

EFSEC Gravity Criteria Notes

When scoring the eight questions, use the point values listed on the Gravity Criteria Scoring Worksheet as listed. Do not use other point values other than those specifically listed.

1. Did the violator know, or reasonably should have known, about the requirement?

It is not necessary to determine whether a violation was intended or willful in order to assess a penalty because many environmental laws contain a strict liability standard. Whether a violator knew, or reasonably should have known, about a requirement may be used to raise the amount of a penalty.

Knowledge may be obtained from a variety of sources, including previous technical assistance. Do not look only at direct contact between the agency and the violator addressing the laws and regulations violated. Knowledge may also be obtained by focused outreach efforts (such as to an industry group or to residents in a specific area) and general outreach efforts by federal, state, or local agencies, or activist/interest groups. **The level of sophistication within the industry for complying with requirements and the accessibility of appropriate control technology may also be considered.**

Claims of a lack of knowledge due to “not reading,” “not listening,” or “not seeing,” etc. educational efforts by entities that have been reasonably presented to the violator should be considered a knowing violation.

2. Is the violator a large business or a small business?

Penalties should act as deterrents to future violations. The deterrent value of a penalty is relative to the ability of the violator to pay the penalty. A penalty that would have little impact to a large corporation may have a devastating impact to a small business.

Small and large businesses may be differentiated by using the definition of a “small business” under the Regulatory Fairness Act, Chapter 19.85 RCW. RCW 19.85.020(1) defines a “small business”, in part, as a business entity with fifty or fewer employees.

3. Does the violator have a history of violations?

This question addresses the past behavior of the violator towards environmental laws, and other laws as they apply to the violator’s operation in general. Violations considered for this question should be either state, federal, or local environmental/natural resources laws and regulations, or should have a direct bearing on the violation being addressed. **A prior violation includes any act or omission resulting in a state, local, or federal environmental response,**

including, but not limited to: a notice of incident and request for assurance and compliance, a notice of violation, a warning letter, an administrative order, or a penalty.

Violations that are for the same or very similar violation should be scored higher than for other violations (example: a violator of a water quality law who has violated water quality laws and regulations before would score higher than a violator who has violated air quality laws before but not water quality laws). **The higher scoring is justified for the same or a similar violation because it is clear that the party was not deterred by the previous governmental enforcement response. Some facts indicating a “similar violation” are: violation of the same permit; violation of the same emissions standard; violation at the same process points of a source; violation of the same statutory or regulatory provision; and a similar act or omission.**

4. Did the violation result in a risk to the health, safety, welfare, the environment, property, a business and/or enjoyment of personal property?

This question addresses whether the violation created a risk, not if the risk resulted in impacts. Certain types of violations might merit penalties, but do not create risks (example – some record keeping errors). **This is a qualitative question that examines whether a risk was created by the violation, not the statistical probability that a risk exists or existed.**

5. Did the risk in Question #4 result in an impact or is it reasonably expected that an impact did occur?

This question addresses the issue of whether impacts actually occurred or are reasonably expected to have occurred.

Two evaluations of this question are necessary:

- a) The first evaluation should be for documented impacts. Documentation may be through reliable complaints, observations, medical records, or other appropriate methods.
- b) The second evaluation deals with either quantified or estimated probabilities (more likely than not) based on modeling, professional knowledge or other defensible method. If the location, nature, and other factors concerning the violation are such that it is probable that impacts occurred, then it should be presumed that there were impacts **even though they were not documented.**

Persons or businesses are sometimes impacted, even severely impacted, and they do not know to report such impacts to the appropriate state agency. Therefore, it is not valid to presume that there were no impacts based upon no impacts being reported. Any presumption of no impacts should be based on the same type of evaluation as a presumption of impacts.

When considering the nature of the violation under this question, examine the magnitude of the violation in terms of type or amount of pollutant and resources affected, as well as the duration and/or number of specific violations.

6. What were the impacts in Question #5? (mark all impacts and add the scores together for the total number of points)

This question looks to address the severity/importance of the impacts created. Impacts to an individual's physical self are considered the most severe.

When answering this question, items "A) Impacts to an individual's health, safety, or welfare" and "C) Impacts to an individual's enjoyment of personal property" are intended to be used for situations where a specific harm and individual or business is identified.

Item "B) Damage to the environment" should be used when an impact to an area occurred, there is no specific individual or business identified, it would be reasonable to expect at least one person or business would be in the impacted area, and an impact to a person or business in the impacted area would be expected.

To determine the score for Question #6, mark all impacts and add the score for each impact together for a total score.

7. Did the violator take actions to correct the violation?

Review any action considered for this question by asking: "Does the action focus on correcting and/or mitigating impacts to the environment and/or human health?"

The Council may be more lenient if the violator promptly corrects a violation, and any underlying system problems, when these are pointed out by staff. Specific actions include purchasing new technology, making system changes, and training company personnel. **Extra efforts such as paying for extra work shifts or paying a premium on a contract to have equipment installed more quickly may also result in more lenient action by the Council.** The Council may be more lenient if the violator has an active and adequate compliance program in place.

The Council may also be more lenient if the violator self-reported the violation, and if the violator is cooperative and responsive during the investigation of the violation.

8. Was there an economic benefit to the violator from this violation, or did the violator expect an economic benefit would be derived from the violation?

The quantitative measurement of economic benefit is reserved for a separate calculation to be added to the penalty amount. This question is aimed at reflecting a greater severity of a violation if one of the reasons for the violation is a perceived economic benefit even when the benefit is not actually obtained. In order to support an evaluation of the perception of an economic benefit for the violation, look for statements such as “I can’t afford to wait for a permit, or install such equipment.” **Statements such as these indicate a desire to delay or avoid costs.**