

**INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NONRULE POLICY DOCUMENT**

Title: Civil Penalty Policy

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Brief Description of Subject Matter: Determining a civil penalty for violations

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1.0 INTRODUCTION

Indiana Code (IC) 13-30-4-1 provides authority for IDEM to assess civil penalties:

13-30-4-1. (a) Subject to IC 13-4-6 and except as provided in IC 13-23-14-2 and IC 13-23-14-3, a person who violates:

- (1) any provision of:
 - (A) environmental management laws;
 - (B) air pollution control laws;
 - (C) water pollution control laws;
 - (D) IC 13-18-14-1; or
 - (E) a rule or standard adopted by one (1) of the boards; or
- (2) any determination, permit, or order made or issued by the commissioner under:
 - (A) environmental management laws or IC 13-7 (before its repeal);
 - (B) air pollution control laws or IC 13-1-1 (before its repeal); or
 - (C) water pollution control laws or IC 13-1-3 (before its repeal);

is liable for a civil penalty not to exceed twenty-five thousand dollars (\$25,000) per day of any violation.

(b) The department may:

- (1) recover the civil penalty described in subsection (a) in a civil action commenced in any court with jurisdiction; and
- (2) request in the action that the person be enjoined from continuing the violation.

This statutory provision authorizes the limits within which IDEM may impose specific penalties for specific violations. The purpose of this document is to provide a policy that allows IDEM to fairly and consistently assess civil penalties within this statutory framework.

IDEM imposes civil penalties for the purpose of encouraging voluntary compliance, deterring future violations, and recovering enforcement costs. The Civil Penalty Policy takes various factors into consideration in the assessment of an appropriate civil penalty for noncompliance with statutes, rules, or permits.

Nothing in this policy precludes IDEM from imposing a civil penalty using an alternative approach or requires IDEM to impose a civil penalty for a violation. There is no upper limit for assessing a civil penalty as part of a unilateral order or court action other than the statutory limit of \$25,000 per violation per day (IC 13-30-4) and \$10,000 per UST for each day of violation (IC 13-23-14-2 and 3).

For violations set forth in IC 13-23-14-2 and IC 13-23-14-3, IDEM has developed a: Penalty Policy for 1998 Underground Storage Tank (UST) Requirements. Relevant portions of this Civil Penalty Policy will be applied in conjunction with the UST Penalty Policy to calculate penalties for violations set forth in IC 13-23-14-2 and IC 13-23-14-3.

IDEM staff implementing this policy will complete the attached Civil Penalty Policy Worksheet for each violation. Each section of the worksheet corresponds to a section of the policy as summarized in Section II below.

In certain factual situations, several violations may have been committed. Separate violations may be grouped for the purpose of applying this policy. A separate worksheet will be completed for each violation (or group of violations). In general, each violation or group of violations will be 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 (NOV). The total civil penalty assessed in an enforcement case may include penalties for several violations or groups of violations, each calculated pursuant to this policy.

2.0 SUMMARY OF THE CIVIL PENALTY POLICY

A civil penalty is calculated by: (1) determining a base civil penalty dependent on the severity and duration of the violation, (2) adjusting the penalty for special factors and circumstances, and (3) considering the economic benefit of noncompliance.

Civil Penalty = (Base Civil Penalty) + or - (Adjustment Factors) + (Economic Benefit)

2.1 Base Civil Penalty

The first step in determining the base civil penalty is the consideration of two factors: (1) potential for harm to human health or the environment, or to a regulatory program, and (2) extent of deviation from a statutory, rule, or permit requirement. These two factors constitute the

seriousness of a violation and are incorporated into a matrix from which a matrix penalty is chosen. This matrix is described and illustrated in Section III.

The matrix penalty is then subject to being multiplied by a number that reflects the number of days of violation.

The resulting figure is the base civil penalty.

2.2 Adjustment Factors

The base civil penalty may be adjusted upward or downward to reflect any peculiar factual situation surrounding the violation. The following adjustment factors may be considered:

- Actions before the violation
- Actions after the violation
- History of noncompliance
- Ability to pay
- IDEM enforcement costs
- Other unique factors

2.3 Economic Benefit of Noncompliance

If a violator has derived significant savings or competitive advantage by its failure to comply with requirements, the amount of economic benefit from noncompliance gained by the violator will be added to a penalty.

The resulting figure is the civil penalty.

3.0 BASE CIVIL PENALTY

3.1 Civil Penalty Matrix

The civil penalty matrix evaluates the relationship of two factors to any given violation. These two factors are: potential for harm and extent of deviation from a requirement. Below is an explanation of these factors, followed by a description of how they form the axes of the civil penalty matrix, thus enabling the calculation of a matrix penalty.

1. Potential for Harm to Human Health or the Environment, or to a Regulatory Program.

The potential for harm resulting from a violation may be determined by:

- The likelihood and degree of exposure of persons or the environment to pollution; or
- The degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program.

The emphasis is placed on the potential harm posed by a violation rather than on whether harm actually occurred. This policy does not advocate assessing a lower civil penalty when the violation does not result in actual harm.

Enforcement staff will evaluate whether the potential for harm is major, moderate, or minor in a particular situation. Factors which will be considered in determining the potential for harm include:

- amount of pollutant
- toxicity of pollutant
- sensitivity of the environment
- sensitivity of the human population
- length of time of exposure
- size of the violator

The degree of potential harm represented by each category is defined as:

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| MAJOR | (1) Violation poses a substantial likelihood of exposure or degree of exposure to pollution; and/or |
| | (2) The actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the program. |
| MODERATE | (1) The violation poses a significant likelihood of exposure or degree of exposure to pollution; and/or |
| | (2) The actions have or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the program. |

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| MINOR | (1) The violation poses a relatively low likelihood of exposure or degree of exposure to pollution; and/or |
| | (2) The actions have or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the program. |

2. Extent of Deviation from Requirement

The “extent of deviation” from the statutory, rule, or permit requirement relates to the degree to which the requirement is violated. For any violation, there exists a range of noncompliance with the subject requirement. That is, a violator may be only slightly out of compliance with the requirement or it may have totally disregarded the requirement (or any point in between). As with potential for harm, extent of deviation may be either major, moderate, or minor. In determining the extent of deviation, the following definitions are used:

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| MAJOR | The violator deviates from the requirements of the regulation, permit, or statute to such an extent that there is substantial noncompliance; |
| MODERATE | The violator significantly deviates from the requirements of the regulation, permit, or statute or only some of the requirements are implemented; |
| MINOR | The violator deviates somewhat from the regulatory, permit, or statutory requirements or most of the requirements are met. |

3. Matrix Penalty Calculation

As stated above, each of the above factors: potential for harm and extent of deviation from a requirement, forms one axis of the civil penalty matrix. The matrix has nine cells, each containing a penalty range. A specific cell is chosen after determining which category (major, moderate, or minor) is appropriate for the potential for harm factor, and which category is appropriate for the extent of deviation factor. The complete matrix is illustrated below:

		Extent of Deviation from Requirement		
		<u>MAJOR</u>	<u>MODERATE</u>	<u>MINOR</u>
Potential for Harm	<u>MAJOR</u>	\$25,000 to \$20,000	\$20,000 to \$15,000	\$15,000 to \$12,500
		<u>MODERATE</u>	\$12,500 to \$10,000	\$10,000 to \$7,500
	<u>MINOR</u>		\$5,000 to \$3,500	\$3,500 to \$2,000

The determination of a specific penalty amount within the selected cell is left to the judgment of enforcement staff and is based on the individual circumstances of each case. However, enforcement staff will consider only the seriousness of the violation and extent of deviation in determining a specific penalty amount from the selected matrix cell.

3.2 Days of Violation Multiplier

IC 13-30-4-1 provides IDEM with the authority to assess civil penalties of up to \$25,000 for each day of any violation. Multi-day penalties will generally be calculated in the case of continuing violations that demonstrate a major potential for harm and/or a major extent of deviation but may also be calculated in the case of other continuing violations.

The penalty derived from the matrix calculation is multiplied by the number of days of violation in order to obtain the base civil penalty.

If the days of violation multiplier is not applied to the penalty derived from the matrix calculation, then that penalty is the base civil penalty.

4.0 PENALTY ADJUSTMENT FACTORS

The determination of a base civil penalty reflects the overall seriousness of a particular violation or violations. IDEM recognizes, however, that unique factors and circumstances may exist in any factual situation that justify an upward or downward adjustment of the base civil penalty. The aggravating or on mitigating circumstances that IDEM will consider in making a penalty adjustment are:

- Actions before the Violation
- Actions after the Violation
- History of Noncompliance
- Ability to Pay
- Other Unique Factors
- IDEM Enforcement Costs

All, some, or none of the adjustment factors may be applicable to a particular factual situation. Any applicable adjustment factor is applied only to the base civil penalty. An upward adjustment cannot result in a total penalty greater than the statutory maximum per violation, per day.

Aggravating and mitigating factors, about which IDEM has sufficient information, will be applied to the initial penalty calculation. Other factors, particularly other mitigating factors that the violator wishes to have considered, will be evaluated at the settlement stage.

4.1 Actions Before the Violation (Violator's ability to foresee and/or prevent the violation)

In assessing the degree to which a violator could foresee and/or prevent a violation, the following factors will be considered:

- How much control the violator had over the events constituting the violation
- The violator's ability to foresee the events constituting the violation
- Whether the violator took reasonable precautions against the events constituting the violation
- Whether the violator knew or should have known of the hazards associated with the conduct
- The degree to which the violator knew or should have known of the statutory, rule or permit requirement that was violated. (Lack of knowledge of a legal requirement will not be used as a basis to reduce the penalty.)

Subject to the above, enforcement staff have discretion to make adjustments up or down by as much as 50% of the base civil penalty.

4.2 Actions After the Violation (Good-Faith Efforts; Cooperation/Noncooperation)

Action or inaction by the violator after a violation, to limit real or potential harm/exposure, may either decrease or increase the civil penalty amount.

Good faith can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, this behavior can result in mitigation of the penalty. Prompt correction of environmental problems can also constitute good faith. However, simply returning to compliance, in the absence of any other good-faith effort, will not justify a downward adjustment of the penalty. Other factors relevant to application of this adjustment factor are: The amount of control that the violator had over how quickly the violation was remedied, and the degree and timeliness of cooperation exhibited by a violator in resolving an enforcement action.

Subject to the above, enforcement staff have discretion to make adjustments up or down as much as 50% of the base civil penalty.

4.3 History of Noncompliance (Upward Adjustment Only)

If a violator has previously violated the same or a similar statute, rule, ordinance, permit, or order, this is usually an indication that the violator was not deterred by the previous enforcement response.

A history of non-compliance is justification for an upward adjustment of the penalty. Some of the factors the enforcement staff will consider are the following:

- How similar was the previous violation?
- Was the previous violation within the last five years?
- What is the number of previous violations?
- What efforts has the violator made to correct any previous violation(s)?

A violation generally will be considered “similar” if the EPA’s or State’s previous enforcement response should have alerted the violator to a particular type of compliance problem. A prior violation of the same or comparable requirement constitutes a similar violation. For the purpose of this policy, a “prior violation” includes any act or omission for which an enforcement response has occurred, e.g., EPA or State notice of violation, warning or violation letter, complaint, consent agreement, or final order. It also includes any act or omission for which the violator has previously been given written notification, however informal, that the agency believes a violation exists.

Subject to the above, enforcement staff have discretion to make upward adjustments up to 100% of the base civil penalty. The adjustment should be toward the lower end of the range if

the prior violation(s) was handled in an informal manner (e.g., warning letter) and toward the upper end of the range if the prior violation(s) was handled in a formal manner e.g., NOV, Agreed Order).

4.4 Ability to Pay

The application of this adjustment factor may result in a deferred or reduced civil penalty. In order for this factor to be considered there must be a demonstration by the violator, that IDEM determines to be acceptable and sufficient, that shows the existence and extent of the violator's inability to pay the assessed penalty. IDEM will also consider the compliance history of the violator, prior to the application of this adjustment factor.

In applying this adjustment factor, the following options may be considered:

- a delayed payment schedule;
- an installment payment plan with or without interest; or
- a reduced penalty, as a last recourse.

4.5 IDEM Enforcement Costs

Pursuit of an enforcement action by IDEM involves the expenditure of varying amounts of staff time and frequently requires collection of special data or information. The base civil penalty will be adjusted upward to include all special costs that are incurred in a particular enforcement action. These costs include: special sampling and analysis costs, research time for collecting other specialized information, and other costs associated with above average staff time for collecting evidence or for pursuing settlement of the violation.

4.6 Other Unique Factors

This factor is designed to allow for the flexibility to respond to unanticipated circumstances or information that arise after the calculation and assessment of the civil penalty. Some unanticipated circumstances or information, such as additional evidence that leads to a significant reevaluation of the facts surrounding a violation, may require a recalculation of the civil penalty. Other unforeseen circumstances or information may be resolved through the application of this adjustment factor.

5.0 ECONOMIC BENEFIT OF NONCOMPLIANCE

The calculation of the economic benefit of noncompliance is the final component of the civil penalty.

Economic benefit will be calculated and added to the base civil penalty when a violation results in significant economic benefit to the violator. Whenever possible, the economic benefit of noncompliance must be considered. However, for many regulatory requirements, the

economic benefit of noncompliance may be difficult to quantify or is relatively insignificant. Examples would be failure to submit a timely report or failure to maintain adequate records. If the calculated economic benefit is less than \$1,000, it may be disregarded in computing the total civil penalty to be imposed.

Enforcement staff will examine the following types of economic benefit from noncompliance in determining the economic benefit component:

- Benefit from delayed costs
- Benefit from avoided costs
- Other benefits, e.g., profits for period of startup prior to obtaining permit

Delayed Costs

Delayed costs are expenditures which have been deferred by a violator by failing to comply with the requirements. The violator will eventually have to spend the money in order to achieve compliance. 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 could have been earned by the violator during noncompliance. The types of violations which result in savings from delayed costs include:

- Failure to install equipment needed to meet discharge or emission control standards
- Failure to effect process changes needed to eliminate pollutants from products or waste streams
- Testing violations, where the testing still must be done to demonstrate achieved compliance
- Improper disposal, where proper disposal is still required to achieve compliance
- Failure to obtain necessary permits for discharge, where such permits would probably be granted

Avoided Costs

Avoided Costs are expenditures which are nullified by the violator's failure to comply. These costs will never be incurred. Examples of avoided costs include, but are not limited to:

- Costs savings for operation and maintenance of equipment that the violator failed to install

- Failure to properly operate and maintain existing control equipment
- Failure to employ sufficient number of adequately trained staff
- Failure to establish or follow precautionary methods required by rules or permits
- Improper storage, where re-disposal or cleanup is not possible
- Process, operational, or maintenance savings from removing pollution equipment
- Failure to collect, record and/or report required samples

For avoided costs, the economic benefit equals the cost of complying with the requirement from the time of violation to compliance, less any tax savings.

Enforcement staff will calculate the economic benefit of the delayed, avoided and other costs for each year. A model such as U.S. EPA 's Economic Benefit (BEN) model may be used in estimating economic benefit costs.

If a violator believes that the economic benefit derived from noncompliance differs from the estimated amount, it should present information documenting its actual savings at the settlement stage.

6.0 OTHER PENALTY CONSIDERATIONS

6.1 Supplemental Environmental Projects

Negotiated orders may contain a provision that allows a portion of the civil penalty to be offset by a qualified project that benefits the environment. See IDEM 's Supplemental Environmental Project Policy for a detailed discussion of these projects.

6.2 Stipulated Penalties

An Order may specify certain actions that the violator must take in order to remediate an environmental problem or to comply with a requirement. The Order will list the necessary actions and include a milestone date for each action. In these instances, a stipulated or additional penalty will be included in the Order that is contingent upon completion of the critical actions in a timely and satisfactory manner. Stipulated or additional penalties are separate from the assessed civil penalty.

Stipulated or additional penalties will be assessed in amounts that will provide an incentive sufficient to meet the milestone.