

Administrative Monetary Penalty Guidelines

February 2016

National Energy
Board



Office national
de l'énergie

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1.0 Introduction

1.1 Background

In February 2016, amendments to the *Canada Oil and Gas Operations Act* (COGOA), as well as the *Canada Oil and Gas Operations Administrative Monetary Penalty Regulations* (Regulations), came into force.

The amendments provide the National Energy Board (NEB or Board) with the authority to issue administrative monetary penalties (AMPs) to NEB-regulated operators in the offshore and Northern onshore for enforcement purposes.

AMPs are penalties that can be imposed on an individual or a company for incidences of non-compliance with legislation, regulations, permits, licences, certificate conditions, Board officer orders, or Board decisions or orders. AMPs are intended to be a compliance-obtaining measure (administrative), as opposed to a punitive measure (criminal).

1.2 Purpose of the Guidelines

The NEB has prepared this Administrative Monetary Penalty Guideline (Guideline) to provide additional information regarding the key elements of the AMP regime established under COGOA and the Regulations.

In the event of a discrepancy between this Guideline and the legislation, the definitions in COGOA and the Regulations will prevail.

1.3 Applicability

The Guidelines apply to NEB-regulated facilities and activities under COGOA.

2.0 Enforcement Policy and AMPs

The NEB holds Operators accountable for safety, environmental protection and resource management outcomes using a rigorous compliance monitoring program and by enforcing legislative requirements.

Enforcement actions are the mechanisms used by the NEB to bring Operators back into compliance with COGOA and its regulations, to deter future non-compliance and/or to prevent harm.

The NEB's objectives for enforcement actions are to achieve compliance as quickly and as effectively as possible. Achieving compliance eliminates or reduces hazards and protects the safety of workers and the public, the environment and property. The NEB's guiding enforcement policy statement is the following:

The NEB will enforce regulatory requirements to obtain compliance, deter future non-compliance, and prevent harm by using the most appropriate tool or tools available.

The NEB will carry out enforcement actions in a manner that is fair, predictable and consistent. AMPs are an addition to the Board's existing enforcement toolkit. The NEB will continue to apply the most appropriate enforcement tool required to achieve compliance and deter future non-compliance. Diagram 1 presents the NEB's approach to using enforcement tools with an emphasis on escalation of enforcement from facilitated to directed compliance actions. As illustrated below, the AMP could be used in conjunction with any other enforcement tool, apart from prosecution, as appropriate.

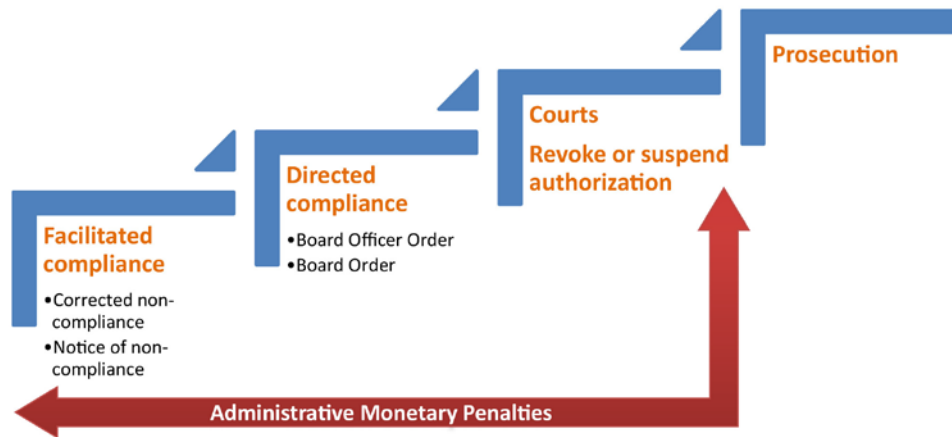


Diagram 1: Compliance and enforcement tools

More information about the NEB's compliance and enforcement tools can be found on the NEB's website: www.neb.one.gc.ca.

The NEB may apply one or more of the following criteria to guide the use of AMPs:

- when compliance is not obtained using either facilitated or directed compliance and enforcement tools,
- when harm is caused because of the non-compliance,
- when harm would likely occur because of the non-compliance, or
- any other situation where an AMP is the best way to obtain compliance or deter future non-compliance.

3.0 Regulations

Schedule 1 of the Regulations outlines specific violations pertaining to safety, environmental protection or resource management which, if contravened, could be subject to an AMP. Contravention of an order or decision made under COGOA, as well as failure to comply with a term or condition of a certificate, licence, authorisation, permit, leave or exemption granted under COGOA, are also designated violations subject to an AMP.

4.0 The AMP Process

The AMP process is built on the following principles:

1. The process will be administered in a timely manner.
2. The process will be transparent.
3. AMPs will be applied in a fair, impartial, and consistent manner, depending on the circumstances of each case.

The AMP process is described in the following 4 sections below. Diagram 2 represents a high level overview of the AMP process. For each step in the process it indicates responsibilities and outputs.

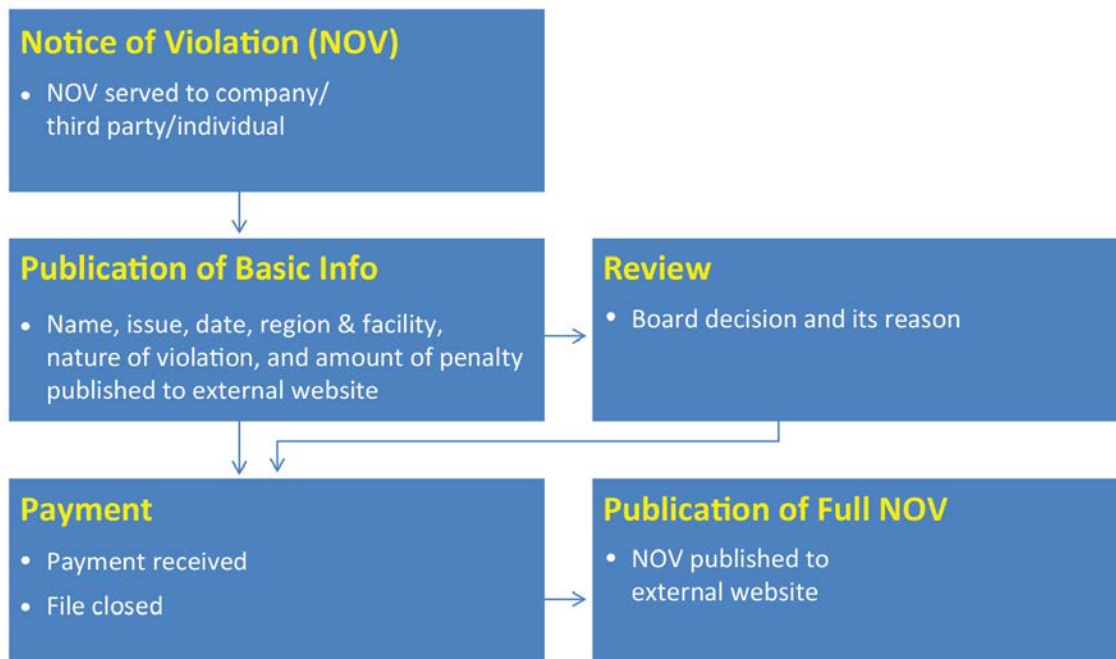


Diagram 2: Summary of AMP Process

4.1 Notice of Violation

Issuing Notices of Violation and Service of Documents

The NEB has designated staff members as “AMP Officers” authorized to issue notices of violation.¹ AMPs will be issued in the form of Notices of Violation (NOVs) from the NEB’s head office. Issuing NOVs from head office will ensure consistency in the NEB’s use of AMPs and adherence to the policies listed in section 2 of this Guideline.

Once the AMP Officer decides to issue an NOV, it will be served on the alleged violator. The Regulations require that notices of violation and any other documents be served in person,

¹ S. 71.02(b) of COGOA.

through registered mail, courier, fax or other electronic means. Section 5 of the Regulations provides additional details on service of documents.

When a company or individual commits a violation, and a decision is made to issue an AMP, the NOV will include the following information:²

- the name of the person believed to have committed the violation,
- the relevant facts surrounding the violation,
- the amount of the penalty, including identification of the mitigating and aggravating factors that were applied,
- how to pay the penalty (Payment form), and
- how to request a review (Request for Review form).

Calculating the Penalty

The calculation of the penalty starts with determination of a baseline penalty that can be increased or decreased using a number of criteria that are listed in the AMP Regulations. Section 4 of the Regulations lists nine adjustment factors that may be applied if the situation warrants, and each factor has different gravity values. The sum of all gravity values determines how much the penalty can be increased or decreased from the baseline. Schedule 2 in the Regulations shows the potential gravity levels and the corresponding penalty amounts. Note that the baseline penalty starts with a gravity level of zero, so if no adjustment factors are applicable, the final gravity level would continue to be zero and the final penalty amount would correspond to that gravity level.

The adjustment factors are designed to promote certain behaviours such as prompt voluntary reporting, undertaking mitigation activities quickly, and taking steps to prevent recurrence of a violation. The factors are also intended to deter behaviours such as negligence, repeat violations, and financial gain from a violation. The complete list of adjustment factors can be found in column 1 of the table in Section 4 of the Regulations.

The Regulations classify violations into two categories, Type A and Type B. Type A are violations of administrative and record-keeping requirements representing a lower risk to safety or the environment. Type B includes all other violations (the vast majority), such as failing to follow an order issued by Board officers or violating safety or environmental requirements. A list of violations can be found in Schedule 1 of the Regulations.

A penalty cannot be increased beyond the maximum daily penalties set out in the Acts of \$25,000 for individuals and \$100,000 for any other person (e.g. companies).³

Each day that a violation is committed or continues is considered a separate violation for which a separate penalty can be issued. Therefore, one non-compliance or incident could result in more than one violation. Information contained in the NOV will indicate if the violation is one or multi-day violation subject to daily penalties.

² S. 71.06(2) of COGOA.

³ S. 71.01(2) of COGOA.

The following two examples illustrate how penalties would be calculated using Schedule 2 of the Regulations. Table 1 summarizes the examples below and Table 2 shows the mitigating and aggravating factors from the Regulations used in the calculations.

1. For an individual who committed a Type A violation, the base amount of the penalty (i.e. gravity value of zero) is \$1,365 (Schedule 2 of the Regulations). The individual has provided assistance with regard to the violation to the NEB. Therefore a gravity value of -2 was applied to this criterion. However, the individual did not promptly report the violation to the NEB (item 6) so a gravity level of +1 was also applied. The total sum of gravity values is -1. The daily penalty, according to Schedule 2 of the Regulations, is therefore \$990.
2. For any other person (e.g., a company) who committed a Type B violation the base amount of the penalty (i.e. gravity value of zero) is \$40,000 (Schedule 2 of the Regulations). The company was found to have committed a previous violation so a gravity value of +1 was applied to this criterion. The violation was also found to have resulted in an increased risk of harm to the environment so a gravity value of +2 was applied. The total sum of gravity levels is +3, which sets the daily penalty amount for the violation at \$76,000.

Table 1: Summary of Above Examples of Possible Penalty Calculations

	Individual	Person other than an individual
Violation of the AMP Regulations	Type A	Type B
Base Penalty	\$1,365	\$40,000
Gravity Values Applied	Criterion 5. -2 Criterion 6. +1 Total Gravity Value-1	Criterion 1. +2 Criterion 9. +1 Total Gravity Value+3
Total Penalty	\$990	\$76,000

Table 2: Mitigating and Aggravating factors from Section 4 of the Regulations

Item	Column 1	Column 2
	Criteria	Gravity Value
1.	Whether the person who committed the violation was finally found or considered to have committed a previous violation set out in a notice of violation issued by the National Energy Board, the Canada–Newfoundland and Labrador Offshore Petroleum Board or the Canada-Nova Scotia Offshore Petroleum Board	0 to +2
2.	Whether the person derived any competitive or economic benefit from the violation	0 to +2
3.	Whether the person made reasonable efforts to mitigate or reverse the violation’s effects	-2 to +2
4.	Whether there was negligence on the person’s part	0 to +2
5.	Whether the person provided all reasonable assistance to the National Energy Board with respect to the violation	-2 to +2
6.	Whether the person, after becoming aware of the violation, promptly reported it to	-2 to +2

the National Energy Board

7.	Whether the person has taken any steps to prevent a recurrence of the violation	-2 to +2
8.	For Type B violations, whether the violation was primarily related to a reporting or record-keeping requirement	-2 to 0
9.	Whether the violation increased a risk of harm to people or the environment or a risk of waste	0 to +3

4.2 The Review Process

If a company or individual does not agree with the NOV they have received, they have 30 days after the day of service to request a review of the amount of the penalty, the facts of the violation or both. A company or individual who requests a review is referred to as the Requester. Upon receipt of a request for review, the Board shall conduct the review or designate a person to conduct the review (hereafter referred to as “Reviewer”). The person conducting the review cannot be the same person that issued the NOV (i.e., the AMP Officer).

The review process will be conducted in writing. The Reviewer is not involved in the NOV issuance process, which is conducted by the AMP Officer. To request a review, the Requester must fill out the “Request for Review” form which will be included with all NOV’s.

The form requires the Requester to indicate whether the request is for a review of the amount of the penalty, the facts of the violation, or both. Depending on the basis of review, the Requester will also be required to provide an explanation as to why they believe the amount of the violation was not determined in accordance with the regulations or why they did not commit the violation.

Within 21 days of receipt of the request, the Reviewer will provide the Requester and AMP Officer with a process letter setting out the dates and steps of the review process. As well, within 30 days of receipt of the request, the AMP Officer will provide the Requester with the evidence used to support the NOV. The Requester will then have 30 days to provide the Reviewer and the AMP Officer with submissions, including any evidence, to support the request that the Reviewer change the amount of the penalty or determine that the Requester did not commit the violation. The AMP Officer has 30 days to provide a written response to the submission. The Requester will then have 30 days from that submission to reply in writing. The Reviewer may vary these time limits on its own motion or in response to a request as it considers appropriate.

At any time before the Reviewer issues a decision on the review, the Requestor may request that review be withdrawn. The Reviewer will review all the submissions and make a decision on the request to review. The Requester will be sent the Reviewer’s decision, and its reasons for decision. The Reviewer’s decision will be posted to the NEB’s external website.

The following Table highlights key steps in the review process.

Table 3: Key Steps in the Review Process

Step in the Review Process	Timeline*	Outcome
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Request for review received	Within 30 days of receiving an NOV	Requester must request a review of the amount of the penalty, the facts of the violation or both; will also be required to provide an explanation as to why they believe the amount of the violation was not determined in accordance with the regulations or why they did not commit the violation. Submission must be received by mail, fax or on-line form.
Board initiates review process	Within 21 days of receiving a request for review	Requester and AMP Officer will receive a letter from the Reviewer setting out the process steps and timelines for submissions. The letter will also provide filing instructions.
AMP Officer releases information package to the Requester	Within 30 days of receiving the request for review	Requester and the Reviewer will receive an information package that contains evidence used to support the NOV.
The Requester files submissions supporting the request for a review	Within 30 days of receiving the information package from the Issuer	The Requester will provide the Reviewer and the AMP Officer with submissions and evidence to support the request.
The AMP Officer provides written response to the Requester's submission	Within 30 days of receiving the submission of the Requester	The AMP Officer will provide a written response.
Requester may, if desired, provide a reply to the Issuer's response	Within 30 days of receiving the AMP Officer's written response	The Requester may provide the Reviewer and the AMP Officer with additional submissions in reply to the AMP Officer's submissions. Submission must follow the filing instructions.
The Reviewer reviews all submissions and makes a decision	Within a reasonable time of receiving the final submission	The Reviewer will review all the submissions and make a decision on the request to review. The Reviewer must change the amount of the penalty if it decides that the amount was not determined in accordance with the regulations. The Reviewer may also find, on a balance of probabilities, that the Requester did not commit the violation. The Requester will be sent the Reviewer's decision, and the Reviewer's reason for decision.

* The Board may vary these time limits on its own motion or in response to a request, as it considers appropriate.

For more information on reviews, please refer to COGOA.⁴

4.3 Recovery of Penalties

The NOV will include instructions on how to pay the penalty. A person served with an NOV has 30 days from the receipt of an NOV to pay the penalty.

If a review is requested, and the Reviewer determines that the Requestor did commit the violation, payment is required within 30 days from the receipt of the Notice of Payment served along with the Reviewer's decision.

⁴ S. 71.2 to 71.6 of COGOA.

Payments may be made by cheque, money order, bank draft, or by electronic funds transfer. All payments must be made payable to Receiver General for Canada. Additional details on these payment options will be provided in the NOV or issued by the NEB.

An unpaid AMP amount is a debt due to the Crown and may be recovered by collection procedures.

4.4 AMPs Published on the NEB's website

In the interest of greater public transparency around the issuance of AMPs, the NEB will post information relating to an NOV as soon as it has been served. This information may include the name of the company who committed the violation, the issue date, the region and facility, the nature of the violation, and the amount of the penalty. The decision to disclose the name of an individual will be made on a case-by-case basis.

In addition, the NEB will post the complete NOV after the 30-day review period has expired or after the review process has been completed.

The NOV will include the following information:

- the name of the Operator (or individual, at the discretion of the NEB) that committed the violation,
- the relevant facts surrounding the violation, and
- the amount of the penalty, including identification of the mitigating and aggravating factors that were applied to arrive at the amount.

5.0 Contact Information

Questions relating to the information contained in this Guideline can be submitted by e-mail, fax or mail to the NEB at the address listed below.

Address: National Energy Board
517 Tenth Avenue SW
Calgary, Alberta
T2R 0A8

Attention: AMP Officer

Fax: 403-292-5503

Toll free fax: 1-877-288-8803

E-mail: ampsap@neb-one.gc.ca