

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY



**WATER QUALITY
ADMINISTRATIVE PENALTY
GUIDANCE DOCUMENT**

November 1999

I. INTRODUCTION

This document sets forth the Idaho Division of Environmental Quality, State Water Quality Program's procedures for assessing administrative penalties under the Idaho Environmental Protection and Health Act (EPHA). The purpose of this document is to provide guidance and procedures for assessing penalties in a consistent manner. This document focuses on determining an administrative penalty once a decision has been made to pursue an enforcement action. This document is not intended to restrict the discretion or judgment of the office of the Attorney General in a civil case.

The EPHA at Idaho Code §§ 39-101 et seq. provides the Idaho Department of Health and Welfare, Division of Environmental Quality (DEQ), with the authority to assess penalties against any person who has violated or is violating a provision of the EPHA or any permit, standard, rule, condition, requirement or consent order issued or promulgated pursuant to the EPHA. Idaho Code § 39-108(3)(a) and 108(5). For violations of water quality rules under the EPHA, a responsible party may be liable for penalties not to exceed ten thousand dollars (\$10,000) per violation or one thousand dollars (\$1,000) for each day of a continuing violation, whichever is greater. Idaho Code § 39-108(5).

In addition to any administrative penalties, a violator may be liable to DEQ for any expense incurred by DEQ in enforcing the EPHA. Idaho Code § 39-108(6). When a civil complaint is filed in district court pursuant to the EPHA, DEQ Deputy Attorneys General are not bound by this policy and may seek penalties up to the maximum statutory amount. Penalties associated with criminal convictions are established in Idaho Code § 39-117 and are not considered in this document.

The procedures set forth in this document are intended solely for the guidance of DEQ personnel. This document is not intended and cannot be relied upon by any person to create any rights or privileges, either substantive or procedural, enforceable by any party in litigation with DEQ. DEQ reserves the right to deviate from this document, including any appendices, and to change it at any time without public notice.

II. PENALTY DETERMINATION PROCEDURES

The penalty calculation consists of two stages: (1) determining the matrix penalty; and, if warranted, (2) adjusting the matrix penalty for specific factors and circumstances as provided for in this document. In calculating the amount of a penalty for a violation, the following procedures apply:

- & Determine the potential of harm for each violation;
- & Determine the extent of deviation for each violation;
- & Choose the appropriate penalty established by the applicable matrix based upon the above findings; and
- & Apply any adjustment factors that may be warranted.

These procedures then establish a total penalty for each violation reflected as the following computation formula:

$$\text{TOTAL PENALTY} = \text{matrix penalty} + \text{any adjustment factors.}$$

III. PENALTY DETERMINATION

Two factors are considered in determining the penalty: (1) potential for harm; and (2) extent of deviation from a statutory or regulatory requirement. Both of these factors establish the seriousness of the violation.

A. Potential for Harm to Human Health and Welfare 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 potential harm posed by a violation, as well as on whether harm actually occurred.

DEQ will evaluate whether the potential for harm is major, moderate, or minor for any given violation and substantiate the classification on the Penalty Worksheet. Some factors which may be considered in determining the potential for harm include:

- The potential toxicity and amount of any pollutant or contaminant emitted, discharged, released, or spilled.
- The sensitivity of the environment where a violation occurred.
- The duration of a violation.
- The location of a violation, including whether the violation occurred in a populated or nonpopulated area.

The potential for harm is generally categorized in the following classifications:

Table 1. Potential For Harm

MAJOR	The violation poses a substantial likelihood of harm to human health, welfare, or the environment.
MODERATE	The violation poses a significant likelihood of harm to human health, welfare, or the environment.
MINOR	The violation poses a relatively low likelihood of harm to human health, welfare, or the environment.

B. 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 mostly in compliance with the provisions of a requirement, or an alleged violator may have totally disregarded the requirement (or any point in between). As with potential for harm, the extent of deviation may be either major, moderate, or minor.

DEQ will evaluate whether the extent of deviation is major, moderate, or minor for any given violation and substantiate the classification on the Penalty Worksheet.

The extent of deviation is generally categorized in the following classifications:

Table 2. Extent of Deviation

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.

IV. PENALTY ASSESSMENT MATRICES

Potential for harm and extent of deviations from a requirement each form one of the axes of the two penalty assessment matrices. The matrix in Table 3 is used for single violations, while the matrix in Table 4 applies to each day of a continuing violation. The matrices have nine cells, each containing a penalty dollar amount. The amount of an administrative penalty should be determined through the use of the following matrices in conjunction with the penalty computation formula:

Table 3. Penalty Assessment Matrix For Single Violations

		POTENTIAL FOR HARM		
		<i>Major</i>	<i>Moderate</i>	<i>Minor</i>
<i>Extent of Deviation</i>	<i>Major</i>	\$10,000	\$5,000	\$2,500
	<i>Moderate</i>	\$8,000	\$2,500	\$1,000
	<i>Minor</i>	\$5,000	\$1,000	\$500

Table 4. Penalty Assessment Matrix For Continuing Violations

		POTENTIAL FOR HARM		
		<i>Major</i>	<i>Moderate</i>	<i>Minor</i>
<i>Extent of Deviation</i>	<i>Major</i>	\$1,000	\$500	\$250
	<i>Moderate</i>	\$800	\$250	\$100
	<i>Minor</i>	\$500	\$100	\$50

The highest cell (major potential for harm/major extent of deviation) is limited by the maximum statutory penalty allowance. Application of the matrix is used to establish the penalty amount, after which adjustment factors may be considered.

V. PENALTY ADJUSTMENT FACTORS

The matrix penalty may be adjusted 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, when necessary, to make adjustments based on legitimate differences between similar violations. In adjusting the matrix penalty, DEQ may consider the willful, negligent, or unavoidable nature of the violation and an alleged violator's history of noncompliance.

The adjustment factors may increase, decrease, or have no effect on the claimed penalty amount. An upward adjustment cannot result in a penalty greater than the statutory maximum. Application of the adjustment factors can be cumulative, i.e., more than one factor may apply in any given case.

The following factors, based on information available at the time of penalty computation, may be considered in assessing a penalty in a NOV:

A. Willful, Negligent, or Unavoidable Nature of a Violation

Subject to the following, DEQ may make adjustments, up or down, by as much as 100% of the matrix penalty.

The degree or absence of willfulness and/or negligence by the alleged violator prior to and at the time the violation occurred may be considered in determining an adjustment to the matrix penalty. A penalty may be adjusted upward for willfulness or negligence. Conversely, a downward adjustment may be made when DEQ determines that unforeseeable or unavoidable circumstances caused the violation.

The following factors may be considered when determining the willful, negligent, or unavoidable nature of any 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 violator took reasonable precautions to prevent the events constituting the violation(s).
- . Whether the alleged violator promptly reported a noncompliance or violation.
- . Whether the alleged violator promptly corrected the violation(s).
- . Whether the alleged violator knew, or should have known, of the violation(s).

B. Alleged Violator's History of Noncompliance

Subject to the following, DEQ may make adjustments upward by as much as 100% of the matrix penalty.

DEQ may consider the alleged violator's history of noncompliance when developing the administrative penalty. The existence of a prior violation(s) may be used to support an upward adjustment of the penalty, unless the prior violation(s) 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.

In considering prior violations, DEQ may review the substance and resolution of each action in determining the percent of an upward adjustment. Some additional factors DEQ may consider are the following:

- . Similarity to a previous violation by the alleged violator.
- . Recentness of a previous violation.
- . The number of previous violations.
- . The alleged violator's efforts and/or success in correcting previous violation(s).

PENALTY WORKSHEET

Name of Alleged Violator: _____

Violation No.: _____ of _____ (USE ONE WORKSHEET PER VIOLATION)

I. Penalty

Potential For Harm: _____ Major _____ Moderate _____ Minor
Justification:

Extent of Deviation: _____ Major _____ Moderate _____ Minor
Justification:

Matrix Penalty Amount: \$ _____

Number Violation Days: _____
(If calculating daily penalties)

MATRIX PENALTY: \$ _____
[MATRIX PENALTY] x [NUMBER VIOLATION DAYS]

II. Adjustment Factors

Intent of Alleged Violator: _____
(+ or - 100% ADJUSTMENT)

Justification:

History of Noncompliance: _____
(+100% ADJUSTMENT)

Justification:

Total % Adjustment: _____
(Intent + HISTORY)

TOTAL PENALTY: \$
[Matrix PENALTY] + [TOTAL % ADJUSTMENT]