



## **POLICY STATEMENT PS25-08**

### **HAZARDOUS WASTE MANAGEMENT ACT CIVIL PENALTIES**

#### **PURPOSE**

This Idaho Department of Environmental Quality (DEQ) policy for assessing administrative penalties under the Hazardous Waste Management Act of 1983 (HWMA) ensures that HWMA civil penalties are assessed in a fair and consistent manner; economic incentives for noncompliance with HWMA are eliminated; persons are deterred from committing violations; and compliance is achieved. This policy supersedes the "HWMA Civil Penalty Policy" (PS20-12) dated June 2020.

#### **STATEMENT OF POLICY**

This policy provides internal guidelines to aid DEQ enforcement personnel in assessing appropriate penalties. It also provides a mechanism for compliance/enforcement personnel to exercise discretion in negotiating administrative civil penalties and otherwise modify the proposed penalty when special circumstances warrant it. The policy will be supplemented as necessary.

#### **RESPONSIBILITY**

DEQ's hazardous waste compliance and enforcement coordinator is responsible for maintaining this policy.

#### **IMPLEMENTATION**

This policy is effective immediately and will remain in effect for 5 years unless amended, replaced, or rescinded prior to expiration.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2025

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# 1 Introduction

To respond to the problem of improper management of hazardous waste, the 1983 Idaho Legislature passed the Hazardous Waste Management Act (HWMA). The legislature's purpose in enacting HWMA was to establish the statutory framework for the state to ensure the proper management of hazardous waste.

Idaho Code § 39-4413 of HWMA provides that if any person is in violation of a provision of HWMA or any permit, standard, regulation, condition, requirement, or Consent Order issued or promulgated pursuant to HWMA, the director of the Idaho Department of Environmental Quality (DEQ) may issue written notice requiring compliance immediately or within a specified time of a violation. Idaho Code § 39-4414 provides that a civil penalty up to \$10,000 may be assessed for violations of a permit, standard, regulation, condition, requirement, compliance agreement, or order issued or promulgated pursuant to Idaho Code § 39-4414, taking into account:

- The seriousness of the violation
- Any good faith efforts to comply with the applicable requirements

Idaho Code § 39-4414 further provides DEQ with the authority to assess civil penalties up to \$10,000 per day for a continuing violation. This document does not discuss whether assessment of an administrative or civil penalty is the correct enforcement response to a particular violation. Rather, this document focuses on determining what the proper civil penalty should be once a decision has been made that an administrative or civil penalty is the proper enforcement remedy to pursue.

The HWMA Civil Penalty Policy will be used to calculate penalties for all actions for violations of HWMA instituted subsequent to the date of this policy, regardless of the date of violation that invokes this policy.

The procedures described in this document are intended solely for the guidance of DEQ personnel and do not have the force and effect of law. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with DEQ. DEQ reserves the right to act at variance with this policy and to change it at any time without public notice. The HWMA Civil Penalty Policy states a system of penalty assessment consistent with the following goals:

- Deterrence
- Fair and equitable treatment of the regulated community
- Swift resolution of environmental problems
- Calculation of a preliminary deterrence amount consisting of a gravity component
- Determination of any economic benefit of noncompliance
- Application of adjustment factors to account for differences between cases

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## 2 Summary of the Policy

The penalty calculation system consists of (1) determining a gravity-based penalty for a particular violation, (2) considering economic benefit of noncompliance where appropriate, and (3) adjusting the penalty for special circumstances. Two factors are considered in determining the gravity-based penalty:

1. Potential for harm
2. Extent of deviation from a statutory or regulatory requirement

These two factors constitute the seriousness of a violation under HWMA and have been incorporated into a penalty matrix from which the gravity-based penalty will be chosen. Penalties for each violation range from \$0 to \$10,000 depending on the two factors. Where a person or entity has derived significant savings by its failure to comply with HWMA requirements, the amount of economic benefit from noncompliance gained by the violator will be calculated and added to the gravity-based penalty. A formula for computing economic benefit is included.

After determining the appropriate penalty based on gravity and, where appropriate, economic benefit, the penalty may be adjusted upwards or downwards to reflect particular circumstances surrounding the violation. The following factors will be considered:

- Good faith efforts to comply/lack of good faith
- Degree of willfulness and/or negligence
- History of noncompliance
- Ability to pay
- Other unique factors

These factors (except for factors that increase the penalty, such as history of noncompliance) generally will be considered after proposing the penalty in the notice of violation (NOV) or complaint (i.e., during the compliance conference or settlement stage). However, DEQ has the discretion to apply the adjustment factors when determining the initial penalty, if the information supporting adjustment is available. The policy also discusses the appropriate assessment of multiple and per-day penalties where the violation continues beyond one day.

This policy includes hypothetical cases illustrating the step-by-step assessment of penalties. The steps include choosing the correct penalty cell on the matrix; calculating the economic benefit of noncompliance, where appropriate; and adjusting the penalty assessment before and after issuance of the NOV or a civil complaint. The hypothetical cases are examples only, and DEQ reserves the right to act at variance with the examples.

## 3 Administrative Record

To support the penalty proposed in an enforcement proceeding, the enforcement coordinator must explain in the administrative record case file how the proposed penalty amount was calculated. The case file must also include a justification of any adjustments made after issuing

an enforcement document. In ongoing cases, the assessment rationale is exempt from the mandatory disclosure requirements of IDAPA 58.01.05.997, because producing such records would interfere with enforcement proceedings. DEQ may elect to release penalty information after a NOV or a civil complaint has been issued. Once an enforcement action has been completed, the justification of the penalty assessment is no longer exempt from disclosure.

A sample penalty computation worksheet included in the case file is shown in section 8.

## 4 Determination of Gravity-Based Penalty

Idaho Code § 39-4414 states that the seriousness of the violation must be taken into account in assessing penalties. The gravity-based penalty is determined according to the seriousness of the violation. The seriousness of the violation is based on two factors that are used to assess the appropriate gravity-based penalty:

1. Potential for harm
2. Extent of deviation from a statutory or regulatory requirement

### 4.1 Potential for Harm

The HWMA was promulgated to protect the public health and safety, the health of living organisms, and the environment (Idaho Code § 39-4402). Noncompliance with any HWMA requirements could result in potential for harm to the public health and safety, the health of living organisms, and the environment. The potential for harm resulting from a violation may be determined by either of the following:

- The likelihood of exposure to hazardous waste posed by noncompliance
- The adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the HWMA program (harm to the program)

By answering the following questions, the enforcement coordinator can determine the likelihood of exposure in a particular situation:

- What is the quantity of waste?
- Is human life or health potentially threatened by the violation?
- Are animals potentially threatened by the violation?
- Are any environmental media potentially threatened by the violation?

There may be violations where the likelihood of exposure resulting from the violation appears small, difficult to quantify, or nonexistent but directly increases the threat of harm to human health and the environment since all HWMA requirements are fundamental to the program. Some violations may disrupt HWMA, presenting the potential for harm to human health or the environment due to the adverse effect noncompliance can have on the statutory or regulatory purposes or procedures for implementing the HWMA program. These violations may preclude DEQ from determining whether a violator is complying with other HWMA requirements. Some examples of regulatory harm include the following:

- Failure to notify as a generator of hazardous waste or hazardous waste facility
- Operating without a permit or interim status
- Failure to maintain required records
- Failure to prepare or maintain a hazardous waste manifest

For each consideration—likelihood of exposure and adverse effect on implementing the HWMA program—the emphasis is placed on the *potential* harm posed by a violation rather than on whether harm actually occurred. The violator may have no control over the presence or absence of direct harm in a noncompliance situation. Such violators should not be rewarded by assessment of lower penalties when the violations do not result in actual harm.

The enforcement coordinator should evaluate whether the potential for harm is major, moderate, or minor in a particular category, as defined below:

Major	(1) Violation poses a substantial likelihood of exposure to hazardous waste; and/or, (2) Actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the HWMA program.
Moderate	(1) Violation poses a significant likelihood of exposure to hazardous waste; and/or, (2) Actions have or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the HWMA program.
Minor	(1) Violation poses a relatively low likelihood of exposure to hazardous waste; and/or, (2) Actions have or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the HWMA program.

The following examples illustrate the difference between major, moderate, and minor potential for harm.

#### **Example 1—Major Potential for Harm**

IDAPA 58.01.05.008 (40 CFR 264.143) requires that owners or operators of hazardous waste facilities establish financial assurance for closure of their facilities. This requirement ensures that funds will be available for proper closure. Under this legal requirement, the wording of a trust agreement establishing financial assurance must be identical to the wording specified in 40 CFR 264.151 (as incorporated by reference in IDAPA 58.01.05.008). Failure to word the trust agreement as required may appear inconsequential. However, even a slight alteration of the language could change the legal effect of the financial language and the financial instrument so that it would no longer satisfy the intent of the regulation. When the language of the agreement differs from the requirement such that funds would not be available to close the

facility properly, the lack of identical wording would have a substantial adverse effect on the regulatory scheme. Proper closure of a facility is designed to protect human health and the environment. This violation would be assigned to the major potential for harm category.

#### **Example 2—Moderate Potential for Harm**

Under IDAPA 58.01.05.006 (40 CFR 262.17), a large quantity generator may accumulate hazardous waste on site for 90 days or less without having interim status or a permit, provided that each container or tank of waste is labeled or marked clearly with the words “Hazardous Waste” and the date that accumulation started. If a generator is storing containers at its central accumulation area where some of the containers are labeled appropriately but several are unlabeled, facility staff may have some indication that the container holds hazardous waste but would not know for sure and would not know if they were accumulated for more than 90 days. This situation poses a moderate potential for harm since there is potential that the containers could be managed and moved without being labeled “Hazardous Waste,” and they may have accumulated for longer than 90 days.

#### **Example 3—Minor Potential for Harm**

Owners or operators of hazardous waste facilities, under IDAPA 58.01.05.009 (40 CFR 265.53), must submit a copy of their contingency plan to all local police and fire departments, hospitals, and state and local emergency response teams that may be called upon to provide emergency services. If a facility has a complete contingency plan, including a description of arrangements agreed to by local entities to coordinate emergency services, but failed to submit copies to *all* of the local entities, there is a potential for harm. However, because a complete plan exists and arrangements with all of the local entities have been agreed to, the likelihood of exposure and adverse effect on HWMA implementation would be relatively low. The minor potential for harm category would be appropriate in this situation.

## **4.2 Extent of Deviation from Requirement**

The *extent of deviation* from HWMA or its regulatory requirements relates to the degree to which the violation renders the requirement inoperative. In any violative situation, a range of potential noncompliance with the subject requirement exists. For example, a violator may be substantial in compliance with the provisions of the requirement or may have totally disregarded the requirement (or a point in between). As with potential for harm, extent of deviation may be major, moderate, or minor. In determining the extent of deviation, the following definitions should be used:

Major	The violator deviates from the statutory or regulatory requirements to an extent that there is substantial noncompliance.
Moderate	The violator significantly deviates from the statutory or regulatory requirements but some of the requirements are implemented as intended.
Minor	The violator deviates somewhat from the statutory or regulatory requirements but most of the requirements are met.

The following examples demonstrate how the evaluation procedure is used to select a category.

#### Example 1—Closure Plan

IDAPA 58.01.05.008 (40 CFR 264.112) requires that owners or operators of treatment, storage, and disposal facilities have a written closure plan. This plan must identify the steps necessary to completely or partially close the facility at any point during its intended operating life and to completely close the facility at the end of its intended operating life. Possible violations of the requirements of this regulation range from having no closure plan at all to having a plan that is inadequate (e.g., failure to include a schedule for final closure, while complying with the other requirements). These violations might be assigned to the *major* and *minor* categories, respectively. A violation between these extremes might involve failure to modify a plan for increased decontamination activities as a result of a spill on site.

#### Example 2—Failure to Maintain Adequate Security

IDAPA 58.01.05.008 (40 CFR 264.14) requires that owners or operators of treatment, storage, and disposal facilities take reasonable care to keep unauthorized persons from entering the active portion of a facility where injury could occur. Generally, a physical barrier must be installed and any access routes conscientiously controlled.

The range of potential noncompliance with the security requirements is broad. In a particular situation, the violator may have failed to supply any security systems. Total noncompliance with a regulatory requirement would be classified in the major category. In contrast, the violation may consist of a small oversight such as failing to lock an access route on a single occasion. The degree of noncompliance in this situation is less significant and should draw a smaller penalty assessment. The minor category would be selected in the matrix.

### 4.3 Penalty Assessment Matrix

Each factor—potential for harm and extent of deviation from a requirement—forms the penalty assessment matrix, containing a penalty range. Determine 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 major potential for harm/extent of deviation is limited by the maximum statutory penalty allowance of \$10,000 per violation or per day of a continuing violation.

#### Penalty matrix—\$10,000 maximum state law

Potential for Harm	Extent of Deviation from Requirement		
	Major	Moderate	Minor
Major	\$10,000 to \$8,000	\$7,999 to \$6,000	\$5,999 to \$4,400
Moderate	\$4,399 to \$3,200	\$3,199 to \$2,000	\$1,999 to \$1,200
Minor	\$1,199 to \$600	\$599 to \$200	\$199 to \$0

The selection of the exact penalty amount is left to the enforcement coordinator's discretion. The enforcement coordinator should carefully consider the seriousness of the violation and select the penalty amount within the range. The reason the violation was committed, the intent of the violator, and other factors related to the violator are not considered at this point but will be considered at the adjustment stage.

## **5 Multiple and Per-Day Penalties**

### **5.1 Assessing Multiple Penalties**

In certain situations, DEQ may find that a particular entity has violated several HWMA regulations. A separate penalty should be assessed for each violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other act (or failure to act) in the NOV or complaint for which a penalty is to be assessed. A given act is independent of, and substantially distinguishable from, any other act when it requires an element of proof not needed by the others. In many cases, violations of different sections of the regulations constitute independent and substantially distinguishable violations. For example, failure to implement a groundwater monitoring program (IDAPA 58.01.05.00; 40 CFR 264 Subpart F), and failure to have a written closure plan (IDAPA 58.01.05.008; 40 CFR 264.112), are violations that result from different sets of circumstances and pose separate risks. In the case of an entity that has violated both of these sections of the regulations, a separate violation should be noted for each violation. For penalty purposes, each of the violations should be assessed separately and the amounts totaled.

It is also possible that different violations of the same section of the regulations could constitute independent and substantially distinguishable violations. For example, in the case of an entity that has open containers of hazardous waste in its storage area (IDAPA 58.01.05.008; 40 CFR 264.173(a)) and that also ruptured different hazardous waste containers while moving them on site (IDAPA 58.01.05.008; 40 CFR 264.173(b)), there are two independent acts. The violations result from two sets of circumstances (improper storage and improper handling) and pose distinct risks. In this situation, the two violations would be separately noted, and two separate penalties would be appropriate. For penalty purposes, each of the violations should be assessed separately and the amounts totaled.

Multiple penalties should also be assessed where one entity has violated the same requirement in substantially different locations. An example is failure to clean up discharged hazardous waste during transportation (IDAPA 58.01.05.007; 40 CFR 263.31). A transporter who did not clean up waste discharged in two separate locations during the same trip has committed two violations. The separate locations present separate and distinct risks to public health and the environment and separate penalty assessments are justified.

In general, multiple penalties are not appropriate where the violations are not independent or substantially distinguishable. Where a violation derives from or merely restates another violation, a separate penalty is not warranted. If an owner/operator of a storage facility failed

to specify in the waste analysis plan the parameters for analyzing each hazardous waste (IDAPA 58.01.05.008; 40 CFR 264.13(b)(1)), and after the initial analysis, the frequency of repeated waste analysis (IDAPA 58.01.05.008; 40 CFR 264.13(b)(4)), the requirement for an adequate waste analysis plan is violated. The violations result from the same factual event (failure to develop an adequate plan) and pose one risk (storing waste improperly due to inadequate analysis). In this situation, both sections violated should be cited in the NOV or complaint, but one penalty, rather than two, should be assessed. The fact that two separate sections were violated will be taken into account in choosing higher *potential for harm* and *extent of deviation* categories on the penalty matrix.

## 5.2 Assessing Per-Day Violations

The HWMA provides the authority to assess civil penalties of up to \$10,000 per violation per day, with each day that noncompliance continues, assessed as a separate violation. Per-day penalties should generally be calculated in the case of continuing egregious violations. However, per-day assessment may be appropriate in other cases.

For continuing violations, DEQ has the authority to calculate penalties based on the number of days of violation since the effective date of the violation and up to the date of coming into compliance. The gravity-based penalty derived from the penalty matrix should be multiplied by the number of days of violation.

## 6 Effect of Economic Benefit of Noncompliance

The HWMA Civil Penalty Policy mandates considering the economic benefit of noncompliance to a violator when penalties are assessed.

An *economic benefit component* should be calculated and added to the gravity-based penalty when a violation results in significant economic benefit to the violator. The following are examples of regulatory areas that should undergo an economic benefit analysis:

- Groundwater monitoring
- Financial requirements
- Closure/postclosure
- Waste determination
- Waste analysis
- Clean up of hazardous waste discharges
- Permit applications

For many HWMA requirements, the economic benefit of noncompliance may be difficult to quantify or relatively insignificant. Examples of these types of violations are failure to submit a report or failure to maintain records.

In general, HWMA civil and administrative enforcement cases should not be settled for an amount less than the economic benefit of noncompliance. However, the HWMA Civil Penalty

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Policy states four exceptions when settling the total penalty amount for less than the economic benefit:

1. The economic benefit component consists of an insignificant amount (i.e., less than \$200).
2. There are compelling public concerns that would not be served by taking a case to trial.
3. It is highly unlikely that DEQ will be able to recover the economic benefit in litigation.
4. The entity has documented an inability to pay the total proposed penalty.

If a case is settled for less than the economic benefit component, a justification must be included in the case file.

## 6.1 Types of Economic Benefit

The enforcement coordinator should examine two types of economic benefit from noncompliance in determining the economic benefit component:

1. Benefit from delayed costs
2. Benefit from avoided costs

Delayed costs are expenditures deferred by the violator's failure to comply with the requirements. The violator eventually will have to spend the money to achieve compliance. Delayed costs are the equivalent of capital costs. The following are examples of violations that result in savings from delayed costs:

- Failure to install groundwater monitoring equipment
- Failure to submit a Part B Permit Application
- Failure to develop a waste analysis plan

Avoided costs are expenditures that are nullified by the violator's failure to comply. These costs will never be incurred. Avoided costs are the equivalent of operating and maintenance costs. The following are examples of violations that result in savings from avoided costs:

- Failure to perform annual and semiannual groundwater monitoring sampling and analysis
- Failure to follow the approved closure plan in removing waste from a facility where re-removal is not possible
- Failure to perform waste analysis before adding waste to tanks, waste piles, incinerators, etc.

## 6.2 Calculation of Economic Benefit

Because the savings that are derived from delayed costs differ from those derived from avoided costs, the economic benefit from delayed and avoided costs are calculated in a different manner. For avoided costs, the economic benefit equals the cost of complying with the

requirement, adjusted to reflect income tax effects on the entity. For delayed costs, the economic benefit does not equal the cost of complying with the requirements because the violator will eventually have to spend the money to achieve compliance. The economic benefit for the delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the violator during noncompliance. If noncompliance has continued for more than a year, the enforcement coordinator should calculate the economic benefit of both the delayed and avoided costs for each year.

The following formula calculates the economic benefit component:

$$\text{Economic Benefit} = \text{Avoided Costs} (1-T) + (\text{Delayed Costs} \times \text{Interest Rate})$$

where “T” represents an entity’s marginal tax rate.

In the absence of specific information about the violator’s tax status, the enforcement coordinator should assume that the entity’s marginal tax rate is 21%, the federal corporate tax rate in 2020 for US resident C-corporations. The enforcement coordinator should assume that  $T = 0.21$ .

The enforcement coordinator should calculate interest by using the interest rate charged by the Internal Revenue Service (IRS) for delinquent accounts.

Tax rates and interest rates are available from the IRS.

The formula provides a reasonable estimate of the economic benefit of noncompliance. If a respondent believes that the economic benefit derived from noncompliance differs from the estimated amount, it should present information documenting the actual savings to the enforcement coordinator at the compliance conference or settlement stage.

## **7 Adjustment Factors and Effect of Settlement**

### **7.1 Adjustment Factors**

As mentioned in section 4, the seriousness of the violation is considered in determining the gravity-based penalty. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are *not* considered in choosing the appropriate penalty from the matrix. However, any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between similar violations. Idaho Code § 39-4414 states that in assessing penalties, DEQ must take into account any good faith efforts to comply with the applicable requirements. This HWMA Civil Penalty Policy states several other adjustment factors to consider, including the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors.

The adjustment factors can increase, decrease, or have no effect on the penalty amount to be paid by the violator. However, no upward adjustment can result in a penalty greater than the

statutory maximum of \$10,000 per violation or per day continuing violation. Adjustment of a penalty may take place before issuing the proposed penalty. Most factors will be considered at the compliance conference or settlement stage with the burden of proof for mitigation is on the violator. Penalties may be adjusted before determining the proposed assessment if the necessary information is available. The enforcement coordinator should use whatever information on the violator (and violation) available at the time of initial assessment. Issuing a NOV or complaint should not be delayed to collect additional adjustment information. The history of noncompliance factor should be used only to increase a penalty; the ability to pay factor should be used only to decrease a penalty. Justification for adjustments must be included in the case file.

In general, these adjustment factors will apply only to the gravity-based penalty derived from the matrix and not to the economic benefit component if calculated (section 6 exceptions).

Application of the adjustment factors is cumulative (i.e., more than one factor may apply in a case). For example, if the base penalty derived from the matrix is \$4,000 and upward adjustments of 10% will be made for both history of noncompliance and degree of willfulness and/or negligence, the total adjusted penalty would be \$4,800 (\$4,000 + 20%). The following discussion illustrates the adjustment factors to consider under this HWMA Civil Penalty Policy.

### **7.1.1 Good Faith Efforts to Comply/Lack of Good Faith (Degree of Cooperation)**

Under Idaho Code § 39-4414(1)(c), good faith efforts to comply with the requirements may be taken into consideration in adjusting the penalty. 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. Lack of good faith can result in an increased penalty. The enforcement coordinator has discretion to make adjustments up or down by as much as 25% of the gravity-based penalty. Adjustments may be made in the 26%–40% range of the gravity-based penalty but only in unusual circumstances. No downward adjustment should be made if the good faith efforts to comply primarily consist of coming into compliance.

### **7.1.2 Degree of Willfulness and/or Negligence**

Idaho Code § 39-4415 provides for criminal (misdemeanor) penalties for *knowing* violations. Instances of culpability may occur that do not meet the criteria for criminal action. When administrative civil penalties are sought for actions of this type, the penalty may be adjusted upward for willfulness and/or negligence. In assessing the degree of willfulness and/or negligence, consider the following factors and any others deemed appropriate:

- How much control the violator had over the events constituting the violation
- The foreseeability of 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

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- Whether the violator knew of the legal requirement that was violated
  - Whether the violator concealed or attempted to conceal relevant information or evidence that demonstrates a violation occurred

The lack of knowledge of the legal requirement *should never be used as a basis to reduce the penalty*; to do so, encourages ignorance of the law. Knowledge of the law should serve only to enhance the penalty.

The amount of control the violator had over how quickly the violation was remedied also is relevant in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors that the violator can clearly show were reasonably foreseeable and out of their control, the penalty may be reduced.

Subject to the above guidance, the enforcement coordinator has discretion in all cases to make adjustments up or down by as much as 25% of the gravity-based penalty. Adjustments in the 26%–40% range may be made, but only in unusual circumstances.

### **7.1.3 History of Noncompliance (Upward Adjustment Only)**

It is typically clear that a party was not deterred by previous enforcement when a party violates the same requirement that they previously violated at the same or a different site. Unless the previous violation was caused by factors entirely out of the control of the violator, it is an indication that the penalty should be adjusted upwards.

Factors the enforcement coordinator should consider regarding history of noncompliance include the following:

- How similar the previous violation was
- How recent the previous violation was
- The number of previous violations
- Violator's response to previous violation(s) in regard to correcting the problem

A violation generally should be considered *similar* if the previous enforcement response should have alerted the party to a particular type of compliance problem in question.

In this section, a *prior violation* includes any act or omission for which an enforcement response has occurred (e.g., NOV, Warning Letter, Consent Order, or civil or criminal action). It also includes any act or omission for which the violator has previously been given any written notification, no matter how informal, by DEQ.

For large corporations with many divisions or wholly owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. In making this determination, the enforcement coordinator should ascertain *who* in the organization had control and oversight responsibility for compliance with HWMA or other environmental laws. In those cases, the violation will be considered part of the compliance history of that regulated party. The enforcement coordinator should assume that if the same corporation *were* involved, the adjustments for history of

noncompliance should apply. The enforcement coordinator should be wary of a party changing operators or shifting responsibility for compliance to different persons or entities as a way of avoiding increased penalties. DEQ may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation although the facilities are at different geographic locations. This pattern often reflects a corporationwide indifference to environmental protection. The adjustment for history of noncompliance probably should apply unless the violator can demonstrate that the other violating corporate facilities are independent.

Subject to the above guidance, the enforcement coordinator has discretion to make upward adjustments by as much as 25% of the gravity-based penalty for history of noncompliance. Adjustments for this factor in the 26%–40% range may be made, but only in unusual circumstances.

#### **7.1.4 Ability to Pay (Downward Adjustment Only)**

DEQ generally will not request penalties that are clearly beyond the means of the violator. DEQ should consider the ability of a violator to pay a penalty. However, it is important that a regulated entity not use violation of environmental requirements as a way of abetting a financially troubled business. It is unlikely that DEQ would reduce a penalty where an entity refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. A long violation history would demonstrate that less severe measures were ineffective.

The burden of demonstrating inability to pay rests on the violator as it does with any mitigating circumstances. An entity's inability to pay usually will be considered at the compliance conference or settlement stage, and then only if the issue is raised by the violator. If the violator fails to provide sufficient information, the enforcement coordinator should disregard this factor in adjusting the penalty. DEQ uses the US Environmental Protection Agency's ABEL software to calculate a corporation's or partnership's ability to afford civil penalties. This requires submission of three to five years of an entity's federal tax returns. The software assists with determining if the entity can generate sufficient cash flow to pay the penalty while covering ordinary business expenses.

When it is determined that a violator cannot afford the penalty prescribed by this policy, or payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures that DEQ deems more important than the deterrence effect of the penalty (e.g., payment of penalty would preclude proper closure/postclosure), the following options may be considered:

- A delayed payment schedule—such a schedule might be contingent upon an increase in sale or some other indicator of improved business
- An installment payment plan with interest
- Penalty deferral or mitigation contingent upon certain activities to be conducted such as *in-kind* use of violator's time to prepare and present free training to other companies engaged in similar waste-handling activities or informational and other nondirect penalty payment adjustments
- Straight penalty reductions as a last recourse

The amount of any downward adjustment of the penalty depends on the individual financial facts of the case.

### **7.1.5 Other Unique Factors**

This policy allows an adjustment for unanticipated factors that may arise on a case-by-case basis. The enforcement coordinator has discretion to make adjustments by as much as 25% of the gravity-based penalty for such reasons. Adjustments for these factors in the 26%–40% range may be made, but only in unusual circumstances.

Depending on specific enforcement circumstances, DEQ, except as discussed below, will endeavor to find an alternative to a strict penalty assessment if the amount of the penalty would force liquidation of facility assets and the termination of employees. This philosophy allows the violator an economic base to provide operating capital for correction of violations, continue waste management, and conduct cleanup activities as warranted.

Other measures to send a message to the violator and the regulated community may be explored to achieve the same economic sanction as that imposed by a direct penalty assessment. This philosophy does not preclude DEQ from seeking direct penalties that could force facility closure if it is in the best interest of the local community and the state program.

## **7.2 Effect of Settlement**

Idaho Code § 39-4413(1)(c) incorporates the DEQ policy of encouraging settlement of an enforcement action if the settlement is consistent with the provisions and objectives of the HWMA and its regulations. If the violator believes that it is not liable or the circumstances of its case justify mitigation of the penalty proposed in the complaint, Idaho Code § 39-4413(1)(c) allows a compliance conference to present these issues.

In many cases, the fact of a violation will be less of an issue than the amount of the penalty assessed. The burden is on the violator to justify any mitigation of the assessed penalty. The mitigation, if any, of the penalty assessed should follow the guidelines in Section 7.1, “Adjustment Factors.” Any Consent Order that includes an adjustment must include a general statement of the reasons for mitigating the proposed penalty. Specific percentage reductions for individual factors are not included.

## 8 Penalty Computation Worksheet

Entity/Person Name \_\_\_\_\_

Regulation Violated \_\_\_\_\_

Assessments for each violation should be determined on separate worksheets and totaled.

(If more space is needed, attach separate sheet)

### Seriousness of Violation Penalty

1. Potential for Harm \_\_\_\_\_
2. Extent of Deviation \_\_\_\_\_
3. Matrix Cell Range \_\_\_\_\_
  - a. Penalty Amount Chosen \_\_\_\_\_
  - b. Justification for Penalty Amount Chosen  
\_\_\_\_\_
4. Per-Day Assessment \_\_\_\_\_

### Penalty Adjustments Prior to Settlement Negotiations

	Percentage Change*	Dollar Amount
5. Good faith efforts to comply/ lack of good faith	_____	_____
6. Degree of willfulness and/or negligence	_____	_____
7. History of noncompliance	_____	_____
8. Economic benefit of noncompliance	_____	_____
9. Other unique factors	_____	_____
10. Justification for adjustments:	_____	
11. Adjusted Per-Day Penalty (Line 4, plus Lines 5 through 9)		_____
12. Number of Days of Violation:		_____

PENALTY COMPUTATION WORKSHEET (cont'd)

13. Per-Day Penalty Total  
(Lines 11 x 12) \_\_\_\_\_

Penalty Adjustments after Settlement Negotiations

	Percentage Change*	Dollar Amount
14. Good Faith Effort	_____	_____
15. Ability to Pay	_____	_____
16. Other Unique Factors	_____	_____
17. Justification for Adjustments	_____	
18. Total Penalty Amount (Must not exceed \$10,000 per day, per violation)	_____	

\*Percentage adjustments are applied to the dollar amount calculated on Line 4.

## 9 Hypothetical Applications of the Penalty Policy

### Hypothetical Example 1

- (1)(A) Violation: By notification dated August 15, 2017, Company A informed DEQ that it conducts activities at its facility involving hazardous waste. In its notification, Company A indicated that it only generated hazardous waste, in quantities making the company subject to the Large Quantity Generator (LQG) requirements. A 2020 inspection revealed that Company A was also storing hazardous waste and had been since 2018. Company A had stored hazardous waste longer than 90 days without a permit, in violation of Idaho Code § 39-4409. In addition, Company A was in violation of Idaho Code § 39-4411 by failing to notify DEQ that it was storing hazardous waste for greater than 90 days. Failure to notify and operate without a permit constitutes independent and substantially distinguishable violations. Each violation should be assessed separately and the amounts totaled. The inspection indicated that Company A's storage area was secure, and the facility was well managed. However, there were a number of violations of the permitted facility standards. The NOV issued to Company A assessed penalties for statutory and regulatory violations.
- (B) Seriousness:
- (i) Failure to notify:  
Potential for Harm. Moderate—DEQ was prevented from knowing that hazardous waste was stored at the facility. However, because Company A notified DEQ that it was a generator, DEQ did know that hazardous waste was handled at the facility. The violation may have a significant adverse effect on the statutory requirements for implementing the HWMA program.  
Extent of Deviation. Moderate—Although Company A did not notify DEQ that it stored hazardous waste, it did notify the agency that it was a generator. Company A significantly deviated from the requirement, but part of the requirement was implemented as intended.
- (ii) Operating without a permit:  
Potential for Harm. Moderate—Although Company A was operating without a permit or interim status, its facility generally was well managed. However, there were a number of IDAPA 58.01.05.008 *et seq.* (40 CFR 264) violations. This situation may pose a significant likelihood of exposure that may have a significant adverse effect on the statutory requirements for implementing the HWMA program.  
Extent of Deviation. Major—Substantial noncompliance with the requirement because Company A did not notify DEQ that it stored hazardous waste and did not submit a Part A or Part B permit application.
- (C) (i) Failure to notify—Moderate potential for harm and moderate extent of deviation results in a penalty ranging from \$2,000 to \$3,199. The midpoint is \$2,599 (Section 4.3, penalty matrix). (ii) Operating without a permit—Moderate potential for harm and major extent of deviation results in a penalty ranging from \$3,200 to \$4,399. The midpoint is \$3,799 (Section 4.3, penalty matrix ). (iii) Total Penalty: \$6,398 before any adjustments.

**Hypothetical Example 2**

- (2)(A) Violation: Company B failed to prevent unknowing entry of persons onto the active portion of its hazardous waste surface impoundment facility. The fence surrounding the area had several holes (IDAPA 58.01.05.008; 40 CFR 264.14).
- (B) Seriousness:  
Potential for Harm. Major—Some children already have entered the area; potential for harm due to exposure to hazardous waste may be substantial because of the lack of adequate security around the site.  
Extent of Deviation. Moderate—There is a fence, but it has holes. Significant degree of deviation, but part of the requirement was implemented.
- (C) Gravity-Based Penalty: Major potential for harm and moderate extent of deviation results in a penalty ranging from \$6,000 to \$7,999 (Section 4.3, penalty matrix). The midpoint is \$6,999.
- (D) Precomplaint Adjustment: During facility inspection, DEQ discovered that the operator of Company B had been alerted about the above occurrence more than three months earlier but had failed to repair the fence or increase security in that area. The penalty is adjusted upwards 25% for willfulness and/or negligence.  $\$6,999 + 25\% = \$8,748$ . (Penalty calculated using the following Penalty Computation Worksheet.)
- (E) Settlement Adjustment: Company B gave evidence at the compliance conference of labor problems with security officers and delivery delays for a new fence. Company B was cooperative and stated that a new fence had been installed after the NOV issuance and security would be provided for by another company in the future. Although the company was cooperative, its actions were only those required under the regulations. No justification for mitigation for good faith efforts to comply exists. No change in \$8,748 penalty.

## PENALTY COMPUTATION WORKSHEET

Company Name Company BRegulation Violated IDAPA 58.01.05.008 (40 CFR 264.14)

Assessments for each violation should be determined on separate worksheets and totaled.

(If more space is needed, attach separate sheet)

Seriousness of Violation Penalty1. Potential for Harm Major2. Extent of Deviation Moderate3. Matrix Cell Range \$6,000-7,999a. Penalty Amount Chosen \$6,999b. Justification for Penalty (Amount Chosen): Midpoint of Range4. Per-Day Assessment N/APenalty Adjustments Prior to Settlement Negotiations

	Percentage Change*	Dollar Amount
5. Good faith efforts to comply/ Lack of good faith	<u>N/A</u>	<u>N/A</u>
6. Degree of willfulness And/or negligence	<u>25%</u>	<u>\$1,749</u>
7. History of Noncompliance	<u>N/A</u>	<u>N/A</u>
8. Economic Benefit of: Non-compliance	<u>N/A</u>	<u>N/A</u>
9. Other unique factors	<u>N/A</u>	<u>N/A</u>
10. Justification for Adjustment:		

\*Percentage adjustments are applied to the dollar amount calculated on line 4



**Hypothetical Example 3**

- (3)(A) Violation: An inspection of Company C’s hazardous waste land disposal facility revealed that it had failed to implement a groundwater monitoring system as required under IDAPA 58.01.05.009 (40 CFR 265.90) over a two-year period. It failed to install monitoring wells (IDAPA 58.01.05.009; 40 CFR 265.91); to obtain and analyze samples (IDAPA 58.01.05.009; 40 CFR 265.92); to submit an outline of a groundwater quality assessment program (IDAPA 58.01.05.009; 40 CFR 265.93); and to file or submit records (IDAPA 58.01.05.009; 40 CFR 265.94). All of the violations arise from the same set of circumstances. Because Company C did not install wells, no sampling and analysis could occur. Without sampling and analysis, Company C did not have information to prepare a quality assessment program outline, keep records, or submit reports to DEQ. The violations are not independent and substantially distinguishable in this situation (Section 5.1, “Assessing Multiple Penalties”). A single penalty assessment is appropriate, with each section of the regulations violated cited in the complaint.
- (3) Seriousness:
- Potential for Harm. Major—The violation could pose a substantial likelihood of exposure and could have a substantial adverse effect on implementing the HWMA program.
- Extent of Deviation. Major—None of the requirements were implemented as intended.
- (C) Gravity-Based Penalty: Major potential for harm and major extent of deviation results in a penalty ranging from \$8,000 to \$10,000 (Section 4.3, penalty matrix). The midpoint is \$9,000.
- (D) Economic Benefit of Noncompliance: Groundwater monitoring was identified as an area for which an economic benefit component may be significant. Current cost estimates can be obtained from a variety of sources.

**FIRST YEAR COSTS**

Cost of Groundwater Quality Assessment Plan outline and Groundwater Sampling and Analysis Plan (COP)	\$ 5,400
Cost of Well (COW), 1 upgradient and 3 downgradient	\$ 24,100
Cost of Sampling (COS)	\$ 4,400
Cost of Analysis (COA)	\$30,500
Cost of Report (COR), for determining system needs, not report required under IDAPA 58.01.05.009 (40 CFR 265.94)	\$8,600
TOTAL	\$73,000

## SECOND YEAR COSTS

Cost of Sampling and Cost Analysis (COS, COA), assuming no contamination found \$34,900

Assumptions: geology is unconsolidated material; hollow-stem auger drilling; PVC construction material; groundwater sampling by hand bailing; well dug 50 feet deep; estimated costs remained constant over time.

SOP, COW, COR, and first-year COS and COA are delayed costs. Company C eventually will make these expenditures to achieve compliance. Second year and subsequent COS and COA are avoided costs. Company C has permanently avoided incurring these costs.

### Calculation of Economic Benefit Component

For each year of noncompliance (2019 and 2020), the economic benefit component should be calculated using the formula set out in section 6:

$$\text{Economic Benefit} = \text{Avoided Costs} (1-T) + (\text{Delayed Costs} \times \text{Interest Rate})$$

2019 Company C was required to implement its groundwater monitoring system by installing wells, obtaining and analyzing samples at least quarterly, and preparing a quality assessment program outline.

Delayed costs = \$73,000

Avoided costs = \$ 0

IRS interest rate = 5%

Assume T = 0.21

$$\begin{aligned} \text{Economic Benefit} &= \$0 + (\$73,000 \times 5\%) \\ &= \$3,650 \end{aligned}$$

2020 Company C still had not implemented its groundwater monitoring system. In addition, it had not obtained and analyzed samples at least annually or semiannually, depending on the indicator parameter.

Delayed cost = \$73,000

Avoided costs = \$34,900

IRS interest rate – 5%

Assume T = 0.39

$$\begin{aligned} \text{Economic Benefit} &= \$34,900 (1-0.21) + (\$73,000 \times 5\%) \\ &= \$31,221 \end{aligned}$$

Total Economic Benefit = \$3,650 + \$31,221 = \$34,871

Penalty proposed in complaint = Gravity-Based Penalty + Economic Benefit component = \$9,000 + \$34,871 = \$43,871.

Because noncompliance continued over a two-year period, the proposed penalty does not exceed \$10,000 per day of violation.

- (E) Compliance conference: Company C requested a compliance conference. No revision of the stated penalty was made and the proposed amount was paid.

#### Hypothetical Example 4

- (4)(A) Violation: Per Idaho Code § 39-4411(5), DEQ sent a warning letter to Company D requesting that it furnish information relating to hazardous waste generation. The letter required a response to DEQ within 14 calendar days of Company D's receipt of the letter. One month after Company D received DEQ's information request, it submitted a partial record of the requested information. DEQ sent a NOV demanding the missing information. Company D failed to respond to the request.
- (B) Seriousness:  
Potential for Harm. Minor—Based on the nature of the information requested, DEQ determined that Company D's failure to submit information relating to hazardous waste to DEQ as requested would have a relatively low effect on implementing the HWMA program.  
Extent of Deviation. Moderate—Although the company did submit some of the information requested, it significantly deviated from the requirement.
- (C) Gravity-Based Penalty: Minor potential for harm and moderate extent of deviation results in a penalty ranging from \$200 to \$599 (Section 4.3, penalty matrix). The midpoint is \$399.
- (D) Preassessment Adjustments: On two previous occasions, Company D failed to respond completely to requests for the same type of information. In those cases, DEQ also issued NOVs after warning letters with proposed penalties of \$500 each. Both cases resulted in submittal of this information and penalties. The penalty is adjusted upward 25% for degree of willfulness ( $\$399 + 25\% = \$499$ ) to deter Company D from repeated noncompliance with HWMA.
- (E) Settlement Adjustment: Company D failed to convince DEQ that any penalty mitigation (decrease) was justified. Settlement negotiations broke down and the case was filed in District court.

#### Hypothetical Example 5

- (5)(A) Violation: Company E's Part B Permit Application was called in by DEQ in 2020. Company E, a storage and treatment facility, failed to submit its Part B by the date specified. DEQ issued a Notice of Incompleteness requiring submission of a complete Part B within 30 days. DEQ also issued a warning letter stating that failure to submit a complete Part B Application is a violation of IDAPA 58.01.05.012 (40 CFR 270.10) that may result in the

assessment of civil penalties and the initiation of procedures to terminate the facility's interim status. Company E sent DEQ a one-page response several weeks after the date stipulated in the Notice of Incompleteness. The response was seriously incomplete. Company E failed to submit a complete Part B in violation of IDAPA 58.01.05.012.

- (B) Seriousness:  
Potential for Harm. Minor—Inspections of Company E's facility revealed a well managed operation under interim status standards. The violation could have a significant adverse effect on implementing the HWMA program.  
Extent of Deviation. Major—Part B Application was seriously incomplete.
- (C) Gravity-Based Penalty: Minor potential for harm and major extent of deviation results in a penalty ranging from \$600 to \$1,199 (Section 4.3, penalty matrix). The midpoint is \$899.
- (D) Economic Benefit of Noncompliance: Failure to submit or submittal of an incomplete Part B Application has been identified as an area for which an economic benefit component may be significant. (The \$34,000 for drafting of a treatment and storage facility permit is for demonstration only.)

The economic benefit component should be calculated using the formula described in section 6:

$$\text{Economic Benefit} = \text{Avoided Costs} (1-T) + (\text{Delayed Costs} \times \text{Interest Rate}).$$

Failure to submit a complete Part B is a delayed cost. Company E eventually will spend the money to achieve compliance. No avoided costs are associated with this violation. The economic benefit should be calculated for a one-year period. The IRS interest rate for 2020 is 5%.

$$\text{Economic Benefit} = \$0 + (\$34,000 \times 5\%) = \$1,700$$

$$\text{Penalty proposed in complaint} = \text{gravity-based penalty} + \text{economic benefit component} \\ = \$899 + \$1,700 = \$2,599$$

Because noncompliance continued over a period of several months, the proposed penalty does not exceed \$10,000 per-day of violation.

- (E) Settlement Adjustment: At the compliance conference, Company E raised and documented that it was in a poor financial state and would be unable to pay the full penalty. Company E also told DEQ that it intended to cease handling hazardous waste. Because of the company's inability to pay and DEQ's desire that Company E commit available funds into proper closure and postclosure care at the facility, the penalty was reduced to \$0. A Consent Order was issued putting Company E on a schedule for closing its facility according to its approved closure plan.