

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY



**HAZARDOUS WASTE MANAGEMENT ACT
(HWMA)
CIVIL PENALTY POLICY**

1983

HWMA CIVIL PENALTY POLICY

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HWMA CIVIL PENALTY POLICY

I. 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 overriding purpose in enacting the HWMA was to establish the statutory framework for a State system that would ensure the proper management of hazardous waste.

Idaho Code § 39-4413 of the HWMA provides that if any person is in violation of a provision of the HWMA or any permit, standard, regulation, condition, requirement, or consent order issued or promulgated pursuant to the HWMA, the Director of the Department of Health and Welfare may issue written notice requiring compliance immediately or within a specified time of violation (NOV). Idaho Code § 39-4414 provides that any Notice of Violation issued may assess a penalty, taking into account:

- the seriousness of the violation; and,
- any good faith efforts to comply with the applicable requirements.

Idaho Code § 39-4414 further provides the Idaho Department of Health and Welfare (IDHW) with the authority to assess civil penalties of up to \$10,000 per-day of violation.

This document sets forth IDHW policy for assessing administrative penalties under the HWMA. The purpose of the policy is to assure that HWMA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with HWMA are eliminated; that persons are deterred from committing violations; and that compliance is achieved.

The policy provides internal guidelines to aid IDHW compliance/enforcement personnel in assessing appropriate penalties. It also provides a mechanism whereby compliance/enforcement personnel may, within specified boundaries, 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.

This document does not discuss whether assessment of an administrative 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 a civil penalty is the proper enforcement remedy to pursue.

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

The procedures set forth in this document are intended solely for the guidance of IDHW personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the IDHW. The IDHW 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 sets forth 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; and,
- application of adjustment factors to account for differences between cases.

I. SUMMARY OF THE POLICY

The penalty calculation system consists of (1) determining 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:

- potential for harm; and,
- 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 the following penalty matrix from which the gravity-based penalty will be chosen:

MATRIX
Extent of Deviation From Requirement

		Major	Moderate	Minor
Potential For Harm	Major	10,000	7,999	5,999
		to	to	to
		8,000	6,000	4,400
	Moderate	4,399	3,199	1,999
		to	to	to
		3,200	2,000	1,200
Minor	1,199	599	199	
	to	to	to	
	600	200	0	

Penalty Matrix \$10,000 Maximum State Law

Where a company 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 factors that will be considered are:

- good faith efforts to comply/lack of good faith;
- degree of willfulness and/or negligence;
- history of noncompliance;
- ability to pay; or,
- other unique factors.

These factors (with the exception of factors which increase the penalty such as history of noncompliance) generally will be considered after proposing the penalty in the Notice of Violation or the complaint, i.e., during the compliance conference or settlement stage. However, the IDHW 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 where the step-by-step assessment of penalties is illustrated. The steps include choice of the correct penalty cell on the matrix; calculation of the economic benefit of noncompliance, where appropriate; and adjustment of the penalty assessment before and after issuance of the Notice of Violation or the complaint.

II. ADMINISTRATIVE RECORD

In order to support the penalty proposed in the Notice of Violation or the complaint, compliance/enforcement personnel must include in the case file an explanation of how the proposed penalty amount was calculated. The case file must also include a justification of any adjustments made after issuance of the complaint. In ongoing cases, the assessment rationale would be exempt from the mandatory disclosure requirements of IDAPA §16.01.5750. because producing such records would interfere with enforcement proceedings. Nevertheless, the IDHW may elect to release penalty information after a Notice of Violation or a complaint has been issued. Once an enforcement action has been completed, the justification of the penalty assessment would no longer be exempt from disclosure.

A sample penalty computation worksheet to be included in the case file is shown in Section VIII.

III. 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 which are used to assess the appropriate gravity-based penalty:

- potential for harm; and,
- extent of deviation from a statutory or regulatory requirement.

A. Potential for Harm

The HWMA was promulgated in order to protect the public health and safety, the health of living organisms and the environment. Thus, noncompliance with any HWMA requirement could result in a situation where there is a potential for harm. The potential for harm resulting from a violation may be determined by:

- the likelihood of exposure to hazardous waste posed by non compliance; or,
- the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the HWMA program.

By answering questions like the following, compliance/enforcement personnel 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 is small, difficult to quantify, or nonexistent, but which nevertheless may disrupt the HWMA program (e.g., failure to comply with financial requirements). This disruption may also present a 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.

For each of the above considerations -- 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 presence or absence of direct harm in a noncompliance situation is something over which the violator may have no control. Such violators should not be rewarded by assessment of lower penalties when the violations do not result in actual harm.

Compliance/enforcement personnel should evaluate whether the potential for harm is major, moderate, or minor in a particular situation. The degree of potential harm represented by each category is defined as follows:

- MAJOR (1) violation poses a substantial likelihood of exposure to hazardous waste; and/or,
 - (2) the actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the HWMA program;
- MODERATE (1) the violation poses a significant likelihood of exposure to hazardous waste; and/or,
 - (2) the actions have or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the HWMA program.
- MINOR (1) the violation poses a relatively low likelihood of exposure to hazardous waste; and/or,
 - (2) the 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 §16.01.5009.08 (40 CFR 265.143), requires that owners or operators of hazardous waste facilities establish financial assurance for closure of their facilities. The purpose of this requirement is to assure that funds will be available for proper closure. Under this requirements the wording of a trust agreement establishing financial assurance must be identical to the wording specified in IDAPA §16.01.5008.08, (40 CFR 264.151), Part 10. 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 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. This violation would be assigned to the major potential for harm category.

Example 2 - Moderate Potential for Harm

Under IDAPA §16.01.5006.03 (40 CFR 262.34) a generator may accumulate hazardous waste on-site for 90-days or less without having interim status or a permit provided that among other requirements, each container or tank of waste is labeled or marked clearly with the words, HAZARDOUS WASTE and the date that accumulation started is also clearly marked. In a situation where a generator is storing compatible waste, has labeled half of his containers, and has clearly identified its storage area as a hazardous waste storage area, there is some indication that the unlabeled containers hold hazardous waste. However, because there is a chance that the unlabeled containers could be removed from the storage area, and that without labels the Department would not know if the waste had been stored for more than 90 days, this situation poses a significant likelihood of exposure to hazardous waste (although the likelihood is not as great as it would be if neither the storage area nor any of the containers were marked). The moderate level for harm category would be appropriate in this case.

Example 3 - Minor Potential for Harm

Owners or operators of hazardous waste facilities must, under IDAPA §16.01.5009.04 (40 CFR 265.53), submit a copy of their Contingency Plan to all local police and fire departments, 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 the implementation of the HWMA would be relatively low. The minor potential for harm category would be appropriate in this situation.

B. Extent of Deviation from Requirement

The extent of deviation from HWMA or its regulatory requirements relate to the degree to which the violation renders inoperative the requirement violated. In any violative situation, a range of potential noncompliance with the subject requirement exists. In other words, a violator may be substantially in compliance with the provisions of the

requirement or he may have totally disregarded the requirement (or a point inbetween). As with potential for harm, extent of deviation may be either major, moderate, or minor. In determining the extent of deviation, the following definitions should be used:

- MAJOR The violator deviates from the requirements of the regulation or statute to such an extent that there is substantial noncompliance.
- MODERATE The violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.
- MINOR The violator deviates somewhat from the regulatory or statutory requirements but most of the requirements are met.

A few examples will help demonstrate how the evaluation procedure described above is used to select a category.

Example 1 - Closure Plan

IDAPA § 16.01.5009,07 (40 CFR 265.112) 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 violation of the requirements of this regulation range from having no Closure Plan at all to having a plan which is somewhat 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 § 16.01.5009,02 (40 CFR 265.14) 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 quite broad. In a particular situation, the violator may have totally failed to supply any security systems. Total noncompliance with regulatory requirements such as this would result in classification into 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. Obviously, the degree of noncompliance in the latter situation is less significant. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In the matrix system this is achieved by choosing the minor category.

C. Penalty Assessment Matrix

Each of the above factors -- potential for harm and extent of deviation from a requirement -- forms one of the axes of the penalty assessment matrix. The matrix has nine cells, each containing a penalty range. The specific cell is chosen after determining 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 complete matrix is illustrated below:

		Extent of Deviation from Requirement		
		Major	Moderate	Minor
Potential For Harm	Major	10,000	7,999	5,999
		to	to	to
		8,000	6,000	4,400
	Moderate	4,399	3,199	1,999
		to	to	to
		3,200	2,000	1,200
	Minor	1,199	599	199
		to	to	to
		600	200	100 0

Penalty Matrix \$10,000 Maximum State Law

The lowest cell (minor potential for harm/minor extent of deviation) contains a penalty range from \$100 to \$199. The highest cell (major potential for extent of deviation) is limited by the maximum statutory penalty allowance of \$10,000 per-day per-violation.

The selection of the exact penalty amount within each cell is left to the discretion of compliance/enforcement personnel in any given case. Compliance/enforcement personnel should be careful to consider the seriousness of the violation only in selecting the penalty amount within the range. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are not considered at this point; they will be considered at the adjustment stage.

IV. MULTIPLE AND PER-DAY PENALTIES

A. Assessing Multiple Penalties

In certain situations, the IDHW may find that a particular firm 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 Notice of Violation or complaint 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 §16.01.5009,06 (40 CFR 265.90), and failure to have a written Closure Plan, IDAPA §16.01.5009,07 (40 CFR 265.112), are violations which result from different sets of circumstances and which pose separate risks. In the case of a firm which 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 a firm which has open containers of hazardous waste in its storage area, IDAPA §16.01.5009,09 (40 CFR 265.173(a)), and which also ruptured different hazardous waste containers while moving them on-site, IDAPA §16.01.5009,09 (40 CFR 265.173(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 company has violated the same requirement in substantially different locations. An example of this type of violation is failure to

clean up discharged hazardous waste during transportation, IDAPA §16.01.5007,03 (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. In these situations, the separate locations present separate and distinct risks to public health and the environment. Thus, 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 his Waste Analysis Plan the parameters for which each hazardous waste will be analyzed, IDAPA §16.01.5009,02 (40 CFR 265.13(b)(1)), and failed to specify the frequency with which the initial analysis of the waste will be repeated, IDAPA §16.01.5009,02 (40 CFR 265.13(b)(4)), he has violated the requirement that he develop an adequate Waste Analysis Plan. 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 Notice of Violation 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.

B. Assessing Per-Day Violations

HWMA provides the authority to assess civil penalties of up to \$10,000 per violation per day, with each day that noncompliance continues to be 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.

In the case of continuing violations, the IDHW 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.

V. EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE

The IDHW Civil Penalty Policy mandates the consideration of 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 which should undergo an economic benefit analysis:

- groundwater monitoring;
- financial requirements;
- closure/post-closure;
- waste determination;
- waste analysis;
- clean-up of hazardous waste discharges; and,
- Part B submittals.

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, it is the IDHW policy not to address cases for an amount less than the economic benefit of noncompliance. However, the civil penalty policy does set out four general areas where settling the total penalty amount for less than the economic benefit may be appropriate. The four exceptions are as follows:

- the economic benefit component consists of an insignificant amount (i.e., less than \$200);
- there are compelling public concerns that would not be served by taking a case to trial;
- it is highly unlikely that IDHW will be able to recover the economic benefit in litigation;
- the company 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.

A. Types of Economic Benefit

Compliance/enforcement personnel should examine two types of economic benefit from noncompliance in determining the economic benefit component:

- benefit from delayed costs; and,
- benefit from avoided costs.

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

- 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 which 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. Examples of violations which result in savings from avoided costs are:

- failure to perform annual and semi-annual groundwater monitoring sampling and analysis;
- failure to follow the approved Closure Plan in removing waste from a facility where re-removal is not possible; and,
- failure to perform waste analysis before adding waste to tanks, waste piles, incinerators, etc.

B. 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 company. For delayed costs, the economic benefit does not equal the cost of complying with the requirements, since the violator will eventually have to spend the money to achieve compliance. The economic benefit for 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, compliance/enforcement personnel should calculate the economic benefit of both the delayed and avoided costs for each year.

The following formula is provided to help calculate the economic benefit component:

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

In the above formula, T represents the firm's marginal tax rate. In the absence of specific information regarding the violator's tax status, compliance/enforcement personnel should assume that the company's marginal tax rate is 39%, the Federal corporate tax rate for firms whose before-tax profits are greater than \$100,000. Thus, compliance/enforcement personnel should assume that T = 0.39.

Compliance/enforcement personnel should calculate interest by using the interest rate charged by the Internal Revenue Service (IRS) for delinquent accounts. The IRS interest rates for 1985 through 1987 are as follows:

01/1/85 - 06/30/85	13%
07/1/85 - 12/31/85	11%
01/1/86 - 06/30/86	10%
07/1/86 - 12/31/86	9%
01/1/87 - 12/31/87	9%

Interest rates for years other than those listed above are available from the Internal Revenue Service.

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

VI. ADJUSTMENT FACTORS AND EFFECT OF SETTLEMENT

A. Adjustment Factors

As mentioned in Section IV of this document, 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, Idaho Code, states that in assessing penalties, IDHW must take into account any good faith efforts to comply with the applicable requirements. The Civil Penalty Policy sets out several other adjustment factors to consider. These include 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. Note, however, that no upward adjustment can result in a penalty greater than the statutory maximum of \$10,000 per day per violation. Adjustment of a penalty may take place before issuance of the proposed penalty. However, most factors, in practice, will be considered at the compliance conference or settlement stage with the burden of proof for mitigation on the violator. Penalties may be adjusted before determining the proposed assessment if the necessary information is available. Compliance/enforcement personnel should use whatever information regarding the violator (and violation) is available at the time of initial assessment. Issuance of a Notice of Violation or complaint should not be delayed in order 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. (See Section VI. of the Policy for 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 of the factors to consider is consistent with the Civil Penalty Policy.

(1) Good Faith Efforts to Comply/Lack of Good Faith
(Degree of Cooperation)

Under § 39-4414(1)(c), Idaho Code, 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, on the other hand, can result in an increased penalty. Compliance/enforcement personnel have 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.

(2) Degree of Willfulness and/or Negligence

Idaho Code, § 39-4415, of the HWMA provides for criminal (misdemeanor) penalties for knowing violations. However, there may be instances of culpability which do not meet the criteria for criminal action. In cases where 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, the following factors should be considered, as well as 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;
- whether the violator knew of the legal requirement which was violated.

It should be noted that this last factor, lack of knowledge of the legal requirement should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which 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 which the violator can clearly show were not reasonably foreseeable and out of his control, the penalty may be reduced.

Subject to the above guidance, compliance/enforcement personnel have 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.

(3) History of noncompliance (upward adjustment only)

Where a party has previously violated the HWMA, RCRA, or State or EPA regulations prior to State program adoption at the same or a different site, this is usually clear evidence that the party was not deterred by the previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator. This is an indication that the penalty should be adjusted upwards.

Some of the factors the compliance/enforcement personnel should consider are 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 correction of 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.

For purposes of the section, a prior violation includes any act or omission for which a formal enforcement response has occurred (e.g., Notice of Violation, Warning Letter, Consent Order, or complaint). It also includes any act or omission for which the violator has previously been given any written notification, no matter how informal, by the IDHW.

In the case of 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. New ownership often raises similar problems. In making this determination, compliance enforcement personnel 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. In general, compliance/enforcement personnel should begin with the assumption that if the same corporation were involved, the adjustments for history of noncompliance should apply. In addition, compliance/enforcement

personnel 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. The IDHW may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects a corporate-wide indifference to environmental protection. Consequently, 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, compliance/enforcement personnel have discretion to make upward adjustments by as much as 25% of the gravity-based penalty. Adjustments for this factor in the 26-40% range may be made, but only in unusual circumstances.

(4) Ability to Pay (Downward Adjustment Only)

The IDHW generally will not request penalties that are clearly beyond the means of the violator. Therefore, the IDHW should consider the ability of a violator to pay a penalty. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. It is unlikely, for example, that the IDHW would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances. Thus, a company'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 respondent. If the respondent fails to provide sufficient information, compliance/enforcement personnel should disregard this factor in adjusting the penalty.

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

- a delayed payment schedule - such a schedule might even be contingent upon an increase in sales 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 violators time to prepare and present free training to other companies engaged in similar waste-handling activities or informational and other non-direct penalty payment adjustments;
- straight penalty reductions as a last recourse.

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

(5) Other Unique Factors

This policy allows an adjustment for unanticipated factors which may arise on a case-by-case basis. Compliance/enforcement personnel have 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, the Department, 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 is intended to allow the violator an economic base from which he can continue to provide operating capital for correction of violations, continuing waste management, and cleanup activities as warranted.

Other measures to send a message to the violator and others in the regulated community may thus be explored to achieve the same economic sanction that would have been imposed by a direct penalty assessment. This philosophy does not in any way preclude the Department from seeking direct penalties which could force facility closure if it is in the best interest of the local community and the State program.

B. Effect of Settlement

Idaho Code, § 39-4413(1)(c), incorporates the IDHW policy of encouraging settlement of an enforcement action as long as the settlement is consistent with the provisions and objectives of HWMA and its regulations. If the violator believes that it is not liable or that the circumstances of its case justify mitigation of the penalty proposed in the complaint, § 39-4413(1)(c), Idaho Code, 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 always 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 the Adjustment Factors section of this document. The Consent Order must include a general statement of the reasons for mitigating the proposed penalty. Specific percentage reductions for individual factors need not be included.

PENALTY COMPUTATION WORKSHEET

Company Name: _____

Regulation Violated: _____

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

(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

	<u>Percentage Change*</u>	<u>Dollar Amount</u>
5. Lack of good faith efforts on complying: _____		_____
6. Degree of willfulness and/or negligence: _____		_____
7. History of non- compliance _____		_____
8. Economic benefit of non-compliance _____		_____
9. Other unique factors: _____		_____
9. Justification for adjustments:		

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

PENALTY COMPUTATION WORKSHEET (cont.)

10. Adjusted Per-Day Penalty
(Line 4, + Lines 5-9):

11. Number of Days of
Violation:

12. Per-Day Penalty Total
Lines 11 x 12

Penalty Adjustments After Settlement Negotiations

	<u>Percentage Change*</u>	<u>Dollar Amount</u>
13. Good Faith Effort:	_____	_____
14. Ability to Pay:	_____	_____
15. Other Unique Factors:	_____	_____
16. Justification for Adjustments:	_____	_____
17. Total Penalty Amount (must not exceed \$10,000 per day of violation):	_____	

VII. HYPOTHETICAL APPLICATIONS OF THE PENALTY POLICYExample 1

- (1)(A) Violation: By notification dated August 15, 1985, Company A informed IDHW that it conducts activities at its facility involving hazardous waste. In its notification, Company A indicated that it only generated hazardous waste. A 1988 inspection revealed that Company A was also storing hazardous waste, and had been since 1986. Company A had stored without a permit or interim status, in violation of Idaho Code § 39-4409. In addition, Company A was in violation of Idaho Code § 39-4411 by failing to notify IDHW that it was storing hazardous waste. Failure to notify, and operation without a permit or interim status constitute independent and substantially distinguishable violations. Each violation should be assessed separately and the amounts totalled. The inspection indicated that Company A's storage area was secure and that, in general, the facility was well managed. However, there were a number of violations of the interim status standards. The Notice of Violation issued to Company A assessed penalties for regulation violations as well as the statutory violations.
- (B) Seriousness: (i) Failure to Notify: Potential for Harm. Moderate - IDHW was prevented from knowing that hazardous waste was being stored at the facility. However, because Company A notified IDHW that it was a generator, IDHW did know that hazardous waste was handled at the facility. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the HWMA program. Extent of Deviation. Moderate - although Company A did not notify IDHW 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 §16.01.5009 et seq. (40 CFR, Part 265) violations. This situation may pose a significant likelihood of exposure which may have a significant adverse effect on the statutory purposes for implementing the HWMA program. Extent of Deviation - Major - substantial noncompliance with the requirement because Company A

did not notify IDHW that it stored hazardous waste, and did not submit a Part A.

- (i) Moderate Potential for Harm and Moderate Extent of Deviation lead one to the cell with the range of \$2,000 to \$3,199. The mid-point is \$2,599. (ii) Operating Without a Permit - Moderate Potential for Harm and Major Extent of Deviation lead one to the cell with the range of \$3,200 to \$4,399. The midpoint is \$3,799. (iii) Total Penalty: \$6,393 before any adjustments.
- (2)(A) Violation: Company B failed to prevent unknowing entry of persons onto the active portion of its surface impoundment facility. The fence surrounding the area had several holes. IDAPA §16.01.5009,02 (40 CFR 265.14).
- (B) Seriousness: Potential for Harm - Major - some children already have entered the area; potential for harm due to exposure to 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 yield the penalty range of \$6,000 to \$7,999. the mid-point is \$6,999.
- (D) Pre-Complaint Adjustment: During the inspection of the facility, IDHW discovered that the operator of Company B had been made aware of 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 calculation using the Penalty Computation worksheet follows this hypothetical.)
- (E) Settlement Adjustment: Company B gave evidence at compliance conference of labor problems with security officers and delivery delays for a new fence. Company B was very cooperative and stated that a new fence had been installed after issuance of the Notice of Violation and that security would be provided for by another company in the near future. Even though the company was very 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 § 16.01.5009,02 (40 CFR 265.14)

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: \$6,000-7,999Penalty Amount Chosen: \$6,999

Justification for Penalty

Amount Chosen:

Midpoint of Range

4. Per-Day Assessment: NAPenalty Adjustments Prior to Settlement Negotiations

	<u>Percentage Change*</u>	<u>Dollar Amount</u>
5. Good faith efforts to comply/lack of good faith:	<u>NA</u>	<u>NA</u>
6. Degree of willfulness and/or negligence:	<u>25%</u>	<u>\$1,749</u>
7. History of noncompliance:	<u>NA</u>	<u>NA</u>
8. Other unique factors:	<u></u>	<u>NA</u>
9. Justification for Adjustments:	<u></u>	<u></u>

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

- (3)(A) Violation: An inspection of Company C's land disposal facility revealed that it had failed to implement a groundwater monitoring system as required under IDAPA §16.01.5009.06 (40 CFR 265.90) over a two year period. It failed to install monitoring wells (01.5009.06 40 CFR 265.91); to obtain and analyze samples (.01.5009,06 40 CFR 265.92); and to submit an outline of a groundwater quality assessment program (01.5009,06 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 with which to prepare a quality assessment program outline, keep records, or submit reports to IDHW. Therefore, the violations are not independent and substantially distinguishable in this situation. (See: Assessing Multiple Penalties). A single penalty assessment is appropriate, with each section of the regulations that was violated cited in the complaint.
- (B) Seriousness: Potential for Harm. Major - the violation could pose a substantial likelihood of exposure and could have a substantial adverse effect on the purposes for 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 yield the cell with the penalty range of \$8,000 to \$10,000. The mid-point is \$9,000.
- (D) Economic Benefit of Noncompliance: Groundwater monitoring has been identified as an area for which an economic benefit component may be significant. The following estimates of the costs of complying with the groundwater monitoring requirements are taken from a January 1982 report prepared for EPA by Geraghty & Miller, Inc., entitled, Development of Groundwater Monitoring Requirements and Costs for Current RCRA Regulatory Requirements.

First Year Costs

Cost of Groundwater Quality Assessment Plan outline and Groundwater Sampling and Analysis Plan (COP)	\$ 2,000
Cost of Wells (COW), 1 upgradient and 3 downgradient	\$ 9,000
Cost of Sampling	\$ 1,650
Cost of Analysis (COA)	\$11,360
Cost of Report (COR), for determining system needs, <u>not</u> report required under IDAPA §16.01.5009,06. (40 CFR 265.94)	\$ 3,200
TOTAL	\$27,200

Second Year Costs

Cost of Sampling and Cost of Analysis (COS, COA), assuming no contamination found.	\$13,000
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Assumptions: geology is unconsolidated material; hollow-stem auger drilling; PVC construction material; groundwater sampling by hand bailing; wells dug 50 ft. deep; estimated costs remained constant over time.

COP, COW, COR, and first year COS and COA are delayed costs. Company C eventually will make these expenditures in order 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 (1985 and 1986), the economic benefit component should be calculated using the formula set out in Section VI:

Economic
Benefit = Avoided Costs (1-T) + (Delayed Costs x Interest Rate)

1985: 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 = \$27,200

Avoided costs = \$ 0

IRS interest rate = 12% (avg. of 11% and 13%)

Assume T = 0.39

Economic Benefit = \$0 + (\$27,200 x 12%)
= \$3,264

1986: Company C still had not implemented its groundwater monitoring system. In addition, it had not obtained and analyzed samples at least annually or semi-annually, depending on the indicator parameter.

Delayed costs = \$27,200

Avoided costs = \$13,000

IRS interest rate = 9.5% (Avg. of 10% and 9%)

Assume T = 0.39

Economic Benefit = \$13,000 (1-0.39) + (\$27,200 x 9.5%)
= \$9,604

Total Economic Benefit = Gravity-based Penalty +
Economic Benefit component = \$9,000 + \$12,868 = \$21,868

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.

(4)(A) Violation: Pursuant to § 39-4411(5), Idaho Code, IDHW sent a Warning Letter to Company D requesting that it furnish information relating to hazardous waste generation. The letter required a response to IDHW within 14 calendar days of Company D's receipt of the letter. One month after Company D received IDHW's information request, it submitted a partial record of the requested information. IDHW sent a Notice of

Violation 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, IDHW determined that Company D's failure to submit information relating to hazardous waste to IDHW as requested would have a relatively low effect on the purposes and procedures for 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 yield the penalty range of \$200 to \$599. the midpoint is \$399.
 - (D) Pre-Assessment Adjustments - On two previous occasions, Company D failed to respond completely to requests for the same type of information. In those cases, IDHW also issued Notices of Violation after Warning Letters with proposed penalties of \$500 each. Both cases resulted in submittal of this information and penalties. The penalty is adjusted upwards 25% for degree of willfulness ($\$399 + 25\% = 499$) to deter Company D from repeated noncompliance with the HWMA.
 - (E) Settlement Adjustment: Company D failed to convince IDHW that any penalty mitigation (decrease) was justified. Settlement negotiations broke down and the case was filed in District Court.
- (5) (A) Violation: Company E's Part B Permit Application was called in by IDHW in 1986. Company E, a storage and treatment facility, failed to submit its Part B by the date specified. IDHW issued a Notice of Incompleteness requiring submission of a complete Part B within 30 days. IDHW also issued a Warning Letter stating that failure to submit a complete Part B Application is a violation of IDAPA §16.01.5012,02 (40 CFR 270.10) which may result in the assessment of civil penalties and the initiation of procedures to terminate the facility's interim status. Company E sent IDHW a one-page response several weeks after the date stipulated in the Notice of Incompleteness. The response was seriously incomplete. Thus, Company E failed to submit a complete Part B in violation of IDAPA §16.01.5012,02.
- (B) Seriousness: Potential for Harm - Minor - inspections of Company E's facility have revealed a generally well-managed operation under interim status standards. The

violation could have a significant adverse effect on the procedures for implementing the HWMA program. Extent of Deviation - Major - Part B Application was seriously incomplete.

- (C) Gravity-based Penalty: Moderate potential for harm and major extent of deviation lead one to the cell with the range of \$600 to \$1,199. The mid-point 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.

(\$15,000 for drafting of a treatment and storage facility permit is assumed for purposes of demonstration only.)

The economic benefit component should be calculated using the formula set out in Section VI:

Economic

Benefit = Avoided Costs (1-T) + (Delayed Costs x Interest Rate)

Failure to submit a complete Part B is a delayed cost. Company E eventually will spend the money in order 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 1986 is 9.5% (avg. of 10% and 9%)

Economic Benefit = \$0 + (\$15,000 x 9.5%)
= \$1,425

Penalty proposed in complaint = gravity-based penalty +
economic benefit
component
= \$899 + \$1,425
= \$2,324

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 the Agency that it intended to cease handling hazardous waste. Because of the company's inability to pay, and because of the

Agency's desire that Company E put what money it has into proper closure and post-closure care at its facility, the penalty was reduced to \$2,500. A Consent Order was issued putting Company E on a schedule for closing its facility in accordance with its approved Closure Plan.