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**TITLE 327 WATER POLLUTION CONTROL DIVISION**

**Notice of First Public Comment Period**  
LSA Document #24-47

**TITLE 327 CIVIL PENALTIES**

**PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on adding rules at [327 IAC 1-2](#) concerning civil penalties. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

**CITATIONS AFFECTED:** [327 IAC 1-2](#)

**AUTHORITY:** [IC 4-22-2](#); [IC 13-14-9](#); [IC 13-30-4-1](#)

**OVERVIEW**

**Basic Purpose and Background**

Under [IC 13-30-4-1](#), IDEM imposes civil penalties on entities that violate provisions of the state's water pollution control laws and rules. The current civil penalty policy and structure became effective on April 5, 1999, through nonrule policy documents. House Enrolled Act 1623, which became law on May 5, 2023, added [IC 4-22-2-19.6](#). This statute requires any fee, fine, or civil penalty imposed by an agency to be included in the Indiana Administrative Code. Accordingly, this rulemaking adds [327 IAC 1-2](#) to include IDEM's civil penalty policy and structure in Title 327.

**[IC 13-14-9-4](#) Identification of Restrictions and Requirements Not Imposed under Federal Law**

The following elements of the draft rule impose either a restriction or a requirement on persons to whom the draft rule applies that is "not imposed under federal law" (NIFL element or elements):

The following information is provided with each NIFL element:

- (1) The environmental circumstance or hazard dictating the imposition of the NIFL element in order to protect human health and the environment in Indiana; and examples in which federal law is inadequate to provide this protection for Indiana.
- (2) The estimated fiscal impact and expected benefits of the NIFL element, based on the extent to which the NIFL element exceeds the requirements of federal law.
- (3) The availability for public inspection of all materials relied on by IDEM in the development of the NIFL element including, if applicable: health criteria, analytical methods, treatment technology, economic impact data, environmental assessment data, analyses of methods to effectively implement the proposed rule, and other background data.

NIFL Element (A): [327 IAC 1-2](#) imposes civil penalties set forth in state statutes, but these penalties are not imposed by federal law.

- (1) The civil penalties are authorized by state law and encourage compliance with the state's water pollution control laws and rules. The penalties account for multiple factors, including the severity of the violation and any economic advantage achieved through a violation. Federal penalties are not imposed for violations of state law, thus relevant federal law is inadequate in encouraging compliance with the state's water pollution control laws.
- (2) The rule will have no fiscal impact because the underlying policy has been in place for the past 25 years. Penalties collected are deposited in the environmental management special fund, which is used by the agency under [IC 13-14-12-2](#).
- (3) The NIFL element was developed using the nonrule policy document that has been in place for 25 years. The document may be viewed at <https://www.in.gov/idem/oe/nrp/civil.html>.

**Small Business Assistance Information**

IDEM established a compliance and technical assistance program (CTAP) under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on CTAP and other resources available can be found at [www.in.gov/idem/ctap](http://www.in.gov/idem/ctap).

For purposes of [IC 4-22-2-28.1](#), small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Julie Rhodes  
IDEM Small Business Regulatory Coordinator/CTAP Small Business Liaison  
IGCN 1316  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 233-4477 or (800) 988-7901  
ctap@idem.in.gov

For purposes of [IC 4-22-2-28.1](#), the Small Business Ombudsman designated by [IC 5-28-17-6](#) is:

Matthew Jaworowski  
Small Business Ombudsman  
Indiana Economic Development Corporation  
One North Capitol, Suite 700  
Indianapolis, IN 46204  
(317) 650-0126  
majaworowski@iedc.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in [IC 5-28-17-6](#), specifically [IC 5-28-17-6\(9\)](#), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

The Small Business Assistance Program Ombudsman is:

Drake Abramson  
IDEM Small Business Assistance Program Ombudsman/Business, Agricultural, and Legislative Liaison  
IGCN 1301  
100 North Senate Avenue  
Indianapolis, IN 46204-2251  
(317) 232-8921 or (800) 451-6027  
dabramso@idem.in.gov

### REQUEST FOR PUBLIC COMMENTS

At this time, IDEM is soliciting public comments on the proposed rule. Comments may be submitted in one of the following ways:

(1) By mail or common carrier to the following address:

LSA Document #24-47 Title 327 Civil Penalties  
Seth Engdahl  
Rules Development Branch  
Office of Legal Counsel  
Indiana Department of Environmental Management  
Indiana Government Center North  
100 North Senate Avenue  
Indianapolis, IN 46204-2251

(2) By electronic mail to [sengdahl@idem.in.gov](mailto:sengdahl@idem.in.gov). To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will not be considered part of the official written comment period unless they are sent to the address indicated in this notice.**

Contact Karla Kindrick at [kkindric@idem.in.gov](mailto:kkindric@idem.in.gov) or (317) 232-8922 if another method of submitting comments within the comment period is desired. Regardless of the delivery method used, in order to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

### COMMENT PERIOD DEADLINE

All comments must be postmarked or time stamped not later than March 15, 2024.

The rule, Regulatory Analysis, appendices referenced in the Regulatory Analysis, and materials incorporated by reference (if applicable) are on file at the office of the Rules Development Branch, Office of Legal Counsel, Indiana Department of Environmental Management, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana and are available for public inspection. Copies of the rule, Regulatory Analysis, and appendices referenced in the Regulatory Analysis are available at the IDEM Rules Development Branch office.

If IDEM does not receive substantive comments during the public comment period or public hearing, the rule may be adopted with text that is the same as or does not substantially differ from the text of the proposed rule published in this notice.

## ADDITIONAL DOCUMENTS

Regulatory Analysis: [20240207-IR-327240047RAA](#)

Notice of Public Hearing: [20240207-IR-327240047PHA](#)

## PROPOSED RULE

SECTION 1. [327 IAC 1-2](#) IS ADDED TO READ AS FOLLOWS:

### Rule 2. Civil Penalties

#### [327 IAC 1-2-1](#) General provisions

Authority: [IC 4-22-2](#); [IC 13-14-9](#); [IC 13-30-4-1](#)

Affected: [IC 13-23-14-2](#); [IC 13-23-14-3](#); [IC 13-30-4](#)

Sec. 1. (a) The department shall assess civil penalties as provided under [IC 13-30-4](#).

(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.

(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.

(d) Relevant portions of this rule shall be applied in conjunction with [329 IAC 9-11](#) [[329 IAC 9-11](#) is proposed to be added at [20240207-IR-329240048FNA](#).] to calculate penalties for violations set forth in [IC 13-23-14-2](#) and [IC 13-23-14-3](#).

(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.

(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.

(Water Pollution Control Division; [327 IAC 1-2-1](#))

#### [327 IAC 1-2-2](#) Definitions

Authority: [IC 4-22-2](#); [IC 13-14-9](#); [IC 13-30-4-1](#)

Affected: [IC 13-30-4](#)

Sec. 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.

(3) "Prior violation" means an act or omission for which the violator has previously been given written notification, however informal, that the department or U.S. EPA believes a violation exists, or for which an enforcement response from the department or U.S. EPA has occurred, including a:

- (A) notice of violation;
- (B) warning or violation letter;
- (C) complaint;
- (D) consent agreement; or
- (E) final order.

(4) "Qualified supplemental environmental project" means an environmentally beneficial project that improves, protects, or reduces risks to public health or the environment, and that a regulated entity agrees to undertake in further settlement of an enforcement action, but that the regulated entity is not otherwise legally required to perform.

(Water Pollution Control Division; [327 IAC 1-2-2](#))

### [327 IAC 1-2-3](#) Base civil penalty

Authority: [IC 4-22-2](#); [IC 13-14-9](#); [IC 13-30-4-1](#)

Affected: [IC 13-30-4](#)

Sec. 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 statutory, rule, or permit requirement.

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

(3) The resulting figure is the base civil penalty.

(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.

(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.

(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.

(f) The department shall determine the base civil penalty based on individual circumstances using the following matrix:

Potential for Harm	Extent of Deviation from Requirement		
	Major	Moderate	Minor
Major	\$25,000 to \$20,000	\$20,000 to \$15,000	\$15,000 to \$12,500
Moderate	\$12,500 to \$10,000	\$10,000 to \$7,500	\$7,500 to \$5,000
Minor	\$5,000 to \$3,500	\$3,500 to \$2,000	\$2,000 to \$1,000

(g) The department shall multiply the penalty derived from the matrix calculation by the number of days of violation to obtain the base civil penalty.

(h) Multi-day penalties may be calculated in the case of continuing violations.

(Water Pollution Control Division; [327 IAC 1-2-3](#))

#### [327 IAC 1-2-4](#) Penalty adjustment factors

Authority: [IC 4-22-2](#); [IC 13-14-9](#); [IC 13-30-4-1](#)

Affected: [IC 13-30-4](#)

Sec. 4. (a) The department may make an upward or downward adjustment to a base civil penalty based on unique factors and circumstances that exist in relation to the violation, including the following aggravating or mitigating circumstances:

- (1) Actions before the violation as described in subsection (c).
- (2) Actions after the violation as described in subsection (d).
- (3) History of noncompliance as described in subsections (e), (f), and (g).
- (4) Ability to pay as described in subsection (h).
- (5) Enforcement costs to the department as described in subsection (i).
- (6) Other unique factors as described in subsection (j).

(b) Aggravating and mitigating factors, for which the department has sufficient information, shall be applied to an initial penalty calculation. Other factors, including other mitigating factors the violator wishes to have considered, shall be evaluated at the settlement stage.

(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 foresee 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.

(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.

(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.

(f) A violation is considered similar to a prior violation if the previous enforcement response from the department or U.S. EPA 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.

(g) The department shall adjust a penalty toward the lower end of the range if a prior violation was handled in an informal manner, such as a warning letter, and toward the higher end of the range if a prior violation was handled in a formal manner, such as a notice of violation or an agreed order.

(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.

(i) The department shall adjust a base civil penalty upward to include all costs incurred by the department in a particular enforcement action, including the following:

- (1) Special sampling and analysis costs.
- (2) Research time for collecting other specialized information.
- (3) Other costs associated with above average department staff time for collecting evidence or pursuing settlement of the violation.

(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 unforeseen circumstances or information that may be resolved through the application of this adjustment factor.

(Water Pollution Control Division; [327 IAC 1-2-4](#))

### **[327 IAC 1-2-5](#) Economic benefit of noncompliance**

Authority: [IC 4-22-2](#); [IC 13-14-9](#); [IC 13-30-4-1](#)

Affected: [IC 13-30-4](#)

**Sec. 5. (a) Under 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.**

- (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).**

**(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.**

**(d) Delayed costs may result from the following types of violations:**

- (1) Failure to install equipment needed to meet discharge or emission control standards.**
- (2) Failure to effect process changes needed to eliminate pollutants from products or waste streams.**
- (3) Testing violations, where testing is required to demonstrate achieved compliance.**
- (4) Improper disposal, where proper disposal is required to achieve compliance.**
- (5) Failure to obtain necessary permits for discharge, where those permits are likely to be granted.**

**(e) Avoided costs may result from the following:**

- (1) Costs savings for operation and maintenance of equipment the violator failed to install.**
- (2) Failure to properly operate and maintain existing control equipment.**
- (3) Failure to employ enough adequately trained staff.**
- (4) Failure to establish or follow precautionary methods required by rules or permits.**
- (5) Improper storage, where redispersion or cleanup is not possible.**
- (6) Process, operational, or maintenance savings from removing pollution equipment.**
- (7) Failure to collect, record, or report required samples.**

**(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.**

**(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.**

*(Water Pollution Control Division; [327 IAC 1-2-5](#))*

### **[327 IAC 1-2-6](#) Other penalty considerations**

**Authority:** [IC 4-22-2](#); [IC 13-14-9](#); [IC 13-30-4-1](#)

**Affected:** [IC 13-30-4](#)

**Sec. 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.**

**(b) An order may include a stipulated or an additional penalty as follows:**

- (1) An order may specify certain actions the violator must take to remediate an environmental problem or comply with a requirement.**
- (2) The order must list the necessary actions and include:**
  - (A) a milestone date for each action; and**
  - (B) a stipulated or an additional penalty that is contingent on completion of the critical actions in a timely and satisfactory manner.**
- (3) A stipulated or an additional penalty is separate from the assessed civil penalty.**
- (4) A stipulated or an additional penalty is assessed in amounts that provide an incentive sufficient to meet the milestone.**

(Water Pollution Control Division; [327 IAC 1-2-6](#))

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