

## MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

# HAZARDOUS WASTE PROGRAM PENALTY GUIDANCE

1. **PURPOSE.** The State of Maine Legislature has established an environmental protection system that provides the Department of Environmental Protection (DEP) with authority to take enforcement actions that result in written binding agreements that include monetary penalties. This Hazardous Waste Program Penalty Guidance (HWPPG) prescribes the methodology that is used by the Hazardous Waste Enforcement Program to perform the function of monetary penalty calculation. The HWPPG embodies the criteria outlined in the Administrative Consent Agreement Policy (ACAP) approved by the Board of Environmental Protection (BEP) on January 10, 1990. The ACAP criteria are the guiding principles on which penalty policies for the various enforcement programs throughout the Department are based. The HWPPG uses those BEP ACAP criteria, along with concepts contained in the U.S. Environmental Protection Agency's (US EPA) Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy (Revised October 1990), as outlined below to assess penalties based on RCRA program-specific violations and circumstances and to ensure penalties are assessed in a consistent and fair manner.
2. **APPLICABILITY.** Guiding principles detailed in the HWPPG apply to calculation of civil monetary penalties that will be proposed as part of an administrative resolution. Monetary penalties proposed, agreed to, or ordered as part of a judicial resolution need not follow the procedures of this guidance, and will typically be significantly higher than amounts calculated pursuant to this guidance.
3. **REFERENCES**
  - A. Maine Revised Statutes Title 38, Section 349.
  - B. Board of Environmental Protection Administrative Consent Agreement Policy (as amended January 10, 1990).
  - C. RCRA Civil Penalty Policy (October 1990) for hazardous waste violations.
4. **PENALTY ASSESSMENT GOALS**
  - A. To provide an incentive to individuals to comply with environmental requirements and deter individuals from repeating the violation of Maine's environmental laws;
  - B. To provide general deterrence within society when the monetary consequences of environmental law violations are observed;
  - C. To remove any competitive advantage derived from non-compliance.
5. **PROCEDURES FOR QUANTIFYING THE PENALTY.** Penalties consist of a gravity component and economic benefit component. The gravity component is calculated for each violation using the base penalty assessments under section 5(A) below, adjusted by the mitigating/aggravating factors outlined in section 5(B) below. The economic benefit component, if any, is added on to the gravity component [see section 5(C) below]. Penalties for each of the violations identified in a case are aggregated into a total assessed penalty. The total assessed penalty is the penalty included in a proposed consent agreement for the purpose of settling the enforcement matter in an administrative manner.
  - A. **Base Penalties.** For each violation, a base penalty is assessed, prior to any adjustment for mitigating or aggravating factors, after review of the circumstances

involved with that specific violation. Two of the basic criteria for establishing monetary penalties outlined in the BEP's ACAP along with guidance from the RCRA Civil Penalty Policy are used in this assessment. These two basic criteria are as follows: (1) the potential or actual environmental impacts ("P & A Impacts"), and (2) the causes and circumstances, including the extent of deviation from the environmental standard caused by the violation ("Cause & Deviation"). [The two other basic criteria of the BEP's ACAP – corrective action once notified of violation, and compliance history/ prior citations within the past five years – are considered after a base penalty is established –see section 5(B) below.]

A penalty matrix using the first two basic criteria as the matrix's two axes is employed to assess the base penalty for each violation. The matrix considers violation-specific and violator-specific information consistent with the BEP's ACAP as outlined below. The matrix uses the statutory ranges for monetary civil penalties pursuant to Maine Revised Statutes Title 38, Section 349 in establishing the upper and lower ranges of the matrix.

PENALTY MATRIX	Cause & Deviation		
Potential & Actual Impacts	Major	Moderate	Minor
Major	\$25,000 – 10,000	\$19,999 – 8,000	\$14,999 – 5,000
Moderate	\$9,999 – 3,000	\$7,999 – 1,500	\$4999 - 500
Minor	\$2,999 – 1,500	\$1,499 - 500	\$499 - 100

A fundamental aspect of the HWPPG is normalization of all cases using a defined set of criteria that are individually assessed to reflect the magnitude of the situation. The assessments are made individually to each violation documented and planned for inclusion in a proposed resolution. As such, an enforcement resolution containing multiple citations will have multiple penalty calculations associated with it that must be aggregated to arrive at the total penalty that will be proposed to resolve that case.

Recognizing that the DEP prosecutes enforcement actions against different types of violators, the penalty amount within any matrix may be adjusted to ensure that the penalty acts as a sufficient or appropriate deterrent to the violator. Different types or classes of violators have their own financial circumstances and these circumstances may be assessed in each case, including the violator's status, i.e. as a multi-national corporation, major corporation, corporation, small business, individual, municipality or non-profit organization, in order to ensure that there is a deterrent effect which is meaningful and appropriate with respect to the violator's financial status or size. As part of assessing a violation within any matrix, a consideration shall be made, in addition to those outlined below, based upon the type of violator and its financial status or size.

**1) Rating Categories for establishing potential or actual environmental impact (P & A Impacts). This Axis shall be rated as major, moderate, or minor based upon a preponderance of the criteria in the following categories:**

**a) Major -**

- Significant impact or potential impact to the environment;
- Substantial risk of exposure or actual exposure of humans to contaminants or pollutants, or other public health concerns;
- Highly sensitive environmental areas;
- Relatively large areas impacted or cumulative impact;
- High volume, quantity or toxicity of contaminants or pollutants involved;
- Violation was of relatively long duration;
- Violation has a major adverse effect on the statutory or regulatory purposes or procedures for implementing the regulatory program.

**b) Moderate –**

- Moderate impact or potential impact to the environment;
- Moderate risk of exposure or actual exposure of humans to contaminants or pollutants, or other public health concerns;
- Moderately sensitive environmental areas;
- Relatively moderate-sized areas impacted or cumulative impact;
- Moderate volume, quantity or toxicity of contaminants or pollutants involved;
- Violation was of relatively moderate duration;
- Violation has a moderate adverse effect on the statutory or regulatory purposes or procedures for implementing the regulatory program.

**c) Minor –**

- Relatively minor impact or potential impact to the environment;
- Relatively minor risk of exposure or actual exposure of humans to contaminants or pollutants, or other public health concerns;
- Relatively low sensitivity of environmental areas;
- Relatively small-sized areas impacted or cumulative impact;
- Relatively low volume, quantity or toxicity of contaminants or pollutants involved;
- Violation was of relatively short duration;
- Violation has a relatively minor adverse effect on the statutory or regulatory purposes or procedures for implementing the regulatory program.

**2) Rating Categories for establishing cause and circumstances, including the extent of deviation from the requirement or environmental standard caused by the violation (“Cause and Deviation”). This Axis shall be rated as major, moderate, or minor based upon a preponderance of the criteria in the following categories.**

**a) Major –**

- Violation deviates from the requirements of the statute or regulation to an extent that most requirements (or the important aspects) are not met resulting in major non-compliance from the standard or permit;
- Permitting standards or regulatory standards are not met, or significant modifications are necessary to meet the standards;
- Violator had significant prior knowledge or citations involving the applicable requirements or standards;
- Violation was highly foreseeable, predictable, or negligent given the violator's knowledge, resources, and sophistication;
- Violator had recent contact with the Department or other environmental professionals regarding the applicable regulation or regulatory aspects which were violated
- Violator did not report incident prior to Department involvement;
- Violator did not mitigate any impacts prior to Department involvement.

**b) Moderate –**

- Violation deviates from the requirements of the statute or regulation to an extent that some requirements (or the important aspects) are not met, although some requirements (or aspects) are implemented as intended;
- Permitting standards or regulatory standards are not met, and moderate modifications are necessary to meet the standards;
- Violator had some prior knowledge or citations, although not specifically involving the applicable requirements or standard;
- Violation was moderately foreseeable, predictable, or negligent given the violator's knowledge, resources, and sophistication;
- Violator had prior contact with the Department or other environmental professionals regarding the applicable regulation or regulatory aspects which were violated;
- Violator did not report incident or reported late under the reporting requirement prior to Department involvement;
- Violator mitigated some impacts prior to Department involvement.

**c) Minor –**

- Violation deviates somewhat from the requirements of the statute or regulation although most requirements (or aspects) are implemented as intended;

- Permit standards or regulatory standards are not met, but only minor modifications are necessary to meet the standards;
- Violator had no prior knowledge or citations involving the applicable requirements or law;
- Violation was not foreseeable, predictable, or negligent given the violator's knowledge, resources, and sophistication;
- Violator had no recent contact with the Department or other environmental professionals regarding the applicable regulation or regulatory aspects which were violated;
- Violator reported incident prior to Department involvement;
- Violator mitigated any/all impacts prior to Department involvement.

**B. Mitigation/Aggravation System.** Mitigating and aggravating circumstances are to be considered after the base penalty for each violation is determined. Mitigating and aggravating circumstances are to be determined on a case-by-case basis and include the two other basic criteria in the BEP ACAP (corrective action or response once notified of violation, and compliance history/ prior citations within the past five years). The mitigating and aggravating circumstances may decrease the base penalty or increase the base penalty, respectively. Based on guidance from the RCRA Civil Penalty Policy, mitigating circumstances may be used to adjust the base penalty downward by a factor of up to 40% depending on the specific facts involved with those circumstances. Aggravating circumstances may be used to adjust the base penalty upward by a factor of up to 40% depending on the specific facts involved with those circumstances. The following two categories are considered under mitigating or aggravating circumstances:

1) RESPONSE ONCE NOTIFIED AND LEVEL OF COOPERATION

In determining the mitigating or aggravating adjustment for the level of cooperation (including good faith efforts or lack of good faith efforts) and the response once notified, the following factors are considered:

- a) Speed. When evaluating a violation for this category, consider how quickly the violator acted on a violation by correcting or abating the violation.
- b) Quality of corrective action and/or restoration of environmental damage. When evaluating this category, consider the amount and the quality of the effort that the violator has put into appropriate remedial actions and the results of that effort, including the quality of any temporary measures to correct the violation and any actual restoration of environmental damages caused by the violation.
- c) Potential for recurrence. When evaluating this category, consider the type of person or company with whom we are dealing. Considerations should include size, sophistication, and the potential for causing or committing the same violation again.

2) PRIOR CITATIONS AND COMPLIANCE HISTORY

Prior citations and compliance history are used only for adjustment as aggravating factors. Adjustments for prior violations which were resolved in a formal manner (with a written binding agreement or order) may be adjusted upwards consistent with the statutory provisions under 38 MRSA Section 349(6), exceeding the 40% factor outlined above. Otherwise, in determining aggravating adjustment for prior citations and compliance history including those which were resolved in an informal manner (without a written binding agreement or order), the following factors are considered:

- a) Number and nature of previous citations. When evaluating this category, consider the number and nature of any previous citations to this violator under the same regulatory program or for citations with similar impacts or potential impacts. Consider how similar the previous citations were to the current violation, time passed since the prior citations, and whether the owner/operator are the same as at the time of the previous citations.
- b) Causes of prior citations. When evaluating this category, consider if the causes, level of negligence, or other factors resulting in the current violation are similar to any of the previous citations.
- c) Quality and timeliness of prior corrective actions. When evaluating this category, consider the quality and timeliness of any prior corrective actions and how they relate to the current violation. Consider how recent the prior citations were.

**C. Economic Benefit.** In addition to the above assessment, any identifiable financial gain to the violator as a result of their non-compliance is calculated and added to the “gravity” portion in order to determine the total assessed penalty. Economic benefit is a monetary penalty line-item separate from the “gravity” portion of the penalty calculated under sections 5(A) and 5(B) of this guidance. Economic benefit portion of the penalty shall be considered in accordance with 38 MRSA 349(8). In all cases, economic benefit may increase the total assessed penalty for any one day a violation existed up to twice (2x) the maximum civil penalty established in law, e.g. \$25,000/day could increase to \$50,000 when economic benefit is added [see 38 M.R.S.A. § 349(8)].

Some examples of economic benefit include: increased property values; avoided operation and maintenance costs (labor, power, chemicals); avoided disposal or testing costs; avoided consulting/application/license fees; avoided capital costs; avoided user charges; and profits during the time of non-compliance. Often the calculation of economic benefit must be estimated based on the best information available to a case manager at the time a proposed resolution is being prepared. Estimated amounts may be adjusted based on any actual amount demonstrated by the violator.

**D. Flexibility Provision.** As with any agency vested with the State’s police powers, DEP has discretion when it comes to enforcing the law. As such, monetary penalties calculated consistent with this procedure may be adjusted as a result of specific circumstances existing in any given case. This provision also allows for the calculation of penalties on a per day basis if the DEP and Office of the Attorney General determine that the circumstances warrant or allow for the calculation of per day penalties.

- D. Ability to Pay.** A violator who claims the total assessed penalty is too large an amount to pay will be subject to an ability-to-pay analysis. DEP uses an automated program developed by US EPA to assess a violator's ability-to-pay. DEP requires the violator's latest 5 years of income tax returns to perform an ability-to-pay analysis. DEP may also consult financial experts to reach a final decision on the validity of any such claim.
- E. Coercive Penalties.** In resolutions that include the performance of significant corrective actions or other compliance schedules, coercive penalties may be included to allow a failure to act in good faith to be further penalized. Coercive penalties are typically in the form of stipulated penalties that will escalate as the amount of time out of compliance with a condition increases.