

**Bold** = new language

~~Strikeout~~ = existing language deleted in this rulemaking

## **TITLE 329 SOLID WASTE MANAGEMENT DIVISION**

### **DRAFT RULE**

LSA Document #24-48

### **DIGEST**

Adds 329 IAC 1-3 and 329 IAC 9-11 concerning civil penalties for violations of solid waste management rules and laws and underground storage tank rules and laws. Effective 30 days after filing with the Publisher.

### **HISTORY**

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Date of First Hearing: April 10, 2024.

### **329 IAC 1-3; 329 IAC 9-11**

### **DRAFT RULE**

SECTION 1. 329 IAC 1-3 IS ADDED TO READ AS FOLLOWS:

#### **Rule 3. Civil Penalties**

#### **329 IAC 1-3-1 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 shall be considered as a separate violation for the purpose of calculating a civil penalty if it results from independent acts or compliance problems and is distinguishable from any other violation cited in the same notice of violation.
  - (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.

(d) Relevant portions of this rule shall be applied in conjunction with 329 IAC 9-11 to calculate penalties for violations set forth in IC 13-23-14-2 and IC 13-23-14-3.

*(Solid Waste Management Division; 329 IAC 1-3-1)*

### **329 IAC 1-3-2 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) "Notice of violation" or "NOV" means the notice issued by the department to an alleged violator pursuant to 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.

*(Solid Waste Management Division; 329 IAC 1-3-2)*

**329 IAC 1-3-3 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) in accordance with 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 that corresponds to the violation's:**

- (1) potential for harm to human health or the environment, or to a regulatory program as described in subsection (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:**

**(1) the likelihood and degree of exposure of persons or the environment to pollution;**  
**or**

**(2) the 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 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. (*Solid Waste Management Division; 329 IAC 1-3-3*)

### 329 IAC 1-3-4 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 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 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 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 recalculate a civil penalty in accordance with this rule when unanticipated circumstances arise, such as additional evidence that leads to a significant reevaluation of the facts surrounding a violation.

*(Solid Waste Management Division; 329 IAC 1-3-4)*

### **329 IAC 1-3-5 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:**

- (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 in or failure to install equipment needed to meet discharge control standards.**

- (2) Delay in or 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) Delay in or failure to obtain 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 in or failure to properly operate and maintain existing control equipment.
- (3) Delay in or failure to employ enough adequately trained staff.
- (4) Delay in or 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. The department shall consider information that is verifiable. (*Solid Waste Management Division; 329 IAC 1-3-5*)

### **329 IAC 1-3-6 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.

(Solid Waste Management Division; 329 IAC 1-3-6)

SECTION 2. 329 IAC 9-11 IS ADDED TO READ AS FOLLOWS:

**Rule 11. Determining Penalties for Violations**

**329 IAC 9-11-1 Applicability**

**Authority: IC 4-22-2; IC 13-14-9; IC 13-30-4-1**

**Affected: IC 13-23-14**

**Sec. 1. (a) This rule applies to a person that violates a rule, requirement, or standard as described in IC 13-23-14.**

**(b) Penalties consist of the following two (2) components:**

**(1) A gravity based portion to penalize the tank owner or operator for the violation described in section 2 of this rule.**

**(2) An economic benefit portion to recoup any profit the tank owner or operator realized by the violation as described in section 3 of this rule.**

**(c) In addition to the penalties described in this rule, the department may follow and apply, as applicable, the factors and considerations in the civil penalty provisions in 329 IAC 1-3. (Solid Waste Management Division; 329 IAC 9-11-1)**

**329 IAC 9-11-2 Gravity based penalty**

**Authority: IC 4-22-2; IC 13-14-9; IC 13-30-4-1**

**Affected: IC 13-23-14**

**Sec. 2. (a) The department shall determine the gravity based penalty for a violation as follows:**

**(1) The department shall assess a penalty sufficient to remove an incentive to operate in violation based on the penalty matrix in subsection (b).**

**(2) The penalty assessed under subsection (b) is multiplied by the number of violative tanks.**

**(3) The penalty determined under subdivision (2) is multiplied by the days of noncompliance multiplier described in subsection (c).**

**(b) The department shall assess penalties sufficient to remove an incentive to operate in violation based on the following penalty matrix:**

Potential for Harm	Extent of Deviation from Requirement		
	Major	Moderate	Minor
Major	\$10,000 to \$8,000	\$8,000 to \$6,000	\$6,000 to \$5,000
Moderate	\$5,000 to \$4,000	\$4,000 to \$3,000	\$3,000 to \$2,000
Minor	\$2,000 to \$1,400	\$1,400 to \$800	\$800 to \$400

**(c) To produce the base civil penalty, the department shall multiply the assessed penalty from subsection (b) by the:**



- (1) number of tanks in violation; and
- (2) following multiplier associated with the number of days in noncompliance:

Days of Noncompliance	Multiplier
1 to 90	1.00
91 to 180	1.25
181 to 270	1.50
271 to 365	1.75
366 and over	2.00

(d) The resulting base civil penalty from subsection (c) may be adjusted upward or downward based on the following adjustment factors to produce the gravity based penalty:

- (1) Actions before the violation.
- (2) Actions after the violation.
- (3) History of noncompliance.
- (4) Ability to pay.
- (5) Cost of enforcement action by the department.
- (6) Unanticipated circumstances, such as additional evidence that leads to a significant reevaluation of the facts surrounding a violation.

*(Solid Waste Management Division; 329 IAC 9-11-2)*

**329 IAC 9-11-3 Economic benefit of noncompliance**

**Authority:** IC 4-22-2; IC 13-14-9; IC 13-30-4-1

**Affected:** IC 13-23-14

**Sec. 3. If an owner or operator has derived significant savings and competitive advantage by their failure to comply with requirements, the amount of economic benefit gained by the owner or operator from noncompliance is calculated and added to the gravity based penalty.** *(Solid Waste Management Division; 329 IAC 9-11-3)*

**329 IAC 9-11-4 Stipulated penalties**

**Authority:** IC 4-22-2; IC 13-14-9; IC 13-30-4-1

**Affected:** IC 13-23-14

**Sec. 4. In addition to the civil penalty, an order may stipulate that an owner or operator must pay additional penalties if certain actions intended to remediate or correct the violation are not performed in a timely or satisfactory manner.** *(Solid Waste Management Division; 329 IAC 9-11-4)*