beyond the BEN model is necessary.⁸

The second question, regarding the permit that significantly alters gross revenues, addresses a second aspect of this category. In addition to changes in project schedules, permits can change or restrict operations in a way that would alter revenues. Violators who avoid these permits enjoy the economic benefit associated with the additional revenues, which BEN does not capture. To answer this question properly the analyst must have knowledge of the permit provisions.

⁸ If the hypothetically obtained permit would have significantly altered any aspect — besides production costs — of the eventual siting and drilling of the wells, then this case would require research and analysis beyond the BEN model. Furthermore, if the permit could not have even been obtained on time (for whatever reasons), then this case would once again be beyond BEN’s scope.

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The hypothetical cases in the following example and counterexample are the same as for the previous screening question (i.e., earlier start of production/sales), since this question addresses an additional facet related to the same avoided permitting.

Example #4: Had the telecommunications company gone through the proper permitting process, it might not only have needed to incur additional compliance costs and delay its operations, but the permitted operations might have been altered in some other fashion. Perhaps the cable's capacity would have been lower, limiting the number of customers the company could serve or the services it could offer. Since this would have affected the company's revenues, the economic benefit is beyond the scope of the BEN model for yet another reason.

Counterexample #4: The resource extraction company that failed to obtain drilling permits would have been able to proceed legally in the same manner that it actually did, even if it had obtained the proper permit on-time. (That is, the eventually granted permit did not affect its operations in any way.) Although the company did avoid the permitting costs, the BEN model captures the economic benefit from such avoided costs. A common objection to this reasoning is that the company violated the law and was subsequently highly profitable, but unless the hypothetically obtained on-time permit would have altered operations in any significant way, then the company presumably would have been just as profitable (*but for* the higher permitting costs, which BEN captures fully).

D. Violator Operates at Higher Capacity Than It Should Have

A firm may be able to comply with applicable environmental regulations by maintaining its output or throughput below a given threshold level. Alternatively, environmental regulations may specifically dictate that compliance requires maintaining output or throughput below a given threshold level. A violator might produce above this threshold level in order to take advantage of high product prices. Alternatively, a violator might realize its lowest unit production costs at an output level that exceeds the level at which it can maintain environmental compliance. In either situation, the violator is able to generate revenues in a noncompliant state that would not have been possible in a compliant state. This renders BEN incapable of calculating the economic benefit.

The screening question in the BEN model linked to this category is:

Did compliance require a reduction in throughput/output?

This question identifies situations where a company has violated regulations by exceeding mandated output or throughput levels, either because the regulations specifically require a certain level, or because the economically rational compliance option dictates such a level. The violator did not avoid any additional compliance costs by producing the additional output, but the company benefitted from the higher revenues associated with the illegal incremental output. Addressing this question requires determining whether traditional compliance alternatives to lower production existed at the time that were technologically, legally, and economically feasible. If such alternatives

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were available, then their higher compliance costs are amenable to a traditional BEN analysis. The following example and counter example illustrate this discussion:

Example #5: A rock crushing facility has explicit and legally binding limits upon its daily operating hours and production tonnage, regardless of its emission levels. It operates in excess of these limits. No additional environmental control costs would have made this excess production compliant. Since the violator's illegal excess production generated revenues that would not have been possible in a compliant state, the BEN model is incapable of measuring the economic benefit.

Counterexample #5: A manufacturer's air emissions exceed mandated levels. It eventually installs the necessary control equipment, which also would have been feasible (both technologically and economically) at the very beginning of the noncompliance period. Alternatively, the company could have instead come into compliance by reducing its throughput, but at an ultimately greater opportunity cost (i.e., lost production, revenue, and hence profits) than installing the control equipment. A BEN model analysis of the avoided and delayed control costs captures the economic benefit: the existence of less economically rational compliance options is universal to all cases, yet irrelevant to economic benefit.

IV. HOW TO CALCULATE ECONOMIC BENEFIT THAT GOES BEYOND BEN

In the types of cases discussed so far, the proper evaluation of economic benefit should involve verifying that the BEN model is inappropriate to the case-specific facts, and then formulating an analytical approach that captures the extent of the violator's economic benefit. This section first provides some suggested analytical approaches, and then applies them to the examples presented in previous sections. As the beginning of this document stated, no simple computer model is capable of calculating the benefit in these types of cases. In addition, these benefit analyses will usually be more complex than those of delayed and avoided costs.

This section strives to adhere to two key goals:

- Initial information collection and analysis should be as simple as possible to minimize the expenditure of Agency resources. While EPA seeks to identify and analyze any cases that merit a thorough analysis, this section focuses on the use of publicly available information and analytical approaches that will assist EPA in making an preliminary determination of the extent of the economic benefit and the possible need for a more thorough investigation.
- EPA analysis should be clear and defensible. This guidance focuses on standard information sources and accepted economic principles that can be used to support an initial determination. This document though is not intended to limit EPA's analytical options should the Agency decide that the

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circumstances of a particular case suggest an approach or a level of effort not addressed in this document.

A full-scale assessment of the economic benefit is likely to require company- and market-specific information. This section therefore cannot provide sufficient information to direct a complete analysis, but merely attempts to point the analyst in a productive direction.

A. Fundamental Guidelines

Any economic benefit analysis should adhere to the same fundamental principles as BEN. Specifically, economic benefit is the difference between the after-tax net present values of the cash flows associated with the two scenarios: the hypothetical compliance scenario, and the actual noncompliance scenario.⁹

The first — and most important — step will therefore entail identifying the cash flows relevant to each scenario. (Cash flows that are identical between the two scenarios — both in their amount and timing — will cancel out each other and hence not enter the analysis.) Once this is accomplished, the next two steps are relatively straightforward: determine the after-tax value of the cash flows, and then adjust them to present values as of the penalty payment date using an estimate of the violator's cost of capital. Therefore, the analysis in the examples below focuses only on the estimation of the relevant cash flows, since the adjustments for taxation and the time value of money are not specific to these types of cases.

B. Examples

This section uses the previous sections' examples to illustrate the calculation of economic benefit in the four categories previously identified:

1. violator gains additional market share;
2. violator sells products or services prohibited by law;
3. violator initiates construction or operation prior to government approval; and,
4. violator operates at higher capacity than it should have.

1. Violator Gains Additional Market Share

If the screening questions outlined above indicate that a violator enjoys a significant cost advantage as a result of the violation, and company information shows sales increasing during the

⁹ As mentioned previously, in some cases the economic benefit might be able to be estimated by a change in asset value, since this in turn reflects projected cash flows.

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period of noncompliance, then the potential exists for economic benefit from changes in market share. This is still only the potential: proof of the causality between noncompliance and market share gain requires careful analysis of the case-specific facts, which is beyond the scope of this document. To calculate the actual economic benefit (if any), the analyst must next develop cash flows associated with both the actual scenario and an alternative “compliance scenario” cash flow.

This section illustrates only a simple market share gain scenario and calculation involving a company with a single product. If a violator has multiple facilities and product lines, then even further and more extensive analysis would be necessary to identify market share gain.

The first step is to focus on the market share gain during the noncompliance period (as opposed to market share gain persisting into the future). A reasonable and defensible compliance scenario is necessary to describe what market share would have been had the violator not enjoyed a cost advantage. Any such description must have the support of a strong argument, especially for any changes in market share being attributable to the noncompliance. Furthermore, the longer the compliance period the more likely that a more sophisticated analysis of specific market trends may be necessary.

If the actual market share of the violator is unknown, then the baseline assumption for the compliance scenario could be that the violator’s sales revenues would have continued to increase at the pre-violation rate, with any increase in excess of that attributable to noncompliance.

In the example of the government contractor presented in Section II A, above, the actual change in market share is equal to the value of the government contract. Without the cost advantage that the company enjoyed from its noncompliance, a competitor would likely have won the contract, reducing the company’s actual market share by the entire value of the contract. In this example the two scenarios are simple:

$$\begin{aligned} \text{Compliance scenario cash flow} &= 0 && \text{[i.e., contract awarded to competitor]} \\ \text{Noncompliance scenario cash flow} &= + && \text{actual contract revenue} \\ & && - \text{variable costs} \\ & && + \text{projected revenue for remaining contract life} \\ & && - \text{projected variable costs} \end{aligned}$$

In this context, variable costs include at least the costs specific to running the contract. The legitimacy of including apportioned overhead costs, by contrast, is generally a case-specific issue, although executive compensation (as a reward for the enhanced profitability from illegal market share) would generally not be relevant.

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This analysis thus far addresses only short-term advantage from the increased market share over the course of the current contract.¹⁰ In this example, any market share impact would presumably disappear at the contract closeout, except perhaps for a small (and almost unquantifiable) advantage from the company's enhanced experience.

In other industries and circumstances, a violator may conceivably defend market share gains for a considerable length of time, and may continue to accrue economic benefit as a result of the earlier noncompliance. Examples of markets in which long-term market share advantages may arise are markets for products with "high switching costs" (e.g., computer hardware and software markets), or markets with no substitute products and/or very few producers (e.g., insulin or other pharmaceuticals markets). These characteristics though would conversely hinder a violator's initial ability to gain market share.

Quantification requires identifying both the extent of the market share increase and its probable duration. A careful analysis of each of the following aspects is necessary: market size, the number and market power of competitors, the ability or inability of additional competitors to enter the market (i.e., barriers to entry), and the availability of substitute products.

The U.S. Department of Justice and the Federal Trade Commission frequently assess changes in market power, both prospectively (addressing potential mergers) and retrospectively (investigating possible anti-trust violations). The two agencies' *1992 Horizontal Merger Guidelines* identifies several key market conditions under which a company may exercise considerable market power, and/or where merger activities might create or enhance the market power of a company or facilitate its exercise. These merger guidelines may provide assistance in examining the economic benefit from persisting market share gain. (Note however that the complete analysis, as well as many anti-trust issues, as outlined in the *Merger Guidelines* are generally irrelevant to economic benefit, e.g., consumer benefits of a price reduction).

2. Violator Sells Products or Services Prohibited by Law

Two similar types of violations involve illegal product sales:

- a. a violator sells a product or service that has not yet been approved (i.e., reviewed and permitted); and,
- b. a violator sells a product or service that has been banned outright.

¹⁰ In some cases the advantage would disappear as soon as compliance is achieved and costs increase, but in this specific instance (i.e., a "cost-plus-fixed-fee" contract) the violator may be able to recover cost increases contractually through the remaining contract term. Conversely, if the contract is fixed-price and the violator comes into compliance partway through the contract period (without being able to recover its compliance costs) then the violator may realize no economic benefit at all from illegally gained market share.

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Product sales in advance of proper approval are essentially the same as operations without a permit. In these cases, the cash flow analysis may need to extend beyond the noncompliance period, since initial start-up costs might suppress earnings, even though the product will eventually be profitable. This approach is described in more detail in the section that analyzes the economic benefit of operating without a permit.

In the example of the banned pesticide (which could not be made legal by incurring any additional regulatory costs), the analysis focuses on the historical income associated with the product, minus the variable cost of producing the item.¹¹ This revenue is the noncompliance scenario cash flow, since the violator should not have sold the product. The compliance scenario is simply the absence of any cash flows, since the violator should not have received any revenue (nor incurred any costs) related to the illegal product.

$$\begin{aligned} \text{Compliance scenario cash flow} &= 0 && [\text{i.e., product not manufactured or sold}] \\ \text{Noncompliance scenario cash flow} &= + \text{ actual product revenue} \\ &\quad - \text{ variable costs} \end{aligned}$$

The key challenge in identifying the economic benefit associated with selling a banned product is identifying the total revenues and legitimate costs directly associated with selling the product. This requires an analysis of both product-level and company-level cost and sales data from the violator. If a violator makes several products and only one is illegal, then the analysis may be more involved. Furthermore, the economic benefit should focus not on the reported profit or taxable income of the violator, but on the banned product's cash flows (which can differ significantly from accounting notions of profit). Another issue is determining the legitimacy of including apportioned overhead costs, which is generally a case-specific issue (just as in the previous analysis of market share gains).¹² By contrast, executive compensation (as a reward for the illegal product's profitability) would generally not be a relevant cash flow.

¹¹ If the violator replaces the illegal product with a legal (yet less effective) substitute for the same application, the violator could conceivably enjoy a lasting market share advantage into the future, based upon the illegal product's effectiveness and hence lingering consumer perceptions about the effectiveness of the violator's entire product line. The economic benefit from such a rare effect is likely to be relatively small yet exceedingly difficult to quantify.

¹² The assignment of overhead costs to a specific product is a case-specific issue and may be relevant to the economic benefit cash flow analysis if such overhead costs are directly and legitimately associated with a specific product. By contrast, costs incurred to evade detection or prosecution of such illegal activity are not relevant to the economic benefit analysis.

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3. Violator Initiates Construction or Operation Prior to Government Approval

If a company is first to market with a new product because of construction and operation of a facility without a permit, it may enjoy an economic benefit both immediately (by selling products or services prior to the time when it could have legally done so) and in the long term, as a result of improved market share from its “early mover” status. In this case, the only avoided cost captured in a BEN analysis would be the avoided cost associated with the permitting process, although the total economic benefit comprises the following:

- + *Present value of net cash flow over life of the actual project*
- *Present value of net cash flow over life of the hypothetically compliant project*

This calculation requires the careful construction of on-time and actual compliance scenarios over the life of the facility, which would then capture both the short-term economic benefit (if any), and long-term advantage from market position.¹³

Determining expected cash flows requires information on typical facility life span and profitability, the level of competition in the industry, and possibly the violator’s actual business plan. On-file permit applications may provide information about potential competitors and the violator’s gains (if, for instance, a prior permit was withdrawn after the violator began operations). If no identifiable competitors have sought to enter the market, then an analyst must consider the length of the permitting cycle and the product development cycle to determine whether competition could have otherwise developed during the avoided permitting process.¹⁴

In the example of avoiding the dredging permit in Section II C, above, the telecommunications company is the first to bring the new cable technology to market on the island, 18 months earlier than it would have otherwise. In its first year, the company controls 100 percent of this new market. At the end of the second year, perhaps the violator has 66 percent and a compliant competitor has 34 percent. If a market equilibrium is soon established of an even share between the two companies, then the hypothetical compliance scenario could assume that the violator’s market share would have been 50 percent from the beginning. By contrast, if the violator persists in maintaining a larger market share than its competitor, then a more detailed analysis of

¹³ With a new facility, initial cash flow might not reflect eventual full efficiency because of the burden of start-up costs, and may even be negative. For this reason an assessment based only on cash flows earned during noncompliance may significantly underestimate the future economic benefit to the violator. The analysis should consider the expected cash flows over the entire future lifecycle of the project (for both the compliant and noncompliant scenarios) to account for such changes in profitability over time.

¹⁴ In certain situations a vastly simplifying yet still reasonable assumption might be that the cash flows under both scenarios would be identical, differing only in their timing and hence relatively insignificant inflation effects. For example, the existing market is mature and competitive (e.g., a new fast-food restaurant on an existing strip) implying that the violator’s early entry has not forestalled potential competitors’ entry.

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actual market development may be necessary to determine whether that higher market share is a result of its first-move status.

More complicated scenarios are imaginable. Perhaps a third company had initially applied for a permit, but then withdrawn its application, implying the market can support only two competitors. A more detailed examination might reveal that the violator would not have been financially viable in this market had it waited for the permitting process, leading to a hypothetical market share of zero percent in a compliant state of the world.

Furthermore, the cash flows should reflect any permit provisions that would have altered the company's operations, e.g., lower cable capacity and hence reduced bandwidth. Such provisions, if avoided not just temporarily but instead permanently, could bolster an argument for the violator's having gained permanent increased market share as a result of its noncompliance.

4. Violator Operates at Higher Capacity Than It Should Have

A firm may be able to (or may be required to) comply with applicable environmental regulations by maintaining its output or throughput below a given threshold level. A violator might produce above this threshold level in order to take advantage of high product prices. Alternatively, a violator might realize its lowest unit production costs at an output level that exceeds the level at which it can maintain environmental compliance. In these cases, the total economic benefit comprises the following:

- + *Avoided compliance costs (calculated by BEN)*
- + *Value of incremental cash flows from additional production*

This approach is appropriate for examples like the rockcrusher, subject to regulations explicitly restricting process throughput and/or product output (instead of — or in addition to — restricting emissions levels or requiring control equipment). Otherwise the violator might have compliance options that would allow it to legally produce some or even all of the “excess” output. If the firm has a technologically and economically feasible compliance option that allows it to produce its violation-level output legally, then the economic benefit of the violation is limited to the avoided and/or delayed cost of compliance, which BEN captures.¹⁵

¹⁵ If that option involves a lengthy implementation schedule (which could not have started before a certain date) then a hybrid approach may be necessary, entailing an initial cutback in production (hence entailing economic benefit over a relatively short period), but then ramping back up once the pollution control equipment is installed (whose actual delay is captured by BEN).

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Under an extreme counterexample, the terms of a new permit place a company's existing production levels in noncompliance. It can comply either by slashing production 50 percent, or by purchasing a replacement part at the local hardware store for a dollar. In this case a company continuing at full production rates has an economic benefit based only on the avoided cost of one dollar.¹⁶ The company has also produced 100 percent more than it would have had it attempted to comply without the one-dollar part, but this is irrelevant, since if the company had purchased the part it still would have been able to continue at the higher production level in a compliant manner.¹⁷

¹⁶ This assumes that the technology would have been both *feasible and sufficient* at the time to bring the violator into compliance. If no feasible technology is available at the time of the violation, then reduced production is the only option for compliance.

¹⁷ Just as with a more routine BEN analysis, even if the economic benefit is negligible, a significant penalty may still be merited for gravity reasons.

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Attachment 7 – Example Request for Information Warning Letter

AIR QUALITY PROGRAM
Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705



<http://www.southernute-nsn.gov/environmental-programs/air-quality>

{Date}

Certified Mail No. {##}
Return Receipt Requested

{Company Name}
Attn: {Recipient, Title}
{Mailing Address}
{City, State ZIP}

Warning Letter – Request for Information

Respondent: {Company name – Facility name}

Dear {Recipient}:

On {Date Initial Request Sent}, we sent a Request for Information letter to you via certified mail. A copy of the Request for Information is attached. The purpose of the letter was to obtain information so that we could determine whether {Facility Name} is in compliance with the Tribe's Clean Air Act Title V Operating Permit Program. The deadline for {Company Name} to provide the requested information was {Date Information Due}, and as of the date of this letter we have received no response.

The Tribe is requesting the information in the attached Request for Information letter pursuant to the authority granted to it under the U.S. Environmental Protection Agency's delegation of authority to administer the Clean Air Act Title V Operating Permit Program within the exterior boundaries of the Southern Ute Indian Reservation (77 FED. REG. 15267 (March 15, 2012)), Section 114 of the Clean Air Act (42 U.S.C. § 7414), and the Southern Ute Indian Tribe/State of Colorado Environmental Commission's Reservation Air Code.

This Warning Letter is a formal warning that {Facility Name} is responsible for complying with the Reservation Air Code and there are substantial penalties for failing to comply with regulatory requirements. The Tribe hereby requires that you furnish the information requested, including all

Enforcement Procedures and Penalty Policy

documents responsive to such request, no later than 30 calendar days from your receipt of this warning letter. Failure to respond to this Warning Letter may subject you to an enforcement action.

Your response to the request should be mailed or provided electronically to:

{AQP Contact Name, Title}
Southern Ute Indian Tribe
Environmental Programs Division
Air Quality Program
P.O. Box 737 MS#84
Ignacio, CO 81137
{AQP Contact Email}@southernute-nsn.gov

Section 113 of the Clean Air Act (42 U.S.C. § 7413) and Reservation Air Code §§ 2-121 authorize the Tribe to pursue penalties and injunctive relief for failure to comply with or respond adequately to an information request under the CAA and RAC. Section 2-121(2)(b) of the RAC authorizes the Tribe to assess penalties up to a maximum of \$10,000 per day per violation. In addition, providing false, fictitious, or fraudulent statements or representations may subject you to criminal penalties under 18 U.S.C. § 1001. The information you provide may be used by the Tribe or EPA in administrative, civil judicial or criminal proceedings.

If you have any technical questions on this matter, please call me at 970-563-4705 ext. *{AQP Contact Extension}* or *{Alternate AQP Contact Name}* at 970-563-4705 ext. *{Alternate AQP Contact Extension}*.

Sincerely,

{AQP Manager Name}
Air Quality Program Manager

cc: Tribal Legal Counsel
Environmental Programs Division Head
{EPA Contact Name}, EPA Region 8

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Attachment 8 – Example Compliance Warning Letter

AIR QUALITY PROGRAM
Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705



<http://www.southernute-nsn.gov/environmental-programs/air-quality>

{Date}

Certified Mail No. {##}
Return Receipt Requested

{Recipient, title}
{Company name}
{Mailing address}
{City, State ZIP}

Warning Letter

Respondent: {Company name – Facility name}
Account ID: {#-###}
Inspection Date: {Date}

Dear {Recipient}:

This Warning Letter provides notice to {Company name, Source name} related to compliance issues {discovered by or reported to} the Air Quality Program (AQP) of the Southern Ute Indian Tribe. {Company name} owns and operates a {Facility description} located within the exterior boundaries of the Southern Ute Indian Reservation at {Section}, {Township}, {Range}, {County}, Colorado. {Facility name} is subject to the terms and conditions of Tribal Operating Permit no. V-SUIT-{XXXX-XXXX.XX} issued on {Date} and the Reservation Air Code (RAC).

On {Date}, {Inspector name}, of the AQP, {inspected and/or conducted a records review of} your facility. Based on {Mr. or Ms. Inspector's last name}'s {inspection and/or records review}, AQP has determined:

{Facility name} failed to {describe violation, being sure to cite evidence and dates}.

This letter constitutes a formal warning that {Facility name} may have operated in violation of {cite permit condition and regulation}. Please be aware that you are responsible for complying with the RAC and there are substantial penalties for failing to comply with applicable regulatory requirements. Section 2-121(2)(c) of the RAC authorizes the AQP to assess penalties and damages of up to a maximum of \$10,000 per day per violation for violations of any applicable requirement; permit condition; fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; or any regulation or orders issued by the Tribe.

If you have any questions concerning this matter, please contact me at 970-563-4705 {AQP Manager phone extension} or by email at {AQP Manager email address}.

Enforcement Procedures and Penalty Policy

Sincerely

{AQP Manager Name}

Air Quality Program Manager

cc: Tribe's Legal Counsel
Environmental Programs Division Head

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Attachment 9 – Example Compliance Advisory Letter

AIR QUALITY PROGRAM
Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705



<http://www.southernute-nsn.gov/environmental-programs/air-quality>

{Date}

Certified Mail No. {##}
Return Receipt Requested
Mailing Date: {date}

{Recipient, title}
{Company name}
{Mailing address}
{City, State ZIP}

Compliance Advisory

Respondent: {Company name – Facility name}
Account ID: {#-####}
Enforcement ID: {#####}
Inspection Date: {Date}

Dear {Recipient}:

This Compliance Advisory provides notice regarding information gained during an air quality *{inspection and/or records review}* conducted by the Southern Ute Indian Tribe's Air Quality Program (AQP) at {Company Name}'s *{Facility name}* located on the Southern Ute Indian Reservation. The Tribe has the authority to enforce compliance with the requirements of the Reservation Air Code (RAC) pursuant to RAC §§1-104, 1-105 and 2-121 is commencing this action because it has cause to believe the compliance issues identified as follows may constitute violations of the RAC.

{Company name} owns and operates *{Facility name}*, a *{Facility description}* located at *{Section}*, *{Township}*, *{Range}*, *{County}*, Colorado. *{Facility name}* is subject to the terms and conditions of Federal Operating Permit no. V-SUIT-*{XXXX-XXXX.XX}* issued on *{Date}*.

On *{Date}*, *{Inspector name}*, of the AQP, *{inspected and/or conducted a records review of}* the facility. Based on *{Mr. or Ms. Inspector's last name}*, AQP has identified the following compliance issues:

1. During an *{inspection and/or records review}* of *{Facility name}*, it was determined that *{Facility name}* failed to *{summarize violation such as "maintain records of performance tests and performance evaluations for emission unit X"}* as required by Federal Operating Permit No. V-SUIT-*{#####-#####.##}*, Permit Condition *{number}*, *{cite parallel RAC requirement}*, and *{cite parallel regulatory requirements from NSPS, NESHAP and/or MACT}*.
2. During an *{inspection and/or records review}* of *{Facility name}*, it was determined that *{Facility name}* failed to *{summarize violation such as "maintain records of performance tests and*

Compliance Advisory

Enforcement Procedures and Penalty Policy

Respondent: {Company name – Facility name}

Account ID.: {#-###}

performance evaluations for emission unit X”} as required by Federal Operating Permit No. V-SUIT-{#####-#####.##}, Permit Condition {number}, {cite parallel RAC requirement}, and {cite parallel regulatory requirements from NSPS, NESHAP and/or MACT}.

The Tribe encourages {Company name} to take immediate action to resolve the alleged violations outlined above. Please be aware that you are responsible for complying with the RAC and there are potential penalties for failing to comply with applicable regulatory requirements. Section 2-121(2)(c) of the RAC authorizes the AQP to assess penalties and damages of up to a maximum of \$10,000 per day per violation for violations of any applicable requirement; permit condition; fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; or any regulation or orders issued by the Tribe.

The Tribe requests that {Company name} provide AQP with a brief written response to each alleged violation, identifying any undisputed compliance issues and if an alleged violation is disputed, the basis for the dispute. Please provide your response to the attention of {Enforcement Coordinator} no later than ten business days of the receipt of this letter.

In addition, the Tribe requests that {Company name} contact the AQP by {Date} to schedule a meeting to: 1.) Discuss any alleged violations that are disputed; 2.) Provide an opportunity for you to provide additional information demonstrating any alleged violation is not a violation of a permit or regulatory requirement; 3.) Confirm the actions your company has taken to resolve the alleged violations; 4.) Establish a mutually acceptable schedule and guideline for the full and final resolution of any alleged violation in a timely manner; and 5.) answer any remaining questions you may have.

Failure to respond to this Compliance Advisory by {Date} may be considered by AQP in any subsequent enforcement action and assessment of penalties. AQP’s enforcement process contemplates a full, final and timely resolution of the alleged violations addressed herein and those that may result from any further review of the matter. Issuance of this Compliance Advisory does not in any way limit or preclude AQP from pursuing additional enforcement options concerning this {inspection and/or records review}, including issuance of a compliance order and assessment of penalties. In addition, this Compliance Advisory does not constitute a bar to enforcement action for conditions not addressed in this letter. If at any time throughout the process of reaching a resolution AQP determines the Parties cannot agree to the dispositive facts, compliance requirements and/or penalty assessments (if any) associated with this Compliance Advisory, or a resultant enforcement action, the Tribe may exercise its full enforcement authority allowed under the law.

AQP’s enforcement process is outlined in the ***Enforcement Procedures and Penalty Policy*** located at www.southernute-nsn.gov/environmental-programs/air-quality. To schedule your Compliance Advisory meeting or if you have any questions regarding this Compliance Advisory, please contact either {Enforcement Coordinator} at 970-563-4705 {EC phone extension} or myself at 970-563-4705 {AQP Manager phone extension}. AQP currently anticipates the meeting will take place during the week of {Date}.

Enforcement Procedures and Penalty Policy

Sincerely

{AQP Manager Name}

Air Quality Program Manager

cc: Tribe's Legal Counsel
EPA Region 8 Enforcement
Environmental Programs Division Head

Enforcement Procedures and Penalty Policy

Attachment 10 – Example Notice of Violation Letter

AIR QUALITY PROGRAM
Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705



<http://www.southernute-nsn.gov/environmental-programs/air-quality>

{Date}

Certified Mail No. {##}
Return Receipt Requested
Mailing Date: {date}

{Recipient, title}
{Company name}
{Mailing address}
{City, State ZIP}

Notice of Violation

Respondent: {Company name – Facility name}
Account ID: {#-####}
Enforcement ID: {#####}
Inspection Date: {Date}

Dear {Recipient}:

The Southern Ute Indian Tribe Air Quality Program (AQP) issues this Notice of Violation to {Company name – Facility Name} pursuant to its authority under §§1-104, 1-105 and 2-121 of the Southern Ute Indian Tribe/State of Colorado Environmental Commission’s Reservation Air Code (RAC).

I. ALLEGED FINDINGS OF FACT

1. This Notice of Violation is a follow up to a {inspection and/or records review} at {Company name – Facility Name}, a {Facility description} facility located at {Section}, {Township}, {Range}, {County}, Colorado. {Company name – Facility Name} is subject to the RAC and the terms and conditions of Operating Permit No. V-SUIT-{{#####-#####.###}. Permit Condition No. {III.B.1.(A) or IV.B.1.(A)} of Operating Permit No. V-SUIT-{{#####-#####.###} requires compliance with the terms and conditions of the permit and provides that any noncompliance with permit terms or conditions constitutes a violation of the RAC and the Clean Air Act.
2. {Relevant facts leading up to inspection}
3. {Description of and relevant facts concerning inspection}
4. {Results of any stack tests, samples, etc. as applicable}

Enforcement Procedures and Penalty Policy

Notice of Violation

Respondent: {Company name – Facility name}

Account ID.: {#-###}

II. PROVISIONS OF THE LAW ALLEGED TO HAVE BEEN VIOLATED

1. {Company name – Facility Name} failed to {summarize violation such as “maintain records of performance tests and performance evaluations for emission unit X”} in violation of Operating Permit No. V-SUIT-{#####-#####.##}, Permit Condition {number}, {cite parallel RAC requirement}, and {cite parallel regulatory requirements from NSPS, NESHAP and/or MACT}.

2. {Company name – Facility Name} failed to {summarize violation such as “maintain records of performance tests and performance evaluations for emission unit X”} in violation of Operating Permit No. V-SUIT-{#####-#####.##}, Permit Condition {number}, {cite parallel RAC requirement}, and {cite parallel regulatory requirements from NSPS, NESHAP and/or MACT}.

3. {Add more lines as necessary}

III. CIVIL PENALTIES FOR THE VIOLATION AS ALLEGED

1. Section 2-121(2)(c) of the RAC authorizes the AQP to assess penalties and damages of up to a maximum of \$10,000 per day per violation for violations of any applicable requirement; permit condition; fee or filing requirement; any duty to allow or carry out inspection, entry, or monitoring activities; or any regulation or orders issued by the Tribe. The amount of noncompliance penalty is calculated in accordance with AQP’s *Enforcement Procedures and Penalty Policy* located at www.southernute-nsn.gov/environmental-programs/air-quality.

IV. CONFERENCE REGARDING THE ALLEGED VIOLATION

1. In accordance with the procedures found in the *Enforcement Procedures and Penalty Policy*, a conference regarding the violations described above has been scheduled for {Date} at {Time}, at the AQP office, located at 71 Mike Frost Way, Ignacio, Colorado, 81137. This conference will provide {Company name} an opportunity to submit data, views, and arguments concerning the violation and whether assessment of civil penalties is appropriate. The AQP may provide further opportunity for you to respond after the conference if circumstances warrant.

2. As a result of the conference, a determination will be made as to whether a compliance order will be issued and whether a civil penalty will be assessed.

3. If you have any questions concerning the conference or need to reschedule the conference, please contact our Enforcement Coordinator at 970-563-4705 {EC phone extension} or the AQP Manager at 970-563-4705 {AQP Manager phone extension}.

V. ADDITIONAL ACTION BY THE DIVISION

Failure to attend the conference will result in the issuance of a Compliance Order and assessment of penalties against {Company name – Facility Name}. Subsequent violation of the Compliance Order may subject {Company name – Facility Name} to further enforcement action under RAC § 2-121.

Enforcement Procedures and Penalty Policy

VI. EFFECTIVE DATE OF NOTICE

This Notice of Violation shall become effective upon receipt. Dated the *{day}* of *{Month, Year}*.

SOUTHERN UTE INDIAN TRIBE AIR QUALITY PROGRAM

{Name}

{Title}

Air Quality Program

cc: Tribe's Legal Counsel
Environmental Programs Division Head

Enforcement Procedures and Penalty Policy

Attachment 11 – Example No Further Action Letter

AIR QUALITY PROGRAM
Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705



<http://www.southernute-nsn.gov/environmental-programs/air-quality>

{Date}

Certified Mail No. {##}
Return Receipt Requested
Mailing Date: {date}

{Recipient, title}
{Company name}
{Mailing address}
{City, State ZIP}

No Further Action

Respondent: {Company name – Facility name}
Account ID: {#-####}
Enforcement ID: {#####, as applicable}
Inspection Date: {Date}

Dear {Recipient}:

As a result of an {inspection and/or records review of} conducted at {Company name, Source name} on {Date}, the Air Quality Program (AQP) of the Southern Ute Indian Tribe sent a {Compliance Advisory or Notice of Violation} letter on {Date of CA or NOV letter}. The {Compliance Advisory or Notice of Violation} stated that {outline alleged violations}.

{Outline and discuss reasons or documentation substantiating source compliance and/or AQP decision not to pursue enforcement}

For the reasons outlined above, the AQP has determined that No Further Action is warranted in relation to the previously cited alleged violations. AQP is therefore closing out {enforcement ID #} associated with {Company name, Source name} and will not pursue enforcement action at this time for the alleged violations. This no further action determination is contingent on the information currently possessed by the AQP and assumes the truth, accuracy and completeness of the information supplied by {Company name, Source name}. If any information associated with the circumstance is determined to be incorrect, further action can occur without contradicting the NFA determination. If you have any question, please contact our Enforcement Coordinator at 970-563-4705 {EC phone extension} or myself at 970-563-4705 {AQP Manager phone extension}.

Sincerely,

{AQP Manager Name}

Enforcement Procedures and Penalty Policy

Air Quality Program Manager

cc: Tribe's Legal Counsel
Environmental Programs Division Head

Attachment 12 – Certificate of Mailing

AIR QUALITY PROGRAM
Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705



<http://www.southernute-nsn.gov/environmental-programs/air-quality>

CERTIFICATE OF MAILING

This is to certify that a signed copy of the NOTICE OF VIOLATION ISSUED TO *{Company name – Facility Name}*, *{Section}*, *{Township}*, *{Range}*, *{County}*, COLORADO, was deposited in the mail on this *{day}* day of *{Month, Year}* to the following:

1. UNITED STATES POSTAL SERVICE, CERTIFIED MAIL NO. {###}
2. UNITED STATES POSTAL SERVICE, FIRST CLASS MAIL

BY:

{Name and Title}
Air Quality Program

cc: Tribe's Legal Counsel
Environmental Programs Division Head

Enforcement Procedures and Penalty Policy

Attachment 13 – Example Settlement Agreement

AIR QUALITY PROGRAM
Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705



<http://www.southernute-nsn.gov/environmental-programs/air-quality>

{Date}

Certified Mail No. *{##}*
Return Receipt Requested

{Recipient, title}
{Company name}
{Mailing address}
{City, State ZIP}

**BEFORE THE AIR QUALITY PROGRAM
ENVIRONMENTAL PROGRAMS DIVISION
SOUTHERN UTE INDIAN TRIBE**

SETTLEMENT AGREEMENT
Enforcement Case ID No.:

In the Matter of:
{Company name, Source name}

This Settlement Agreement is issued by the Air Quality Program (AQP), pursuant to the Southern Ute Indian Tribe's authority under §§1-104, 1-105 and 2-121 of the Southern Ute Indian Tribe/State of Colorado Environmental Commission's Reservation Air Code with the express consent of *{Company name}*. The AQP and *{Company name}* may be referred to collectively as "the Parties."

Enforcement Procedures and Penalty Policy

I. STATEMENT OF PURPOSE

The mutual objectives of the Parties in entering into this Settlement Agreement are:

1. To bring *{Company name, Source name}* into compliance with the Reservation Air Code (RAC).
2. To resolve the RAC violations discovered by the AQP during an inspection on *{Date}* and described below at the *{Company name, Source name}*.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Parties stipulate to the following facts regarding violations of the Reservation Air Code, federal regulatory, and permit requirements associated with *{Company name, Source Name}*:

1. *{Company name}*, owns and operates *{Source name}*, a *{Source description}* facility located at *{Section}, {Township}, {Range}, {County}*, Colorado. *{Company name – Source name}* is subject to the Southern Ute Indian Tribe/State of Colorado Environmental Commission's Reservation Air Code, federal air quality statutes and regulations, and the terms and conditions of Operating Permit No. V-SUIT-*{#####-#####.##}*. Permit Condition No. *{III.B.1.(A) or IV.B.1.(A)}* provides that any noncompliance with permit terms or conditions constitutes a violation of the RAC and the Clean Air Act.
2. On *{Date}*, *{Inspector's name}* conducted an *{inspection and/or records review}*, to assess the compliance status of *{Company name – Source name}* with the terms and conditions of Operating Permit No. V-SUIT-*{#####-#####.##}*. Based on the results of this *{inspection and/or records review}*, the AQP has determined the following:
 - A. *{Company name, Source name}* failed to *{summarize violation such as "maintain records of performance tests and performance evaluations for emission unit X"}* in violation of Operating Permit No. V-SUIT-*{#####-#####.##}*, Permit Condition *{number}*, *{cite parallel RAC requirement}*, and *{cite parallel regulatory requirements from NSPS, NESHAP and/or MACT}*.
 - B. *{Add more violation citation lines as necessary}*.
3. Pursuant to the above Findings of Fact, the Tribe issued a *{Compliance Advisory (CA) or Notice of Violation (NOV)}* to *{Company name, Source name}* on *{Date of CA or NOV}* based on the results of this *{inspection and/or records review}*.

Enforcement Procedures and Penalty Policy

4. A {CA or NOV} conference was held on {Date of CA or NOV conference} to provide {Company name, Source name} with an opportunity to present data, arguments, and other information concerning the alleged violations. At the conference {relevant discussion and facts from the conference}.
5. The AQP and {Company name, Source name} entered into settlement discussions for the alleged violations. The Parties reached an agreement that is detailed in this Settlement Agreement.

III. COMPLIANCE REQUIREMENTS

Based on the foregoing stipulated facts and legal determinations, and pursuant to its authority under RAC §§1-104, 1-105 and 2-121, the AQP orders, and {Company name} agrees to the following:

1. Effective immediately and without limitation, {Company name} shall comply with the Reservation Air Code and Operating Permit No. V-SUIT-#####-#####.## in the regulation and control of air pollutants from {Company name, Source name}.
2. {Add compliance requirement/action lines such as “{Company name, Source name} shall install oxidation catalysts on emission unit no.{XX} by {Date} reducing carbon monoxide emissions to less than {X} g/hp-hr. Source testing shall be conducted within 90 days of installation to confirm the emission rate of {X} g/hp-hr has been achieved”}.
3. {Add more compliance requirement/action lines as necessary}.

IV. PENALTIES

1. Based upon the factors set forth in the Southern Ute Indian Tribe’s Enforcement Procedures and Penalty Policy and the Penalty Calculation Worksheet, the AQP has assessed a civil penalty in the amount of _____ Dollars (\$ _____.00) against {Company name, Source name} for violations of the Reservation Air Code cited in Section II of this Settlement Agreement. A copy of the penalty calculation worksheet is attached.
2. {Discussion about negotiated penalty amount, as needed}
3. {Company name} agrees to pay the civil penalty to the Southern Ute Indian Tribe, Air Quality Program within 30 days of receipt of the effective date of this Settlement Agreement. {Company name} shall pay the civil penalty due by electronic funds transfer (EFT) to the Southern Ute Indian Tribe, Air Quality Program in accordance with written instructions to be provided to {Company name} by the Air Quality Program. At the time

Enforcement Procedures and Penalty Policy

of payment, *{Company name}* shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to this Settlement Agreement and shall reference the Settlement Agreement Enforcement Case ID #, by email to mhutson@southernute-nsn.gov; and by mail to:

Environmental Programs Division
P.O. Box 737 MS#84
Ignacio, CO 81137

V. SUPPLEMENTAL ENVIRONMENTAL PROJECT

1. *{Company name, Source name}* has indicated a desire to perform a Supplemental Environmental Project (SEP) to offset the penalties identified in Section IV above. The AQP may allow approvable SEPs to offset up to 80% of the gravity component of the civil penalty assessed above, at a cost ratio of 1:1.5 of penalty to SEP dollars expended.
2. *{Company name, Source name}* shall undertake the following SEP, which the parties agree is intended to secure significant environmental or public health protection and improvements. *{Describe SEP; include dates, specific milestones, goals or objectives}*.
3. The total expenditure for the SEP shall be not less than _____ Dollars (\$ _____.00). *{Company name, Source name}* shall provide the AQP with documentation of the expenditures made in connection with the SEP within thirty (30) days of making such expenditures.
4. *{Company name, Source name}* hereby certifies that, as of the date of this Settlement Agreement, it is not required to perform or develop the SEP by any federal, tribal, or local law or regulation; nor is *{Company name, Source name}* required to perform or develop the SEP by agreement, grant or injunctive relief in this or any other case or in compliance with tribal or local requirements. *{Company name, Source name}* further certifies that it has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.
5. *{Company name, Source name}* shall submit by the specified deadline the following reports:
 - A. A SEP completion report to the AQP by *{Date}*. The completion report shall contain the following information:
 - (i) A detailed description of the SEP as implemented;
 - (ii) A description of any operating problems encountered and the solutions thereto;

Enforcement Procedures and Penalty Policy

- (iii) Itemized costs, documented by copies of purchase orders and receipts or canceled checks;
 - (iv) Certification that the SEP has been fully implemented pursuant to the provisions of this Settlement Agreement; and
 - (v) A description of the environmental and public health benefits resulting from implementation of the SEP (with quantification of the benefits and pollutant reductions, if feasible).
 - B. *{Company name, Source name}* shall submit periodic reports, as required by the scope of work identified in the SEP, to the AQP in accordance with the schedule and requirements recited therein.
 - C. *{Company name}* agrees that failure to submit the Completion Report with the required information, or any periodic report, shall be deemed a violation of this Settlement Agreement and *{Company name}* shall become liable for stipulated penalties pursuant to paragraph below.
6. In the event that *{Company name}* fails to comply with any of the terms or provisions of this Settlement Agreement relating to the performance of the SEP, or to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP described in the paragraphs above, *{Company name}* shall be liable for stipulated penalties as follows:
- A. Except as provided in the subparagraph below, for a *SEP* which has not been completed satisfactorily pursuant to this Settlement Agreement, *{Company name}* shall pay a stipulated penalty to the Tribe in the amount of \$ *{75 -150 % of the amount the settlement penalty was mitigated due to the proposed SEP}*.
 - B. If the SEP is not completed in accordance with provisions outlined in paragraph 2 of this section, but the Tribe determines that *{Company name}*: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent has been expended on the SEP, *{Company name}* shall not be liable for any stipulated penalty.
 - C. If the SEP is completed in accordance with provisions outlined in paragraph 2 of this section, but the Tribe determines that *{Company name}* spent less than 90 percent of the amount of money required to be spent for the project, *{Company name}* shall pay a stipulated penalty to the Tribe in the amount of \$ *{10 -25 % of the amount the settlement penalty was mitigated due to the proposed SEP}*.

Enforcement Procedures and Penalty Policy

- D. For failure to submit the SEP Completion Report required by paragraph 5(A) of this section, *{Company name}* shall pay a stipulated penalty in the amount of $\${penalty amount}$ for each day after *{due date outlined in paragraph 5(A)}* until the report is submitted.
- E. For failure to submit any other report required by paragraph 5 above, *{Company name}* shall pay a stipulated penalty in the amount of $\${penalty amount}$ for each day after the report was originally due until the report is submitted.
7. The determinations of whether the SEP has been satisfactorily completed and whether *{Company name}* has made a good faith, timely effort to implement the SEP shall be in the sole discretion of the Tribe.
8. Stipulated penalties outlined in paragraph 6 shall begin to accrue on the day after performance is due, and shall continue to accrue through the final day of the completion of the activity.
9. *{Company name, Source name}* shall pay the civil penalty to the Southern Ute Indian Tribe, Air Quality Program stipulated penalties within 15 days of receipt of written demand by the AQP. *{Company name}* shall pay the civil penalty due by electronic funds transfer (EFT) to the Southern Ute Indian Tribe, Air Quality Program in accordance with written instructions to be provided to *{Company name}* by the Air Quality Program. At the time of payment, *{Company name}* shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to this Settlement Agreement and shall reference the Settlement Agreement Enforcement Case ID #, by email to mhutson@southernute-nsn.gov; and by mail to:

Environmental Programs Division
P.O. Box 737 MS#84
Ignacio, CO 81137

10. Any public statement, oral or written, made by *{Company name, Source name}* making reference to the SEP shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action taken by the Southern Ute Indian Tribe, Air Quality Program, for violations of _____.”

VI. *{Company name}* AGREEMENT TO SETTLE

1. *{Company name}* agrees to the terms and conditions of this Settlement Agreement. Compliance with this Settlement Agreement shall be a requirement under the Reservation Air Code. *{Company name}* agrees not to challenge the factual or legal determinations

Enforcement Procedures and Penalty Policy

made by the AQP, the AQP's authority to bring, or the federal court's jurisdiction to hear, any action to enforce the terms of this Settlement Agreement.

2. The undersigned representative of *{Company name}* certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind *{Company name}* to this document.
3. Failure by *{Company name}* to comply with any of the terms of this Settlement Agreement shall constitute a breach of this Settlement Agreement and may result in referral of the matter to the Tribe's legal counsel for enforcement of this Settlement Agreement and for such other relief as may be appropriate.

VII. SCOPE AND EFFECT OF SETTLEMENT AGREEMENT

1. The Parties agree and acknowledge that this Settlement Agreement constitutes a full and final resolution of the noncompliance addressed in this Settlement Agreement, and further agree not to challenge the terms and conditions of this Settlement Agreement in any proceeding before any administrative body or any judicial forum, whether by way of direct judicial review or collateral challenge.
2. This Settlement Agreement fully and finally resolves the AQP's civil claims for the violations alleged in the Notice of Violation. Nothing herein shall be construed as prohibiting the AQP from seeking compliance with this Settlement Agreement in the event *{Company name, Source name}* fails to fulfill its obligations under this Settlement Agreement. The AQP reserves all legal and equitable remedies available to enforce the provisions of this Settlement Agreement. This Settlement Agreement shall not be construed to limit the rights of the AQP to obtain penalties or injunctive relief for violations not addressed in this Settlement Agreement. The AQP further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, *{Company Name, Source name}*, whether related to the violations addressed in this Settlement Agreement or otherwise.
3. This Settlement Agreement constitutes a final agency order upon execution by *{Company name, Source name}* and the AQP and shall be enforceable by either party in the same manner as if this Settlement Agreement had been entered by the AQP without agreement by *{Company name, Source name}*. The Parties agree that any violation of the provisions of this Settlement Agreement by *{Company name, Source name}* concerning the Reservation Air Code shall be a violation of a final order of the AQP.
4. The Parties' obligations under this Settlement Agreement are limited to the matters expressly stated herein or in approved submissions required hereunder. All submissions made pursuant to this Settlement Agreement are incorporated into this Settlement Agreement and become enforceable under the terms of this Settlement Agreement as of the date of approval by the AQP.

Enforcement Procedures and Penalty Policy

5. The AQP's approval of any submission, standard, or action under this Settlement Agreement shall not constitute a defense to, or an excuse for, any prior violation of any requirement under the RAC or any subsequent violation of any requirement of this Settlement Agreement or the RAC.
6. The described violation will constitute part of *{Company name, Source name}* compliance history for any purpose for which such history is relevant, including considering the violation described above in assessing a penalty for any subsequent violations, in accordance with the provisions of RAC §2-121, against *{Company name, Source name}*.
7. *{Company name, Source name}* shall comply with all applicable federal, Environmental Commission, and tribal laws or regulations and shall obtain all necessary approvals or permits to conduct the investigation and remedial activities required by this Settlement Agreement and perform its obligations required hereunder. The AQP makes no representation with respect to approval and permits required by federal, Environmental Commission, and tribal laws or regulations other than those specifically referred to herein.
8. By signing this Settlement Agreement, *{Company name, Source name}* certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response, and statement.
9. This Settlement Agreement constitutes the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in herein and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. NO other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Settlement Agreement or the settlement it represents, nor shall it be used in construing the terms of this Settlement Agreement.

VIII. NOTICES

Unless otherwise specified, any report, notice or other communication required under the Settlement Agreement shall be sent to:

**Southern Ute Indian Tribe
Environmental Programs Division
Air Quality Program
P.O. Box 737 MS# 84
Ignacio, CO 81137**

For: *{Company name, Source name}*

Enforcement Procedures and Penalty Policy

IX. EFFECT OF BANKRUPTCY PETITION

The obligations imposed by this Settlement Agreement require the performance by *{Company name, Source name}* of actions which are reasonably designed to protect public health and welfare and the environment. Any enforcement of the obligations imposed by this Settlement Agreement constitutes, solely for the purposes of 11 U.S.C. section 362(b)(4) (1988), the enforcement of a judgment, other than a money judgment, obtained in an action to enforce the Tribe's regulatory and police powers.

X. MODIFICATIONS

This Settlement Agreement may be modified only upon mutual written agreement of the Parties. The AQP, in its sole discretion, may extend any deadlines set forth herein, and upon acceptance of such extension by *{Company name, Source name}*, any such extension shall constitute a modification to this Settlement Agreement.

XI. COUNTERPARTS

This Settlement Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

XII. RESERVATION OF RIGHTS

The AQP reserves the right to bring any action or to seek civil or administrative penalties for any past, present or future violations of the Reservation Air Code, not specifically addressed herein. Further, the AQP has the right to bring any action to enforce this Settlement Agreement and to seek any authorized penalties for any violation of this Settlement Agreement. The AQP reserves the right to revoke this Settlement Agreement if and to the extent the AQP finds, after signing this Settlement Agreement, that any information provided by *{Company name, Source name}* was materially false or inaccurate at the time such information was provided to the AQP, and the AQP reserves the right to assess and collect any and all civil penalties for any violation described herein.

XIII. BINDING EFFECT AND EFFECTIVE DATE

This Settlement Agreement is binding upon the Parties to this Settlement Agreement and their corporate subsidiaries or parents, their officers, directors, agents, attorneys, employees, contractors, successors in interest, and assigns. The undersigned representatives certify that they are authorized by the party or parties whom they represent to enter into this Settlement Agreement and to execute and legally bind that party or those parties to the terms and conditions of the Settlement Agreement. This Settlement Agreement shall become effective as of the date on which the last of all required signatures has been obtained.

Enforcement Procedures and Penalty Policy

XIV. DISPUTE RESOLUTION

Any claim, dispute, or controversy arising out of or in connection with or relating to this Settlement Agreement or the breach or alleged breach thereof, shall be settled by mutual agreement of the Parties' senior management to the extent possible. To the extent disputes cannot be mutually resolved, each party may pursue any available remedies.

SOUTHERN UTE INDIAN TRIBE, AIR QUALITY PROGRAM

By: _____ **Date:** _____

{name}

Environmental Programs Division Head

By: _____ **Date:** _____

{name}

Air Quality Program Manager

By: _____ **Date:** _____

{Respondent – Responsible Official name}

{Respondent - Title}

{Respondent – Company name}

cc: Tribe's Legal Counsel
Environmental Programs Division Head

Enforcement Procedures and Penalty Policy

Attachment 14 – Example Compliance Order AIR QUALITY PROGRAM

Environmental Programs Division
Southern Ute Indian Tribe
PO Box 737 MS#84
Ignacio, CO 81137
970-563-4705

<http://www.southernute-nsn.gov/environmental-programs/air-quality>



{Date}

Certified Mail No. {##}
Return Receipt Requested

{Recipient, title}
{Company name}
{Mailing address}
{City, State ZIP}

**BEFORE THE AIR QUALITY PROGRAM
ENVIRONMENTAL PROGRAMS DIVISION
SOUTHERN UTE INDIAN TRIBE**

**COMPLIANCE AND PENALTY ORDER
Enforcement Case ID No.:**

In the Matter of:
{Company name, Source name}

This Compliance Order is issued by the Air Quality Program (AQP) to *{Company name, Facility name}* pursuant to the authority of the Southern Ute Indian Tribe under §§1-104, 1-105 and 2-121 of the Southern Ute Indian Tribe/State of Colorado Environmental Commission's Reservation Air Code.

I. FINDINGS OF FACT

1. *{Company name}*, owns and operates *{Facility name}*, a *{Facility description}* facility located at *{Section}*, *{Township}*, *{Range}*, *{County}*, Colorado. *{Company name – Facility name}* is subject to the Southern Ute Indian Tribe/State of Colorado Environmental Commission's Reservation Air Code, Federal air quality statutes and regulations, and the terms and conditions of Operating Permit No. V-SUIT-*{#####-#####.##}*. Permit Condition No. *{III.B.1.(A) or IV.B.1.(A)}* provides that any

Enforcement Procedures and Penalty Policy

noncompliance with permit terms or conditions constitutes a violation of the RAC and the Clean Air Act.

2. On *{Date}*, *{Inspector's name}* conducted an *{inspection and/or records review}*, to assess the compliance status of *{Company name – Facility name}* with the terms and conditions of Operating Permit No. V-SUIT-*{#####-#####.##}*. Based on the results of this *{inspection and/or records review}*, AQP has determined the following:
 - C. *{Company name, Facility name}* failed to *{summarize violation such as “maintain records of performance tests and performance evaluations for emission unit X”}* in violation of Federal Operating Permit No. V-SUIT-*{#####-#####.##}*, Permit Condition *{number}*.
 - D. *{add more violation description lines as necessary}*.
3. Pursuant to the above Findings of Fact, the Tribe issued a *{a Compliance Advisory (CA) or Notice of Violation (NOV)}* to *{Company name, Facility name}* on *{Date of CA or NOV}*. based on the results of this *{inspection and/or records review}*.
4. A *{CA or NOV}* conference was held on *{Date of CA or NOV conference}* to provide *{Company name, Facility name}* with an opportunity to present data, arguments, and other information concerning the alleged violations. *{Company name}* *{attended/did not attend}* the conference and *{presented/failed to present}* information that demonstrated noncompliance with the RAC and the terms and conditions of Operating Permit No. V-SUIT-*{#####-#####.##}* as identified above.

II. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, and pursuant to its authority under RAC §§1-104, 1-105 and 2-121, the AQP determines that *{Company name, Facility name}* violated the following:

1. Operating Permit No. V-SUIT-*{#####-#####.##}*, Permit Condition *{number}*, *{cite parallel RAC requirement}*, and *{cite parallel regulatory requirements from NSPS, NESHAP and/or MACT}*. These violation(s) occurred on *{Date or Date Range}*.
2. *{add more violation citation lines as necessary}*

III. COMPLIANCE REQUIREMENTS

Based on the foregoing Findings of Fact and Conclusions of Law, and pursuant to RAC §2-121, *{Company name, Facility name}* is hereby ordered to comply with the following requirements:

Enforcement Procedures and Penalty Policy

1. Effective immediately and without limitation, *{Company name}* shall comply with the Reservation Air Code and Operating Permit No. V-SUIT-*{#####-#####.##}* in the regulation and control of air pollutants from *{Company name, Facility name}*.
2. *{Add compliance requirement/action lines such as “{Company name, Source name} shall install oxidation catalysts on emission unit no.{XX} by {Date} reducing carbon monoxide emissions to less than {X} g/hp-hr. Source testing shall be conducted within 90 days of installation to confirm the emission rate of {X} g/hp-hr has been achieved”}*.
3. *{Add more compliance requirement/action lines as necessary}*.

This Compliance Order shall constitute a final order of the AQP.

IV. CIVIL PENALTIES

1. Based upon the factors set forth in the Southern Ute Indian Tribe’s Enforcement Procedures and Penalty Policy, the AQP has assessed a civil penalty in the amount of _____Dollars (\$ _____.00) against *{Company name, Source name}* for violations of the Reservation Air Code cited in Section II of this Compliance Order.
2. *{Company name, Facility name}* shall pay the civil penalty to the Southern Ute Indian Tribe, Air Quality Program within 30 days of the effective date of this Compliance Order. *{Company name, Source name}* shall pay the civil penalty due by electronic funds transfer (“EFT”) to the Southern Ute Indian Tribe, Air Quality Program in accordance with written instructions to be provided to *{Company name, Source name}* by the Air Quality Program. At the time of payment, *{Company name, Source name}* shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to this Compliance Order, and shall reference the Compliance Order Enforcement Case ID # by email to mhutson@southernute-nsn.gov; and by mail to:

Environmental Programs Division
P.O. Box 737 MS#84
Ignacio, CO 81137

V. OPPORTUNITY TO APPEAL

Pursuant to RAC §1-105 and the Environmental Commission’s Procedural Rules, *{Company name, Source name}* has the right to appeal to the Environmental Commission by sending a written request for a hearing to the Commission at:

Enforcement Procedures and Penalty Policy

**Southern Ute Indian Tribe/State of Colorado Environmental Commission
% Environmental Programs Division
P.O. Box 737 MS#84
Ignacio, CO 81137**

The request for a hearing may include a request to determine any one or all of the following items:

1. Whether the alleged violation or noncompliance existed or did not exist.
2. Whether *{Company name, Source name}* is subject to civil penalties under RAC § 2-121 and whether the civil penalties are appropriate for the alleged violation or noncompliance.

The Environmental Commission's Administrative Appeal Procedures require that all requests for review be filed with the Commission within 30 days following the date of the appealed action.

VI. NOTICE OF POTENTIAL LIABILITY FOR ADDITIONAL CIVIL PENALTIES AND INJUNCTIVE RELIEF

In accordance with RAC §2-112(1)(c), failure to comply with the terms of this Compliance Order could result in termination of *{Company name, Source name}*'s permit to operate. In addition, the Act of October 18, 2004, Pub. L. No. 108-336, 118 Stat. 1354, and RAC §2-121 authorize the Tribe or the Environmental Commission to bring a civil action for declaratory and injunctive relief, or for other orders in aid of enforcement, against any person who fails to comply with any term or condition contained in any permit or other final civil order of the Tribe or the Commission and assess penalties for failure to comply with a final order of the Tribe or Commission in an amount up to \$10,000.00 per day per violation.

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VII. EFFECTIVE DATE OF ORDER

This Compliance Order shall become effective upon receipt.

**SOUTHERN UTE INDIAN TRIBE,
AIR QUALITY PROGRAM**

By: _____ Date: _____

{name}

Environmental Programs Division Head

By: _____ Date: _____

{name}

Air Quality Program Manager

cc: Tribe's Legal Counsel
Environmental Programs Division Head