
DISCUSSION PAPER

**The Calculations Policy
for the negotiation of civil penalties under
the Environment Protection Act 1993**

FOR PUBLIC CONSULTATION

May 2006

CALL FOR COMMENTS

This discussion paper has been prepared to accompany the Draft Civil Penalties Calculations Policy, which sets the framework in which civil penalty negotiations will take place.

Your comments on the draft Civil Penalty Calculations Policy may be made online at the EPA consultation web site <www.epacommentss.sa.gov.au> or in writing to:

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All submissions are public documents unless clearly marked 'confidential' and may be made available to other interested parties subject to *Freedom of Information Act 1991* provisions.

Submissions close at 5.00 pm on Friday 30 June 2006

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FOREWORD FROM THE CHIEF EXECUTIVE AND CHAIRMAN

The *Environment Protection (Miscellaneous) Amendment Act 2005* (the Act), which was proclaimed on 16 June 2005, provides for the introduction of civil penalties to come into effect on 1 July 2006.

The introduction of the civil penalty system was a recommendation of Parliament's Environment, Resources and Development Committee inquiry into environment protection in South Australia (May 2000).

The use of civil penalties for environmental contraventions is well established in other parts of the world, particularly the United States of America where they have been in operation for over 25 years. Unlike the 'administrative' penalty provisions used by other Australian regulatory bodies, the use of negotiations to determine levels of civil penalty is a new approach to environmental regulation in this country. The level of civil penalty will be able to be determined by negotiations between the alleged offender and the EPA, considering the facts on a case-by-case basis.

This discussion paper explains the proposed system for negotiating civil penalties contained in the draft *Calculations Policy for the Negotiation of Civil Penalties under the Environment Protection Act 1993* (the policy). The policy has been developed to provide a clear framework in which civil penalty negotiations may occur.

The new section 104A of the Act will enable civil penalties to be sought in two forms, either imposed by the court or agreed to by the accused through negotiations with the EPA. A copy of section 104A is contained in Appendix one of the draft policy provided with this discussion paper.

The negotiation of civil penalties does not seek to replace the important role of the courts for more serious offences, but provides a timely and cost-effective alternative to court proceedings for less serious offences where the alleged offender agrees to negotiate.

The objective of the policy is to provide an open and transparent framework that not only allows for the efficient resolution of allegations, but also produces fair and consistent outcomes. I would encourage you to read the discussion paper and to make written submissions on the issues raised.



DR PAUL VOGEL
CHIEF EXECUTIVE AND CHAIRMAN
ENVIRONMENT PROTECTION AUTHORITY

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PENALTIES UNDER THE ENVIRONMENT PROTECTION ACT 1993

INTRODUCTION

On 1 July 2006 section (s.) 104A of the *Environment Protection Act 1993* (the Act) will come into operation, enabling the Environment Protection Authority (the EPA) to seek a 'civil penalty' from an accused in respect of certain contraventions of the Act. In general terms, civil penalties will be sought in relation to less serious contraventions of the Act where there has not been a significant impact upon the environment.

Section 104A details the matters that the EPA and the court must have regard to when considering whether a contravention may be dealt with by way of civil penalty. This includes the seriousness of the alleged contravention, previous contraventions by the accused and other relevant factors. A copy of s. 104A is provided in the policy (see Appendix one).

In addition to those matters, civil penalties may only be sought in relation to 'strict liability offences', that is contraventions where the Act does not require the prosecution, in this case the EPA, to prove that the accused acted with a particular state of mind at the time of the offence. Therefore, where the particular section of the Act contravened states that a person 'knowingly', 'intentionally', 'recklessly' contravened that provision, it cannot be dealt with by way of civil penalty. Contraventions that require evidence of intent, knowledge or recklessness are generally considered more serious, attracting higher penalties, and will continue to be put before the courts.

The Act allows a civil penalty to be sought in two forms: either as a 'negotiated civil penalty' or a 'court imposed civil penalty'. The draft Civil Penalties Calculations Policy (the policy) has been developed for the purpose of determining the appropriate level of financial penalty to be sought by the EPA through the negotiations process.

This discussion paper focuses on the policy that the EPA will be applying when seeking to negotiate a civil penalty. It does not discuss the process of obtaining a penalty through the civil or criminal courts.

The matters which the EPA will consider when deciding whether to negotiate a civil penalty are discussed in part 1 of the policy.

In relation to negotiated penalties, s. 104A does not specify the manner or form in which these negotiations should take place. The calculations policy seeks to provide a structure within which negotiations will occur, informing all parties and observers of the key considerations and constraints when determining a civil penalty.

The policy will provide a framework for determining consistent civil penalty amounts, balancing the need for deterrence and accountability with fairness and equity. The process not only examines the allegations against the accused, but also enables the accused to make submissions on matters that they believe should be taken into account when determining a penalty. If the accused disputes the allegation, does not agree with the proposed penalty or simply no longer wishes to participate, they may withdraw from negotiations. At that time the EPA may seek to initiate proceedings before the Environment Resources and Development Court for a civil penalty, or commence a criminal prosecution.

A flow chart showing the alternate ways a contravention may progress through the negotiated civil penalty process, the court imposed civil penalty process or the criminal prosecution process is provided in figure 1 of the policy.

What is the difference between negotiated civil penalties, court imposed civil penalties and criminal prosecutions?

A fundamental difference between the determination of responsibility under the civil and criminal processes is the level of proof required to prove an allegation. In the civil jurisdiction the prosecution only has to prove an allegation '*on the balance of probabilities*'. In contrast, to satisfy the criminal burden of proof, an allegation needs to be proven '*beyond reasonable doubt*', a significantly higher standard. However, as the civil penalties system is optional, the accused may refuse to participate and elect to be prosecuted under the criminal system.

Another key difference between the civil and criminal prosecution systems is the sentencing outcomes, in particular the possibility that the accused will receive a criminal conviction if found guilty by a criminal court. This will be a significant issue for the accused when considering in which system to participate. It is also an important consideration for the EPA when deciding whether an offence should be dealt with by way of civil or criminal proceedings. The seriousness of the offence and the behaviour of the accused will be important considerations, along with the need to deter the accused and others in the community from similar future offending.

Upon finding an accused responsible for a contravention in the civil or criminal jurisdiction, a court may make a number of additional orders (including orders to pay compensation, damages and costs) or impose other obligations on the accused. Some of these sentencing options may be found in s. 133 of the Act and in other legislation including the *Criminal Law (Sentencing) Act 1988*.

Comparatively, the negotiation of civil penalties involves only the negotiation of penalties and associated terms. While the negotiations system may seek an undertaking from an accused to pay costs, make good any harm or carry out environmentally beneficial projects, negotiations cannot impose this. If the EPA wishes to impose such additional obligations on the accused, it must do so using other mechanisms under the Act, for example clean-up orders or cost recovery orders, or apply to the court for imposition of such orders.

Nothing in the negotiation of a civil penalty shall prevent a third party from seeking damages or compensation from the accused arising from the contravention. An application for a civil remedy may still be made by another party in accordance with s. 104 of the Act or under any other entitlement at law.

PART 1 WHEN THE EPA WILL SEEK TO NEGOTIATE A CIVIL PENALTY

Part 1 of the policy discusses when the EPA may choose to resolve a contravention by way of a negotiated civil penalty. This is an important part of the policy as it seeks to provide an understanding of the nature of the offences and circumstances where a negotiated penalty may be sought.

Section 104A(2) of the Act identifies the following matters which the EPA must have regard to when deciding whether to seek a negotiated civil penalty:

- the seriousness of the contravention
- the accused's record of offending
- whether the offence is one of 'strict liability'
- any other relevant factor.

Part 1 of the policy explains how these matters will be assessed and what matters may constitute 'other relevant factors'.

Questions

1. Do you believe the criteria discussed under the heading '*seriousness of the contravention*' are appropriate? If not, what changes would you recommend?
2. Do you believe the matters considered when assessing the '*accused's record of offending*' are suitable? If not, why?
3. What other issues should be considered under part 1?

Who makes the decision to negotiate a civil penalty?

The policy is not intended to provide a detailed overview of processes adopted by the EPA when investigating environmental offences. Matters relating to the handling of complaints and investigations are dealt with in other EPA policies and procedures including *Guidelines for compliance and enforcement*.

The policy does, however, provide a brief description of the course a complaint may take once it has been investigated and allegations of a contravention have been reviewed by the Crown Solicitor's Office (CSO). The policy does not seek to influence or affect either the manner in which the investigation of a complaint is carried out or the independent assessment of the evidence by the CSO.

It is proposed that the CSO will provide advice to the EPA on the sufficiency of evidence contained within a brief and the appropriateness of the allegation. That advice will be considered by the EPA's Environment Protection Prosecutions Committee (EPPC).

Following consideration of the advice, and in accordance with the Act, the criteria provided in part 1 of the policy and the EPA's *Guidelines for compliance and enforcement*, the EPPC will decide whether the contravention is suitable to be dealt with under the negotiated civil penalty process.

If the EPPC is satisfied that the alleged contravention meets the criteria, a preliminary assessment of penalty will be carried out using the tables provided in the policy. This assessment will be conducted purely on the basis of the information provided in the brief of evidence. Once an initial penalty assessment has been calculated, notice of this assessment will be sent to the accused with an invitation to participate in civil penalty negotiations. The accused will have the opportunity to consider an overview of the allegations and the penalty assessment. If the accused wishes to participate in negotiations, they have 21 days to respond to the invitation and to make submissions on matters they believe should be taken into account when calculating the penalty.

PART 2 CALCULATING A NEGOTIATED CIVIL PENALTY

This part of the policy provides a broad overview of the steps that are taken in the calculations process.

Question

4. Do you believe there should be any additional stages in the calculations process? If so, what are they?

PART 3 THE FOUNDATION PENALTY

This part of the policy details the first stage in the calculations process, that is the determination of a 'foundation penalty'. This requires classifying the contravention into one of three categories:

- **category one:** contraventions that allege actual harm to the environment
- **category two:** contraventions that allege potential harm to the environment
- **category three:** contraventions that do NOT allege any actual or potential harm to the environment (i.e. 'administrative breaches').

Category one contraventions attract a foundation penalty of 50% of the maximum prescribed for that contravention under the Act. Category two and three contraventions attract a foundation penalty of 25%.

Essentially, foundation penalty levels have been selected to ensure negotiated penalties reflect the level of penalties imposed by courts for lower level contraventions of the Act, which are the type of contraventions to be negotiated under this policy. The foundation penalty recognises that courts rarely impose maximum penalties, and when they do they are for the most aggravated, repeated and serious offences put before them. It would be inconsistent to impose maximum penalties for the lower level contraventions negotiated under this policy.

As stated in the policy, while the foundation penalty percentages place an initial ceiling on the level of the penalty, this is only the first stage in the calculations process. A number of adjustments may then be made to the foundation penalty to increase or decrease it within the constraints of the Act.

In some circumstances the foundation penalty may be reduced to reflect a number of mitigating factors advanced by the accused. In other circumstances the foundation penalty may be increased to reflect the level of economic benefit derived from the contravention by the accused. If a preliminary penalty assessment reaches the maximum prescribed for the offence or the \$120,000 limit prescribed in the Act, the matter may be referred to the court for determination.

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

Question

5. Do you believe the policy should distinguish between those contraventions that cause actual or potential harm to the environment and non-polluting or 'administrative' contraventions? If so, why?
6. Please comment on the adequacy of the foundation penalty percentages of 50% (category one) and 25% (categories two and three) as starting points for the calculation of a civil penalty.

PART 4 CALCULATING THE BASE PENALTY

Part 4 is a short introduction to parts 5 and 6 discussed below.

PART 5 CATEGORIES ONE AND TWO—CONTRAVENTIONS THAT ALLEGE ACTUAL HARM OR POTENTIAL HARM TO THE ENVIRONMENT

While a distinction is made between contraventions resulting in ‘actual or ‘potential’ harm to the environment for the purpose of determining the foundation penalty, the following stages in the calculations process are exactly the same for both. For this reason part 5 of the policy discusses both category one and category two contraventions together.

Section 5 of the Act does not distinguish between ‘actual’, ‘potential’ or the ‘risk’ of harm. If the same approach were adopted when calculating a penalty, parties committing contraventions posing some risk of harm to the environment would be subjected to the same penalties as those who actually perpetrated harm on the environment. This would not be consistent with the courts’ approach to sentencing such matters.

Part 5 of the policy attempts to offer some distinction between contraventions involving actual and potential harm and those non-polluting contraventions that do not result in harm but may pose some risk of harm. By comparing tables 2 and 3, it can be seen that the criteria used for assessing actual and potential harm are different from those used to assess the level of risk associated with non-polluting (or ‘administrative’) contraventions.

It is not the purpose of the policy to provide a full scientific assessment of the level of harm that has or is likely to result from a contravention. The role of the policy is to assess the information provided in the brief of evidence and formulate an appropriate level of penalty.

The level of harm resulting from a contravention will generally be reflected in the type of offence alleged and the penalty prescribed for that offence. In simple terms the relationship between impact, offence and penalty will generally see offences resulting in less significant impacts receiving lower penalties while those resulting in greater environmental impacts incur higher penalties.

While the escalating nature of offences and penalties directly correlates with the level of actual or potential harm, there may be a broad range of factual circumstances that fall under the heading of a single offence. For example, an allegation of ‘*causing material environmental harm*’¹ may involve causing \$5,000 damage or \$49,000 damage, or damaging 20 m of watercourse or 200 m. For this reason further adjustments may need to be made to the penalty to reflect the degree of harm caused or threatened.

Further adjustments can be made to the penalty in table 2 (part 5) of the policy to best reflect the level of actual or potential harm that has occurred. These adjustments are made by assessing the following matters:

- the nature of the pollutant released
- the quantity/level of the pollutant released
- the sensitivity of the receiving environment
- the duration of exposure of the pollutant to the environment.

¹ in contravention of s. 80 of the Act

Again, it should be noted that this part of the policy is not intended to be an all-inclusive scientific analysis of the environmental impacts associated with a contravention. Those findings should already be contained in the brief of evidence and reflected in the type of offence alleged. This stage of the process is simply to enable adjustments to be made to the penalty to reflect the varying levels of impact and other factual circumstances that may occur within an offence category. The accused will also be afforded the opportunity to make submissions on these matters and submit scientific reports or other evidence in support of any argument for a reduction in penalty.

Question

7. Please comment on whether the four factors assessed in table 2 allow for appropriate adjustments to be made to the penalty.
8. What changes, if any, would you recommend to part 5 of the policy?

PART 6 CATEGORY THREE—CONTRAVENTIONS THAT DO NOT ALLEGE ANY ACTUAL OR POTENTIAL HARM TO THE ENVIRONMENT

Part 6 of the policy deals with contraventions that do not involve allegations of causing actual or potential harm, that is generally not involving pollution events. They are often 'administrative breaches' of EPA licence conditions or other requirements under the Act.

As discussed in the policy, the EPA imposes a number of requirements on people undertaking activities of environmental significance, which are aimed at reducing the risk of an environmental incident occurring. These requirements may be EPA conditions requiring the monitoring of plant emissions, the training of staff in matters of environmental protection, the installation of warning devices or other preventative systems, or the submission of Environment Improvement Programs (EIPs) or emergency contingency plans. All these requirements play a key role in reducing the level of risk associated with carrying out environmentally significant activities.

The assignment of a foundation penalty of 25% of the maximum should not be seen to downgrade the importance of compliance with requirements of this nature. It is simply to enable penalties to be calculated that are consistent with what the court would hand down in similar circumstances. Once again, repeated or aggravated contraventions of this nature will not be dealt with under this system and will be sent to court for potentially higher penalties to be imposed.

Assessment of risk

It is not within the scope of the policy to provide a full structure for carrying out a comprehensive risk analysis. This information should be contained in the brief of evidence in reports of experts qualified in the field of risk assessment.

There will often be site-specific considerations when assessing the level of risk associated with a contravention. These could include the nature of the activity being carried out at that location, the sensitivity of the surrounding environment, the design or age of infrastructure, the nature of chemicals used at the facility etc. Such information will be contained in the brief of evidence and can be used to support a finding as to the level of risk created by a contravention.

The EPA will apply its risk assessment protocol and recognised Australian standards in risk assessment when evaluating the level of risk associated with a contravention. Much of this work will be done by witnesses whose reports are included in the brief of evidence. Their findings will be applied to table 3, where adjustments can be made to the penalty with regard to those findings. In the event that the accused wishes to furnish information that supports an alternate view of risk, they may do so during the negotiations process.

Example

Scenario *XYZ Pty Ltd is accused of failing to comply with its EPA licence condition requiring it to monitor or report to the EPA the level of sulphur dioxide (SO₂) emissions from its plant. While there is no evidence of emissions over and above the limits allowed by their EPA licence, there is obvious concern about the potential risks to the environment associated with such a failure. Expert reports contained in the brief of evidence support the finding that the probability of a discharge occurring that results in environmental harm is high. Based on this overview of the facts, the following process would take place.*

The alleged contravention:

Section 45(5) of the Act states:

'The holder of an environmental authorisation must not contravene a condition of the authorisation

Penalty: If the offender is a body corporate - \$120,000...'

You will note that this offence does not allege or require any proof of any *actual* or *potential* environmental harm arising from the contravention and on that basis will be treated as a category 3 contravention.

Example of using table 1: Foundation penalty calculations

<i>FOUNDATION PENALTY CALCULATIONS</i>	
<p>Insert the details of the provision contravened (below) and place the maximum penalty prescribed for that offence in the column (A)</p> <p><i>Section/provision</i> contravened:.....Failing to comply with EPA licence conditions requiring monitoring of SO₂ emissions - section 45(5) EP Act</p> <p><i>(including section, subsection or clause number)</i></p>	<p>\$ 120,000</p> <p>(A)</p> <p>(maximum penalty)</p>
<p>i) Category one contraventions involving actual harm to the environment, multiply the maximum penalty prescribed for the offence by 50%</p> <p>or</p> <p>ii) Category two contraventions alleging potential harm to the environment, multiply the maximum penalty prescribed for the offence by 25%</p> <p>or</p> <p>iii) Category three contraventions that do not allege any actual or potential harm to the environment, multiply the maximum penalty by 25%</p>	<p>multiply (A) by</p> <p>50%</p> <p>or</p> <p>25%</p> <p>or</p> <p>25%</p> <p>(delete as appropriate)</p>
<p>Foundation penalty</p>	<p>\$ 30,000</p> <p>(B)</p>

Example of using table 3: Assessment of risk associated with contraventions that do not allege actual or potential harm to the environment (category three)

Contraventions that do not allege environmental harm					
(If table 2 has been completed, DO NOT complete this table and proceed to table 4)					
	Nil	Minor	Moderate	Major	Points total
Level of risk of environmental harm arising from the contravention	0	1	2	3	3
Conversion of points total to a percentage Multiply the points total by 100 Divide by 3					$\begin{array}{r} \times 100 \\ = 300 \\ \div 3 \end{array}$
Total (C)					= 100% (C)
Insert the Foundation Penalty (B) from table 1					$\begin{array}{r} \times \\ \$ 30,000 \end{array}$ (B)
To determine the Base Penalty multiply (B) by (C) BASE PENALTY					$\begin{array}{r} = \\ \$ 30,000 \end{array}$ (D)
Proceed to table 4 and copy the Base Penalty (D) to the space provided					

Further adjustments may then be made to the Base Penalty (D) with regard to the matters contained in table 4 and matters of 'economic benefit', discussed in part 8.

This scenario demonstrates how a penalty may be calculated in respect of a contravention that does not allege any actual or potential harm. If a contravention involving actual or potential environmental harm was alleged, for example causing material environmental harm through the emission of excessive amounts of SO₂ gas, then the penalty would be calculated with regard to the matters contained in table 2 rather than on the basis of risk.

PART 7 ADJUSTING FACTORS

Part 7 of the policy enables the penalty to be adjusted with regard to a number of factors. They are:

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

These six factors each carry a reduction of up to 10%, with a potential combined maximum reduction of 60% of the base penalty.

The accused's history of compliance

In addition to an analysis of the accused's history of prior offending for the purpose of determining whether a matter can be negotiated, consideration will also be given to the accused's prior conduct for the purpose of calculating a penalty. The *good* prior conduct of the accused is a matter frequently considered by the courts when imposing penalty.

The EPA will not limit its assessment of the accused's prior conduct to whether they have been prosecuted or convicted of an offence previously. Consideration will also be given to their broader compliance history, including any orders, expiation notices, warning letters or other administrative action that has been taken against them in an attempt to secure compliance.

Question

9. Do you agree with the matters to be considered by the EPA when determining whether any reductions should be made in recognition of prior good conduct by the accused? If not, please explain why.

The practical measures taken by the accused to prevent the contravention

The policy allows for reduction in the base penalty to reflect any positive measures taken by the accused to prevent a contravention from occurring. It is recognised that while a contravention has occurred, a responsible party will often have demonstrated varying levels of diligence, and penalties should be adjusted to reflect this.

As discussed in the policy, in some circumstances where the accused 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 s. 124 of the Act. If this is disclosed during the course of the negotiations, the brief may be referred back to the CSO for further assessment.

In circumstances where this defence is not available, the EPA will consider any positive steps taken by the accused prior to the incident and make a reduction to the base penalty accordingly.

The appropriateness and speed of corrective action taken by the accused after the contravention

The policy allows for adjustment to the base penalty to reflect the appropriateness and speed of corrective action taken to rectify a contravention after it has occurred, and mitigate or repair any damage that may have resulted from the contravention.

In circumstances where the accused has taken positive steps to rectify the breach, and put in place measures to ensure that such a contravention is unlikely to occur again, the accused will be entitled to a reduction in penalty. In circumstances where there have been undue delays in rectifying or preventing the contravention, no reduction will be available.

In cases where preliminary investigations are required to establish the origin or cause of any pollution, an assessment of the 'reasonableness' of such delays will be conducted before any reduction is offered.

Similarly, if any delays occur in rectifying or mitigating the effects of a pollution event caused by apparent resource restrictions, consideration will be given to:

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

While the policy will recognise and apply appropriate reductions where the accused has acted responsibly after a pollution incident, it will be less generous when delays or failures result from the accused failing to be prepared or adequately equipped.

The timeliness of notification of an incident and the degree of cooperation demonstrated by the accused

While the Act may impose certain reporting and other requirements on an accused, reductions may be made to the penalty in circumstances where the accused has promptly brought an incident to the attention of the EPA, local government or other public authority to enable prompt action to be taken to mitigate against the effects of the incident.

Additionally, reductions may be made where the accused has demonstrated a degree of cooperation and honesty above what is required at law. While the policy will not serve to penalise those for exercising any rights at law, for example the 'right to silence', it will provide a penalty reduction for the honesty and frankness demonstrated by the accused during the course of investigations into a contravention.

The degree of public contrition demonstrated by the accused

When any crime occurs, it is often important for those affected to be recognised and receive some form of apology for any damage the event may have caused them.

It is not uncommon for responsible individuals and good corporate citizens to take a proactive stance and apologise for the damage caused. The policy recognises such displays of public contrition and allows for reductions to the penalty accordingly.

Additionally, reductions may be available where the accused agrees to make a public apology in the press, or is prepared to publish details of the contravention together with the outcome of civil penalty negotiations in the public press.

Other relevant factors

It is envisaged that there may be other compelling reasons put forward by the accused in support of a reduction in penalty. A total reduction of up to 10% may be made to account for that or any other mitigating factor.

Question

10. Should adjusting factors consist only of reductions requiring the accused to make submissions supporting a reduction or should the policy also enable an increase of penalty?
11. Do you believe factors should be included to increase the penalty? If so, what percentage increases would you apply to them?
12. Please comment on the adequacy of the adjusting factors and the percentages that apply to them.
13. Do you believe there should be any limit on the percentage reduction applied for any one adjusting factor during the negotiations process?
14. Please detail any other adjusting factors that should be included in the policy and what percentage reductions you would apply to them.

PART 8 ECONOMIC BENEFIT

Part 8 of the policy enables the EPA to factor into a negotiated penalty an amount reflective of any economic benefit that an accused gained through the contravention. This part mirrors s. 104A(6) of the Act, which requires the court, when determining a civil penalty, to have regard to any financial saving or other benefit that the person stood to gain by committing the contravention.

Accounting for economic benefit ensures that an accused does not benefit financially from contraventions, despite having to pay a penalty in respect of the contravention.

There is considerable scope for economic benefit to be factored into a negotiated civil penalty. Easily identifiable benefits include savings through avoidance of licence fees, levies and other statutory charges, but there are also less apparent benefits, for example the financial gain that the accused may have received by successfully undercutting legitimate competitors in the marketplace.

Calculating the level of economic benefit will not always be an easy task. The EPA will need to gather information during the course of the investigation stage. Practically, however, this imposes no more of an obligation on the EPA than if they were to seek a similar order from the court under s. 104A(6) or s. 133(1a)² of the Act.

This is a negotiated process, and if the EPA and the accused cannot agree on the level of economic benefit factored into a penalty, negotiations may cease and the issue may be put before the court for determination.

It is anticipated that matters where the economic benefit component exceeds the maximum penalty prescribed for the offence or the \$120,000 cap placed on negotiated civil penalties by the Act will not be suitable for negotiation. In circumstances where the EPA believes that an adequate penalty cannot be negotiated, recognising the level of economic benefit derived from the contravention, then the EPA may elect to put the matter before the court, where penalties for higher levels of economic benefit can be awarded in addition to a penalty for the contravention.

Question

15. Do you have any comments to make about the proposed inclusion of economic benefit considerations in the formulation of a civil penalty?

² Section 133(1a) enables the court, in addition to any penalty imposed for an offence, to order a convicted person to pay an amount in lieu of the economic benefit accrued or accruing from the commission of the offence.

PART 9 COST RECOVERY

As discussed in part 9 of the policy, the costs incurred by those involved in cleaning up, investigating or taking other action in relation to a contravention will not form part of the negotiated civil penalty. Penalties and costs will be treated as two separate matters.

The Act currently provides a number of avenues for the EPA, administering agencies and others to recover such costs. These include the civil remedies available under s. 104(1) of the Act, cost recovery provisions contained in s. 135 and other specific cost recovery provisions relating to Clean-up and Environment Protection Orders presently in the Act.

However, as the negotiated civil penalties system is intended to provide an alternative to resolving matters through court proceedings, an opportunity will be provided in the negotiations process to come to an agreement for the reimbursement of such costs. Any such agreement will feature as an additional term of the agreement and not part of the negotiated civil penalty itself.

While disagreement as to the level of cost reimbursement will not necessarily prevent the resolution of matters by way of negotiated civil penalty, in circumstances where it is likely that court proceedings will be required for the purpose of cost recovery, the EPA may elect not to negotiate a civil penalty and instead put the whole matter before the court for determination of penalty and costs.

In circumstances where a negotiated civil penalty is agreed without the consideration of 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 penalty negotiations will not prevent the EPA, administering agencies or other public authorities from making a claim for cost recovery in accordance with their statutory or common law rights.

In relation to costs and damages incurred by third parties, while there is no specific power for the EPA to negotiate reimbursements on their behalf, the EPA may have regard to the accused's willingness to pay costs when negotiating a penalty.

Nothing in the terms of a negotiated agreement shall limit or deny any another party from making a claim against the accused for the recovery of costs, damages or other compensation available under this Act or other law. This includes any civil action commenced by a third party pursuant to s. 104 of the Act.

104—Civil remedies

'(1) Applications may be made to the Environment, Resources and Development Court for one or more of the following orders:

- (d) if the Authority or any other public authority has incurred costs or expenses in taking action to prevent or mitigate environmental harm caused by a contravention of this Act or a repealed environment law, or to make good resulting environmental damage—an order against the person who committed the contravention for payment of the reasonable costs and expenses incurred in taking that action;*
- (e) if a person has suffered injury or loss or damage to property as a result of a contravention of this Act, or incurred costs and expenses in taking action to prevent or mitigate such injury, loss or damage—an order against the person who committed the contravention for payment of compensation for the injury, loss or damage, or for payment of the reasonable costs and expenses incurred in taking that action'*

Question

16. Do you have any comments to make in relation to the negotiation of cost recovery as an additional term of negotiated civil penalty agreements?

PART 10 ENVIRONMENTALLY BENEFICIAL PROJECTS AND PERFORMANCE AGREEMENTS

The negotiated civil penalty system may provide additional opportunities to achieve positive outcomes for the environment.

Section 133(1) of the Act empowers the court to make orders for the restoration or enhancement of the environment in a public place. Orders of this nature cannot be imposed through the negotiations process.

However, the negotiated civil penalty system seeks to offer some involvement and recompense to communities affected by pollution events through the potential inclusion of environmentally beneficial projects in the terms of negotiated agreements. For example, the EPA may seek, as a term of a penalty agreement, that the accused pledge an amount of money for the preservation or restoration of public space in the district.

Money pledged for this purpose may then be offset against the proposed penalty on a dollar for dollar basis. This will not include funds required to rectify the damage caused by a contravention or for repair of the accused's plant or machinery that caused the contravention.

It is anticipated that many of these agreements will be underpinned by Environmental Performance Agreements entered into pursuant to s. 59 of the Act. These agreements can require such terms as are necessary for the completion of the project, including how, when and by whom the work is to be carried out, and have the effect of a binding contract on the accused.

In circumstances where a local community organisation or authority has submitted a proposal for the restoration or enhancement of a public space in their district, the EPA may agree to the payment of a specified sum to that organisation for the project to be carried out. An example of such a project is the restoration of a degraded environment by the planting of native vegetation and eradication of weeds.

The EPA may seek to underpin the provision of those services with that organisation through a written contract of service.

Question

17. Do you have any comments to make in relation to the inclusion of environmentally beneficial projects and performance agreements in the policy?

PART 11 MULTIPLE CONTRAVENTIONS

Section 104A(8) of the Act enables the EPA to recover from a person a civil penalty in respect of multiple contraventions, provided they are not the result of the same conduct by the accused. Essentially, this is to prevent the accused from being penalised twice for the same conduct.

It is not unusual for the actions of an accused to amount to a breach of more than one provision of the Act. For example, by polluting a watercourse they may contravene a mandatory provision of the *Environment Protection (Water Quality) Policy 2003* and also cause 'material environmental harm' in contravention of s. 80 of the Act.

If a penalty is to be sought in relation to more than one contravention arising out of more than one distinct conduct by the accused, the EPA may elect to calculate the penalty either in relation to the most substantive offence alone or in relation to each contravention.

It is not practicable to split disputed from undisputed allegations, negotiating some then arguing the others before a court. Therefore, if one or more of the contraventions are disputed, or the accused agrees to negotiate some allegations but not others, the EPA may elect to withdraw from all negotiations and put all the alleged contraventions before the courts for determination.

Alternatively, if the EPA believes that an adequate penalty can be negotiated in relation to the more substantive offence, it may elect to take no further action in relation to the lesser contravention(s) and resolve the matter by way of agreement.

It should be noted that when one matter is resolved by way of negotiation, the EPA would not be prohibited from launching civil or criminal action in relation to other distinct contraventions not featuring in prior negotiations.

PART 12 MULTIPLE ACCUSED

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

Where there is more than one accused, a decision to negotiate a civil penalty in respect of one or more individuals will occur on a case-by-case basis. Joint negotiations will depend upon the willingness of each accused to participate in negotiations, as well as on other factors, including whether one or more of the accused has a record of significant prior offending, the level of culpability of the parties, and the potential for legal action between them.

The policy contains excerpts from legislation relating to the liability of company directors in respect of contraventions committed by employees and officers of their company, and the imputation of the state of mind of such employees and officers. This has been included in the policy to alert company directors to their potential liability under the Act and possible involvement in the civil penalty negotiations process. In such circumstances the level of knowledge, diligence and oversight demonstrated by a company director may determine whether they are eligible to participate in negotiations, and may affect the level of penalty proposed.

While refusal by one accused to participate in civil penalty negotiations will not necessarily prevent another from participating, in some circumstances the EPA may elect not to negotiate and put all accused before the court, particularly where there is dispute as to which party was substantially responsible for the contravention.

PART 13 ADMISSIBILITY OF EVIDENCE AND CONFIDENTIALITY

The Act affixes a limited degree of confidentiality to matters discussed during civil penalty negotiations. Unlike other mediation and dispute resolution forums in the legal system, there is no blanket restriction on the use of information disclosed during the course of negotiations. The EPA will be bound to keep records of negotiations and potentially disclose such records in accordance with prevailing legislative and common law requirements.

To prevent any confusion by the accused as to what level of confidentiality applies to specific information furnished during the course of negotiations, a copy of the intended terms of the negotiation, incorporating information about matters of confidentiality, will be sent to the accused with the written invitation to participate in negotiations (Form 1).

One limitation contained in the Act which governs the use of information furnished during negotiations appears in s. 104A(11). It 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 relating 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 accused may not be entitled to benefit from the confidentiality afforded by this provision.

It should also be noted that s. 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 accused should be aware that the EPA may also be required to disclose any information or documents furnished during the course of negotiations in accordance with other statutory or common law requirements, for example the requirements of 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 CSO has been provided an opportunity to assess the evidence. The EPA will then send an invitation to the accused together with notice of the terms of the negotiation (Form 1). Negotiations will not commence until the EPA has received a written response from the accused indicating their willingness to participate in negotiations (Form 2). This process is to prevent any confusion as to when negotiations have started and confidentiality

provisions apply. This will not only prevent negotiations occurring without full consideration of the facts, but also prevent information from being ‘laundered’ through the negotiations process.

If negotiations cease at the request of the accused, any further information disclosed from that point may be deemed admissible in any subsequent court proceedings in accordance with statutory and common law rules of admissibility.

Discovery and disclosure

The Act does not impose any specific requirements on the EPA or the accused to disclose information during the course of negotiations. Materials produced and information furnished during negotiations will largely occur at the discretion of the parties involved. The disclosure and discovery of documents during the negotiations process may also occur in accordance with other statutory requirements, for example a court order for pre-action discovery or other legislative requirement. An accused may also be required to continue to furnish information to the EPA in accordance with the requirements of their licence or the Act, for example an information discovery order.

The EPA recognises that the accused should be afforded the opportunity to properly consider any allegations advanced against them. For this reason, an overview of the allegations will accompany the invitation to the accused to participate in negotiations (Form 1). The EPA may also make available to the accused any additional information underpinning the allegations to enable the accused to consider, rebut or make any further submissions in relation to them. The factual basis of an allegation to which an accused and the EPA agree to negotiate a penalty may be reduced to writing during the course of the negotiations and published in the final penalty agreement or on the EPA’s public register.

If the accused refuses to participate in negotiations, proceedings for a civil penalty or criminal prosecution may be commenced, where established rules of discovery and disclosure will apply.

Publication of the outcome of civil penalty negotiations

In accordance with s. 109 of the Act, the EPA maintains a public register which records, among other matters, details of civil court proceedings, prosecutions and other enforcement actions. The section states in part:

109—Public register

- (1) The Authority must keep a register in accordance with this section.*
- (2) The register is to be in a form determined by the Authority.*
- (3) The Authority must record in the register the following:*
 - (a) ...*
 - (h) details of serious or material environmental harm caused or threatened in the course of an activity that come to the notice of the Authority;*
 - (i) details of any environment protection order, clean-up order or clean-up authorisation issued under this Act and of any consequent action taken by the person to whom such an order was issued or by the Authority or another administering agency;*

- (j) *details of prosecutions and other enforcement action under this Act;*
- (k) *details of civil proceedings before the Environment, Resources and Development Court under this Act;*
- (l) *such other information as is prescribed.'*

Amendments to s. 109 are due to take effect on 1 July 2006, requiring the following additional information to be placed on the public register:

- 109(3)(ka) *'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;'*

A balance needs to be struck between the timely provision of information to the community to ensure transparency versus the rights of the accused to retain their good character until an allegation has been finalised. The question arises as to when the EPA should place details of a negotiation or proposed negotiation on the public register.

At this time it is proposed that details of a contravention, or the negotiated or court imposed penalty, will not be published on the EPA's public register until negotiations have been finalised or the matter has been determined by a court.

In a similar manner to publication orders imposed by the court as part of sentencing pursuant to s. 133(1)c of the Act, the EPA may, as a term of the negotiated agreement, seek to publish details of the alleged contravention in the public press.

Question

18. At what time do you believe the EPA should place details of a civil penalty negotiation on the public register?

Third party involvement in the negotiations process

Third parties, including those affected directly or indirectly by an alleged contravention, will not be able to participate in negotiations. Third parties will, however, have a voice in the process through the submission of witness statements gathered during the investigation stage. These statements may be considered in the brief of evidence being assessed for determination of a penalty.

The negotiated civil penalty system is not designed for those affected by environmental contraventions to seek compensation. While the impact of a contravention will be considered when determining whether a matter should be negotiated or when adjusting a penalty in recognition of the accused's willingness to pay compensation, the policy cannot be used to force the accused to pay such compensation.

If significant compensation is likely to be due to third parties affected by a contravention, the EPA may choose not to negotiate a civil penalty but put the matter before the court, where an order for compensation may be made at the conclusion of the proceedings.

Nothing in the conduct of civil penalty negotiations will affect the ability of a third party to take their own action against an accused for compensation, including an action for the recovery of damages under s. 104(1)(e) of the Act.

In assessing a level of penalty, consideration will be given to the statements of affected parties. This will occur in parts 2 and 3 of the policy, when the levels of impact and risk associated with the contravention are measured.

Question

19. Do you believe that third parties should have a greater level of involvement in the negotiation of civil penalties? If so, how?

PART 14 SIGN-OFF

Upon agreement being reached between the EPA and the accused as to the level of monetary penalty to be paid and associated terms, a binding agreement will be reduced to writing for signing by both parties.

The proposed agreement will be considered by the Board of the EPA and, if approved, signed by them or a delegate on their behalf.

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 agreement on the organisation's behalf. The EPA may also seek some other financial assurance or guarantee from a corporation or parties representing it in negotiations.

If no agreement can be reached in relation to the level of penalty or associated terms, or if the accused elects to withdraw from negotiations, the EPA may apply to the Environment Resources and Development Court to commence criminal proceedings or seek the accused's approval to commence proceedings for a court imposed civil penalty.

Question

20. Who do you believe should approve negotiated civil penalty agreements on behalf of the EPA?

PART 15 TIMEFRAMES FOR NEGOTIATIONS

One of the primary objectives of the negotiated civil penalties system is to hold offenders accountable for their actions in a prompt and effective manner, to bring resolution for those involved. For this reason the EPA proposes a number of timeframes in which negotiations should occur, not to restrict submissions or stifle meaningful discussion, but to prevent matters 'dragging on' for considerable periods.

Upon being served a notice of intention to negotiate a civil penalty (Form 1), an accused person has 21 days to respond to the notice on the prescribed form (Form 2). If the accused 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 accused agrees to participate in the negotiations process, they have 21 days from receipt of the Form 1 to make written submission to the EPA on matters that they wish the EPA to take into account when determining a civil penalty. Further discussions may then occur between the accused and the EPA on matters submitted by the accused.

Negotiations for a civil penalty must conclude within three months from the date of service of the notice of intention (Form 1) on the accused. The EPA may allow an additional month to enable further consideration of material furnished by the accused during the three months, but will not consider any new issues raised after that time.

Question

21. Do you agree with the proposed timeframes? If not, why?

PART 16 PAYMENT TERMS

The EPA and the accused may negotiate suitable payment terms which will be formalised by way of a binding agreement and, where necessary, underpinned by further personal guarantees or security.

While the accused's ability to pay is not a factor considered when determining penalty, the EPA recognises the effect that the imposition of a large lump sum penalty may have on an accused. In circumstances where a large penalty has the potential to cause extreme financial hardship to an accused, possibly hampering their ability to upgrade the infrastructure responsible for the contravention, the EPA may agree to spread penalty payments over a period of time, in much the same manner as the court may grant a defendant 'time to pay'.

In circumstances where the accused requests time to pay, the EPA may require them to produce evidence of their financial position, or seek some other form of financial assurance or guarantee from the organisation or individual.

Question

22. Do you believe the EPA should provide payment options? If so, under what circumstances?

FORM OF THE POLICY

The policy seeks to provide a more thorough process for the determination of negotiated civil penalties than is provided in the Act.

There are a number of potential options for the form of the policy, including (but not limited to) a policy or guideline approved by the Board of the EPA, the Minister for the Environment and Conservation or Parliamentary Committee; or formalisation of the policy in the form of a regulation.

The final question raised in this discussion paper relates to what form the policy should take.

Question

23. What form should the final policy take?

APPENDIX ONE: DRAFT CALCULATIONS POLICY FOR THE NEGOTIATION OF CIVIL PENALTIES UNDER THE ENVIRONMENT PROTECTION ACT 1993

May 2006

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INTRODUCTION

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

This draft Civil Penalties Calculations Policy ('the policy') has been developed to provide a structure for the EPA to calculate appropriate levels of monetary penalty through the negotiations process.

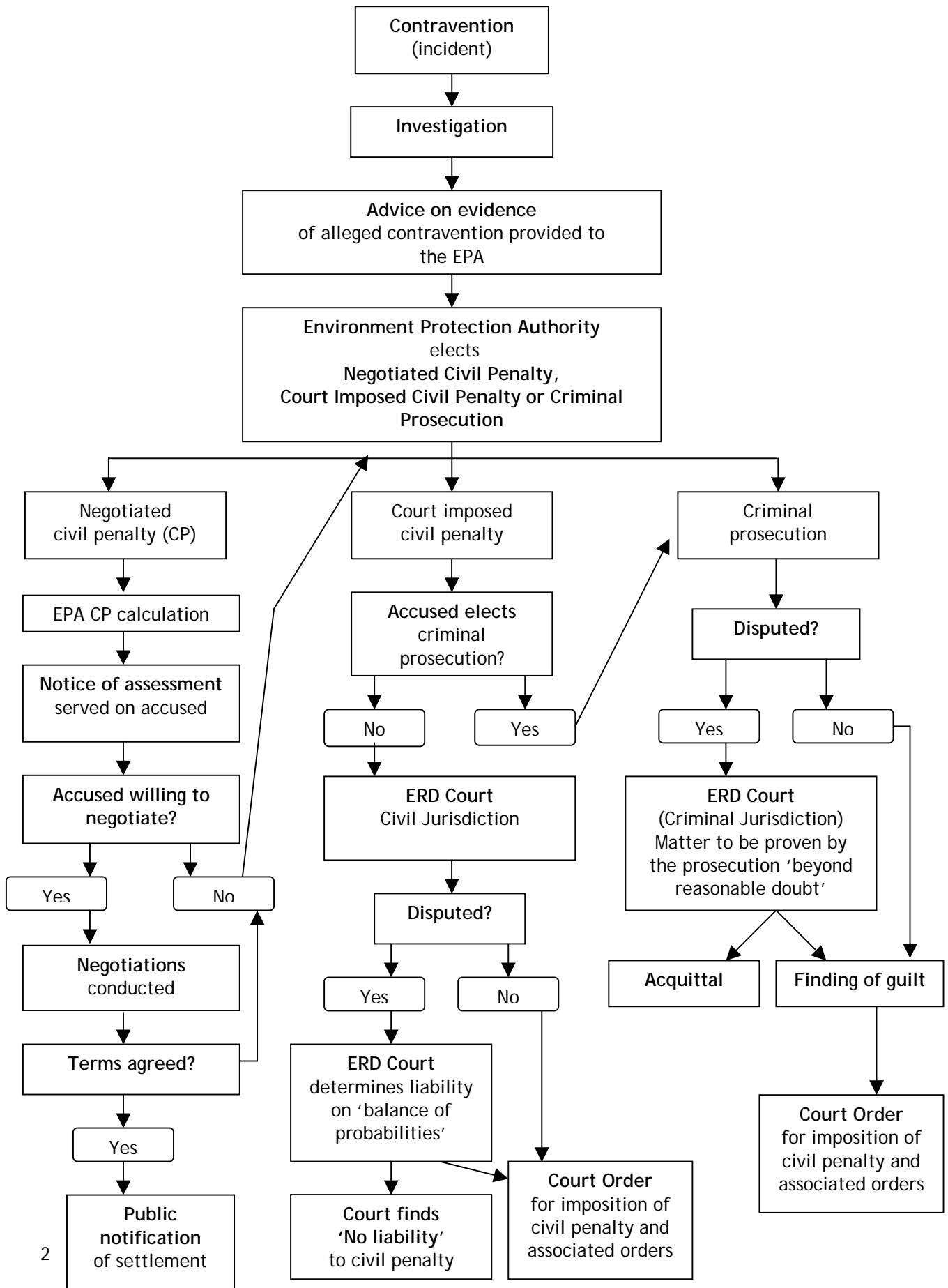
The policy seeks to provide a framework for calculating fair and consistent penalty amounts while balancing the need for deterrence, accountability and equity. Participation in negotiations is voluntary and provides the accused with the opportunity to make submissions on matters that they believe should be taken into consideration when determining a penalty.

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

If the accused 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 for a civil penalty, or commence a criminal prosecution. The processes in which a penalty may be imposed in respect of a contravention are illustrated in figure 1: the negotiated civil penalty process, the court imposed civil penalty process and 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 *Environment Protection Act 1993* 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.

'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 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.

'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.

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

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.

1.1 Seriousness of the contravention

When considering the seriousness of the alleged contravention, the EPA will consider the impact 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 knowledge, willfulness or recklessness demonstrated by the accused, their employees and agents at the time of the contravention
- the length of time the accused allowed the contravention to continue
- the impact that the contravention has or may have on the regulatory system
- whether an appropriate level of penalty is available under the negotiations system
- the need to deter others in the community from committing the same or similar contravention
- matters of public interest
- any other relevant factor.

1.2 Accused's record of offending

When assessing the accused's prior record of offending, the EPA will consider their record of criminal convictions within the State of South Australia and any other Australian State or Territory.

Additionally, the EPA may have regard to any other civil or administrative penalties imposed on the accused for an act of a similar kind within Australia. In making this assessment the EPA may consider whether the prior offence was of the same or similar nature, the passage of time since the prior offence and the conduct of the accused since.

In making this assessment, consideration will also be given to whether the accused, if a corporation, has undergone a name change 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 accused acted with a particular state of mind at the time the contravention occurred. An example of this may be found in s. 45(5) of the Act, which does not require the EPA to show that the accused 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 s. 80(1) of the Act, which requires the EPA to show that the accused acted 'intentionally or recklessly at the time, causing material environment

harm'. A list of the types of strict liability offences that the EPA may seek to negotiate civil penalty in relation to is provided in this policy (attachment D).

When determining whether a matter should be dealt with by way of negotiated civil penalty, the EPA will have regard to the *Environment Protection Authority Guideline for Compliance and Enforcement*. In general terms, these guidelines outline an escalating approach to regulation by the EPA. They contain a number of measures including the issue of warnings, expiation notices and orders that may be applied by the EPA in order to achieve compliance.

2 CALCULATING A NEGOTIATED CIVIL PENALTY

Section 104A specifies the matters to which a court shall have regard when assessing a civil penalty amount, stating:

- '(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 into this policy to enable the EPA to negotiate civil penalty amounts that are consistent with what the court would impose for the contravention. The fundamental difference is that the court has the ability to *impose* a civil penalty upon an accused with regard to 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 in relation to a contravention, and offer little guidance to appropriate penalties for lower 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. Contraventions of that nature will not be dealt with under the negotiated civil penalty system and will continue to be referred to the court for determination.

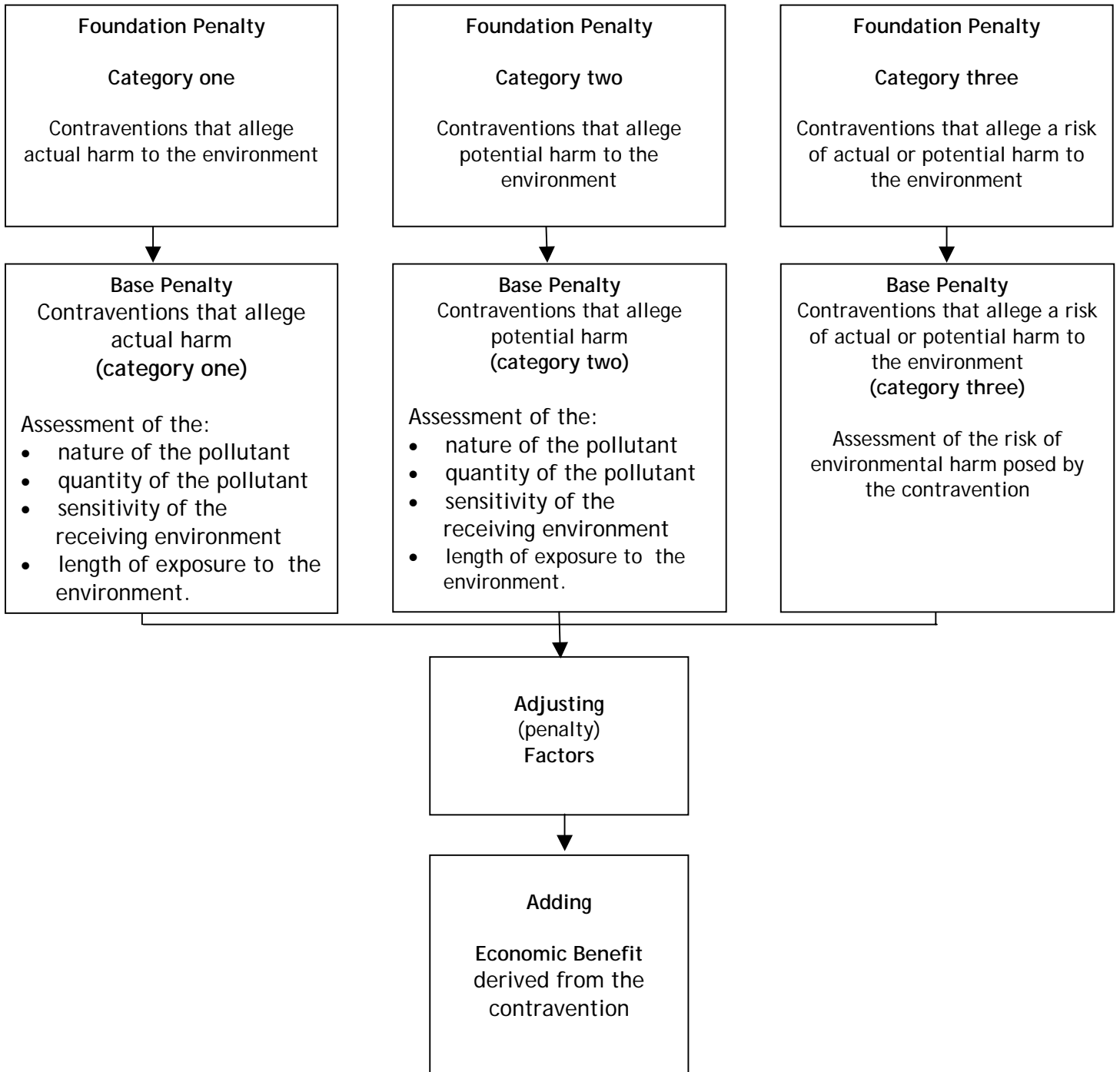
In order to provide consistency with the level of penalty imposed by sentencing courts for lower level contraventions, the starting point (or 'foundation penalty') for calculating a civil penalty will be a percentage of the maximum penalty prescribed for the offence. The percentages are 50% of the maximum penalty for contraventions resulting in actual harm to the environment ('category one') and 25% of the maximum for those contraventions resulting in 'potential harm' ('category two') or risk of harm to the environment ('category three').

The civil penalty calculation equation consists of 4 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 accused together with an invitation to participate in negotiations. If the accused elects to participate in negotiations, they may make written submissions on matters to be taken into account for the purpose of adjusting the penalty. Alternatively, the accused may elect not to participate in the negotiations process, at which time 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. It involves placing the contravention into one of three categories:

- contraventions that allege actual harm to the environment
- contraventions that allege potential harm to the environment
- contraventions that do not allege any actual or potential harm to the environment, but pose a risk of harm.

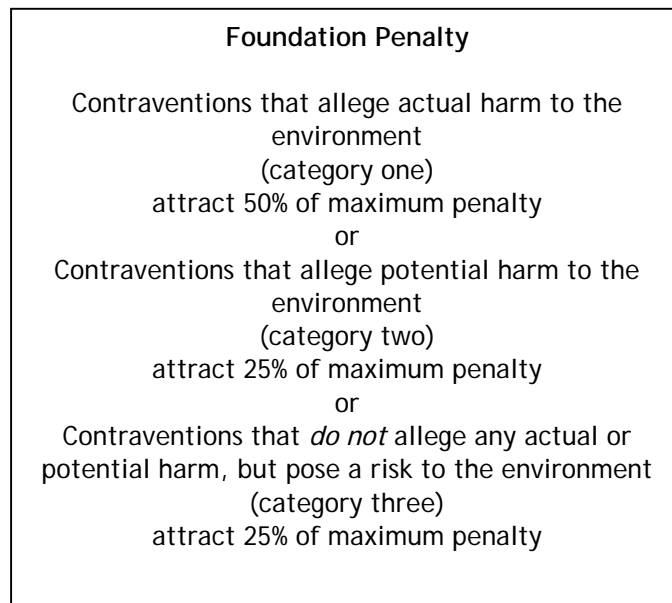


Figure 3 Foundation Penalty

The foundation penalty is a pre-determined percentage of the maximum penalty prescribed for the contravention in the Act.

‘Category one’ contraventions are those that allege actual harm to the environment. In general terms these will be contraventions that involve a pollution release and some measurable impact on the environment¹. They attract a foundation penalty of 50% of the maximum penalty prescribed in the Act for the offence.

‘Category two’ contraventions are those that allege ‘potential harm’ to the environment. In general terms these will often be contraventions 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 (SO₂) to the atmosphere. These contraventions attract a foundation penalty of 25% of the maximum penalty prescribed in the Act for the offence.

¹ Including exceedence of specified criteria, for example the Water Quality Criteria—Schedule 2 of the *Environment Protection (Water Quality) Policy 2003*

'Category three' contraventions are those that *do not* allege any actual or potential harm to the environment but pose a risk of such harm occurring. Most often these will be contraventions 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). These contraventions will attract a foundation penalty of 25% of the maximum penalty prescribed in the Act for the offence. Other examples of contraventions of this type may include failure to submit monitoring data, adequately train staff or lodge monthly weighbridge returns.

Distinction has been made between these three categories of offences to enable a penalty to be calculated that reflects the impact of the contravention on the environment. The penalty also recognises that while a contravention 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 determination of 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 accused. In other circumstances it may be increased to reflect a level of economic benefit derived by the accused in respect 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 level of penalty to be negotiated (i.e. 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.

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 50% for contraventions involving actual harm to the environment or 25% for contraventions that allege 'potential' harm or risk of such harm. The resulting figure is the foundation penalty (B).

Table 1 Foundation penalty calculations

<i>FOUNDATION PENALTY CALCULATIONS</i>	
<p>Insert the details of the provision contravened (below) and place the maximum penalty prescribed for that offence in the column (A)</p> <p><i>Section/provision contravened:.....</i></p> <p><i>.....</i></p> <p><i>(including section, subsection or clause number)</i></p>	<p>\$</p> <p>(A)</p> <p>(maximum penalty)</p>
<p>i) Category one contraventions involving actual harm to the environment, multiply the maximum penalty prescribed for the offence by 50%</p> <p>or</p> <p>ii) Category two contraventions involving potential harm to the environment, multiply the maximum penalty prescribed for the offence by 25%</p> <p>or</p> <p>iii) Category three contraventions that do not allege any actual or potential harm to the environment, multiply the maximum penalty by 25%</p>	<p>multiply (A) by</p> <p>50%</p> <p>or</p> <p>25%</p> <p>or</p> <p>25%</p> <p>(delete as appropriate)</p>
Foundation penalty	<p>\$</p> <p>(B)</p>

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

4 CALCULATING THE BASE PENALTY

Further adjustment to the foundation penalty (see part 3) may then be made with regard to the nature of the pollutant released, its quantity, toxicity and length of exposure to the environment for category one and two offences and risk of harm to the environment for category three offences. This will determine the base penalty (see table 2).

When determining an appropriate base penalty, consideration will be given to varying factors depending on the nature of the contravention. For example, the factors considered for an 'administrative' contravention will be different from those considered for a contravention involving an actual pollution release.

4.1 What is 'harm'?

The *Environment Protection Act 1993* 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 as harm that which is caused directly or indirectly by a pollutant alone or from its combined effects with other factors. For the purpose of calculating 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 the calculations 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 accused may furnish additional evidence for consideration by the EPA. The EPA 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 s. 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 in reference to allegations of a more serious nature.

When assessing the potential harm associated with a pollution release, in addition to considering the available scientific evidence, the EPA may take into account the likely impact 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 a pollution release occurs but the actual impact is difficult to measure due to the circumstances or nature of the substance released, scientific evidence may be relied upon 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 identifying 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, the Australian standard for risk assessment² and EPA protocols for evaluating risk will be applied.

² Standards Australia *Risk Management Guidelines Companion to AS/NZS 4360:2004 and Environmental Risk Management Principles and Process HB203:2004*

5 CATEGORIES ONE AND TWO—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 provide 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 exceedence of emission limits specified in an authorisation through to causing ‘material environmental harm’. The level of impact on 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, it is recognised that there will often be variations in circumstances and levels of impact that may fall within the scope of each of these offences (e.g. causing ‘material environmental harm’ in contravention of s. 80 of the Act).

To address the broad 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 impact that a contravention has or is likely to have.

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

- a.* the nature and toxicity of the pollutant
- b.* the quantity or level of the pollutant
- c.* the nature and sensitivity of the receiving environment
- d.* the duration of exposure of the pollutant in the environment.

These factors feature in table 2, where a numerical rating is applied under three broad headings: minor, moderate and major.

An assessment of these individual factors should not occur in isolation—there will often be a need to assess each factor 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.

a) Nature and toxicity of the pollutant

Principally, when making an assessment as to 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*³, 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, 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 to this policy.

The EPA may also take into account any submissions made by the accused 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 policy.

Minor—Example: 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 algae 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—Example: 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,

³ Available online at <www.deh.gov.au/chemicals-guide>

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—Example: 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 provided that the effect of the toxicity of a particular 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.

b) 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. An example of such limits is the noise levels specified in the *Environment Protection (Noise) Policy 2003*. An assessment of minor, moderate and major noise level exceedances can be made with direct reference to such defined limits.

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 of 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 for the purpose of making such an assessment, for example the levels specified in NPI data relating to emissions to the atmosphere.

As discussed above, the quantity or level of 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 flowing into the stormwater system and, in turn, 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 substantive spill of chemical B, for example 1,000 litres, onto a roadway and then flowing into a watercourse via a stormwater system poses a significantly greater threat to the environment. The larger quantities of the substance in the watercourse will have a significantly greater actual or potential 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 occur 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.

c) Nature and sensitivity of the receiving environment

It is recognised that different environments will have varying sensitivities to different pollutants. As with the factors discussed above, the sensitivity of a receiving environment will often need to be assessed with direct regard to the nature, toxicity, quantity and length of exposure to the pollutant released.

For the purposes of this policy, the nature of the receiving environment relates to broader physical aspects, for example whether the pollutant was released into a small freshwater stream or an ocean, or into 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 available scientific evidence contained within the brief of evidence. In addition, the EPA may consider information furnished by the accused, or may consult other relevant scientific publications, for example the ANZECC water quality guidelines for the protection of cultured fish, molluscs and crustaceans⁴.

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

⁴ ANZECC *National Water Quality Management Strategy*, Ch. 4.4 'Aquaculture for human consumption', Australian and New Zealand Environment and Conservation Council, October 2000

Minor

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

Moderate

The spillage of 200 litres of chemical B onto a concrete heavy-vehicle loading area, and then flowing into a nearby stream carrying moderate freshwater flows. These natural flows would provide dilution of the pollutant to the point that there would be little evidence of impact caused to bird, fish or other aquatic life.

Major

The spillage of 200 litres of chemical B onto a premises, resulting in the escape of fumes through a ventilation system and leading to the evacuation of persons experiencing headaches, vomiting, and throat and nose irritation, would constitute a significantly greater actual or potential threat.

d) Duration of exposure of the pollutant in the environment

The length of exposure of the environment to the pollutant will often determine the extent of the impact caused. Again, this factor will be substantively determined from consideration of the scientific and technical evidence contained in the brief, together with other established scientific research and guidelines.

Again, assessment of this factor should not occur 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

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

Moderate

A spillage of the same quantity of chemical B in the premises which remains unattended to for 2 hours, resulting in people experiencing dizziness and significant eye and throat irritation, and requiring evacuation of an adjoining public premises.

Major

A spillage of the same quantity of chemical B in the same premises which remains unattended to for 6 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 impacts, 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 contravention alleges actual or potential environmental harm

Degree of actual or potential harm to the environment <i>(including people)</i> (If no actual or potential environmental harm was caused, proceed to table 3)				
Circle one number in each line	Minor	Moderate	Major	Factor subtotal
Nature of the pollutant*	1	2	3	
Quantity/level of pollutant released*	1	2	3	
Sensitivity of the receiving environment* (including human population and broader environment)	1	2	3	
Duration of exposure to the environment*	1	2	3	
Points total				(max 12 points)
Points conversion to a percentage multiply points total by 100 divide by 12				$\begin{array}{r} \times 100 \\ = \underline{\hspace{2cm}} \\ \div 12 \end{array}$
= Percentage total (C) (rounded down to nearest whole number)				= % (C)
Insert the Foundation Penalty (B) from table 1				X \$ (B)
To determine the Base Penalty multiply (B) by (C) BASE PENALTY (D)				= \$ (D)
Proceed to table 4 and copy the Base Penalty (D) to the space provided				

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

6 CATEGORY THREE – CONTRAVENTIONS THAT DO NOT ALLEGE ANY ACTUAL OR POTENTIAL HARM TO THE ENVIRONMENT

Not all contraventions of the Act involve the release of pollution to the environment. The Act, and licences issued in accordance with it, often impose a number of requirements on individuals carrying out activities that have the potential to cause an adverse impact on the environment. These requirements are aimed at reducing 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, they may significantly increase the risk of such an occurrence.

For the purpose of calculating a penalty under this policy, an assessment of risk involves identifying 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.

The role of this policy is not to determine the level of risk associated with a contravention. That information should be provided in the form of expert witness statements provided in the brief of evidence being considered. These assessments will need to comply with recognised Australian standards for environmental risk assessment⁵. During the course of the negotiations process, the accused may furnish additional information or reports from other suitably qualified experts with regard to the level of risk associated with a contravention. These will be considered when making adjustments to the proposed penalty (table 3).

⁵ Standards Australia *Risk Management Guidelines Companion to AS/NZS 4360:2004 and Environmental Risk Management Principles and process HB203:2004*

Table 3 Assessment of risk associated with contraventions that do not allege actual or potential harm to the environment (category three)

<i>CONTRAVENTIONS THAT DO NOT ALLEGE ENVIRONMENTAL HARM</i>					
(If table 2 has been completed, DO NOT complete this table and proceed to table 4)					
Level of risk of environmental harm arising from the contravention	Nil*	Minor	Moderate	Major	Points total
	0	1	2	3	
Conversion of points total to a percentage Multiply the points total by 100 Divide by 3					$= \frac{\text{ } \times 100}{\div 3}$
Total (C) (rounded down to nearest whole number)					= % (C)
Insert the Foundation Penalty (B) from table 1					x \$ (B)
To determine the Base Penalty multiply (B) by (C) BASE PENALTY (D)					= \$ (D)
Proceed to table 4 and copy the Base Penalty (D) to the space provided					

* 'Nil' risk includes risk assessed below the threshold of concern, i.e. minor risk with low probability of occurrence or insignificant environmental consequence.

7 ADJUSTING FACTORS

To assist the EPA and the accused in negotiating an appropriate level of civil penalty, the accused will be 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 (table 4):

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

7.1 The accused's history of compliance

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

Section 104A(6) of the Act states that the court, when determining penalty, shall have regard to, among other things, 'whether the accused 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 compliance history of the accused. If the accused has had no previous enforcement action, civil penalty or conviction imposed in relation to a contravention of a same or similar nature, the accused may benefit from a discount of the base penalty.

If the accused has had prior enforcement action taken against them, 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 accused 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 The practical measures taken by the accused 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 accused to prevent a contravention from occurring.

Indeed, in some circumstances where the accused 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 s. 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 accused prior to the incident which were aimed at preventing 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 accused after the contravention

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

In circumstances where the accused 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 conducted 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 accused 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 statutory, 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 and the degree of cooperation demonstrated by the accused

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

An accused may negotiate a reduction in penalty in circumstances where they can show they notified the EPA of a pollution incident in a timely and appropriate manner and then assisted the EPA with their inquiries 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 accused. No reductions will be made where the information provided by the accused is incorrect or misleading in nature.

While it is recognised that an accused may need time to conduct preliminary investigations 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 accused, by failing to promptly report an incident, breaches their EPA licence conditions or s. 83 of the Act, the accused may face a separate prosecution for this failure.

In addition to the timeliness of the notification, consideration will also be given to the level of cooperation provided by the accused to the EPA during the course of clean-up operations and investigations into the incident.

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

7.5 The degree of public contrition demonstrated by the accused

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

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

Reductions on this basis may also be made as a reflection of the accused's willingness to comply with the EPA's request to publish an apology, in a similar manner to that available to the court pursuant to s. 133(1)c of the Act.

7.6 Other relevant factors

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

Table 4 Adjusting factors

<i>ADJUSTING FACTOR</i>	%
(Insert a reduction of 0-10 percentage points for each of the following)	decrease
The accused's history of compliance <i>(max of 10% points reduction)</i>	
The preventative measures by the accused 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 degree of cooperation demonstrated by the accused <i>(max of 10% points reduction)</i>	
The degree of public contrition demonstrated by the accused <i>(max of 10% points reduction)</i>	
Other relevant factors <i>(max of 10% points reduction)</i>	
Total percentage points reduction (E)	%
	(E)
Insert Base Penalty (D) from table 2 or 3	x \$
	(D)
Reduction expressed in \$ (F) Multiply the Base Penalty (D) by the total % reduction (E)	\$
	(F)
ADJUSTED BASE PENALTY (G) Subtract the Reduction (F) from the Base Penalty (D)	\$
	(G)
Copy the Adjusted Base Penalty (G) to the Economic Benefit Table (table 5)	

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 the appropriate level of civil penalty, the EPA will consider the amount of economic benefit that the accused has derived from the contravention. Economic benefits can either be passive or active in nature.

Passive economic benefit usually consists of profits that were made or could have been made by alternate use of funds that should have been expended to achieve compliance, for example interest earned on money that should have been spent on pollution control equipment. If, upon enforcement action, the accused 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 will depend on the amount of money that should have been spent, the period of time the costs were avoided or delayed, and the prevailing market interest rate.

Active economic benefits usually consist of any increase in profits or reduction in costs that are 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 accused, 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 accused.

Table 5 Economic benefit

<i>ADDING ECONOMIC BENEFIT</i>	
Insert Adjusted Base Penalty (G) from table 4	\$ (G)
Add Economic Benefit (H) derived from contravention	+ \$ (H)
FINAL NEGOTIATED CIVIL PENALTY	\$

9 COST RECOVERY

The costs associated with cleaning up or rectifying the damage caused by pollution, investigation of 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 s. 104(1), cost recovery provisions contained in s. 135, and cost recovery provisions relating specifically to Clean Up and Environment Protection Orders contained in ss. 103 and 95.

However, as the negotiated civil penalties system is intended to provide an alternate avenue for resolving matters without resorting to court proceedings, an opportunity may be provided during the negotiations process to come to an agreement for 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 as to the appropriate level of cost reimbursement will not necessarily prevent the resolution of matters by way of negotiated civil penalty. However, in circumstances where it is likely that court proceedings need to be initiated for the purpose of cost recovery, the EPA may elect not to negotiate a civil penalty in respect of a contravention.

In circumstances where a negotiated civil penalty is agreed without reference to the issue of 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 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 another party from making a claim against the accused for the recovery of costs, damages or other compensation available at law.

10 ENVIRONMENTALLY BENEFICIAL PROJECTS AND PERFORMANCE AGREEMENTS

Section 133(1) of the Act empowers the court to make an order for a defendant to carry out a specified project for the restoration or enhancement of the environment in a public place. This may be ordered in addition to any financial penalty the court wishes to impose for an offence, and may be considered separate from any remediation requirements imposed by the EPA or the court in relation to the incident.

Such a provision is not available to the EPA when negotiating a civil penalty. However, the EPA may seek to negotiate a similar environmentally beneficial outcome by encouraging the accused to enter into an Environment Performance Agreement pursuant to s. 59 of the Act, and may reduce the negotiated civil penalty on a dollar for dollar basis according to the amount committed to the agreement.

To ensure that such agreements are fulfilled, the EPA may require that the terms specify how projects are to be carried out, who is to carry out the project and in what timeframe. Additionally, the agreement will specify what remedies are available to the EPA (including bonds, financial assurances etc.) if the terms of the agreement are not fulfilled.

11 MULTIPLE CONTRAVENTIONS

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 accused. 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 in relation to both a primary pollution offence (e.g. the overflow of wastewater into a watercourse) and a second distinct offence (e.g. failing to report the incident), as these two contraventions arise from different 'conduct' by the accused.

The EPA cannot seek to recover more than one penalty in respect of a single conduct by the accused, for example causing material environmental harm by the release of wastewater and breaching the Environment Protection (Water Quality) Policy through the same release of wastewater.

If a penalty is to be sought in relation to more than one contravention, not arising out of the same conduct by the accused, the EPA may elect to calculate the penalty either in relation to the most substantive offence only or in relation to each contravention.

If one or more of the contraventions are in dispute, or the accused agrees to negotiate some allegations but not others, the EPA may elect to withdraw from all negotiations and put all allegations before the court for determination.

The negotiation of a penalty in respect of an offence will not prohibit the EPA from launching civil or criminal action in relation to a distinct contravention arising out of different conduct by the accused.

12 MULTIPLE ACCUSED

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 accused persons, the EPA is entitled to seek a penalty from each individual rather than just a proportion of the maximum penalty according to the number of potential defendants found liable.

12.1 Liability of company directors to a civil penalty

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

As of 1 July 2006, s. 127 of the Act regarding the *Imputation of conduct or state of mind of officer, employee etc* will be amended to make reference to civil penalty proceedings.

13 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 s. 104A of the Act does not require the accused to disclose information relating to the alleged contravention during the course of negotiations, production of that material will be largely at the discretion of the accused. 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 accused should be provided 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 accused to participate in negotiations (Form 1—attachment C). The EPA may also make available to the accused any additional information to enable the accused to consider the allegations and make submissions in relation to them. The factual basis of an allegation to which the accused 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 accused refuses to participate in negotiations, 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 also accompany the written invitation to participate in negotiations sent to the accused (Form 1).

Included in this notice will be advice to the accused that information furnished during civil penalty negotiations is deemed inadmissible in any subsequent *criminal* proceedings, in accordance with s. 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 relating 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 accused may not be entitled to benefit from the confidentiality afforded by this provision. While s. 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 accused should be aware that the EPA may also be required to disclose any 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 an opportunity to assess the evidence.

To eliminate any confusion as to when negotiations have commenced, the EPA will advise the accused of its intention to resolve a matter by way of civil penalty negotiation by service of a 'Form 1' on the accused. Negotiations will not commence until the EPA has received a written response, in the form of a 'Form 2' (attachment C) from the accused indicating their willingness to participate in negotiations. Preventing premature negotiations protects both parties from entering into negotiations without full knowledge of the facts forming the allegation.

If negotiations cease at the request of the accused, any further information disclosed from that point may be deemed admissible in any subsequent court proceedings in accordance with statutory and common law rules of admissibility.

In accordance with s. 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. 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'*

Additionally, the EPA may seek to negotiate, as a condition of the civil penalty settlement, that the accused consent to publishing details of the contravention together with the terms of the agreement in the public press. Such a requirement would reflect the power of the court to require an accused to publish details of their offending in accordance with s. 133(1)c of the Act.

14 SIGN-OFF

Upon agreement being reached between the EPA and the accused as to the level of 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 considered by the Board of the EPA and signed by the Board or a delegate on their behalf. Details of the agreement will be published on the EPA public register in accordance with the requirements of s. 109 of the Act.

If no agreement can be reached in relation to the level of penalty or associated terms within the requisite timeframes, or if the accused elects to withdraw from negotiations, the EPA may apply to the Environment Resources and Development Court to commence criminal proceedings or seek the accused's approval to initiate proceedings for a court imposed civil penalty.

15 TIMEFRAMES FOR NEGOTIATIONS

Upon being served a notice of intention to negotiate a civil penalty (Form 1), an accused person has 21 days to respond to the notice on the prescribed form (Form 2). If the accused 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 accused agrees to participate in the negotiations process, they have 21 days from receipt of the Form 1 to make written submission to the EPA on matters that they wish the EPA to take into account when determining a civil penalty. Further discussions may then occur between the accused and the EPA on matters submitted by the accused, and the EPA may allow further time for the accused to furnish evidence in support of those submissions.

Negotiations for a civil penalty must conclude within 3 months from the date of service of the notice of intention (Form 1) on the accused. The EPA may allow an additional month to enable further consideration of submissions and supporting evidence submitted during the 3 months, but will not consider any new material raised.

16 PAYMENT TERMS

The EPA may negotiate with the accused suitable payment terms that will be formalised by way of a binding agreement and subject to further proceedings in the event of default.

17 REVIEW OF POLICY

A review of this policy will commence on 1 July 2008.

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

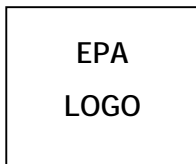
In determining the above factors the EPA may refer to national and international guidelines and standards including:

- 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)
- The Environment Protection (Noise) Policy 2004
- 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 2000
- South Australian EPA guideline for safe handling, reuse and disposal of bio-solids
- World Health Organization guidelines
- Australian New Zealand Food Standards Code (ANZFSC).

ATTACHMENT C—FORMS

Form 1—Notice of intention to negotiate a civil penalty

Form 2—Nomination to participate in civil penalty negotiations



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 *Calculations Policy for the Negotiation of Civil Penalties* provided with this form.

In accordance with the Calculations Policy, the EPA has considered the factual allegations presented to it and made a preliminary penalty determination of \$>insert preliminary penalty amount <.

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 participate in negotiations, you will be provided the opportunity to make submissions in relation to 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 Calculations Policy provided with this form.

Your opportunity to make submissions

Rear of Form 1

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 enclosed Nomination Form (Form 2). You have 21 days to return the 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 the negotiation period. The negotiation period will conclude 3 calendar months after the service of this notice (Form 1) on you.

Disclosure of information by you

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

The *Environment Protection Act 1993* contains specific provisions regarding 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.'*

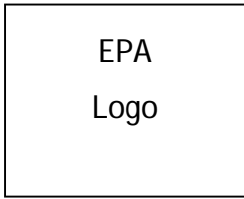
You should be aware that this limitation applies only to subsequent criminal proceedings relating to the matter being negotiated. If, during the course of negotiations, other contraventions are disclosed, the EPA may act on those contraventions and you may not be entitled to benefit from the confidentiality 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 mail-out
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:
(place a tick in one of the boxes below to indicate your preference)

No, I do not wish to participate in negotiations with the EPA for the purpose
of determining 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 for the
purpose of determining 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 for the
purpose of determining 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..... Date/...../.....
The accused (or authorised representative)

Position of representative.....

Please return this completed form to:
The Chief Executive
Environment Protection Authority
GPO Box 2607 Adelaide 5001
within 21 days of receipt.

ATTACHMENT D—‘STRICT LIABILITY’ CONTRAVENTIONS IN THE EP ACT

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

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

Strict liability offences in the EP Act	Maximum penalty amount
<p>Offence to contravene mandatory provisions of policy</p> <p>s. 34 (2) A person who contravenes a mandatory provision of an environment protection policy is guilty of an offence.</p> <p>(* category one, two or three contraventions)</p>	<p>Penalty:</p> <p>(a) For a category A offence if the offender</p> <p>(i) is a body corporate; \$120,000</p> <p>(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>Requirement for works approval</p> <p>s. 35 (1) Subject to this section, a person must not carry out works for</p> <p>(a) the construction or alteration of a building or structure for use for a prescribed activity of environmental significance; or</p> <p>(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 three contraventions)</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>Requirement for licence</p> <p>s. 36 A person must not undertake a prescribed activity</p>	<p>Penalty:</p> <p>If the offender is a body corporate;</p>

<p>of environmental significance except as authorised by an environmental authorisation in the form of a licence under this Part.</p> <p>(* category three contraventions)</p>	<p>\$120,000.</p> <p>If the offender is a natural person Division 1 fine; \$60,000</p>
<p>Conditions</p> <p>s. 45 (5) The holder of an environmental authorisation must not contravene a condition of the authorisation.</p> <p>(* category one, two or three contraventions)</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>Registration of environment performance agreements in relation to land</p> <p>s. 60 (4) 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 three contraventions)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p>Risk of escape of pollutant from land etc.</p> <p>s. 64B (2) A person who fails to comply with a notice under subsection (1) is guilty of an offence.</p> <p>(* category three contraventions)</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>Approvals, markings etc. required before sale or supply of beverages in containers</p> <p>s. 68 (1) A retailer must not sell a beverage in a container unless</p> <p>(a) the Authority has approved a class of containers to which the container belongs as category A containers or category B containers or both; and</p> <p>(b) the Authority has approved the refund marking for a class of containers to which the container belongs and the container bears the refund marking so approved.</p> <p>(* category three contraventions)</p>	<p>Penalty: Division 7 fine; \$2,000</p>
<p>Approvals, markings etc. required before sale or supply of beverages in containers</p> <p>s. 68 (2) A person must not</p> <p>(a) supply a beverage in a container to a retailer for</p>	<p>Penalty: Division 6 fine; \$4,000</p>

<p>sale by the retailer; or</p> <p><i>(b)</i> sell a beverage in a container for consumption, unless the requirements of subsection (1) have been satisfied in respect of a class of containers to which the container belongs.</p> <p>(* category three contraventions)</p>	
<p>Retailers to pay refund amounts for certain empty category A containers</p> <p>s. 70 (1) 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><i>(a)</i> to accept delivery of empty containers of that class that bear the refund marking approved by the Authority for containers of that class; or</p> <p><i>(b)</i> in respect of each such container, to pay to the person delivering that container the refund amount for that container.</p> <p>(* category three contraventions)</p>	<p>Penalty: Division 7 fine; \$2,000</p>
<p>Collection depots to pay refund amounts for certain empty category B containers</p> <p>s. 71 (1) Subject to subsection (2), the person operating or in charge of a collection depot must not refuse or fail, or permit a person acting on his or her behalf, to refuse or fail</p> <p><i>(a)</i> to accept delivery of empty category B containers of a class for which the collection depot is approved, being containers that bear the refund marking approved by the Authority for containers of that class; or</p> <p><i>(b)</i> in respect of each such container, to pay to the person delivering that container the refund amount for that container.</p> <p>(* category three contraventions)</p>	<p>Penalty: Division 7 fine; \$2,000</p>
<p>Certain containers prohibited</p> <p>s. 72 (3) A retailer must not sell a beverage in a prohibited container.</p> <p>(* category three contraventions)</p>	<p>Penalty: Division 7 fine; \$2,000</p>
<p>Certain containers prohibited</p> <p>s. 72 (4) A person must not</p>	<p>Penalty: Division 6 fine; \$4,000</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>(* category three contraventions)</p>	
<p>Prohibition of manufacture, use etc. of prescribed substances</p> <p>s. 75 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, a prescribed substance or any product containing a prescribed substance.</p> <p>(* category one, two or three contraventions)</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>Authority may prohibit sale or use of certain products</p> <p>s. 76 (3) A person who contravenes a notice under this section is guilty of an offence.</p> <p>(* category one, two or three contraventions)</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>Labelling of certain products</p> <p>s. 77 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 one, two or three contraventions)</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>Causing material environmental harm</p> <p>s. 80 (2) A person who by polluting the environment causes material environmental harm is guilty of an offence.</p> <p>(* category one, two or three contraventions)</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>Causing environmental nuisance</p> <p>s. 82 (2) A person who by polluting the environment causes an environmental nuisance is guilty of an</p>	<p>Penalty:</p> <p>If the offender is a body corporate Division 4 fine; \$15,000</p>

<p>offence. (* category one, two or three contraventions)</p>	<p>If the offender is a natural person Division 6 fine; \$4,000 Expiation fee: Division 6 fee \$300</p>
<p>Provisions relating to seizure s. 89 (2) Where a seizure order is issued under this Division, a person who removes or interferes with the thing to which the order relates without the approval of the Authority before an order is made under subsection (3) (b) in respect of the thing or the seizure order is discharged under subsection (3) (c) is guilty of an offence. (* category one, two or three contraventions)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p>Offence to hinder etc. authorised officers s. 90 (1) A person who (a) hinders or obstructs an authorised officer, or a person assisting an authorised officer, in the exercise of powers conferred by this Act; or (b) uses abusive, threatening or insulting language to an authorised officer, or a person assisting an authorised officer; or (c) refuses or fails to comply with a requirement or direction of an authorised officer under this Division; or (d) when required by an authorised officer under this Division to answer a question, refuses or fails to answer the question to the best of the person's knowledge, information and belief; or (e) falsely represents, by words or conduct, that he or she is an authorised officer, is guilty of an offence. (* category three contraventions)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p>Offence to hinder etc. authorised officers s. 90 (2) A person who assaults an authorised officer, or a person assisting an authorised officer in the exercise of powers under this Act, is guilty of an offence. (* category three contraventions)</p>	<p>Penalty: Division 5 fine or division 5 imprisonment, or both; \$8,000</p>
<p>Environment protection orders s. 93 (8) A person to whom an environment protection</p>	<p>Penalty: (a) If the order was issued for the</p>

<p>order is issued must comply with the order. (* category three contraventions)</p>	<p>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>s. 93 (9) A person must not hinder or obstruct a person complying with an environment protection order. (* category three contraventions)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p>Environment Protection Orders relating to the cessation of activity s. 93A (5) A person to whom an environment protection order is issued in accordance with this section must comply with the order. (* category one, two or three contraventions)</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>Registration of environment protection orders in relation to land s. 94 (5) An owner or occupier who fails to comply with subsection (4) (d) is guilty of an offence. (* category three contraventions)</p>	<p>Penalty: Division 6 fine; \$4,000</p>
<p>Information discovery orders s. 96 (5) A person to whom an information discovery order is issued must comply with the order. (* category three contraventions)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p>Clean-up orders s. 99 (8) A person to whom a clean-up order is issued must comply with the order. (* category three contraventions)</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>Registration of clean-up orders or clean-up authorisations in relation to land s. 101 (6) An owner or occupier who fails to comply</p>	<p>Penalty: Division 6 fine; \$4,000</p>

<p>with subsection (5) <i>(d)</i> is guilty of an offence. (* category three contraventions)</p>	
<p>False or misleading information s. 119 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. (* category three contraventions)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p>False reports calling for action by Authority s. 120A (1) 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 (a) the person knows the report is false; and (b) the report is of a kind that would reasonably call for investigation or action by the Authority. (* category three contraventions)</p>	<p>Penalty: Division 5 fine; \$8,000</p>
<p>Recovery of administrative and technical costs s. 135 (4) 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. (* category three contraventions)</p>	<p>Penalty: Division 8 fine; \$1,000 Expiation fee; \$500</p>

ATTACHMENT E—CIVIL PENALTY CALCULATION TABLES LIFT-OUT

Table 1 Foundation penalty calculations

FOUNDATION PENALTY CALCULATIONS	
Insert the details of the provision contravened (below) and place the maximum penalty prescribed for that offence in the column (A) <i>Section/provision</i> contravened:..... (including section, subsection or clause number)	\$ (A) (maximum penalty)
i) Category one contraventions involving actual harm to the environment, multiply the maximum penalty prescribed for the offence by 50% or ii) Category two contraventions alleging potential harm to the environment, multiply the maximum penalty prescribed for the offence by 25% or ii) Category three contraventions that do not allege any actual or potential harm to the environment, multiply the maximum penalty by 25%	multiply (A) by 50% or 25% or 25% (delete as appropriate)
Foundation penalty	\$ (B)

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

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

Degree of actual or potential harm to the environment <i>(including people)</i> (If no actual or potential environmental harm was caused, proceed to table 3)				
<i>Circle one number in each line</i>	Minor	Moderate	Major	Factor subtotal
Nature of the pollutant*	1	2	3	
Quantity/level of pollutant released*	1	2	3	
Sensitivity of the receiving environment* (including human population and broader environment)	1	2	3	
Duration of exposure to the environment*	1	2	3	
Points total				
				(max 12 points)
Points conversion to a percentage multiply points total by 100 Divide by 12				$\begin{array}{r} \times 100 \\ = \text{—————} \\ \div 12 \end{array}$
= Percentage total (C) (rounded down to nearest whole number)				= % (C)
Insert the Foundation Penalty (B) from table 1				$\begin{array}{r} \times \\ \$ \end{array}$ (B)
To determine the Base Penalty multiply (B) by (C) BASE PENALTY (D)				$\begin{array}{r} = \\ \$ \end{array}$ (D)
Proceed to table 4 and copy the Base Penalty (D) to the space provided				

Table 3 Assessment of risk associated with contraventions that do not allege actual or potential harm to the environment (category three)

Contraventions that do not allege environmental harm					
(If table 2 has been completed, DO NOT complete this table and proceed to table 4)					
Level of risk of environmental harm arising from the contravention	Nil*	Minor	Moderate	Major	Points total
	0	1	2	3	
Conversion of points total to a percentage Multiply the points total by 100 Divide by 3					$\begin{array}{r} \times 100 \\ = \text{—————} \\ \div 3 \end{array}$
Total (C) (rounded down to nearest whole number)					= % (C)
Insert the Foundation Penalty (B) from table 1					x \$ (B)
To determine the Base Penalty multiply (B) by (C) BASE PENALTY (D)					= \$ (D)
Proceed to table 4 and copy the Base Penalty (D) to the space provided					

* 'Nil' risk includes risk assessed below the threshold of concern, i.e. minor risk with low probability of occurrence or insignificant environmental consequence.

Table 4 Adjusting factors

Adjusting factor (Insert a reduction of 0-10 percentage points for each of the following)	% decrease
The accused's history of compliance <i>(max of 10% points reduction)</i>	
The preventative measures by the accused 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 degree of cooperation demonstrated by the accused <i>(max of 10% points reduction)</i>	
The degree of public contrition demonstrated by the accused <i>(max of 10% points reduction)</i>	
Other relevant factors <i>(max of 10 % points reduction)</i>	
Total percentage point reduction (E)	% (E)
Insert Base Penalty (D) from table 2 or 3	x \$ (D)
Reduction expressed in \$ (F) Multiply the Base Penalty (D) by the total % reduction (E)	\$ (F)
ADJUSTED BASE PENALTY (G) Subtract the Reduction (F) from the Base Penalty (D)	\$ (G)
Copy the Adjusted Base Penalty (G) to the Economic Benefit Table (table 5)	

Table 5 Economic Benefit

Adding economic benefit	
Insert Adjusted Base Penalty (G) from table 4	\$ (G)
Add Economic Benefit (H) derived from contravention	+ \$ (H)
FINAL NEGOTIATED CIVIL PENALTY	\$