



VIOLATION PENALTY POLICY

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Signature: Robert Kard

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Procedures contained in this policy are intended solely for the guidance of Maricopa County Air Quality Department personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, that are enforceable by any person. The Department reserves the right to act at variance with this policy. Nothing in this policy is intended to preclude the Department from imposing a penalty using an alternative approach or requires the Department to impose a penalty for a violation. This policy may be changed at any time without public notice.

I. Introduction

The primary goal of this policy is to deter future violations of air quality requirements. Deterrence will be achieved by recovering the economic benefit of noncompliance plus an additional penalty amount beyond the economic benefit to reflect the seriousness of the violation. This policy shall be used for settlement purposes only. In the event that settlement is not possible and litigation is necessary to bring an alleged violator (hereinafter “violator”) into compliance and collect penalties, this policy may no longer be used. In the event of litigation, the Department may seek the statutory maximum for all alleged violations, mitigated only by the considerations set forth in Arizona Revised Statute § 49-513.

Arizona Revised Statute § 49-513 provides authority for the County Attorney to file an action in Superior Court to recover penalties of up to \$10,000.00 per day per violation of air quality requirements set forth in Title 49 of Arizona Revised Statutes and Maricopa County Air Pollution Control Regulations. This policy was established to ensure that penalties are developed in a consistent manner utilizing factors listed in Arizona Revised Statute § 49-513. In addition, this policy is based on the EPA Clean Air Act Civil Penalty Policy.

Penalties are extremely important to the success of the Department’s air quality program. Environmental requirements in statutes, regulations, permits, and orders exist to prevent harm to the environment and public health. Department enforcement action is initiated to correct violations and encourage continuous compliance in the future. Penalties are an essential component of the enforcement process and are intended to encourage compliance; they remove the economic benefit and incentive to operate in violation of requirements. Penalties should recoup any money a violator saved by operating out of compliance and create an additional incentive to comply by adding a gravity-based penalty amount which makes noncompliance cost more than staying in compliance with requirements.

The penalty calculation system contained in this policy consists of the following elements: 1) determining a gravity component dependent on the severity of a violation which may be adjusted based on factors and circumstances unique to each particular case, 2) determining a violator’s economic benefit of noncompliance, 3) determining the Department’s enforcement action costs, and 4) consideration of mitigating factors.

$$\text{Total Penalty} = \text{Gravity Component} + \text{Economic Benefit Component} + \text{Cost Recovery} + \text{Mitigating Factors}$$

II. Gravity Component

The first step in calculating a penalty is to determine the gravity component. A gravity component is calculated by assessing both a potential for harm posed by the violation and a violator’s extent of deviation from legal requirements. These two factors measure the seriousness of a violation, and are incorporated in the penalty matrix from which an amount of gravity component is selected. This amount may then be adjusted to account for multi-day violations and for unique factors of each case.

$$\text{Gravity Component} = \text{Potential for Harm} + \text{Extent of Deviation} + \text{Multi-day Component} + \text{or - Adjustments}$$

A. Potential for Harm

Potential for harm relates but is not necessarily limited to: risk of human or environmental exposure to pollutants in the air, water, or soil that may be imposed by a violation; the risk of

harm to natural resources from regulated activities; and the adverse effect a violation may have on statutory or regulatory purpose, intent, or objective.

Each and every requirement in enforceable statutes, regulations, permits, and orders was adopted or imposed in order to prevent, in some manner, harm to human health and the environment. Therefore, noncompliance with any requirement could result in a potential for environmental or human health impacts. It is not appropriate to refer to any violation as just a “paperwork” violation. Even violations of record keeping requirements create a risk of harm through a lack of information necessary to monitor and ensure compliance with more substantive standards.

This section emphasizes a potential for harm. Whether harm actually results from a violation is something over which a violator may have no control. A violator should not be rewarded with lower penalties simply because a violation failed to cause actual harm.

Instructions: On the calculation worksheet, circle a score for each of the five factors contributing to “Potential for Harm”. Add the five scores and enter the total on the line marked “Total Score”. This number will correspond to a degree of potential for harm (major, moderate, or minor) for a violation. Circle the appropriate degree on the worksheet.

1. Level of violation: Potential or actual quantity of the discharge, emission, or waste involved in that portion of an operation to which a violation applies.

0	1	2	3	4
negligible amount	relatively low amount	medium amount	relatively high amount	extremely high amount

2. Toxicity of pollutant: Nature and characteristics of the pollutant or potential or actual discharge, emission, or waste involved in that portion of an operation to which a violation applies, including concentration, toxicity, and fire or explosion hazard from direct contact.

0	1	2	3	4
negligible toxicity	relatively low toxicity	medium toxicity	relatively high toxicity	extremely high toxicity

3. Risk to environment: Potential or actual harm and the character and degree of potential or actual injury to or interference with public trust in the County’s air quality program which is caused or can reasonably be expected to be caused by a violation.

0	1	2	3	4
negligible risk	relatively low risk	medium risk	relatively high risk	extremely high risk

4. Risk to population: Potential or actual harm and the character and degree of potential or actual injury caused by a violation; proximity to areas of population centers, schools, recreational areas, or other areas used by the public; and potential migration pathways from the violation site.

0	1	2	3	4
negligible risk	relatively low risk	medium risk	relatively high risk	extremely high risk

5. Size of the violator: The size and sophistication of the violator including, but not limited to, physical size of the facility, number of employees, net worth, existence of internal environmental compliance personnel, and geographical presence.

0 negligible size	1 relatively small size	2 medium size	3 relatively large size	4 extremely large size
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<u>Total Score</u>	<u>Potential for Harm</u>
14-20	Major
7-13	Moderate
0-6	Minor

B. Extent of Deviation from the Requirement

The extent of deviation is the degree to which the violator has deviated from the substance and intent of a requirement. A violator may be substantially in compliance or may have totally disregarded the requirement, or some point in between. The extent of deviation should be determined without regard to any hazards posed by the violation; factors regarding the potential impact on the environment or public health are evaluated when determining potential for harm.

Instructions: On the calculation worksheet, circle the degree of “Extent of Deviation” from a requirement (major, moderate, minor) that most appropriately describes the violation.

1. Major - Failure to comply: The violator deviates from a requirement to such an extent that all or most of the components of the requirement are not met, or are met after serious delay.
2. Moderate - Incomplete or incorrect compliance: The violator deviates from a requirement but some of the important components of the requirement are implemented as intended, or requirements are met after unnecessary delay
3. Minor - Late compliance: The violator deviates somewhat from a requirement but most of the components of the requirement are met, or are met after minimal delay.

C. Gravity Component Matrix

Both of the above factors, potential for harm and extent of deviation from the requirement, form an axis in the gravity component matrix. The matrix has nine cells, each containing a penalty range. A specific cell is determined by applying the degree of potential for harm and the degree of extent of deviation.

		EXTENT OF DEVIATION		
		MAJOR	MODERATE	MINOR
POTENTIAL FOR HARM	MAJOR	\$10,000-8,000	\$8,000-6,000	\$6,000-4,400
	MODERATE	\$4,400-3,200	\$3,200-2,000	\$2,000-1,200
	MINOR	\$1,200-600	\$600-200	\$200-0

It may be noted that potential for harm is weighted more heavily than extent of deviation in the penalty matrix. This is because potential for harm is directly related to protecting public health and the environment. Penalties therefore increase more rapidly as potential for harm increases.

Instructions: Within the “Penalty Matrix” section of the calculation worksheet, circle the cell indicated by the selected degrees for “Potential for Harm” and “Extent of Deviation”.

Within each cell exists a range of values for the gravity-based penalty component. Determine a specific value within a selected cell based on the total score calculated for potential for harm. For example, if the total score for potential for harm is 13 (Moderate Degree), select the highest value within the cell; or if the total score for potential for harm is 7 (also Moderate Degree), select

the lowest value within the cell. For scores between 7 and 13, pro-rate the values. This methodology for determining a gravity-based penalty amount will consistently reflect a violation's degree of seriousness within a Major, Moderate, or Minor potential for harm rating.

Instructions: Using the paragraph above as a guide, determine the specific dollar amount from the cell selected and enter the amount on the worksheet line marked "Dollar amount from within range".

D. Multi-day Violations

Multi-day component of gravity-based portion of a penalty applies to a violation which continued for more than one day. Arizona Revised Statutes provide penalties for each day that a violation continued. Determination of the duration of a violation can be based on any credible evidence including but not limited to observations by a Department representative of a violation over a number of days, violator or violator's representative admitting a multi-day violation occurred, and information contained in records maintained by a violator or other parties.

A discount factor may be applied to the Gravity Component for each violation day except the first day.

Day(s)	Discount
0-1	0%
2-15	15%
16-30	30%
>30	50%

Instructions: Under the "Multi-day violations" section of the calculation worksheet enter the number of days that a violation occurred in the "# of Days" column for each range specified. For example, a violation that continued for 10 days will have one (1) day in the first range, nine (9) days in the 2-15 range, and zero for the last 2 ranges. Next multiply the dollar amount from the "Penalty Matrix" by the "Rate" and "# of Days" for each range and enter the product in the "Subtotal" column for each of the 4 ranges. Total these products and enter it on the line marked "Total".

Penalties are calculated prior to a settlement negotiation. Therefore, it is important that both the Department and the County Attorney are aware that the penalty calculation must be updated during negotiations to account for any continuation of the violation. The violator should be aware that the penalty amount will increase for any continuing violations.

E. Adjustments

Any system for calculating penalties must have flexibility to allow adjustments for case-by-case differences. Adjustments are made only within the Gravity Component of a penalty. The adjustment factors can increase, decrease, or have no effect on the penalty amount. After all adjustment factors have been applied, the resulting penalty cannot exceed the maximum penalty per day provided by statute. The following factors are evaluated to determine appropriate adjustments.

1. Degree of Willfulness or Negligence A case that involves knowing, willful, or negligent behavior warrants an increase in the penalty. The degree of willfulness and/or negligence both prior to and after discovery of the violation should be considered in determining the appropriate penalty. The following factors should be considered as well as any others deemed appropriate: (1) how much control the violator had over the events constituting the violation; (2) whether the

events constituting the violation were foreseeable; (3) whether reasonable precautions were taken to prevent the events which caused the violation; and (4) whether the violator knew or should have known about the events which caused the violation. It is also appropriate to consider whether the violator knew or should have known of the requirement or standard which was violated. This factor, however, should never be used as a basis to reduce the penalty because to do so would encourage ignorance of the law. While ignorance of the law is never a basis for downward adjustment, knowledge of the law is a basis for increasing a penalty.

Instructions: From the three statements that follow, choose the one that best fits the violator's degree of willfulness and/or negligence and circle the corresponding percentage adjustment on the calculation worksheet under "Degree of willfulness or negligence".

- a. The source knowingly violated an avoidable situation = + 25%.
- b. The source unknowingly violated an avoidable situation = + 10%.
- c. The source violated an unavoidable situation = 0%.

2. Degree of Cooperation In calculating a penalty, consider whether a violator followed all feasible and reasonable procedures to comply with or correct the violation. The presence or absence of cooperation may be used as a basis for either increasing or decreasing the penalty. No downward adjustment should be made if the efforts to comply primarily consist of coming into compliance, or if the violator lacks knowledge concerning either applicable requirements or the violations. Failure to take reasonable and prompt measures to come into compliance is cause for upward adjustment for lack of cooperation. The degree of cooperation or lack thereof is considered for the periods both before and after discovery of the violation.

a. Before Discovery

Instructions: From the four statements that follow, choose the one that best fits the violator's degree of cooperation before discovery of the violation and circle its corresponding percentage adjustment on the calculation worksheet under "Degree of cooperation before discovery".

- (1) The source promptly reported its noncompliance when there was no legal obligation to report a problem = - 15%.
- (2) The source reported its noncompliance when there was no legal obligation to do so, but there was an unnecessary delay in reporting = - 5%.
- (3) Noncompliance was documented prior to any report from the source, or the source had a legal obligation to report noncompliance = 0%.
- (4) The source exhibited a lack of cooperation, or did not make efforts to come into compliance = + 5%

b. After Discovery

Instructions: From the four statements that follow, choose the one that best fits the violator's degree of cooperation after discovery of the violation and circle the corresponding percentage adjustment on the calculation worksheet under "Degree of cooperation after discovery".

- (1) The source makes extraordinary voluntary efforts to successfully achieve compliance after learning of a violation, (such efforts may include paying for extra work shifts, or paying a premium on a contract to have control equipment installed sooner) = - 15%.
- (2) The source makes immediate voluntary efforts to successfully come into compliance after learning of a violation = - 5%.
- (3) The source makes voluntary efforts which fail to bring them into compliance = 0%.
- (4) The source exhibited a lack of cooperation, did not make efforts to come into compliance, or negotiated with the Department in bad faith = + 5%

3. History of Noncompliance Prior violations of statutes, regulations, orders, or permits will increase a penalty during the adjustment phase of penalty calculation. Every person has the obligation to comply with requirements and continuous compliance is expected, therefore, a penalty will not be decreased if the violator has no history of noncompliance.

In determining whether a violator has a history of noncompliance, consider the compliance history of the violator in all aspects of the air quality program. In addition, if a violator is a business which has undergone a merger, consolidation, transfer of assets, or other business change, the compliance history of the old business may be attributable to the new business. Where an individual, corporation or other entity owns several facilities in Maricopa County, all such facilities should be considered in determining a violator's history of noncompliance. The compliance history of any parent or subsidiary corporation should also be considered. Take into account the extent and degree to which the facility in violation and these other facilities and entities are controlled by the same management team. If the extent of control is unknown, assume that there is an overlap of control until the violator satisfactorily demonstrates otherwise.

The following factors are considered when increasing the penalty for a history of noncompliance: (1) the similarity of the violation in question to the prior violation(s); (2) the time elapsed since the prior violation(s); (3) the number of prior violations; and (4) the violator's response to the prior violation(s) with regard to correcting the previous problem and attempts to avoid future violations.

Instructions: For each of the following considerations, choose the situation that best fits the violator and circle the corresponding percentage adjustment on the calculation worksheet under "History of Noncompliance". (For c., multiply the number of previous violations by 5% and enter the product on the line marked percentage.)

a. Was one or more of the prior violations the same as or very similar to the current violation?

- (1) Yes = +5%
- (2) No = 0%

b. The most recent prior violation was:

- (1) Within the last year = + 10%
- (2) Within one to 5 years = + 5%
- (3) Over 5 years ago = 0%

c. The number of prior violations = + 5% for each violation.

d. The violator's response to prior violations can best be described as:

- (1) The source immediately remedied the problem = 0%.
- (2) The source remedied the problem after a delay = + 5%.
- (3) The source remedied the problem after a long delay or not at all = + 10%.

Instructions: Add all of the adjustment percentages together and enter the total on the line marked "Total Adjustments". Complete the equation on the penalty calculation worksheet and enter the result on the line marked "Gravity Component".

III. Economic Benefit Component

The economic benefit component should be calculated and included in the penalty when a violator has realized savings or profits in the form of delayed costs, avoided costs, or illegal profits through its failure to comply. The economic benefit should not be adjusted downward and therefore a penalty will never be less than the amount a violator saved and/or gained through noncompliance. This eliminates any economic incentive for noncompliance by ensuring a violator does not profit from violating the law. Furthermore, an economic benefit penalty is essential to prevent situations in which violators of the law are at a competitive advantage.

$$\text{Economic Benefit} = \text{Delayed Costs} + \text{Avoided Costs} + \text{Illegal Profits}$$

A. Delayed Costs

Delayed costs are expenditures deferred by the violator's failure to comply with the requirements. The violator eventually will have to spend the money in order to achieve compliance. The economic benefit for delayed costs consists of the amount of interest earned on money the violator reasonably could have saved or deferred during the period of noncompliance. The "rule of thumb" for calculating the economic benefit of delayed compliance is: 5% per year of the delayed one-time only capital cost for the period from the date the violation began until the date compliance was or is expected to be achieved. A more detailed analysis may be appropriate to defend or support the agency's position. EPA's BEN Model is an option available to determine a violator's economic savings from delaying and/or avoiding pollution control expenditures.

Instructions: Enter the dollar amount for all costs which were delayed by noncompliance on the calculation worksheet under "Delayed Costs". Multiply this number by .05 and then by the number of years to determine the violator's economic benefit of delayed costs.

B. Avoided Costs

Avoided costs are expenditures nullified by the violator's failure to comply. These costs will never be incurred. By avoiding these expenditures permanently, the violator has accrued an economic benefit.

Instructions: Enter the dollar amount for all costs which were avoided by the violator for noncompliance on the calculation worksheet on the line for "Avoided Costs".

C. Illegal Profits

Profits from illegal activities are also an economic benefit to the violator. The present value of these illegal profits should be added to the delayed and avoided costs to calculate the total economic benefit. Care must be taken to ensure that any calculation of profits from illegal activities does not include profits attributable to lawful operations at a facility.

Instructions: Enter the dollar amount for all illegal profits earned by the violator during the noncompliance period on the line for "Illegal Profits". Total the three types of economic benefits and enter amount on the line marked "Total Economic Benefit".

IV. Cost Recovery for Enforcement Efforts

Pursuit of an enforcement action involves the expenditure of varying amounts of staff time and frequently requires collection of special data or information. A penalty will be increased to include all special costs incurred that are unique to a particular enforcement action. These costs may

include special sampling and analysis costs, research time, and other costs associated with above average staff time for gathering evidence and pursuing settlement of the violation.

Instructions: Enter the total cost of enforcement efforts on the calculation worksheet on the line marked "Cost Recovery".

V. Mitigating Factors

A. Ability to Pay

This factor will be considered after commencement of settlement negotiations, only if raised by a violator and only if the violator provides all necessary financial information to evaluate the claim. The burden to demonstrate inability to pay rests solely on the violator.

When it is determined that a violator cannot afford the penalty, or that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which are more important than the deterrence effect of the penalty, the following options may be considered: 1) a delayed payment schedule; 2) an installment payment plan with interest; or 3) straight penalty reductions only as a last recourse. EPA's ABEL Model is an option available to determine a violator's ability to pay.

Instructions: Please note the above conditions which must be met or considered before using this factor to mitigate the penalty. Enter the dollar amount on the calculation worksheet on the line for "Ability to Pay".

B. Litigation Risks

The penalty amount may also be mitigated in appropriate circumstances based on litigation risk. Cases raising legal issues of first impression must be carefully selected in order to present the issue fairly in a factual context. Adverse legal precedent and strength of the overall case, including the evidence and the available witnesses, the strength of the violator's evidence, and any adverse indications from the court must be considered.

Instructions: Enter the dollar amount by which to reduce the penalty for litigation risks on the calculation worksheet on the line for "Litigation risks". Add the amounts for "Ability to pay" and "Litigation risks" and enter the total on the line marked "Total Mitigating Factors".

To complete the calculation worksheet, carry down the totals for each of the four components, and enter them on the corresponding lines within the final equation. Add together the "Gravity Component," the "Economic Benefit" and the "Cost Recovery" figures and subtract the "Mitigating Factors" figure. This is the penalty that should be sought in proceedings against the violator.

VI. Multiple violations

In certain situations, several violations may have been documented. Separate rule violations may be grouped for the purpose of applying this policy. A separate worksheet should be completed for each violation or group of violations. In general, each violation or group of violations should be considered as a separate violation for the purpose of calculating a penalty if they result from independent acts, compliance problems, or if they are distinguishable from any other rule violation. The total penalty amount in an enforcement case may include penalties for several violations or groups of violations, each calculated to be consistent with this policy.

VII. Documentation of Calculations

Complete an Air Quality Violation Penalty Calculation Worksheet for each violation by carefully following the instructions located in each section of this policy. Provide a brief description next to each factor on the worksheet indicating how each factor of the penalty was developed.

This Penalty Policy is a public record which will not be kept confidential. However, any documentation which contains or supports a penalty calculation for a particular case will generally be held confidential. Therefore, Air Quality Penalty Violation Calculation Worksheets are classified as confidential documents and will not be released unless the Department Director determines it is in the public's best interest to make the record available.

VIII. Settlement Discussions

When settlement negotiations commence, always mention to a violator that the use of this guidance is limited to pre-trial settlement and is not meant to control a penalty amount requested when a case goes to trial. If discussions fail to produce an out-of-court settlement, prosecutors may find it relevant and helpful to introduce a penalty calculated under this policy as a point of reference during their demand for a court imposed penalty.

Issues that may be raised by violators include their belief that specific circumstances justify mitigation of the penalty, or that they are not responsible for the violation and payment of a penalty. The burden of proof to justify any mitigation of a penalty is invariably a violator's responsibility. Therefore, require violators to provide detailed documentation that supports their claims. Any penalty relief resulting from the submittal of new information by a violator shall follow the guidelines in the adjustment factors section of this policy.

AIR QUALITY VIOLATION PENALTY CALCULATION WORKSHEET

Source Name / Permit # _____

NOV# _____

Description _____

II. GRAVITY COMPONENT

A. POTENTIAL FOR HARM

1. Level of Violation:

0 negligible amount	1 relatively low amount	2 medium amount	3 relatively high amount	4 extremely high amount
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2. Toxicity of Pollutant:

0 negligible amount	1 relatively low amount	2 medium amount	3 relatively high amount	4 extremely high amount
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3. Risk to Environment:

0 negligible amount	1 relatively low amount	2 medium amount	3 relatively high amount	4 extremely high amount
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4. Risk to Population:

0 negligible amount	1 relatively low amount	2 medium amount	3 relatively high amount	4 extremely high amount
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5. Size of the Violator:

0 negligible amount	1 relatively low amount	2 medium amount	3 relatively high amount	4 extremely high amount
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Total Score _____

14-20
MAJOR

7-13
MODERATE

0-6
MINOR

B. EXTENT OF DEVIATION

MAJOR
failure to
comply

MODERATE
incomplete or
incorrect compliance

MINOR
late
compliance

C. GRAVITY COMPONENT MATRIX

		EXTENT OF DEVIATION		
		MAJOR	MODERATE	MINOR
POTENTIAL FOR HARM	MAJOR	\$10,000-8,000	\$8,000-6,000	\$6,000-4,400
	MODERATE	\$4,400-3,200	\$3,200-2,000	\$2,000-1,200
	MINOR	\$1,200-600	\$600-200	\$200-0

Dollar Amount from within Range _____

Enforcement Officer

Date

CONFIDENTIAL WHEN COMPLETED

D. MULTI-DAY VIOLATIONS

DAY	DISCOUNT	RATE	# of DAYS	SUBTOTAL
0-1	0%	1.00		
2-15	15%	0.85		
16-30	30%	0.70		
>30	50%	0.50		

Total Amount _____

E. ADJUSTMENTS

1. Degree of Willfulness or Negligence:				
	+25%	+10%	+0%	
2. Degree of Cooperation:				
a. Before Discovery?				
	-15%	-5%	-0%	+5%
b. After Discovery?				
	-15%	-5%	-0%	+5%
3. History of Non-compliance:				
a. Similar Violations?				
	+5%	+0%		
	yes	no		
b. Most Recent Violation?				
	+10%	+5%		
	Within 1 year	≤ 5 years		
c. Number of Prior Violations?				
	+5%	X _____	= _____ %	
d. Response to Prior Violations?				
	+0%	+5%	+10%	
	immediate	short delay	long delay	
	Total Adjustments _____ %			
	_____	X (1+ _____)	= _____	
	Total Amount	Total Adjustments	Gravity Component	

III. ECONOMIC BENEFIT COMPONENT

A. DELAYED COSTS:				
	_____ X _____	X 0.05	= _____	
	# of years			
B. AVOIDED COSTS:				
C. ILLEGAL PROFITS:			+	
	Total Economic Benefit _____			

IV. COST RECOVERY FOR ENFORCEMENT EFFORTS

Total Cost Recovery _____

V. MITIGATING FACTORS

A. ABILITY TO PAY:			
B. LITIGATION RISKS:			+
	Total Mitigating Factors _____		

_____	+	_____	+	_____	-	_____	=	_____
Gravity Component		Economic Benefit		Cost Recovery		Mitigating Factors		Total