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**BY EMAIL ONLY**

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Re: Public comments on

LSA Doc. #24-46: Title 326 Civil Penalties (Air Pollution Control Laws)  
LSA Doc. #24-47: Title 327 Civil Penalties (Water Pollution Control Laws)  
LSA Doc. #24-48: Title 329 Civil Penalties (Solid Waste Management & UST Laws)

Dear Mr. Engdahl,

The Conservation Law Center, joined by the organizations listed below, (collectively “Commenters”) submit these comments on the above-referenced proposed regulations setting forth how the Indiana Department of Environmental Management (“IDEM”) will calculate and impose civil penalties for violations of Indiana’s air, water, solid waste management, and underground storage tank (“UST”) laws.

The proposed regulations are mandated by recent legislation intended to make fees, fines, and civil penalties more transparent and provide “sufficient certainty” to be able to “evaluate whether the amount was reasonable.” We submit these comments for the purpose of clarifying the proposed regulations so that they achieve the intended statutory goals. Our comments include three general concerns that apply to all the proposed regulations. In addition, we include comments and propose edits on each subsection of 326 IAC 1-8, which is the proposed regulation for imposing civil penalties for violations of Indiana’s air pollution control laws. These specific comments apply equally to identical language in 327 IAC 1-2, 329 IAC 1-3, and 329 IAC 9-11, but adjusted in a few provisions that relate specifically to water pollution control and solid waste management laws.

## **Background and Purpose of the Proposed Regulations**

Last year, the Indiana General Assembly passed House Bill 1623 to improve transparency, increase oversight, and simplify the rulemaking process. Section 15 of HB 1623 requires that any civil penalties imposed by an agency be included in the Indiana Administrative Code. *See* Ind. Code § 4-22-2-19.6. The new law applies to all agencies, not just IDEM. We support transparency in rulemaking and offer these comments in support of the legislative intent.

The new law requires that for “each fee, fine, or civil penalty imposed by an agency . . . a rule must describe the circumstances for which the agency will assess a fee, fine, or civil penalty and set forth the amount” as either (1) a specific dollar amount, (2) a formula, or (3) a range of potential dollar amounts. Ind. Code § 4-22-2-19.6(b). To comply with this new statutory requirement, IDEM proposes four regulations for determining civil penalties for violations of Indiana’s air, water, solid waste management and UST laws. IDEM’s proposed rules are best described as “a range of potential dollar amounts” utilizing factors to set a specific penalty amount. In doing so, IDEM seeks “to encourage compliance, penalize violations, and recover enforcement costs of Indiana’s environmental laws and rules.” Regulatory Analysis, at 1.<sup>1</sup>

Section 15 of HB 1623 requires IDEM to promulgate regulations that provide transparency and certainty in the imposition of civil penalties for violations of Indiana’s environmental laws and rules. Our comments are aimed primarily at clarifying the new regulations to provide the transparency and certainty required by the new legislation. To effectively “encourage compliance, penalize violations, and recover enforcement costs,” the new rules must ensure that businesses and individuals understand the civil penalty to be imposed for polluting or threatening to pollute Indiana’s environment. Deterrence is achieved through clear penalties that are at least greater than the economic benefit of the violation. We note that this may not always be possible because civil penalties for violations of Indiana’s environmental laws were statutorily capped at \$25,000 per day back in 1996, and the state legislature has not adjusted that amount since to reflect inflation.<sup>2</sup> As such, it is even more critical for IDEM and the Environmental Rules Board to adopt regulations for imposing civil penalties that will clearly deter future violations and encourage compliance within the statutory limit.

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<sup>1</sup> The proposed regulations and Regulatory Analyses for LSA Doc. Nos. 24-46, 24-47, and 24-48 are virtually identical, with the exception of the civil penalty rule for violation of UST laws and regulations. Unless otherwise specified, our comments cite to the proposed regulation and Regulatory Analysis for LSA Doc. #24-46 related to air pollution control laws and rules, but our comments are directed equally to the other proposed regulations.

<sup>2</sup> U.S. EPA’s civil penalties are routinely adjusted for inflation as required by the Federal Civil Penalties Adjustment Act. 28 U.S.C. § 2461 note, Pub. L. 114-74 (see <https://www.congress.gov/114/plaws/publ74/PLAW-114publ74.pdf>). IDEM should ask the General Assembly to pass legislation giving it similar authority to adjust for inflation.

Although not part of the proposed regulations, we take issue with Section III of the Regulatory Analysis in which IDEM states that the “parties impacted by this rule are entities who violate the state’s environmental laws and rules.” *See* Regulatory Analysis, at 1. This is an overly narrow view of the regulations’ impacts. Businesses that operate lawfully in the same market as violators are impacted by competitors with an unfair advantage due to their noncompliance. Imposing penalties that “encourage compliance” and are meted out in a consistent and fair manner ensures a fair market that benefits businesses and consumers alike. In addition, members of the public who are exposed to excess pollution or to violations that increase the possibility of such exposure are greatly impacted when civil penalties do not deter future violations or are inconsistently or unfairly assessed. In short, every Hoosier benefits when regulated entities routinely comply with state laws. To ensure that that these proposed regulations “encourage compliance, penalize violations, and recover enforcement costs of Indiana’s environmental laws and rules,” we offer several comments to clarify the new rules and add greater certainty in their calculation.

### **General Comment 1: Revise Indiana’s Civil Penalty Rules Based on Past Practice**

According to the Regulatory Analyses for these regulations, IDEM is merely codifying its existing civil penalty policy, Non-rule Policy Document ENFORCEMENT-99-0002-NPD, adopted in 1999. For the civil penalty regulation applicable to air pollution control laws, IDEM views it as not making any substantive changes to the policy.

From a policy standpoint, this rulemaking will *not* make any substantive changes to rules and policies. This rulemaking’s sole purpose is to ensure the agency’s compliance with IC 4-22-2-19.6 by incorporating IDEM’s civil penalty policy into the Indiana Administrative Code. This specific rulemaking incorporates the civil penalty policy as it relates to air pollution control laws and rules. This policy has been in place for 25 years, and IDEM is not making any substantive changes to this policy.

From an administrative standpoint, this rulemaking is *not* making any changes to existing rules; rather, it adds a new civil penalty rule to 326 IAC 1, the content of which is an existing civil penalty policy. Again, this rulemaking will ensure that the agency’s process for assessing civil penalties is compliant with IC 4-22-2-19.6.

IDEM Regulatory Analysis LSA Doc. #24-46, § IV (Feb. 7, 2024) (emphasis in original).<sup>3</sup>

As discussed below, we disagree that the proposed regulations make no substantive changes to IDEM’s civil penalty policy. By largely copying language from its non-rule policy

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<sup>3</sup> Identical language is contained in IDEM Regulatory Analysis LSA Doc. #24-47 specific to “water pollution control laws and rules” and in LSA Doc. and #24-48 specific to “solid waste management laws and rules and UST laws and rules.”

that applied to all environmental laws into four distinct regulations that each apply only to one media, as IDEM did here, it has created several confusing provisions. For example, in calculating “delayed costs” for purposes of determining the economic benefit of noncompliance with solid waste management laws, the proposed regulations would have IDEM consider the “[f]ailure to install equipment needed to meet discharge or emission control standards.” 329 IAC 1-3-5(d)(1). But that makes little sense in the context of solid waste regulation because “discharge standards” are established in water pollution control laws, and emission control standards are part of air pollution control laws – neither of which apply to violations of solid waste management laws. At minimum, the proposed regulations should be revised to address these inconsistencies and make clear that they apply to the specific environmental laws to which the civil penalties apply.

More importantly, IDEM has overlooked an opportunity to clarify, update and improve upon its process for calculating civil penalties. Promulgating regulations is a time-consuming and cumbersome process. Given that IDEM is nevertheless obligated to go through this rulemaking process, it should take this opportunity to do more than codify its existing policy that has been unchanged for 25 years. Instead, IDEM should reflect on its own extensive enforcement experience to identify edits that would better serve the purpose of the regulations and the types of violations incurred under each of the three titles. According to IDEM’s enforcement database, in 2023 alone it issued 14 Commissioner’s Orders and 342 Agreed Orders. In addition, there is caselaw related to the non-rule policy that could inform the development of these regulations. The Commenters did not attempt an analysis of IDEM’s past practices, but we encourage the department to do so to identify ways to improve transparency and certainty as to the range of civil penalties for certain violations, thereby improving their consistency and deterrent effect.

## **General Comment 2: Clearly Define the Extent and Exercise of IDEM’s Discretion**

In codifying its existing penalty policy, IDEM has sought to maintain virtually unfettered discretion by implication. While the existing policy gave enforcement staff “discretion” and relied in part on their “judgement,” these terms are nowhere to be found in the proposed regulations used to calculate civil penalties. Removal of these terms, by themselves, is insufficient to comply with the statute’s mandate that penalties be calculated with sufficient “certainty.” IDEM’s judicious use of the word “may” throughout the regulations and its use of broad, undefined terms greatly reduce the certainty required by law.

We do not recommend eliminating discretion in the regulations. Environmental laws are complex precisely because the industrial processes creating regulated pollutants and their effect on human health and the environment are very complicated. There are many factors that need to be considered in evaluating the seriousness of violations and size of the penalty needed to ensure future compliance. IDEM’s enforcement staff and management are the only ones capable of making such determinations on a regular basis. But if the limits of that discretion are not clearly defined, as we suggest in our specific comments below, these regulations will fail to satisfy their statutory intent to provide sufficient certainty with respect to the exercise of IDEM’s discretion in calculating civil penalties.

### General Comment 3: Provide Greater Clarity in Penalty Application

IDEM's prior non-rule policy document did not contain a definitions section. Tacitly recognizing the need for greater clarity and certainty, IDEM's proposed regulations provide definitions for four terms. We recommend adding additional definitions for terms that are inherently nonspecific such as "substantial likelihood" and "cooperation." Some terms that are incapable of a more precise definition, such as "other unique factors," could benefit from examples that fit or do not fit within the meaning of the term. Consistent with our recommendation that IDEM revise these regulations based upon an analysis of past enforcement experience, we recommend using examples to clarify the proper application of these regulations based upon past experience. *See, e.g.,* U.S. EPA, "Clean Air Act Stationary Source Civil Penalty Policy" (Oct. 25, 1991), at 24.<sup>4</sup> Although every enforcement action presents a unique set of facts, providing examples of cases that fit or do not fit within the meaning of various terms will provide greater certainty and help "ensure that civil penalties are assessed in a consistent and fair manner."

#### Specific Comments on the Proposed Civil Penalties Rule for Air Pollution Control Laws

*[Our comments are provided in italics below each subsection of the proposed rule.]*

#### **326 IAC 1-8-1 General provisions**

##### **Sec. 1.**

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

*Presumably, this subsection is included to comply with the statutory requirement that the "rule must describe the circumstances for which the agency will assess a . . . civil penalty." Ind. Code § 4-22-2-19.6(b). To more clearly satisfy this purpose and to be consistent with the "Scope of the Rule" as stated in the Regulatory Analysis, this subsection should be rewritten to read:*

***"(a) The department shall assess civil penalties consistent with this Rule when imposing civil penalties as provided under IC 13-30-4."***

**(b) The department may:**

- (1) impose a civil penalty using an alternative approach; or**
- (2) decide not to impose a civil penalty for a violation.**

*Delete this entire subsection. As the first actionable subsection, it appears to offer the department only two choices when imposing a civil penalty: (1) an undefined "alternative approach," or (2) no penalty. The first of these fails to set forth the manner in which a penalty will be calculated as required by Ind. Code § 4-22-2-19.6(b). If such an "alternative approach" exists and has been applied over the past 25 years of enforcement experience, the regulated community and the broader public is entitled to be informed of any such alternative. This is precisely the transparency called for in HB 1623. As for the second option listed here, a decision*

<sup>4</sup>

Available at <https://www.epa.gov/sites/default/files/documents/penpol.pdf>.

*to not impose a civil penalty, is already available under the provisions of Sections 3 through 5, as limited by Ind. Code § 13-30-4-3.*

- (c) A civil penalty, as part of a unilateral order or court action, is only limited in amount by [IC 13-30-4](#) or as otherwise limited by law.**

*Delete this entire subsection because it serves only to identify statutory limitations on the amount of a civil penalty. Those limitations exist with or without this subsection. Department enforcement officials should be knowledgeable about statutory limits when imposing civil penalties. If needed, this provision should be placed in commentary and not in the rule.*

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

*Delete this entire subsection. This rule applies to civil penalties imposed on violations of air pollution control laws. It has no application to rules meant to impose civil penalties for violations of UST laws. This subsection is appropriate for 329 IAC 1-3, but should not be included in 326 IAC 1-8 or 327 IAC 1-2.*

- (e) In situations where several violations have occurred, the following applies:**
- (1) Separate violations may be grouped for the purpose of applying this rule.**
  - (2) Each violation or group of violations is considered as a separate violation for the purpose of calculating a civil penalty if it results from independent acts or compliance problems and is distinguishable from any other violation cited in the same notice of violation.**
  - (3) The total civil penalty assessed in an enforcement case may include penalties for several violations or groups of violations, as calculated under this rule.**

*Move this subsection to the end of this section. Include examples to help clarify when and how separate violations should or should not be grouped. Definitions or examples could also help explain what is meant by “independent acts or compliance problems.” In addition, subsection (e)(3) fails to adequately describe the manner in which a penalty will be calculated as required by Ind. Code § 4-22-2-19.6(b). To correct this, it should read:*

***“(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.”***

- (f) A civil penalty is the figure resulting from the following calculation:**
- (1) The base civil penalty is determined dependent on the severity and duration of the violation as described in section 3 of this rule.**
  - (2) The base civil penalty is adjusted for special factors and circumstances as described in section 4 of this rule.**
  - (3) The economic benefit of noncompliance is considered and added as described in section 5 of this rule.**

*Move this subsection to just below subsection (1)(a). Add a fourth subsection to read as follows:*

***“(4) Offset for any qualified supplemental environmental project as described in section 6(a) of this rule.”***

### 326 IAC 1-8-2 Definitions

**Sec. 2. The following definitions apply to this rule:**

- (1) "Avoided costs" means expenditures that are nullified by the violator's failure to comply and never incurred. The economic benefit of avoided costs equals the cost of complying with the requirement from the time of violation to compliance, less any tax savings.**
- (2) "Delayed costs" means expenditures that have been deferred by a violator by failing to comply with the requirements. Delayed costs are the equivalent of capital costs. The economic benefit for delayed costs includes the amount of interest on the unspent money that reasonably was able to be earned by the violator during noncompliance.**
- (3) "Prior violation" means an act or omission for which the violator has previously been given written notification, however informal, that the department or U.S. EPA believes a violation exists, or for which an enforcement response from the department or U.S. EPA has occurred, including a:
  - (A) notice of violation;**
  - (B) warning or violation letter;**
  - (C) complaint;**
  - (D) consent agreement; or**
  - (E) final order.****
- (4) "Qualified supplemental environmental project" means an environmentally beneficial project that improves, protects, or reduces risks to public health or the environment, and that a regulated entity agrees to undertake in further settlement of an enforcement action, but that the regulated entity is not otherwise legally required to perform.**

*The definitions for "avoided costs" and "delayed costs" apply to determining the economic benefit of noncompliance in section 5. That section requires the department to use a model to estimate economic benefit "such as U.S. EPA's Economic Benefit model." To add clarification, these first two definitions should reference the U.S. EPA's user's manual for the current version of the BEN model for examples of how these terms are applied.<sup>5</sup> Commenters do not recommend any changes to the third and fourth definitions.*

### 326 IAC 1-8-3 Base civil penalty

**Sec. 3.**

**(a) A base civil penalty is determined by the following:**

- (1) To determine the seriousness of a violation, the department considers the following factors based on the matrix in subsection (f):**
  - (A) The potential for harm to human health or the environment, or to a regulatory program.**
  - (B) The extent of deviation from a statutory, rule, or permit requirement.**

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<sup>5</sup> The BEN model and its user's manual are available at:  
<https://www.epa.gov/enforcement/penalty-and-financial-models>.

- (2) The matrix penalty is multiplied by the number of days of violation as described in subsection (g).**
- (3) The resulting figure is the base civil penalty.**

*Subsection (a) is based upon, but deviates considerably from, Section II of IDEM's non-rule civil penalty policy. To clarify its purpose, Commenters recommend revising this entire subsection to read as follows:*

***“(a) A base civil penalty is calculated by selecting a range of penalties from the matrix in subsection (e) and multiplying it by a number that reflects the number of days of violation as described in subsection (f).”<sup>6</sup>***

- (b) The civil penalty matrix evaluates the relationship of the potential for harm and extent of deviation from a requirement to a violation based on the following:**
  - (1) The likelihood and degree of exposure of persons or the environment to pollution.**
  - (2) The degree of the adverse effect of noncompliance on the statutory or regulatory purposes or procedures for implementing the program.**

*Subsection (b) is based upon, but deviates considerably from, Section III.A of IDEM's non-rule civil penalty policy. To clarify its purpose, Commenters recommend revising this entire subsection to read as follows:*

***“(b) In calculating the base civil penalty, the range of penalties to be selected from the penalty matrix in subsection (e) is that 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***
- (2) Extent of deviation from a statutory, rule, or permit requirement as described in subsection (d).”***

- (c) The department shall evaluate whether the potential for harm is major, moderate, or minor in a particular situation based on the following factors:**
  - (1) Amount of pollutant.**
  - (2) Toxicity of pollutant.**
  - (3) Sensitivity of the environment.**
  - (4) Sensitivity of the human population.**
  - (5) Length of time of exposure.**
  - (6) Size of the violator.**
- (d) The degree of potential harm represented by each category is defined as follows:**
  - (1) For a major violation:**
    - (A) the violation poses a substantial likelihood or degree of exposure to pollution; or**
    - (B) the actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the program.**
  - (2) For a moderate violation:**
    - (A) the violation poses a significant likelihood or degree of exposure to pollution; or**

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<sup>6</sup> Commenters recommend combining subsections (c) and (d), which will move the matrix from (f) to (e) and days of violation from (g) to (f).



- (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.

*Subsections (c) and (d) both relate to the “potential for harm” criteria for selecting a range of penalties in the penalty matrix. As such, we recommend combining these two subsections in a manner that helps explain how they are related as applied to a particular violation. In addition, we recommend adding definitions, examples, or key criteria to guide selection of determining whether a violation is major, moderate, or minor. The following is Commenters’ recommendation to revise these two subsections consistent with the rule’s goals and IDEM’s prior non-rule policy document:*

***“(c) In selecting a penalty range from the penalty matrix, the department shall select a “potential for harm” row that reflects the violation’s potential for harm to human health or the environment, or, where there is minimal or no potential for harm to human health or the environment, the violation’s potential for harm to a regulatory program.***

- (1) A violation that has the potential for harm to human health or the environment, regardless of whether actual harm occurs, should be considered:***
  - a. “Major” if the violation poses a substantial likelihood or degree of exposure to air pollution;***
  - b. “Moderate” if the violation poses a significant likelihood or degree of exposure to air pollution; and***
  - c. “Minor” if the violation poses a relatively low likelihood or degree of exposure to air pollution.<sup>7</sup>***
- (2) A violation that has the potential for harm to only a statutory or regulatory program, regardless of whether actual harm occurs, should be considered***
  - a. “Major” if the violation has or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the program;***
  - b. “Moderate” if the violation has or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the program;***
  - c. “Minor” if the violation has or may have an adverse effect on the statutory or regulatory purposes or procedures for implementing the program.***
- (3) In evaluating whether a potential for harm is “major,” “moderate,” or “minor,” the department shall consider the following six factors:***
  - a. The amount of air pollutant that was or could have been released into the atmosphere.***

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<sup>7</sup> The rule should define numerically what is meant by “substantial” and “significant.” When referring to likelihood, these terms are often given percentages of “greater than 50%” and “greater than 5%” respectively. Commenters recommend that IDEM should provide a definition consistent with its past practice or understanding of its existing non-rule policy document. In addition, examples of each category would be particularly helpful here.

- b. The toxicity of the air pollutant that was or could have been released into the atmosphere.*
- c. The length of time over which the air pollutant was or could have been released into the atmosphere.*
- d. The sensitivity of the environment into which the air pollutant was or could have been released, including whether the local environment is in attainment or nonattainment for the pollutant.*
- e. The sensitivity of the human population most likely to be exposed to the air pollutant which was or could have been released, including the size of the population, the age of that population if a particular age group is sensitive to the pollutant, and the incidence of adverse health consequences in that population if the pollutant is known to exacerbate that health condition.*
- f. The size of the violator as measured by its potential to emit that air pollutant and/or its current net income or asset valuation.”*

(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.

*Subsection (e) should be changed to (d). The above comments recommending definitions and examples apply equally to this subsection’s terms. Commenters recommend using percentages to define an exceedance of an emission limit as major, moderate, or minor (e.g., A minor exceedance is 1-X% over the limit; a moderate exceedance is X-Y% over the limit; and a major exceedance is more than Y% over the emission limit).*

(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.

*Subsections (f), (g), and (h) should be renumbered (e), (f), and (g) if subsections (c) and (d) are combined. Commenters do not recommend any changes to the language.*

**326 IAC 1-8-4 Penalty adjustment factors**

**Sec. 4.**

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

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

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

*Commenters do not recommend any changes to the language in subsections (a) or (b).*

**(c) The department may adjust a base civil penalty up or down by up to fifty percent (50%) based on an assessment of the degree to which a violator is able to anticipate or prevent a violation, using the following factors:**

- (1) How much control the violator had over the events constituting the violation.**
- (2) The violator's ability to foresee the events constituting the violation.**
- (3) Whether the violator took reasonable precautions against the events constituting the violation.**
- (4) Whether the violator knew or should have known of the hazards associated with the conduct.**
- (5) The degree to which the violator knew or should have known of the statutory, rule, or permit requirement that was violated.**

*Commenters recommend inserting the language from IDEM's non-rule policy at the end of subsection (c)(5): "Lack of knowledge of a legal requirement will not be used as a basis to reduce the penalty." In other words, factor (c)(5) may be used to adjust the penalty upwards if, for example, the violator has repeatedly been notified of the requirement, but the factor cannot be used to adjust the penalty downwards. We also recommend that this subsection limit its adjustment to no more than 25% of the base civil penalty to add greater certainty to the civil penalty calculation and to avoid unreasonably high or low penalties due to the application of multiple adjustments.*

**(d) Action or inaction by the violator after a violation, to limit real or potential harm or exposure, may either decrease or increase the civil penalty amount by up to fifty percent (50%) of the base civil penalty, and is determined based on the following actions by the violator:**

- (1) Promptly reporting noncompliance if not otherwise required by law.**
- (2) Promptly correcting environmental problems in conjunction with other good faith efforts.**

- (3) The amount of control the violator had over how quickly the violation was remedied, and the degree and timeliness of cooperation exhibited by the violator in resolving an enforcement action.**

*Violators are obligated to report noncompliance. IDEM's compliance enforcement relies on self-reported violations. Moreover, violators are obligated to mitigate the harm caused by noncompliance. As such, these first two subsections would rarely warrant a decrease in civil penalty and the rule should be revised to reflect this. Commenters recommend that subsection (d)(3) be separated into two separate subsections (3) and (4) because cooperation is distinct from the other actions. Again, IDEM should expect all violators to come into compliance expeditiously and negotiate in good faith, so these latter two actions require exceptional efforts to justify mitigation of the penalty. Examples would be helpful in defining what actions or inactions taken by the violator after a violation warrant an increase or decrease in the civil penalty. Finally, for the reasons described above, we recommend that this subsection limit its adjustment to no more than 25% of the base civil penalty.*

- (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.**

*Commenters recommend providing examples of "other relevant factors" that may be considered in subsection (e)(5).*

- (f) A violation is considered similar to a prior violation if the previous enforcement response from the department or U.S. EPA should have alerted the violator to a particular type of compliance problem. A prior violation of the same or comparable requirement constitutes a similar violation.**
- (g) The department shall adjust a penalty toward the lower end of the range if a prior violation was handled in an informal manner, such as a warning letter, and toward the higher end of the range if a prior violation was handled in a formal manner, such as a notice of violation or an agreed order.**

*Commenters do not recommend any changes to the language in subsections (f) or (g).*

- (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.**

*A violator's ability to pay may be the subject of considerable disagreement, particularly when the violator is an individual or a privately-held company that is not required to publicly disclose its income and assets. Commenters strongly recommend identifying examples of the kinds of documentation that will be considered "acceptable and sufficient" under subsection (h)(1)(A). Placing the documentation requirement in the regulation will avoid considerable argument over the adequacy of the financial information provided. The types of documentation generally considered acceptable can be found in U.S. EPA's guidance document related to ability to pay.<sup>8</sup> In addition, to add greater clarity to the procedure and standard to be used for determining a violator's ability to pay, Commenters recommend editing subsection (h)(1) to read: "A violator who raises an ability to pay the civil penalty has the burden of providing information to demonstrate extreme financial hardship."*

- (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.**

*Commenters do not recommend any changes to the language in subsection (i).*

- (j) The department may consider other unique factors for flexibility in responding to unanticipated circumstances or information that arise after the calculation and assessment of a civil penalty, such as the following:**
  - (1) The need to recalculate a civil penalty because of the need to collect and evaluate additional evidence that leads to a significant reevaluation of the facts surrounding a violation.**
  - (2) Other unforeseen circumstances or information that may be resolved through the application of this adjustment factor.**

*Commenters recommend deleting this subsection because it is vague and ill defined. It appears to allow IDEM complete and unfettered discretion in the imposition of a civil penalty in negotiations with a violator. As such, this provision would violate the statutory requirement to state "the factors the department will utilize to set a specific dollar amount in an individual case with sufficient certainty" such that a reviewing agency or court "can evaluate whether the amount was reasonable." Ind. Code § 4-22-2-19.6(b)(3). If, based on its prior experience, IDEM needs additional enforcement discretion, it should identify where and how that discretion will be utilized in calculating a civil penalty. If "other unique factors" routinely arise in IDEM's enforcement matters, they are not "unique" and could be set out in separate adjustment provisions or as examples in existing provisions.*

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<sup>8</sup> See U.S. EPA, "Guidance on Determining a Violator's Ability to Pay a Civil Penalty" (Dec. 16, 1986) (available at <https://www.epa.gov/sites/default/files/documents/civilpenalty-violators.pdf>).

**326 IAC 1-8-5 Economic benefit of noncompliance**

**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.**

*The term “significant” as used in this subsection should be defined or clarified by an explanatory phrase. If it is meant to be any benefit greater than \$1,000, as suggested in subsection (b)(2) below, this subsection should so state. Alternatively, Commenters recommend that this subsection simply delete the final phrase “when a violation results in significant economic benefit to the violator” thus requiring an economic benefit to be calculated in every case. Whether it must be applied as part of the penalty is the subject of subsection (b).*

- (b) The department shall consider the economic benefit of noncompliance, but may disregard it if it is:**
- (1) difficult to quantify; or**
  - (2) calculated to be less than one thousand dollars (\$1,000).**

*The term “difficult to quantify” is too vague to provide the clarity and transparency required by HB 1623. Considering that the rule recommends using U.S. EPA’s BEN model, a user-friendly economic benefit model that can be downloaded for free onto any computer, Commenters recommend deleting subsection (b)(1). If this subsection remains, IDEM should clarify what is intended by a definition or by examples of economic benefits that are difficult to quantify.*

- (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.**

*The economic benefits that may be achieved through noncompliance with environmental laws have been analyzed and detailed by economists.<sup>9</sup> This subsection and subsections (d) and (e) serve more to provide a description to the regulated and general public as to what this includes. We recommend expanding this subsection slightly as follows:*

- “(c) The department shall calculate the economic benefit of noncompliance by considering all economic benefits of the commission or omission, including:**
- (1) Benefits from delayed costs as described in subsection (d).**
  - (2) Benefits from avoided costs as described in subsection (e).**

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<sup>9</sup> See, e.g., U.S. EPA, “Identifying and Calculating Economic Benefit that Goes Beyond Avoided and/or Delayed Costs,” (May 25, 2003); U.S. EPA, “An Advisory of the Illegal Competitive Advantage (ICA) Economic Benefit (EB) Advisory Panel of the EPA Science Advisory Board,” (Sept. 7, 2005).

***(3) Any other benefits, such as profits or increased market share from a startup period before obtaining a required permit.”***

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

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

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

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

*Commenters recommend that subsections (d) and (e) be revised to eliminate terms and provisions unrelated to air pollution control laws. This includes deleting the terms “discharge” and “disposal” which would appear to relate to water pollution and solid waste management laws, respectively. This would also include deleting subsections (d)(4) and (e)(5) entirely. Commenters also recommend inserting the phrase “delay in or” prior to each use of the phrase “failure to.”*

**(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.**

*Commenters recommend mandating the use of U.S. EPA's BEN model unless the department can justify the use of an alternative basis for making this calculation.*

**(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.**

*Commenters recommend adding the following sentence at end of this subsection: “To alter its own calculation of economic benefit, the department may only consider documentation that can be verified as accurate, such as certified accounting records.*

**326 IAC 1-8-6 Other penalty considerations**

**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.**

*As written, this subsection would appear to allow all of a civil penalty to be offset by a qualified supplemental environmental project of any size. Commenters do not believe that is what is intended. To provide some limitation on the amount of the offset and the manner in which the project's cost is used to calculate the offset, Commenters recommend revising this subsection as follows:*

- “(a) A negotiated order assessing a civil penalty under this rule may contain a provision that allows not more than 25% of the civil penalty calculated under this rule to be offset by a qualified supplemental environmental project. The total amount of the offset shall be no more than 80% of the violator’s cost of implementing the 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.**

*Commenters do not recommend any changes to the language in this subsection.*

**Specific Comments on Civil Penalties for  
Water Pollution Control and Solid Waste Management Laws**

*As these proposed regulations are virtually identical to the proposed regulation for Air Pollution Control Laws, our comments are identical with very minor exceptions unique to water pollution control and solid waste management laws. See, e.g., Subsections (1)(d), (5)(d), and 5(e).*

**Specific Comments on Civil Penalties for UST Laws**

*IDEM's proposed regulation to calculate civil penalties for violation of UST laws, 329 IAC 9-11, is naturally narrower and more certain than the broad regulations that must address violations of the more expansive air, water, and solid waste laws. Commenters generally agree with the structure and content of these rules with only the following recommendations:*



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March 15, 2024

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*Sec. 2: Commenters encourage IDEM to include examples of the application of the gravity determinations.*

*Subsection 2(d): Commenters recommend including a limit of no more than 50% adjustment to the base civil penalty upon consideration of all of the listed factors. Commenters also recommend deleting subsection (2)(d)(6) because "Other unique factors" is too vague to be applied with any certainty.*

Thank you for considering our comments on IDEM's proposed rules governing the calculation of civil penalties for violation of state air, water, solid waste, and UST laws. We hope that our recommendations will make the regulations clearer and provide sufficient certainty for the regulated community and all Hoosiers to calculate civil penalties for violations of environmental laws.

Sincerely,



Michael J. Zoeller  
Senior Staff Attorney

Organizations joining these comments:

Robert Michaels  
Managing Attorney  
Environmental Law & Policy Center

Betsy Maher  
Executive Director  
Save the Dunes

Dorreen Carey  
President  
Gary Advocates for Responsible Development