



# **Policy for calculation of civil penalties under the *Environment Protection Act 1993* and associated legislation**

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# Contents

Definitions .....	1
<b>1 Introduction .....</b>	<b>3</b>
<b>2 When the EPA will seek to negotiate a civil penalty .....</b>	<b>5</b>
2.1 Seriousness of the contravention .....	5
2.2 Alleged offender's record of offending .....	5
2.3 Strict liability offences .....	5
<b>3 Calculating a negotiated civil penalty under the EP Act .....</b>	<b>6</b>
<b>4 The Foundation Penalty .....</b>	<b>8</b>
4.1 Calculating the Foundation Penalty .....	9
4.2 What is 'harm'? .....	9
<b>5 Category 1 and 2 – contraventions that allege actual or potential harm to the environment .....</b>	<b>11</b>
5.1 Calculating the level of actual or potential environmental harm .....	11
<b>6 Category 3 offences – administrative offences that do not allege actual or potential harm however pose a heightened risk of harm .....</b>	<b>16</b>
<b>7 Adjusting factors .....</b>	<b>17</b>
7.1 The alleged offender's good compliance record .....	17
7.2 Practical measures taken by the alleged offender to prevent the contravention .....	17
7.3 The appropriateness and speed of corrective action taken by the alleged offender .....	18
7.4 The timeliness of notification of an incident .....	18
7.5 The degree of cooperation demonstrated by the alleged offender .....	18
7.6 The degree of public contrition demonstrated by the alleged offender .....	19
7.7 Other relevant factors .....	19
<b>8 Economic benefit .....</b>	<b>20</b>
<b>9 Cost recovery .....</b>	<b>21</b>
<b>10 Multiple offences .....</b>	<b>22</b>
10.1 Multiple alleged offenders .....	22
<b>11 Liability of company directors to a civil penalty .....</b>	<b>23</b>
<b>12 Admissibility of evidence and confidentiality .....</b>	<b>24</b>
<b>13 Timeframes for negotiations .....</b>	<b>26</b>
<b>14 Sign-off .....</b>	<b>26</b>
<b>15 Payment terms .....</b>	<b>26</b>
<b>16 Review of the Policy .....</b>	<b>26</b>
<b>Attachment A Section 104A of the <i>Environment Protection Act 1993</i> .....</b>	<b>27</b>
<b>Attachment B National and international guidelines and standards .....</b>	<b>29</b>
<b>Attachment C Forms .....</b>	<b>30</b>
<b>Attachment D Strict liability offences .....</b>	<b>38</b>
<b>Attachment E Civil penalty calculation tables lift-out .....</b>	<b>54</b>

## List of figures

Figure 1	Overview of negotiated civil penalty, court imposed civil penalty and criminal prosecution processes.....	4
Figure 2	Overview of penalty calculation process .....	7

## List of tables

Table 1	Calculating Foundation Penalties .....	9
Table 2	Assessment of factors where the offence alleges actual or potential environmental harm .....	15
Table 3	Assessment of risk associated with administrative offences that do not allege actual or potential harm, but pose an increased risk of harm.....	16
Table 4	Adjusting factors .....	19
Table 5	Economic benefit .....	20

# 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.

<b>EP Act</b>	refers to the <i>Environment Protection Act 1993</i> and associated legislation and instruments, including environment protection policies.
<b>adjusted penalty</b>	is the penalty amount calculated after consideration of submissions received during the negotiation process.
<b>associated legislation</b>	includes Acts that are to be read together with the EP Act, including the <i>Single-use and Other Plastic Products (Waste Avoidance) Act 2020</i> and the <i>Plastic Shopping Bags (Waste Avoidance) Act 2008</i> .
<b>Category 1 offence</b>	refers to an offence that alleges environmental harm where the harm has actually occurred.
<b>Category 2 offence</b>	refers to an offence that alleges environmental harm where actual harm has not occurred but there is a potential for harm and includes risk of harm and future harm.
<b>Category 3 offence</b>	refers to an administrative offence that does not allege actual or potential harm, but poses a heightened risk of harm to the environment or human health.
<b>compliance</b>	means fulfilling directions and requirements of the EPA, the EP Act and associated legislation.
<b>contravention</b>	means a failure to comply with requirements of the EP Act. For the purpose of the negotiated civil penalty process, a reference to a contravention refers to an alleged contravention.
<b>ERD Court</b>	means the Environment Resources and Development Court of South Australia.
<b>economic benefit</b>	see <a href="#">Part 7</a> of this Policy.
<b>environmental harm</b>	has the same meaning as in the EP Act.
<b>environmental nuisance</b>	has the same meaning as in the EP Act.
<b>Environment Performance Agreement</b>	has the same meaning as in the EP Act.
<b>EPA</b>	South Australian Environment Protection Authority.
<b>final negotiated civil penalty</b>	the civil penalty that all parties agree at the conclusion of the negotiation process.
<b>Foundation Penalty</b>	see <a href="#">Part 3</a> of this Policy.
<b>licence</b>	has the same meaning as in the EP Act.
<b>occupier</b>	has the same meaning as in the EP Act.
<b>owner</b>	has the same meaning as in the EP Act.
<b>person</b>	includes but is not limited to individuals, corporations, associations, firms, partnerships, public and municipal corporations, state and federal government organisations.
the <b>Policy</b>	means the Policy for calculation of civil penalties under the <i>Environment Protection Act 1993</i> and associated legislation.

<b>pollutant</b>	has the same meaning as in the EP Act.
<b>pollution</b>	has the same meaning as in the EP Act.
<b>potential harm</b>	has the same meaning as in the EP Act.
<b>Preliminary Penalty</b>	see <a href="#">Part 4</a> of this Policy.
<b>risk of harm to the environment</b>	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.
<b>site contamination</b>	has the same meaning as in the EP Act.
<b>toxicity</b>	the inherent potential or capacity of a material to cause adverse effects in a living organism.

## Introduction

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

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

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

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

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

This Policy should be read in conjunction with the relevant provisions of the EP 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.

This Policy also applies to offences under associated legislation, being the *Single-use and Other Plastic Products (Waste Avoidance) Act 2020* and the *Plastic Shopping Bags (Waste Avoidance) Act 2008* as these acts are to be read together with the EP Act and the provisions in the EP Act relevant to civil penalties apply.

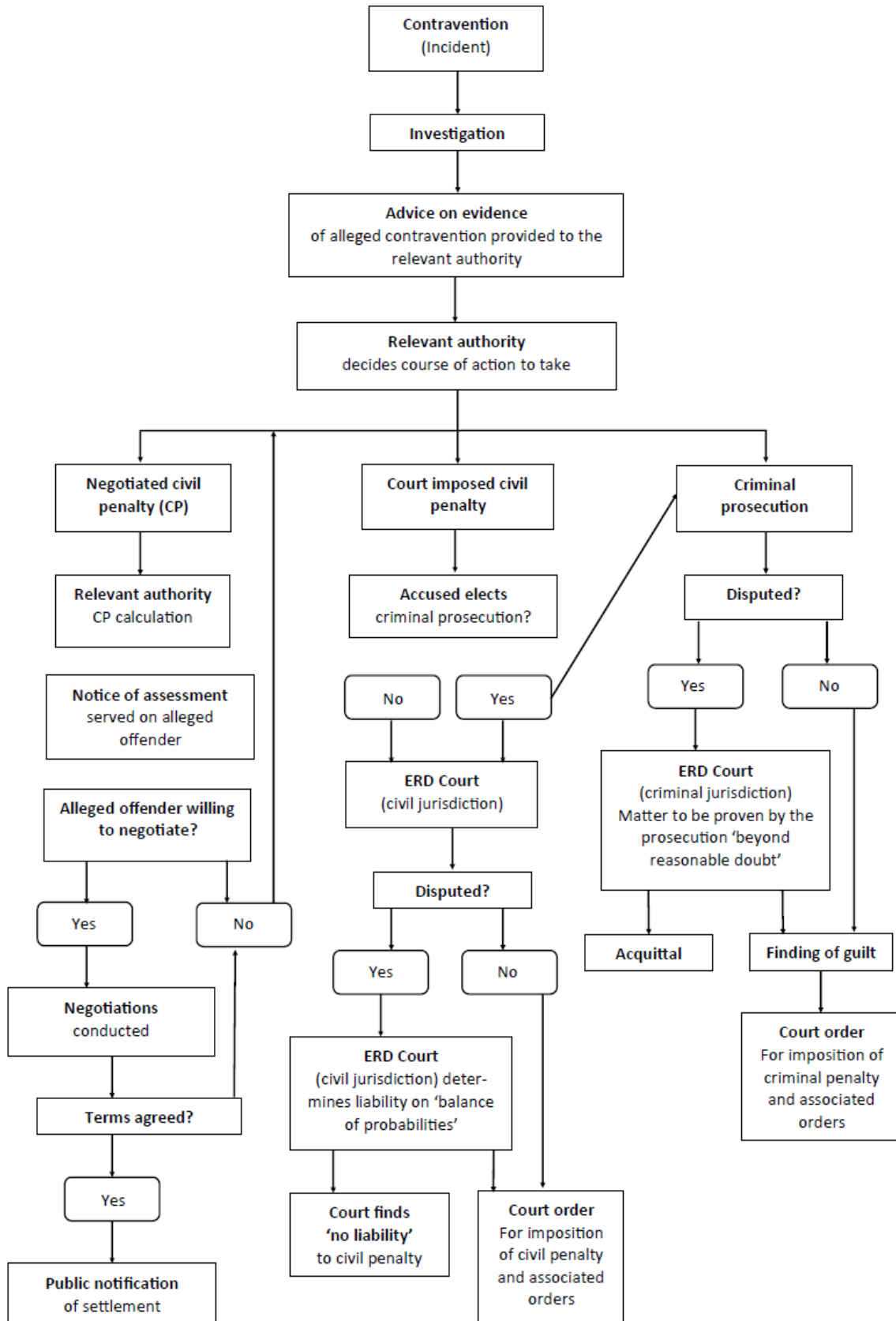


Figure 1 Overview of negotiated civil penalty, court imposed civil penalty and criminal prosecution processes



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

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

## 1.1 Seriousness of the contravention

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

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

## 1.2 Alleged offender's record of offending

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

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

In making this assessment the EPA may consider the nature of the prior criminal conviction, the passage of time since the offence was committed and the conduct of the alleged offender since the offence was committed. Consideration will also be given to whether the alleged offender, if a corporation, has changed its name since being found liable for a previous offence, or whether a related corporate entity (or branch) of the company has committed the same or similar offence(s) previously.

## 1.3 Strict liability offences

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

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

## 2 Calculating a negotiated civil penalty under the EP Act

Section 104A(6) of the EP Act specifies the matters which a court shall take into account when considering a civil penalty:

In determining the amount to be paid by a person as a civil penalty, the court must have regard to—

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

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

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

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

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

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

- 1 determination of the *Foundation Penalty*
- 2 calculation of the *Preliminary Penalty*
- 3 adjustment of the Preliminary Penalty to account for mitigating factors
- 4 addition of any economic benefit derived from the contravention.

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

In the event that the Preliminary Penalty Assessment is greater than \$120,000, negotiation will not be an option and the EPA may seek to commence civil or criminal proceedings in the Court.

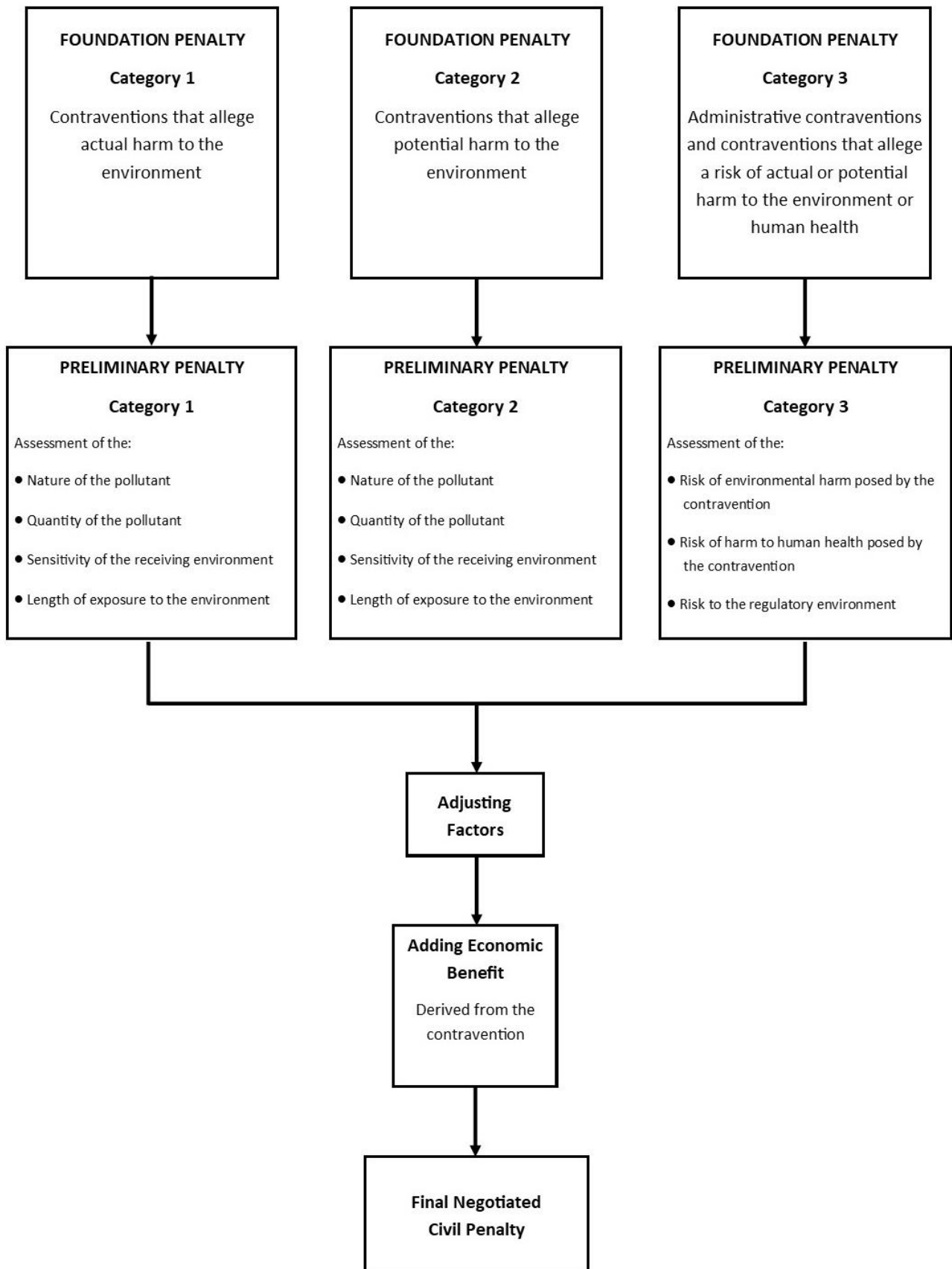


Figure 2 Overview of penalty calculation process

### 3 The Foundation Penalty

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

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

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

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

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

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

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

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

The minimum penalty amount is \$1,500 (the Minimum Penalty). In circumstances where the EPA determines a penalty using the calculations formulae to be \$1,500 or less, then the negotiated penalty amount offered will be the Minimum Penalty amount. The alleged offender will not have the opportunity to submit to the EPA adjusting criteria to request a penalty reduction as decreasing the penalty to less than the Minimum Penalty is not permitted.

It is also noted that where the EPA, using an established formula, determines the level of public concern to be considerable, the EPA will not commence negotiations and may instead seek other regulatory action such as prosecution.

### 3.1 Calculating the Foundation Penalty

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

**Table 1 Calculating the Foundation Penalty**

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

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

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

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

### 3.2 What is 'harm'?

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

calculating a penalty, a distinction is made between pollution offences resulting in actual harm and those resulting in potential harm.

In general terms, the EP 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 what offence has been committed and the maximum penalty prescribed for that contravention.

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

This Policy is designed to calculate a penalty within the range prescribed by the EP Act or \$120,000, whichever is the lesser. For example, if a matter of environmental nuisance under section 82(2) of the EP 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). This Policy is specifically designed to prevent penalties being calculated for allegations of a more serious nature.

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

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

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

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

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

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

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

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

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

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

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

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

#### 4.1.1 Nature and toxicity of the pollutant

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

Additionally, the EPA may refer to recognised national and international standards and guidelines, including but not limited to:

- Guidelines for Fresh and Marine Water Quality
- National Pollution Inventory (NPI) information
- National Environment Protection Measures (NEPMs)
- Environment Protection Policies (EPPs)
- other recognised standards

- listed wastes detailed in Part B of Schedule 1 to the EP Act.

A list of guidelines, standards and reference materials may be found in [Attachment B](#). The EPA may also take into account any submissions made by the alleged offender in relation to the nature of the pollutant.

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

#### **Minor: Chemical A**

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

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

#### **Moderate: Chemical B**

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

#### **Major: Chemical C**

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

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

### **4.1.2 Quantity or concentration 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 EP Act, environment protection policies and other instruments including EPA licence conditions.

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



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

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

### **Minor**

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

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

### **Moderate**

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

### **Major**

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

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

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

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

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

In the first instance, an assessment of the sensitivity of the receiving environment will be made on the scientific evidence in the brief of evidence. In addition, the EPA may consider information furnished by the alleged offender, or may consult other scientific publications, for example the *Australian and New Zealand Guidelines for Fresh and Marine Water Quality* for the protection of cultured fish, molluscs and crustaceans.<sup>1</sup>

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

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<sup>1</sup> Australian and New Zealand Environment and Conservation Council 2000, *Australian and New Zealand Guidelines for Fresh and Marine Water Quality*, Chapter 4.4 Aquaculture for human consumption of aquatic foods.

**Minor**

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

**Moderate**

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

**Major**

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

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

**4.1.4 Duration of exposure of the pollutant in the environment**

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

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

**Minor**

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

**Moderate**

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

**Major**

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

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

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

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

\* Some factors may need to be assessed with regard to other factors contained in the table (see [Part 4.1](#)).

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

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

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

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

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

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

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

## 6 Adjusting factors

To assist the EPA and the alleged offender to negotiate an appropriate civil penalty, the alleged offender will be entitled to make submissions on a number of factors that can be used to adjust the penalty. The EPA may consider these submissions and reduce the penalty accordingly. A maximum reduction of up to 70% of the Foundation Penalty can be made with regard to the following factors ([Table 4](#)):

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

The Minimum Penalty amount is \$1,500. If when calculating the penalty, the final amount is less than the Minimum Penalty, the alleged offender will not have the opportunity to submit to the EPA adjusting criteria to request a penalty reduction.

### 6.1 Alleged offender's good compliance record

This factor may reduce the Preliminary Penalty by up to 10%.

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

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

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

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

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

This factor may reduce the Preliminary Penalty by up to 10%.

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

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

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

### **6.3 Appropriateness and speed of corrective action taken by the alleged offender**

This factor may reduce the Preliminary Penalty by up to 10%.

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

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

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

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

### **6.4 Timeliness of notification of an incident**

This factor may reduce the Preliminary Penalty by up to 10%.

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

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

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

### **6.5 Degree of cooperation demonstrated by the alleged offender**

This factor may decrease the Preliminary Penalty by up to 10%.

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

While this factor does not seek to penalise an alleged offender for exercising their rights at law, for example refusing to answer questions in accordance with their right to silence, no reduction will be made where investigations have been impeded by uncooperative or deceptive responses by the alleged offender or their representative(s). In serious

circumstances of deception, the EPA may elect to launch a criminal prosecution against an alleged offender found providing false or misleading information or hindering EPA officers or agents in their attempts to administer the EP Act.

### 6.6 Degree of public contrition demonstrated by the alleged offender

This factor may decrease the Preliminary Penalty by up to 10%.

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

### 6.7 Other relevant factors

Other relevant factors may decrease the Preliminary Penalty by up to 10%.

**Table 4 Adjusting factors**

Adjusting factor (Insert a reduction of 0–10 percentage points for each of the following)		% decrease
1	The alleged offender’s good compliance record	
2	The preventative measures by the alleged offender prior to the incident	
3	The extent, speed and appropriateness of corrective action	
4	The timeliness of notification	
5	The degree of cooperation demonstrated by the alleged offender	
6	The degree of public contrition demonstrated by the alleged offender	
7	Other relevant factors	
<b>Total percentage points reduction</b>		%
<b>reduction expressed in \$</b>		<b>\$ (E)</b>
insert Preliminary Penalty (D) from Tables 2 or 3		<b>\$ (D)</b>
subtract (E) from (D)		–
		<b>\$ (E)</b>
		=
<b>Adjusted Penalty</b>		<b>\$ (F)</b>
<b>Copy the Adjusted Penalty (F) to economic benefit (Table 5)</b>		

## 7 Economic benefit

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

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

Active economic benefits are usually an increase in profit, or a reduction in cost, directly attributable to the activity conducted in contravention of the EP 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 Adjusted Penalty. While there may be circumstances where the contravention has attributed to financial losses for the alleged offender, for example a failure to operate equipment in accordance with EPA requirements resulting in greater waste generation, this will not be factored in to benefit the alleged offender.

**Table 5 Economic benefit**

<b>Adding economic benefit</b>	
insert <b>adjusted Foundation Penalty (F)</b> from Table 4	\$ (G)
add <b>economic benefit (G)</b> derived from contravention	\$ + (H)
<b>Final Negotiated Civil Penalty</b>	\$



## 8 Cost recovery

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

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

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

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

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

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

## **9 Multiple offences**

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

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

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

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

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

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

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

### **9.1 Multiple alleged offenders**

Section 137A of the EP Act states:

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

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

## 10 Liability of company directors to a civil penalty

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

- (1) Where a body corporate contravenes a provision of this Act, a person who is an officer of the body corporate is—
  - (a) subject to the general defence under this Part, guilty of a contravention of this Act; and
  - (b) subject to subsection (2), liable to the same penalty as may be imposed for the principal contravention when committed by a natural person.
- (2) Where an officer of a body corporate is convicted of an offence under subsection (1), the officer is not liable to be punished by imprisonment for the offence.
- (3) Where a body corporate contravenes a provision of this Act, an officer of the body corporate who knowingly promoted or acquiesced in the contravention is also guilty of contravening that provision.
- (4) An officer of a body corporate—
  - (a) may be prosecuted and convicted of an offence pursuant to subsection (1) or (3); or
  - (b) may be ordered to pay an amount as a civil penalty pursuant to subsection (1) or (3),whether or not there has been a finding by a court that the body corporate committed the contravention.
- (5) If, in proceedings against a body corporate for an offence against this Act or for the imposition of a penalty in respect of a contravention of this Act—
  - (a) information or a document was admitted in evidence against the body corporate; and
  - (b) an officer of the body corporate had been required to give the information or produce the document under a provision of this Act; and
  - (c) the information or document was such as to tend to incriminate the body corporate of the offence or make the body corporate liable to the penalty (as the case may be),

the officer of the body corporate will not be guilty of a contravention of this Act as a result of the body corporate having been found guilty of the offence, or liable to the penalty, in those proceedings.

## 11 Admissibility of evidence and confidentiality

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

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

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

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

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

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

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

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

Additionally, this provision does not seek to limit the admissibility of evidence or information disclosed during the course of an investigation prior to negotiations commencing. Such evidence will be admissible in any subsequent criminal proceedings in accordance with prevailing legislative and common law rules of evidence. To enable proper consideration of an alleged contravention, negotiations will not commence until the EPA is satisfied that a thorough investigation has been carried out and the Crown Solicitor's Office has been provided with an opportunity to assess the evidence.

To eliminate any confusion over when negotiations commence, the EPA will advise the alleged offender of its intention to resolve a matter by way of civil penalty negotiation by serving Form 1 on the alleged offender.

Negotiations will not commence until the EPA has received a written response, in [Form 2](#) from the alleged offender indicating their willingness to negotiate. Preventing premature negotiation protects both parties from entering into negotiation without full knowledge of the facts of the allegation.

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

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

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

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

It will also be noted that negotiating a civil penalty or entering into an arrangement or Agreement under the Act:

- (a) does not constitute an admission of guilt or of civil liability; and
- (b) will not be regarded as evidence tending to establish guilt or any civil liability; and
- (c) cannot be referred to in any report furnished to the court for the purposes of determining sentence for any offence.

## **12 Timeframes for negotiations**

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

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

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

## **13 Sign-off**

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

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

The proposed agreement will be executed by a delegate of the EPA. Details of the agreement will be published on the EPA public register in accordance with the requirements of section 109 of the EP Act. The EPA may publish the details of the civil penalty in a media release and/or in newspapers. The following information may be published:

- the name of the body corporate, or in the alternative, the term 'a Person' or 'a Licensee' from whom the amount was recovered
- particulars of the alleged contravention
- the amount recovered.

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

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

## **14 Payment terms**

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

## **15 Review of the Policy**

A review of the Policy will be carried out within five years from the date of commencement of this version of the Policy.

**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.

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- 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.



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

The EPA may refer to national and international guidelines and standards including:

- *Australian and New Zealand Guidelines for Fresh and Marine Water Quality* (2000 and 2018)
- *Environment Protection (Water Quality) Policy 2015*
- *Ambient Air Quality National Environment Protection Measure*
- Environment Protection and Heritage Council (EPHC)/National Environment Protection Council (NEPC), *Assessment of Site Contamination National Environment Protection Measure 1999*
- *Guideline for Safe Handling, Reuse and Disposal of Bio-solids* (EPA 2020)
- World Health Organization guidelines
- Australian New Zealand Food Standards Code (ANZFSC)
- International Agency for Research on Cancer Scientific Publications Series
- *Guidelines for the assessment and remediation of groundwater contamination* (EPA 2018).

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## Attachment C      Forms

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



**EPA file ref:** [file no.]

To: [name of alleged offender (insert full name and ACN for incorporated bodies)]

of: [address of alleged offender (registered business office of corporation)]

It is alleged that on or about the [insert date(s)] that you, [insert details of alleged contravention(s), 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* (EP Act), 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 Notice (Form 1) is to notify you of the EPA's intention to negotiate a civil penalty with you as an alternative to a criminal prosecution and to provide you with an opportunity to participate in negotiations. Negotiations are conducted in accordance with the EPA's *Policy for calculation of civil penalties* (the Policy).

In accordance with the Policy, the EPA has considered the factual allegations presented to it and made a Preliminary Penalty determination of \$[insert preliminary penalty amount].

Additionally, the EPA will be seeking the following terms and conditions to be included in the Negotiated Civil Penalty Agreement (the Agreement):

- [insert details of additional conditions sought].

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

The attached "Nomination to participate in civil penalty negotiations" (Form 2) asks you whether you are prepared to participate in civil penalty negotiations with the EPA. If you elect to negotiate a civil penalty, Form 2 must be returned to the EPA within 28 days of service of Form 1 upon you.

Note: Entering into negotiations is not to be taken as an admission of liability.

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

Alternatively, you may elect to be prosecuted for the alleged contraventions(s) outlined above by returning the attached "Notice of right to elect to be prosecuted" (Form 3) to the EPA within 21 days of service of this Notice upon you.

The terms of the negotiations are detailed in the Policy available from:

[https://www.epa.sa.gov.au/business\\_and\\_industry/civil-penalty-calculation-policy](https://www.epa.sa.gov.au/business_and_industry/civil-penalty-calculation-policy)



### Your opportunity to make submissions

If you elect to participate in civil penalty negotiations, you may choose to make submissions on any matters that you wish the EPA to consider. These submissions should be forwarded to the EPA in writing with the nomination form (Form 2). You have 28 days to return Form 2 to the EPA with any written submissions that you wish to make. You may also make further written submissions during the course of negotiations. The negotiation period will conclude three calendar months after the service of this notice (Form 1) on you or at a later time if an extension is sought from the EPA due to exceptional circumstances and granted. If the minimum civil penalty amount of \$1,500 (the Minimum Penalty) has been issued you will not have the opportunity to submit to the EPA adjusting criteria to request a penalty decrease as a reduction of the penalty to less than the Minimum Penalty is not permitted.

### Disclosure of information by you

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

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

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

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

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

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

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

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

In accordance with section 109(3)(ka) of the EP Act, details of negotiated civil penalty agreements will be made available to the public via the EPA public register. The EPA may publish the details of the civil penalty in a media release and/or in newspapers. The following information may be published:

- (a) name of the person from whom the amount was recovered
- (b) particulars of the alleged contravention
- (c) the amount recovered.



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## Form 2 - Nomination to participate in civil penalty negotiations

EPA file ref: [file no.]

I [insert alleged offender's name]

For incorporated bodies [insert 'I, having authority to act on behalf of [company name] the company (the Company)] of [insert residential address or corporation's registered business address] acknowledge receipt of the 'Notice of intention to negotiate a civil penalty' (Form 1)

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

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

**or**

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

**or**

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

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

Signed: [by alleged offender/authorised representative]]

Date: [insert date]

Position of representative: [insert title]

Please return this completed form within 28 days of service of Form 1 to:

The Chief Executive  
Environment Protection Authority  
GPO Box 2607  
Adelaide 5001

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## Form 3 - Notice of right to elect to be prosecuted for contravention

*Environment Protection Act 1993 – section 104A(3)*

File Number: *[Fields to be completed prior to being sent]*

Issued by: The Environment Protection Authority

Date:

To: *[insert title and full name, company name (if applicable), postal address and any other information relevant for service of the notice]*

### Notice to alleged offender

1. The Environment Protection Authority (EPA) is satisfied that you have committed an offence by contravening a provision of the *Environment Protection Act 1993* (the Act) as follows:
  - Provision contravened:
  - Address or location of contravention:
  - Details of contravention:
2. The purpose of this Notice is to advise you that you may, by written notice to the EPA, elect to be prosecuted for the contravention (see section 104A(3) of the Act).

**If you do not elect to be prosecuted, the EPA may commence civil penalty proceedings under section 104A of the Act for the purpose of obtaining an order from the Court that you pay an amount as a civil penalty in respect of the contravention.**

In these civil proceedings, any contravention of the Act would only need to be proved on the balance of probabilities.

3. **If you elect to be prosecuted, rather than negotiating a civil penalty with the EPA or facing civil penalty proceedings, you must serve a written notice on the EPA or council within 21 days after service of this notice.**
4. The following matters are relevant to the provision of a notice of election to the EPA:
  - (1) The notice must be addressed to the EPA as follows:

*[insert relevant information]*
  - (2) You may choose to use the Attachment (below) or you may inform the EPA by your own letter, quoting your name and the File Number shown at the top of this document.
  - (3) Section 104A of the Act may be found at [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au) and additional information about the Act can be obtained from [www.epa.sa.gov.au](http://www.epa.sa.gov.au). Information concerning this Notice can also be obtained by telephoning the Manager, Investigations Branch on 08 8204 2050
  - (4) If you do not, within 21 days after service of this Notice, give notice to the EPA of election to be prosecuted, proceedings may be commenced to recover a civil penalty in the Environment, Resources and Development Court.

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**Form 3 Attachment - Notice to Environment Protection Authority of election to be prosecuted**

To: The Chief Executive, Environment Protection Authority

Of: Level 2, 211 Victoria Square, Adelaide 5000

File number of notice under section 104A(3) of the *Environment Protection Act 1993*

[insert file number]

**\* Individual**

I elect to be prosecuted for the alleged contravention specified in the Notice of the file number set out above.

Name in full:

Contact details:

Date:

Signed:

**\* Company**

I, having authority to act for and on behalf of the company in this matter, give notice that the company elects to be prosecuted for the alleged contravention specified in the Notice of the file number set out above.

Name of company:

Name in full of person with authority to act:

Contact details:

Date:

Signed:

*\*Strike out whichever is inapplicable*





## Attachment D      Strict liability offences

The EPA may seek to negotiate a civil penalty for these offences in certain circumstances. The maximum civil penalty that may be negotiated is \$120,000 or the maximum penalty amount for the offence stated in the Act whichever is the lesser.

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

### Environment Protection Act 1993

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s34(2) – Offence to contravene mandatory provisions of policy</b></p> <p>(a) A person who contravenes a mandatory provision of an environment protection policy is guilty of an offence.</p>	<p>1, 2 or 3</p>	<p><b>Penalty:</b></p> <p>(a) for a Category A offence if the offender:</p> <p>(i) is a body corporate – \$150,000</p> <p>(ii) is a natural person – \$60,000</p> <p>(b) for a Category B offence – \$4,000</p> <p>(c) or a Category C offence – \$2,000</p> <p>(d) for a Category D offence – \$500</p> <p>(e) for a Category E offence – \$100</p> <p><b>Expiation fees:</b></p> <p>(a) for a category B offence – \$300</p> <p>(b) for a category C offence – \$200</p> <p>(c) for a category D offence – \$100</p> <p>(d) for a category E offence – \$50</p>
<p><b>s35 – Requirement for works approval</b></p> <p>(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>3</p>	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$60,000</p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s36 – Requirement for licence</b></p> <p>A person must not undertake a prescribed activity of environmental significance except as authorised by an environmental authorisation in the form of a licence under this Part.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000.</p> <p>(b) If the offender is a natural person – \$60,000</p>
<p><b>s45 – Conditions</b></p> <p>(5) The holder of an environmental authorisation must not contravene a condition of the authorisation.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$60,000</p> <p><b>Expiation fees:</b></p> <p>(a) for a prescribed condition – the corresponding expiation fee</p> <p>(b) for any other condition (other than a reporting deadline condition) – \$1,000.</p>
<p><b>s57A – Requirement for endorsement of licence</b></p> <p>A person must not represent that a licence is a sustainability licence, or permit another person to do so, unless the licence is endorsed under this Part as a sustainability licence.</p>	3	<p><b>Penalty:</b> \$40,000</p>
<p><b>s60 – Registration of environment performance agreements in relation to land</b></p> <p>(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>	3	<p><b>Penalty:</b> \$4,000</p>
<p><b>S64B – Risk of escape of pollutant from land, etc</b></p> <p>(2) A <b>person</b> who fails to comply with a notice under subsection (1) is guilty of an offence.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$75,000</p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s69 – Approval of collection depots and super collectors</b></p> <p>(1) A person must not –</p> <ul style="list-style-type: none"> <li>(a) operate a collection depot; or</li> <li>(b) carry on business as a super collector,</li> </ul> <p>without the approval of the Authority.</p>	3	<p><b>Penalty:</b></p> <ul style="list-style-type: none"> <li>(a) If the offender is a body corporate – \$60,000</li> <li>(b) If the offender is a natural person – \$30,000</li> </ul>
<p><b>s69B – Sale and supply of beverages in containers</b></p> <p>(1) A retailer must not sell a beverage in a container unless the container –</p> <ul style="list-style-type: none"> <li>(a) is a Category A or B container; and</li> <li>(b) bears the approved refund marking for containers of that class.</li> </ul> <p>(2) A person must not –</p> <ul style="list-style-type: none"> <li>(a) supply a beverage in a container to a retailer for sale by the retailer; or</li> <li>(b) sell a beverage in a container for consumption, unless the container is a Category A or B container and bears the approved refund marking for containers of that class.</li> </ul>	3	<p><b>Penalty:</b> \$4,000</p> <p><b>Expiation fee:</b> \$300</p>
<p><b>s69C – Offence to claim refund on beverage containers purchased outside state or corresponding jurisdiction</b></p> <p>(3) If, within any 48-hour period, a person presents to a retailer or the operator of a collection depot 3,000 or more containers for the purpose of claiming refund amounts, the retailer or operator must request the person to complete a declaration of a kind referred to in subsection (2).</p> <p>(4) A retailer, the operator of a collection depot or a person carrying on business as a super collector must –</p> <ul style="list-style-type: none"> <li>(a) keep each declaration made under this section (or copy of the declaration) at his or her place of business in the state for three years from the date of the declaration; and</li> <li>(b) have the document readily available for inspection at all reasonable times by an authorised officer.</li> </ul>	3	<p><b>Penalty:</b> \$4,000</p> <p><b>Expiation fee:</b> \$300</p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s69D – Offence to contravene condition of beverage container approval</b></p> <p>The holder of a beverage container approval must not contravene a condition of the approval.</p>	3	<p><b>Penalty: \$4,000</b></p> <p><b>Expiation fee: \$300</b></p>
<p><b>s70 – Retailers to pay refunds for certain empty Category A containers</b></p> <p>(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>(a) to accept delivery of empty containers of that class that bear the approved refund marking, or a former approved refund marking, for containers of that class; or</p> <p>(b) in respect of each such container, to pay to the person delivering that container the refund amount for that container.</p>	3	<p><b>Penalty: \$4,000</b></p> <p><b>Expiation fee: \$300</b></p>
<p><b>s71 – Collection depots to pay refund amounts for certain empty Category B containers</b></p> <p>(1) Subject to subsection (2), the operator of an approved collection depot must not refuse or fail, or permit a person acting on his or her behalf to refuse or fail –</p> <p>(a) to accept delivery of empty Category B containers that bear the approved refund marking, or a former approved refund marking, for containers of that class; or</p> <p>(b) in respect of each such container, to pay to the person delivering that container the refund amount for that container.</p>	3	<p><b>Penalty: \$4,000</b></p> <p><b>Expiation fee: \$300</b></p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s71A – Manner of payment of refund amounts</b></p> <p>A person who is required under this Division to pay a refund amount for a container must pay the amount –</p> <p>(a) in the case of a refund amount dispensed from a reverse vending machine –</p> <p>(i) in cash; or</p> <p>(ii) by way of credit note redeemable for cash; or</p> <p>(iii) in a manner prescribed by regulation; or</p> <p>(b) in any other case –</p> <p>(i) unless subparagraph (ii) applies, in cash; or</p> <p>(ii) if the person to whom the refund amount is payable agrees –</p> <p>(A) by way of electronic funds transfer to a bank account or credit card account; or</p> <p>(B) in a manner prescribed by regulation.</p>	3	<p><b>Penalty:</b> \$4,000</p> <p><b>Expiation fee:</b> \$300</p>
<p><b>s72 – Certain containers prohibited</b></p> <p>(3) A retailer must not sell a beverage in a prohibited container.</p> <p>(4) A person must not –</p> <p>(a) supply a beverage in a prohibited container to a retailer for sale by the retailer; or</p> <p>(b) sell a beverage in a prohibited container for consumption.</p>	3  3	<p><b>Penalty:</b> \$4,000</p> <p><b>Expiation fee:</b> \$300</p> <p><b>Penalty:</b> \$4,000</p> <p><b>Expiation fee:</b> \$300</p>
<p><b>s79 – Causing serious environmental harm</b></p> <p>(2) A person who by polluting the environment causes serious environmental harm is guilty of an offence.</p>	1 or 2	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$500,000.</p> <p>(b) If the offender is a natural person – \$250,000</p>
<p><b>s80 – Causing material environmental harm</b></p> <p>(2) A person who by polluting the environment causes material environmental harm is guilty of an offence.</p>	1 or 2	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$250,000</p> <p>(b) If the offender is a natural person – \$150,000</p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s82 – Causing environmental nuisance</b></p> <p>(2) A person who by polluting the environment causes an environmental nuisance is guilty of an offence.</p>	1 or 2	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$15,000</p> <p>(b) If the offender is a natural person – \$4,000</p> <p><b>Expiation fee: \$300</b></p>
<p><b>s83 – Notification where serious or material harm is caused or threatened</b></p> <p>(1) If serious or material environmental harm from pollution is caused or threatened in the course of an activity undertaken by a person, the person must, as soon as reasonably practicable after becoming aware of the harm or threatened harm, notify the Authority of the harm or threatened harm, its nature, the circumstances in which it occurred and the action taken to deal with it.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$250,000.</p> <p>(b) If the offender is a natural person – \$150,000.</p>
<p><b>s83A – Notification of site contamination of underground water</b></p> <p>(2) A person to whom this section applies must notify the Authority in writing as soon as reasonably practicable after becoming aware of the existence of site contamination at the site or in the vicinity of the site (whether arising before or after the commencement of this section) that affects or threatens water occurring naturally under the ground or introduced to an aquifer or other area under the ground.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$60,000</p>
<p><b>s89 – Provisions relating to seizure</b></p> <p>(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.</p>	3	<p><b>Penalty: \$4,000</b></p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>S90 – Offence to hinder etc authorised officers</b></p> <p>(1) A person who –</p> <ul style="list-style-type: none"> <li>(a) hinders or obstructs an authorised officer, or a person assisting an authorised officer, in the exercise of powers conferred by this Act; or</li> <li>(b) uses abusive, threatening or insulting language to an authorised officer, or a person assisting an authorised officer;</li> <li>(c) refuses or fails to comply with a requirement or direction of an authorised officer under this Division; or</li> <li>(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</li> <li>(e) falsely represents, by words or conduct, that he or she is an authorised officer or other person with powers under this Act,</li> </ul> <p>is guilty of an offence.</p> <p>(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.</p>	<p style="text-align: center;">3</p> <p style="text-align: center;">3</p>	<p><b>Penalty:</b> \$15,000</p> <p><b>Penalty:</b> \$15,000 or imprisonment for 2 years, or both</p>
<p><b>93 – Environment protection orders</b></p> <p>(8) A person to whom an environment protection order is issued must comply with the order.</p>	<p style="text-align: center;">3</p>	<p><b>Penalty:</b></p> <ul style="list-style-type: none"> <li>(a) if the order was issued for the purpose of securing compliance with a requirement imposed by or under this Act and a penalty is fixed by this Act for contravention of that requirement – that penalty;</li> <li>(b) if the order was issued in relation to a domestic activity for the purpose of securing compliance with the general environmental duty – \$500;</li> <li>(c) if the order was issued in relation to a domestic activity in circumstances specified in an environment protection policy or for the purpose of giving effect to an environment protection policy – \$500;</li> <li>(d) in any other case – \$4,000.</li> </ul>



Strict liability offences	Offence category	Maximum penalty amount
(9) A person must not hinder or obstruct a person complying with an environment protection order.	3	<p><b>Expiation fee:</b></p> <p>(a) if the order was issued for the purpose of securing compliance with a requirement imposed by or under this Act and an expiation fee is fixed by this Act for contravention of that requirement – that expiation fee;</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 – \$100;</p> <p>(c) if the order was issued in relation to a domestic activity in circumstances specified in an environment protection policy or for the purpose of giving effect to an environment protection policy – \$100;</p> <p>(d) in any other case – \$300.</p> <p><b>Penalty: \$4,000</b></p>
<p><b>s93A – Environment protection orders relating to the cessation of activity</b></p> <p>(5) A person to whom an environment protection order is issued in accordance with this section must comply with the order.</p> <p>(8) A person must not hinder or obstruct a person complying with an environment protection order issued in accordance with this section.</p>	<p>3</p> <p>3</p>	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$60,000</p> <p><b>Penalty: \$4,000</b></p>
<p><b>s94 – Registration of environment protection orders in relation to land</b></p> <p>(5) An owner or occupier who fails to comply with subsection (4)(d) is guilty of an offence.</p>	3	<b>Penalty: \$4,000</b>
<p><b>s96 – Information discovery orders</b></p> <p>(5) A person to whom an information discovery order is issued must comply with the order.</p>	3	<b>Penalty: \$8,000</b>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s99 – Clean-up orders</b></p> <p>(8) A person to whom a clean-up order is issued must comply with the order.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$60,000</p>
<p><b>s101 – Registration of clean-up orders or clean-up authorisations in relation to land</b></p> <p>(6) A person who fails to comply with subsection (5)(d) is guilty of an offence.</p>	3	<p><b>Penalty:</b> \$4,000</p>
<p><b>s103H – Site contamination assessment orders</b></p> <p>(6) A person to whom a site contamination assessment order is issued must comply with the order.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$60,000</p>
<p><b>s103J – Site remediation orders</b></p> <p>(11) A person to whom a site remediation order is issued must comply with the order.</p>	3	<p><b>Penalty:</b></p> <p>(a) If the offender is a body corporate – \$120,000</p> <p>(b) If the offender is a natural person – \$60,000</p>
<p><b>s103O – Registration of site assessment orders or site remediation orders in relation to land</b></p> <p>(6) A person who fails to comply with subsection (4)(b) is guilty of an offence.</p>	3	<p><b>Penalty:</b> \$4,000</p>
<p><b>s103S – Prohibition or restriction on taking water affected by site contamination</b></p> <p>(3) A person must not contravene a notice under this section.</p>	3	<p><b>Penalty:</b> \$8,000</p>
<p><b>s103U – Requirement for auditors to be accredited</b></p> <p>A person must not carry out a site contamination audit unless –</p> <p>(a) the person is a site contamination auditor and personally carries out or directly supervises the work involved in the audit; or</p> <p>(b) the person carries out the audit through the instrumentality of a site contamination auditor who personally carries out or directly supervises the work involved in the audit.</p>	3	<p><b>Penalty:</b> \$15,000</p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s103W – Illegal holding out as site contamination auditor</b></p> <p>(1) A person must not hold himself or herself out as a site contamination auditor unless the person is accredited under this Division as a site contamination auditor.</p> <p>(2) A person must not hold out another as a site contamination auditor unless the other person is accredited under this Division as a site contamination auditor.</p>	<p>3</p> <p>3</p>	<p><b>Penalty: \$15,000</b></p> <p><b>Penalty: \$15,000</b></p>
<p><b>s103X – Conflict of interest and honesty</b></p> <p>(2) A person to whom this section applies must not, unless authorised by the Authority in writing, carry out a site contamination audit of a site—</p> <p>(a) if the person is an associate of another person by whom any part of the site is owned or occupied; or</p> <p>(b) if the person has a direct or indirect pecuniary or personal interest in any part of the site or any activity that has taken place or is to take place at the site or part of the site; or</p> <p>(c) if the person has been involved in, or is an associate of another person who has been involved in, assessment or remediation of site contamination at the site; or</p> <p>(d) on the instructions of, or under a contract with, a site contamination consultant who has been involved in the assessment of site contamination at the site.</p>	<p>3</p>	<p><b>Penalty: \$4,000 or imprisonment for 1 year.</b></p>
<p><b>s103Y – Annual returns and notification of change of address, etc</b></p> <p>(1) A site contamination auditor must, during the prescribed period each year, furnish the Authority with a return relating to site contamination audits for which the auditor is or was the responsible auditor, listing each such audit commenced, in progress, completed or terminated before completion during the period commencing –</p> <p>(a) in the case of an auditor in his or her first year of accreditation –on the day on which accreditation was granted; or</p>	<p>3</p>	<p><b>Penalty: \$8,000</b></p>

Strict liability offences	Offence category	Maximum penalty amount
<p>(b) In any other case – on the first day of the prescribed period in the preceding year.</p> <p>(3) A site contamination auditor must, within 14 days after any change of address or any other change relating to his or her activities as a site contamination auditor that affects the accuracy of particulars last furnished to the Authority, notify the Authority of the change.</p>	3	<b>Penalty: \$8,000</b>
<p><b>s103Z – Requirements relating to site contamination audits</b></p> <p>(1) A site contamination auditor must, within 14 days after the commencement of a site contamination audit for which the auditor is the responsible auditor, notify the Authority in writing of the person who commissioned the audit and the location of the land to which the audit is to relate.</p> <p>(2) A site contamination auditor must, within 14 days after the termination before completion of a site contamination audit for which the auditor was the responsible auditor, notify the Authority</p> <p>(4) A site contamination auditor must, on the completion of each site contamination audit for which the auditor is the responsible auditor</p> <ul style="list-style-type: none"> <li>(a) provide a site contamination audit report to the person who commissioned the audit; and</li> <li>(b) at the same time, provide – <ul style="list-style-type: none"> <li>(i) a site contamination audit report to the Authority; and</li> <li>(ii) a site contamination audit statement to the council for the area in which the land to which the audit relates is situated and any prescribed body.</li> </ul> </li> </ul>	<p>3</p> <p>3</p> <p>3</p>	<p><b>Penalty: \$8,000</b></p> <p><b>Penalty: \$8,000</b></p> <p><b>Penalty: \$8,000</b></p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s103ZA – Reports by site contamination auditors and consultants</b></p> <p>A site contamination auditor or site contamination consultant must, in any written report that the auditor or consultant prepares in relation to a site, clearly qualify any statement of the auditor's or consultant's opinion as to the existence of site contamination at the site by specifying the land uses that were taken into account in forming that opinion.</p>	3	Penalty: \$8,000
<p><b>s121 – Confidentiality</b></p> <p>A person must not divulge any information relating to trade processes or financial information obtained (whether by that person or some other person) in the administration or enforcement of this Act except—</p> <ul style="list-style-type: none"> <li>(a) as authorised by or under this Act or the <i>Green Industries SA Act 2004</i>; or</li> <li>(b) with the consent of the person from whom the information was obtained or to whom the information relates; or</li> <li>(c) in connection with the administration or enforcement of this Act; or</li> <li>(d) for the purpose of any legal proceedings arising out of the administration or enforcement of this Act.</li> </ul>	3	Penalty: \$8,000
<p><b>s135 – Recovery of administrative and technical costs associated with contraventions</b></p> <p>(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.</p>	3	Penalty: \$1,000 Expiation fee: \$500
<p><b>s135A – Recovery of administrative and technical costs associated with action under Part 10A</b></p> <p>(5) A person who fails to pay an amount payable to the Authority in <b>accordance</b> with this section is guilty of an offence.</p>	3	Penalty: \$1,000 Expiation: \$500

## Plastic Shopping Bags (Waste Avoidance) Act 2008

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s4 – Retailer must provide alternative shopping bag until prescribed day</b></p> <p>(1) From the day on which this section comes into operation until the day immediately preceding the prescribed day, a retailer who at any premises makes plastic shopping bags available to customers as a means of carrying goods purchased, or to be purchased, from the retailer must –</p> <p>(a) be in a position to provide an alternative shopping bag to a customer who requests that the retailer provide him or her with such a bag; and</p> <p>(b) display a notice, or notices, in the premises in accordance with the requirements prescribed by regulation.</p>	3	<p><b>Penalty:</b> \$5,000</p> <p><b>Expiation fee:</b> \$315</p>
<p><b>s5 – Retailer not to provide plastic shopping bag</b></p> <p>(1) If –</p> <p>(a) a retailer provides a plastic shopping bag to a customer on or after the prescribed day; and</p> <p>(b) the plastic shopping bag is provided to the customer as a means of carrying goods purchased, or to be purchased, from the retailer, the retailer is guilty of an offence.</p>	3	<p><b>Penalty:</b> \$5,000</p> <p><b>Expiation fee:</b> \$315</p>
<p><b>s7 – Person must not sell, supply or distribute prohibited plastic products in course of carrying on a business</b></p> <p>(1) person who, in the course of carrying on a business, sells, supplies or distributes a prohibited plastic product to another person is guilty of an offence.</p>	3	<p><b>Penalty:</b></p> <p>(a) in the case of a prescribed person – \$20,000;</p> <p>(b) in any other case – \$5,000.</p> <p><b>Expiation fee:</b></p> <p>(a) in the case of a prescribed person – \$1,000;</p> <p>(b) in any other case – \$315.</p>

Strict liability offences	Offence category	Maximum penalty amount
<p><b>s8 – Person must not represent that product is not a prohibited plastic product</b></p> <p>A person who—</p> <ul style="list-style-type: none"> <li>(a) sells, supplies or distributes a prohibited plastic product to another person; and</li> <li>(b) prior to, or in the course of, selling, supplying or distributing the product, represents to the other person that the product is not a prohibited plastic product</li> </ul> <p>is guilty of an offence.</p>	3	<p><b>Penalty:</b> \$20,000</p> <p><b>Expiation fee:</b> \$1,000</p>
<p><b>s9 – Person must not manufacture or produce oxo-degradable plastic products</b></p> <p>A person who, in the course of carrying on a business, manufactures or produces a product comprised, in whole or in part, of oxo-degradable plastic is guilty of an offence.</p>	3	<p><b>Penalty:</b> \$20,000</p> <p><b>Expiation fee:</b> \$1,000</p>
<p><b>s10 – Person must not sell, supply or distribute oxo-degradable plastic products in course of carrying on a business</b></p> <p>(1) A person who, in the course of carrying on a business, sells, supplies or distributes a product comprised, in whole or in part, of oxo-degradable plastic to another person is guilty of an offence.</p>	3	<p><b>Penalty:</b></p> <ul style="list-style-type: none"> <li>(a) in the case of a prescribed person – \$20,000;</li> <li>(b) in any other case – \$5,000.</li> </ul> <p><b>Expiation fee:</b></p> <ul style="list-style-type: none"> <li>(a) in the case of a prescribed person – \$1,000;</li> <li>(b) in any other case - \$315.</li> </ul>
<p><b>s11 – Provision of manufacturer's or producer's certification as to oxo-degradable plastic content of plastic products</b></p> <p>(1) A person who, in the course of carrying on a business, manufactures or produces a plastic product, must, at the written request of an authorised officer, provide to the Authority in accordance with this section, certification as to whether or not the product contains oxo-degradable plastic, unless the person has a reasonable excuse for not doing so.</p>	3	<p><b>Penalty:</b> \$20,000</p>

Strict liability offences	Offence category	Maximum penalty amount
<p>(2) A person who, in the course of carrying on a business, distributes a plastic product or sells or supplies a plastic product by wholesale, must, at the written request of an authorised officer, provide to the Authority in accordance with this section, certification of the manufacturer or producer of the product as to whether or not the product contains oxo-degradable plastic, unless the person has a reasonable excuse for not doing so.</p>	3	<b>Penalty: \$20,000</b>





## Attachment E Civil penalty calculation tables lift-out

Table 1 Calculating foundation penalties

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

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



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

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

\* Some factors may need to be assessed with regard to other factors contained in the table (see section 4.1)



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

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



**Table 4 Adjusting factors**

<b>Adjusting factors</b> (Insert a reduction of 0–10 percentage points for each of the following)		<b>% decrease</b>
<b>1</b>	<b>The alleged offender’s good compliance record</b>	
<b>2</b>	<b>The preventative measures by the alleged offender prior to the incident</b>	
<b>3</b>	<b>The extent, speed and appropriateness of corrective action</b>	
<b>4</b>	<b>The timeliness of notification</b>	
<b>5</b>	<b>The degree of cooperation demonstrated by the alleged offender</b>	
<b>6</b>	<b>The degree of public contrition demonstrated by the alleged offender</b>	
<b>7</b>	<b>Other relevant factors</b>	
<b>total percentage points reduction</b>		%
<b>reduction expressed in \$</b>		<b>\$ (E)</b>
insert Preliminary Penalty (D) from Tables 2 or 3		<b>\$ (D)</b>
subtract (E) from (D)		–
		<b>\$ (E)</b>
		=
<b>Adjusted Penalty</b>		<b>\$ (F)</b>
<b>Copy the Adjusted Penalty (F) to Economic Benefit (Table 5)</b>		





**Table 5 Economic benefit**

<b>Adding economic benefit</b>	
insert <b>adjusted Foundation Penalty (F)</b> from Table 4	\$ (G)
add <b>economic benefit (G)</b> derived from contravention	\$ + (H)
<b>Final Negotiated Civil Penalty</b>	\$