

## Energy Facility Site Evaluation Council

### Enforcement Guidance

#### Policy #15-01

**Purpose:** To provide guidance to Energy Facility Site Evaluation Council (EFSEC or Council) staff and Council members on the enforcement process, and to provide for the consistent levying of penalties.

#### General

This document expresses the Council's current view of its enforcement policies. As a policy statement adopted under the Administrative Procedures Act, chapter 34.05 RCW, it is not intended to be binding as a formally adopted rule. The Council retains discretion to apply and adapt its enforcement efforts in individual cases to implement its overall duty to assure compliance with all site certification agreements and permits issued by the Council. Adoption of this policy advances the effective and equitable enforcement of the laws under the Council's responsibility.

Enforcement is a tool for protecting the public health, the property of others, and the environment. As directed by RCW 80.50.040(9), other agencies perform any on-site inspections required by the Council pursuant to interagency agreement. EFSEC, however, retains authority for determining compliance relative to monitoring. The inspecting agency may recommend a penalty for a violation to EFSEC based upon the penalty criteria adopted by the Council.

A violation does not necessarily result in the issuance of a penalty. A notice of incident and request for assurance of compliance may be issued when a violation is being corrected quickly and effectively by the violator; no substantial danger to humans, the property of others, or the environment resulted from the violation; and a penalty does not appear to be appropriate in light of the seriousness of the violation or as an incentive to secure future compliance.

The purpose of a civil penalty is to influence behavior, encourage compliance, and deter future violations. Penalty amounts will include a gravity component and an economic benefit component. The gravity component will carefully match the significance of the violation to the impact of the enforcement action. The Council will recover any economic benefit in order to promote a level playing field for those businesses that expend money to comply with environmental laws and regulatory requirements.

## I. Range of Council Actions

EFSEC is authorized to take four types of enforcement actions to apparent violations. The range of actions allows EFSEC to use, in its discretion, an approach that is best suited to address the seriousness of the apparent violation, the potential damage to humans or the environment, the willingness and ability of the violators to make required corrections, and the speed with which corrective actions should be taken. WAC 463-70-070(1).

The four different types of enforcement actions in response to an apparent violation are:

- 1) The Chair of the Council, or the Chair's designee, may take emergency action to stop or eliminate any imminent or actual substantial danger to health or welfare of persons or the environment. The Council must consider any emergency action as soon as practical after the emergency action is taken, and may adopt, rescind, or modify the emergency action taken and may take other enforcement action. WAC 463-70-070(2).
- 2) The Council may issue a notice of incident and request for assurance and compliance when the Council believes: that a violation occurred; that the violation is being corrected quickly and effectively by the violator; that the violation caused no substantial danger to humans, the property of others or the environment; and that a penalty does not appear to be appropriate in light of the seriousness of the violation or as an incentive to secure future compliance.

The Council may issue a notice of incident and request for assurance and compliance if it has probable cause to believe that a term or condition of a certificate agreement or permit has been violated. If the Council issues a notice of incident and request for assurance and compliance, within 30 days of service of the notice the certificate holder must provide the Council with a report of the incident and assurance of compliance, including appropriate measures to preclude a recurrence of the incident. The Council will review the assurance of compliance and may close out the matter by resolution or take such other action it deems necessary. WAC 463-70-070(3).

- 3) The Council may issue a notice of violation when the Council believes that a violation has occurred; that a violation is not being timely or effectively corrected; that a violation may cause a substantial risk of harm to humans, the property of others, or the environment; or that a penalty may be appropriate as an incentive to future compliance.

The Council may issue a notice of violation if it has probable cause to believe that a term or condition of a certificate agreement or permit has been violated. The notice must specify the provisions of law or rule, or the certificate agreement or permit which are alleged to

have been violated and must include a requirement for corrective action to be taken. If the Council issues a notice of violation, it may include a penalty. WAC 463-70-070(4)(a).

- 4) A penalty may be issued pursuant to RCW 80.50.150, or RCW 74.90.431 if the violation is of the Washington Clean Air Act. See also RCW 70.94.422 and 90.48.262; WAC 463-70-070(4)(b), 463-74-040, 463-76-065(6), 463-78-230, 463-80-080, 463-85-240.

## **II. Imposition of Penalties**

RCW 80.50.150(5) provides that every person who violates the provisions of certificates and permits issued or administered by the Council is subject to a penalty of up to \$5000 per day for every violation. This section remains in effect for any violations occurring before October 9, 2015. Any violation occurring on or after October 9, 2015, is subject to a penalty of \$10,000 per day per violation. (See SB 5310, codified as Chapter 39, Laws of 2015, 3<sup>rd</sup> special session.)

Each violation is considered a separate and distinct offense. In the case of a continuing violation, every day's continuance is deemed a separate and distinct violation.

The total penalty will consist of a gravity component and an economic benefit component.

### **Consistent Penalties – Gravity Component of Penalty**

After EFSEC has decided to issue a penalty, the gravity component amount is calculated by using the Gravity Criteria Scoring Worksheet, which contains a penalty matrix. The worksheet asks several questions, and for each question, assigns points based on the response to the particular question. The number of points for all of the questions are then totaled to produce a score for that violation. In the case of a continuing violation, each day's continuance is deemed a separate and distinct violation. The score for the violation is then translated into a specific penalty amount by referring to the range of penalties contained in the penalty matrix. The greater the number of points, the greater the potential penalty. The penalty amounts determined for each violation are added together to produce up to the statutory maximum amount of the gravity component of the potential penalty.

For example, a regulated entity committed two separate permit violations. One violation is scored at 5 points and the second violation is scored at 16 points. Turning to the penalty matrix, the first violation produces a potential \$1000 penalty, and the second violation produces a potential \$3000 penalty. These two penalties are added together to produce a potential penalty of \$4000 under the gravity component. In another example, a violation generates a potential penalty of \$1000, but the violation was continuing and occurred for eight days. The potential maximum penalty under the gravity component for this continuing violation is \$8000 (\$1000 per day violation x 8 days = \$8000).

NOTE: The penalty matrix for determining the gravity component of a penalty is based upon a statutory daily maximum of \$10,000 per day, per violation. The last box in the penalty matrix contains a penalty of \$10,000 if the violation scores 35 points or above. The penalty matrix therefore, does not allow the gravity component for a violation to exceed \$10,000 per violation. The \$10,000 maximum penalty amount is authorized pursuant to SB 5310, which was enacted during the 2015 third special session. (See Chapter 39, Laws of 2015, 3<sup>rd</sup> special session.) The effective date of this bill is October 9, 2015. For any violations occurring before October 9, 2015, the maximum penalty amount is \$5000 per day, per violation. Therefore, in determining the maximum penalty under the gravity component for violations occurring prior to October 9, 2015, the range of penalty amounts contained in the penalty matrix must be reduced by one-half.

The worksheet is not intended to determine if a penalty is appropriate, but rather it enables the program to be consistent in the penalty amounts imposed. The Gravity Criteria Notes may be used to help answer questions contained on the worksheet.

### **Council Discretion on Gravity Component of Penalty**

When determining the amount of the gravity component of the penalty, Council will be mindful of the purpose of a civil penalty, which is to influence behavior, encourage compliance, and deter future violations. The Council may reduce, but not increase, the potential amount of the penalty generated through use of the Gravity Criteria Scoring Worksheet.

The factors that the Council will consider when deciding whether to reduce the gravity component of a penalty are:

- 1) The seriousness of the violation. This includes the gravity of the damage to human health, the environment, or the property of others. The Council will also consider the circumstances of its occurrence, including the duration of the violation, and whether the violator's actions were done knowingly.
- 2) The prior behavior of the violator. Specific criteria include the record of similar violations or a pattern of violations indicating general disregard of environmental laws and rules, and precautions taken to prevent the violation. The Council will take harsher steps against violators who have a history of non-compliance, repeated violations of the same or other regulations, and previous penalties.
- 3) Subsequent actions taken to rectify the problem. The Council will consider the degree the responsible party cooperated with EFSEC and other agencies to gain compliance, and how timely and appropriately corrective actions were taken. Corrective actions that are delayed will generally not be considered as favorably as corrective actions that are taken as soon as the violation was discovered.

The Council balances all of these factors to best achieve the purpose of a civil penalty. The Council shall describe the basis used for any reduction in the amount of the gravity component of the penalty.

### **Economic Benefit Component of Penalty**

EFSEC will recover the economic benefit of noncompliance when penalizing violators. Economic benefit is usually found in the form of delayed or avoided costs, such as the failure to install necessary equipment, obtain necessary permits, conduct necessary tests, or employ a sufficient number of adequately trained staff. In recognition that the economic benefit component can be difficult to calculate, EFSEC may rely upon an economic analysis used by the inspecting agency for determining the economic benefit of noncompliance. It is general Council policy not to adjust or mitigate the economic benefit component. If the Council decides to adjust the economic benefit component, the reasons must be set forth in the final Council decision.

### **III. Issuance of Penalty**

A penalty must be imposed in writing, either by certified mail with return receipt requested, or by personal service. The penalty notice must describe the violation with reasonable particularity and include the right to appeal of the Council's decision.

### **IV. Remission/Mitigation of Penalties**

For violations occurring before October 9, 2015, a certificate holder may seek remission or mitigation of a penalty from the Council. The request for remission or mitigation must be filed with the Council within 15 days after *receipt* of the notice of violation. RCW 80.50.150(5). Note that the Council's regulation provides that this request must be filed within 15 days after *service* of the notice of violation. See WAC 463-70-070(4)(c)(i). The Council will rely upon the date of receipt for calculating the 15-day time period for requesting remission or mitigation. A decision by the Council to remit or mitigate a penalty is an administrative decision which the Council makes within its discretion. Remission or mitigation is only generally allowed to raise items not considered as part of the imposition of the original penalty.

The ability to request remission or mitigation of a penalty was repealed as part of SB 5310, which was enacted during the 2015 third special session. (See Chapter 39, Laws of 2015, 3<sup>rd</sup> special session.)

### **V. Appeal Rights**

Any person may appeal a penalty imposed by the Council to the Council within 30 days after the date of receipt of the notice imposing the penalty. For violations occurring before October 9, 2015, if an

application for remission or mitigation is filed, the appeal of the penalty must be filed within 30 days of receipt of notice from the Council setting forth the disposition of the application. Timely appeal to the Council is required before an appeal of the penalty may be made to superior court.