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TITLE 327 WATER POLLUTION CONTROL DIVISION

PROPOSED RULE AS PRELIMINARILY ADOPTED WITH IDEM'S SUGGESTED CHANGES INCORPORATED

LSA Document #24-47

DIGEST

Adds 327 IAC 1-2 concerning civil penalties for violations of water pollution control laws and rules. Effective 30 days after filing with the Publisher.

HISTORY

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Date of Second Hearing: August 14, 2024.

327 IAC 1-2

FINAL 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 consistent with this rule when

imposing civil penalties as provided under IC 13-30-4.

(b) 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.**

(c) 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 is the sum of all penalties for multiple violations or groups of violations, as calculated under 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 13-30-3-3; 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) "Notice of violation" or "NOV" means the notice issued by the department to an alleged violator under IC 13-30-3-3 to initiate a formal enforcement action.**
- (4) "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) NOV;**
 - (B) warning or violation letter;**
 - (C) complaint;**
 - (D) consent agreement; or**
 - (E) final order.****

(5) "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 calculated by selecting a penalty from the matrix in subsection (f), under subsections (b) through (e), and multiplying the base penalty by the number of days of violation as described in subsection (g).

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

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

(2) the extent of deviation from a statutory, regulatory, or permit requirement as described in subsection (e).

(c) The department shall determine a violation's potential for harm by evaluating the:

**(1) likelihood and degree of exposure of persons or the environment to pollution; or
(2) degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the program, based on the following factors:**

(A) Amount of pollutant.

(B) Toxicity of pollutant.

(C) Sensitivity of the environment.

(D) Sensitivity of the human population.

(E) Length of time of exposure.

(F) 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) Unanticipated circumstances as described in subsection (j).

(b) Aggravating and mitigating factors, for which the department has sufficient

information, ~~shall~~ may be applied to an initial penalty calculation. Other factors, including other mitigating factors the violator wishes to have considered, ~~shall~~ may 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 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. Lack of knowledge of a legal requirement will not be used as a basis to reduce civil penalty.

(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.
- (4) 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 alerted, or reasonably 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~~ may 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 may consider the compliance history of the violator before consideration of the ability to pay.

(3) The department shall may 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 may 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 recalculate a civil penalty under this rule when unanticipated circumstances arise, such as additional evidence that leads to a significant reevaluation of the facts surrounding a violation. (*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 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.

(b) The department shall consider the economic benefit of noncompliance, but may disregard it if:

(1) there is a lack of information necessary to determine the economic benefit; or

(2) the economic benefit of noncompliance is 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) Delay or failure in installing equipment needed to meet discharge control standards.**
- (2) Delay or failure in effecting process changes needed to eliminate pollutants from products or waste streams.**
- (3) Testing violations, where testing is required to demonstrate achieved compliance.**
- (4) Delay or failure in obtaining necessary permits, 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) Delay or failure in properly operating and maintaining existing control equipment.**
- (3) Delay or failure in employing enough adequately trained staff.**
- (4) Delay or failure in establishing or following precautionary methods required by rules or permits.**
- (5) Process, operational, or maintenance savings from removing pollution equipment.**
- (6) Delay or failure in collecting, recording, or reporting 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. The department shall consider information that is verifiable. (*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)