

SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST PUBLIC COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from February 7, 2024, through March 15, 2024, on IDEM's draft rule language for new rules at 329 IAC 1-3 and 329 IAC 9-11. Comments were made by the following parties:

Environmental Organizations (EO) including:
The Conservation Law Center
Environmental Law & Policy Center
Save the Dunes
Gary Advocates for Responsible Development
Indiana Manufacturing Association (IMA)
Indiana Chamber of Commerce (ICC)

Following is a summary of the comments received and IDEM's responses thereto:

Comment: According to the Regulatory Analyses for these regulations, IDEM is merely codifying its existing civil penalty policy, Non-rule Policy Document ENFORCEMENT-99-0002-NPD, adopted in 1999. For the civil penalty regulation applicable to air pollution control laws, IDEM views it as not making any substantive changes to the policy. (quotation omitted)

As discussed below, we disagree that the proposed regulations make no substantive changes to IDEM's civil penalty policy. By largely copying language from its non-rule policy that applied to all environmental laws into four distinct regulations that each apply only to one media, as IDEM did here, it has created several confusing provisions. For example, in calculating "delayed costs" for purposes of determining the economic benefit of noncompliance with solid waste management laws, the proposed regulations would have IDEM consider the "[f]ailure to install equipment needed to meet discharge or emission control standards." But that makes little sense in the context of solid waste regulation because "discharge standards" are established in water pollution control laws, and emission control standards are part of air pollution control laws – neither of which apply to violations of solid waste management laws. At minimum, the proposed regulations should be revised to address these inconsistencies and make clear that they apply to the specific environmental laws to which the civil penalties apply.

More importantly, IDEM has overlooked an opportunity to clarify, update and improve upon its process for calculating civil penalties. Promulgating regulations is a time-consuming and cumbersome process. Given that IDEM is nevertheless obligated to go through this rulemaking process, it should take this opportunity to do more than codify its existing policy that has been unchanged for 25 years. Instead, IDEM should reflect on its own extensive enforcement experience to identify edits that would better serve the purpose of the regulations and the types of violations incurred under each of the three titles. According to IDEM's enforcement database, in 2023 alone it issued 14 Commissioner's Orders and 342 Agreed Orders. In addition, there is caselaw related to the non-rule policy that could inform the development of these regulations. The Commenters did not attempt an analysis of IDEM's past practices, but we encourage the department to do so to identify ways to improve transparency and certainty as to the range of civil penalties for certain violations, thereby improving their consistency and deterrent effect. (EO)

Response: The commenter has raised two issues: (1) the inclusion of language that may be inapplicable to a respective Title as a result of translating the existing non-rule policy documents into rules, and (2) IDEM neglecting to “clarify, update[,] and improve upon its process for calculating civil penalties.”

In addressing the first issue, IDEM agrees that each rule should be tailored to its Title and concern only its respective subject matter. Accordingly, we have made minor changes to the rule language to tailor the rules to their respective Titles.

In addressing the second issue, the commenter correctly pointed out that “promulgating regulations is a time-consuming and cumbersome process.” “Clarifying, updating, and improving upon” an existing policy that has served the agency well for 25 years would further add to this “time-consuming and cumbersome process.” Furthermore, IC 4-22-2-19.6(e)(2)(C)(i) requires IDEM to include its civil penalty policy in a rule before December 31, 2024. Therefore, the agency determined that the quickest and best way to comply with statute was to take its existing civil penalty policy—unchanged—and transpose it into rules.

The agency agrees that, arguably, no policy is perfect and future changes to “clarify, update[,] and improve upon its process for calculating civil penalties” may be necessary in the future. However, given the time constraints on the agency and stakeholder familiarity with the existing policy, IDEM has decided to not make significant changes to the existing civil penalty policy. IDEM encourages the commenters to remain in touch with the agency and provide input on any future updates to this rule or possible guidance to accompany the rule.

Comment: In codifying its existing penalty policy, IDEM has sought to maintain virtually unfettered discretion by implication. While the existing policy gave enforcement staff “discretion” and relied in part on their “judgement,” these terms are nowhere to be found in the proposed regulations used to calculate civil penalties. Removal of these terms, by themselves, is insufficient to comply with the statute’s mandate that penalties be calculated with sufficient “certainty.” IDEM’s judicious use of the word “may” throughout the regulations and its use of broad, undefined terms greatly reduce the certainty required by law. We do not recommend eliminating discretion in the regulations. Environmental laws are complex precisely because the industrial processes creating regulated pollutants and their effect on human health and the environment are very complicated. There are many factors that need to be considered in evaluating the seriousness of violations and size of the penalty needed to ensure future compliance. IDEM’s enforcement staff and management are the only ones capable of making such determinations on a regular basis. But if the limits of that discretion are not clearly defined, as we suggest in our specific comments below, these regulations will fail to satisfy their statutory intent to provide sufficient certainty with respect to the exercise of IDEM’s discretion in calculating civil penalties. (EO)

Response: IDEM agrees with the commenters’ assertion that environmental laws are complex, as are the effects of non-compliance. The draft rule is modeled off an existing non-rule policy document that has been in effect for 25 years. While the agency disagrees with the assertion that the rule language and the policy gave IDEM “unfettered discretion,” we appreciate the commenters’ concern and have made some suggested changes in an attempt to remove uncertainty. The agency agrees that mandatory language is generally preferred over discretionary language in rules. IDEM has attempted to strike a balance that gives the agency the necessary

berth to tailor civil penalties to unique situations, while also ensuring that civil penalties are determined in a consistent, predictable manner.

Comment: IDEM's prior non-rule policy document did not contain a definitions section. Tacitly recognizing the need for greater clarity and certainty, IDEM's proposed regulations provide definitions for four terms. We recommend adding additional definitions for terms that are inherently nonspecific such as "substantial likelihood" and "cooperation." Some terms that are incapable of a more precise definition, such as "other unique factors," could benefit from examples that fit or do not fit within the meaning of the term. Consistent with our recommendation that IDEM revise these regulations based upon an analysis of past enforcement experience, we recommend using examples to clarify the proper application of these regulations based upon past experience. See, e.g., U.S. EPA, "Clean Air Act Stationary Source Civil Penalty Policy" (Oct. 25, 1991), at 24.4 Although every enforcement action presents a unique set of facts, providing examples of cases that fit or do not fit within the meaning of various terms will provide greater certainty and help "ensure that civil penalties are assessed in a consistent and fair manner." (EO)

Response: IDEM appreciates the commenters' concern and desire for more definitions. However, pinning down specific definition of terms like "substantial likelihood" or "cooperation" could place the agency in an awkward position in assessing penalties among a variety of violators. For example, "cooperation" with a small entity may look different than "cooperation" with a large entity. The same is true for the term "substantial likelihood." Given the wide variety of sources being regulated by IDEM, it is best for the agency to have discretion in applying these terms. The agency has enforced its civil penalty policy for 25 years in a "consistent and fair manner" without such definitions and it will continue to do so after this rule is effective. IDEM encourages the commenters to remain engaged in the event the agency determines it necessary to develop guidance on this rulemaking to address such issues.

Comment: [329 IAC 1-3-1](a) The department shall assess civil penalties as provided under IC 13-30-4.

Presumably, this subsection is included to comply with the statutory requirement that the "rule must describe the circumstances for which the agency will assess a . . . civil penalty." Ind. Code § 4-22-2-19.6(b). To more clearly satisfy this purpose and to be consistent with the "Scope of the Rule" as stated in the Regulatory Analysis, this subsection should be rewritten to read: "(a) The department shall assess civil penalties consistent with this Rule when imposing civil penalties as provided under IC 13-30-4." (EO)

Response: IDEM agrees and appreciates the commenters' suggestion. The language will be changed accordingly in the proposed rule.

Comment: [329 IAC 1-3-1](b) The department may:
(1) impose a civil penalty using an alternative approach; or
(2) decide not to impose a civil penalty for a violation.

Delete this entire subsection. As the first actionable subsection, it appears to offer the

department only two choices when imposing a civil penalty: (1) an undefined “alternative approach,” or (2) no penalty. The first of these fails to set forth the manner in which a penalty will be calculated as required by Ind. Code § 4-22-2-19.6(b). If such an “alternative approach” exists and has been applied over the past 25 years of enforcement experience, the regulated community and the broader public is entitled to be informed of any such alternative. This is precisely the transparency called for in HB 1623. As for the second option listed here, a decision to not impose a civil penalty, is already available under the provisions of Sections 3 through 5, as limited by Ind. Code § 13-30-4-3. (EO)

Comment: [329 IAC 1-3-1](b) of the draft rule says that IDEM can decide to use an “alternative approach” in assessing penalties. However, the new statute requires IDEM to state with “sufficient certainty” the penalty that will be assessed. We believe that the statute does not authorize it to use an alternative approach separate from the policy, although we believe that IDEM has the full discretion to not issue a penalty or otherwise reduce it. IDEM’s suggestion that it can use an unspecified “alternative approach” not adopted by rule is beyond its statutory authority and this language should be stricken from a final rule. The draft rule should specifically outline IDEM’s ability to use discretion for penalty reductions. (IMA)

Comment: We believe that the rule could be clarified more. Page 3 of the rulemaking document provides the language, [329 IAC 1-3-1](a), which states the department “shall” assess civil penalties. This language could be read to conflict with (b) which says the department “may” impose a civil penalty using an alternative approach or decide not to impose a civil penalty for a violation. (ICC)

Response: IDEM agrees that the “alternative approach” language is problematic. The agency also agrees that (b)(2) is redundant given IDEM’s existing statutory authority to not impose a civil penalty. Therefore, this subsection will be deleted from the proposed rule. IDEM believes that the agency’s discretion for penalty reductions is sufficiently conveyed in other sections of the proposed rule.

Comment: [329 IAC 1-3-1](c) A civil penalty, as part of a unilateral order or court action, is only limited in amount by IC 13-30-4 or as otherwise limited by law.

Delete this entire subsection because it serves only to identify statutory limitations on the amount of a civil penalty. Those limitations exist with or without this subsection. Department enforcement officials should be knowledgeable about statutory limits when imposing civil penalties. If needed, this provision should be placed in commentary and not in the rule. (EO)

Response: IDEM agrees with the commenters’ suggestion and has removed this subsection from the proposed rule.

Comment: [329 IAC 1-3-1](e) In situations where several violations have occurred, the following applies:

- (1) Separate violations may be grouped for the purpose of applying this rule.
- (2) Each violation or group of violations is considered as a separate violation for the purpose of calculating a civil penalty if it results from independent acts or compliance problems and is distinguishable from any other violation cited in the same notice of violation.
- (3) The total civil penalty assessed in an enforcement case may include penalties for several violations or groups of violations, as calculated under this rule.

Move this subsection to the end of this section. Include examples to help clarify when and how separate violations should or should not be grouped. Definitions or examples could also help explain what is meant by “independent acts or compliance problems.” In addition, subsection (e)(3) fails to adequately describe the manner in which a penalty will be calculated as required by Ind. Code § 4-22-2-19.6(b). To correct this, it should read:

“(3) The total civil penalty assessed in an enforcement case is the sum of all penalties for multiple violations or groups of violations, as calculated under this rule.” (EO)

Response: IDEM agrees with the commenters’ suggested language changes, and they will be included in the proposed rule. However, IDEM will not be including any additional definitions or examples because (1) the agency believes they are unnecessary, and (2) examples are generally not placed in rules but may be included in guidance at a later date.

Comment: [329 IAC 1-3-1](f) A civil penalty is the figure resulting from the following calculation:

- (1) The base civil penalty is determined dependent on the severity and duration of the violation as described in section 3 of this rule.
- (2) The base civil penalty is adjusted for special factors and circumstances as described in section 4 of this rule.
- (3) The economic benefit of noncompliance is considered and added as described in section 5 of this rule.

Move this subsection to just below subsection (1)(a). Add a fourth section to read as follows:

“(4) Offset for any qualified supplemental environmental project as described in section 6(a) of this rule.” (EO)

Response: IDEM appreciates the commenters’ suggestion. The agency agrees with the commenters’ recommendation to reorder the subsection. However, IDEM believes including the proposed section on supplemental environmental projects is unnecessary and repetitive given the proposed contents of 329 IAC 1-3-6(a). Therefore, IDEM is not adding any additional language.

Comment: [329 IAC 1-3-2] The following definitions apply to this rule:

- (1) "Avoided costs" means expenditures that are nullified by the violator's failure to comply and never incurred. The economic benefit of avoided costs equals the cost of complying with the requirement from the time of violation to compliance, less any tax savings.
- (2) "Delayed costs" means expenditures that have been deferred by a violator by failing to comply with the requirements. Delayed costs are the equivalent of capital costs. The economic benefit for delayed costs includes the amount of interest on the unspent money that reasonably was able to be earned by the violator during noncompliance.

The definitions for “avoided costs” and “delayed costs” apply to determining the economic benefit of noncompliance in section 5. That section requires the department to use a model to estimate economic benefit “such as U.S. EPA’s Economic Benefit model.” To add

clarification, these first two definitions should reference the U.S. EPA's user's manual for the current version of the BEN model for examples of how these terms are applied. (EO)

Response: IDEM appreciates the commenters' suggestion. However, the agency declines to limit its adherence to only one economic benefit model. The agency believes that the definitions, as written, along with 329 IAC 1-3-6, provide enough guidance on applicable economic benefits. Therefore, IDEM is not changing this section.

Comment: [329 IAC 1-3-3](a) A base civil penalty is determined by the following:

(1) To determine the seriousness of a violation, the department considers the following factors based on the matrix in subsection (f):

(A) The potential for harm to human health or the environment, or to a regulatory program.

(B) The extent of deviation from a statute, rule, or permit requirement.

(2) The matrix penalty is multiplied by the number of days of violation as described in subsection (g).

(3) After calculating the factors in subdivisions (1) and (2), the resulting figure is the base civil penalty.

Subsection (a) is based upon, but deviates considerably from, Section II of IDEM's non-rule civil penalty policy. To clarify its purpose, Commenters recommend revising this entire subsection to read as follows: "(a) A base civil penalty is calculated by selecting a range of penalties from the matrix in subsection (e) and multiplying it by a number that reflects the number of days of violation as described in subsection (f)." (EO)

Response: IDEM appreciates the commenters' suggestion and agrees that the subsection could use some modification. IDEM has reworked the language to read: "A base civil penalty is calculated by selecting a penalty from the matrix in subsection (f) in accordance with subsections (b) through (e) and multiplying it by the number of days of violation as described in subsection (g)."

Comment: [329 IAC 1-3-3](b) The civil penalty matrix evaluates the relationship of the potential for harm and extent of deviation from a requirement to a violation based on the following:

(1) The likelihood and degree of exposure of persons or the environment to pollution.

(2) The degree of the adverse effect of noncompliance on the statutory or regulatory purposes or procedures for implementing the program.

Subsection (b) is based upon, but deviates considerably from, Section III.A of IDEM's non-rule civil penalty policy. To clarify its purpose, Commenters recommend revising this entire subsection to read as follows:

"(b) In calculating the base civil penalty, the range of penalties to be selected from the penalty matrix in subsection (e) is that range that corresponds to the violation's:

(1) Potential for harm to human health or the environment, or to a regulatory program as described in subsection (c); and

(2) Extent of deviation from a statutory, rule, or permit requirement as described in subsection (d)." (EO)

Response: IDEM agrees with the commenters suggestion and will modify the language in the proposed rule accordingly.

Comment: [329 IAC 1-3-3](c) The department shall evaluate whether the potential for harm is major, moderate, or minor in a particular situation based on the following factors:

- (1) Amount of pollutant.
 - (2) Toxicity of pollutant.
 - (3) Sensitivity of the environment.
 - (4) Sensitivity of the human population.
 - (5) Length of time of exposure.
 - (6) Size of the violator.
- (d) The degree of potential harm represented by each category is defined as follows:
- (1) For a major violation:
 - (A) the violation poses a substantial likelihood or degree of exposure to pollution;
or
 - (B) the actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the program.
 - (2) For a moderate violation:
 - (A) the violation poses a significant likelihood or degree of exposure to pollution;
or
 - (B) the actions have or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the program.
 - (3) For a minor violation:
 - (A) the violation poses a relatively low likelihood or degree of exposure to pollution; or
 - (B) the actions have or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the program.

Subsections (c) and (d) both relate to the “potential for harm” criteria for selecting a range of penalties in the penalty matrix. As such, we recommend combining these two subsections in a manner that helps explain how they are related as applied to a particular violation. In addition, we recommend adding definitions, examples, or key criteria to guide selection of determining whether a violation is major, moderate, or minor. The following is Commenters’ recommendation to revise these two subsections consistent with the rule’s goals and IDEM’s prior non-rule policy document:

“(c) In selecting a penalty range from the penalty matrix, the department shall select a “potential for harm” row that reflects the violation’s potential for harm to human health or the environment, or, where there is minimal or no potential for harm to human health or the environment, the violation’s potential for harm to a regulatory program.

- (1) A violation that has the potential for harm to human health or the environment, regardless of whether actual harm occurs, should be considered:
 - a. “Major” if the violation poses a substantial likelihood or degree of exposure to air pollution;
 - b. “Moderate” if the violation poses a significant likelihood or degree of exposure to air pollution; and

- c. “Minor” if the violation poses a relatively low likelihood or degree of exposure to air pollution.
- (2) A violation that has the potential for harm to only a statutory or regulatory program, regardless of whether actual harm occurs, should be considered
- a. “Major” if the violation has or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the program;
 - b. “Moderate” if the violation has or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the program;
 - c. “Minor” if the violation has or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the program.
- (3) In evaluating whether a potential for harm is “major,” “moderate,” or “minor,” the department shall consider the following six factors:
- a. The amount of air pollutant that was or could have been released into the atmosphere.
 - b. The toxicity of the air pollutant that was or could have been released into the atmosphere.
 - c. The length of time over which the air pollutant was or could have been released into the atmosphere.
 - d. The sensitivity of the environment into which the air pollutant was or could have been released, including whether the local environment is in attainment or nonattainment for the pollutant.
 - e. The sensitivity of the human population most likely to be exposed to the air pollutant which was or could have been released, including the size of the population, the age of that population if a particular age group is sensitive to the pollutant, and the incidence of adverse health consequences in that population if the pollutant is known to exacerbate that health condition.
 - f. The size of the violator as measured by its potential to emit that air pollutant and/or its current net income or asset valuation.” (EO)

Response: IDEM appreciates the commenters’ suggestion and made changes to subsection (c) to clarify potentially ambiguous language and make it align better with existing policy language. These changes sufficiently clarify subsection (d). Therefore, IDEM will not be adopting the suggested changes in the proposed rule.

Comment: [329 IAC 1-3-3](e) The extent of deviation from a statutory, rule, or permit requirement relates to the degree to which the requirement is violated and is defined as follows:

- (1) For a major deviation, the violator deviates from the requirements of the regulation, permit, or statute to the extent that there is substantial noncompliance.
- (2) For a moderate deviation, the violator significantly deviates from the requirements of the regulation, permit, or statute, or only some of the requirements are implemented.
- (3) For a minor deviation, the violator deviates somewhat from the regulatory, permit, or statutory requirements, or most of the requirements are met.

Subsection (e) should be changed to (d). The above comments recommending definitions and examples apply equally to this subsection’s terms. Commenters recommend using percentages to define an exceedance of an emission limit as major, moderate, or minor (e.g., A

minor exceedance is 1-X% over the limit; a moderate exceedance is X-Y% over the limit; and a major exceedance is more than Y% over the emission limit). (EO)

Response: IDEM appreciates the commenters' suggestion. However, the extent of deviation from a statute, rule, or permit requirement is more extensive than numeric permit violations. Therefore, the agency does not believe that using percentages in this fashion is appropriate. Further, the agency believes that this change would deviate from the original civil penalty policy, which the agency is attempting to transpose into rules.

Comment: [329 IAC 1-3-4](c) The department may adjust a base civil penalty up or down by up to fifty percent (50%) based on an assessment of the degree to which a violator is able to anticipate or prevent a violation, using the following factors:

- (1) How much control the violator had over the events constituting the violation.
- (2) The violator's ability to anticipate the events constituting the violation.
- (3) Whether the violator took reasonable precautions against the events constituting the violation.
- (4) Whether the violator knew or should have known of the hazards associated with the conduct.
- (5) The degree to which the violator knew or should have known of the statutory, rule, or permit requirement that was violated.

Commenters recommend inserting the language from IDEM's non-rule policy at the end of subsection (c)(5): "Lack of knowledge of a legal requirement will not be used as a basis to reduce the penalty." In other words, factor (c)(5) may be used to adjust the penalty upwards if, for example, the violator has repeatedly been notified of the requirement, but the factor cannot be used to adjust the penalty downwards. We also recommend that this subsection limit its adjustment to no more than 25% of the base civil penalty to add greater certainty to the civil penalty calculation and to avoid unreasonably high or low penalties due to the application of multiple adjustments. (EO)

Response: IDEM agrees with the commenters suggestion regarding 329 IAC 1-3-4(c)(5) and has added the suggested language to the proposed rule. However, IDEM does not agree with the commenters' recommendation on the limit on civil penalty adjustments because this would deviate from the agency's existing civil penalty policy.

Comment: [329 IAC 1-3-4](d) Action or inaction by the violator after a violation, to limit real or potential harm or exposure, may either decrease or increase the civil penalty amount by up to fifty percent (50%) of the base civil penalty, and is determined based on the following actions by the violator:

- (1) Promptly reporting noncompliance if not otherwise required by law.
- (2) Promptly correcting environmental problems in conjunction with other good faith efforts.
- (3) The amount of control the violator had over how quickly the violation was remedied, and the degree and timeliness of cooperation exhibited by the violator in resolving an enforcement action.

Violators are obligated to report noncompliance. IDEM's compliance enforcement relies on self-reported violations. Moreover, violators are obligated to mitigate the harm caused by noncompliance. As such, these first two subsections would rarely warrant a decrease in civil penalty and the rule should be revised to reflect this. Commenters recommend that subsection (d)(3) be separated into two separate subsections (3) and (4) because cooperation is distinct from the other actions. Again, IDEM should expect all violators to come into compliance expeditiously and negotiate in good faith, so these latter two actions require exceptional efforts to justify mitigation of the penalty. Examples would be helpful in defining what actions or inactions taken by the violator after a violation warrant an increase or decrease in the civil penalty. Finally, for the reasons described above, we recommend that this subsection limit its adjustment to no more than 25% of the base civil penalty. (EO)

Response: IDEM appreciates the commenters' concerns regarding self-reporting. However, civil penalties for noncompliance may encompass a wide range of issues, many of which may not fall under an obligation to report. Therefore, IDEM will not be modifying (d)(1) or (d)(2).

With regard to subsection (d)(3), IDEM agrees that this subsection could be split into two sections and has made this recommended change in the proposed rule.

Regarding the commenters' request for examples, examples are generally not found in IDEM's rules and are more appropriate for guidance documents. Therefore, the agency encourages the commenters to remain in contact with IDEM should the agency decide to produce guidance for this rule.

Finally, IDEM respectfully disagrees with the suggestion to impose a limit on penalty adjustments. The agency's goal is for the rule language to adhere to the existing civil penalty policy as closely as possible and the commenters' suggestion runs counter to this goal.

Comment: [329 IAC 1-3-4](e) The department may increase a base civil penalty by up to one hundred percent (100%) for a history of noncompliance, taking into consideration subsections (f) and (g) and based on the following factors:

- (1) Similarity of the violation to a prior violation.
- (2) If the prior violation occurred within the last five (5) years.
- (3) The number of prior violations.
- (4) Efforts by the violator to correct a prior violation.
- (5) Other relevant factors to be considered.

Commenters recommend providing examples of "other relevant factors" that may be considered in subsection (e)(5). (EO)

Response: IDEM appreciates the suggestion, but examples are generally not found in IDEM's rules and are more appropriate for guidance documents. Therefore, the agency encourages the commenters to remain in contact with IDEM should the agency decide to produce guidance for this rule.

Comment: [329 IAC 1-3-4](h) The department may defer or reduce a civil penalty depending on a violator's ability to pay the penalty in the following manner:

- (1) The violator shall provide a demonstration to the department that:
 - (A) the department determines to be acceptable and sufficient; and

- (B) shows the existence and extent of the violator's inability to pay the assessed penalty.
- (2) The department shall consider the compliance history of the violator before consideration of the ability to pay.
- (3) The department shall consider the following options related to the ability to pay:
 - (A) A delayed payment schedule.
 - (B) An installment payment plan, with or without interest.
 - (C) A reduced penalty, as a last recourse.

A violator's ability to pay may be the subject of considerable disagreement, particularly when the violator is an individual or a privately-held company that is not required to publicly disclose its income and assets. Commenters strongly recommend identifying examples of the kinds of documentation that will be considered "acceptable and sufficient" under subsection (h)(1)(A). Placing the documentation requirement in the regulation will avoid considerable argument over the adequacy of the financial information provided. The types of documentation generally considered acceptable can be found in U.S. EPA's guidance document related to ability to pay. In addition, to add greater clarity to the procedure and standard to be used for determining a violator's ability to pay, Commenters recommend editing subsection (h)(1) to read: "A violator who raises an ability to pay the civil penalty has the burden of providing information to demonstrate extreme financial hardship." (EO)

Response: IDEM appreciates the commenters' suggestion and concerns regarding a violator claiming that they are unable to pay. Examples are generally not found and rules and are more likely to be included in accompanying guidance documents. Therefore, IDEM encourages the commenters to remain in contact with the agency should such documents be produced.

With regard to the language suggestion, the agency believes that this proposed language deviates from the civil penalty policy that has been in place for 25 years. IDEM is attempting to comport with statute and transpose its existing civil penalty policy into rules. Accordingly, IDEM is refraining from deviation from this policy.

Comment: (j) The department may consider other unique factors for flexibility in responding to unanticipated circumstances or information that arise after the calculation and assessment of a civil penalty, such as the following:

- (1) The need to recalculate a civil penalty because of the need to collect and evaluate additional evidence that leads to a significant reevaluation of the facts surrounding a violation.
- (2) Other unanticipated circumstances or information that may be resolved through the application of this adjustment factor.

Commenters recommend deleting this subsection because it is vague and ill defined. It appears to allow IDEM complete and unfettered discretion in the imposition of a civil penalty in negotiations with a violator. As such, this provision would violate the statutory requirement to state "the factors the department will utilize to set a specific dollar amount in an individual case with sufficient certainty" such that a reviewing agency or court "can evaluate whether the amount was reasonable." Ind. Code § 4-22-2-19.6(b)(3). If, based on its prior experience, IDEM needs additional enforcement discretion, it should identify where and how that discretion will be

utilized in calculating a civil penalty. If “other unique factors” routinely arise in IDEM’s enforcement matters, they are not “unique” and could be set out in separate adjustment provisions or as examples in existing provisions. (EO)

Response: IDEM agrees with the commenter that this subsection should be reworked but disagrees that the subsection should be deleted. The agency believes that the section is important to include in the rule to ensure that it may recalculate a civil penalty in certain circumstances. Considering the commenters’ suggestion, IDEM is rewording the subsection in the proposed rule.

Comment: [329 IAC 1-3-5](a) Under the provisions of this section, the department shall calculate and add the economic benefit to the base civil penalty as adjusted under section 4 of this rule when a violation results in significant economic benefit to the violator.

The term “significant” as used in this subsection should be defined or clarified by an explanatory phrase. If it is meant to be any benefit greater than \$1,000, as suggested in subsection (b)(2) below, this subsection should so state. Alternatively, Commenters recommend that this subsection simply delete the final phrase “when a violation results in significant economic benefit to the violator” thus requiring an economic benefit to be calculated in every case. Whether it must be applied as part of the penalty is the subject of subsection (b). (EO)

Response: IDEM disagrees with the commenters’ suggestion. Given the wide variety of violations and violators that IDEM interacts with, it would be exceedingly difficult for the agency to narrowly define which economic benefits are “significant.” Therefore, IDEM will not be defining the term “significant” or deleting any portions of this subsection.

Comment: [329 IAC 1-3-5](b) The department shall consider the economic benefit of noncompliance, but may disregard it if it is:

- (1) difficult to quantify; or
- (2) calculated to be less than one thousand dollars (\$1,000).

The term “difficult to quantify” is too vague to provide the clarity and transparency required by HB 1623. Considering that the rule recommends using U.S. EPA’s BEN model, a user-friendly economic benefit model that can be downloaded for free onto any computer, Commenters recommend deleting subsection (b)(1). If this subsection remains, IDEM should clarify what is intended by a definition or by examples of economic benefits that are difficult to quantify. (EO)

Response: IDEM agrees that the term “difficult to quantify” is somewhat vague. Considering the commenters’ suggestion, we have altered the language of the proposed rule to read: “(1) there is a lack of information necessary to determine the economic benefit.”

Comment: [329 IAC 1-3-5](c) The department shall examine the following types of economic benefit of noncompliance in determining the economic benefit component:

- (1) Benefit from delayed costs as described in subsection (d).
- (2) Benefit from avoided costs as described in subsection (e).
- (3) Other benefits, such as profits from a startup period before obtaining a permit.

The economic benefits that may be achieved through noncompliance with environmental laws have been analyzed and detailed by economists. This subsection and subsections (d) and (e) serve more to provide a description to the regulated and general public as to what this includes. We recommend expanding this subsection slightly as follows:

“(c) The department shall calculate the economic benefit of noncompliance by considering all economic benefits of the commission or omission, including:

- (1) Benefits from delayed costs as described in subsection (d).
- (2) Benefits from avoided costs as described in subsection (e).
- (3) Any other benefits, such as profits or increased market share from a startup period before obtaining a required permit.” (EO)

Response: IDEM appreciates the commenters’ suggestion. However, under the existing civil penalty policy, which IDEM has relied on for 25 years, the agency only examines what is described in (c)(1)-(3) in calculating the economic benefit of noncompliance. Adding additional factors to the policy would deviate from IDEM’s goal of transitioning the existing civil penalty policy to its administrative rules.

Comment: [Commenters made a suggestion having to do with a similar rulemaking found at LSA 24-46]. Commenters also recommend inserting the phrase “delay in or” prior to each use of the phrase “failure to” [in 329 IAC 1-3-5(d)-(e)]. (EO)

Response: IDEM agrees with the commenters’ suggested changes and has changed the proposed rule accordingly.

Comment: [329 IAC 1-3-5](f) The department shall calculate the economic benefit of delayed, avoided, and other costs for each year and may use a model, such as U.S. EPA's Economic Benefit model, to estimate economic benefit costs.

Commenters recommend mandating the use of U.S. EPA’s BEN model unless the department can justify the use of an alternative basis for making this calculation. (EO)

Response: IDEM appreciates the commenters’ suggestion. However, the agency declines to limit itself to only one economic benefit model.

Comment: [329 IAC 1-3-5](g) If a violator believes the economic benefit derived from noncompliance differs from the estimated amount, the violator may present information documenting its actual savings at the settlement stage.

Commenters recommend adding the following sentence at end of this subsection: “To alter its own calculation of economic benefit, the department may only consider documentation that can be verified as accurate, such as certified accounting records.” (EO)

Response: IDEM appreciates the commenters’ suggestion. Examples are generally not found in IDEM’s rules, but to address the commenters’ concern, IDEM has added the following sentence to subsection (g): “The department shall consider information that is verifiable.”

Comment: [329 IAC 1-3-6](a) A negotiated order may contain a provision that allows a portion of the civil penalty to be offset by a qualified supplemental environmental project.

As written, this subsection would appear to allow all of a civil penalty to be offset by a qualified supplemental environmental project of any size. Commenters do not believe that is

what is intended. To provide some limitation on the amount of the offset and the manner in which the project's cost is used to calculate the offset, Commenters recommend revising this subsection as follows:

“(a) A negotiated order assessing a civil penalty under this rule may contain a provision that allows not more than 25% of the civil penalty calculated under this rule to be offset by a qualified supplemental environmental project. The total amount of the offset shall be no more than 80% of the violator's cost if implementing the qualified supplemental environmental project.” (EO)

Response: IDEM appreciates the commenters' suggestion. Such limitations are not present in the existing civil penalty policy, which IDEM seeks to transition into rules, and therefore the agency will not be making the suggested change to subsection (a). However, IDEM does have an effective Nonrule Policy Document (08-003-NPD) on Supplemental Environmental Projects that details how the agency evaluates proposed SEPs and calculates the applicable offset.

Comment: [329 IAC 9-11-2] Commenters encourage IDEM to include examples of the application of the gravity determinations. (EO)

Response: IDEM appreciates the suggestion, but examples are generally not found in IDEM's rules and are more appropriate for guidance documents. Therefore, the agency encourages the commenters to remain in contact with IDEM should the agency decide to produce guidance for this rule.

Comment: [329 IAC 9-11-2](d) Commenters recommend including a limit of no more than 50% adjustment to the base civil penalty upon consideration of all of the listed factors. Commenters also recommend deleting subsection (2)(d)(6) because “Other unique factors” is too vague to be applied with any certainty. (EO)

Response: IDEM appreciates the commenters' suggestion. IDEM does agree that “other unique factors” in subsection (j) is vague. Therefore, the agency is amending the (d)(6) to read: “Unanticipated circumstances, such as additional evidence that leads to a significant reevaluation of the facts surrounding a violation.”

Comment: As a general comment, simply adopting the existing penalty policy as a rule does not comport with the General Assembly's directive in adopting HEA 1623 and Ind. Code 4-22-2-19.6. IDEM needs to develop civil penalty language that fits within its statutory authority. (IMA)

Response: IDEM appreciates the comment, but respectfully disagrees with the commenter's assertion that IDEM doesn't have the statutory authority to adopt its proposed civil penalty rule. IDEM has developed civil penalty language that fits within its statutory authority.

Comment: [329 IAC 1-3-1](c) of the draft rule states that the \$25,000 per day statutory limit is the only constraint, but that ignores §19.6(b)(3), which states that the amount must be “reasonable.” This also ignores the Minor Violations statute (Ind. Code Ch. 13-30-7), which limits IDEM's penalty amount for certain violations. IDEM has ignored this statutory provision for years. Yet this statute states that IDEM “shall” make rules to implement it. Is hard to understand how IDEM would undertake a rulemaking on penalties that addresses the new statute

but ignores another statutory provision concerning penalties that has been on the books for years. The Minor Violations statute should be addressed in this rulemaking. (IMA)

Response: IDEM appreciates the commenter's suggestion and has removed the reference to the statutory limitations on penalty amounts. As statutes, IC 13-30-4, IC 13-30-7, and any other statutes dealing with civil penalties, have primacy over this proposed rule. Therefore, IDEM believes that restating limitations existing in statute is altogether redundant and unnecessary.

Comment: This rulemaking also ignores the IDEM self-disclosure policy, which is an extremely successful program that precludes issuance of a penalty for disclosure of certain violations under specific conditions. When the civil penalty policy becomes a rule, if the self-disclosure policy is not included or referenced, our concern is that this rule would overrule the self-disclosure policy. The self-disclosure policy should also be mentioned as a limit on IDEM's penalties. (IMA)

Response: IDEM appreciates the commenter's concern for the self-disclosure policy. This rulemaking will not overrule the self-disclosure policy when that policy applies. IDEM's civil penalty policy covers a wide range of violations, including some where the self-disclosure policy may not be applicable. Therefore, the agency believes that references to the self-disclosure policy are best left out of this proposed rule.

Comment: The potential for harm factors are the same as in IDEM's policy. However, the statute requires IDEM to consider "whether the violation has a major or minor impact." IDEM's practice of looking at potential-as opposed to actual-harm arguably violates the new statute. Any reference to "potential" should be removed from the new rule. (IMA)

Response: IDEM appreciates the commenters' suggestion, but respectfully disagrees. The rule includes various factors to be used to determine the impact of a violation. Further, the removal of the word "potential" would deviate from IDEM's existing civil penalty policy, which the agency seeks to transition into rules.

Comment: The draft rule includes the current policy's days of violation multiplier, but IDEM has never used the policy in this manner. The proposed rule states that IDEM "shall" multiply the base penalty by the days of violation, which, when adopted into a rule, suggests that IDEM must now start doing that. This would exponentially increase the amount of civil penalties IDEM is collecting for the same violations. This language should not be directly adopted into the rule as is. (IMA)

Response: IDEM appreciates the commenter's concern, but respectfully disagrees. The agency believes that the rule's reference to the days of violation multiplier comports with the existing civil penalty, which is the basis for this proposed rule. Further, the rule includes several provisions that allow for civil penalties to be adjusted or for violations to be grouped together.

Comment: Similarly, the draft rule states that IDEM "shall" apply an economic benefit penalty, but this would be a significant deviation from IDEM's current practice and would result in much higher fines. This part of the policy should not be adopted as is. (IMA)

Response: IDEM appreciates the commenter's concern, but respectfully disagrees. The proposed rule explains when economic benefit is included, and when it is not included, in an

assessed penalty. The agency believes that the rule's reference to the economic benefit penalty comports with the existing civil penalty policy, which is the basis for this proposed rule. Further, the proposed rule's economic benefit penalty would only apply to significant benefits.

Comment: The repeat violation provision is too broad and similarly is much more stringent than IDEM's actual current practice. It is problematic that a "prior violation" includes any sort of notice, "however informal," and is based on an agency's belief instead of actual enforcement. There is also no specific limit on how long ago the violation needed to have occurred. Finally, the language can be construed to call arguably unrelated violations "repeat violations." This portion of the policy should not be adopted as is. The effect of repeat violations should be specifically and narrowly defined in the rule. (IMA)

Response: IDEM appreciates the commenter's concern regarding prior violations, but respectfully disagrees. The agency believes the proposed rule, as written, establishes details on how prior violations impact a civil penalty. Specific to the commenter's concerns, the rule considers whether the prior violation occurred in the last five years (1-8-4(e)(2)).

Comment: The draft rule suggests that IDEM may increase the fine by as much as 100% based on foreseeability and preventability (sec. 4(c)), action or inaction after a violation (sec. 4(d)), history of noncompliance, (sec. 4(3)), prior violations (sec. 4(f)), and agency costs (sec. 4(i)). These widely discretionary adjustments fail to state "the factors that the agency will utilize to set a specific dollar amount in an individual case with sufficient certainty that a review of an agency action under IC 4-21.5 or comparable process can evaluate whether the amount was reasonable" as required by Ind. Code 4-22-2-19.6. (IMA)

Response: IDEM appreciates the commenter's concern regarding prior violations, but respectfully disagrees. The agency believes that the subsections cited offer sufficient detail to determine whether a civil penalty is reasonable.

Comment: IDEM should consider whether the base civil penalty matrix represents amounts that are reasonable given the definition of the violations. (IMA)

Response: IDEM appreciates the comment but seeks to transition its existing matrix into rules. Given that reconsidering the matrix amounts would deviate from IDEM's existing civil penalty policy, the agency declines to reconsider the matrix's amounts.

Comment: IDEM's adoption of three separate rules that all contain identical language is unwieldy. IDEM should consider adopting one rule. (IMA)

Response: IDEM understands the commenter's concern but given that IDEM's rules are divided into three Titles (air, water, and land), it is necessary for each Title to have its own civil penalty rule for it to be effective.

Comment: [329 IAC 1-3-3](c)(6) discusses the size of the violator. The "size" of the violator does not necessarily have anything to do with the "harm". We believe that 3(c)(6) should be deleted. In that same section, (1) accounts for the "amount of pollutant" emitted, (2) the "toxicity of the pollutant", and (5) the "length of time of exposure". All of these can correctly assess potential "harm" and should be sufficient to make (6) unnecessary. (ICC)

Response: IDEM appreciates the commenter's concern, but respectfully disagrees. The "size of the violator" factor has been considered as part of IDEM's civil penalty policy for the past 25 years. IDEM does not intend to deviate from this policy and believes the size of the violator remains a distinct factor to consider in evaluating a potential for harm.