

ADEM PENALTY POLICY



- **Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement (Apr. 2000)**
- **Final Report and Recommendations of the Enforcement and Administrative Penalties Stakeholders Committee to the Alabama Environmental Management Commission (Apr. 2005)**
- **ADEM Reform Coalition Comments on Final Report and Recommendations of the Enforcement and Administrative Penalty Stakeholder Committee (May 15, 2005)**
- **ADEM Reform Coalition Blueprint – Recommendation Thirteen (Oct. 2006)**
- **ADEM Compliance and Enforcement Strategy – Memorandum #105 (Sep. 4, 2007)**
- **ADEM Reform Coalition Enforcement Policy Recommendations (Apr. 4, 2008)**
- **ADEM NPDES and Pretreatment Program Compliance/Enforcement Management Strategy (Jan. 28, 2011)**
- **A Proposed Penalty Calculation Methodology to Implement Ala. Code § 22-22A-5(18)**

Minimum Penalty Limit

\$100 per violation per day

“Any civil penalty . . . shall not be less than \$100.00 . . . for each violation . . . provided however, that the total penalty assessed in an order . . . shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation . . .” Ala. Code § 22-22A-5(18)c.

House Bill 106

Senate Bill 181

Maximum Penalty Limit

\$25,000 per violation per day

\$250,000 per order

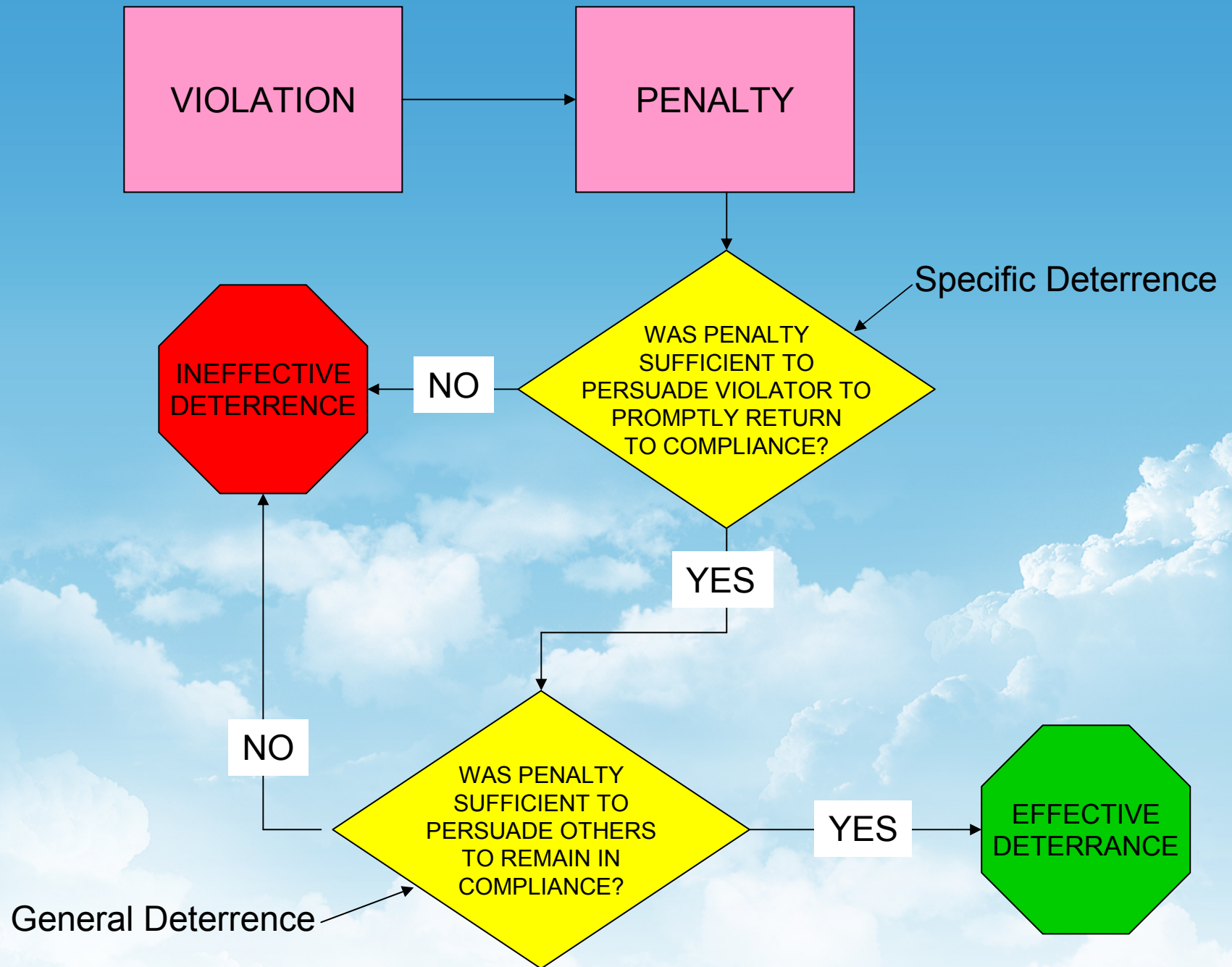
“Any civil penalty . . . shall not . . . exceed \$25,000.00 . . . for each violation . . . provided however, that the total penalty assessed in an order . . . shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation . . .” Ala. Code § 22-22A-5(18)c.

Factors

that must be considered in determining the penalty amount

1. The **economic benefit (EB)** which delayed compliance may confer upon the violator (avoided costs, delayed costs, unjust enrichment (profits))
2. The **seriousness of the violation (SV)** (any irreparable harm to the environment; any threat to the health or safety of the public; magnitude of deviation and duration of violation)
3. The **standard of care (SC)** manifested by the violator (intentional, knowing, reckless or negligent)
4. The violator's **history of previous violations (HPV)**
5. The violator's **efforts to minimize or mitigate (MM)** the effects of such violation upon the environment (nature, extent and degree of success)
6. The **ability of the violator to pay (AP)** such penalty (inability to pay)

$$\text{Preliminary Penalty} = (\text{EB} + \text{SV} + \text{SC} + \text{HPV} + \text{MM}) - (\text{MM} + \text{AP})$$



RECOMMENDATIONS

Appoint a subcommittee of the Commission to work with the Director to develop a penalty calculation methodology that

1. Takes into account the statutory minimum and maximum limits on penalty amounts;
2. Takes into account the five other statutory factors for determining penalty amounts;
3. Is completely transparent in how penalty amounts are calculated;
4. Results in penalty amounts that are fair and consistent; and
5. Results in penalty amounts that effectively achieve specific and general deterrence.

See “A Proposed Penalty Calculation Methodology to Implement Ala. Code § 22-22A-5(18)”

A PROPOSED PENALTY CALCULATION METHODOLOGY TO IMPLEMENT ALA. CODE § 22-22A-5(18) (Rev. 4/4/11)

The Alabama Department of Environmental Management's (ADEM's) penalty calculation methodology continues to lack rationality and transparency. *See e.g., Final Report and Recommendations of the Enforcement and Administrative Penalties Stakeholders Committee to the Alabama Environmental Management Commission* (Apr. 2005);¹ *2006 Alabama Environmental Protection Division State Review Framework Report* (EPA, Jan. 2007);² *Memorandum #105: Compliance and Enforcement Strategy* (ADEM, Jan. 2008);³ and various proposed Consent Orders published at <http://www.adem.alabama.gov/compInfo/adminOrders.cnt>. In response to these deficiencies, a rational and transparent methodology has been developed and is discussed herein.

General Principles of Methodology

First, the methodology must ensure that the penalty assessed is no less than the statutory minimum (\$100 per violation per day). *See State v. Leary & Owens Equip. Co., Inc.*, 304 So.2d 604, 609 (Ala. Civ. App. 1974) (per curiam) (when a statute directs that an agency *shall* assess a penalty of a specified amount, the agency must do so). In addition, the methodology must ensure that the penalty assessed is no more than the statutory maximum (\$25,000 per violation per day not to exceed \$250,000 in any order). Ala. Code § 22-22A-5(18)c.

Second, between the minimum and maximum statutory extremes, the methodology must ensure that all other statutory penalty factors are considered. Ala. Code § 22-22A-5(18)c. requires that ADEM consider the following factors in determining the amount of any penalty:

- seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public;
- standard of care manifested by the violator;
- the economic benefit which delayed compliance may confer upon the violator;
- the nature, extent and degree of success of the violator's efforts to minimize or mitigate the effects of such violation upon the environment;

¹ *Final Report and Recommendations of the Enforcement and Administrative Penalties Stakeholders Committee to the Alabama Environmental Management Commission* (Apr. 2005) is published at [http://www.enviro-lawyer.com/Enforcement & Penalties Stakeholders Report \(April 2005\).pdf](http://www.enviro-lawyer.com/Enforcement%20&%20Penalties%20Stakeholders%20Report%20(April%202005).pdf).

² *2006 Alabama Environmental Protection Division State Review Framework Report* (EPA, Jan. 2007) is published at <http://www.epa.gov/oecaerth/resources/reports/srf/srf-rd1-rev-al.pdf>.

³ *Memorandum #105: Compliance and Enforcement Strategy* (ADEM, Jan. 2008) is published at [http://www.enviro-lawyer.com/2008 ADEM Enforcement Strategy.pdf](http://www.enviro-lawyer.com/2008%20ADEM%20Enforcement%20Strategy.pdf).

- the violator’s history of previous violations; and
- the ability of the violator to pay such penalty.

Third, the methodology should make use of the full range of authorized penalties, *i.e.*, some violations should be penalized toward the minimum of the range and some violations should be penalized toward the maximum of the range. Other violations would fall somewhere in the continuum between the minimum penalty and maximum penalty. Failure to make use of the full range of authorized penalties would ignore the Legislature’s obvious intent in establishing this range.

Fourth, the economic benefit conferred on the violator from his non-compliance must be captured in any penalty to “level the playing field” among all regulated entities. Thus, the penalty assessed should never be lower than this value.

Fifth, seriousness of the violation, standard of care, and history of previous violations each have a best to worst continuum of their own. These can be assigned numeric values or scores depending on the presence of particular facts and circumstances. In the methodology presented in the following *Penalty Calculation and Findings*, the seriousness of the violation, standard of care, and history of violations factors are each given a continuum with an assigned range of 0.00 (0.10 in the case of seriousness of the violation) to 1.00. These values are then averaged to arrive at a combined value or score for the three factors. This value or score is then multiplied by \$25,000 to arrive at a “preliminary” per violation penalty. This amount is then multiplied by the number of violations to arrive at an aggregate “preliminary” penalty amount.

Sixth, the “preliminary” penalty amount can be adjusted downward for the violator’s efforts to minimize or mitigate the effects of the violation or upward for the violator’s failure to minimize or mitigate the effects of the violation. Furthermore, the “preliminary” penalty amount can be adjusted downward for the violator’s inability to pay a penalty.

Finally, Ala. Code § 22-22A-5(18)a. requires that “[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty” The penalty calculation methodology should ensure that adequate findings of fact are developed to demonstrate how each of the statutory factors influenced the penalty amount.

Specific Principles of Methodology

Minimum Penalty Amount

Ala. Code § 22-22A-5(18)c. provides that “[a]ny civil penalty assessed . . . under paragraph a. . . . of this subdivision *shall not* be less than \$100.00 . . . for each violation Each day such violation continues shall constitute a separate violation for purposes of this subdivision. (Emphasis

added).⁴ This language mandates that any penalty assessed by ADEM shall not be less than the minimum. *See State v. Leary & Owens Equip. Co., Inc.*, 304 So.2d 604, 609 (Ala. Civ. App. 1974) (per curiam) (when a statute directs that an agency *shall* assess a penalty of a specified amount, the agency must do so).

Economic Benefit

Ala. Code § 22-22A-5(18)c. states that ADEM shall give consideration to “the economic benefit which delayed compliance may confer upon” the violator in determining the penalty amount.

[A]llowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the “benefit component” of the penalty.

Policy on Civil Penalties (EPA, Feb. 16, 1984).⁵ “Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations.” *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990). A court’s failure to consider the economic benefit factor is an abuse of discretion and reversible error. *Id.*

Typically, the economic benefit is represented by the present value of avoided costs of compliance (e.g., avoided operation and maintenance costs) plus the potential return on investment

⁴ Under the Clean Water Act, monthly average and monthly geometric mean violations are counted as violations that continue during each day of the month in which a discharge occurred. *See e.g., Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Inc.*, 791 F.2d 304, 313-315 (4th Cir. 1986), *vacated and remanded on other grounds, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1139-1140 (11th Cir. 1990); *United States Env’tl. Protection Agency v. City of Green Forest*, 921 F.2d 1394, 1407 (8th Cir. 1990); *Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc.*, 2 F.3d 493, 507-508 (3d Cir. 1993); *Interim Clean Water Act Settlement Penalty Policy* (EPA 1995) published at www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf. The same rationale should apply to weekly average violations. *Id.* at *Attachment 1*. Where a daily maximum violation occurs during a month when the monthly average or monthly geometric mean is also violated, the daily maximum violation is disregarded because it is duplicative. *Atlantic States Legal Found., Inc.*, 897 F.2d at 1140; *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 527-528 (4th Cir. 1999).

⁵ *Policy on Civil Penalties* (EPA, Feb. 16, 1984) is published at <http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf>.

of avoided costs of compliance and the potential return on investment of delayed costs of compliance (e.g., interest on delayed capital expenditures). *BEN User's Manual* (EPA, Aug. 2000) at 1-2.⁶ Delayed capital expenditures are those expenditures which should have been made to maintain compliance. "The best evidence of what the violator should have done to prevent the violations, is what it eventually does (or will do) to achieve compliance." *Interim Clean Water Act Settlement Policy* (EPA, March 1, 1995) at 5.⁷ "The standard method . . . for calculating the economic benefit from delayed and avoided pollution control expenditures is through the use of the [EPA's] BEN model." *Id.*⁸

Ala. Code § 22-22A-5(18)a. requires that "[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty" A finding that "[t]he Department has been unable to ascertain if there has been a significant economic benefit conferred by the delay of compliance with permit limitations" is not sufficiently responsive to this statutory mandate if ADEM has done nothing to determine the economic benefit.

Seriousness of Violations

Ala. Code § 22-22A-5(18)c. states that ADEM shall give consideration to "the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public" in determining the penalty amount. A penalty should be enhanced if a violation results in irreparable harm to the environment or a threat to public health or safety.

Irreparable harm to the environment and threat to the health or safety of the public are not the exclusive considerations under this factor, but they are required considerations. We suggest that "seriousness of the violation" should also consider the extent (degree) and duration of the deviation from the applicable requirement. A penalty should be enhanced based on the degree and duration of the deviation from the applicable requirement.

Ala. Code § 22-22A-5(18)a. requires that "[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty" A finding that "[t]he Department has no evidence of irreparable harm to the environment or any threat to the health or safety of the public as a result of the violations

⁶ *BEN User's Manual* (EPA, Aug. 2000) is published at <http://www.seneca-environmental.com/BEN%20USER%27S%20MANUAL.pdf>

⁷ *Interim Clean Water Act Settlement Policy* (EPA, March 1, 1995) is published at <http://www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf>.

⁸ EPA's BEN model is available at <http://www.epa.gov/compliance/civil/econmodels/index.html>.

stated herein” is not sufficient if ADEM has not performed a site assessment to evaluate the impact of the violations on the environment or to evaluate any threat to the health or safety of the public.

Standard of Care

Ala. Code § 22-22A-5(18)c. requires that ADEM shall give consideration to “the standard of care manifested by” the violator in determining the penalty amount. A penalty should be enhanced if the violator manifested a low standard of care.

ADEM must determine the standard of care manifested by the violator, *e.g.*, intentional, knowing, reckless, or negligent. *See* Ala. Code § 13A-2-2 (differentiating “intentional,” “knowing,” “reckless,” and “criminally negligent” conduct); § 22-30-19 (identifying “intentional,” “knowing,” “reckless,” and “criminally negligent” conduct); § 22-22-9 (identifying “willful,” “grossly negligent,” and “knowing” conduct), § 22-28-22 (identifying “knowing” conduct); *Lynn Strickland Sales and Service, Inc. v. Aero-Lane Fabricators, Inc.*, 510 So. 2d 142 (Ala. 1987) (differentiating “simple negligence” from “willful and wanton” conduct); *Allen v. State*, 7 So.2d 91 (Ala. Civ. App. 1942) (differentiating “simple” or “ordinary” negligence from “gross” negligence). The manifestation of these different standards of care deserve different penalty enhancements. For example, violations that are “intentional” or “knowing” should be subject to a more severe penalty than mere “negligent” violations. A suggested standard of care scheme is as follows:

Intentional: Violator purposefully caused violation or purposefully engaged in activity resulting in violation.

Knowing: Violator was aware that his activity would result in violation.

Reckless: Violator was aware of and consciously disregarded a substantial and unjustifiable risk that his activity would result in violation.

Negligent: Violator failed to perceive a substantial and unjustifiable risk that his activity would result in violation.

Ala. Code § 22-22A-5(18)a. requires that “[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty . . .” The standard of care required by law of all persons is one of “strict liability.” This standard of care requires unconditional full compliance. A finding that a violator failed to achieve the strict liability standard of care does not describe the standard of care manifested by the violator.

History of Previous Violations

Ala. Code § 22-22A-5(18)c. requires that ADEM shall give consideration to the violator's "history of previous violations" in determining the penalty amount. A penalty should be enhanced if the violator has a "history of previous violations."

Ala. Code § 22-22A-5(18)a. requires that "[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty . . ." Consideration of previous enforcement actions taken against the violator does not satisfy the requirement for consideration of previous violations.

Minimize/Mitigate Effects

Ala. Code § 22-22A-5(18)c. requires that ADEM shall give consideration to the violator's "efforts to minimize or mitigate the effects of such violation upon the environment." Where violations are capable of causing adverse effects upon the environment, the violator should undertake efforts to minimize or mitigate the effects of such violations. The violator's failure to undertake such efforts should result in a penalty enhancement. The violator's voluntary and prompt efforts to minimize and mitigate the effects of a violation upon the environment might result in a penalty reduction.

Ala. Code § 22-22A-5(18)a. requires that "[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty . . ." A conclusory finding that "[t]here are no known environmental effects" to be minimized or mitigated is not sufficient without substantiation that ADEM has done an appropriate site assessment.

Ability to Pay

Ala. Code § 22-22A-5(18)c. requires that ADEM shall give consideration to the violator's ability to pay such penalty. If it is demonstrated that the violator is unable to pay such penalty, the penalty may be reduced, but not below the statutory minimum. EPA has developed the MUNIPAY, ABEL and INDIPAY models to evaluate the ability of a violator to afford civil penalties.⁹

In addition, Ala. Code § 22-22A-5(18)a. requires that "[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty . . ." A finding that "[b]ased on available information, the Department believes that the Permittee has a limited ability to pay a civil penalty" is not sufficient when ADEM provides no facts identifying the "available information" and provides no facts supporting the conclusion of a "limited ability" to pay.

⁹ The MUNIPAY, ABEL and INDIPAY models are published at <http://www.epa.gov/compliance/civil/econmodels/index.html>.

Other Factors

“It is settled law in Alabama that an administrative agency is purely a creature of the legislature and has *only* those powers conferred upon it by the legislature.” *Jefferson County v. Alabama Criminal Justice Information Ctr. Comm’n*, 620 So.2d 651, 658 (Ala. 1993) (per curiam). *Accord*, *Ex parte City of Florence*, 417 So.2d 191, 193-94 (Ala. 1982). “An administrative agency cannot usurp legislative powers” *Ex parte Jones Mfg. Co.*, 589 So.2d 208, 210 (Ala. 1991). Ala. Code § 22-22A-5(18)c. provides that “[i]n determining the amount of any penalty, consideration shall be given to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person’s efforts to minimize or mitigate the effects of such violation upon the environment; such person’s history of previous violations; and the ability of such person to pay such penalty.” ADEM is not expressly authorized to consider any other factors in determining the amount of a penalty. Under the principle of *expressio unis est exclusio alterius*, a rule of statutory construction, the express inclusion of requirements in the law implies an intention to exclude other requirements not so included. *Jefferson County*, 620 So.2d at 658. *See Alabama Dep’t of Env’tl. Mgmt. v. Wright Bros., Constr. Co.*, 604 So.2d 429, 433 (Ala. Civ. App. 1992) (“It is obvious from the language of this section that these factors were intended to provide a list of criteria for the Department to consider prior to assessing a fine or a penalty for a violation. There is nothing in the language of this section that allows for the assessment of punitive damages in addition to fines or penalties for violations.”); *Dep’t of Env’tl. Mgmt. v. Teasley-Mill Water System, Inc.*, 537 So.2d 57, 58 (Ala. Civ. App. 1988) (“the criteria for assessing or recovering such a penalty are also set out by statute”). The Legislature could have easily added language such as “and such other matters as justice may require,” *see e.g.*, 33 U.S.C. § 1319(d), or “in addition to such other factors as justice may require,” *see e.g.*, 42 U.S.C. § 7413(e)(1), but it did not do so. Thus, no factors other than those expressly mentioned by the statute may be considered in determining the amount of a penalty.

PENALTY CALCULATIONS AND FINDINGS

A. Economic Benefit Conferred on Violator	
<p>Avoided costs: Present value of avoided costs plus potential return on investment of avoided costs since time of initial violation (<i>e.g.</i>, avoided operation and maintenance costs, including labor, power and chemicals; avoided sampling and laboratory costs). “The best evidence of what the violator should have done to prevent the violations, is what it eventually does (or will do) to achieve compliance.” EPA has developed a model for calculating avoided costs known as BEN (http://www.epa.gov/oecaerth/civil/econmodels/index.html).</p>	<div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>
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<p>Delayed costs: Potential return on investment of delayed costs since time of initial violation (<i>e.g.</i>, delayed expenditures for capital equipment improvements or repairs, including engineering design, purchase, installation, and replacement; delayed costs of one-time acquisitions, including land or easements). “The best evidence of what the violator should have done to prevent the violations, is what it eventually does (or will do) to achieve compliance.” EPA has developed a model for calculating delayed costs known as BEN (http://www.epa.gov/oecaerth/civil/econmodels/index.html).</p>	<div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>
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<p>Profits: In some cases, profits earned as a result of non-compliance may exceed avoided costs and delayed costs, particularly in situations where the violator failed to obtain a permit. Where earned profits may substantially exceed avoided and delayed costs, earned profits should be the measure of economic benefit.</p>	<div style="border: 1px solid black; height: 20px; width: 100%;"></div> <div style="border: 1px solid black; height: 20px; width: 100%;"></div>
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Economic Benefit Factor	\$

B. Seriousness of Violation

The seriousness of a violation is a function of irreparable harm to environment, threat to health or safety of public, and extent (degree and duration) of deviation from requirement.

HARM COMPONENT

	No threat to health or safety	Minor threat to health or safety	Moderate threat to health or safety	Major threat to health or safety
No harm to environment	0.00	0.09	0.17	0.25
Minor harm to environment	0.09	0.17	0.25	0.33
Moderate harm to environment	0.17	0.25	0.33	0.41
Major harm to environment	0.25	0.33	0.41	0.50

Finding:

Harm Component

DEVIATION COMPONENT

	$\leq 20\%$ above limit	$21\% \leq 40$ above limit	$41\% \leq 60\%$ above limit	$> 60\%$ above limit
<3 months	0.10	0.13	0.16	0.20
3-4 months	0.13	0.16	0.20	0.30
5-6 months	0.16	0.20	0.30	0.40
>6 months	0.20	0.30	0.40	0.50

Finding:

Deviation Component

Seriousness Factor (sum of Harm and Deviation Components)

C. Standard of Care Manifested by Violator																										
<div style="text-align: center; margin-bottom: 10px;">STANDARD OF CARE FACTOR</div> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 5px;">Intentional: Violator purposefully caused violation or purposefully engaged in activity resulting in violation.</td> <td style="text-align: center; padding: 5px;">1.00</td> </tr> <tr> <td style="padding: 5px;">Knowing: Violator was aware that his activity would result in violation.</td> <td style="text-align: center; padding: 5px;">0.75</td> </tr> <tr> <td style="padding: 5px;">Reckless: Violator was aware of and consciously disregarded a substantial and unjustifiable risk that his activity would result in violation.</td> <td style="text-align: center; padding: 5px;">0.50</td> </tr> <tr> <td style="padding: 5px;">Negligent: Violator failed to perceive a substantial and unjustifiable risk that his activity would result in violation.</td> <td style="text-align: center; padding: 5px;">0.25</td> </tr> </table> <p style="margin-top: 10px;">Finding:</p>	Intentional: Violator purposefully caused violation or purposefully engaged in activity resulting in violation.	1.00	Knowing: Violator was aware that his activity would result in violation.	0.75	Reckless: Violator was aware of and consciously disregarded a substantial and unjustifiable risk that his activity would result in violation.	0.50	Negligent: Violator failed to perceive a substantial and unjustifiable risk that his activity would result in violation.	0.25																		
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Standard of Care Factor																										
D. Violator's History of Previous Violations																										
<div style="text-align: center; margin-bottom: 10px;">HISTORY FACTOR</div> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <th></th> <th style="text-align: center;">≤ 20% above limit</th> <th style="text-align: center;">21% ≤ 40% above limit</th> <th style="text-align: center;">41% ≤ 60% above limit</th> <th style="text-align: center;">> 60% above limit</th> </tr> <tr> <td style="padding: 5px;"><3 months</td> <td style="text-align: center; padding: 5px;">0.20</td> <td style="text-align: center; padding: 5px;">0.33</td> <td style="text-align: center; padding: 5px;">0.47</td> <td style="text-align: center; padding: 5px;">0.60</td> </tr> <tr> <td style="padding: 5px;">3-4 months</td> <td style="text-align: center; padding: 5px;">0.33</td> <td style="text-align: center; padding: 5px;">0.47</td> <td style="text-align: center; padding: 5px;">0.60</td> <td style="text-align: center; padding: 5px;">0.73</td> </tr> <tr> <td style="padding: 5px;">5-6 months</td> <td style="text-align: center; padding: 5px;">0.47</td> <td style="text-align: center; padding: 5px;">0.60</td> <td style="text-align: center; padding: 5px;">0.73</td> <td style="text-align: center; padding: 5px;">0.86</td> </tr> <tr> <td style="padding: 5px;">>6 months</td> <td style="text-align: center; padding: 5px;">0.60</td> <td style="text-align: center; padding: 5px;">0.73</td> <td style="text-align: center; padding: 5px;">0.86</td> <td style="text-align: center; padding: 5px;">1.00</td> </tr> </table> <p style="margin-top: 10px;">Finding:</p>		≤ 20% above limit	21% ≤ 40% above limit	41% ≤ 60% above limit	> 60% above limit	<3 months	0.20	0.33	0.47	0.60	3-4 months	0.33	0.47	0.60	0.73	5-6 months	0.47	0.60	0.73	0.86	>6 months	0.60	0.73	0.86	1.00	
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<3 months	0.20	0.33	0.47	0.60																						
3-4 months	0.33	0.47	0.60	0.73																						
5-6 months	0.47	0.60	0.73	0.86																						
>6 months	0.60	0.73	0.86	1.00																						
History Factor																										
E. (Seriousness Factor + Standard of Care Factor + History Factor) /3																										
F. Preliminary Penalty Amount Per Violation Per Day (\$25,000 x Line E)	\$																									
G. Preliminary Penalty Amount																										
Number of days daily maximum limit exceeded (#) x Line F	\$																									
Number of days monthly average limits exceeded (#) x Line F	\$																									
Number of days monthly geometric mean limit exceeded (#) x Line F	\$																									
Number of days weekly average limit exceeded (#) x Line F	\$																									
Other violation x number of days (#) x Line F	\$																									
Total Preliminary Penalty Amount	\$																									

H. Violator's Efforts to Minimize and Mitigate Effects of Violation		
Finding:	\$	
Finding:	\$	
	\$	
Minimize/Mitigate Factor Adjustment		\$
I. Violator's Ability to Pay Penalty		
<p>A penalty may be reduced (not below economic benefit or statutory minimum) if it would seriously jeopardize the violator's ability to continue operations and achieve compliance. If the violator is unwilling to cooperate in demonstrating its inability to pay the penalty, this adjustment should not be considered in the penalty calculation, <i>i.e.</i>, \$0 should be entered. EPA has developed models for evaluating a violator's ability to pay known as MUNIPAY, ABEL, and INDIPAY (http://www.epa.gov/oecaerth/civil/econmodels/index.html)</p> <p>Finding:</p>		
Ability to Pay Factor Adjustment		
J. Total Adjustments to Preliminary Penalty Amount (Add Lines H and I)		\$
K. Calculated Penalty Amount (Add Lines G and J, but not less than Line A)		\$
L. Minimum Statutory Penalty (\$100 per violation per day)		
Number of days daily maximum limit exceeded (#) x \$100	\$	
Number of days monthly average limits exceeded (#) x \$100	\$	
Number of days monthly geometric mean limit exceeded (#) x \$100	\$	
Number of days weekly average limit exceeded (#) x \$100	\$	
Other violation x number of days (#) x \$100	\$	
Total Minimum Statutory Penalty		\$
M. Maximum Statutory Penalty (\$25,000 per violation per day, not to exceed an aggregate of \$250,000)		
Number of days daily maximum limit exceeded (#) x \$25,000	\$	
Number of days monthly average limits exceeded (#) x \$25,000	\$	
Number of days monthly geometric mean limit exceeded (#) x \$25,000	\$	
Number of days weekly average limit exceeded (#) x \$25,000	\$	
Other violation x number of days (#) x \$25,000	\$	
Total Maximum Statutory Penalty		\$
N. Penalty Assessed (Larger of K or L, not to exceed M)		\$