

**Environment Protection Authority**

# **Civil penalty calculations policy – proposed amendments**

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**Public Consultation Report**

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## Civil Penalty Calculations Policy – proposed amendments public consultation report

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### Public consultation

The EPA seeks your views regarding proposed amendments to the EPA Policy for Calculation of Civil Penalties under the *Environment Protection Act 1993*. This consultation report may also be obtained from the EPA website <[www.epa.sa.gov.au](http://www.epa.sa.gov.au)> and hard copies of materials can be posted to you upon request.

The public consultation invites your responses to key questions posed in relation to the proposed amendments. A copy of the proposed amended Calculations Policy is attached for your information. Comments on the proposed amendments are required to be submitted by **5 pm Friday 29 March 2013**.

Comments may be forwarded by mail or email to: Principal Policy Officer, Environment Protection Authority GPO Box 2607 Adelaide SA 5001, email: [epainfo@epa.sa.gov.au](mailto:epainfo@epa.sa.gov.au) (mark subject as 'Civil Penalty Calculations Policy'). Please note that submissions received will be treated as public documents and may be made available for inspection by interested persons.

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## Abbreviations

<b>(The) Act</b>	Environment Protection Act 1993
<b>EPA</b>	South Australian Environment Protection Authority
<b>EPP</b>	environment protection policy
<b>Calculations Policy</b>	EPA policy for calculation of civil penalties under the Environment Protection Act 1993
<b>The court</b>	South Australian Environment, Resources and Development Court

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## Summary

The EPA has undertaken a review of the *EPA policy for calculation of civil penalties under the Environment Protection Act 1993* (Calculations Policy) and seeks your views regarding the resulting proposed amendments to the policy.

There are five main areas of amendments proposed for the Calculations Policy:

- 1 increasing the amount of negotiated civil penalties calculated
- 2 the inclusion of new offences
- 3 clarification of the process of negotiating a civil penalty and corrections
- 4 amendment to the adjusting factors
- 5 timing for the next review.

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## 1 Introduction

Section 104A of the *Environment Protection Act 1993* (the Act) came into operation on 1 July 2006 and allows the EPA to seek a civil penalty from an alleged offender in respect of certain alleged contraventions of the Act, as an alternative to criminal prosecution. Civil penalties may only be pursued for less serious offences that do not require proof of intention or some other state of mind (referred to in this report as strict liability offences). The Act allows a civil penalty to be sought in two ways; as a negotiated civil penalty, or as a civil penalty imposed by the South Australian Environment Resources and Development Court (the court).

At the time of writing this public consultation report, there has been seven settled civil penalty negotiations and one court agreed civil penalty which can be viewed at the EPA website under *Completed prosecutions & civil penalties*<sup>1</sup>.

The Calculations Policy provides a structure for calculating monetary penalties through negotiation. A summary of the civil penalty calculation formula is provided in section 2. The objective of the Calculations Policy is to provide a framework for calculating fair and consistent penalties while balancing the need for deterrence, accountability and equity. Participation in negotiations is voluntary.

The Calculations Policy was developed by reviewing how the court had sentenced offenders and also how relevant jurisdictions in the United States calculated negotiated civil penalty amounts with the objective that negotiated civil penalties be consistent with the amount of court imposed penalties for comparable cases.

The Calculations Policy states that it was to be reviewed after five civil penalty negotiations or court imposed civil penalties, and the review exercise was carried out in 2012. This public consultation is the result of the review, and seeks feedback on amendments to the policy.

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<sup>1</sup> [www.epa.sa.gov.au/what\\_we\\_do/public\\_register\\_directory/completed\\_prosecutions\\_and\\_civil\\_penalties](http://www.epa.sa.gov.au/what_we_do/public_register_directory/completed_prosecutions_and_civil_penalties)

## 2 Summary of the civil penalty calculation formula

The civil penalty calculation formula consists of four key stages:

- 1 determination of a foundation penalty
- 2 determination of a base penalty
- 3 adjustment of the base penalty to account for mitigating factors
- 4 addition of any economic benefit derived from the contravention.

**Foundation penalty:** In order to provide consistency with the level of penalty imposed by sentencing courts for lower level contraventions, the Calculations Policy sets a starting point for calculating a civil penalty as a percentage of the maximum penalty prescribed for the offence. The percentages are:

- 50% of the maximum penalty for offences resulting in actual harm to the environment (Category 1)
- 25% of the maximum penalty for those offences resulting in potential harm (Category 2)
- 25% of the maximum penalty for those offences resulting in risk of harm to the environment where there are no actual or potential harm, ie administrative breaches (Category 3).

**Base penalty:** Further adjustment to the foundation penalty may then be made with regard to severity of the contravention, ie the nature of the pollutant released, its quantity, toxicity and length of exposure to the environment for Category 1 and 2 offences, and risk of harm to the environment for Category 3 offences.

**Adjusting factors:** To assist the EPA and the alleged offender in negotiating an appropriate level of civil penalty, the alleged offender is entitled to make submissions on a number of 'adjusting factors'. The EPA may consider these submissions and make appropriate reductions to the penalty accordingly. A maximum reduction of up to 60% of the base penalty may occur with regard to the following factors:

- the alleged offender's good compliance record
- the practical measures taken by the alleged offender to prevent the contravention
- the appropriateness and speed of corrective action taken by the alleged offender after the contravention
- the timeliness of notification of an incident and the degree of cooperation demonstrated by the alleged offender
- the degree of public contrition demonstrated by the alleged offender
- any other relevant factor in specific cases.

**Economic benefit.** The EPA may add to a civil penalty, the amount of economic benefit that the alleged offender has derived from the contravention.

### 3 Policy review objectives

The objectives of the civil penalty policy review were to investigate:

- 1 the consistency between negotiated penalties and court imposed criminal penalties
- 2 the adequacy of the penalties generated by the Calculations Policy, in particular the foundation penalty and adjusting criteria components of the calculation formula
- 3 whether the EPA should start to negotiate environmentally beneficial projects as an option in the negotiation of civil penalties
- 4 possible improvements to the Calculations Policy to more clearly set out the principles to be followed when making decisions under section 104A of the Act.

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## 4 Review outcomes

### Review outcome for Objective 1 – consistency of penalties

In summary, the review identified the calculation of the seven negotiated civil penalty amounts to be generally consistent with the penalty adjustments applied by the court for similar offences. There were difficulties in identifying comparable court imposed penalties for the offence of environmental nuisance without intent or recklessness [section 82(2) of the Act] as there has been no court prosecutions for this offence. Historical prosecutions for the offence of environmental nuisance *with* intent or recklessness have been identified for the purpose of the comparison.

The calculated penalties varied in some cases where the court imposed large reductions in penalty (penalty adjustments) for early guilty pleas or a person's financial situation. The current Calculations Policy limits the discretion of the EPA to provide such large penalty adjustments for these factors. This limited discretion by the EPA has been and continues to be appropriate.

A comparison of negotiated civil penalty amounts with the penalties imposed by the courts in prosecutions for similar offences appears in Tables 1 and 2.

**Table 1 Negotiated civil penalty amounts**

Offence	Date of negotiated penalty	Negotiated penalty amount	Reduction of maximum penalty
Environmental nuisance without intent or recklessness (max penalty \$15,000)	13 June 2012	\$4,350 (plus \$434.90 technical costs)	71%
Environmental nuisance without intent or recklessness (max penalty \$15,000)	19 June 2012	\$2,175	85.5%
Environmental nuisance without intent or recklessness (max penalty \$15,000)	5 October 2011	\$2,475 (plus \$4,070 technical costs)	83%
Environmental nuisance without intent or recklessness (max penalty \$15,000)	10 January 2011	\$3,075 (plus \$285.95 technical costs)	80%
Environmental nuisance without intent or recklessness (max penalty \$15,000)	23 April 2010	\$3,750 (plus \$6,768.89 technical costs)	75%
Operating without a licence (max penalty \$120,000) and Category B offence of breach of mandatory provision of EPP (max penalty \$4,000)	27 February 2009	\$13,365  \$276.75 for each of the 2 offences (plus \$6,046.48 technical costs)	89%  93%
Environmental nuisance without intent or recklessness (max penalty \$15,000)	25 October 2007	\$3,750 (plus \$330 technical costs)	75%

**Table 2 Penalties imposed by the courts in prosecutions for offences similar to those that have been the subject of negotiated penalties**

Offence	Date of court decision	Court Imposed penalty amount	Reduction of maximum penalty
Operating without a licence (max penalty \$120,000)	7 June 2012	\$7,500	93%
Category B offence of breach of mandatory provision of EPP (max penalty \$30,000)	24 November 2011	\$0 (prosecution costs of \$500 paid and \$160 victims of crime levy)	100%
Operating without a licence (max penalty \$120,000)	6 November 2007	\$0 (Offender spent \$31,000 for waste remediation)	100%
Operating without a licence (max penalty \$120,000)	3 July 2007	\$4,760	96%
Operating without a licence (Max penalty \$120,000)	9 May 2007	\$19,200	84%
Category B offence of breach of mandatory provision of EPP (max penalty \$4,000)	9 February 2007	\$3,000	25%
Operating without a licence (max penalty \$60,000 for individual)	16 December 2005	\$60	99.9%
Operating without a licence (max penalty \$60,000 for individual)	16 December 2005	\$500	99.17%
Operating without a licence (max penalty \$120,000)	2 July 2004	\$34,000 (plus costs of \$6,000)	72%
Environmental nuisance with intent or recklessness* (max penalty \$30,000)	7 April 2004	\$13,500 (costs \$4,054)	55%
Environmental nuisance with intent or recklessness* (max penalty \$30,000)	15 October 2001	\$6,250 (plus costs of \$1,600 to the EPA and \$3,500 to the Crown)	79%
Environmental nuisance with intent or recklessness* (max penalty \$30,000)	16 May 2001	\$18,750	37.5%
Environmental nuisance with intent or recklessness* (max penalty \$30,000)	18 October 1999	\$5,000	83%

\* Note that a civil penalty could not be pursued for this former section 82 offence as it required proof of state of mind.

The review used comparable past EPA criminal cases to calculate a hypothetical civil penalty amount which demonstrated the civil penalty amount and the actual criminal penalty imposed to be generally consistent. However they varied for serious and intentional or reckless offences in the Act. This reflects the current intention and applicability of the Calculations Policy to calculate penalties for less serious, strict liability offences.

## Review outcome for Objective 2 – adequacy of penalties

The review identified that the negotiated penalties are generally consistent with the court's determinations. Negotiated penalties that are calculated for less serious offences (ie those that have maximum penalties at \$4,000 or less) may, however, be considered an inadequate deterrent.

For example, the Act sets a maximum penalty of \$4,000 for breaching a mandatory provision of an environment protection policy for a Category B offence, whereas an expiation of \$300 is set for the offence. However, a negotiated civil penalty amount for an average breach of such a provision is only approximately \$300. Amendment to the Calculations Policy is recommended such that civil penalty amounts are comparable to criminal penalties and greater than expiations.

The review also considered whether the civil penalty amount should be increased to reflect the cost saved by the alleged offender from avoiding court proceedings.

Two amendments to the Calculations Policy are proposed to increase the deterrence value of negotiated civil penalties:

- a create a minimum floor civil penalty amount of \$1,000 such that if the calculation formula generates a penalty of less than \$1,000, a default \$1,000 penalty will be assessed.
- b amend the calculations formula to increase all negotiated civil penalties to take into consideration the cost savings of avoiding court proceedings and possible conviction by increasing the foundation penalty by 20%.

These proposed amendments are discussed later.

The review also considered the adequacy of the 'adjusting factors' in the Calculations Policy. As explained above, to assist the EPA and the alleged offender in negotiating an appropriate level of civil penalty, the alleged offender is entitled to make submissions on a number of 'adjusting factors'. The EPA may consider these submissions and make appropriate reductions to the penalty accordingly. A maximum reduction of up to 60% of the base penalty may occur with regard to the following adjusting factors:

- the alleged offender's good compliance record
- the practical measures taken by the alleged offender to prevent the contravention
- the appropriateness and speed of corrective action taken by the alleged offender after the contravention
- the timeliness of notification of an incident and the degree of cooperation demonstrated by the alleged offender
- the degree of public contrition demonstrated by the alleged offender
- any other relevant factor in specific cases.

The review investigated the adequacy of the 10% limit in penalty reduction applied for each adjusting factor and the possible adoption of a global reduction such that the penalty could be reduced up to a certain amount (60%) for any one or combination of factors.

The review considered the factors that have been used in the reduction of past negotiated civil penalties noting that only the one negotiated civil penalty took into account adjusting factors which were as follows:

- good compliance record
- speed of corrective action
- timeliness of notification
- degree of public contrition
- other relevant factors.

The review does not support the global reduction of a penalty so that any one adjusting factors could reduce the base penalty by 60% as this could generate penalties that are less than those applied by the courts.

The review considered the factors that the court has used to reduce penalty amounts in recent court cases for breach of the Act and concluded that there does not need to be any new adjusting factors.

The review recommends an amendment to the adjusting criteria in the Calculations Policy such that a greater penalty reduction is available for factor 7.4 'the timeliness of notification of an incident and the degree of cooperation demonstrated by the alleged offender' by separating the two elements and providing an equal 10% reduction for each factor rather than the current combined 10% reduction to reflect the importance of such actions.

### **Review outcome for Objective 3 – use of environmentally beneficial projects in negotiation**

The review considered whether the EPA should start to negotiate environmentally beneficial projects as an option in the negotiation of civil penalties such that the penalty amount would be reduced by the cost of the project. Pursuant to section 133(1)(b) of the Act, the court may, in addition to any penalty, impose an order that the person carry out a specified project for the restoration or enhancement of the environment in a public place or for public benefit. To date the court has not made such an order.

It is recognised that the inclusion of environmentally beneficial projects in negotiated agreements may address an alleged offender's resource limitations and provide a creative response to incidents; however the following limitations of their adoption are considered to outweigh the benefits:

- South Australian courts have not applied section 133(1)(b) of the Act to order such a project, so there is no precedent in South Australia
- the amount of penalty that is generated by the Calculations Policy would limit the value of the project (the value of environmental service orders in New South Wales and the projects in Victoria have varied widely, however are mostly higher than the amount of negotiated civil penalties that have been settled to date in South Australia)
- the time and resources added to the negotiation process to negotiate the details of such projects would significantly reduce the efficiency of the negotiated penalty.

The review recommends that the Calculations Policy not include this option at this time and that consideration of the possible introduction of such projects be delayed until the courts have imposed orders pursuant to section 133(1)(b) of the Act.

### **Review outcome for Objective 4 – Calculations Policy improvements and clarifications**

Finally the review explored the possible improvements to the Calculations Policy to more clearly set out the principles to be followed when making decisions under section 104A of the Act. The review recommends a variety of improvements to the policies that are discussed below and in summary are to:

- add to the list of offences suitable for consideration as a negotiated civil penalty: the strict liability offence of causing serious environmental harm in section 79(2) of the Act; the strict liability offence of failing to notify of serious or material environmental harm in section 83(1); strict liability site contamination offences contained in part 10A being enforcement provisions for site contamination; and those strict liability offences contained in the *Plastic Shopping Bags (Waste Avoidance) Act 2008*
- insert explanatory text in the Calculations Policy for calculating civil penalties for relevant site contamination strict liability offences
- clarification of the process of negotiating a civil penalty and corrections to the Calculations Policy update references to guidelines and other documents
- review the Calculations Policy again within five years from the date of commencement of the updated policy and that the policy be amended to state that this is required.

## 5 Proposed amendments

There are five main areas of amendments proposed to the Calculations Policy:

- increasing the penalty amount of negotiated civil penalties
- the inclusion of new offences
- clarification of the process of negotiating a civil penalty and corrections
- amendment to the adjusting factors
- timing for the next review.

### Increasing negotiated civil penalty amounts

Amendments to the Calculations Policy are proposed to increase the deterrence value of negotiated civil penalties as discussed below.

- a Create a minimum floor civil penalty amount of \$1,000 such that if the calculation formula generates a penalty of less than \$1,000, a default \$1,000 penalty will be assessed.
- b Amend the calculations formula to increase all negotiated civil penalties to take into consideration the cost savings of avoiding court proceedings and possible conviction by increasing the foundation penalty by 20%.

### Minimum floor civil penalty amount of \$1,000

It is proposed that a minimum penalty be issued for negotiated civil penalties. If the EPA calculates a penalty using the calculations formula that is less than the floor amount of \$1,000 then the negotiated penalty amount offered will be the floor amount. Pursuant to this strategy an alleged offender would not have the opportunity to submit to the EPA adjusting criteria to request a penalty reduction as a reduction of the penalty to less than the floor penalty would not be permitted.

This strategy reflects the need for civil penalties to provide an adequate deterrent and also to justify the time and resources of the EPA to investigate and negotiate a civil penalty.

A problem reported with the current calculations formula occurs when calculating a civil penalty for offences that impose a maximum penalty of \$4,000 or less such as for certain breaches of environment protection policies (Category B offences) as the civil penalty generated is considered to be too low to be an adequate deterrent. The maximum penalties for a contravention of a mandatory provision of an environment protection policy (without intention or recklessness) for a Category B offence is \$4,000 and a 50% or 25% reduction of the maximum for the foundation penalty generates a relatively low base penalty of \$2,000 (causing harm) or \$1,000 (potential or risk of harm).

This penalty is used to determine the foundation penalty by reducing the penalty to reflect the severity of the contravention (between 0% reduction for major impact and 66% reduction for minor impact) and further reductions for any mitigating factors (adjusting factors of up to a further 60% reduction of the foundation penalty). Therefore a civil penalty for a Category B offence (without intention or recklessness) which caused potential harm or a risk of harm and had a minor impact may be \$330 with further reductions available for mitigating factors.

An amount of \$1,000 is considered to be appropriate as the floor penalty as it covers the administrative cost of negotiating a civil penalty and provides an adequate deterrent. It is noted that expiations of \$300 are commonly specified for less serious offences and the floor penalty must be more than this expiation amount to warrant the additional costs to the EPA of pursuing a civil penalty or the EPA would not benefit from pursuing such a penalty and this tool would not be useful.

**Your feedback is sought as to whether a \$1,000 floor penalty is reasonable.**



## Increasing the foundation penalty by 20%.

It is proposed that the calculations formula be amended to increase the amount of negotiated civil penalties to take into consideration the cost savings of avoiding court proceedings and possible conviction.

Savings include court appearance fees for solicitors, the time of the alleged offender to appear in court and the victims of crime levy of \$160 per offence if a conviction is recorded and possible awarding of costs against them. It is recognised that an alleged offender avoids the prospect of criminal prosecution and conviction by accepting a negotiated civil penalty.

An increase in the foundation penalty of the negotiated civil penalty of 20% may be considered appropriate to reflect this saving. This could be achieved by amending the foundation penalty to 70% of the maximum penalty for offences that result in actual harm to the environment (Category 1 offences) or 45% of the maximum penalty for those offences resulting in potential harm (Category 2) or 45% of the maximum penalty for administrative offences (Category 3).

The civil penalty amounts calculated for past negotiated civil penalties are stated in the table below and the civil penalty amounts that would be determined if they were assessed under a proposed addition of 20% to the foundation penalty is placed in the end column.

**Table 3 Past negotiated civil penalty amounts recalculated with an additional 20% to the foundation penalty**

Offence	Negotiated penalty	20% addition
Environmental nuisance	\$3,750	\$5,250
Environmental nuisance	\$2,475	\$4,455
Environmental nuisance	\$3,075	\$4,305
Environmental nuisance	\$3,750	\$5,250
Environmental nuisance	\$2,175	\$3,915
Environmental nuisance	\$4,350	\$6,090
Operating without a licence and Category B offence of breach of mandatory provision of EPP	\$13,365 \$276.75 (for each of the two offences)	\$24,057 \$498.15

**Your feedback is sought as to whether a proposed 20% increase to the foundation penalty accurately reflects the cost saved by avoiding prosecution and whether the penalty should be increased to reflect this saving.**

## Inclusion of new offences

Section 104A of the Act specifies the matters that the EPA must have regard to before seeking a civil penalty and states:

(2) The Authority may not recover an amount under this section in respect of a contravention if the relevant offence requires proof of intention or some other state of mind, and must, in respect of any other contravention, determine whether to initiate proceedings for an offence or take action under this section, having regard to the seriousness of the contravention, the previous record of the offender and any other relevant factors.

Attachment E of the proposed Calculations Policy lists the offences in the Act that may be suitable for consideration of a negotiated civil penalty.

This review identified offences in the Act that do not require proof of a state of mind and may be suitable for a negotiated civil penalty to be included in the Calculations Policy:

- **Section 79(2) of the Act – the offence of causing serious environmental harm (without intention or recklessness) and section 83(1) of the Act – the offence of failing to notify of serious or material environmental harm**

While it may be the case that many offences of causing serious environmental harm (without intention or recklessness) and of failing to notify of serious or material environmental harm will be too serious for the EPA to appropriately pursue a civil penalty, there may be some situations where it would be appropriate.

For example, there could be a contravention that meets the definition of causing serious environmental harm because it is of high impact or wide scale, such as noise pollution caused by a concert that is not considered too serious and hence appropriate to be enforced via a civil penalty. The Calculations Policy clarifies the appropriate situations where the EPA may pursue this type of civil penalty.

**Your feedback is sought as to whether the offence of serious environmental harm [section 79(2) of the Act] and the offence of failing to notify of serious or material environmental harm [section 83(1) of the Act] should be included in the Calculations Policy.**

- **Site contamination offences contained in Part 10A of the Act that do not require proof of intention or some other state of mind**

These offences have been added to the Act since the last update of the Calculations Policy. Consequential amendment is proposed to facilitate the calculation of civil penalties for relevant strict liability site contamination offences. The offences can be viewed in the Attachment D of the proposed Calculations Policy. The update of Attachment B is proposed to add documents relevant to site contamination offences, [International Agency for Research on Cancer Scientific Publications Series](#) and the *EPA Site contamination: Guidelines for the assessment and remediation of groundwater contamination* (2009).

**Your feedback is sought as to whether the site contamination offences contained in Part 10A of the Act that do not require proof of intention or some other state of mind should be included in the Calculations Policy.**

- **Strict liability offences in the Plastic Shopping Bags (Waste Avoidance) Act 2008**

Amendment of Attachment D of the Calculations Policy is also proposed to add the offences in section 4 (retailer must provide alternative shopping bag until prescribed day) and section 5 (retailer not to provide plastic shopping bag) of the *Plastic Shopping Bags (Waste Avoidance) Act 2008*. Section 7 of that Act states that the *Plastic Shopping Bags (Waste Avoidance) Act 2008* and the Act will be read together and construed as if the two acts constituted a single act and as such the EPA may pursue a civil penalty for suitable offences in the *Plastic Shopping Bags (Waste Avoidance) Act 2008*.

**Your feedback is sought as to whether the offences in sections 4 and 5 of the Plastic Shopping Bags (Waste Avoidance) Act 2008 should be included in the Calculations Policy.**

## Clarification of the process of negotiating a civil penalty and corrections

The review examined the process of negotiating a civil penalty as set out in the Calculations Policy and amendment to the policy is proposed to clarify the process as follows:

- i Clarify Table 2 of the Calculations Policy 'Assessment of factors where the offence alleges actual or potential harm' such that the sensitivity of the receiving environment stated for offences that allege potential environmental harm is assessed as the environment that was to be potentially impacted rather than the actual environment that was impacted.

- ii Insert an additional factor in item 1 of the policy entitled 'When the EPA will seek to negotiate a civil penalty' to state that before seeking a negotiated civil penalty the EPA will consider the deterrent that a negotiated civil penalty would have on the alleged offender. This amendment would address the concern that large companies who are easily able to pay a civil penalty may find this less of an incentive not to re-offend than a smaller operator who may find it more difficult to pay the amount.
- iii Clarify further the explanation of Category 2 and 3 offence and that Category 2 offences may include a heightened risk of harm and Category 3 offences mean administrative offences.
- iv Clarify what constitutes potential harm and what constitutes a risk of harm by reference to section 5 of the Act.

**Your feedback is sought as to whether the proposed amendments to clarify the civil penalty negotiation process should be made.**

The following minor corrections to the Calculations Policy are proposed:

- i Amendment of Attachment D 'Strict liability offences in the Act' to correct the reference to the maximum penalty for the offence in section 34(2) of the Act for a body corporate for a breach of a Category A offence from \$120,000 to \$150,000.
- ii Update the reference to 'Compliance and enforcement policy' to refer to the 'Compliance and enforcement regulatory options and tools guidelines'.
- iii Insert text 'of aquatic foods' to update reference to: state '*ANZECC National Water Quality Management Strategy, Ch 4.4 Aquaculture for human consumption of aquatic foods, Australian and New Zealand Environment and Conservation Council, October 2000*'.
- iv Update Attachment B to the Calculations Policy to state: 'Environment Protection and Heritage Council (EPHC)/ National Environmental Protection Council (NEPC), *Assessment of Site Contamination National Environmental Protection Measures 1999*'.

### **Amendment to the adjusting factors**

The review recommends an amendment to the adjusting factor item 7.4 that provides a possible 10% reduction of the base penalty for 'the timeliness of notification of an incident and the degree of cooperation demonstrated by the alleged offender'. It is recommended that this factor be separated into two factors of equal 10% reduction capacity to reflect the importance of such actions.

Amendment to the supporting text in the policy is recommended to explain that a licence-holder would not get a reduction for 'the timeliness of notification of an incident' if their condition of licence requires notification of an incident as this is a standard licence condition.

**Your comment is sought as to whether the proposed amendments to the adjusting factor item 7.4 should be made into separate factors and increase the maximum penalty reduction for the adjusting factor from 60% to 70%.**

### **Next review of the Calculations Policy**

The review recommends that the Calculations Policy be examined within five years from the date of commencement of the updated policy and that the policy be amended to state that this is required.

**Your comment is sought as to whether the Calculations Policy should be reviewed again within five years.**

## 6 Glossary

<b>Adjusting criteria</b>	Adjusting criteria may be submitted by the alleged offender to the EPA to seek an adjustment of the base penalty to account for mitigating factors.
<b>Actual harm</b>	For the purpose of the Calculations Policy is harm that has occurred to the environment including environmental nuisance.
<b>Base penalty</b>	The base penalty is an adjustment of the foundation penalty to consider the nature of the pollutant released, its quantity, toxicity and length of exposure to the environment for Category 1 and 2 offences and risk of harm to the environment for Category 3 offences.
<b>Economic benefit</b>	Any financial saving that the person stands to gain by committing the contravention.
<b>Foundation penalty</b>	Foundation penalty is a percentage of the maximum penalty prescribed for the offence contravened.
<b>Potential harm</b>	For the purpose of the Calculations Policy, includes harm that is likely to result to the environment from a pollution release, or was likely to result if not for intervention preventing such harm and includes risk of harm and future harm.
<b>Strict liability</b>	In general terms, strict liability offences in the Act are those that do not require the EPA to prove that the alleged offender acted with a particular state of mind at the time the contravention occurred.

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# EPA policy for calculation of civil penalties under the Environment Protection Act 1993

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## EPA policy for calculation of civil penalties under the Environment Protection Act 1993

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## Introduction

Section 104A of the *Environment Protection Act 1993* (the Act) allows the Environment Protection Authority (EPA) to seek a civil penalty from an alleged offender in respect of certain alleged contraventions of the Act, as an alternative to criminal prosecution. The Act allows a civil penalty to be sought in two ways: as a negotiated civil penalty or as a 'court imposed civil penalty'. A copy of section 104A is found at [Attachment A](#).

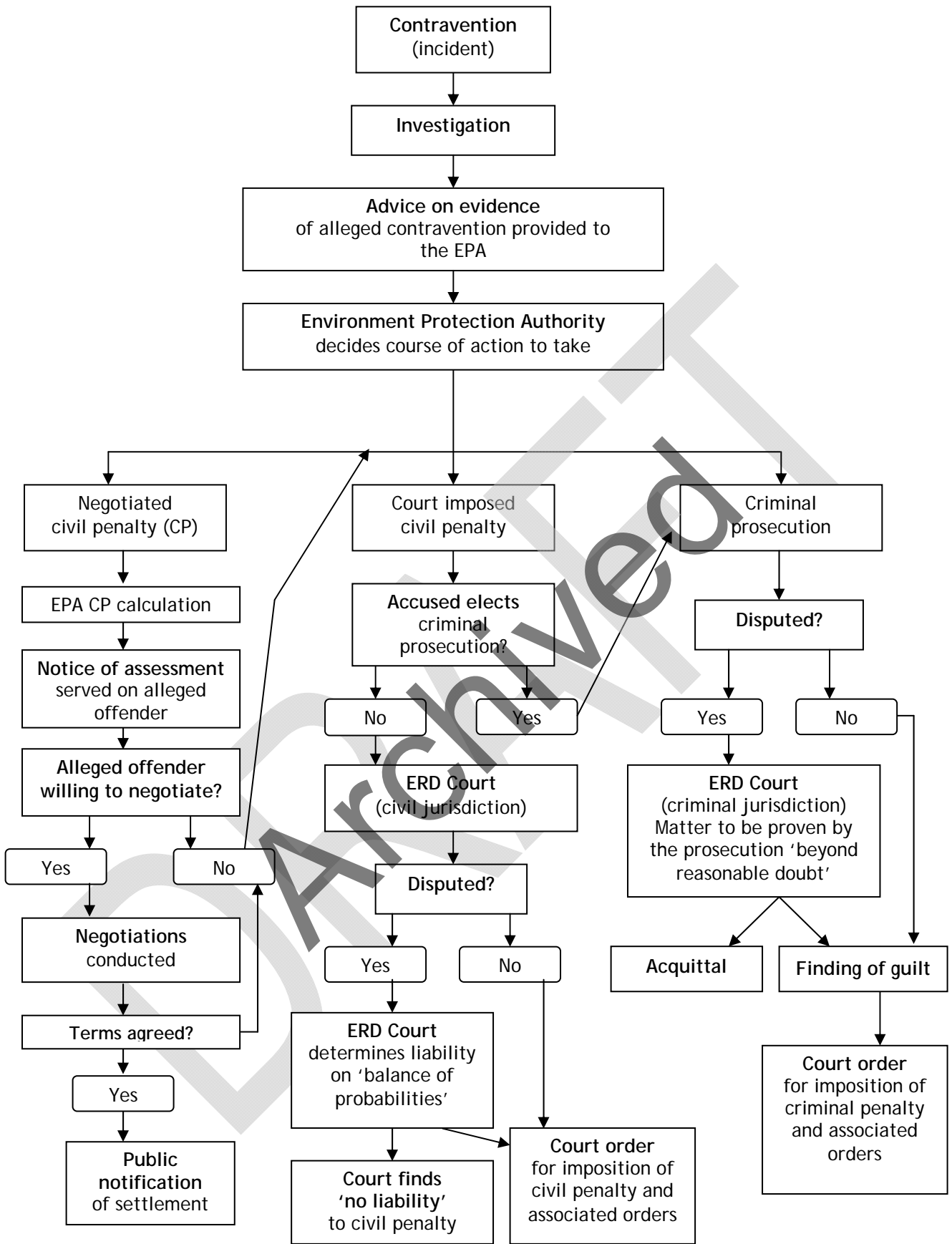
This *Policy for calculation of civil penalties* (the policy) has been developed to provide a structure for the EPA to use when calculating monetary penalties through negotiation. The policy provides a framework for calculating fair and consistent penalties while balancing the need for deterrence, accountability and equity. Participation in negotiation is voluntary and gives the alleged offender an opportunity to make submissions on matters that they believe should be taken into consideration when determining a penalty.

Civil penalties may only be negotiated for certain, generally low level, contraventions of the Act at the invitation of the EPA. Details of matters that the EPA must have regard to when deciding whether to negotiate a civil penalty are contained in section 104A.

If the alleged offender disputes the allegation or calculated penalty, they have the right to withdraw from negotiations. At that time, the EPA may choose to initiate proceedings in the Environment Resources and Development Court (the court) for a civil penalty, or commence criminal prosecution. The processes in which a penalty may be imposed for a contravention are illustrated in Figure 1 and are as follows:

- the negotiated civil penalty process
- the court imposed civil penalty process
- the criminal prosecution process.

This policy should be read in conjunction with the relevant provisions of the Act and subordinate legislation, and does not seek to derogate from the Act or any other legal requirement. The policy does not seek to affect or limit the validity of any other claim brought by a third party under this Act or other law.



**Figure 1** Overview of negotiated civil penalty, court imposed civil penalty and criminal prosecution processes

## Definitions

The following definitions are provided to assist with the interpretation of this policy, and do not derogate from definitions provided in the Act or associated legislative instruments.

**the Act** refers to the Environment Protection Act 1993 and associated instruments, including environment protection policies.

**base penalty** – see part 4 of this policy.

**Category 1 offence** refers to an offence that alleges environmental harm where the harm has actually occurred.

**Category 2 offence** refers to an offence that alleges environmental harm where actual harm has not occurred but there is a potential for harm **and includes risk of harm and future harm.**

**Category 3 offence** refers to **an** administrative offence that does not allege actual or potential harm, but poses a heightened risk of harm **to the environment or human health.**

**compliance** means fulfilling directions and requirements of the EPA, the Act and associated legislative instruments.

**contravention** means a failure to comply with requirements of the Act. For the purpose of the negotiated civil penalty process, a reference to a contravention refers to an alleged contravention.

**the court** means the Environment Resources and Development Court of South Australia.

**economic benefit** – see part 8 of this policy.

**environmental harm** has the same meaning as in the Act, namely:

### 5 – Environmental harm

- (1) For the purposes of this Act, **environmental harm** is any harm, or potential harm, to the environment (of whatever degree or duration) and includes—
  - (a) an environmental nuisance; and
  - (b) anything declared by regulation (after consultation under section 5A) or by an environment protection policy to be environmental harm.
- (2) For the purposes of this Act, potential harm includes risk of harm and future harm.
- (3) For the purposes of this Act, the following provisions are to be applied in determining whether environmental harm is material environmental harm or serious environmental harm:
  - (a) environmental harm is to be treated as material environmental harm if—
    - (i) it consists of an environmental nuisance of a high impact or on a wide scale; or
    - (ii) it involves actual or potential harm to the health or safety of human beings that is not trivial, or other actual or potential environmental harm (not being merely an environmental nuisance) that is not trivial; or
    - (iii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$5 000;
  - (b) environmental harm is to be treated as serious environmental harm if—

- (i) it involves actual or potential harm to the health or safety of human beings that is of a high impact or on a wide scale, or other actual or potential environmental harm (not being merely an environmental nuisance) that is of a high impact or on a wide scale; or
  - (ii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$50 000.
- (4) For the purposes of subsection (3), loss includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent or mitigate the environmental harm and to make good resulting environmental damage.
- (5) For the purposes of this Act, environmental harm is caused by pollution—
- (a) whether the harm is a direct or indirect result of the pollution; and
  - (b) whether the harm results from the pollution alone or from the combined effects of the pollution and other factors.

**environmental nuisance** has the same meaning as in the Act, namely:

environmental nuisance means—

- (a) any adverse effect on an amenity value of an area that—
  - (i) is caused by pollution; and
  - (ii) unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area; or
- (b) any unsightly or offensive condition caused by pollution;

**environment performance agreement** has the same meaning as in the Act.

**EPA** is the Environment Protection Authority (South Australia) and its delegates.

**foundation penalty** is a percentage of the maximum penalty prescribed for the offence contravened.

**licence** has the same meaning as in the Act.

**occupier** has the same meaning as in the Act.

**owner** has the same meaning as in the Act.

**person** includes but is not limited to individuals, corporations, associations, firms, partnerships, public and municipal corporations, state and federal government organisations.

**pollutant** has the same meaning as in the Act.

**pollution** has the same meaning as in the Act.

**potential harm**, for the purpose of this policy, includes harm that is likely to result to the environment from a pollution release, or was likely to result if not for intervention preventing such harm and includes risk of harm and future harm.

**risk of harm to the environment**, for the purpose of this policy, is the probability of an event occurring that results in the release of pollution to the environment, and its consequences.

**site contamination** has the same meaning as in the Act.

**toxicity** is the inherent potential or capacity of a material to cause adverse effects in a living organism.

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# 1 When the EPA will seek to negotiate a civil penalty

Section 104A(2) of the Act specifies the matters that the EPA must have regard to before seeking a civil penalty. They include the seriousness of the alleged contravention, the previous record of the offender, whether the offence is one of strict liability, and any other relevant factor(s).

## 1.1 Seriousness of the contravention

When considering the seriousness of the alleged contravention, the EPA will consider the effect the contravention has, or will potentially have, on the environment. In addition, the EPA may have regard to other relevant factors including:

- the degree of culpability of the alleged offender in connection with the offence
- the length of time the alleged offender allowed the contravention to continue
- the impact that the contravention has or may have on the regulatory system
- the deterrent that a negotiated civil penalty would have on the alleged offender
- the need to deter others in the community from committing the same or similar contravention
- whether the alleged offender is willing to cooperate with the investigation or prosecution of others, or the extent to which the alleged offender has done so
- whether the alleged offence is of considerable public concern
- any other relevant factor.

## 1.2 Alleged offender's record of offending

When assessing the alleged offender's prior record of offending, the EPA will consider their record of environmentally relevant criminal convictions in South Australia and any other Australian jurisdiction.

Additionally, the EPA may have regard to any other civil or administrative enforcements imposed on the alleged offender under the Act.

In making this assessment the EPA may consider the nature of the prior criminal conviction, the passage of time since the offence was committed and the conduct of the alleged offender since the offence was committed.

In making this assessment, consideration will also be given to whether the alleged offender, if a corporation, has changed its name since being found liable for a previous offence, or whether a related corporate entity (or branch) of the company has committed the same or similar offences previously.

## 1.3 Strict liability offences

In general terms, strict liability offences are those that do not require the EPA to prove that the alleged offender acted with a particular state of mind at the time the contravention occurred. An example of this may be found in section 45(5) of the Act, which does not require the EPA to show that the alleged offender intended to breach the conditions contained in their EPA licence; rather, that they simply failed to meet their obligations. This may be distinguished from other offences; for example section 80(1) of the Act, which requires the EPA to show that the alleged offender acted 'intentionally or recklessly and with the knowledge that environmental harm will or might result'. A list of the types of strict liability offences for which the EPA may seek to negotiate a civil penalty is provided in this policy ([Attachment D](#)).

When determining whether a matter should be dealt with by a negotiated civil penalty, the EPA will have regard to the *Compliance and enforcement regulatory options and tools guidelines*. In general terms, this document outlines the EPA's principles for compliance and enforcement decisions, along with the process for managing non-compliance.

## 2 Calculating a negotiated civil penalty

Section 104A specifies the matters which a court shall take into account when considering a civil penalty:

- (6) In determining the amount to be paid by a person as a civil penalty, the court must have regard to—
- (a) the nature and extent of the contravention; and
  - (b) any environmental harm or detriment to the public interest resulting from the contravention; and
  - (c) any financial saving or other benefit that the person stood to gain by committing the contravention; and
  - (d) whether the person has previously been found, in proceedings under this Act, to have engaged in any similar conduct; and
  - (e) any other matter it considers relevant.

These considerations are incorporated in this policy to enable the EPA to negotiate civil penalties that are consistent with what the court would impose for the contravention. The fundamental difference is that the court can *impose* a civil penalty on an alleged offender based on these factors, while the EPA will *negotiate* a penalty amount with these and other factors in mind.

The offence provisions contained in the Act only specify the maximum penalty that may be imposed for a contravention; they offer little guidance for penalties for low-level and first-time contraventions of the Act.

A review of penalties handed down by the courts reveals that maximum penalties are rarely imposed, and higher penalties are reserved for the most serious, repeated and aggravated contraventions of the Act. Such contraventions will not be dealt with under the negotiated civil penalty system, and will continue to be referred to the court for determination.

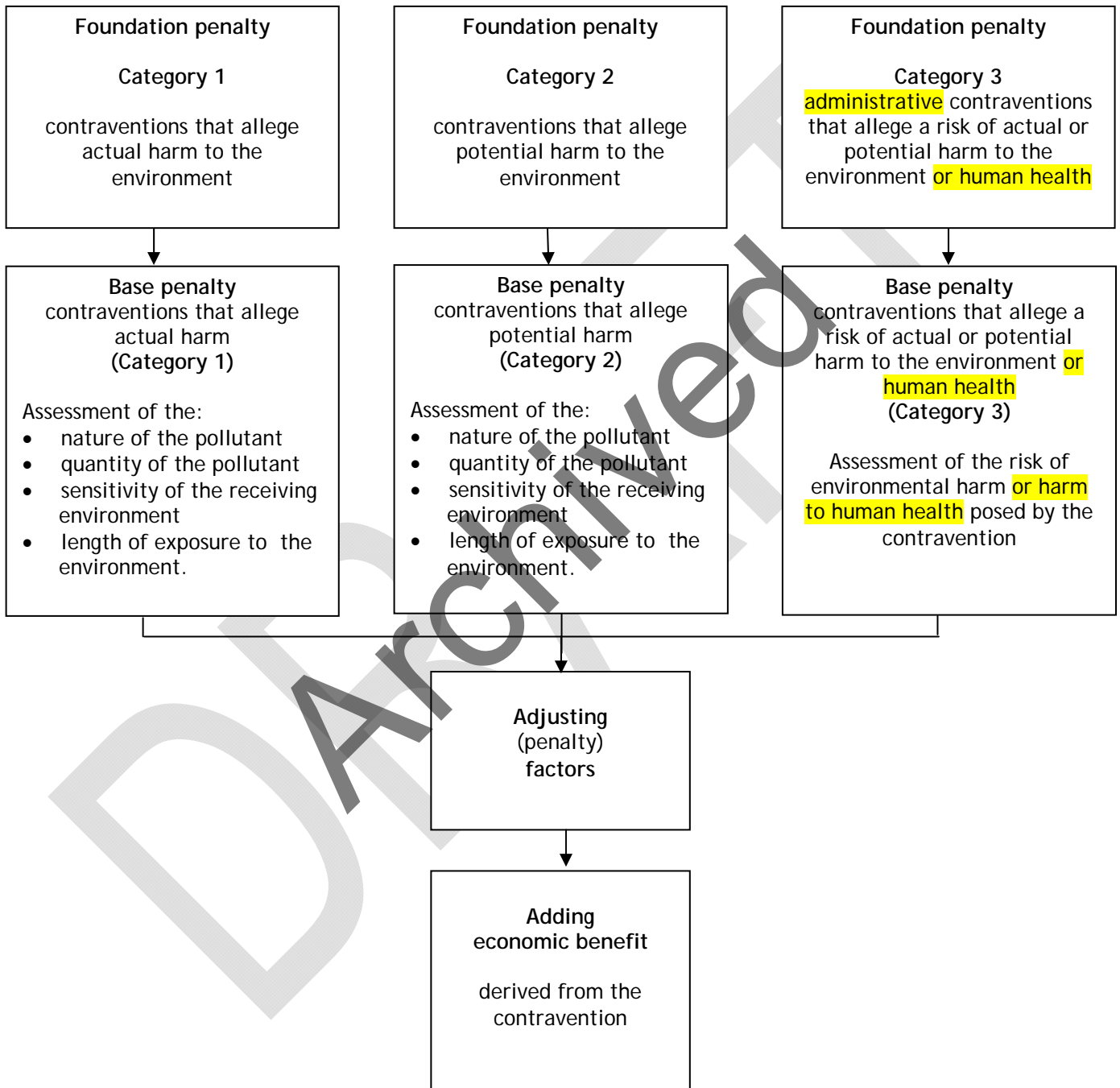
To maintain consistency with penalties imposed by sentencing courts for low level contraventions, the starting point (or foundation penalty) for calculating a civil penalty will be a percentage of the maximum penalty prescribed for the offence. The percentages are 70% of the maximum penalty for offences resulting in actual harm to the environment (Category 1) and 45% of the maximum for those offences resulting in potential harm (Category 2) or risk of harm to the environment (Category 3).

The civil penalty calculation equation consists of four key stages (Figure 2):

- 1 determination of a *foundation penalty*
- 2 determination of a *base penalty*
- 3 adjustment of the base penalty to account for mitigating factors
- 4 addition of any economic benefit derived from the contravention.

Following calculation of the base penalty, the EPA will issue a preliminary penalty assessment to the alleged offender together with an invitation to participate in negotiations. If the alleged offender elects to negotiate, they may make written submissions on matters to be taken into account when adjusting the penalty. Alternatively, the alleged offender may elect not to negotiate, at which point the EPA may seek to commence civil or criminal proceedings in the court.

In the event that the preliminary penalty assessment is greater than \$120,000, negotiation will not be an option and the EPA may seek to commence civil or criminal proceedings in the court.



**Figure 2 Overview of penalty calculation process**



### 3 The foundation penalty

Determining the foundation penalty is the first stage in calculating a negotiated civil penalty. The foundation penalty is a pre-determined percentage of the maximum penalty prescribed for the contravention in the Act and is determined by placing the contravention into one of three categories.

- 1 Category 1 offences are those that allege actual harm to the environment. In general terms these will be offences that involve a pollution release and some measurable impact on the environment<sup>1</sup>. They attract a foundation penalty of 70% of the maximum penalty prescribed in the Act for the offence.
- 2 Category 2 offences are those that allege potential harm to the environment (including a risk of harm and future harm) where actual harm has not occurred. In general terms these will often be offences involving the release of a pollutant where the resulting harm was mitigated or cannot be accurately measured, for example the discharge of large quantities of sulphur dioxide (SO<sub>2</sub>) to the atmosphere. These offences attract a foundation penalty of 45% of the maximum penalty prescribed in the Act for the offence.
- 3 Category 3 offences are those administrative offences that do not allege any actual or potential harm to the environment, but pose a heightened risk of such harm occurring. Most often these will be offences that do not involve a pollution release, and are administrative in nature, for example failing to comply with licence conditions requiring the submission of an environment improvement program (EIP). Other examples of offences of this type include failure to submit monitoring data, adequately train staff or lodge monthly weighbridge returns.

Category 3 offences include the special provisions and enforcement powers for site-contamination and includes offences contained in Part 10A of the Act that have the potential to increase the risk of harm to the environment and to human health caused by site contamination as defined in section 5B of the Act. These offences will attract a foundation penalty of 45% of the maximum penalty prescribed in the Act for the offence.

Distinction has been made between these three categories of offences to enable a penalty to be calculated that reflects the effect of the contravention on the environment. The penalty also recognises that, while an offence may not necessarily have any measurable impact on the environment, it may carry a potential or risk of resulting in harm.

The foundation penalty percentage places an initial ceiling on the penalty, but this is only the first stage in the calculations process. A number of adjustments may then be made to increase or decrease the penalty within the constraints of the Act.

In some circumstances the foundation penalty may be reduced to reflect mitigating factors advanced by the alleged offender. In other circumstances it may be increased to reflect an economic benefit derived by the alleged offender as a result of the contravention.

If a negotiated civil penalty exceeds the maximum prescribed for the offence or the \$120,000 limit prescribed in the Act, the EPA may elect to refer the matter to the court for determination.

Similarly, in circumstances where the EPA believes the foundation penalty does not provide an opportunity for an appropriate penalty to be negotiated (ie one that reflects the true gravity or circumstances of the contravention), the EPA may refuse to negotiate, and seek a penalty through civil or criminal court proceedings.

In circumstances where the EPA determines a penalty using the calculations formula that is less than the amount of \$1,000, then the negotiated penalty amount offered will be the minimum civil penalty amount of \$1,000. If the minimum civil penalty amount is issued the alleged offender will not have the opportunity to submit to the EPA adjusting criteria to request a penalty reduction as a reduction of the penalty to less than the floor penalty is not permitted.

<sup>1</sup> Including exceedance of specified criteria, for example the Water Quality Criteria, Schedule 2 of the *Environment Protection (Water Quality) Policy 2003*.

### 3.1 Calculating the foundation penalty

The foundation penalty is calculated as a proportion of the maximum penalty prescribed for the contravention. The maximum penalty is inserted into Table 1 at (A'), and multiplied by a percentage, namely 70% for contraventions involving actual harm to the environment or 45% for contraventions that allege 'potential' harm or risk of such harm. The resulting figure is the foundation penalty (B).

**Table 1** Calculating foundation penalties

Foundation penalty calculations	
<p><b>Insert the details of the provision contravened (below) and place the maximum penalty prescribed for that offence in the column (A)</b></p> <p>Section/provision contravened (including section, subsection or clause number):</p>	<p><b>\$ (A)</b></p> <p><b>(maximum penalty)</b></p>
<p><b>Category 1 offence</b> that alleges environmental harm where the harm has actually occurred: multiply the maximum penalty prescribed for the offence by 70%</p> <p>or</p> <p><b>Category 2 offence</b> that alleges environmental harm where actual harm has not occurred, but there is a potential for harm to the environment: multiply the maximum penalty prescribed for the offence by 45%</p> <p>or</p> <p><b>Category 3 offence, an administrative offence</b> that does not allege actual or potential harm, but poses a heightened risk of harm to the environment or human health: multiply the maximum penalty by 45%</p>	<p><b>multiply (A) by</b></p> <p><b>70%</b></p> <p><b>or</b></p> <p><b>45%</b></p> <p><b>or</b></p> <p><b>45%</b></p> <p><b>(delete as appropriate)</b></p>
<p><b>Foundation penalty</b></p>	<p><b>\$ (B)</b></p>

**Note:** Where more than one contravention is alleged and separate negotiated civil penalties are to be sought for each of them, additional sets of calculation tables will need to be completed.

## 4 Calculating the base penalty

Further adjustment to the foundation penalty (see section 3) may then be made by considering the nature of the pollutant released, its quantity, toxicity and length of exposure to the environment for Category 1 and 2 offences and risk of harm to the environment or human health for Category 3 offences. This will determine the base penalty (see Table 2).

When determining an appropriate base penalty, consideration will be given to various factors that depend on the nature of the contravention. For example, the factors taken into account for an administrative contravention will be different from those considered for a contravention involving an actual pollution release.

### 4.1 What is 'harm'?

The Act defines 'environmental harm' as including any harm or potential harm to the environment, of any degree or duration. It includes environmental nuisance and anything declared by regulation or environment protection policies to be environmental harm, including *potential* harm and *risk* of future harm. The Act also assesses harm that is caused directly or indirectly by a pollutant alone, or from its combined effects with other factors. For the purpose of calculating a penalty, a distinction is made between pollution offences resulting in actual harm and those resulting in potential harm.

In general terms, the Act categorises pollution events into various offences depending on the level of actual or potential harm caused. Contraventions range from simple breaches of limits imposed by various environment protection policies, to causing 'environmental nuisance', 'material environmental harm' or 'serious environmental harm'. The level of actual or potential harm caused by a pollution release will determine both what offence has been committed and the maximum penalty prescribed for that contravention.

It should be noted that it is not the purpose of this policy to determine what provision of the Act has been contravened. The recommended offence (or charge) will be specified in the brief of evidence, which will have been reviewed by the Crown Solicitor's Office before being forwarded for negotiation of a civil penalty. If the level of actual or potential harm is in dispute, the alleged offender may furnish additional evidence for consideration by the EPA. The Authority may then refer the allegation back to the Crown Solicitor's Office for further consideration of the evidence and appropriateness of the allegation. Alternatively, the EPA may apply to the court for determination of the disputed matter.

This policy is designed to calculate a penalty within the range prescribed by the Act or \$120,000, whichever is the lesser. For example, if a matter of environmental nuisance under section 82(2) of the Act is referred for negotiation, the negotiated penalty will be a proportion of the fine prescribed for that offence (\$15,000 for a body corporate and \$4,000 for a natural person). The policy is specifically designed to prevent penalties being calculated for allegations of a more serious nature.

When assessing the potential harm caused by a pollution release, in addition to considering the scientific evidence, the EPA may take into account the likely effect that the pollutant would have had if not for intervening factors. For example, if a harmful pollutant escapes into a watercourse and a third party intervenes to take corrective action to prevent or mitigate the harm caused, then the likely harm that would have resulted if not for the intervention may be considered potential harm for the purpose of this policy. Similarly, if there is a pollution release, but its effect is difficult to measure due to the circumstances or nature of the substance released, scientific evidence may be used to support an argument of the potential for harm that was likely to have arisen from the discharge.

Comparatively, for the purpose of this policy, an assessment of risk involves considering the probability of an event occurring and resulting in the release of a pollutant, together with the consequences of that release. When determining the level of risk resulting from a contravention, EPA protocols for evaluating risk will be applied.

## 5 Category 1 and 2 – contraventions that allege actual or potential harm to the environment

This section of the policy discusses how negotiated penalties will be determined for contraventions that have resulted in actual or potential harm to the environment.

### 5.1 Calculating the level of actual or potential environmental harm

As discussed, it is not the function of this policy to make a scientific assessment of the level of environmental harm caused by a pollution event. That information will be provided in the form of scientific reports and expert witness statements contained in the brief of evidence being considered.

Much of the work in assessing actual or potential harm will be reflected in the particular contravention alleged, which may range from a minor exceedance of emission limits specified in an authorisation, through to causing material environmental harm. The level of damage to the environment will usually be reflected in the offence alleged and penalties prescribed for it; that is, the greater the environmental impact, the greater the offence specified and the penalty prescribed.

While the Act provides an escalating approach to penalties relative to the level of environmental harm caused, there will often be differences in circumstances and damage caused that may fall within the scope of each of these offences (eg causing material environmental harm in contravention of section 80 of the Act).

To address the range of impacts that may fall within the scope of one offence and adjust the penalty accordingly, Table 2 provides additional criteria for assessing the level of actual or potential environmental harm that a contravention has caused, or is likely to cause.

When determining an appropriate base penalty for contraventions alleging actual or potential harm, consideration will be given to the following factors:

- the nature and toxicity of the pollutant
- the quantity or level of the pollutant
- the nature and sensitivity of the receiving environment
- the duration of exposure of the pollutant in the environment.

These factors feature in Table 2, where a numerical rating is applied under three headings: minor, moderate and major. They should not be assessed in isolation—there will often be a need to consider all factors with regard to one another. For example, the nature of the pollutant may be assessed differently depending upon the nature and sensitivity of the receiving environment. In this situation the release of a large quantity of sulfate into a freshwater stream used for domestic purposes would be assessed differently from the release of the same quantity of sulfate into a saline marine environment.

#### 5.1.1 Nature and toxicity of the pollutant

Principally, when assessing the nature and toxicity of a pollutant, consideration will be given to the scientific reports and expert witness statements contained in the brief of evidence.

Additionally, the EPA may refer to recognised national and international standards and guidelines, including but not limited to: the Environment Protection and Heritage Council's (NPHC) *National Chemical Reference Guide—Standards in the Australian Environment*<sup>2</sup>, the Australian and New Zealand Environment and Conservation Council's (ANZECC) *Guidelines for Fresh and Marine Water Quality* (ANZECC guidelines), National Pollution Inventory (NPI) information,

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<sup>2</sup> Available online at [http://apps5a.ris.environment.gov.au/pubgate/crg\\_public/!CRGPPUBLIC.pStart](http://apps5a.ris.environment.gov.au/pubgate/crg_public/!CRGPPUBLIC.pStart).

environment protection policies, National Environment Protection Measures (NEPMs) and other recognised standards; and listed wastes detailed in Schedule 1 Part B of the Act. A list of guidelines, standards and reference materials may be found in [Attachment B](#).

The EPA may also take into account any submissions made by the alleged offender in relation to the nature of the pollutant.

For discussion purposes, descriptions of the following fictitious chemical substances 'A', 'B' and 'C' illustrate how assessments will be conducted under the Calculations Policy.

**Minor:** Chemical A

Has a broad range of commercial, domestic and agricultural uses including preserving hides, tanning leather, manufacturing chemical A salts, preserving pulp wood and controlling algal growth. It is also used as an insecticide, herbicide and fungicide, and to control downy mildew, apple scab and peach leaf curl.

The NPI states: 'chemical A is a common element, naturally occurring in rocks, soil, waters, plants, animals and humans ... it occurs naturally in the environment and humans can be exposed to natural levels of chemical A by breathing air, drinking water and eating food, and by skin contact with jewellery containing the element.... In small but critical concentrations chemical A is an essential element for humans. To stay healthy, a daily dietary intake of about 1–2 mg is required; however, very large single or daily intakes can harm your health ... it is essential to animals and plants [but] is toxic to many bacteria and viruses ... chemical A is commonly found in natural waters and its free ion is potentially very toxic to aquatic life.... There is no data available on the short-term and long-term effects of chemical A on plants, birds or land animals'.

**Moderate:** Chemical B

It is used as a solvent for surface coatings such as paints, coatings, varnishes, lacquers for paper and leather, and acetate adhesives.... On a health hazard spectrum of 0–3, where a score of 3 represents a very high hazard to health, 2 represents a medium hazard and 1 is harmful to health, chemical B registers 1.2.... Exposure to the vapour can cause irritation to the eyes, nose, mouth, throat and lungs. Prolonged exposure to concentrated vapour can result in dizziness, headache, nausea and unconsciousness ... it can have an acute toxic effect on aquatic life and is rapidly absorbed, inhaled or ingested by humans by direct contact with skin, swallowing or breathing in the vapour.

**Major:** Chemical C

On a health spectrum of 0–3, where a score of 3 represents a very high hazard to health, 2 represents a medium hazard and 1 is harmful to health, chemical C registers a 2.5. On an environmental spectrum of 0–3, chemical C compounds register 3.... Chemical C can have a high to moderately acute toxic effect on plants, birds and land animals, which can mean the death of animals, birds or fish and the death or low growth rate of plants. Chemical C does not break down or degrade easily and there is a high potential for its accumulation in fish life.

It can be seen from the examples above that the toxicity of a pollutant should not be assessed without regard to other factors, for example the quantity or the geographical setting in which it is released. For example, chemical A in the right doses is essential for human health, but in the wrong doses is dangerous to both human and aquatic life.

### 5.1.2 Quantity or level of the pollutant

This factor relates to the size or order of magnitude of a pollution release. In some circumstances the quantity or level of pollution released can be measured against clearly defined limits specified in the Act, environment protection policies and other instruments including EPA licence conditions.

This policy does not seek to specify figures for each and every substance that may be involved in a pollution event. Again, the key source for determining the seriousness of the quantity or level of pollutant released will be the scientific, expert and other factual evidence contained in the brief of evidence. Additionally, the EPA may consider any other recognised scientific standards or guidelines when making such an assessment, for example the levels specified in NPI data for emissions to the atmosphere.

As discussed above, the quantity or level of a pollution release will often need to be assessed with regard to other factors, including the nature and toxicity of the pollutant, the sensitivity of the receiving environment to the pollutant and the length of exposure.

To aid in adjustment of the base penalty, the quantity or level of pollutant released will be placed into a minor, moderate or major category and assigned a numerical rating accordingly. For demonstration purposes, examples using different quantities of the previously discussed chemical B are given for each of the three categories.

### **Minor**

Exposure to small quantities of chemical B for short periods of time in well-ventilated conditions poses very little risk of harm to human health or the environment, although in the wrong conditions exposure to the vapour can cause irritation to the eyes, nose, mouth, throat and lungs.

An example of a minor pollution event would be spillage of a 20-litre drum of chemical B onto a public roadway and then into a stormwater system. In that quantity, containment of the spill in the stormwater system can be achieved with appropriate action with very little risk of potential harm to human health or the environment.

### **Moderate**

If 200 litres of chemical B was to be spilled onto a roadway and then flows into the stormwater system and in turn, into a nearby watercourse, the spill, simply by virtue of its quantity, poses a greater threat to humans and aquatic wildlife in the watercourse coming into contact with the substance.

### **Major**

A more substantial spill of chemical B, for example 1,000 litres, onto a roadway and then into a watercourse via a stormwater system, is a significantly greater threat to the environment. The larger quantities of the substance in the watercourse will have a significantly higher actual or potentially toxic effect on aquatic life and may pose a threat to humans who come into primary contact with the substance.

An assessment of the level or quantity of pollutant released will always be based on the scientific evidence provided in the brief. The quantity of the pollutant should not be assessed in isolation, and other contextual factors will need to be considered, including the nature and sensitivity of the receiving environment.

#### **5.1.3 Nature and sensitivity of the receiving environment**

Different environments will respond differently to pollutants. As with the factors discussed above, the sensitivity of a receiving environment will often need to be assessed with regard to the nature, toxicity, quantity and length of exposure to the pollutant released.

For the purposes of this policy, the physical nature of the receiving environment is important, for example, was the pollutant released into a small freshwater stream or an ocean, in a densely populated region or a remote area?

In the first instance, an assessment of the sensitivity of the receiving environment will be made on the scientific evidence in the brief of evidence. In addition, the EPA may consider information furnished by the alleged offender, or may consult

other scientific publications, for example the ANZECC water quality guidelines for the protection of cultured fish, molluscs and crustaceans<sup>3</sup>.

Using the example of chemical B, it can be seen how the release of the same quantity of pollutant may have differing effects, depending on the nature and sensitivity of the receiving environment.

#### **Minor**

A total of 200 litres of chemical B is spilled onto a concrete heavy vehicle-loading area situated outdoors, with little or no potential for escape into surface, storm or groundwater. With effective fire protection and traffic control, this would create a minimal risk of potential environmental harm.

#### **Moderate**

A total of 200 litres of chemical B is spilled onto a concrete heavy-vehicle loading area, and flows into a nearby stream which carries moderate freshwater flows. These natural flows would dilute the pollutant to the point that there would be little evidence of impact caused to bird, fish or other aquatic life.

#### **Major**

A total of 200 litres of chemical B is spilled and fumes escape through a ventilation system and lead to the evacuation of people who experience headaches, vomiting, and throat and nose irritation. This would constitute significantly greater actual or potential harm.

The sensitivity of the receiving environment stated for offences that allege potential environmental harm is assessed as the environment that was potentially impacted.

#### **5.1.4 Duration of exposure of the pollutant in the environment**

The length of exposure of the environment to the pollutant will often influence the extent of damage. Again, this factor will be substantially determined by considering the scientific and technical evidence contained in the brief, together with other established scientific research and guidelines.

Again, this factor should not be assessed in isolation from the other factors, for example the nature and sensitivity of the receiving environment and the quantity of pollutant released. Using the example of chemical B, the following examples of minor, moderate and major exposures are provided.

#### **Minor**

A quantity of chemical B is spilled in a premises. It is cleaned up within 10 minutes, resulting in some discomfort to the throat and eyes, and minor dizziness, to those in the vicinity.

#### **Moderate**

The same quantity of chemical B is spilled in the premises and remains unattended for two hours, resulting in people experiencing dizziness and significant eye and throat irritation, and requiring evacuation of an adjoining public premises.

<sup>3</sup> *National Water Quality Management Strategy*, Ch. 4.4 Aquaculture for human consumption of aquatic foods, Australian and New Zealand Environment and Conservation Council, October 2000.

**Major**

The same quantity of chemical B is spilled in the same premises and remains unattended for six hours, resulting in initial dizziness, irritation of the throat and nose, eventual lung irritation and loss of consciousness of occupants of the building.

Similar examples may be provided for other pollutants, where varying levels of exposure to the natural environment will have different effects, for example the ongoing impacts of noise, discharge of a pollutant to a watercourse, or seepage of contaminants into the soil.

**Table 2 Assessment of factors where the offence alleges actual or potential environmental harm**

<b>Degree of actual or potential harm to the environment (including people)</b> (If no actual or potential environmental harm was caused, proceed to Table 3)				
Circle one number in each line	<b>Minor</b>	<b>Moderate</b>	<b>Major</b>	<b>Factor subtotal</b>
<b>Nature of the pollutant*</b>	1	2	3	
<b>Quantity/level of pollutant released*</b>	1	2	3	
<b>Sensitivity of the receiving environment*</b> (including human population and broader environment)	1	2	3	
<b>Duration of exposure to the environment*</b>	1	2	3	
Points total				(max 12 points)
<b>points conversion to a percentage</b> multiply points total by 100  divide by the maximum points possible (12)				$= \frac{\text{ } \times 100}{\div 12}$
<b>= percentage total (C)</b> (rounded down to nearest whole number)				<b>= % (C)</b>
<b>insert the foundation penalty (B) from Table 1</b>				<b>X</b> <b>\$ (B)</b>
to determine the base penalty multiply (B) by (C)				<b>=</b> <b>\$ (D)</b>
<b>Proceed to Table 4 and copy the base penalty (D) to the space provided</b>				

\* Some factors may need to be assessed with regard to other factors contained in the Table (see section 5.1).



## 6 Category 3 offences – administrative offences that do not allege actual or potential harm however pose a heightened risk of harm

Not all offences under the Act involve the release of pollution into the environment. The Act and licences issued in accordance with it, often impose a number of requirements on individuals conducting activities that have the potential to harm the environment. These requirements are intended to reduce the risk of a pollution event occurring. For example, a licence may require the licensee to adequately train staff in matters of environmental protection, prepare emergency contingency plans, or collect monitoring data of their operations. While a failure to comply with these obligations may not necessarily result in a pollution release, it may significantly increase the risk of such an occurrence.

Part 10A of the Act contains special provisions and enforcement powers for site contamination and includes offences that have the potential to increase the risk of harm to the environment and human health caused by site contamination as defined in section 5B of the Act.

For the purpose of calculating a penalty under this policy, an assessment of risk involves determining the probability that an event will result in the release of pollution to the environment, together with a measurement of the consequences of such a release.

During the course of the negotiations the alleged offender may furnish additional information, or reports from suitably qualified experts, on the level of risk associated with an offence. These will be considered when making adjustments to the proposed penalty (Table 3).

**Table 3 Assessment of risk associated with administrative offences that do not allege actual or potential harm, but pose an increased risk of harm (Category 3)**

Offences that do not contain elements of environmental harm (If Table 2 has been completed, do not complete this table and proceed to Table 4)				
Circle one number in each line	Minor	Moderate	Major	Points total
<b>Level of risk of environmental harm or harm to human health arising from the contravention</b>	1	2	3	
<b>conversion of points total to a percentage</b> multiply the points total by 100 divide by the maximum points possible (3)				<b>x 100</b> = _____ ÷ 3
<b>total (C)</b> (rounded down to nearest whole number)				= <b>%(C)</b>
<b>insert the foundation penalty (B) from Table 1</b>				<b>x</b> <b>\$ (B)</b>
to determine the base penalty multiply (B) by (C)				=
<b>base penalty (D)</b>				<b>\$ (D)</b>
<b>Proceed to table 4 and copy the base penalty (D) to the space provided</b>				

## 7 Adjusting factors

To assist the EPA and the alleged offender to negotiate an appropriate civil penalty, the alleged offender will be entitled to make submissions on a number of factors that can be used to adjust the penalty. The EPA may consider these submissions and reduce the penalty accordingly. A maximum reduction of up to 60% of the base penalty can be made with regard to the following factors (Table 4):

- 1 the alleged offender's previous good compliance record
- 2 the practical measures taken by the alleged offender to prevent the contravention
- 3 the appropriateness and speed of corrective action taken by the alleged offender after the contravention
- 4 the timeliness of notification of an incident
- 5 the degree of cooperation demonstrated by the alleged offender
- 6 the degree of public contrition demonstrated by the alleged offender
- 7 any other relevant factor.

If the minimum civil penalty amount of \$1,000 is issued the alleged offender will not have the opportunity to submit to the EPA adjusting criteria to request a penalty reduction as a reduction of the penalty to less than the floor penalty is not be permitted.

### 7.1 The alleged offender's good compliance record

This factor may reduce the base penalty by up to 10%.

Section 104A(6) of the Act states that the court, when determining a penalty, shall have regard to, among other things, 'whether the alleged offender has previously been found, in proceedings under this Act, to have engaged in any similar conduct.'

Similarly, when determining adjustments to the base penalty, the EPA may consider the good compliance record of the alleged offender. If the alleged offender has had no previous enforcement action taken against them, has not received a civil penalty under the Act, or has had no conviction imposed for a contravention of a same or similar nature in an Australian jurisdiction, they may benefit from a discount of the base penalty.

If the alleged offender has had prior enforcement action taken against them under the Act, including official warning letters, expiation notices, environment protection orders, and negotiated or court imposed civil penalties, the EPA may oppose a reduction to the penalty on that basis.

If the alleged offender has a long history of non-compliance or a past conviction for a similar offence, it is likely that the EPA will refer the matter to the court rather than initiate civil penalty negotiations.

### 7.2 Practical measures taken by the alleged offender to prevent the contravention

This factor may reduce the base penalty by up to 10%.

When considering an appropriate adjustment to the base penalty, the EPA may take into account the level of diligence demonstrated and the positive measures taken by the alleged offender to prevent a contravention from occurring.

Indeed, in some circumstances where the alleged offender has exercised all reasonable and practicable measures to prevent a contravention from occurring, they may be entitled to rely on the general defence provided in section 124 of the Act. In other circumstances where this defence is not available, the EPA may still have regard to any positive steps taken by the alleged offender prior to the incident, which were intended to prevent a contravention from occurring, and adjust the penalty accordingly.

Examples of measures taken to prevent a contravention include the training of staff, the existence of operating procedures, and physical measures such as the installation of alarm and monitoring systems, bunding, back-up generators or secondary pumps.

### **7.3 The appropriateness and speed of corrective action taken by the alleged offender after the contravention**

This factor may reduce the base penalty by up to 10%.

In circumstances where the alleged offender has taken positive steps to rectify the breach *after* a contravention has occurred, and has put in place measures to ensure that such a contravention is unlikely to occur again, the EPA may reduce the base penalty.

On the other hand, in circumstances where there have been undue delays in rectifying or preventing the release of pollutant, no reduction will be made. In cases where preliminary investigations were required to establish the origin or cause of any pollution, an assessment of the reasonableness of such delays will be made before any reduction is considered.

Similarly, if delays occur in rectifying or mitigating a pollution event due to resource restrictions, consideration will be given to:

- the adequacy of resources provided by the alleged offender in advance of the event
- the likelihood of such an event occurring
- the foreseeable impact of such an event
- the cost of resources required to prevent the incident
- obligations under any statute, licence, code of practice or other requirements pertaining to the provision of emergency and safety equipment
- any other relevant factor.

### **7.4 The timeliness of notification of an incident**

This factor may reduce the base penalty by up to 10%.

An alleged offender may negotiate a reduction of penalty in circumstances where they can show that they notified the EPA of a pollution incident in a timely and appropriate manner and then assisted the EPA with their enquiries into the matter.

When considering an appropriate reduction, the EPA will not only consider the timeliness of the notification, but the accuracy and quality of the information provided by the alleged offender. No reduction will be made where the information provided by the alleged offender is incorrect or misleading. **No reduction will be made if notification of an incident is a condition of an environmental authorisation.**

While it is recognised that an alleged offender may need time to make a preliminary investigation into the cause of a pollution event, where such delays result in further actual or potential harm to the environment, the EPA will oppose a reduction. In circumstances where the alleged offender, by failing to promptly report an incident, breaches their EPA licence conditions or section 83 of the Act, the alleged offender may face a separate prosecution for this failure.

### **7.5 The degree of cooperation demonstrated by the alleged offender**

**This factor may decrease the base penalty by up to 10%.**

Consideration will be given to the level of cooperation shown by the alleged offender to the EPA during the course of clean-up operations and investigations into the incident.

While this factor does not seek to penalise an alleged offender for exercising their rights at law, for example refusing to answer questions in accordance with their right to silence, no reduction will be made where investigations have been impeded by uncooperative or deceptive responses by the alleged offender or their representative(s). In serious circumstances of deception, the EPA may elect to launch a criminal prosecution against an alleged offender found providing false or misleading information or hindering EPA officers or agents in their attempts to administer the Act.

## **7.6 The degree of public contrition demonstrated by the alleged offender**

This factor may decrease the base penalty by up to 10%.

The EPA may consider the level of public contrition demonstrated by the alleged offender following an incident, including public apologies or other measures taken by the alleged offender to reduce the impact of a contravention on the community. For example, a reduction may be made where an alleged offender promptly apologises to neighbours, and provides remediation or compensation for damage to their properties as a result of a pollution release.

## **7.7 Other relevant factors**

Other relevant factors may decrease the base penalty by up to 10%.

**Table 4**      **Adjusting factors**

<b>Adjusting factor</b> (Insert a reduction of 0–10 percentage points for each of the following)	<b>% decrease</b>
The alleged offender's good compliance record <i>(max of 10% points reduction)</i>	
The preventative measures by the alleged offender prior to the incident <i>(max of 10% points reduction)</i>	
The extent, speed and appropriateness of corrective action <i>(max of 10% points reduction)</i>	
The timeliness of notification and <i>(max of 10% points reduction)</i>	
The degree of cooperation demonstrated by the alleged offender <i>(max of 10% points reduction)</i>	
The degree of public contrition demonstrated by the alleged offender <i>(max of 10% points reduction)</i>	
Other relevant factors <i>(max of 10% points reduction)</i>	
<b>total percentage points reduction (E)</b>	<b>% (E)</b>
insert base penalty (D) from Tables 2 or 3	<b>x</b>
	<b>\$ (D)</b>
reduction expressed in \$ (F)	<b>\$ (F)</b>
multiply the base penalty (D) by the total % reduction (E)	
<b>adjusted base penalty (G)</b>	<b>\$ (G)</b>
subtract the reduction (F) from the base penalty (D)	
<b>Copy the adjusted base penalty (G) to economic benefit (Table 5)</b>	

## 8 Economic benefit

Section 104A(6)(c) of the Act requires the court to have regard to, among other things, 'any financial saving or other benefit that the person stood to gain by committing the contravention'. Similarly, when determining a civil penalty, the EPA will consider the economic benefit that the alleged offender derived from the contravention, if any. Economic benefits can either be passive or active.

Passive economic benefit is usually profits that were made, or could have been made, by alternative usage of funds that should have been spent to achieve compliance, for example interest earned on money that should have been spent on pollution control equipment. If, on enforcement, the alleged offender devotes funds to achieve compliance, the economic benefit associated with avoiding or delaying the requirement may be determined by calculating the amount of interest that was, or could have been, earned on that money. This form of economic benefit depends on the amount of money that should have been spent, the period of time during which the costs were avoided or delayed, and the prevailing market interest rate.

Active economic benefits are usually an increase in profit, or a reduction in cost, directly attributable to the activity conducted in contravention of the Act. An example would be the profits derived from operating a landfill without requisite authorisations and in the absence of necessary environmental safeguards.

The level of economic benefit derived from the contravention will only ever be added to the base penalty. While there may be circumstances where the contravention has attributed to financial losses for the alleged offender, for example a failure to operate equipment in accordance with EPA requirements resulting in greater waste generation, this will not be factored in to benefit the alleged offender.

**Table 5 Economic benefit**

<b>Adding economic benefit</b>	
insert <b>adjusted base penalty (G)</b> from Table 4	<b>\$ (G)</b>
add <b>economic benefit (H)</b> derived from contravention	<b>+ \$ (H)</b>
<b>final negotiated civil penalty</b>	<b>\$</b>

## 9 Cost recovery

The cost of cleaning up or rectifying the damage caused by pollution, investigating such events or otherwise administering the Act will not form part of the negotiated civil penalty.

The Act provides a number of avenues for the EPA, administering agencies and others to recover such costs. These include the civil remedies available under section 104(1), cost recovery provisions contained in section 135, and cost recovery provisions related specifically to clean up and environment protection orders contained in sections 103 and 95.

However, as the negotiated civil penalties system is intended to provide an alternative avenue for resolving matters without resorting to the court, there may be an opportunity during negotiation to come to an agreement on the reimbursement of costs. Any such agreement will feature as an additional term of the agreement, and not part of the negotiated civil penalty itself.

Disagreement over the amount to be reimbursed will not necessarily prevent the resolution of matters by way of negotiated civil penalty. However, in circumstances where it is likely that court proceedings will need to be undertaken to recover costs, the EPA may elect not to negotiate a civil penalty for a contravention.

In circumstances where a negotiated civil penalty is agreed without reference to costs, the EPA may still seek recovery of those costs through the other avenues provided in the Act. For this reason, unless specifically stated in the terms of the negotiated agreement, civil penalties negotiations will not prevent the EPA, or an administering agency, from making a further claim for cost recovery in accordance with its statutory or common law rights.

It should also be noted that nothing in the terms of a negotiated agreement shall limit or deny any other party from making a claim against the alleged offender for the recovery of costs, damages or other compensation available at law.

## 10 Multiple offences

Section 104A(8) of the Act enables the EPA to recover from a person a civil penalty in respect of multiple offences, provided they are not the result of the same conduct by the alleged offender. It states:

If conduct of a person constitutes a contravention of two or more provisions of this Act, an amount may be recovered from the person under this section in relation to the contravention of any one or more of those provisions (provided that the person is not liable to pay more than one amount as a civil penalty in respect of the same conduct).

Based on this, the EPA may negotiate a civil penalty for both a primary pollution offence (eg overflow of wastewater into a watercourse) and a second distinct offence (eg breach of licence condition), as these two contraventions arise from different conduct by the alleged offender.

The EPA cannot recover more than one amount as a civil penalty for the same alleged offence. However, if more than one contravention arises from the one set of circumstances (ie a breach of licence condition and causing an environmental nuisance) the EPA may elect to calculate the penalty for either the most significant offence alone, or individually for each contravention.

If a penalty is to be sought for more than one contravention, not arising from the same conduct by the alleged offender, the EPA may elect to calculate the penalty either for the most substantive offence only, or individually for each contravention.

If one or more of the contraventions are disputed, or the alleged offender agrees to negotiate some allegations but not others, the EPA shall elect to withdraw from all negotiations and put the matter before the courts for determination.

The negotiation of a penalty for an offence will not prohibit the EPA from launching civil or criminal action for a distinct contravention arising from different conduct by the alleged offender.



## 11 Multiple alleged offenders

Section 137A of the Act states:

Where an amount is recoverable by the Authority or another administering agency from two or more persons under a provision of this Act, the provision is to be construed as if those persons were jointly and severally liable to pay the amount to the Authority or other administering agency (as the case may be).

In negotiations for a civil penalty against one or several alleged offenders, the EPA is entitled to seek a penalty from each, rather than a proportion of the penalty according to the number of defendants found liable.

### 11.1 Liability of company directors to a civil penalty

In accordance with section 129 of the Act, officers of body corporates may also be liable to pay a civil penalty for contraventions of the Act.

As of 1 July 2006, section 127 of the Act covering the *Imputation of conduct or state of mind of officer, employee, etc.*, was amended to make reference to civil penalty proceedings.

## 12 Admissibility of evidence and confidentiality

Matters discussed during civil penalty negotiations will be treated in confidence according to statutory and other legal requirements governing the release of information and privacy, and established rules of discovery, disclosure and privilege will apply. In other words, as section 104A of the Act does not require the alleged offender to disclose information about the alleged contravention during the course of negotiations, production of that material will be largely at the discretion of the alleged offender. Similarly, information will be provided by the EPA in accordance with statutory and common-law requirements governing the disclosure of such information.

However, it is recognised that an alleged offender should be provided with the opportunity to properly consider the allegations directed towards them. For this reason an overview of the allegations will accompany the invitation sent to the alleged offender to participate in negotiations (see [Form 1](#)).

The EPA may also make available to the alleged offender any additional information to enable them to consider the allegations and make submissions on them. The factual basis of an allegation for which the alleged offender agrees to pay a penalty shall be reduced to writing during the course of the negotiations and may be published in the final penalty agreement or on the EPA's public register.

If the alleged offender refuses to negotiate, proceedings for the imposition of a civil penalty or criminal prosecution may be commenced, where established rules of discovery and disclosure will operate.

A copy of the intended terms of the negotiation, incorporating information about matters of disclosure and confidentiality, will accompany the written invitation to participate in negotiations sent to the alleged offender (Form 1).

Included in this notice will be advice to the alleged offender that the fact of production of information in the course of civil penalty negotiations is inadmissible in any subsequent criminal proceedings, in accordance with section 104A(11) of the Act, which states:

Evidence of information given or evidence of the production of documents by a person is not admissible in criminal proceedings against the person if—

- (a) the person gave the evidence or produced the documents in the course of negotiations or proceedings under this section for the recovery of an amount as a civil penalty in relation to a contravention of this Act; and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was alleged to constitute the contravention.

Parties entering into negotiations should be aware that this limitation applies only to criminal proceedings related to the matter being negotiated. If, during the course of negotiations, other unrelated offences are disclosed, the EPA may act on those contraventions and the alleged offender may not be entitled to benefit from the confidentiality afforded by this provision. While section 104A(11) governs the subsequent use of information in criminal proceedings, it does not seek to prevent the use or disclosure of that information in any subsequent civil proceedings brought by the EPA or another party.

The alleged offender should be aware that the EPA may also be required to disclose information or documents furnished during the course of negotiations, in accordance with other statutory or common law requirements, for example under the *Freedom of Information Act 1991* or court ordered discovery.

Additionally, this provision does not seek to limit the admissibility of evidence or information disclosed during the course of an investigation prior to negotiations commencing. Such evidence will be admissible in any subsequent criminal proceedings in accordance with prevailing legislative and common law rules of evidence.

To enable proper consideration of an alleged contravention, negotiations will not commence until the EPA is satisfied that a thorough investigation has been carried out and the Crown Solicitor's Office has been provided with an opportunity to assess the evidence.

To eliminate any confusion over when negotiations commence, the EPA will advise the alleged offender of its intention to resolve a matter by way of civil penalty negotiation by service of [Form 1](#) on the alleged offender. Negotiations will not commence until the EPA has received a written response, in [Form 2](#) from the alleged offender indicating their willingness to negotiate. Preventing premature negotiation protects both parties from entering into negotiation without full knowledge of the facts of the allegation.

If negotiation ceases at the request of the alleged offender, any further information disclosed from that point on may be deemed admissible in any subsequent court proceedings in accordance with statutory and common law rules of admissibility.

In accordance with section 109(3)(a) of the Act, details of negotiated civil penalty agreements will be made available to the public via the EPA's public register once the negotiation has been finalised. It requires:

...the following details of the recovery by the Authority, by negotiation, of an amount as a civil penalty in respect of an alleged contravention of this Act:

- i the name of the person from whom the amount was recovered;
- ii particulars of the alleged contravention;
- iii the amount recovered.

## 13 Sign-off

Once agreement is reached between the EPA and the alleged offender on the monetary penalty and associated terms, a binding agreement will be reduced to writing for signing by both parties.

In the case of incorporated bodies, the EPA may seek confirmation from the governing body as to a representative's authority to enter into the binding agreement and, if necessary, seek other financial assurances.

The proposed agreement will be executed by a delegate of the EPA. Details of the agreement will be published on the EPA's public register in accordance with the requirements of section 109 of the Act.

If no agreement can be reached on the penalty or associated terms in the requisite time, or if the alleged offender elects to withdraw from negotiations, the EPA may pursue a court imposed civil penalty or commence criminal proceedings.

Before the EPA applies to the court for a civil penalty it must serve a notice on the alleged offender advising them that they may elect to be prosecuted for the contravention rather than be party to a civil penalty proceeding in the court. If the alleged offender does not elect to be prosecuted the EPA may make an application to the court for a civil penalty.

## 14 Timeframes for negotiations

On being served a notice of intention to negotiate a civil penalty (Form 1), an alleged offender has 28 days to respond to the notice on the prescribed form (Form 2). If the alleged offender does not respond in that time, the EPA may take steps to initiate proceedings in the court for the imposition of a civil penalty, or launch a criminal prosecution.

If the alleged offender agrees to negotiate, they have 28 days from receipt of the Form 1 to make written submission to the EPA on matters that they wish to be taken into account when determining a civil penalty. Further discussions may then occur between the alleged offender and the EPA on matters submitted by the alleged offender, and the EPA may allow further time for the alleged offender to furnish evidence in support of those submissions.

Negotiations for a civil penalty shall conclude within three months from the date of service of the notice of intention ([Form 1](#)) on the alleged offender. The EPA may allow additional time in excess of three months in exceptional circumstances.

## 15 Payment terms

Full payment of the agreed civil penalty shall be made to the EPA within 28 days of the agreement unless alternative arrangements have been made. The alleged offender may negotiate with the EPA to receive suitable payment terms that will be formalised by way of a binding agreement, and where necessary, supported by personal guarantees or security, subject to further proceedings in the event of default.

## 16 Review of policy

A review of the policy will be commenced within five years from the date of commencement of this version of the policy.

## Attachment A      Section 104A of the Environment Protection Act 1993

### 104A—Authority may recover civil penalty in respect of contravention

- 1 Subject to this section, if the Authority is satisfied that a person has committed an offence by contravening a provision of this Act, the Authority may, as an alternative to criminal proceedings, recover, by negotiation or by application to the Environment, Resources and Development Court, an amount as a civil penalty in respect of the contravention.
- 2 The Authority may not recover an amount under this section in respect of a contravention if the relevant offence requires proof of intention or some other state of mind, and must, in respect of any other contravention, determine whether to initiate proceedings for an offence or take action under this section, having regard to the seriousness of the contravention, the previous record of the offender and any other relevant factors.
- 3 The Authority may not make an application to the Court under this section to recover an amount from a person as a civil penalty in respect of a contravention—
  - a unless the Authority has served on the person a notice in the prescribed form advising the person that the person may, by written notice to the Authority, elect to be prosecuted for the contravention and the person has been allowed not less than 21 days after service of the Authority's notice to make such an election; or
  - b if the person serves written notice on the Authority, before the making of such an application, that the person elects to be prosecuted for the contravention.
- 4 The maximum amount that the Authority may recover by negotiation as a civil penalty in respect of a contravention is—
  - a the amount specified by this Act as the criminal penalty in relation to that contravention; or
  - b \$120,000,whichever is the lesser.
- 5 If, on an application by the Authority, the Environment, Resources and Development Court is satisfied on the balance of probabilities that a person has contravened a provision of this Act, the Court may order the person to pay to the Authority an amount as a civil penalty (but not exceeding the amount specified by this Act as the criminal penalty in relation to that contravention).
- 6 In determining the amount to be paid by a person as a civil penalty, the Court must have regard to—
  - a the nature and extent of the contravention; and
  - b any environmental harm or detriment to the public interest resulting from the contravention; and
  - c any financial saving or other benefit that the person stood to gain by committing the contravention; and
  - d whether the person has previously been found, in proceedings under this Act, to have engaged in any similar conduct; and
  - e any other matter it considers relevant.
- 7 The jurisdiction conferred by this section is to be part of the civil jurisdiction of the Court.
- 8 If conduct of a person constitutes a contravention of two or more provisions of this Act, an amount may be recovered from the person under this section in relation to the contravention of any one or more of those provisions (provided that the person is not liable to pay more than one amount as a civil penalty in respect of the same conduct).
- 9 Proceedings for an order under this section that a person pay an amount as a civil penalty in relation to a contravention of this Act, or for enforcement of such an order, are stayed if criminal proceedings are started or have already been started against the person for an offence constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.

- 10 Proceedings referred to in subsection (9) may only be resumed if the criminal proceedings do not result in a formal finding of guilt being made against the person.
- 11 Evidence of information given or evidence of the production of documents by a person is not admissible in criminal proceedings against the person if—
  - a the person gave the evidence or produced the documents in the course of negotiations or proceedings under this section for the recovery of an amount as a civil penalty in relation to a contravention of this Act; and
  - b the conduct alleged to constitute the offence is substantially the same as the conduct that was alleged to constitute the contravention.
- 12 However, subsection 11 does not apply to criminal proceedings in respect of the making of a false or misleading statement.
- 13 Proceedings for an order under this section may be commenced at any time within three years after the date of the alleged contravention or, with the authorisation of the Attorney-General, at any later time within 10 years after the date of the alleged contravention.
- 14 An apparently genuine document purporting to be under the hand of the Attorney-General and to authorise the commencement of proceedings for an order under this section will be accepted in any legal proceedings, in the absence of proof to the contrary, as proof of the authorisation.
- 15 The Court may, in any proceedings under this section, make such orders in relation to the costs of the proceedings as it thinks just and reasonable.

## **Attachment B      National and international guidelines and standards**

In determining the above factors the EPA may refer to national and international guidelines and standards including:

- The Australian and New Zealand Guidelines for Fresh and Marine Water Quality (2000)
- The Environment Protection Authority of South Australia, Environment Protection (Water Quality) Policy 2003
- Ambient Air Quality National Environment Protection Measure
- Environment Protection and Heritage Council (EPHC)/National Environment Protection Council (NEPC) Assessment of Site Contamination National Environment Protection Measure 1999
- South Australian EPA guideline for safe handling, reuse and disposal of bio-solids
- World Health Organization guidelines
- Australian New Zealand Food Standards Code (ANZFSC)
- International Agency for Research on Cancer Scientific Publications Series
- EPA Site contamination: Guidelines for the assessment and remediation of groundwater contamination, 2009.

## Attachment C Forms

### Form 1 Notice of intention to negotiate a civil penalty



EPA file ref: >file no.<

To: >name of alleged offender (insert full name and ACN for incorporated bodies)<

of: >address of alleged offender (registered business office of corporation)<

It is alleged that on or about the >insert date(s)< that you >insert details of alleged contravention, including relevant section number(s) of the legislation<.

The maximum penalty prescribed for >this/these< contravention(s) is >insert maximum penalty prescribed for offence<.

The particulars of the alleged contravention(s) are:

>insert brief details of the alleged contravention<

>attach additional or supporting information if required<

Pursuant to section 104A of the Environment Protection Act 1993, the Environment Protection Authority (EPA) wishes to enter into negotiations with you for the purpose of recovering a penalty amount in respect of the alleged contravention(s). The purpose of this form is to notify you of the EPA's intention to negotiate a civil penalty with you as an alternative to a criminal prosecution and to provide you with an opportunity to participate in negotiations. Negotiations are conducted in accordance with the EPA policy for calculation of civil penalties provided with this form.

In accordance with the policy, the EPA has considered the factual allegations presented to it and made a preliminary penalty determination of \$>insert preliminary penalty amount and copy of Table 2 or 3<.

Additionally, the EPA will be seeking the following terms and conditions to be included in a negotiated civil penalty agreement >insert details of additional conditions sought<.

If you choose to negotiate, you will be given an opportunity to make submissions on the preliminary penalty determination and any of the proposed terms or conditions of the agreement.

#### **Participation in civil penalty negotiations is voluntary.**

The attached nomination form (Form 2) asks you whether you are prepared to participate in civil penalty negotiations with the EPA.

The terms of the negotiations are detailed in the policy provided with this form.

#### **Your opportunity to make submissions**

If you elect to participate in civil penalty negotiations, you may choose to make submissions on any matters that you wish the EPA to consider. These submissions should be forwarded to the EPA in writing with the nomination form ([Form 2](#)). You have 28 days to return Form 2 to the EPA with any written submissions that you wish to make. You may also make further written submissions during the course of negotiations. The negotiation period will conclude three calendar months after the service of this notice (Form 1) on you or at a later time if an extension is sought from the EPA due to exceptional



circumstances and granted. If the minimum civil penalty amount of \$1,000 has been issued you will not have the opportunity to submit to the EPA adjusting criteria to request a penalty reduction as a reduction of the penalty to less than the floor penalty is not be permitted.

### Disclosure of information by you

You are not obliged to disclose any information concerning the allegation during the course of civil penalty negotiations. The provision of information by you during the negotiations is completely voluntary and you may wish to obtain independent legal advice on what information to provide.

The Environment Protection Act 1993 contains specific provisions covering the subsequent use of information disclosed during civil penalty negotiations. In particular, section 104A(11) states:

Evidence of information given or evidence of the production of documents by a person is not admissible in criminal proceedings against the person if—

- (a) the person gave the evidence or produced the documents in the course of negotiations or proceedings under this section for the recovery of an amount as a civil penalty in relation to a contravention of this Act; and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct that was alleged to constitute the contravention.

You should be aware that this limitation applies only to subsequent criminal proceedings related to the matter being negotiated. If, during the course of negotiations, other contraventions are disclosed, the EPA may act on those contraventions and you may not be entitled to benefit from the confidentiality afforded by this provision. Additionally, this provision does not prevent the use or disclosure of information disclosed during negotiations in any subsequent *civil* proceedings brought by the EPA or another party.

It should be noted that section 104A(11) does not affect the admissibility of any information disclosed prior to negotiations commencing or after negotiations have ceased. Such evidence will be admissible in any subsequent criminal proceedings in accordance with prevailing legislative and common law rules of evidence.

To eliminate any confusion as to when negotiations have commenced, the **EPA will not commence negotiations until it has received a signed Form 2 from you indicating your willingness to participate.**

You should also be aware that the EPA may be required to disclose any information or documents furnished by you during negotiations, in accordance with other statutory or common law requirements.

In accordance with section 109(3)(ka) of the Act, details of negotiated civil penalty agreements will be made available to the public via the EPA's public register.



## Form 2 Nomination to participate in civil penalty negotiations

EPA file ref: >file no.<

I >insert alleged offender's name prior to mailout<

For incorporated bodies >insert 'I am authorised to speak for and on behalf of [company name]'<

of >insert residential address or corporation's registered business address<

acknowledge receipt of the attached 'Notice of intention to negotiate a civil penalty' (Form 1)

I have considered the information contained in the Form 1 and indicate: (tick your preference)

No, I do not wish to participate in negotiations with the EPA to determine a civil penalty to be paid in respect of the alleged contravention.

I understand that if I choose not to participate in civil penalty negotiations, the EPA may commence a criminal prosecution against me in relation to the alleged contravention(s).

OR

Yes, I am prepared to participate in negotiations with the EPA to determine a civil penalty and I wish to make written submissions on matters I want the EPA to take into account for the purpose of determining a penalty.

OR

Yes, I am prepared to participate in negotiations with the EPA to determine a civil penalty and I do not wish to make any submissions in matters that I want the EPA to take into account for the purpose of determining a penalty.

Signed: >by alleged offender (or authorised representative)<

Date: >insert date<

Position of representative: >insert title<

Please return this completed form within 28 days of receipt to:

The Chief Executive  
Environment Protection Authority  
GPO Box 2607  
Adelaide 5001

## Attachment D      Strict liability offences

The EPA may seek to negotiate a civil penalty for these offences in certain circumstances.

\* Denotes the categories the offence falls within for the purpose of determining the foundation penalty.

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Offence to contravene mandatory provisions of policy</b></p> <p><b>s. 34(2)</b> A person who contravenes a mandatory provision of an environment protection policy is guilty of an offence.</p> <p>(* Category 1, 2 or 3 offences)</p>	<p>Penalty:</p> <p>(a) For a Category A offence if the offender</p> <p style="padding-left: 20px;">(i) is a body corporate; \$150,000</p> <p style="padding-left: 20px;">(ii) is a natural person Division 1 fine; \$60,000</p> <p>(b) For a Category B offence Division 6 fine; \$4,000</p> <p>(c) For a Category C offence Division 7 fine; \$2,000</p> <p>(d) for a Category D offence Division 9 fine; \$500</p> <p>(e) For a Category E offence Division 11 fine; \$100</p>
<p><b>Requirement for works approval</b></p> <p><b>s. 35(1)</b> Subject to this section, a person must not carry out works for</p> <p style="padding-left: 20px;">(a) the construction or alteration of a building or structure for use for a prescribed activity of environmental significance; or</p> <p style="padding-left: 20px;">(b) the installation or alteration of any plant or equipment for use for a prescribed activity of environmental significance,</p> <p>except as authorised by an environmental authorisation in the form of a works approval under this Part.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120,000</p> <p>If the offender is a natural person Division 1 fine; \$60,000</p>
<p><b>Requirement for licence</b></p> <p><b>s. 36</b> A person must not undertake a prescribed activity of environmental significance except as authorised by an environmental authorisation in the form of a licence under this Part.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120,000.</p> <p>If the offender is a natural person Division 1 fine; \$60,000</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Conditions</b></p> <p><b>s. 45(5)</b> The holder of an environmental authorisation must not contravene a condition of the authorisation.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120,000</p> <p>If the offender is a natural person Division 1 fine; \$60,000</p>
<p><b>Registration of environment performance agreements in relation to land</b></p> <p><b>s. 60(4)</b> While an environment performance agreement remains registered under this section in relation to land, an owner or occupier of the land who ceases to own or occupy the land must notify the Authority in writing of the name and address of the new owner or occupier.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Risk of escape of pollutant from land, etc</b></p> <p><b>s. 64B(2)</b> A person who fails to comply with a notice under subsection (1) is guilty of an offence.</p> <p>(* Category 3 offences)</p>	<p>Maximum penalty:</p> <p>If the offender is a body corporate; \$120,000</p> <p>If the offender is a natural person; \$75,000</p>
<p><b>Approval of collection depots and super collectors</b></p> <p><b>s. 69 (1)</b> A person must not—</p> <p>(a) operate a collection depot; or</p> <p>(b) carry on business as a super collector,</p> <p>without the approval of the Authority.</p>	<p>Maximum penalty:</p> <p>If the offender is a body corporate Division 1 fine; \$60,000</p> <p>If the offender is a natural person Division 3 fine; \$30,000</p>
<p><b>Sale and supply of beverages in containers</b></p> <p><b>s. 69B</b> Sale and supply of beverages in containers</p> <p>(1) A retailer must not sell a beverage in a container unless the container—</p> <p>(a) is a Category A or B container; and</p> <p>(b) bears the approved refund marking for containers of that class.</p> <p>(2) A person must not—</p> <p>(a) supply a beverage in a container to a retailer for sale by the retailer; or</p> <p>(b) sell a beverage in a container for consumption, unless the container is a Category A or B container and bears the approved refund marking for containers of that class.</p>	<p>Penalty: Division 6 fine; \$4,000</p> <p>Penalty: Division 6 fine; \$4,000</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Offence to claim refund on beverage containers purchased outside state or corresponding jurisdiction</b></p> <p><b>s. 69C(3)</b> If, within any 48-hour period, a person presents to a retailer or the operator of a collection depot 3,000 or more containers for the purpose of claiming refund amounts, the retailer or operator must request the person to complete a declaration of a kind referred to in subsection (2).</p> <p><b>s. 69C(4)</b> A retailer, the operator of a collection depot or a person carrying on business as a super collector must—</p> <p>(a) keep each declaration made under this section (or copy of the declaration) at his or her place of business in the state for three years from the date of the declaration; and</p> <p>(b) have the document readily available for inspection at all reasonable times by an authorised officer.</p>	<p>Penalty: Division 6 fine; \$4,000</p> <p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Offence to contravene condition of beverage container approval</b></p> <p><b>s. 69D</b> The holder of a beverage container approval must not contravene a condition of the approval.</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Retailers to pay refund amounts for certain empty Category A containers</b></p> <p><b>s. 70(1)</b> Subject to subsection (2), a retailer who sells a beverage in Category A containers of a particular class must not refuse or fail, or permit a person acting on the retailer's behalf to refuse or fail—</p> <p>(a) to accept delivery of empty containers of that class that bear the approved refund marking, or a former approved refund marking, for containers of that class; or</p> <p>(b) in respect of each such container, to pay to the person delivering that container the refund amount for that container.</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Collection depots to pay refund amounts for certain empty Category B containers</b></p> <p><b>s. 71(1)</b> Subject to subsection (2), the operator of an approved collection depot must not refuse or fail, or permit a person acting on his or her behalf to refuse or fail—</p> <p>(a) to accept delivery of empty Category B containers that bear the approved refund marking, or a former approved refund marking, for containers of that class; or</p> <p>(b) in respect of each such container, to pay to the person delivering that container the refund amount for that container.</p>	<p>Penalty: Division 6 fine; \$4,000</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Manner of payment of refund amounts</b></p> <p><b>s. 71A(1)</b> Subject to subsection (2), the operator of an approved collection depot must not refuse or fail, or permit a person acting on his or her behalf to refuse or fail—</p> <p>(a) to accept delivery of empty Category B containers that bear the approved refund marking, or a former approved refund marking, for containers of that class; or</p> <p>(b) in respect of each such container, to pay to the person delivering that container the refund amount for that container.</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Certain containers prohibited</b></p> <p><b>s. 72(3)</b> A retailer must not sell a beverage in a prohibited container.</p> <p>(4) A person must not—</p> <p>(a) supply a beverage in a prohibited container to a retailer for sale by the retailer; or</p> <p>(b) sell a beverage in a prohibited container for consumption.</p>	<p>Penalty: Division 6 fine; \$4,000</p> <p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Prohibition of manufacture, use, etc of prescribed substances</b></p> <p><b>s. 75</b> Subject to the regulations and any exemption under Part 6, a person must not</p> <p>(a) manufacture; or</p> <p>(b) store; or</p> <p>(c) sell; or</p> <p>(d) use; or</p> <p>(e) service; or</p> <p>(f) dispose of or allow the escape of,</p> <p>a prescribed substance or any product containing a prescribed substance.</p> <p>(* Category three offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate Division 1 fine; \$60,000</p> <p>If the offender is a natural person Division 3 fine; \$30,000</p>
<p><b>Authority may prohibit sale or use of certain products</b></p> <p><b>s. 76 (3)</b> A person who contravenes a notice under this section is guilty of an offence.</p> <p>(* Category three offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate Division 1 fine; \$60,000</p> <p>If the offender is a natural person Division 3 fine; \$30,000</p>
<p><b>Labelling of certain products</b></p> <p><b>s. 77</b> A manufacturer of products of a prescribed class that contain a prescribed substance must not sell, or supply the products for sale, unless the products are labelled in accordance with the regulations.</p> <p>(* Category three offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate Division 1 fine; \$60,000</p> <p>If the offender is a natural person Division 3 fine; \$30,000</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Causing serious environmental harm</b></p> <p><b>s. 79(2)</b> A person who by polluting the environment causes serious environmental harm is guilty of an offence.</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$500,000.</p> <p>If the offender is a natural person; \$250,000</p>
<p><b>Causing material environmental harm</b></p> <p><b>s. 80(2)</b> A person who by polluting the environment causes material environmental harm is guilty of an offence.</p> <p>(* Category 1 or 2 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$250,000</p> <p>If the offender is a natural person; \$150,000</p>
<p><b>Causing environmental nuisance</b></p> <p><b>s. 82(2)</b> A person who by polluting the environment causes an environmental nuisance is guilty of an offence.</p> <p>(* Category one or two offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate Division 4 fine; \$15,000</p> <p>If the offender is a natural person Division 6 fine; \$4,000</p> <p>Expiation fee Division 6 fee; \$300</p>
<p><b>Offence to fail to notify where serious or material harm is caused or threatened</b></p> <p><b>s.83(1)</b> If serious or material environmental harm from pollution is caused or threatened in the course of an activity undertaken by a person, the person must, as soon as reasonably practicable after becoming aware of the harm or threatened harm, notify the Authority of the harm or threatened harm, its nature, the circumstances in which it occurred and the action taken to deal with it.</p> <p>(* Category three offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$250,000.</p> <p>If the offender is a natural person; \$150,000.</p>
<p><b>Offence to fail to notify of site contamination of underground water</b></p> <p><b>S. 83A(2)</b> A person to whom this section applies must notify the Authority in writing as soon as reasonably practicable after becoming aware of the existence of site contamination at the site or in the vicinity of the site (whether arising before or after the commencement of this section) that affects or threatens water occurring naturally under the ground or introduced to an aquifer or other area under the ground.</p> <p>(* Category three offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120,000.</p> <p>If the offender is a natural person; Division 1 fine \$60,000.</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Environment protection orders</b></p> <p><b>s. 93(8)</b> A person to whom an environment protection order is issued must comply with the order.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>(a) If the order was issued for the purpose of securing compliance with a requirement imposed by or under this Act and a penalty is fixed by this Act for contravention of that requirement - that penalty;</p> <p>(b) If the order was issued in relation to a domestic activity for the purpose of securing compliance with the general environmental duty, or giving effect to an environment protection policy Division 9 fine; \$500</p> <p>(c) In any other case Division 6 fine; \$4,000</p>
<p><b>Environment protection orders</b></p> <p><b>s. 93(9)</b> A person must not hinder or obstruct a person complying with an environment protection order.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Environment Protection Orders relating to the cessation of activity</b></p> <p><b>s. 93A(5)</b> A person to whom an environment protection order is issued in accordance with this section must comply with the order.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120,000</p> <p>If the offender is a natural person Division 1 fine; \$60,000</p>
<p><b>Registration of environment protection orders in relation to land</b></p> <p><b>s. 94(5)</b> An owner or occupier who fails to comply with subsection (4)(d) is guilty of an offence.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Information discovery orders</b></p> <p><b>s. 96(5)</b> A person to whom an information discovery order is issued must comply with the order.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>Clean-up orders</b></p> <p><b>s. 99(8)</b> A person to whom a clean-up order is issued must comply with the order.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120,000</p> <p>If the offender is a natural person Division 1 fine; \$60,000</p>



Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Registration of clean-up orders or clean-up authorisations in relation to land</b></p> <p><b>s. 101(6)</b> A person who fails to comply with subsection (5)(d) is guilty of an offence.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Failure to comply with a site contamination assessment orders</b></p> <p><b>s. 103H(6)</b> A person to whom a site contamination assessment order is issued must comply with the order.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120 000</p> <p>If the offender is a natural person; Division 1 fine \$60,000</p>
<p><b>Failure to comply with a site remediation orders</b></p> <p><b>s. 103J(11)</b> A person to whom a site remediation order is issued must comply with the order.</p> <p>(* Category 3 offences)</p>	<p>Penalty:</p> <p>If the offender is a body corporate; \$120 000</p> <p>If the offender is a natural person; Division 1 fine \$60,000</p>
<p><b>Failure to notify of new owner of registered site</b></p> <p><b>s. 103O(6)</b> A person who fails to comply with subsection (4)(b) is guilty of an offence.</p> <p>(* Category 3 offences)</p> <p>It is noted that Section 103O(4) that states:</p> <p><i>Where a site contamination assessment order or a site remediation order (other than an order authorising remediation of a site by authorised officers or other persons authorised by the Authority) was issued to an owner or occupier of the site and is registered under this section in relation to the site—</i></p> <p><i>(a) the order is binding on each owner from time to time of the site, and this Division applies as if the order had been issued to each owner; and</i></p> <p><i>(b) a person who ceases to be an owner of the site must, as soon as reasonably practicable, notify the Authority in writing of the name and address of the new owner.</i></p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p><b>Failure to comply with a prohibition or restriction on taking water affected by site contamination</b></p> <p><b>s. 103S(3)</b> A person must not contravene a notice under this section.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Requirement for auditors to be accredited</b></p> <p><b>s.103U</b> A person must not carry out a site contamination audit unless—</p> <p>(a) the person is a site contamination auditor and personally carries out or directly supervises the work involved in the audit; or</p> <p>(b) the person carries out the audit through the instrumentality of a site contamination auditor who personally carries out or directly supervises the work involved in the audit.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 4 fine; \$15,000</p>
<p><b>Illegal holding out as site contamination auditor</b></p> <p><b>s. 103W(1)</b> A person must not hold himself or herself out as a site contamination auditor unless the person is accredited under this Division as a site contamination auditor.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 4 fine; \$15,000</p>
<p><b>s. 103W(2)</b> A person must not hold out another as a site contamination auditor unless the other person is accredited under this Division as a site contamination auditor.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 4 fine; \$15,000</p>
<p><b>Conflict of interest and honesty</b></p> <p><b>s. 103X(2)</b> A person to whom this section applies must not, unless authorised by the Authority in writing, carry out a site contamination audit of a site—</p> <p>(a) if the person is an associate of another person by whom any part of the site is owned or occupied; or</p> <p>(b) if the person has a direct or indirect pecuniary or personal interest in any part of the site or any activity that has taken place or is to take place at the site or part of the site; or</p> <p>(c) if the person has been involved in, or is an associate of another person who has been involved in, assessment or remediation of site contamination at the site; or</p> <p>(d) on the instructions of, or under a contract with, a site contamination consultant who has been involved in the assessment of site contamination at the site.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 6 fine; \$4,000</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Annual returns and notification of change of address, etc.</b></p> <p><b>s. 103Y(1)</b> A site contamination auditor must, during the prescribed period each year, furnish the Authority with a return relating to site contamination audits for which the auditor is or was the responsible auditor, listing each such audit commenced, in progress, completed or terminated before completion during the period commencing—</p> <p>(a) in the case of an auditor in his or her first year of accreditation—on the day on which accreditation was granted; or</p> <p>(b) in any other case—on the first day of the prescribed period in the preceding year.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>Annual returns and notification of change of address, etc</b></p> <p><b>s. 103Y(3)</b> A site contamination auditor must, within 14 days after any change of address or any other change relating to his or her activities as a site contamination auditor that affects the accuracy of particulars last furnished to the Authority, notify the Authority of the change.</p> <p>Penalty: Division 5 fine.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>Requirements relating to site contamination audits</b></p> <p><b>s. 103Z(1)</b> A site contamination auditor must, within 14 days after the commencement of a site,contamination audit for which the auditor is the responsible auditor, notify the Authority in writing of the person who commissioned the audit and the location of the land to which the audit is to relate.</p> <p>Penalty: Division 5 fine</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>Requirements relating to site contamination audits</b></p> <p><b>s. 103Z(2)</b> A site contamination auditor must, within 14 days after the termination before completion of a site contamination audit for which the auditor was the responsible auditor, notify the Authority in writing of the termination and the reasons for the termination.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>

Strict liability offences in the Environment Protection Act	Maximum penalty amount
<p><b>Requirements relating to site contamination audits</b></p> <p><b>s. 103Z(4)</b> A site contamination auditor must, on the completion of each site contamination audit for which the auditor is the responsible auditor—</p> <p>(a) provide a site contamination audit report to the person who commissioned the audit; and</p> <p>(b) at the same time, provide—</p> <p>(i) a site contamination audit report to the Authority; and</p> <p>(ii) a site contamination audit statement to the council for the area in which the land to which the audit relates is situated and any prescribed body.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>Reports by site contamination auditors and consultants</b></p> <p><b>s. 103ZA</b> A site contamination auditor or site contamination consultant must, in any written report that the auditor or consultant prepares in relation to a site, clearly qualify any statement of the auditor's or consultant's opinion as to the existence of site contamination at the site by specifying the land uses that were taken into account in forming that opinion.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>False or misleading information</b></p> <p><b>s. 119</b> A person must not make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of any particular) in any information furnished, or record kept, under this Act.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>False reports calling for action by Authority</b></p> <p><b>s. 120A (1)</b> A person who makes a false report to the Authority or to a person engaged in the administration of this Act is guilty of an offence if</p> <p>(a) the person knows the report is false; and</p> <p>(b) the report is of a kind that would reasonably call for investigation or action by the Authority.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p><b>Recovery of administrative and technical costs</b></p> <p><b>s. 135(4)</b> A person who fails to pay an amount payable to the Authority or another administering agency in accordance with this section is guilty of an offence.</p> <p>(* Category 3 offences)</p>	<p>Penalty: Division 8 fine; \$1,000</p> <p>Expiation fee; \$500</p>

Strict liability offences in the Plastic Shopping Bags (Waste Avoidance) Act 2008	Maximum penalty amount
<p><b>Retailer must provide alternative shopping bag until prescribed day</b></p> <p><b>s. 4(1)</b> From the day on which this section comes into operation until the day immediately preceding the prescribed day, a retailer who at any premises makes plastic shopping bags available to customers as a means of carrying goods purchased, or to be purchased, from the retailer must—</p> <p>(a) be in a position to provide an alternative shopping bag to a customer who requests that the retailer provide him or her with such a bag; and</p> <p>(b) display a notice, or notices, in the premises in accordance with the requirements prescribed by regulation.</p> <p>(* Category 3 offences)</p>	<p>Penalty: \$5,000</p> <p>Expiation fee; \$315</p>
<p><b>Retailer not to provide plastic shopping bag</b></p> <p><b>s. 5 (1)</b> If—</p> <p>(a) a retailer provides a plastic shopping bag to a customer on or after the prescribed day; and</p> <p>(b) the plastic shopping bag is provided to the customer as a means of carrying goods purchased, or to be purchased, from the retailer, the retailer is guilty of an offence.</p> <p>(* Category 3 offences)</p>	<p>Penalty: \$5,000</p> <p>Expiation fee; \$315</p>

## Attachment E Civil penalty calculation tables lift-out

Table 1 Calculating foundation penalties

Foundation penalty calculations	
<p><b>Insert the details of the provision contravened (below) and place the maximum penalty prescribed for that offence in the column (A)</b></p> <p>Section/provision contravened (including section, subsection or clause number):</p>	<p><b>\$ (A)</b></p> <p><b>(maximum penalty)</b></p>
<p><b>Category 1 offence</b> that alleges environmental harm where the harm has actually occurred: multiply the maximum penalty prescribed for the offence by <b>70%</b></p> <p>or</p> <p><b>Category 2 offence</b> that alleges environmental harm where actual harm has not occurred, but there is a potential for harm to the environment: multiply the maximum penalty prescribed for the offence by <b>45%</b></p> <p>or</p> <p><b>Category 3 offence, an administrative offence</b> that does not allege actual or potential harm, but poses a heightened risk of harm to the environment or human health: multiply the maximum penalty by <b>45%</b></p>	<p><b>multiply (A) by</b></p> <p><b>70%</b></p> <p><b>or</b></p> <p><b>45%</b></p> <p><b>or</b></p> <p><b>45%</b></p> <p><b>(delete as appropriate)</b></p>
<p><b>Foundation penalty</b></p>	<p><b>\$ (B)</b></p>

**Note:** Where more than one contravention is alleged and separate negotiated civil penalties are to be sought for each of them, additional sets of calculation tables will need to be completed.

**Table 2 Assessment of factors where the offence alleges actual or potential environmental harm**

<b>Degree of actual or potential harm to the environment (including people)</b> (If no actual or potential environmental harm was caused, proceed to Table 3)				
Circle one number in each line	<b>Minor</b>	<b>Moderate</b>	<b>Major</b>	<b>Factor subtotal</b>
<b>Nature of the pollutant*</b>	1	2	3	
<b>Quantity/level of pollutant released*</b>	1	2	3	
<b>Sensitivity of the receiving environment*</b> (including human population and broader environment)	1	2	3	
<b>Duration of exposure to the environment*</b>	1	2	3	
Points total				(max 12 points)
<b>points conversion to a percentage</b> multiply points total by 100				<b>x 100</b> = _____
divide by the maximum points possible (12)				<b>÷ 12</b>
<b>= percentage total (C)</b> (rounded down to nearest whole number)				<b>= % (C)</b>
<b>insert the foundation penalty (B) from Table 1</b>				<b>X</b> <b>\$ (B)</b>
to determine the base penalty multiply (B) by (C)				<b>=</b>
<b>base penalty (D)</b>				<b>\$ (D)</b>
<b>Proceed to Table 4 and copy the base penalty (D) to the space provided</b>				

\* Some factors may need to be assessed with regard to other factors contained in the table (see section 5.1)

**Table 3 Assessment of risk associated with administrative offences that do not allege actual or potential harm, but pose an increased risk of harm, such as (Category three)**

<b>Offences that do not contain elements of environmental harm</b> (If Table 2 has been completed, do not complete this table and proceed to Table 4)				
Circle one number in each line	Minor	Moderate	Major	Points total
<b>Level of risk of environmental harm or harm to human health</b> arising from the contravention	1	2	3	
<b>conversion of points total to a percentage</b> multiply the points total by 100 divide by the maximum points possible (3)				x 100 = _____ ÷ 3
<b>total (C)</b> (rounded down to nearest whole number)				=    %(C)
<b>insert the foundation penalty (B) from Table 1</b>				x \$    (B)
to determine the base penalty multiply (B) by (C) <b>base penalty (D)</b>				= \$    (D)
<b>Proceed to table 4 and copy the base penalty (D) to the space provided</b>				



**Table 4 Adjusting factors**

<b>Adjusting factor</b> (Insert a reduction of 0–10 percentage points for each of the following)	<b>% decrease</b>
The alleged offender's good compliance record <i>(max of 10% points reduction)</i>	
The preventative measures by the alleged offender prior to the incident <i>(max of 10% points reduction)</i>	
The extent, speed and appropriateness of corrective action <i>(max of 10% points reduction)</i>	
The timeliness of notification and <i>(max of 10% points reduction)</i>	
The degree of cooperation demonstrated by the alleged offender <i>(max of 10% points reduction)</i>	
The degree of public contrition demonstrated by the alleged offender <i>(max of 10% points reduction)</i>	
Other relevant factors <i>(max of 10% points reduction)</i>	
<b>total percentage points reduction (E)</b>	<b>% (E)</b>
insert base penalty (D) from Tables 2 or 3	<b>x</b>
	<b>\$ (D)</b>
reduction expressed in \$ (F)	<b>\$ (F)</b>
multiply the base penalty (D) by the total % reduction (E)	
<b>adjusted base penalty (G)</b>	<b>\$ (G)</b>
subtract the reduction (F) from the base penalty (D)	
<b>Copy the adjusted base penalty (G) to economic benefit (Table 5)</b>	

**Table 5 Economic benefit**

<b>Adding economic benefit</b>	
insert <b>adjusted base penalty (G)</b> from Table 4	<b>\$ (G)</b>
add <b>economic benefit (H)</b> derived from contravention	<b>+ \$ (H)</b>
<b>final negotiated civil penalty</b>	<b>\$</b>

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