

Policy Number: Policy No. 2022-XX

Title: Policy and Guidance Statement for the Settlement of Civil Penalties/Enforcement Actions

Effective Date: Month XX, 2022

Authority: Public Law 91-575, 84 Stat. 1509 *et seq.*, Sections 3.1, 3.4(8) & (9), 3.5(3) & (5) and 3.10, 18 CFR §§ 808.14, 808.16, 806.17, and 808.18.

Policy: The Susquehanna River Basin Commission (Commission or SRBC) established regulatory requirements for hearings and enforcement actions, at 18 CFR Part 808, including the Commission’s authority to issue orders, investigate possible infractions, assess penalties, and enter into settlement agreements. Section 808.18 states that the an alleged violator may offer to settle an enforcement action by agreement, and the Executive Director and Commission may enter into settlement agreements in accordance with the civil penalty criteria established at § 808.16. The Commission or Executive Director also has the authority to enter into a Consent Order and Agreement (COA) to resolve enforcement actions either in conjunction with or separately from settlement agreements, per 18 CFR § 808.14(e). In reaching settlement agreements, the Commission intends to engage in a process that generates penalty terms and amounts that fairly reflect the scope of the violation committed, proportionally deter future violations, mitigate any adverse environmental impacts and, if possible, educate both the violator and the public. The Commission is committed to providing project sponsors and the public with insight into the process by which objective and subjective criteria, derived from Commission regulations, are applied to violation scenarios to assess the appropriate penalty. The Civil Penalty Matrix, contained in Commission Policy No. 2022-XX, is designed to be read in conjunction with this policy and should provide a consistent metric by which settlement terms may be more readily understood and prospective penalty amounts may be calculated.

Purpose: The purpose of this policy is to provide transparency with respect to the process by which the Commission reaches settlement agreements and assesses penalties. Read in conjunction with companion Policy, No. 2022-XX, the criteria and protocols presented herein should provide

project sponsors and the public with a more precise means of understanding settlement terms and calculating penalty amounts.

Applicability: This policy relates to the Commission’s application of its regulations regarding enforcement and compliance and companion Policy, No. 2022-XX, SRBC Civil Penalty Matrix. The policy is intended to be read in conjunction with the regulations and companion policy to provide guidance in understanding the process by which the Commission reaches settlement agreements and assesses penalties.

Disclaimer: The policy outlined in this document is intended to supplement existing requirements. Nothing in this policy shall affect regulatory requirements. The policies and procedures herein are not an adjudication or a regulation. This document establishes the framework within which the Commission will exercise its administrative discretion in the future. The Commission reserves the discretion to deviate from this policy statement if circumstances warrant.

Page Length: 6 pages

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Month XX, 2022**

**POLICY AND GUIDANCE STATEMENT FOR THE SETTLEMENT
OF CIVIL PENALTIES/ENFORCEMENT ACTIONS**

The primary purpose of the policy is to articulate the Commission's approach to assessing and collecting penalties according to the provisions of 18 CFR § 808.18, Settlement by Agreement, and § 808.16, Civil Penalty Criteria. A clearly defined process will assist Commission personnel in efficiently and fairly deterring and resolving violations, and help to guide the public through the application and interpretation of regulatory requirements. This policy is intended to send a message to regulated entities that the Commission has the will and ability to obtain penalties when necessary, but also stands ready to engage in a cooperative process that protects the water resources of the basin, resolves the likelihood of repeat violations, and potentially helps to educate violators and the public on the rationale underlying the Commission's regulations and means of avoiding environmental harm. The policy also reflects the Commission's increased focus on the enforcement of civil penalties in disadvantaged or underserved areas and renewed commitment to ensuring that compliance actions are equitably handled in all cases, but especially in environmental justice areas and areas with disproportionate environmental burdens. Pursuant to these goals, the policy provides a framework of objective and subjective criteria designed to be applied to violation scenarios to assess the appropriate penalty as follows:

In settling cases in which the Commission could levy a civil penalty, the Commission shall first require the abatement and remediation of any environmental problems resulting from the noncompliance and shall coordinate the settlement with its member jurisdictions. This coordination will be conducted according to the terms of Commission Resolution No. 2018-08 and, where applicable, the Letter of Understanding (LOU) with the Commonwealth of Pennsylvania, dated April 2022, and the Memorandum of Understanding with New York State, dated April 2015. Thereafter, the Commission shall be guided by the following principles:

1. The Commission shall continue its past policy of using settlements as the primary means of carrying out enforcement actions per the terms of Commission Resolution No. 2018-08.
2. The Commission is authorized to enter into a Consent Order and Agreement (COA) to resolve non-compliant operations and enforcement proceedings in conjunction with or separately from settlement agreements under § 808.18, per § 808.14. COAs that are incorporated into settlement agreements will be treated as part of the settlement agreement and will therefore be subject to the provisions of § 808.18 and § 808.16 and the guiding principles presented in this document.
3. In completing settlement agreements, the Commission strives for consistency in cases with similar factual situations but, recognizing that each case is unique and

- settlements are negotiated recognizing the unique circumstances of each situation, the Commission retains flexibility in fashioning settlement terms.
4. All settlements shall be agreed to by the alleged violator, in writing, prior to the presentation of settlement terms to the Commission for final approval.
 5. The Commission generally will look back 5 years for avoided consumptive use fees as a result of non-compliance in determining a settlement amount. However, the Commission reserves the right to review the potential economic benefit that may have accrued and compliance history that may have accumulated previous to the 5-year period preceding the enforcement action in determining the appropriate penalty amount, per the terms of Section 10 below, the Commission's Civil Penalty Matrix – Policy No. 2022-XX, and § 808.16(a)(1),(6) and (7).
 6. For all settlements, the Commission reserves the right to reinstitute a civil penalty action against the alleged violator in the event the violator fails to carry out the terms of the settlement agreement. See § 808.18(b).
 7. Settlements may be based upon monetary payments or non-monetary actions, services or products of benefit to the public and/or the environment.
 8. The Commission will consider the deterrence of disproportionate negative impacts to human health and the environment in environmental justice areas a relevant factor in penalty assessments and may employ this factor to add enhancements to civil penalties at its discretion, per § 808.16(a)(3).
 9. Except in cases involving an alternate payment schedule or non-monetary actions, it will be the practice of the Commission to execute settlements agreements and receive payment prior to the issuance or renewal of any approvals.
 10. For any given violation, there is no single “correct” penalty amount that can be determined by any formula. Rather, it is more reasonable to attempt to identify a penalty figure that lies within a range of amounts that would be fair and effective. The Commission should adhere to the provisions of § 808.16 and refer to the Civil Penalty Matrix contained in Commission Policy No. 2022-XX to determine an appropriate penalty amount.
 11. In deciding whether to settle a civil penalty case and determining the appropriate terms therefore, including, but not limited to, those related to the amount of any such penalty or the rate of interest applicable to settlement amounts, the Commission and its staff are bound by § 808.16 and should be guided by the following considerations:

SPECIFIC CONSIDERATIONS

The Civil Penalty Matrix contained in Commission Policy No. 2022-XX provides the most accurate means of calculating a specific penalty amount based upon the degree of severity of the various aspects of a given violation. Apply the facts of an alleged violation to the factors below and the penalty matrix to determine a likely penalty amount.

1. **The extent to which the alleged violation caused serious environmental or other public harm or created the potential for serious harm.** The Commission considers passby and conservation release violations and other types of instream flow violations to rise to the level of “severe.” The Civil Penalty Matrix contained in Commission Policy No. 2022-XX provides a means of calculating specific penalty amounts based upon the level of harm caused by a given violation. Section 808.16(a)(3).
2. **The extent to which the alleged violation resulted in any negative impacts to human health and the environment, with a heightened focus on environmental justice (EJ) area(s).** The Commission will consider any impact to human health and safety or the environment. Impacts on EJ communities and any impact in EJ areas will also be reviewed as relevant factors in assessing the severity of a given violation. Section 808.16(a)(3).
3. **The intent of the violator and the extent to which the alleged violator’s actions were willful or grossly negligent.** The Commission will consider the level of intent of an alleged violator according to the following scale, ranging from “moderate” to “severe”: unintentional and unaware >> unintentional but aware >> knowing and intentional. The Commission would consider an alleged violator’s knowledge that it was committing a given infraction or causing harm and any economic benefit it might incur from committing such a violation or causing such harm as factual support for willfulness or gross negligence. A finding of willfulness or gross negligence would be sufficient to increase the level of any violation to “severe” and constitute grounds for increasing the penalty amount. Section 808.16(a)(2).
4. **The extent to which the alleged violation resulted in any economic benefit to the alleged violator.** The Commission will consider the extent to which an alleged violation yielded any profit to the alleged violator and particularly, in conjunction with item No. 3 above, the extent to which the profit appears to have been the intentional objective of the alleged violation. Section 808.16(a)(6).
5. **The alleged violator’s compliance history.** The Commission will consider the alleged violator’s compliance history for the 5-year period preceding the enforcement action (if available), including, but not limited to, the number of previous violations it contains, if any. Section 808.16(a)(1).
6. **The alleged violator’s cooperativeness and responsiveness.** The Commission will consider the level of cooperativeness and responsiveness displayed by the alleged violator in resolving the violation. Higher levels of cooperativeness will include

civility in interactions and initiative in addressing issues related to the violation. Higher levels of responsiveness will include clear, efficient, and prompt communication. Generally, less cooperativeness and responsiveness have the potential to increase the assessed penalty amount. Section 808.16(a)(5).

7. **A particular need to deter such action by other potential violators.** The Commission will assess the value of incorporating a punitive measure into a given penalty amount or settlement term in order to deter future violations by the alleged violator and other potential future violators. Factors to be considered will include the scope of the alleged violation and its impacts and potential impacts and the economic scale of the elements involved. Accordingly, the Commission may assess the size of the alleged violator, including its relative sophistication and its overall financial wherewithal in determining the impact of any proposed penalty. Section 808.16(a)(8).
8. **The magnitude of the physical impact of the alleged violation.** The Commission will consider the scale of the alleged violation, including the length of time over which it occurred and the amount of water used, diverted, or withdraw during that time period. Section 808.16(a)(7).
9. **Any unique factors or extenuating circumstances that should be considered.** The Commission will consider unique aspects of the project or alleged violation and any extenuating circumstances relating to either as potential justification for waiving any penalty or reducing an assessed penalty amount. Section 808.16(b).
10. **The cost to the Commission.** The Commission will consider the overall cost of the enforcement action, particularly with respect to the investment of time and resources over and above the standard cost for similar enforcement actions. The Commission may increase the assessed penalty amount to compensate for any additional costs. Section 808.16(a)(4).