

Fuel Quality Enforcement Guidelines

The Texas Legislature, under Chapter 17 of the Texas Agriculture Code (Code), has given the Texas Department of Agriculture (the department) the authority and responsibility to monitor and regulate the quality of motor fuel sold or offered for sale in this state. The department's regulatory goals are to provide consumers and businesses with a fair and efficient trade environment, to encourage business development, and to inspire consumer confidence. To achieve these goals, the department enforces a variety of fuel quality standards through routine and risk-based inspection programs, complaint investigations, and other regulatory activities involving suppliers, dealers (retailers), and other distributors of motor fuel.

Department enforcement occurs through administration actions, including stop-sales, and by direct enforcement with monetary administrative penalties or license sanctions. In instances of serious fraud, widespread deliberate violation of the law, or repeat offenders who have failed to be deterred through administrative action, the matter may be referred to the Office of the Attorney General for assessment of civil penalties or to a local district or county attorney for assessment of civil penalties, criminal prosecution, or both. Civil penalties under Chapter 17 can be as high as \$10,000 per violation. Civil penalties or criminal prosecution may be pursued instead of or in addition to any administrative action.

The department's authority to assess administrative penalties for the enforcement of Chapter 17 and associated rules is found in Sections 12.020 and 17.155 of the Code. Such penalties can range up to a statutorily-imposed maximum of \$5000 for each violation. Each day that a violation continues or occurs may be considered a separate violation. Each transaction may be considered a separate violation and, under certain circumstances, each unit of measure involved in a transaction also may be considered a separate violation. Given the wide variety of possible motor fuel transactions, the department cannot describe all possible circumstances that would constitute a separate violations for which the maximum penalty may be assessed.

The department publishes these Fuel Quality Enforcement Guidelines, including the Fuel Quality Penalty and Sanction Matrix, to inform the regulated public about the department's enforcement policies. These guidelines describe in general the most likely consequences of noncompliance with Chapter 17 of the Code and rules adopted under that chapter, as published in Chapter 5 of Title 4 of the Texas Administrative Code (TAC). These guidelines and the matrix have been developed to encourage consistent, uniform, and fair assessment of penalties by the department's enforcement staff for violations of the aforementioned statutory and rule provisions.

These guidelines do not constitute a policy or rule of general applicability. Under Sections 12.020(d) and 17.155(c) of the Code, all penalties assessed by the department ultimately must be individualized to the specific nature, circumstances, extent, and gravity (NCEG) and the hazard or potential hazard (HPH) of the violation, and must take into account other factors related to the violation or violator listed in the aforementioned subsections when appropriate. Although the department has determined that in general the NCEG and HPH of the violations described in the matrix, as well as any other factors, will vary little from case to case for the violations listed therein, thus establishing a prescribed penalty for each such violation type, the actual penalty amount to be assessed in a particular case remains within the department's prosecutorial discretion. That discretion will be informed by those factors and circumstances for a particular violator and violation that might warrant deviation from the prescribed penalty. Thus, in

extraordinary circumstances outside the general principles that inform these basic guidelines, the penalties set forth in the matrix may be adjusted upwards or downwards as justice may require.

The department's enforcement staff is authorized to settle disputed claims or address unusual or extraordinary circumstances informally through penalty reductions, probationary periods, deferred penalties, remedial actions in lieu of penalties, or by other appropriate lawful means, at their discretion and subject to approval of the Commissioner or Deputy Commissioner of Agriculture. **The department encourages all respondents[†] to timely respond to notices of violation or other enforcement actions and to submit any information believed to mitigate or negate the alleged violation or which would, as justice requires, warrant reduction or waiver of the penalty. The department's enforcement staff will consider all relevant and responsive information, claims, or contentions submitted in response to an enforcement action before further legal action is taken to enforce the assessed penalty.**

The general principles incorporated into these guidelines, including the matrix, and the department's enforcement responses to violations of Chapter 17 and associated rules are as follows:

1. The standards, prohibitions, duties, or other requirements of Chapter 17 and the rules adopted under the authority of that chapter are considered strict liability laws, unless intent or knowledge is expressly required by the underlying Chapter 17 provision or applicable rule.
2. The prescribed penalties in the first-occurrence column of the matrix, therefore, are generally the minimum penalties to be assessed for unintentional or unknowing noncompliance with a Chapter 17 standard, prohibition, duty, or other requirement. In other words, the department has presumed in determining the amount of the penalty for a first violation, unless otherwise expressly noted, that the noncompliant person acted without intent or knowledge in violating the law. Thus, unless the matrix provision expressly states that a penalty is to be assessed only upon proof that the violation was intentional or knowing, a claim that the noncompliant actor did not intend to commit or did not know they were committing a violation is not a defense and does not constitute a circumstance for which a penalty in this matrix may be reduced or waived.
3. The penalties in the matrix, for all offense levels, also assume no significant, specific, identifiable harm has occurred as the result of the noncompliant conduct. A primary goal of regulation is to deter conduct that may cause harm before harm actually occurs. Thus, conduct that may cause harm will be punished, even when no harm has in fact occurred or cannot be shown to have occurred, in order to deter future noncompliance that may or would result in harm. Regulatory systems are intended to be proactive, not reactive.
4. Because the penalties in the matrix are for noncompliant conduct that is presumed, in the absence of evidence to the contrary, not intentional or knowing and for which no significant, specific, identifiable harm has occurred, the department may, as justice requires, assess penalties greater than specified in the matrix, bound only by the statutory limit, when the evidence demonstrates that the misconduct was knowing, intentional, has caused or will cause significant economic harm to one or more Texas consumers, or is the result of deliberate indifference to or habitual negligence in complying with the law. The amount of any increase in the penalty will be determined by considering the nature of the intent or

knowledge, the amount and nature of the harm, the need for deterrence, and any other relevant factor.

5. A person who has previously been assessed a penalty or license sanction for violating the same or a similar provision of the law or who has received an inspection finding, warning, or other department notice regarding the same or similar noncompliant conduct may be presumed to have acted with intent when committing subsequent violations of the same or a similar provision of the law. The consequence of an intentional or knowing violation may be an increase in the penalty above what is prescribed in the matrix. The department, however, will not readily presume intent and a single violation will not automatically result in an allegation of intent absent exceptional circumstances and clear evidence of such intent.
6. The department evaluates prior violations at the client or owner level, not the managerial level. In other words, for a single legal entity operating multiple separate locations, whether concurrently or sequentially, a violation at any one location will be considered a prior violation with respect to any future violation(s) committed by that same entity at the same or a different location. For many violations, however, the penalty remains a flat amount across multiple subsequent violations and the penalty amount for such violations will not automatically increase as the result of a prior violation absent clear evidence demonstrating that the misconduct was knowing, intentional, has caused or will cause significant economic harm to one or more Texas consumers, or is the result of deliberate indifference to or habitual negligence in complying with the law.
7. The date of a violation is the actual date the violation occurred, the date the violation first began occurring in the case of a continuing violation that occurs over a number of consecutive days, or any date within the period of consecutive days that constitutes a continuing violation, as appropriate to the violation and circumstances.

If the date of first occurrence cannot be determined, the date of the violation is the date the department first discovers the violation (or the date of the first provable violation) and any consecutive day thereafter on which the violation continues (or continued).

8. In determining whether a particular entity has a prior violation, the department will review the five-year time period immediately preceding the date of the current violation. A violation is a prior violation only if an alleged violation resulted in an order finding that a violation in fact occurred or if an entity has agreed, in a no-contest plea regarding a prior alleged violation, that the prior alleged violation would operate in the future as a prior violation for purposes of department penalty determinations.
9. Payment of the full amount of an assessed penalty in any form, outside of an authorized settlement agreement, constitutes a waiver of all objections to the department's allegations. All objections, assertions, comments, or qualifications of any kind accompanying any penalty payment shall be considered void and of no effect. No such objection, assertion, or comment shall be acknowledged by or incorporated into the findings of fact or conclusions of law set forth in the order approving payment of the penalty. If a respondent wishes to object to or otherwise contest any portion of the department's notice of violation, the respondent must request a hearing.

Each no-contest disposition regardless of form shall operate as a prior violation (occurrence) for purposes of future department penalty determinations. Payment of a penalty in full or payment of a penalty in full with one or more objections, assertions, comments, or qualifications by the respondent shall constitute a no-contest disposition, in the absence of a stipulation or hearing determination. Absent withdrawal or rescission of the alleged violation by the department, or an approved settlement, a respondent must request a hearing and obtain a favorable ruling through the hearing process, or by district court or appellate court judgment on appeal, that the violation did not occur to avoid use of the alleged violation as a prior violation (occurrence) or to obtain findings of fact or conclusions of law that incorporate or take into account any objections, assertions, comments, or qualifications proffered by the respondent.

Partial payments of an assessed penalty, absent an authorized settlement, shall be returned and the department shall consider any such failure to pay the full penalty amount to be a request for a hearing.

10. The department does not consider the immediate correction or cessation of noncompliant conduct or correction or removal of noncompliant equipment or products to be a defense or excuse to assessment of a penalty or license sanction. Nothing in this provision, however, shall prevent the department from adopting policies that provide for no penalty or a waiver of penalty upon correction, cessation, or removal of noncompliance in particular circumstances.

These guidelines, including the matrix, are based on current circumstances, including extant information, laws, and department policies. As the enforcement of these types of violations continues and additional data are gathered, these guidelines will be reviewed and may be adjusted from time to time to reflect any changes in the circumstances on which it is based. Such modifications may be implemented retroactively, to the extent permitted by law, or become effective, at the department's discretion, prior to, concurrent with, or at a time certain after publication.

This matrix is effective immediately upon filing in the <hi>Texas Register<h> and supersedes the Fuel Testing Penalty Matrix as published in the January 9, 2004, issue of the <hi>Texas Register<h> (29 TexReg 399) for those violations committed on or after the date of its filing.

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Fuel Quality Penalty and Sanction Matrix

<u>Violation</u>	<u>First Occurrence</u>		<u>Second Occurrence⁴</u>		<u>Subsequent Occurrences⁴</u>	
<p>Dealer (retailer) fails to accurately post the AFR* of motor fuel sold or offered for sale in compliance with Texas Agriculture Code § 17.055:</p> <p>The AFR* of motor fuel tested by or at the direction of TDA is less than the posted AFR* by more than the allowable tolerance.^{1,2}</p>	<p>\$250 plus a variance adjustment, octane units, as follows:</p> <p>Variance Adjustment</p>		<p>\$250 plus a variance adjustment, octane units, as follows:</p> <p>Variance Adjustment</p>		<p>\$250 plus a variance adjustment, octane units, as follows:</p> <p>Variance Adjustment</p>	
	Amount of Variance	Adjustment	Amount of Variance	Adjustment	Amount of Variance	Adjustment
	0.8 - 1.3	\$100	0.8 - 1.3	\$100	0.8 - 1.3	\$100
	1.4 - 1.9	\$350	1.4 - 1.9	\$350	1.4 - 1.9	\$350
	> 1.9	\$600	> 1.9	\$600	> 1.9	\$600
<p>Distributor or supplier fails to accurately certify the AFR* of motor fuel delivered in compliance with Texas Agriculture Code § 17.055:</p> <p>The AFR* of motor fuel tested by or at the direction of TDA is less than the certified AFR* by more than the allowable tolerance.^{1,2}</p>	<p>\$1000 plus a variance adjustment, in octane units, as follows:</p> <p>Variance Adjustment</p>		<p>\$2000 plus a variance adjustment, in octane units, as follows:</p> <p>Variance Adjustment</p>		<p>\$4000 plus a variance adjustment in octane units, as follows:</p> <p>Variance Adjustment</p>	
	Amount of Variance	Adjustment	Amount of Variance	Adjustment	Amount of Variance	Adjustment
	0.8 - 1.3	\$100	0.8 - 1.3	\$150	0.8 - 1.3	\$250
	1.4 - 1.9	\$350	1.4 - 1.9	\$400	1.4 - 1.9	\$500
	> 1.9	\$600	> 1.9	\$650	> 1.9	\$1000

Dealer (retailer) sells or offers for sale motor fuel that fails to meet the minimum motor fuel standards established by Texas Agriculture Code § 17.071. ^{2,3}	\$1250	\$1250	\$1250
Dealer (retailer) fails to post ethanol and/or methanol content in compliance with Texas Agriculture Code § 17.051.	\$50 for each required posting location at which the ethanol and/or methanol content is not posted.	\$100 for each required posting location at which the ethanol and/or methanol content is not posted.	\$100 multiplied by the number of prior violations for each required posting location at which the ethanol and/or methanol content is not posted.
Dealer (retailer) fails to post the AFR* of motor fuel in compliance with Texas Administrative Code § 5.3.	\$50 for each required posting location at which the AFR* of motor fuel is not posted.	\$100 for each required posting location at which the AFR* of motor fuel is not posted.	\$100 multiplied by the number of prior violations for each required posting location at which the AFR* of motor fuel is not posted.
Distributor or supplier fails to certify the AFR* of motor fuel in compliance with Texas Agriculture Code § 17.054. ²	\$1000	\$2000	\$4000
Failure or refusal to allow inspection or testing of motor fuel as authorized and/or required by Texas Agriculture Code § 17.102.	\$500 for failure \$1000 for refusal	\$500 for failure \$5000 for refusal	\$500 for failure \$5000 for refusal

Failure or refusal to allow access to records as authorized and/or required by Texas Agriculture Code § 17.053.	\$500 for failure \$2500 for refusal	\$500 for failure \$5000 for refusal	\$500 for failure \$5000 for refusal
Failure to comply with a stop-sale order issued under Texas Agriculture Code § 17.073.	\$1000	\$5000	\$5000
Failure to pay the motor fuel testing fee authorized and/or required by 17.104.	200% of required fee plus \$250; or Payment of the required fee and a two-year probation with a deferred penalty ⁵ of 100% of the required fee plus \$250.	200% of required fee plus \$500	200% of the required fee plus \$1000 multiplied by the number of previous violations within the continuous five-year period immediately preceding the date of the current violation, not to exceed \$5000.

† “Respondent” means a person who is alleged to have or has committed a violation.

* “AFR” means automotive fuel rating, also known as the Anti-Knock Index (AKI), Research Octane Number (RON), Motor Octane Number (MON), or (R+M)/2. The meaning of “automotive fuel rating” may be found by consulting Texas Agriculture Code § 17.001(1) and 15 U.S.C. Section 2821.

¹ The allowable tolerance is -0.7 octane units. Penalties are assessed for each different fuel type sample tested for which a representation of AFR is posted or certified. An additional penalty adjustment is imposed based on the amount by which the actual AFR varies from the posted or certified AFR.

² Penalties are assessed for each different fuel type sample tested.

³ Penalties related to motor fuel sold or offered for sale by a dealer (retailer) that fails to meet the posted AFR* are not assessed under this violation but are instead assessed under a separate violation.

⁴ The department will evaluate whether a prior violation has occurred by consulting the continuous five-year period immediately preceding the date on which the current violation occurred or if that date is uncertain the first date on which the violation was discovered by the department. The penalty for a second occurrence will be assessed if the respondent has had one prior violation, as determined by a department final order, which occurred within the aforementioned period of time. The penalty for a subsequent occurrence will be assessed if the respondent has had more than one prior violation, as determined by a department final order, which occurred within the aforementioned period of time. A violation occurs on the date the respondent failed to comply with the law, including a department order, or if that date is uncertain the first date on which the violation was discovered by the department. A continuous violation that occurs during a period of consecutive days occurs on any or all days during that period and the department may use the first day, the last day, any other day, or all days of, within, or during that period for purposes of determining when the violation occurred and the number of individual penalties to assess.

⁵ Probation and deferred penalty: The respondent must sign an agreed settlement admitting the violation and establishing the period and terms of probation. If the probation period is completed without further violation and all other terms of the probation are met, then the penalty will be waived and the violation will not be counted as a prior violation (occurrence) for purposes of penalty enhancement. If the terms of probation are not met, the deferred penalty must be paid within 30 days after the date the department notifies the respondent that the respondent has not complied with the terms of probation. If respondent fails to comply with the terms of probation by committing another violation within the probation period, then an additional penalty will be separately assessed for that violation. A person who has previously committed a violation, as determined by a department final order, within the continuous five-year period immediately preceding the current violation or who has previously violated a probation and deferred penalty agreement at any time is ineligible for a probation and deferred penalty. No more than one probation and deferred penalty shall be allowed within any continuous five-year period.