

8. Civil Penalties

Civil penalties are an indispensable part of enforcement. Penalties serve several purposes, including minimizing the effect of violations on human health and the environment, achieving a swift return to compliance, removing any economic advantage that might have come about through violations, and deterring others from similar acts. Penalties are considered when a notice of violation is issued. At that time, the violating party has already been provided the information and opportunity to reach compliance and failed to comply, or the violation has already resulted in significant damage which must be addressed. It is appropriate to consider a penalty assessment as a way to impress on the violator the seriousness of the matter and the department's determination to address it.

Each of the environmental protection statutes contain provisions related to penalties, generally indicating the violations subject to penalties and the range of penalties that may be assessed. Some statutes identify factors to be considered in developing a proposed penalty, and these typically include the seriousness and duration of the violation, the degree of responsibility of the violator, actions taken by the violator to mitigate the effects of the violation, the history of past violations, the economic benefit obtained through the violation, and the ability to pay. In addition, federal authorities implemented by the department have expectations for penalties for violations, and the department's actions in its parallel administration of those authorities is expected to satisfy the federal enforcement role to the extent possible.

The state environmental protection statutes also provide for the assessment of administrative penalties, and the department and commissions have established rules that provide procedures for those penalties.

There are also several federal policies related to penalties and the most frequently referenced is Environmental Protection Agency's policy on self-disclosure. This policy allows the reduction or elimination of penalties based on certain criteria met by the violator. See www.epa.gov/compliance/incentives/auditing/auditpolicy.html. While the state does not have a similar policy in place, the compliance and enforcement sections recognize the benefits available to the state and the violator through the use of this policy. The state can implement this policy at the state level as well.

After proposed penalty amounts are calculated, various methods are available to approve the penalty assessment depending upon the amount of the penalty. Consult the current delegation of authority memorandum to determine the approval authority for the penalty. In addition, some penalties are proposed in the context of settlement, with a failure to reach a settlement resulting in a referral for litigation. In those cases the approval of the penalty assessment is made through the process for approving a referral in case further negotiation toward settlement is not successful. See [Section 7](#).

Penalty calculations are maintained in confidential files. The files are labeled "CONFIDENTIAL: Work Product Privileged" or alternatively for penalties over \$20,000 "CONFIDENTIAL: Attorney-Client Privileged".

8.1 Air Pollution Control

See the Guide to Our Air Pollution Enforcement Process factsheet (PUB2059) on the department Web site at www.dnr.mo.gov/pubs/pub2059.pdf

8.2 Drinking Water

Civil penalties may be sought for public drinking water enforcement cases referred to the Missouri Attorney General for litigation and resolution. Section 640.130.4., RSMo states: "The court may impose a civil penalty of not more than fifty dollars per day or part thereof for the first violation of section 192.320, RSMo, and sections 640.100 to 640.140; one hundred dollars per day or part thereof for the second violation and for each violation thereafter, including any order issued pursuant to this section, or any rules or regulations promulgated pursuant to sections 640.100 to 640.140. The department shall not seek a civil monetary penalty under this section for a violation where an administrative penalty was assessed and collected. Any offer of settlement to resolve a civil penalty under this section shall be in writing, shall state that an action for imposition of a civil penalty may be initiated by the attorney general under authority of this section and shall identify any dollar amount as an offer of settlement which shall be negotiated in good faith through conference, conciliation and persuasion."

Prior to referral to the Attorney General's Office, the Public Drinking Water Branch's Compliance/Enforcement Section may offer a settlement agreement with penalties to the violator. After calculating the civil penalty as authorized above, the Compliance/ Enforcement Section will send the violator a settlement offer letter, providing penalty amounts and offering to meet in the interest of settlement. The penalty can be discussed in person or over the phone. Upon agreement of the penalty amount and other terms of the settlement, the case and proposed penalty will be presented to the Enforcement Review Board for approval. Upon approval, Public Drinking Water Branch staff will draft a settlement agreement for the Attorney General's Office to finalize and send to facility representatives. If the penalty is not agreed upon or not paid, the Compliance and Enforcement Section will notify the facility that the department will pursue referral to the Attorney General's Office. After the agreement is finalized and penalty is paid, the Compliance/Enforcement Section will track any suspended penalty and ensure that inspections are conducted to determine if the suspended penalty is due.

8.3 Environmental Services

Penalties for hazardous waste violations are calculated based on guidance in EPA's Resource Conservation and Recovery Act Civil Penalty Policy, as modified by Missouri. Penalties for underground storage tank violations are calculated based on EPA's Underground Storage Tank Civil Penalty Policy, as modified by Missouri. After calculating the civil penalty, the Compliance/Enforcement Section will request section chief approval and management approval. After approved, the case and proposed penalty will be presented to the Enforcement Review Board for approval. A penalty negotiation letter will be sent listing the violations, providing penalty amount and offering to meet in the interest of settlement. The penalty can be discussed in person or over the phone. Upon agreement of the penalty amount and other terms of settlement, the case manager will draft a settlement agreement for the Attorney General's Office to finalize and send to facility representatives. If the penalty is not agreed upon or not paid, the Compliance/Enforcement Section will notify the facility that the department will pursue referral to the Attorney General's Office at the next Hazardous Waste Management Commission meeting. After the agreement is finalized and penalty is paid, the Compliance/Enforcement Section will track any suspended penalty and ensure that inspections are conducted to determine if the suspended penalty is due.

8.4 Land Reclamation

Industrial Minerals

A proposed penalty assessment is prepared after a notice of violation is issued. The dollar amount range is up to \$1,000. The penalty may be assessed for each day the violation has occurred. However, it is typically assessed for one day only.

The criteria for assessing a penalty involves establishing a basic dollar amount using a matrix or table. Additions or subtractions are made to the initial amount based upon:

- A good faith or lack of good faith.
- The degree of willfulness or negligence.
- The history of noncompliance.
- The operator's ability to pay.

Good faith points are earned by rapid abatement of the notice of violation. Up to \$100 can be deducted in this category.

Under the degree of willfulness or negligence the dollar value may be raised or lowered based upon:

- The operator's control of the situation.
- The foreseeability of the events that contributed or led to the violation.
- The precautions taken and whether the operator was diligent, negligent or his/her conduct was intentional and led to a threat to health or safety.
- The legal requirement and was warned of the same or of any hazards associated with the violation.

For the history of noncompliance, a dollar value may be added for all violations that were issued to the operator that are of a similar nature. The only violations that can be used in this category are those where rights for appeal by the operator have expired. The dollar value is also increased by the number of all violations that have been issued during the past 18 months. Also, a dollar amount may be added for each day that the operator went over the abatement date on all previous violations.

If the operator supplies a notarized statement that they are unable to pay, the program director may lower the proposed assessment by an appropriate amount.

The matrix or table uses these criteria for determining potential for harm and the extent of the deviation from the requirement. The potential for harm involves applying a numerical value from one for the least serious to three for the most serious.

The Land Reclamation staff will rate each of the following parameters:

- Risk of exposure of human or environmental receptors.
- Potential seriousness of exposure.
- Harm to the regulatory program.

The point total for each parameter is totaled and divided by three. The numerical value obtained is assigned a dollar amount on the matrix or table. The matrix value for extent of the deviation is determined by whether the violation represents a major, moderate or minor deviation from the requirement of the rule or law.

After the penalty assessment has been prepared it is mailed to the operator by certified mail.

If the operator is considered a habitual violator, the commission may refer the matter to the Attorney General's Office for assessment of civil penalties as well.

The following is a list of criteria used to determine if an operator qualifies as a habitual violator:

- The operator has three similar notice of violations issued in any six or less inspections.
- The operator has five notice of violations issued in any 10 (or fewer) inspections.
- The operator has three or more notice of violations issued in any three consecutive inspections.

Coal

1. **Assessments** - After an enforcement action is issued, including a notice of violation, notice of delinquent reclamation or a cessation order, it must be reviewed and assessed a penalty. The penalty may either be zero or a dollar amount based on the following discussion.
2. **Notices of Violation** - Four criteria are used to assess a penalty related to a notice of violation. These are history of previous violations, seriousness of the violation, degree of negligence involved and the operator's good faith in achieving compliance once the violation has been cited.
 - History takes into consideration the enforcement actions previously issued to the permittee. Generally, the enforcement actions are counted for a period of 12 months after appeal rights concerning that violation have expired, or after the administrative appeal proceeding has been concluded. Notices of violation are assigned one point. Cessation Orders are assigned five points. A maximum of 30 points can be assigned.
 - Seriousness usually takes into consideration three criteria. One is the probability of the occurrence of the event which a violated standard is designed to prevent. Up to 15 points can be assigned. The second is the extent of potential or actual damage that occurs due to the violation. Up to 15 points can be assigned. The third is whether or not the damage occurred on or off the permit. Up to 15 points can be assigned. Generally, the greater the damage, the higher the penalty. Also, damage that occurs off the permitted site is assessed heavier than damage that occurs on the permitted site.
 - Negligence is based on the degree of fault of the permittee in causing or failing to correct the violation, condition or practice that led to the issuance of the notice of violation. Up to 25 points can be assigned. Generally, three separate criteria affect the level of negligence. If there is no negligence, the points assigned will be low. If it is deemed that the violation was caused by negligence, the points assigned will be moderate. If the violation occurred through a higher degree of fault than negligence, then the points assigned will be higher. The greater the degree of negligence, the greater the number of points that a notice of violation will be assigned.
 - Good faith is where the permittee has the ability to reduce the final civil penalty. Up to 10 points can be deducted. Generally, two criteria are examined when assessing this area. Rapid compliance is where the permittee abates the notice of violation faster than required. The faster the permittee abates the violation, the more points are deducted. Another item that is taken into consideration is extraordinary measures. The operator may receive a larger deduction if changes to the operation are made to abate violations quicker.
 - The points are then totaled. These points are then matched to a dollar amount in a table in the regulations. The maximum point total is 70, and the maximum fine is \$5,000. If the penalty points total 30 or less, a monetary penalty may be assessed. A point total of 31 or more shall result in the assessment of a monetary penalty.
3. **Notice of Delinquent Reclamation** - In addition to being assessed the same as a notice of violation, the notice of delinquent reclamation receives a second assessment. A penalty of 25 cents per ton of coal sold, shipped or otherwise disposed of during the delinquency period shall be imposed on the permittee.
4. **Cessation Orders** - Cessation orders are, by law, assessed a civil penalty not less than \$750 per day, nor more than \$5,000 per day. Where notices of violation have the option of not being assessed a dollar amount, a cessation order will be assessed a minimum of \$750 for each day it continues, up to a maximum of 30 days.

Metallic Minerals

After a notice of violation is issued a proposed penalty assessment is prepared. The range of the dollar amount is up to \$1,000. The penalty may be assessed for each day the violation has occurred. However, it is typically assessed for one day only.

The criteria for assessing a penalty involves establishing a basic dollar amount using a matrix or table. Additions or subtractions are made to the initial amount based upon:

- A good faith or lack of good faith.
- The degree of willfulness or negligence.
- The history of noncompliance.
- The operator's ability to pay.

Good faith points are earned by rapid abatement of the notice of violation.

Under the degree of willfulness or negligence the dollar value may be raised or lowered based upon:

- The operator's control of the situation.
- The foreseeability of the events that contributed or led to the violation.
- The precautions taken and whether the operator was diligent, negligent or his or her conduct was intentional and led to a threat to health or safety.
- The legal requirement and was warned of the same or of any hazards associated with the violation.

For the history of noncompliance a dollar value may be added for all violations were issued to the operator that were similar in nature. The only violations that can be used in this category are those where all rights for appeal by the operator have expired. The dollar value is also increased by the number of all violations issued during the past 18 months. Also, a dollar amount may be added for each day the operator went over the abatement date on all previous violations.

If the operator supplies a notarized statement that they are unable to pay, the director may lower the proposed assessment by an appropriate amount.

The matrix or table uses these criteria for determining potential for harm and the extent of the deviation from the requirement. The potential for harm involves applying a numerical value from one for the least serious to three for the most serious.

The Land Reclamation staff will rate each of the following parameters.

- Risk of exposure of human or environmental receptors.
- Potential seriousness of exposure.
- Harm to the regulatory program.

The point total for each parameter of the above is totaled and divided by three. The numerical value obtained is assigned a dollar amount on the matrix or table. The matrix value for extent of the deviation is determined by whether the violation represents a major, moderate or minor deviation from the requirement of the rule or law.

After the penalty assessment has been prepared it is mailed to the operator by certified mail.

8.5 Solid Waste

RSMo. 260.240 allows for the assessment of civil penalties up to \$1,000 per day or part thereof that a violation of Solid Waste Management Law or Regulation occurred or continues to occur, or both. A proposed penalty assessment is prepared after a notice of violation is issued to the responsible party. Penalty offers greater than \$10,000 must receive prior approval from the director of the Division of Environmental Quality.

General Solid Waste

The criteria for assessing a penalty involve establishing a basic dollar amount using a matrix or table. Additions or subtractions are made to the initial amount based upon:

- The gravity or seriousness of the violation including potential for harm and extent of deviation from statute, regulation or permit requirement.
- A good faith or lack of good faith.
- The degree of willfulness or negligence.
- The history of noncompliance.
- The operator's ability to pay.
- Any economic benefit derived by the violation. This may be determined through examining expense(s) that were avoided or delayed as a result of the violation.

Base Penalty Amount

Calculation of the base amount of a civil penalty is determined by evaluating the gravity or severity of a violation including the potential harm and degree of deviation from statute, regulation or permit requirements. The two factors are then coordinated in a matrix for determination of the actual base penalty amount.

1. The following factors should be considered in evaluating potential for harm. Each violation will be classified as major, moderate or minor based on established descriptions of the three levels of severity.
 - The likelihood of environmental pollution, creation of a public nuisance or health hazard
 - The adverse effect noncompliance has on the purposes of or procedures for implementing the Missouri Solid Waste Management Law and Regulations.
2. A determination must be made on the extent of deviation from requirements. Each violation will be classified as major, moderate or minor based on established descriptions of the three levels of severity. After the severity is determined for both the potential for harm and the degree of deviation, the penalty matrix is used to select the appropriate cell with a penalty range. The highest cell is the major potential for harm and major extent of deviation and it reflects the maximum penalty allowed by statute of \$1,000 per day per violation.

Note: A separate penalty will be assessed when multiple violations are involved. Multiple penalties are not appropriate if the violations are not independent and substantially different from one another.

Economic Benefit

An economic benefit component should be calculated and added to the base penalty amount. Two types of economic benefit should be considered:

- Benefit from delayed costs. Delayed costs will be incurred after establishing compliance.
- Benefit from avoided costs. Avoided costs can not be recovered due to the violation.

The following formula is used to calculate total economic benefit:

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

T represents the entities marginal tax rate. Tax rates and interest rates are those in effect at the time the violations occurred.

Adjustment Factors

Good faith or lack of good faith may be considered when assessing a penalty. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s).

The degree of willfulness or negligence may be considered when assessing a penalty. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s). The following factors should be considered:

- The operator's control of the situation.
- The foreseeability of the events that contributed or led to the violation.
- The precautions taken and whether the operator was diligent, negligent or their conduct was intentional and led to a threat to health or safety.
- The legal requirement was known and/or was previously warned of the same or of any hazards associated with the violation.

The history of noncompliance may be considered when assessing a penalty. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s). The following factors should be considered:

- How similar was the previous violation.
- How recent was the previous violation.
- The number of previous violations.
- The violator's previous response to correcting past violations.

The inability to pay may be considered when assessing a penalty. The burden to demonstrate inability to pay rests on the violator, as it does with any factors resulting in a downward penalty adjustment. An entity's ability to pay usually will be considered at the settlement stage, and then only if the violator raises the issue. If the violator fails to provide sufficient information, then this factor should be disregarded in adjusting the penalty amount.

Other unique factors may be considered when assessing a penalty. Unanticipated factors may be considered on a case by case basis. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s).

After the penalty assessment has been prepared, a settlement offer is mailed to the operator by certified mail.

Scrap Tires

The criteria for assessing a penalty involve establishing a basic dollar amount using a matrix or table.

Additions or subtractions are made to the initial amount based upon:

- The gravity or seriousness of the violation including the potential for harm and extent of deviation from statute, regulation or permit requirement.
- A good faith or lack of good faith.
- The degree of willfulness or negligence.
- The history of noncompliance.
- The operator's ability to pay.
- Any economic benefit derived by the violation. This may be determined through examining expense(s) that were avoided or delayed as a result of the violation.

Base Penalty Amount

Calculation of the base amount of a civil penalty is determined by evaluating the gravity or severity of a violation in terms of potential harm and degree of deviation from statute, regulation or permit requirements. The following factors should be considered in evaluating potential for harm. Each violation will be classified as major, moderate or minor based on established descriptions of the three levels of severity.

- The likelihood of environmental pollution, creation of a public nuisance or health hazard.
- The adverse effect noncompliance has on the purposes of or procedures for implementing the Missouri Solid Waste Management Law and Regulations.

A determination must be made on the extent of deviation from requirements. Each violation will be classified as major, moderate or minor based on established descriptions of the three levels of severity.

After the severity is determined for both the potential for harm and the degree of deviation, the penalty matrix is used to select the appropriate cell with a penalty range. The highest cell is the major potential for harm and major extent of deviation and it reflects the maximum penalty allowed by statute of \$1,000 per day per violation.

Note: A separate penalty will be assessed when multiple violations are involved. Multiple penalties are not appropriate if the violations are not independent and substantially different from one another.

Economic Benefit

An economic benefit component should be calculated and added to the base penalty amount. Two types of economic benefit should be considered:

- Benefit from delayed costs. Delayed costs will be incurred after establishing compliance.
- Benefit from avoided costs. Avoided costs can not be recovered due to the violation.

The following formula is used to calculate total economic benefit:

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

T represents the entities marginal tax rate. Tax rates and interest rates are those in effect at the time the violations occurred.

Adjustment Factors

Good faith or lack of good faith may be considered when assessing a penalty. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s).

The degree of willfulness/negligence may be considered when assessing a penalty. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s). The following factors should be considered:

- The operator's control of the situation.
- The foreseeability of the events that contributed or led to the violation
- The precautions taken and whether the operator was diligent, negligent or their conduct was intentional and led to a threat to health or safety.
- The legal requirement was known or was previously warned of the same or of any hazards associated with the violation.

The history of noncompliance may be considered when assessing a penalty. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s). The following factors should be considered:

- How similar was the previous violation.
- How recent was the previous violation.
- The number of previous violations.
- The violator's previous response to correcting past violations.

The inability to pay may be considered when assessing a penalty. The burden to demonstrate inability to pay rests on the violator, as it does with any factors resulting in a downward penalty adjustment. An entity's ability to pay usually will be considered at the settlement stage, and then only if the violator raises the issue. If the violator fails to provide sufficient information, then this factor should be disregarded in adjusting the penalty amount.

Other unique factors may be considered when assessing a penalty. Unanticipated factors may be considered on a case by case basis. Adjustments may be made by as much as 25 percent. Larger adjustments may be made due to unusual circumstances surrounding the violation(s).

Once the penalty assessment has been prepared, a settlement offer is mailed to the operator by certified mail.

8.6 Water

The Missouri Clean Water Law Section 644.076.1 establishes civil penalties of up to \$10,000 per day per violation.