

TITLE 329 SOLID WASTE MANAGEMENT DIVISION

LSA Document #24-48

SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from June 19, 2024, through July 19, 2024, on IDEM's draft rule language. IDEM received comments from the following parties:

Indiana Manufacturing Association (IMA)
Indiana Cast Metals Association (INCMA)

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

Comment: The commenter asks for clarity while appreciating the time constraint imposed by the recent statutory change. How exactly to improve upon existing practices should come from a thoughtful review of information available from other states and include collaboration from Indiana stakeholders. (INCMA)

Response: IDEM appreciates the commenter's desire for more clarity and recommendation that stakeholders be involved in improving existing practices.

With respect to clarity, IDEM believes the proposed rule, as written, provides sufficient clarity while also giving the agency enough berth to apply its civil penalty policy to the wide variety of entities the agency regulates.

With respect to the involvement of stakeholders, IDEM agrees that stakeholders should absolutely be involved in improving practices. As the commenter alluded, IDEM is currently facing a statutorily imposed deadline to amend its existing civil penalty policy into the Indiana Administrative Code. The agency believes that the best way to meet this deadline is to adopt its existing civil penalty policy without substantive changes. This policy has been in place for 25 years and the agency intends to continue applying this policy in the same manner so that civil penalties are assessed in a consistent manner that is familiar to stakeholders. Any future changes to the civil penalty policy will certainly involve greater stakeholder input—including input from the commenter—since the agency will face less time constraints. IDEM encourages the commenter to remain in contact with the agency as they move forward with this rulemaking.

Comment: The commenter does not believe IDEM should be allowed cost recovery for its expenditures. It discourages efficiency in agency actions. (IMA)

Response: IDEM assumes the commenter refers to the proposed rule language regarding civil penalty adjustment factors. IDEM is maintaining the "agency enforcement costs" adjustment factor from the preexisting civil penalty policy, which the agency seeks to transpose to rule with no major substantive changes. While the agency is within its statutory authority to adjust a civil penalty based on the agency's costs, the application of those adjustment factors is discretionary. The agency's enforcement costs are one of many adjustment factors that may not apply in every enforcement action. Accordingly, the agency is changing the word "shall" to "may" regarding how the agency applies this factor.

Comment: The commenter suggests that augmentation factors only allow a penalty to be increased by 50% rather than 100% because the mitigating factors only allow a 50% reduction. (IMA)

Response: IDEM appreciates the commenter's suggestion. However, such a modification to the rule would be a substantial deviation from the existing civil penalty policy, which the agency seeks to transpose into rules unchanged.

Comment: The commenter submitted the following language suggestion and stated: As a general comment, it is not our intention to rewrite the language and that is not what the mock-up exemplifies. It is there to serve merely as an example of the level of detail and clarity that industry is looking for within the rule. The mockup does not represent a verbatim ask for industry. Although the language is only for water, we believe this example could be used to craft rules for air and land, as well.

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 (e):

(A) Major violations shall include:

(i) Any violation of any effluent limitation that is measured by concentration or mass for any discharge exceeding the effluent limitation as follows:

- (1) By more than 50 percent for a hazardous pollutant;
- (2) By more than 100 percent for a non-hazardous pollutant; or
- (3) Any discharge of a pollutant that has caused imminent endangerment to human health, welfare or to the environment; or

(ii) The greatest violation of a pH effluent range in any one calendar day which violation deviates from the midpoint of the range by more than 50 percent of the midpoint of the range excluding the excursions specifically excepted by an issued permit with continuous pH monitoring; or

(iii) Any other violation not included in (a)(1)(i) or (ii) above which either:

- (1) Has caused or has the potential to cause serious harm to human health or the environment; or
- (2) Seriously deviates from the requirements of the Water Pollution Control Act or of any rule, pretreatment standards, effluent limitation, administrative order or permit issued pursuant thereto; serious deviation shall include, but not be limited to, those violations that are in complete contravention of the requirement, or if some of the requirement is met, which severely impair or undermine the operation or intent of the requirement.

(B) Moderate shall include:

(i) Any violation, other than a violation of an effluent limitation identified in (B)ii or iii below, which has caused or has the potential to cause substantial harm to human health or the environment;

(ii) Any violation of an effluent limitation which is measured by concentration or mass of any discharge exceeding the effluent limitation as follows:

- (1) By 20 to 50 percent for a hazardous pollutant; or

- (2) By 40 to 100 percent for a non-hazardous pollutant;
- (3) The greatest violation of a pH effluent range in any one calendar day which violation deviates from the midpoint of the range by at least 40 percent but no more than 50 percent of the midpoint of the range excluding the excursions specifically excepted by an issued permit with continuous pH monitoring; or

(iii) Any violation, other than a violation of an effluent limitation identified in (B)(2)(i) or (ii) above, which:

- (1) Poses a significant likelihood or degree of exposure to pollution; or
- (2) Substantially deviates from the requirements of the Water Pollution Control Act or of any rule, pretreatment standards, effluent limitation, administrative order or permit issued pursuant thereto; substantial deviation shall include, but not be limited to, violations that are in substantial contravention of the requirements or which substantially impair or undermine the operation or intent of the requirement.

(C) Minor shall include:

(i) Any violation, other than a violation of an effluent limitation identified in (C)(3)(ii) or (iii) below, not included in (A) or (B) above;

(ii) Any violation of an effluent limitation which is measured by concentration or mass for any discharge exceeding the effluent limitation as follows:

- (1) By less than 20 percent for a hazardous pollutant; or
- (2) By less than 40 percent for a non-hazardous pollutant; or
- (3) The greatest violation of a pH effluent range in any one calendar day which violation deviates from the midpoint of the range by less than 40 percent of the midpoint of the range excluding the excursions specifically excepted by an issued permit with continuous pH monitoring.

(iii) Any violation, other than a violation of an effluent limitation identified in (C)(2)(ii) or (iii) above, which:

- (1) Poses relatively low likelihood or degree of exposure to pollution significant likelihood or degree of exposure to pollution; or
- (2) Substantially deviates from the requirements of the Water Pollution Control Act or of any rule, pretreatment standards, effluent limitation, administrative order or permit issued pursuant thereto; substantial deviation shall include, but not be limited to, violations that are in substantial contravention of the requirements or which substantially impair or undermine the operation or intent of the requirement. (IMA)

Response: IDEM appreciates the commenter's suggestion. However, such a modification to the rule would be a substantial deviation from the existing civil penalty policy, which the agency seeks to transpose into rules. This policy has been in place for 25 years and is familiar to the regulated community. IDEM believes the proposed rule, as written, provides sufficient clarity while also giving the agency enough berth to apply its civil penalty policy to the wide variety of entities the agency regulates.