

360 CMR 2.00: ENFORCEMENT AND ADMINISTRATIVE PENALTIES

Section

GENERAL PROVISIONS

- 2.01: Authority
- 2.02: Purpose
- 2.03: Severability
- 2.04: Definitions
- 2.05: Applicability
- 2.06: Computation of Time
- 2.07: Issuance and Service of Notices, Orders, and Rulings
- 2.08: Effective Date

ENFORCEMENT OPTIONS

- 2.11: Enforcement Options - General
- 2.12: Notice of Noncompliance
- 2.13: Administrative Order
- 2.14: Penalty Assessment Notice
- 2.15: Permit Actions
- 2.16: Emergency Suspension of Service

APPEALS AND AFFIRMATIVE DEFENSES

- 2.21: Appeals of Notices of Noncompliance, Orders, Permits and Permit Actions
- 2.22: Appeals of Penalty Assessment Notices
- 2.23: Affirmative Defenses

ADMINISTRATIVE PENALTIES

- 2.31: Maximum Permissible Penalty
- 2.32: Calculating the Duration of Noncompliance for Purposes of a Penalty Assessment Notice
- 2.33: Determining the Amount of an Administrative Penalty
- 2.34: Paying an Administrative Penalty

APPENDIX

- A: Calculation of a Penalty Pursuant to 360 CMR 2.33(1) and (6)
- B: Example of a Penalty Computation

2.01: Authority

360 CMR 2.00 is promulgated pursuant to St. 1984, c. 372, §§ 6 and 8, governing enforcement by the Authority of St. 1984, c. 372, §§ 6 and 8 and of the Authority's rules, regulations, orders, permits, and other requirements.

2.02: Purpose

360 CMR 2.00 is intended to:

- (1) Promote the efficient and economical repair, replacement, rehabilitation, modernization, extension, regulation, and operation of systems for water service and wastewater collection, disposal, and treatment in the service area of the Authority;
- (2) Enhance the Authority's ability and effectiveness in administering its present and future programs and in enforcing St. 1984, c. 372, §§ 6 and 8 and the Authority's rules, regulations, orders, permits, and other requirements;
- (3) Assure that the Authority assesses civil administrative penalties, and otherwise implements St. 1984, c. 372, §§ 6 and 8 lawfully, fairly, and consistently;

2.02: continued

- (4) Provide for the imposition of reasonable penalties for violations of the Authority's regulations that are commensurate with the seriousness of the violation; and
- (5) Implement the requirements of the National Pretreatment Regulations promulgated pursuant to the Federal Water Pollution Control Act, including 40 CFR § 403.8(f).

2.03: Severability

The provisions of 360 CMR 2.00 are severable. If any provision of 360 CMR 2.00, or the application to any Person or circumstance, is held invalid, the invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

2.04: Definitions

Unless the context specifically indicates otherwise, the meaning of the terms used in 360 CMR 2.00 shall be those defined in 360 CMR 10.004 and as follows:

Civil Administrative Penalty and Penalty shall mean a civil administrative penalty that the Authority seeks to assess pursuant to St. 1984, c. 372, §§ 6 and 8 and 360 CMR 2.00.

Executive Director shall mean the Executive Director of the Authority.

Notice of Noncompliance shall mean the written notice given to a Person by the Authority pursuant to 360 CMR 2.12 stating that the Person has failed to comply on a specified occasion with a described Requirement.

Penalty Assessment Notice or PAN shall mean a written notice from the Authority imposing a civil administrative penalty pursuant to St. 1984, c. 372, as amended, and Authority regulations.

Permit shall mean any license, permit, certificate, registration, charter, authority, approval, or other form of permission required by law or by rule, regulation, or order of the Authority.

Permit Action shall mean an action by the Authority taken pursuant to 360 CMR 2.15 to revoke, suspend, modify, deny, or refuse to renew a Permit.

Requirement shall mean any rule, regulation, order, or Permit issued or adopted by the Authority, or any law or regulation which the Authority has the authority or responsibility to enforce.

Violation shall mean any act or failure to act or omission which constitutes or results in one or more of the following:

- (a) Engaging in any business or other activity without a currently valid Permit whenever engaging in such business or activity requires such a Permit;
- (b) Engaging in any activity prohibited by, or not in compliance with, any Requirement; or
- (c) Not doing fully, or not doing in timely fashion, anything required by any Requirement.

2.05: Applicability

360 CMR 2.00 applies to every law the Authority has the authority or the responsibility to enforce, and to every rule, regulation, order, permit, and other requirement issued or adopted by the Authority. This includes laws, rules, regulations, orders, permits, and other requirements now in effect or enacted, issued, or adopted in the future.

2.06: Computation of Time

Unless otherwise specifically provided by statute or by regulation or order issued by the Authority, any time period prescribed or referred to in 360 CMR 2.00 shall begin with the first day following the last day of the act which initiates the running of the time period, and shall include every calendar day, including the last day of the time period so computed. If the last day is a Saturday, Sunday, legal holiday, or other day in which the Authority offices are closed, the deadline shall run until the end of the next business day.

2.07: Issuance and Service of Notices, Orders, and Rulings

(1) Each notice, order, and/or ruling issued under 360 CMR 2.00 shall be served by one or more of the following methods:

- (a) Service in hand at the last known address in the Commonwealth of the Person or at the last known address of any officer, employee, or agent of the Person authorized by appointment of the Person or by law to accept service;
- (b) Service in hand to the Person, or to any officer, employee, or agent of the Person authorized by appointment of the Person or by law to accept service; or
- (c) By certified mail, return receipt requested, addressed to the Person's last known address in the Commonwealth, or to the last known address of any officer, employee or agent authorized by appointment of the Person or by law to accept service.

(2) If served by hand, the notice shall be deemed issued on the date so served. If served by mail, the notice shall be deemed issued when postmarked by the U.S. Postal Service. If the notice is returned to the Authority by the U.S. Postal Service as unclaimed or refused, the notice will be deemed issued when postmarked by the U.S. Postal Service unless the Person to whom the notice is issued persuades the Authority that the notice was not claimed for reasons beyond its control.

2.08: Effective Date

360 CMR 2.00 shall govern all enforcement actions taken on or after the effective date of 360 CMR 2.00, regardless of whether a Violation occurred before, on, or after the effective date. Any enforcement action taken prior to the effective date of 360 CMR 2.00 shall be governed by the regulations in effect when that enforcement action was taken.

2.11: Enforcement Options - General

Whenever, on the basis of any available information, the Authority finds that a Person has violated, is violating, or threatens to violate 360 CMR 10.000, any Notice of Noncompliance, order, or Permit issued pursuant to Authority regulations, or any settlement agreement to which the Authority is a signatory and which binds the Person or his or her assignee or successor, or that a Person has made a false representation in an application, record, or report to the Authority, or has falsified, tampered with, or rendered inaccurate a monitoring device or method, or failed to pay a penalty or fee due to the Authority, the Authority may take one or more of the following actions:

- (1) Issue a Notice of Noncompliance;
- (2) Issue an administrative order requiring any action the Authority is authorized to require;
- (3) Assess a civil administrative penalty;
- (4) Issue or modify a Permit under 360 CMR 10.000 with schedules of compliance or other requirements as necessary to bring the permittee into compliance or prevent further violations, or both;
- (5) Revoke, deny, suspend, or refuse to renew a Permit issued under 360 CMR 10.000;
- (6) Terminate or suspend water and/or sewer services provided to the Person;

2.11: continued

- (7) Institute a court action for:
  - (a) Civil penalties;
  - (b) Criminal fines and/or other criminal punishment;
  - (c) Injunctive relief, including the issuance of an injunction or a temporary restraining order;
  - (d) Reimbursement of costs and/or damages resulting from the violation or threatened violation; and/or
  - (e) Any other judicial relief authorized by law or regulation;
- (8) Require the Person to attend a meeting at the Authority during business hours, or at any other reasonable time, to discuss its violations or threatened violations, the remedial actions that it might take, and the actions that the Authority might take under 360 CMR 2.00;
- (9) Enter into a Consent Agreement or Settlement Agreement with the Person in which the Person agrees to take actions that the Authority might require under 360 CMR 2.00 and 10.000, including to pay penalties to the Authority without the issuance of a Penalty Assessment Notice, and/or not take actions that the Authority might restrain under 360 CMR 2.00 and 10.000. The Agreement also may take the place of a ruling that the Authority would otherwise issue under 360 CMR 2.21(3); and
- (10) Take any other action authorized by law.

2.12: Notice of Noncompliance

- (1) A Notice of Noncompliance shall identify each Requirement the Authority asserts was violated by the Person to whom the Notice of Noncompliance is issued, the occasion(s) that each Requirement was violated, and shall require the Person to whom the Notice of Noncompliance is issued to:
  - (a) comply by a date certain with the Requirement(s) identified in the Notice of Noncompliance and/or with 360 CMR 10.021 through 10.025; and/or
  - (b) submit to the Authority by a date certain a written report describing the measures the Person will take to achieve compliance with the Requirements identified in the Notice of Noncompliance, and the date by which such measures will be taken.
- (2) A Notice of Noncompliance shall notify the Person of its right to request reconsideration of the Notice of Noncompliance.
- (3) A Person who seeks a later compliance date than the compliance date required by a Notice of Noncompliance shall have the burden to establish:
  - (a) that the Person has not had a reasonable time in which to comply since the Requirement became applicable to the Person;
  - (b) the existence of a substantial non-monetary impediment that prevents the Person from meeting the compliance date;
  - (c) that the Person cannot reasonably and feasibly cease discharging to the sewer until it achieves compliance;
  - (d) a schedule for achieving compliance within a reasonable time and that it can remain in compliance after a date certain;
  - (e) specific interim measures the Person will take to minimize the instances and severity of the noncompliance until it achieves compliance within a reasonable time; and
  - (f) that the Person's discharge does not have a potential to violate 360 CMR 10.021 or otherwise have an adverse impact on the Authority or on any tributary to the Authority sewer system.
- (4) The purpose of a Notice of Noncompliance is to provide a formal notice of one or more violations and to set a compliance date or require the submission of a compliance schedule. A Notice of Noncompliance shall not be construed as an authorization or approval to violate any Authority regulation or requirement prior to achieving compliance.

2.13: Administrative Order

- (1) The Authority may issue an administrative order to require a Person to:
  - (a) Cease and desist a Violation and/or any actions that cause or threaten to cause a Violation;
  - (b) Submit reports, subject to such modifications as the Authority deems appropriate, identifying the measures the Person will take to correct or eliminate a Violation or threatened Violation, and the dates by which the measures will be taken;
  - (c) Take specific measures to correct or eliminate a Violation or threatened Violation, including pretreatment changes, process changes, and/or the implementation of measures to reduce the use of toxic materials in the Person's production process;
  - (d) Follow an implementation schedule requiring specific actions according to a time schedule, including, but not limited to, submitting plans identifying all wastewater piping and sewer connections, dye testing of lines and pipes, installing improved or additional sampling locations, and obtaining expert advice and assistance;
  - (e) Follow a schedule of sampling, analyzing, and reporting sampling results to the Authority; and/or
  - (f) Take any other action the Authority is authorized by law or regulation to require concerning the Violation or threatened Violation.
  
- (2) An Order shall:
  - (a) State with reasonable specificity the nature of the Violation or threatened Violation;
  - (b) Specify a time for compliance with the terms of the Order; and
  - (c) Notify the Person of its right to request reconsideration of the Order.
  
- (3) An Order may be issued as part of a Notice of Noncompliance.

2.14: Penalty Assessment Notice

- (1) To assess an administrative penalty, the Authority shall issue a Penalty Assessment Notice to the Person to be assessed the penalty. Each penalty shall be based on a Violation that occurred on or after May 1, 1987, and, at the time it occurred, constituted noncompliance with a Requirement:
  - (a) Which was then in effect;
  - (b) To which that Person was then subject; and
  - (c) To which Authority regulations apply.
  
- (2) A Penalty Assessment Notice shall:
  - (a) Contain a concise statement of the Violation and date of Violation for each penalty to be assessed;
  - (b) State the money amount to be assessed as a penalty for each Violation and the factors considered by the Authority in determining this amount;
  - (c) State that the Person to be assessed the penalty has a right to a hearing on such assessment according to 360 CMR 1.00 and 2.00;
  - (d) Identify the appeal procedure to be complied with by the Person to be assessed the Penalty in order for the Person to avoid waiving its right to a hearing under 360 CMR 1.00 and 2.00; and
  - (e) Identify the method and deadline for payment of the penalty if the Person to be assessed the penalty waives his right to a hearing.
  
- (3) The issuance of a Notice of Noncompliance, Order, Ruling, Permit, or other document is not a prerequisite for the issuance of a Penalty Assessment Notice. A penalty may be assessed: to compensate the Authority or others for damages suffered or costs incurred as a result of each violation; for any actual or potential impact of the violation on the public health, safety, and welfare and the environment; to help assure that the violator did not have an economic gain from its noncompliance, as a deterrent to future violations by the Person subject to the penalty and by others; for intentional violations; and/or as part of a process of escalating enforcement to gain compliance.

2.15: Permit Action

- (1) The Authority may revoke, suspend, modify, deny, or refuse to renew a Permit issued under 360 CMR 10.000 whenever, on the basis of available information, the Authority finds that the permittee:
- (a) Provided false or misleading information to the Authority, or failed to provide relevant information to the Authority, as part of the permitting process;
  - (b) Intentionally falsified or misrepresented records, rendered inaccurate or tampered with any monitoring device or method used or required by the Authority, or manipulated sampling, inspecting, or other monitoring to hide actual or potential violations of any Requirement;
  - (c) Has a history of noncompliance that has not abated after receiving a Notice of Noncompliance, Order, Penalty Assessment Notice, or a Permit with a compliance schedule from the Authority;
  - (d) Has violated or failed to comply with a Notice of Noncompliance, Order, Ruling, or a Permit, issued by the Authority or a court after having a reasonable opportunity to comply;
  - (e) Intentionally violated or failed to comply with a Notice of Noncompliance, Order, Ruling, or a Permit, issued by the Authority or a court;
  - (f) Intentionally violated or failed to comply with a settlement agreement to which the Authority and the permittee are parties;
  - (g) Does not have the ability to comply with an Authority Requirement within a reasonable period of time;
  - (h) Has a discharge which can reasonably be expected to result in a significant harm to health, safety, the environment, the Authority Sewerage System, a tributary to the Authority Sewerage System, or to cause Interference or Pass Through; or
  - (i) Has failed to pay a penalty or fee due the Authority after receiving notice to do so.
- (2) A Permit Action shall be initiated by a notice to the permittee that:
- (a) Identifies the basis for the Authority action and the facts and circumstances upon which the Authority relies;
  - (b) Indicates whether such action is of limited, indefinite, or permanent duration; and
  - (c) Informs the permittee of its right to request reconsideration of the Permit Action and that timely filing of such request will stay the Permit Action pending the resolution of such request.
- (3) A Permit Action may be taken to prevent further violations, as a means to help insure compliance, as part of a process of escalating enforcement to gain compliance, and/or as a deterrent to future Violations by the permittee subject to the Action.

2.16: Emergency Suspension of Service

- (1) Notwithstanding any other provision of 360 CMR 2.00, whenever the Authority finds that a discharge presents or reasonably appears to present an imminent endangerment to the health or welfare of persons or to the environment, or threatens to interfere with the operation of the Authority Sewerage System or a municipal sewerage system, the Authority may take steps immediately and effectively to halt or prevent such discharge. Steps may include disconnecting the Person from the sewer system.
- (2) The Authority shall not disconnect or otherwise suspend service without giving prior informal notice of the suspension to the Person whose service will be suspended or who appears responsible for the discharge. A Person receiving notice of the Authority's intent to disconnect or otherwise suspend service shall suspend the discharge within the time specified by the Authority. If the Person fails to suspend the discharge, the Authority may take such action as it deems necessary to halt or prevent the discharge. The Authority shall reinstate service when it finds that the conditions requiring the suspension have been eliminated.

2.21: Appeals of Notices of Noncompliance, Orders, Permits and Permit Actions

- (1) Except as provided in 360 CMR 2.21(7), whenever the Authority issues, denies, revokes, suspends, modifies, or refuses to renew a permit, or issues an Order or Notice of Noncompliance, the Person subject to such Authority action shall have ten working days from the date of such action or notice to submit a written request for reconsideration and/or a stay of that action. The request shall set forth in detail the facts supporting it.

## 2.21: continued

- (2) The Authority may schedule and hold an informal conference with the Person submitting a request for reconsideration and/or a stay.
- (3) The Authority shall issue a ruling on a request for reconsideration and/or a stay within 15 working days after completing its consideration of the request. The ruling may affirm, modify, or withdraw the Authority action that is the subject of the request, and shall inform the Person of its right to appeal the ruling by commencing, within 30 calendar days of the date of the ruling, an adjudicatory proceeding.
- (4) Within 30 calendar days of the Authority's issuance of a ruling on a request for reconsideration and/or a stay, the Person who requested reconsideration may appeal the ruling by filing a written Claim for An Adjudicatory Proceeding with the Authority. The Claim shall comply with 360 CMR 1.00. The Proceeding shall be governed by 360 CMR 1.00. The adjudicatory proceeding shall provide each party with the opportunity for a full and fair hearing and the opportunity to call and examine witnesses, to introduce evidence, to cross-examine witnesses who testify, and to submit rebuttal evidence, as provided by 360 CMR 1.00. This shall not be construed to limit or prevent prefiled direct testimony as provided in 360 CMR 1.00.
- (5) The Authority shall not be required to prove the occurrence of an act or omission alleged by the Authority in a Notice, Order, Permit or Permit Action not disputed in the request for reconsideration and the claim for adjudicatory proceeding. Failure to contest an allegation contained in the Notice, Order, Permit or Permit Action shall constitute an admission of that allegation. The Authority shall have the burden to establish each challenged fact by a preponderance of the evidence, except the Person contesting the Notice, Order, Permit or Permit Action shall have the burden of establishing an affirmative defense available pursuant to 360 CMR 2.23. The results of sampling and analysis of wastewater conducted according to appropriate sampling, custody, and analysis procedures and contained in the official records of the Authority shall be admissible and such results shall be afforded a rebuttable presumption of validity.
- (6) The timely submittal of a request for reconsideration and/or stay of a Permit Action shall not postpone the effective date of the Permit Action. Upon written request by the person subject to the Permit Action, the Authority may consider a temporary stay of action.
- (7) The commencement of an adjudicatory proceeding shall not operate as a stay of any existing or further enforcement action by the Authority, unless the person requesting an adjudicatory proceeding also requests a stay by motion, in which case the Presiding Officer may, in his or her discretion, order a stay upon such terms as he or she considers proper.
- (8) An adjudicatory proceeding shall be ended by:
- (a) A voluntary dismissal, pursuant to 360 CMR 1.27(2);
  - (b) A written Settlement by Agreement of the Parties pursuant to 360 CMR 1.27(3), which shall take effect only upon written approval by the Executive Director; or
  - (c) A final decision, pursuant to 360 CMR 1.26 which shall take effect only upon written approval by the Executive Director.
- (9) When the Authority modifies a permit, only the terms being modified are subject to appeal. In addition, there shall be no appeal from the Authority's action issuing, denying, revoking, suspending, modifying, or refusing to renew a permit when the Authority took the action to implement the terms of a settlement agreement between the Authority and the permittee, or to implement a ruling on reconsideration, final decision in an adjudicatory proceeding, or court action.

2.22: Appeals of Penalty Assessment Notices

- (1) Within 30 days of the issuance of a Penalty Assessment Notice, the Person to whom the notice is issued may request a hearing by filing a Claim for Adjudicatory Proceeding pursuant to 360 CMR 1.00. In addition to the complying with the requirements of 360 CMR 1.00, the Claim shall:
- (a) Contain a concise statement of the grounds for the Claim;

## 2.22: continued

- (b) Identify each contested act or omission alleged in the Penalty Assessment Notice and state the grounds for contesting the act or omission;
- (c) Identify each Requirement alleged to have been violated that the Person intends to contest and state the grounds for contesting the Requirement;
- (d) Contain a concise statement of the grounds upon which the Person intends to contest the penalty assessed for each act or omission alleged to constitute a Violation; and
- (e) State the relief sought.

(2) The adjudicatory proceeding shall provide each party with the opportunity for a full and fair hearing and the opportunity to call and examine witnesses, to introduce evidence, to cross-examine witnesses who testify, and to submit rebuttal evidence, as provided by 360 CMR 1.00. This shall not be construed to limit or prevent prefiled direct testimony as provided in 360 CMR 1.00.

(3) The Authority shall not be required to prove the occurrence of an act or omission alleged by the Authority in a Penalty Assessment Notice and not disputed in the Claim for Adjudicatory Proceeding. Failure to contest an allegation contained in the Penalty Assessment Notice shall constitute an admission of that allegation. The Authority shall have the burden to establish each challenged fact by a preponderance of the evidence, except the Person contesting the penalty shall have the burden of establishing an affirmative defense available pursuant to 360 CMR 2.23 and the burden of establishing that it is entitled to a reduction in a penalty amount pursuant to 360 CMR 2.33(6). The results of sampling and analysis of wastewater contained in the official records of the Authority shall be admissible and such results shall be afforded a rebuttable presumption of validity. The presumption shall be overcome by evidence showing sampling, custody, or analytical errors.

- (4) An adjudicatory proceeding on a Penalty Assessment Notice shall be ended by either:
  - (a) A written agreement, which shall take effect only upon written approval by the Executive Director; or
  - (b) A final decision, which shall take effect only upon written approval by the Executive Director.

2.23: Affirmative Defenses

(1) It shall be an affirmative defense to any enforcement action that the noncompliance was caused by an Upset as defined in 360 CMR 10.004. In such action, the Person seeking to establish the occurrence of an Upset shall have the burden of proof, which will be met if the Person:

- (a) Has reported the following information to the Authority within 24 hours of becoming aware of the Upset (if the information is provided orally, a written submission must be provided within five days):
  - 1. A description of the discharge and cause of noncompliance;
  - 2. The period of noncompliance, including exact dates and times or, if not corrected, the anticipated time the noncompliance is expected to continue; and
  - 3. Steps being taken and/or planned to reduce, eliminate, and prevent recurrence of the noncompliance; and
- (b) Demonstrates through properly signed contemporaneous operating logs or other relevant evidence that:
  - 1. An Upset occurred and that the Person can identify the cause(s) of the Upset; and
  - 2. The facility was at the time being operated in a prudent and skillful manner and in compliance with applicable operation and maintenance procedures and with the requirements of 360 CMR 10.013(5)(a).

(2) It shall be an affirmative defense to any enforcement action brought for noncompliance with 360 CMR 10.021 that:

- (a) the Person did not know or have reason to know that its discharge, alone or in conjunction with a discharge or discharges from other sources, would violate 360 CMR 10.021; and
- (b) the Person's discharge complied with 360 CMR 10.023 and 10.024, the specific discharge limitations and prohibitions in any permit issued to it by the Authority, and any applicable National Categorical Pretreatment Standard.

2.31: Maximum Permissible Penalty

A penalty shall not exceed \$10,000.00 per violation per day. Each day's violation shall constitute a separate violation.

There may be a penalty assessed for more than one Violation per day. For example, where on one day a Person violates the discharge limits for various pollutants, the Authority may assess a separate penalty of up to \$10,000.00 for each pollutant limit violated.

2.32: Calculating Duration of Noncompliance for Purposes of a Penalty Assessment Notice

(1) When the Authority issues a Penalty Assessment Notice to a Person within two years after it issued the Person a Notice of Noncompliance, and the Person failed to comply with Requirements set forth in the Notice of Noncompliance by the date specified therein, a penalty may be assessed for each Violation cited in the Notice of Noncompliance that occurred within two years prior to the issuance of the Notice of Noncompliance and for each violation of the same Requirement occurring thereafter.

No penalty may be assessed for Violations cited in a Notice of Noncompliance where the Person to whom the Notice of Noncompliance was issued complied with the Requirements set forth in the Notice of Noncompliance by the date specified, submitted any reports required by the Notice of Noncompliance by the dates set forth, and completed the measure(s) by the date set forth in the reports.

(2) When the Authority issues a Penalty Assessment Notice to a Person to whom it had not issued a Notice of Noncompliance, or to whom it issued a Notice of Noncompliance more than two years prior to the issuance of the Penalty Assessment Notice, a penalty may not be assessed for any Violation by the Person of which the Authority had knowledge more than two years prior to the Penalty Assessment Notice.

2.33: Determining the Amount of an Administrative Penalty

The amount of each Penalty to be assessed under 360 CMR 2.00 shall be determined as follows:

(1) For each violation of a discharge standard found at 360 CMR 10.021, 10.023, or 10.024, of a discharge standard contained in a permit or order issued by the Authority, or of a National Pretreatment Standard applicable to the discharge, the amount of the penalty for each violation shall be determined as follows:

(a) Four criteria shall be considered: violation magnitude; flow; culpability; and frequency. For each criterion, a numerical score shall be calculated and that score shall be multiplied by the weight factor for that criterion. The four weighted scores shall then be totalled and then multiplied by \$10 to yield a penalty amount for each violation. The weight factors for each criterion shall be as follows:

1. Violation magnitude	30
2. Flow	30
3. Culpability	20
4. Frequency	20

(b) The numerical scores for the criteria identified in 360 CMR 2.33(1)(a) shall be calculated as follows:

1. Violation Magnitude. The violation magnitude score for a violation of 360 CMR 10.024(2), 360 CMR 10.023(3) and (10), of a limit contained in a permit issued by the Authority, and of a limit contained in a National Categorical Pretreatment Standard shall be calculated based on the magnitude the violation exceeds the standard it must meet, according to the following chart:

2.33: continued

<u>Ratio of Violation Over Limit</u> (how many times the violation was greater than the limit)	<u>Score</u>
1.01 - 1.49	1
1.5 - 1.99	2
2.0 - 2.49	3
2.5 - 2.99	4
3.0 - 3.49	5
3.5 - 3.99	6
4.0 - 4.49	7
4.5 - 4.99	8
5.0 - 5.49	9
5.5 and above	10

A violation of 360 CMR 10.021, 10.023(4), (5), (7), (8), (9), (12), (13), (14), (15), (16), (17), (18), (20), or (21), and 10.024(1) shall receive a automatic violation magnitude score of 10. A violation of 360 CMR 10.023(1), (2), (11), or (19) shall receive a violation magnitude score equal to the flow score it receives. A violation of 10.023(6) shall receive the following score:

<u>Standard Units</u>	<u>Score</u>
5.0 - 5.4 or 12.1 - 12.5	1
4.0 - 4.9 or 12.6 - 13.0	5
below 4.0 or above 13.0	10

2. **Flow.** The flow score shall be calculated, based on the number of gallons of wastewater discharged (known or estimated) by the violator on the day of the violation, according to the following chart:

<u>Gallons Discharged</u>	<u>Score</u>
up to 1,000	1
1,001 - 5,000	2
5,001 - 15,000	3
15,001 - 25,000	4
25,001 - 35,000	5
35,001 - 45,000	6
45,001 - 55,000	7
55,001 - 65,000	8
65,001 - 75,000	9
75,001 and above	10

The flow chart in 360 CMR 2.33(1)(b) shall not apply to a violation of 360 CMR 10.021, or 360 CMR 10.023(4), (5), (7), (8), (9), and (13) through (21); such violation shall receive an automatic flow score of 10, regardless of the gallons discharged.

3. **Culpability.** The culpability score shall be determined on the basis of how culpable the violator was for the discharge violation. A scale of zero to ten shall be used, with zero being no culpability and ten being the highest level of culpability. Factors to consider in determining the culpability score include:

- a. **Score of 10:** Intentional action or inaction causing the discharge violation. Examples may include: discharging without pretreatment; not operating pretreatment; intentionally operating pretreatment or production equipment improperly or without appropriate maintenance; continued knowing violations; no pretreatment for the violated pollutant; intentionally bypassing pretreatment; dumping untreated vats, containers or other vessels; frequent spills or upsets without having taken measures to prevent reoccurrence; untrained or unqualified staff; inadequate number of pretreatment staff; no meaningful attempts to prevent the violation.
- b. **Score of 7 to 9:** Grossly inadequate or improper action or inaction causing the discharge violation. Examples may include: clearly inadequate pretreatment; grossly inadequate or improper operation or maintenance of pretreatment or production equipment; gross production or pretreatment errors; frequent spills or upsets; poorly or infrequently trained staff; pretreatment staff unavailability; a history of violations with clearly inadequate attempts to prevent the violation.

2.33: continued

c. Score of 3 to 6: Inadequate or improper action or inaction causing the discharge violation. Examples may include: inadequate pretreatment; inadequate or improper operation or maintenance of pretreatment or production equipment; occasional production or pretreatment errors; rare spills or upsets; recent change in production or pretreatment; a history of violations with minimal and inadequate attempts to prevent the violations.

d. Score of 1 or 2: Inadvertent action or inaction causing the discharge violation. Examples may include: rare spill or production or pretreatment error that would be unanticipated during the normal course of events but that is not an upset; a history of few violations and reasonable attempts to prevent violations.

e. Score of 0: one time unavoidable accident or an upset for which an affirmative defense is not available.

4. Frequency. The frequency score shall be calculated on the basis of how often the violation of the particular pollutant requirement occurred over a period of time as follows:

<u>Percentage in Violation</u>	<u>Score</u>
up to 10%	2
11 - 25%	4
26 - 40%	6
41 - 55%	8
over 55%	10

The period of time shall be from the first to last date for which a penalty is assessed in the Penalty Assessment Notice, unless the Penalty Assessment Notice uses another time period and states why a greater or lesser time period is used. The percentage shall be based on those days for which the nature of the discharge at issue is known.

(c) A penalty may be increased over the amount calculated according to 360 CMR 2.33(1)(a) and (b) for one or more of the following reasons:

1. to make the violator's failure to comply more costly than if the violator had complied;
2. to help to deter future noncompliance by the violator or others;
3. to compensate the Authority or others for damages suffered or costs incurred as a result of each violation, including costs incurred by the Authority for activities undertaken to assess the penalty and assure compliance (such as monitoring and inspecting costs);
4. if previous penalties imposed on the violator by the Authority, or by a court for violation of an Authority requirement, did not assure compliance by the violator; and/or;
5. to compensate for other damages to the public health, safety, welfare, or the environment, caused by the violation.

If more than one violation is assessed a penalty in a Penalty Assessment Notice, the increase may be applied either to individual penalty amounts or to the total penalty assessed in the Penalty Assessment Notice. In no event shall such increase result in a single violation being penalized in excess of \$10,000.00.

(d) 360 CMR 2.00: *Appendix A* contains a chart that may be used to calculate a penalty pursuant to 360 CMR 2.33. 360 CMR 2.00: *Appendix B* contains examples of penalty computations.

(2) A \$10,000 penalty per violation shall be assessed for intentionally:

- (a) providing false information or falsifying or misrepresenting records;
- (b) rendering inaccurate or tampering with any monitoring device or method used or required by the Authority;
- (c) manipulating sampling, inspecting, or other monitoring to hide actual or potential violations of any Requirements;
- (d) violating 360 CMR 10.025;
- (e) violating an enforcement order issued by the Authority;
- (f) discharging without a currently valid permit.

For purposes of 360 CMR 2.33(2), "intentionally" means knowingly intending to do the act that constitutes the violation, not that the Person knowingly intended to violate the requirement. When a violation listed in 360 CMR 2.33(2)(a) through (f) is committed unintentionally, the amount of the penalty for that violation shall be determined under 360 CMR 2.33(5).

## 2.33: continued

- (3) The following penalties shall be assessed for a failure to file a document:
- (a) A \$5,000 penalty shall be assessed for failing to file an application, report, or other document required by an Authority regulation or Permit unless a different amount is specifically noted in a Group Permit. Late filing of such a document shall be penalized \$250 for each working day late, up to \$5,000 for 20 or more working days late, unless a different amount is specifically noted in a Group Permit or Combined Permit.
  - (b) A \$10,000 penalty shall be assessed for failing to file an application, report, or other document required by a Notice of Noncompliance, Order, or decision issued to the Person. Late filing of such a document shall be penalized \$500 for each working day late, up to \$10,000 for 20 or more working days late.
- (4) A violation of 360 CMR 10.012, 10.016, 10.017, or 10.027 shall be penalized \$1,000 for the first violation in a two-year period, \$5,000 for the second violation in a two year period, and \$10,000 for the third and each subsequent violation in a two year period. The penalty may be increased for one or more of the reasons listed in 360 CMR 2.33(1)(c), provided the penalty for each violation does not exceed \$10,000.
- (5) Any violation not otherwise cited in 360 CMR 2.33 shall be penalized based on a consideration of the following factors:
- (a) The violation's actual and/or potential impact on public health, safety, welfare, and the environment.
  - (b) The actual and/or potential damages suffered, and actual and/or potential costs incurred, by the Authority, or by any other person as a result of the violation.
  - (c) Whether the violator took steps to prevent the violation.
  - (d) Whether the violator took steps to promptly come into compliance after the violation.
  - (e) Whether the violator took steps to remedy and mitigate whatever harm might have been done as a result of the violation.
  - (f) Whether the violator previously failed to comply with any regulation, order, Permit, or approval issued or adopted by the Authority, or any law which the Authority has the authority or responsibility to enforce.
  - (g) Whether the violator derived an economic benefit from its failure to comply.
  - (h) That the penalty is sufficient to deter future noncompliance by the violator and/or by other persons.
  - (i) The public interest.
  - (j) Any other factors that reasonably may be considered in determining the amount of a penalty, provided those factors are set forth in the Penalty Assessment Notice.
- (6) A penalty calculated pursuant to 360 CMR 2.33(1) through (5) may be reduced if a violator shows by a preponderance of the evidence that payment of the penalty would make it economically unfeasible for the violator to continue operations. The reduction may be applied either to an individual penalty amount or to the total penalty assessed in a Penalty Assessment Notice. If a penalty is so reduced, the Authority may require the violator to undertake a non-monetary alternative if such an alternative reasonably may be undertaken by the violator.

2.34: Paying an Administrative Penalty

- (1) A penalty shall be paid by certified check, cashier's check, or money order payable to the Massachusetts Water Resources Authority.
- (2) Each administrative penalty shall be paid in full as follows:
  - (a) If the Person assessed the penalty waives its right to a hearing, the Penalty shall be paid in full no later than 30 days after the date of issuance of the Penalty Assessment Notice.

2.34: continued

(b) If the Person assessed the penalty seeks a hearing under 360 CMR 1.00 and 2.00, the penalty shall be paid in full upon the conclusion of the hearing, as follows:

1. If the proceeding is ended by written agreement, no later than 30 days after the Executive Director approves the agreement;
2. If the proceeding is ended by a Final Decision approved and signed by the Executive Director, no later than 30 days after the approval;
3. If a civil action for judicial review of a final decision is commenced pursuant to M.G.L. c. 30A, and the court upholds the assessment in whole or in part, no later than 30 days after the date of the court's decision, unless the court orders otherwise.

(c) The Authority may authorize payment of a Penalty at a time or times later than those prescribed pursuant to 360 CMR 2.34. No such authorization shall be valid unless made by the Executive Director expressly and in writing. In the absence of any such express written authorization, the provisions of 360 CMR 2.34(2)(b) shall apply. If the Authority gives any such express written authorization, the Penalty shall be paid in full at the time or times specified.

(3) A Person who fails to pay a penalty in full and on time in compliance with 360 CMR 2.34 shall be liable to the Authority for costs, interest from the time the penalty became final, and attorneys' fees, including all costs and attorney's fees incurred directly in collecting the penalty. This is in addition to any other remedy authorized by law. For purposes of 360 CMR 2.34(3), a penalty becomes final and interest begins as follows:

- (a) On the date of issuance, unless it is timely appealed pursuant to 360 CMR 2.22;
- (b) On such date as the parties agree to in a written agreement ending an adjudicatory proceeding;
- (c) On the date that a Final Decision in favor of the Authority is signed by the Executive Director; or
- (d) If a civil action for judicial review of a Final Decision is commenced pursuant to M.G.L. c. 30A, and the court upholds the assessment in whole or in part, from the date of entry of judgment pursuant to M.R. Civ. P. 54(d), unless the Court orders otherwise.

REGULATORY AUTHORITY

360 CMR 2.00: St. 1984, c. 372, §§ 6(e) and 8(m)

360 CMR 2.00 Appendix A

Calculation of a Penalty pursuant to 360 CMR 2.33(1)and(6)  
 For each discharge violation:

<u>Evaluation Criteria</u>	<u>Score</u>	<u>Weight Factor</u>	<u>Weighted Score</u>
Violation Magnitude	_____	x 30	= _____
Flow	_____	x 30	= _____
Culpability	_____	x 20	= _____
Frequency	_____	x 20	= _____
		TOTAL	_____
			x \$10
		PENALTY AMOUNT	_____

Adjustment factors

To make the violator's failure to comply more costly than if the violator had complied	+ _____
To help to deter future noncompliance by the violator or others	+ _____
To compensate the Authority or others for damages suffered or costs incurred	+ _____
To compensate for other damages to the public health safety, welfare, or the environment	+ _____
If previous penalties did not assure compliance by the violator	+ _____
Violator's ability to pay	- _____

TOTAL PENALTY AFTER ADJUSTMENT \$ \_\_\_\_\_

## 360 CMR 2.00: APPENDIX B

Example of a Penalty calculation pursuant to 360 CMR 2.33(1)(b):

Example of Facts:

A sewer user has a process discharge of 20,000 gallons per day. In its last four monitoring reports, the following violations have been found: 1 lead violation at 0.4 mg/l (assume lead has a limit of 0.2 mg/l); 1 copper violation at 6.0 mg/l and one copper violation at 1.8 mg/l (assume copper has a limit of 1.0 mg/l); one mercury violation at 0.004 mg/l (assume mercury is a prohibited substance with an enforcement limit of 0.001 mg/l); and two pH violations, one at 4.2 S.U. and one at 12.4 S.U. (assume pH is a violation if it is outside the range of 5.5-12.0 S.U.).

Use of the Penalty Calculation Chart:

For lead at 0.4 mg/l, the Authority determining that the violation was caused by negligence in operating pretreatment:

<u>Evaluation Criteria</u>	<u>Score</u>	<u>Weight Factor</u>	<u>Weighted Score</u>
Violation Magnitude	<u>3</u>	x 30	= <u>90</u>
Flow	<u>4</u>	x 30	= <u>120</u>
Culpability	<u>4</u>	x 20	= <u>80</u>
Frequency	<u>4</u>	x 20	= <u>80</u>
		TOTAL	<u>370</u>
			x \$10
		PENALTY AMOUNT	<u>\$3,700</u>

For copper at 6.0 mg/l, the Authority determining that the violation was caused by gross negligence in exceeding the design flow of the pretreatment system:

<u>Evaluation Criteria</u>	<u>Score</u>	<u>Weight Factor</u>	<u>Weighted Score</u>
Violation Magnitude	<u>10</u>	x 30	= <u>300</u>
Flow	<u>4</u>	x 30	= <u>120</u>
Culpability	<u>8</u>	x 20	= <u>160</u>
Frequency	<u>8</u>	x 20	= <u>160</u>
		TOTAL	<u>740</u>
			x \$10
		PENALTY AMOUNT	<u>\$7,400</u>

For copper at 1.8 mg/l, the Authority determining that the violation was caused by gross negligence in exceeding the design flow of the pretreatment system:

<u>Evaluation Criteria</u>	<u>Score</u>	<u>Weight Factor</u>	<u>Weighted Score</u>
Violation Magnitude	<u>2</u>	x 30	= <u>60</u>
Flow	<u>4</u>	x 30	= <u>120</u>
Culpability	<u>8</u>	x 20	= <u>160</u>
Frequency	<u>8</u>	x 20	= <u>160</u>
		TOTAL	<u>500</u>
			x \$10
		PENALTY AMOUNT	<u>\$5,000</u>

360 CMR: MASSACHUSETTS WATER RESOURCES AUTHORITY

Appendix B: continued

For mercury at 0.004 mg/l, the Authority determining that the violation was an intentional discharge of mercury without pretreatment:

<u>Evaluation Criteria</u>	<u>Score</u>	<u>Weight Factor</u>	<u>Weighted Score</u>
Violation Magnitude	<u>10</u>	x 30	= <u>300</u>
Flow	<u>4</u>	x 30	= <u>120</u>
Culpability	<u>10</u>	x 20	= <u>200</u>
Frequency	<u>4</u>	x 20	= <u>80</u>
		TOTAL	<u>700</u>
			x \$10
		PENALTY AMOUNT	<u>\$7,000</u>

For pH at 4.2 S.U., the Authority determining that the pretreatment system was known by the user to be inadequate to prevent pH violations:

<u>Evaluation Criteria</u>	<u>Score</u>	<u>Weight Factor</u>	<u>Weighted Score</u>
Violation Magnitude	<u>5</u>	x 30	= <u>150</u>
Flow	<u>4</u>	x 30	= <u>120</u>
Culpability	<u>9</u>	x 20	= <u>180</u>
Frequency	<u>8</u>	x 20	= <u>160</u>
		TOTAL	<u>610</u>
			x \$10
		PENALTY AMOUNT	<u>\$6,100</u>

For pH at 12.4 S.U., the Authority determining that the pretreatment system was known by the user to be inadequate to prevent pH violations:

<u>Evaluation Criteria</u>	<u>Score</u>	<u>Weight Factor</u>	<u>Weighted Score</u>
Violation Magnitude	<u>1</u>	x 30	= <u>30</u>
Flow	<u>4</u>	x 30	= <u>120</u>
Culpability	<u>9</u>	x 20	= <u>180</u>
Frequency	<u>8</u>	x 20	= <u>160</u>
		TOTAL	<u>490</u>
			x \$10
		PENALTY AMOUNT	<u>\$4,900</u>

Note: The penalties so calculated would then be reviewed according to the adjustment factors of 360 CMR 2.33(1)(c) and 360 CMR 2.33(6).