



## DEQ POLICY STATEMENT PS15-06

### AIR QUALITY ADMINISTRATIVE PENALTIES

#### PURPOSE

This policy is intended for calculating administrative penalties. This policy does not address whether an enforcement action seeking an administrative penalty is the appropriate enforcement response given the specific violative condition. This policy addresses only the procedures to follow to determine an administrative penalty given a decision to pursue that enforcement option. This administrative penalty policy does not address the Idaho Department of Environmental Quality's (DEQ's) authority to seek enforcement-related expenses, civil penalties, or criminal penalties. This policy does not directly address the applicability of supplemental environmental projects (SEPs). For further information regarding SEPs, see DEQ Policy Statement PS15-05.

In addition to administrative penalty, an alleged violator may be further liable to DEQ for any expense incurred by DEQ in enforcing the Environmental Protection and Health Act (EPHA) (see Idaho Code §39-108(6)). If a civil complaint is filed in district court pursuant to the EPHA, DEQ attorneys are not bound by this policy and may seek penalties up to the statutory maximum amount. Penalties associated with criminal convictions are established in Idaho Code §39-117 and are not addressed in this policy.

The procedures set forth in this policy are intended solely for the guidance of DEQ personnel. This policy is not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with DEQ. DEQ reserves the right to deviate from this policy, including any appendices, and to change this policy at any time without public notice. This policy supersedes DEQ's Air Quality Administrative Policy dated December 31, 1999.

#### BACKGROUND

The EPHA, Idaho Code §§39-101 et seq., provides authority for DEQ to claim administrative penalties as follows:

Any person determined in a civil enforcement action to have violated any provision of this act or any rule, permit or order promulgated pursuant to this act shall be liable for a civil penalty not to exceed . . . ten thousand dollars (\$10,000) for each separate air violation and day of continuing air violation, whichever is greater. Parties to an administrative enforcement action may agree to a civil penalty as provide in this subsection. (Idaho Code §39-108(5))

No civil or administrative proceeding may be brought to recover for a violation of any provision of this chapter or a violation of any rule, permit or order issued or promulgated pursuant to this chapter more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation. (Idaho Code §39-108(4))

This administrative penalty policy is intended to ensure the fair and consistent application of DEQ's penalty assessment authority. The effective application of this policy will serve to encourage compliance, deter future violations, and ensure an economic advantage is not realized by any party failing to comply with the law.

## STATEMENT OF POLICY

### 1. Application of Penalty Policy

DEQ personnel using this policy are required to complete a Base Penalty Worksheet for each violation and a Total Claimed Penalty Worksheet for each case. The worksheets provide the background information necessary to ensure fair and consistent application of this penalty policy. The worksheets will be available to the recipient of a notice of violation (NOV) upon request.

The calculation of the total claimed penalty consists of three distinct but related stages: (1) determining a base amount; (2) adjusting the base amount for special factors and circumstances; and (3) accounting for any economic benefit realized during a period of noncompliance. The total claimed penalty for a violation is derived as follows:

Total Claimed Penalty = (base amount) + (adjustment factor) + (economic benefit realized)

This penalty policy addresses factors that may be used to justify mitigation of a total claimed penalty as a result of new information being brought forward during settlement negotiations (section 6). In no case will the total claimed penalty exceed the statutory limit of ten thousand dollars (\$10,000) for each separate air violation and day of continuing air violation.

The EPHA states that the imposition or computation of monetary penalties may take into account the following:

- Seriousness of the violation
- Good faith efforts to comply with the law
- An enforceable commitment by the person against whom the penalty is directed to implement a SEP

DEQ has considered these factors in developing the penalty policy. DEQ's position is that the "seriousness of the violation" is captured in both the "potential for harm" and "extent of deviation" factors discussed in section 2. "Good faith efforts to comply with the law" is captured as a penalty mitigating factor. SEPs are not directly addressed in the penalty policy, as DEQ has a separate SEP guidance document.

In addition to these factors, DEQ will consider the size of the alleged violator's business when computing and/or adjusting the base penalty.

## 2. Base Penalty Determination

Two factors are to be considered in determining the base penalty: (1) potential for harm; and (2) extent of deviation from the statutory or regulatory requirement. Both of these factors point to the seriousness of the violation and come together in the penalty assessment matrix.

### 2.1. Potential for Harm to Human Health and the Environment

The potential for harm resulting from a violation is determined by the likelihood and degree of exposure of persons or the environment to pollution. The emphasis may be placed on the actual or potential harm posed by a violation.

DEQ personnel must, as objectively as possible, evaluate whether the potential for harm from any alleged violation is major, moderate, or minor and substantiate the classification on the Base Penalty Worksheet (Table 1). Some factors that should be considered in determining the potential for harm include the following:

- Amount of pollutant
- Type of pollutant
- Sensitivity of the local environment
- Duration of the violation
- Location of the violation, including whether the violation occurred in a populated or nonpopulated area

**Table 1. Potential for harm classifications and descriptions.\***

Potential for Harm	Description
Major	The violation poses a substantial likelihood of harm to human health or the environment.
Moderate	The violation poses a significant likelihood of harm to human health or the environment.
Minor	The violation poses a relatively low likelihood of harm to human health or the environment.

\* See Appendix A for sample potential for harm classifications.

### 2.2. Extent of Deviation from Requirement

The “extent of deviation” from any statutory or regulatory requirement or permit condition relates to the degree to which the requirement or condition has been violated. For any violation, a range of potential deviation from the subject requirement exists. For example, an alleged violator may be substantially in compliance with the provisions of the requirement, or an alleged violator may have significantly disregarded the requirement (or any point in between). As with potential for harm, the extent of deviation may be either major, moderate, or minor (Table 2).

DEQ personnel must, as objectively as possible, evaluate whether the extent of deviation for any alleged violation is major, moderate, or minor and substantiate the classification on the Base Penalty Worksheet.

**Table 2. Extent of deviation classifications and descriptions.**

Extent of Deviation	Description
Major	The alleged violator deviates from the requirements to such an extent that there is substantial noncompliance.
Moderate	The alleged violator significantly deviates from the requirements but some of the requirement(s) are implemented as intended.
Minor	The alleged violator deviates somewhat from the requirements but most of the requirement(s) are met.

### 2.3. Penalty Assessment Matrix

The potential for harm and extent of deviation each define one axis of the penalty assessment matrix (Table 3). The matrix has nine cells, each containing a specific penalty dollar range up to the statutory maximum. The appropriate penalty range is determined after DEQ personnel have reviewed all the available information needed to determine which classification (major, moderate, or minor) is appropriate for both the potential for harm and the extent of deviation factors. The determination of the exact penalty amount from the range provided within a cell is made by DEQ personnel after a review of all available information and comparison to how the penalty policy may have been applied in similar cases.

**Table 3. Base penalty assessment matrix.**

		Extent of Deviation		
		Major	Moderate	Minor
Potential for Harm	Major	\$10,000 to \$8,000	\$8,000 to \$6,000	\$6,000 to \$5,000
	Moderate	\$5,000 to \$4,000	\$4,000 to \$3,000	\$3,000 to \$2,000
	Minor	\$2,000 to \$1,000	\$1,000 to \$500	\$500 to \$100

The top left cell (major potential for harm/major extent of deviation) ranges to the maximum statutory penalty allowance. The penalty matrix is used to establish a base penalty amount, after which penalty adjustment factors will be considered.

### 3. Penalty Adjustment Factors

The base penalty can be adjusted by taking into account the alleged violator's intent and other factors related to the alleged violator's past and present compliance status. These factors provide DEQ the flexibility to make adjustments when necessary based on legitimate differences between similar violations. In adjusting the base penalty, DEQ considers the willful, negligent, or unavoidable nature of the violation, an alleged violator's history of noncompliance, and the size of the alleged violator.

Once taken into account, the adjustment factors may increase, decrease, or have no effect on the claimed penalty amount. An upward adjustment cannot result in the penalty exceeding the statutory maximum. Adjustments to the base penalty may take place prior to claiming the penalty in the NOV and again as part of the settlement process (see section 6) after the penalty has been claimed.

DEQ personnel will use all information available at the time in determining the need to adjust the base penalty prior to the issuance of the NOV.

Application of the adjustment factors can be cumulative (i.e., more than one factor may apply in any given case).

The following adjustment factors will be considered before claiming a penalty in an NOV:

### **3.1. Willful, Negligent, or Unavoidable Nature of a Violation**

DEQ personnel have the discretion to make adjustments, up or down, by as much as 100% of the base penalty based on the degree or absence of willfulness and/or negligence by the alleged violator prior to and at the time the violation was alleged to have occurred.

The following adjustment factors will be considered when determining the willfulness, negligent, or unavoidable nature of a violation:

- Extent of the alleged violator's direct or indirect control over the events resulting in the violation(s)
- The foreseeability of the events resulting in the violation(s)
- Whether the alleged violator took reasonable precautions to prevent the events constituting the violation(s)
- Whether the alleged violator promptly reported its noncompliance
- Whether the alleged violator promptly corrected the violation(s)
- Whether the alleged violator knew, or should have known, of the violation(s)

A justification for any adjustments made must be included on the Base Penalty Worksheet.

### **3.2. Alleged Violator's History of Noncompliance**

DEQ has interpreted the EPHA to allow the agency to consider the alleged violator's history of noncompliance when determining the administrative penalty claim.

DEQ personnel have the discretion to not adjust the base penalty or make an adjustment upward by as much as 100% of the base penalty.

The existence of a prior air quality violation may be used to support an upward adjustment of the penalty, unless the prior violation was caused by factors entirely out of the alleged violator's control. An upward adjustment may be warranted for any prior violation that DEQ is aware of by any means or when the prior violation:

- Resulted in a civil or criminal enforcement action
- Resulted in formal administrative enforcement action (e.g., NOV, NTC, warning letter)
- Was documented in a Visible Emissions Evaluation Form
- Was documented in a Preliminary Inspection Finding Form
- Was documented as part of the Title V Compliance Certification

In considering the above adjustment factors, DEQ may review the substance and resolution of each action prior to reaching a decision as to whether an upward adjustment of the base penalty is appropriate. Additional factors DEQ personnel should consider include the following:

- Similarity of the alleged violation to a previous violation

- Recentness of the previous violation
- The number of previous violations
- The alleged violator's efforts and success in correcting the previous violation(s)

### **3.3. Size of the Alleged Violator**

DEQ personnel have the discretion to make downward adjustments of the base penalty amount by as much as 100% based on the size of the alleged violator.

The following factors will be considered when determining if the size would support a claim for a downward adjustment of the base penalty amount:

- The business has made a good faith effort to comply with the law.
- This is the business's first violation of the requirement.
- The business promptly corrected the violation.
- The violation has not caused actual serious harm to public health or the environment.
- The violation is not one that may present an imminent and substantial endangerment to public health or the environment.
- The violation does not involve criminal conduct.

The determination of whether a business qualifies for a downward penalty adjustment based on its size will be made by DEQ personnel upon consultation with its Small Business Assistance Program.

## **4. Economic Benefit of Noncompliance**

DEQ has interpreted the EPHA to allow the agency to consider the alleged violator's economic benefit realized during the period of noncompliance when developing the administrative penalty claim.

This penalty policy provides for DEQ's recovery of economic benefit. The economic benefit component will always be considered when determining the appropriate penalty amount; however, DEQ will not significantly delay issuance of an NOV in order to collect additional information that may support economic benefit.

Once a base penalty has been determined and adjusted, if sufficient information is available or must be obtained, the economic benefit of noncompliance will be calculated using the US Environmental Protection Agency's (EPA's) Economic Benefit (BEN) model. At this time, EPA's BEN model is the only model that DEQ is aware of that can calculate economic benefit. DEQ shall use the BEN model for penalty calculations but may, at its discretion, consider substitution of other more user-friendly or accurate models should they become available at a later date.

DEQ personnel shall add the adjusted base penalty amount and the calculated economic benefit amount to attain the total claimed penalty. DEQ personnel shall use the Total Claimed Penalty Worksheet to define how the total claimed penalty was reached. The BEN model run printout will be attached to the worksheets for those violations on which a BEN analysis was conducted.

There may be instances where the economic benefit cannot be easily calculated or is determined to be relatively insignificant. In those cases, DEQ may choose to not adjust the penalty for

economic benefit when computing the total claimed penalty to be imposed. There may also be instances where the economic benefit is calculated to be zero, or a negative amount. In those cases the total claimed penalty to be imposed will be the adjusted base penalty.

## **5. Continuous Violations**

Idaho Code §39-108 provides DEQ with the authority to claim penalties of up to \$10,000 for each separate air violation and day of continuing air violation. In the case of continuing air violations, DEQ has the authority to calculate a penalty based on the number of consecutive days of noncompliance. The total claimed penalty for a continuous violation would then be the adjusted base penalty, derived from the penalty matrix, multiplied by the total number of consecutive days of noncompliance.

When proposing to claim a penalty for a continuous violation, should the violation have continued for one hundred (100) or more consecutive days, DEQ shall consult with and seek the approval of the air quality division administrator prior to the issuance of the NOV.

## **6. Mitigating Factors to be Considered During Settlement Discussions**

The burden is always on the alleged violator to provide additional information to support mitigation of the claimed penalty. If the alleged violator contends that the circumstances of the case justify mitigation of the claimed penalty, the factors in this section may be considered during settlement discussions. DEQ will not significantly delay issuance of an NOV in order to collect additional information that may support adjustment.

Factors to consider for penalty mitigation include the alleged violator's inability to pay; the claimed penalty's overstatement of economic benefit; the alleged violator's good faith efforts to comply with the law; or other unique factors.

In each case, DEQ personnel shall complete a Mitigated Penalty Worksheet for each mitigated penalty to record how the final penalty was derived.

### **6.1. Alleged Violator's Inability to Pay**

The responsibility to claim and demonstrate an inability to pay a penalty rests fully with the alleged violator and will only be considered if the issue is raised by the alleged violator. Once making this claim, the alleged violator must provide in a timely manner all economic information requested by DEQ to support this claim. If the alleged violator fails to provide sufficient information, in DEQ's determination, to establish an inability to pay, no penalty mitigation based on this factor will occur. A determination made by DEQ supporting mitigation of the claimed penalty based on the alleged violator's inability to pay will be made on a case-by-case basis, considering each alleged violator's respective financial situation. DEQ will determine the appropriate terms of penalty mitigation (delayed payment, installment payment plan, etc.), and when appropriate, the amount of any downward adjustment to the penalty.

Should DEQ personnel determine that mitigation is warranted and that payment of all or any portion of the penalty will preclude the alleged violator from achieving compliance or from carrying out remedial measures that DEQ believes to be of primary importance, the following options may be considered:

- Delayed payment schedule. Such a schedule might, for example, be contingent upon an improved financial situation of the company.
- An installment payment plan.
- In the most extreme cases, an outright penalty reduction.

### **6.2. The Claimed Penalty's Overstatement of Economic Benefit**

If an alleged violator believes that the economic benefit it realized from noncompliance differs from DEQ's calculated amount, the alleged violator may provide to DEQ personnel information supporting this claim. This information must be complete and submitted within DEQ approved time frames.

Should DEQ determine using the provided information that the claimed penalty overstates economic benefit, the penalty will be adjusted downward by the overstated amount. If the alleged violator fails to provide information sufficient, in DEQ's determination, to establish an overstatement of economic benefit, a penalty adjustment will not occur.

### **6.3. An Alleged Violator's Good Faith Efforts to Comply with the Law**

This policy provides for a downward adjustment by as much as 100% of the base penalty for an alleged violator's good faith efforts to comply with the law. To determine if mitigation of the penalty is warranted, the alleged violator must prove to DEQ's satisfaction that it has taken good faith efforts to comply with the law. The following are examples of good faith efforts:

- Having achieved ISO 14000 certification
- Having in place well-developed and proven Environmental Management Systems
- Any other efforts as presented in the Federal Sentencing Guidelines
- Any action that goes above and beyond the compliance requirement

The burden of proof rests fully on the alleged violator; therefore, all information supporting the alleged violator's good faith efforts to comply with the law must be supplied by the alleged violator during settlement discussions.

### **6.4. Other Unique Factors**

This policy further provides for a downward penalty adjustment for other unique factors that may arise on a case-by-case basis. DEQ personnel have discretion to make penalty adjustments downward by as much as 100% of the base penalty for such reasons and must justify any adjustments of this type on the penalty worksheet.

Unique factors that may warrant a downward adjustment of the claimed penalty include, but are not limited to, the following:

- Compelling public interest that would not be served by taking a case to trial
- Litigation risks based on the facts of the case after consultation with counsel
- The late submittal or discovery of information that demonstrates a violation did not occur as alleged in the NOV
- Force majeure considerations

**RESPONSIBILITY**

DEQ's air quality compliance and enforcement coordinator is responsible for maintaining this policy.

**IMPLEMENTATION**

This policy is effective immediately and will remain in effect for 5 years unless amended, replaced, or rescinded prior to expiration. This policy will be applied to all enforcement actions initiated on or after the effective date of this policy.

Dated this 7<sup>th</sup> day of May, 2015



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Curt Fransen  
Director

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## Appendix A. Potential for Harm

This appendix contains examples of the types of violations that may be classified as major, moderate, or minor with regard to the potential for harm. This appendix is intended solely for the guidance of DEQ personnel. It is not intended, and cannot be relied upon, to create any rights in any party. DEQ reserves the right to deviate from the provided example classifications in any given case. Contact the air quality compliance and enforcement coordinator for specific examples of potential for harm classifications for past violations reviewed under this policy.

### Major Classification

1. Failure to obtain an air quality permit to construct for an air emission source with actual or potential air emissions of any single air pollutant of 250 tons or more per year; 100 tons or more per year of any designated facility; with actual or potential air emissions of 10 tons per year or more of any single toxic or hazardous air pollutant; at least 25 tons per year of two or more toxic or hazardous air pollutants; or any other air emission source determined by DEQ to pose a major potential risk of harm to public health or the environment for the purposes of applying this penalty policy.
2. Opacity violations in nonattainment areas or in populated areas, or opacity violations that pose a major potential risk of harm to public health or the environment.
3. Fugitive dust violations in nonattainment areas or in populated areas, or fugitive dust violations that pose a major potential risk of harm to public health or the environment.
4. Open burning violations in nonattainment areas or in populated areas or open burning violations that pose a major potential risk of harm to public health or the environment.
5. Odor violations that pose a major potential risk of harm to public health or the environment.
6. Failure to submit any reports, data, or information that is required to be submitted and thus poses a major potential risk of harm to public health or the environment.
7. Air quality permit violation of parameter limits where the parameter is a direct surrogate for an emissions limitation that poses a major potential risk of harm to public health or the environment.
8. Air quality permit violations that pose a major potential risk of harm to public health or the environment.
9. Any other violation that poses a major potential risk of harm to public health or the environment.

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**Moderate Classification**

1. Failure to obtain an air quality permit to construct for an air emission source with actual or potential air emissions of any single air pollutant of 100 tons per year or more (but less than 250 tons per year) with the exception of designated facilities that emit 100 tons per year or more per year; or which has any individual actual or potential toxic or hazardous air pollutant emission equal to or greater than the acceptable ambient concentrations specified by DEQ, but are less than 10 tons per year or more of any single toxic or hazardous air pollutants; or any other air emission source determined to pose a moderate potential risk of harm to public health, or the environment by DEQ for the purposes of application of this penalty policy.
2. Opacity violations in attainment areas, that occurred in a nonpopulated area, or that pose a moderate potential risk of harm to public health or the environment.
3. Fugitive dust violations in attainment areas, that occurred in a nonpopulated area, or that pose a moderate potential risk of harm to public health or the environment.
4. Open burning violations in attainment areas, that occurred in a nonpopulated area, or that pose a moderate potential risk of harm to public health or the environment.
5. Odor violations that pose a moderate potential risk of harm to public health or the environment.
6. Failure to maintain and keep records as required by applicable state statute, rule, consent order, or permit.
7. Failure to monitor, test, or sample as required by applicable state statute, rule, consent order, or permit.
8. Failure to submit any reports, data, or information that is required to be submitted and thus poses a moderate potential risk of harm to public health or the environment.
9. Air quality permit violation of parameter limits where the parameter is a direct surrogate for an emissions limitation that poses a moderate potential risk of harm to public health or the environment.
10. Air quality permit violations that pose a moderate potential risk of harm to public health or the environment.
11. Any other violation that poses a moderate potential risk of harm to public health or the environment.

**Minor Classification**

1. Failure to obtain an air quality permit to construct for an air emission source that does not have actual or potential emissions of any individual air pollutant of 99.999 tons per year or greater; has all individual actual or potential toxic or hazardous air pollutant emissions below either the screening emissions level or net acceptable ambient concentrations specified by DEQ; or any other air emission source determined to pose a minor potential risk of harm to public health or the environment by DEQ for the purposes of applying this penalty policy.
2. Submittal of inadequate reports required by statute, rule, consent order, or permit.
3. Failure to submit any reports, data, or information that is required to be submitted and thus poses a minor potential risk of harm to public health or the environment.
4. Opacity violations that pose a minor potential risk of harm to public health or the environment.
5. Fugitive dust violations that pose a minor potential risk of harm to public health or the environment.
6. Open burning violations that pose a minor potential risk of harm to public health or the environment.
7. Air quality permit violation of parameter limits where the parameter is a direct surrogate for an emissions limitation that poses a minor potential risk of harm to public health or the environment.
8. Air quality permit violations that pose a minor potential risk of harm to public health or the environment.
9. Any other violation that poses a minor potential risk of harm to public health or the environment.
10. Odor violations that pose a minor potential risk of harm to public health or the environment.