



STATE OF IDAHO  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

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## DEQ POLICY STATEMENT PS18-03

### LEAKING UNDERGROUND STORAGE TANK (LUST) PROGRAM PENALTY POLICY

#### PURPOSE

This document sets forth the Department of Environmental Quality's (DEQ's) policy for assessing administrative penalties under the Water Quality Standards, IDAPA 58.01.02.851-852, the Standards and Procedures for Application of Risk Based Corrective Action at Petroleum Release Sites, IDAPA 58.01.24, and the Rules Regulating Underground Storage Tank Systems, IDAPA 58.01.07. The purpose of the policy is to ensure that civil penalties are assessed in a fair and consistent manner; that economic incentives for noncompliance is eliminated; that persons are deterred from committing violations; and that compliance is achieved.

#### STATEMENT OF POLICY

This policy provides internal guidelines to aid DEQ 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.

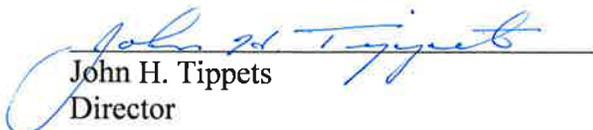
#### RESPONSIBILITY

DEQ's underground and leaking underground storage tank program manager 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This policy is effective immediately and will remain in effect for 5 years unless amended, replaced, or rescinded prior to expiration.

Dated this 6<sup>th</sup> day of March, 2018

  
John H. Tippetts  
Director

# **Leaking Underground Storage Tank (LUST) Program Penalty Policy**

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**State of Idaho  
Department of Environmental Quality**

**January 2018**

## Contents

1 Introduction.....	1
2 Determining the Economic Benefit Component.....	2
2.1 Avoided Costs .....	2
2.2 Delayed Costs .....	4
3 Determining the Gravity-Based Component .....	4
3.1 Matrix Value .....	5
3.2 Violator-Specific Adjustments.....	7
3.3 Environmental Sensitivity Multiplier.....	9
3.4 Days of Noncompliance Multiplier.....	10
3.5 Gravity-Based Component Calculation .....	11
4 Total Penalty .....	11
5 Settlement Adjustments .....	11
6 Penalty Collections .....	13
LUST NOV Penalty Computation Worksheet .....	15
LUST NOV Penalty Computation Worksheet Totals— Total Initial Penalty Amount .....	18
LUST NOV Penalty Computation After Settlement Negotiations Worksheet .....	19
LUST Enforcement Case Referral Form .....	20

## 1 Introduction

Idaho Code §39-108 provides for monetary penalties assessed against the owner or operator in enforcement actions for violations of the “Water Quality Standards” (IDAPA 58.01.02.851-852). Penalties can be assessed up to \$10,000 per violation or \$1,000 for each day of a continuing violation, whichever is greater. It is not the LUST program’s intent to use civil penalties often; our goal is to work cooperatively with Idaho’s owners and operators by using our authorities under IDAPA 58.01.02.851-852 without administrative or civil enforcement actions. However, there are circumstances where an immediate public or environmental health threat exists or where working cooperatively is no longer effective.

This penalty policy is modeled after the US Environmental Protection Agency (EPA) Office of Solid Waste and Emergency Response Directive 9610.12, “Penalty Guidance for Violations of UST Regulations” (November 14, 1990) and the Idaho Department of Environmental Quality’s (DEQ’s) “Hazardous Waste Management Act (HWMA) Civil Penalty Policy” of 2015. The policy provides internal guidelines to aid DEQ LUST personnel in assessing appropriate penalties. It also provides a mechanism whereby the UST/LUST program manager may, within specified boundaries, exercise discretion in negotiating penalties and otherwise modify the proposed penalty when circumstances warrant.

This policy does not discuss whether assessment of a penalty is the correct enforcement action to a particular violation. Rather, this document focuses on determining what the proper civil penalty should be after a decision has been made that a penalty is the proper enforcement action to issue. For guidance on determining what type of enforcement action to issue, see section 5 of the “Leaking Underground Storage Tank (LUST) Enforcement Procedures Manual.”

This document sets forth DEQ’s policy for assessing administrative and civil penalties under Idaho Code §39-108. The purpose of the policy is to ensure that penalties do the following:

- Are assessed in a fair and consistent manner
- Are appropriate for the gravity of the violation committed
- Eliminate economic incentives for noncompliance
- Deter owners and operators from committing future violations
- Achieve compliance

Issuing a notice of violation (NOV) with penalties will hopefully ensure that the owner or operator returns to compliance and is deterred from repeating the violation. Such deterrence is achieved by the following actions:

1. Removing any significant economic benefit that the owner or operator may have gained from noncompliance (the **economic benefit component**)
2. Charging an additional amount, based on the specific violation and circumstances of the case, to penalize the owner or operator for not complying with the statute and/or rules (the **gravity-based component**)

The sum of the economic benefit component (section 2) and gravity-based component (section 3) yields the initial penalty amount per violation (section 4), which is calculated using the LUST NOV Penalty Computation Worksheet located at the end of this policy. Each violation must be

computed on separate worksheets. The sum of the per-violation penalty worksheets yields the initial penalty for the *entire* facility. The initial penalty is the penalty amount presented to the owner or operator and before any settlement negotiations occur.

$$\text{Initial Penalty} = \text{Economic Benefit Component} + \left[ \text{Matrix Value} \times \text{Violator-Specific Adjustments} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier} \right]$$

## 2 Determining the Economic Benefit Component

The economic benefit component represents the economic advantage an owner or operator has gained by delaying or avoiding assessment and/or cleanup costs. The total economic benefit component is based on the benefit from two sources: avoided costs and delayed costs.

$$\text{Economic Benefit Component} = \text{Avoided Costs} + \text{Delayed Costs}$$

**Avoided costs** are the assessment and cleanup expenditures that should have been incurred but were not. They are costs the owner or operator cannot make up for.

**Delayed costs** are the expenditures that have been delayed but will eventually be incurred to achieve compliance.

There are two methods for calculating the economic benefit from noncompliance: (1) the rule-of-thumb approach and (2) the software program called BEN. The rule-of-thumb approach (described in the sections that follow) should be used for making an initial estimate of the economic benefit of noncompliance. If the initial estimate is less than \$10,000, the rule-of-thumb calculation may be used as a basis for the economic benefit assessed in the penalty. If, however, the estimate indicates that the economic benefit is greater than \$10,000, the BEN model should be used. The BEN model should also be used if the owner or operator rejects the rule-of-thumb calculation.

### 2.1 Avoided Costs

Avoided costs are the assessment and cleanup expenditures that are averted by the owner or operator's failure to comply. These are considered to be avoided because they will never be incurred even if the owner or operator comes into compliance (i.e., it is impossible for the owner or operator to make up for them). For example, an owner or operator who has failed to report a spill or overfill within 24 hours has already saved costs by not reporting the release because the next day the spill or overfill could be cleaned up and they have avoided further assessment required by the department. Other examples of avoided costs include proper disposal of soils and failure to remove free product. The owner or operator's benefit from avoided costs is generally expressed as the avoided expenditures plus the interest potentially earned on the money not spent.

### Determining Avoided Costs

$$\text{Avoided Costs} = \left[ \frac{\text{Avoided Expenditures} \times \text{Interest} \times \text{Number of Days}}{365 \text{ Days}} \right] \times (1 - \text{MTR})$$

Where:

- Avoided expenditures are estimated using local, comparable costs.
- Interest is the equity discount rate provided in the BEN model.
- Number of days is from the date of noncompliance to the date of compliance.
- 365 days is the number of days in a year.
- Marginal tax rate (MTR) is based on corporate tax rates or financial responsibility compliance class.

To determine the value of the interest, compounded annually, the *equity discount rate* should be used. This represents the risk-free rate (T-bill) plus the cost of financing for pollution control equipment. This rate can be obtained by calling the EPA Office of Enforcement or by accessing the BEN computer model. When used in the formula, this number should be expressed as a decimal and not a percentage (e.g., 0.181 instead of 18.1%).

The MTR used in calculating the avoided costs will vary depending on the size of the business. As with the interest rate, this number should be expressed as a decimal, not a percentage (e.g., 0.15 instead of 15%). To determine the taxable income, enforcement staff should contact EPA's National Enforcement Investigations Center (NEIC) to determine whether the business in violation is listed in the Dun and Bradstreet Business Information Report database. Using the owner or operator's name and location (city and state), NEIC staff can search the database for information on the company's annual income. The database provides information on the annual incomes of a large number of companies across the country, including the smaller "mom-and-pop" businesses. Although most of the incomes listed in the database are those reported to Dun and Bradstreet, the database also includes some estimated incomes for companies that have not reported.

If information on annual income cannot be obtained from NEIC, enforcement staff may use the company's financial responsibility (FR) compliance class as a basis for determining the appropriate MTR (Table 1).

**Table 1. Marginal tax rates based on financial responsibility (FR) compliance class.**

Compliance Class <sup>a</sup>	Tax Rate
FR Classes 1 & 2	0.34 (34%)
FR Class 3	0.25 (25%)
FR Class 4	0.15 (15%)

<sup>a</sup> Compliance class is determined as follows: Class 1—large petroleum marketing firms with 1,000 or more USTs or any firm with net worth over \$20 million; Class 2—large and medium-sized petroleum marketing firms with 100 to 999 USTs; Class 3—small petroleum marketing firms with 13 to 99 USTs; and Class 4—very small marketing firms with 1 to 12 USTs or less than 100 USTs at one site, all other firms with net worth of less than \$20 million, and municipalities.

In the absence of specific information on the owner or operator's FR compliance class, enforcement staff should assume that the owner or operator is in FR Class 4 (which will result in the highest penalty).

## 2.2 Delayed Costs

Delayed costs are the capital expenditures that have been delayed because the owner or operator failed to comply with the requirements. Examples of delayed costs include failure to conduct an initial site characterization within 45 days, investigate off-site impacts, repair or replace the leaking tank system, remove the petroleum from the tank system, mitigate fire and vapor hazards, submit a corrective plan, and begin corrective action. These expenditures are considered delayed, and not avoided altogether, because the owner or operator will eventually have to incur these costs to come into compliance. The benefit from delayed costs is generally expressed as only the return on investment that could have been earned on the money not spent.

### Determining Delayed Costs

$$\text{Delayed Costs} = \frac{\text{Delayed Expenditures} \times \text{Interest} \times \text{Number of Days}}{365 \text{ Days}}$$

Where:

- Delayed expenditures are estimated using local, comparable costs.
- Interest is the equity discount rate provided in the BEN model.
- Number of days is from the date of noncompliance to the date of compliance.
- 365 days is the number of days in a year.

## 3 Determining the Gravity-Based Component

The second component of a penalty is the gravity-based component. The purpose of the gravity-based component is to ensure that those owners and operators who violate the rules are economically disadvantaged relative to owners or operators who are in compliance. The gravity-based component is also used to penalize current and/or past noncompliance and consists of four elements:

- Matrix value
- Violator-specific adjustments to the matrix value
- Environmental sensitivity multiplier
- Days of noncompliance multiplier

### Determining the Gravity-Based Component

$$\text{Gravity-Based Component} = \text{Matrix Value} \times \text{Violator-Specific Adjustments} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier}$$

Where:

- Matrix value is based on potential for harm and deviation from the requirement.
- Violator-specific adjustments to the matrix value are based on an owner or operator's cooperation, willfulness, history of noncompliance, and other factors.
- Environmental sensitivity multiplier is a value based on the environmental sensitivity associated with the location of the facility.
- Days of noncompliance multiplier is a value based on the number of days of noncompliance.

The gravity-based component is then added to the economic benefit component to arrive at the initial penalty.

If the enforcement action results in settlement negotiations, certain factors used to adjust the matrix value may be re-assessed during negotiations to determine whether a downward adjustment in the gravity-based component is appropriate. In general, it is the owner or operator's responsibility to provide evidence in support of reducing the penalty.

### 3.1 Matrix Value

The first step in determining the gravity-based component is determining the initial matrix value. The matrix value is based on the following two criteria:

- **Extent of deviation from requirement**—the extent to which the violation deviates from the rule requirements.
- **Actual or potential harm**—the likelihood that the violation could (or did) result in harm to human health or the environment and/or has/had an adverse effect on the LUST program.

A matrix has been developed in which these two criteria form the axes (Table 2). Three gravity levels apply to each of these criteria—major, moderate, and minor—and form the grid of the matrix. The matrix has nine cells, each of which contains a penalty amount. The specific cell to be used in determining the matrix value is identified by selecting a gravity level for both factors. The focus of this section is to determine the gravity-based matrix value for administrative enforcement (i.e., issuance of an NOV) and civil enforcement (i.e., filing a civil complaint) cases.

**Table 2. Base penalty matrix value.**

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

**Penalties will be assessed on a per-tank or per-pipe basis** if the violation is associated with one tank or one pipe. In a typical release scenario, there is only one release source.

### 1. Extent of Deviation from Requirements

The first factor in determining the matrix value is the extent of deviation from the requirements. The categories for extent of deviation from the requirements are as follows:

- **Major**—The owner or operator deviates from the requirements of the rule to such an extent that there is substantial noncompliance. An example is knowingly failing to notify the LUST program of a release while never initiating cleanup.
- **Moderate**—The owner or operator significantly deviates from the requirement of the rule, but to some extent has implemented the requirement as intended. An example is submitting the initial site characterization report a few months late and some of the required information is missing.
- **Minor**—The owner or operator deviates slightly from the rule, but most of the requirements are met. An example is investigating a suspected release within 10 days instead of 7, without a granted extension.

### 2. Potential for Harm

The second factor for determining the matrix value of a violation is the extent to which the owner or operator's actions resulted in, or were likely to result in, a situation that could cause harm to human health or the environment. When determining this factor, it is the potential in each situation that is important, not whether the harm has actually occurred. Owners or operators should not be rewarded with lower penalties simply because no harm occurred. The potential extent of this harm is addressed by the environmental sensitivity multiplier.

The potential-for-harm factor is also applied to violations of administrative requirements (e.g., delivering reports and notification requirements). For violations of these requirements, the UST/LUST program manager and regional office personnel should consider the importance of the requirement violated. For example, failure to notify DEQ that cleanup has begun may be considered to have significant potential for harm because the department did not have an opportunity to ensure cleanup would be conducted according to the rules. For purposes of this guidance, the categories for potential for harm are as follows:

- **Major**—The violation causes or may cause a situation resulting in a *substantial* or continuing risk to human health and the environment and/or may have a *substantial* adverse effect. Examples are (1) failing to mitigate fire or vapor hazards; (2) failing to

take immediate action to prevent any further releases (i.e., continuing to use the tank or failing to repair the pipe); (3) not taking samples in the correct locations; (4) not addressing off-site impacts; and (5) failing to conduct free product removal.

- **Moderate**—The violation causes or may cause a situation resulting in a *significant* risk to human health and the environment and/or may have a *significant* adverse effect. Examples are (1) failing to report a spill because the owner or operator thought it was under 25 gallons but later realized it was more; (2) failing to perform a tank tightness test for a suspected release in a timely manner; (3) failing to address contaminated stockpiles of soil; and (4) submitting a corrective action plan that does not adequately address the contamination.
- **Minor**—The violation causes or may cause a situation resulting in a relatively *low risk* to human health and the environment and/or may have a *minor adverse effect*. An example would be submitting a report slightly late.

### 3.2 Violator-Specific Adjustments

In general, adjustments to the matrix value may be made at the settlement stages of penalty assessment (see section 5) to address the unique facts of each case and to resolve the case quickly. Prior to settlement negotiations, enforcement personnel have the discretion to use any relevant information to adjust the matrix value upwards or downwards.

Specifically, to ensure that penalties are assessed in a fair and consistent manner and take into account case-specific differences, enforcement personnel have the option of adjusting the matrix value based on any information known about the owner or operator's degree of cooperation or noncooperation, degree of willfulness or negligence, history of noncompliance, and other unique factors (Table 3).

**Table 3. Violator-specific adjustments to the matrix value.**

Adjustment Factor	Range of Percentage Adjustment
Degree of cooperation/noncooperation	25% up or down
Degree of willfulness or negligence	25% up or down
History of compliance/noncompliance	25% up or down
Other unique factors	25% up or down

The sections that follow discuss these four adjustment factors. In addition, the matrix value should be adjusted to reflect the environmental sensitivity (see section 3.3 below) and the days of noncompliance (section 3.4 below). Subsequent adjustments made during the settlement stage, including adjustments for inability to pay, are discussed in section 5.

To ensure that penalties are calculated fairly and consistently, any upwards adjustment may be made only if the circumstances of the case warrant such adjustments. Furthermore, for any adjustments made to the gravity-based matrix value, justification must be provided on the Penalty Computation Worksheet located at the end of this policy.

## 1. Degree of Cooperation/Noncooperation

The first factor that may be considered in adjusting the matrix value is the owner or operator's cooperation or good faith efforts in response to enforcement actions. In adjusting for the owner or operator's degree of cooperation or noncooperation, the UST/LUST program manager and regional office personnel may consider making upward or downward adjustments by as much as 25% of the matrix value.

To have the matrix value reduced, the owner or operator must demonstrate cooperative behavior by responding in a timely manner, providing periodic updates, seeking out compliance assistance, and going beyond what is minimally required to comply with requirements that are closely related to the initial harm addressed. For example, an owner or operator may indicate a willingness to ensure that the violation never occurs again or may upgrade equipment. Because compliance with the statute and/or rule is required, **no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance.** That is, there should be no reward for doing now what should have been done in the first place. On the other hand, lack of cooperation can result in an increase of up to 25% of the matrix value.

## 2. Degree of Willfulness or Negligence

The second adjustment that may be made to the matrix value is for willfulness or negligence, which takes into account the owner or operator's responsibility and intentions in committing the violation. In assessing the degree of willfulness or negligence, the following factors may be considered:

- How much control the owner or operator had over events constituting the violation (e.g., whether the violation could have been prevented or was beyond the owner or operator's control as in the case of a natural disaster)
- Whether the owner or operator made any good faith efforts to comply and/or took reasonable precautions against the events constituting the violation
- Whether the owner or operator knew or should have known of the risks or hazards associated with the conduct
- Whether the owner or operator knew of the legal requirement that was violated

The last factor, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. **If the owner or operator was aware that he or she was violating the rules, the matrix value will be increased.**

In certain circumstances, the amount of control that the owner or operator has over how quickly the violation is remedied can also be relevant. Specifically, if correcting a violation is delayed by factors that the owner or operator clearly can show were out of his or her control, the penalty multiplier assigned for the duration of noncompliance may be reduced (see section 3.4 below), although the original penalty for noncompliance will not be. For example, if the owner or operator has scheduled a consultant to perform soil excavation but the consultant cannot make it to the owner or operator's facility in a timely manner, then the owner or operator will not be held accountable for the delay. If an owner or operator is in violation of not taking samples in the correct locations but immediately performs another round of sampling, then those actions will be perceived favorably. In assessing the degree of willfulness, the UST/LUST program manager and regional office personnel may consider making upward or downward adjustments by as much as 25% of the matrix value.

### 3. History of Compliance/Noncompliance

The third factor to be considered in adjusting the matrix value is the owner or operator's history of compliance or noncompliance. Previous violations are usually considered clear evidence that the owner or operator was not deterred by previous enforcement actions. Unless the current violation was caused by factors entirely out of the control of the owner or operator, prior violations should be taken as an indication that the matrix value should be adjusted upwards.

When assessing the history of noncompliance, some of the following factors may be considered:

- Number of previous violations and enforcement actions
- Seriousness of the previous violations
- When previous violations occurred (i.e., how recent)
- Similarity of the previous violations
- Enforcement tools utilized (e.g., whether the owner or operator's previous behavior required use of more stringent enforcement actions)
- Owner or operator's response to the previous violation(s) with respect to correcting the problem

A prior violation includes civil complaints and administrative enforcement (NOVs). It also includes any violations for which the owner or operator has previously been given any written notification, no matter how informal.

### 4. Other Unique Factors

An adjustment is allowed for unanticipated factors that may arise on a case-by-case basis. As with the previous factors, the UST/LUST program manager and regional office personnel may want to make upward or downward adjustments to the matrix value by as much as 25% for such reasons.

### 3.3 Environmental Sensitivity Multiplier

In addition to the violator-specific adjustments discussed above, enforcement personnel may make a further adjustment to the matrix value based on potential site-specific impacts that could be caused by the violation. The environmental sensitivity multiplier takes into account the adverse environmental effects the violation may have had given the sensitivity of the local area to damage posed by a potential or actual release. This factor differs from the potential-for-harm factor, which takes into account the *probability* that a release or other harmful action *would occur* because of the violation. The environmental sensitivity multiplier addressed here looks at the *actual or potential impact* that such a release, *once it did occur*, would have on the local environment and public health.

To calculate the environmental sensitivity multiplier, the sensitivity of the environment must first be determined. For purposes of this document, the environmental sensitivity will be either low, moderate, or high. Factors to consider in determining the appropriate sensitivity level include the following:

- Amount of petroleum or hazardous substance potentially or actually released (e.g., size of the tanks and number of tanks at the facility that were involved in the violation, as they relate to the potential volume of materials released)
- Toxicity of petroleum or hazardous substance released

- Potential hazards presented by the release or potential release, such as explosions or other human health hazards
- Geologic features of the site that may affect the extent of the release and may make remediation difficult
- Actual or potential human or environmental receptors, including:
  - Likelihood that release may contaminate a nearby river or stream
  - Number of drinking water wells potentially affected
  - Proximity to environmentally sensitive areas, such as wetlands or sole source aquifers
  - Proximity to sensitive populations, such as children (e.g., schools, daycares)
- Ecological or aesthetic value of environmentally sensitive areas

The following are examples of environmental sensitivity determinations. A **low sensitivity** value may be given in a case where one tank containing petroleum is located in clay soil in a semi-residential area where all drinking water is supplied by municipal systems and where little wildlife is expected to be affected. A **moderate sensitivity** value may be given if several tanks were in violation, the geology of the site allows for some movement of a plume, and several drinking water wells could have been affected. A **high sensitivity** value may be given if a number of tanks (or very large tanks) were involved, there were several potential receptors of the released substance through drinking water wells or contact with contaminated surface water, and the contamination would be difficult to remediate, such as in fractured basalt. Each level of sensitivity is given a corresponding multiplier value (Table 4).

**Table 4. Determining the environmental sensitivity multiplier.**

Environmental Sensitivity	Multiplier
Low	1.0
Moderate	1.5
High	2.0

### 3.4 Days of Noncompliance Multiplier

The final adjustment that may be made to the matrix value takes into account the number of days of noncompliance. To determine the amount of the adjustment, locate the days of noncompliance multiplier in Table 5 that corresponds to the duration of the violation.

**Table 5. Determining the days of noncompliance multiplier.**

Days of Noncompliance	Multiplier
0–90	1.0
91–180	1.5
181–270	2.0
271–365	2.5
Each additional 6 months or fraction thereof	add 0.5

### 3.5 Gravity-Based Component Calculation

The gravity-based component is calculated using the matrix value (section 3.1), violator-specific adjustments (section 3.2), the environmental sensitivity multiplier (section 3.3), and the days of noncompliance multiplier (section 3.4).

#### Determining the Gravity-Based Component

$$\text{Gravity-Based Component} = \text{Matrix Value} \times \text{Violator-Specific Adjustments} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier}$$

## 4 Total Penalty

The economic benefit component (section 2 of this policy) is added to the gravity-based component (section 3.5) to form the initial penalty to be assessed in the NOV or civil complaint. The total penalty cannot exceed \$10,000 per violation. The LUST NOV Penalty Computation Worksheet and LUST NOV Penalty Computation Worksheet Totals sheet document penalty calculations and initial total penalty determined by the UST/LUST program manager.

## 5 Settlement Adjustments

If the owner or operator disagrees with or wants to discuss an enforcement action, including penalty calculations, he or she has the right to request a compliance conference in accordance with Idaho Code §39-108(3)(a) and IDAPA 58.01.07.500.07, “Rules Regulating Underground Storage Tank Systems.” The owner or operator must contact DEQ within 15 days of the receipt administrative enforcement (NOV), and the conference shall be held within 20 days unless the department and the owner or operator agree on a later date. The compliance conference provides an opportunity for the owner or operator to explain the circumstances of the alleged violation and to present a proposal for remedying the damage caused by the alleged violation and ensuring future compliance.

If the owner or operator and DEQ agree on a plan to remedy damage caused by the alleged violation and to ensure future compliance, they enter into a consent order formalizing the

agreement (see Idaho Code §39-108(3)(a)(iv) and (v)). The consent order may include a provision providing a payment of any agreed penalty. The consent order is effective immediately upon signing by both parties and precludes any civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, or if the parties cannot reach agreement on the terms of the consent order, DEQ may pursue a civil enforcement action in district court for specific performance of the consent order and/or any other relief allowed in the Idaho Environmental Protection and Health Act (Idaho Code Title 39, Chapter 1); the UST Act (Idaho Code Title 39, Chapter 88); and any other remedy as provided in law.

In lieu of monetary penalties, DEQ may allow the owner or operator to implement a supplemental environmental project as provided in Idaho Code §39-108(5)(b). A supplemental environmental project is a project that the person is not otherwise required to perform and that prevents pollution, reduces the amount of pollutants reaching the environment, contributes to public awareness of environmental matters, or enhances the quality of the environment. In evaluating a particular supplemental environmental project proposal, preference may be given to those projects with an environmental benefit that relates to the violation or the objectives of the underlying statute or rule that was violated or that enhances the quality of the environment in the general geographic location where the violation occurred. DEQ's policy statement on supplemental environmental projects (PS15-05) is available at [www.deq.idaho.gov/policies](http://www.deq.idaho.gov/policies).

Additionally, the owner or operator has the right to appeal in accordance with Idaho Code §39-108; the "Rules Regulating Underground Storage Tank Systems," IDAPA 58.01.07; and the "Rules of Administrative Procedure Before the Board of Environmental Quality," IDAPA 58.01.23.

At a minimum, the UST/LUST program manager may consider adjustments to NOV penalty amounts during settlement negotiations based on the four violator-specific adjustment factors discussed in section 3.2:

- Degree of cooperation/noncooperation
- Degree of willfulness or negligence
- History of noncompliance
- Other unique factors

It is up to the owner or operator to present information during settlement that mitigates use of upward adjustments. The settlement adjustment is usually *not* made to the economic benefit component unless new and better information about the economic benefits is made available. The UST/LUST program manager must record the reasons for adjusting the penalty using the LUST NOV Penalty Computation After Settlement Negotiations Worksheet.

In addition to the adjustment factors listed above, one factor that is commonly discussed during negotiations is the owner or operator's inability to pay. An adjustment may need to be made for inability to pay to ensure fair and equitable treatment of the regulated community. A penalty should not be reduced when an owner or operator refuses to correct a violation, has a history of noncompliance, or in cases with egregious violations (e.g., failure to stop a continuing release).

The inability-to-pay adjustment should be based on the amount of the initial penalty and the financial condition of the business, but it is the owner or operator's responsibility to provide evidence of inability to pay. The owner or operator may provide evidence, such as tax returns, to

document his or her claims. In cases when the owner or operator fails to demonstrate inability to pay, DEQ should determine whether the owner or operator is unwilling to pay, in which case no adjustments to the initial penalty should be made. In cases where the owner or operator can successfully demonstrate that the company is unable to pay or that payment of all or a portion of the penalty will preclude the owner or operator from achieving compliance, the following options may be considered:

- Delayed payment schedule. Such a schedule might be contingent on an increase in sales or some other indicator of improved business.
- An installment payment plan with or without interest.
- Payment deferral.
- In-kind payments such as system upgrades.
- In the most extreme cases, a reduction of up to 40% of the gravity-based component.

A reduction of the gravity-based component should be considered *only* after determining the other options are not feasible.

To evaluate an owner or operator's claim regarding inability to pay, DEQ uses EPA's financial models:

- ABEL—Evaluates a corporation's or partnership's ability to afford compliance costs, cleanup costs, or civil penalties
- INDIPAY—Evaluates an individual's ability to afford compliance costs, cleanup costs, or civil penalties

Determining inability to pay varies greatly depending on a number of factors. For example, an owner may provide tax records that showed a profit at the time the taxes were submitted but the present situation may be that he or she is unemployed. Additionally, one year out of three years of tax data may be below the poverty level and skew the average. DEQ's decision-making process when taking these factors into consideration must be clearly documented in all inability-to-pay cases.

If DEQ determines the owner or operator *does* have the ability to pay and the owner or operator disagrees, he or she has the right to request a compliance conference in accordance with Idaho Code §39-108. A compliance conference must be requested within 15 days of the ability-to-pay determination.

## 6 Penalty Collections

All penalties shall be submitted by check to:

Accounts Receivable  
Fiscal Office  
Idaho Department of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706-1255

The fiscal office must be informed that a penalty check is expected so they can create an invoice. An email to the accounts receivable staff briefly summarizing the expected payment amount, the

name of the payee, and the EDMS link to the facility record is required. When the fiscal office has received the check, they will email the program manager a receipt. The receipt shall be entered by the UST/LUST program manager into the facility's record in the EDMS. All LUST penalties shall be deposited into DEQ's General Fund.

# LUST NOV Penalty Computation Worksheet

Assessments for each violation must be calculated on separate worksheets and totaled.

## I. Background

Facility ID# \_\_\_\_\_ Date of Violation \_\_\_\_\_

Facility Name \_\_\_\_\_

Owner Name \_\_\_\_\_

Regulation Violated \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Previous Violations \_\_\_\_\_

\_\_\_\_\_

Date of Return to Compliance (if applicable) \_\_\_\_\_

Days of Noncompliance \_\_\_\_\_

## II. Economic Benefit Component

Avoided Expenditures \_\_\_\_\_

Basis:

Delayed Expenditures \_\_\_\_\_

Basis:

Marginal or Weighted Tax Rate \_\_\_\_\_ Source: \_\_\_\_\_

Interest Rate \_\_\_\_\_ Source: \_\_\_\_\_

$$\text{Avoided Costs} = \left[ \frac{\text{Avoided Expenditures} \times \text{Interest} \times \text{Number of Days}}{365 \text{ Days}} \right] \times (1 - \text{MTR})$$

3. Calculated Avoided Costs: \_\_\_\_\_

$$\text{Delayed Costs} = \frac{\text{Delayed Expenditures} \times \text{Interest} \times \text{Number of Days}}{365 \text{ Days}}$$

4. Calculated Delayed Costs: \_\_\_\_\_

5. Economic Benefit Component: \_\_\_\_\_ (carry figure to Line 16).  
(Line 3 + Line 4)

**III. Matrix Value for the Gravity-Based Component**

Potential for Harm: \_\_\_\_\_ Extent of Deviation \_\_\_\_\_

6. Matrix Value (MV) from Section 3.1: \_\_\_\_\_

7. Per-tank or pipe MV: \_\_\_\_\_ (if violation is per facility, the amount on Line 7 will be the same as the amount on Line 6)

**IV. Violator-Specific Adjustments to Matrix Value**

	Percentage Change (+ or -)	× Matrix Value	= Dollar Adjustment (+ or -)	Justification for Adjustment
8. Degree of cooperation/ noncooperation	_____	_____	_____	
9. Degree of willfulness or negligence	_____	_____	_____	
10. History of noncompliance:	_____	_____	_____	
11. Unique factors:	_____	_____	_____	
12. Adjusted Matrix Value (Line 7 + Lines 8–11)			_____	

**V. Gravity-Based Component**

Level of Environmental Sensitivity (low, moderate, high): \_\_\_\_\_ Justification: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

13. ESM (from section 3.3) \_\_\_\_\_

14. DNM (from section 3.4) \_\_\_\_\_

$$\text{Gravity-Based Component} = \text{Adjusted Matrix Value} \times \text{Environmental Sensitivity Multiplier} \times \text{Days of Noncompliance Multiplier}$$

15. Gravity-Based Component: \_\_\_\_\_  
(Line 12 × Line 13 × Line 14)

**Vi. Initial Penalty**

16. Economic Benefit Component: \_\_\_\_\_  
(from Line 5)

17. Gravity-Based Component: \_\_\_\_\_  
(from Line 15)

18. Initial Penalty: \_\_\_\_\_  
(Line 16 + Line 17)

SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

**LUST NOV Penalty Computation Worksheet Totals—  
Total Initial Penalty Amount**

Facility ID# \_\_\_\_\_ Date of Violation \_\_\_\_\_

Facility Name \_\_\_\_\_

Owner Name \_\_\_\_\_

Total Initial Penalty: \_\_\_\_\_ (add up all individual computation worksheets)

## LUST NOV Penalty Computation After Settlement Negotiations Worksheet

Facility ID# \_\_\_\_\_ Date of Settlement Negotiation \_\_\_\_\_

Facility Name \_\_\_\_\_

Owner Name \_\_\_\_\_

Initial Penalty: \_\_\_\_\_

Justifications for Adjustments (e.g., discuss and attach INDIPAY or ABEL worksheets):

Final Settlement Penalty Amount: \_\_\_\_\_

LUST PROGRAM MANAGER SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

OWNER OR OPERATOR SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

## **LUST Enforcement Case Referral Form**

See EDMS record 2018BAH2.