

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. 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, any past history of violations, any 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 assessing penalties.

There are also several federal policies related to penalties, and the most frequently referenced is the 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. Most penalties are calculated and approved prior to the negotiation of a settlement. If a case is referred to the Attorney General's Office, either immediately due to its seriousness or after a settlement negotiation fails, the approval of the penalty calculation may be a part of the approval of the referral packet. (See [Chapter 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 and Enforcement Section may offer a settlement agreement with penalties to the violator. After calculating the civil penalty as authorized above, the Compliance and 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 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 and 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 and Enforcement Section will request section chief approval and management approval. After approved, the case and proposed penalty will be presented 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 and 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 and 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 Mineral Open Pit and In-Stream Sand & Gravel Operations:

Penalty Point Assessments are derived from the Code of State Regulations at 10 CSR 40-10.070(7). There are about two and three-quarter pages of regulations that help determine a dollar assessment associated with an notice of violation. Those regulations follow this paragraph. Based off the code of state regulations, the Land Reclamation Program has developed a worksheet to help the penalty point assessor derive a monetary figure associated with the degree of a specific violation. Further aAttached to this document is the penalty point assessment worksheet.

Penalty Assessment

(A) The director shall review each notice of violation in accordance with the assessment procedures described in this rule to determine whether an administrative penalty should be assessed, the amount of the penalty and whether each day of continued violation will be deemed a separate violation for purposes of the total penalty assessed and, when appropriate, file with the commission and serve the operator the notice provided by section 444.787, RSMo, within thirty days of the issuance of the notice of violation.

(B) Matrix System for Penalties.

The matrix system described in this section shall be used to determine the amount of penalty. A penalty shall not be imposed until the director has sought to eliminate the violation through CC&P as defined in 10 CSR 40-10.100(6) or if the violation is considered a minor violation as defined in 10 CSR 40-10.100(31)(B).

A penalty shall be assigned in whole numbers as follows:

- Potential for harm. The assessment of the potential for harm resulting from a violation should be based on the following:
 - Risk of exposure. The risk of human or environmental exposure presented by a given violation depends on both the likelihood of exposure and the degree of that potential exposure. Evaluating the risk of exposure may be aided by considering these factors.
 1. Probability of exposure; if the investigation indicates that the probability of exposure is considered high, three points are assigned, if considered moderate, two points are assigned, if considered low, one point is assigned.
 2. Potential seriousness of the exposure; if the investigation indicates that the probability of exposure is considered high, three points are assigned, if it is considered moderate, two points are assigned, if it is considered low, one point is assigned.
 - Harm to the regulatory program. Violations may have serious implications and merit substantial penalties where the violation undermines statutory or regulatory purposes or procedures for implementing Sections 444.760-444.790, RSMo and its corresponding regulations. If the actions of the operator that are the subject of a violation, have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the law or regulations and the program is substantially undermined, three points shall be assigned, if the program is significantly undermined, two points shall be assigned, if there is a small adverse effect, one point shall be assigned; and
 - Evaluating the potential for harm. The potential for harm should be considered to be major, moderate or minor based upon the average of the points assigned under (7)(B)2.A.(I)(a), (b) and part (7)(B)2.A.(II). If the average of the total points assigned is 2.6 or greater, the assigned category in the assessment matrix in the potential for harm axis shall be considered major; if the average is from 1.6 to 2.3, the assigned category shall be moderate; if the average is 1.3 or lower, the assigned category shall be minor.
 1. Major. The violation poses or may pose a substantial risk of exposure of humans or other environmental receptors to a health or safety hazard(s) or environmental pollution or the actions have or may have a substantial adverse effect on statutory or regulatory purposes or procedures for implementing The Land Reclamation Act or its corresponding regulations, or both.
 2. Moderate. The violation poses or may pose a significant risk of exposure of humans or other environmental receptors to a health or safety hazard(s) or environmental pollution or, actions, have or may have a significant adverse effect on statutory or regulatory purposes or procedures for implementing The Land Reclamation Act or its corresponding regulations, or both; and
 3. Minor. The violation does not pose a substantial or significant risk of exposure of humans or other environmental receptors to a health or safety hazard(s) or environmental pollution or the actions have or may have a small adverse effect on statutory or regulatory purposes or procedures for implementing The Land Reclamation Act or its corresponding regulations.

- Extent of deviation from requirement. This relates to the degree to which the violation renders inoperative the law or regulation violated. The violator may be substantially in compliance with the provisions of the law or regulation or it may have totally disregarded the law or regulation. In determining the extent of the deviation, the following categories should be used:
 - Major. The violator deviates from the law or regulation requirements to the extent that most (or important aspects) of the requirements are not met, resulting in substantial noncompliance.
 - Moderate. The violator significantly deviates from the requirements of the regulation or statute, but some of the requirements are implemented as intended.
 - Minor. The violator does not deviate substantially or significantly from the regulatory or statutory requirements, but most (or all important aspects) of the requirements are met.
 - Penalty assessment matrix. The factors outlined in subsections (2)(A) and (B) concerning potential for harm and extent of deviation from a requirement will be used in determining the penalty to be assessed. A matrix is formed using potential for harm and extent of deviation from a requirement as axes of the penalty assessment matrix. The matrix has nine (9) cells and the specific cell is chosen after determining whether major, moderate or minor is appropriate for both the potential for harm and the extent of deviation from requirement factors. The matrix to be used is illustrated.

	Extent of Deviation from a Requirement		
Potential for Harm	Major	Moderate	Minor
Major	\$1000 to \$800	\$799 to \$600	\$599 to \$400
Moderate	\$799 to \$600	\$399 to \$200	\$199 to \$100
Minor	\$599 to \$400	\$199 to \$100	\$0

- Adjustment factors. After the initial assessment is obtained from the matrix, the assessment may be adjusted by taking into account the following factors:
- Good faith or lack of good faith. The operator can manifest good faith by promptly acting to abate the violation, in which case, the assessment would be adjusted down. The operator can also manifest lack of good faith by not meeting specified time frames for no apparent reason, in which case, the assessment may be adjusted up. No adjustment should be made where the operator's efforts primarily consist of coming into compliance. The following dollar amounts shall be used to adjust the penalty assessment as determined by the matrix:
 - (A) For prompt abatement.
 - Abatement within 10% of time allowed, deduct \$100.
 - Abatement within 11 to 20% of time allowed, deduct \$90.
 - Abatement within 21 to 30% of time allowed, deduct \$80.
 - Abatement within 31 to 40% of time allowed, deduct \$70.
 - Abatement within 41 to 50% of time allowed, deduct \$60.
 - Abatement within 51 to 60% of time allowed, deduct \$50.
 - Abatement within 61 to 70% of time allowed, deduct \$40.
 - Abatement within 71 to 80% of time allowed, deduct \$30.
 - Abatement within 81 to 90% of time allowed, deduct \$20.
 - Abatement within 91 to 99% of time allowed, deduct \$10
 - Abatement within 100% of time allowed, deduct \$0.
 - (B) For lack of good faith, there shall be an additional \$5 added to the assessment for each day that the abatement goes beyond the date assigned in the notice of violation, for up to thirty days or \$150 of added assessment.

- Degree of willfulness, negligence, or both. Adjustments may be made in instances of heightened culpability. In determining whether to adjust the penalty upward, the commission shall consider the operator's control over the violation, foresee-ability of the events constituting the violation, precautions taken by the operator, the operator's knowledge of the legal requirement which was violated and whether the operator knew or should have known of the hazards associated with the conduct that caused the violation. The penalty shall be adjusted as follows, considering the operator's degree of willfulness or negligence:
 - If the events surrounding the violation were within the operator's control, the assessment shall be increased by \$50.
 - If the events surrounding the violation were out of the control of the operator, the assessment shall be decreased by \$50.
 - If the events surrounding the violation were foreseeable and the operator failed to act, the assessment shall be increased by \$50.
 - If the events surrounding the violation were unforeseeable, the assessment shall be decreased by \$50.
 - If the operator was diligent in taking precautions to prevent or avoid the violation, the assessment shall be decreased by \$50.
 - If the operator was not diligent, there shall be no adjustment to the assessment.
 - If the operator was negligent in preventing the violation, \$50 shall be added to the assessment.
 - If the violation was caused by intentional conduct and a threat to health or safety is a result, \$100 is added to the assessment.
 - If the operator was warned of the legal requirements, \$20 shall be added to the assessment for each written warning given.
 - If the operator was aware of the legal requirements, but not advised of them, \$10 shall be added to the assessment.
 - If the operator was warned of the hazards posed by the violation and an environmental, health or safety hazard has been created, \$20 shall be added to the assessment for each warning given.
 - If the operator was aware of the environmental, health or safety hazards, but was not warned, \$10 shall be added to the assessment;
- History of noncompliance. The assessment would be adjusted upwards if the operator has a history of noncompliance. The adjustment would be based on the similarity of the previous violation(s), how recent the previous violation(s) was, the number of previous violation(s) and the operator's response to abating the previous violation(s). The history of all violation(s) that have been finalized in the past 24 months shall be considered as follows:
 - For violation(s) of a similar nature, \$25 each shall be added to the assessment.
 - For each day the operator failed to abate the notice(s) of violation(s), \$5 shall be added to the assessment for each violation.
- Ability to pay. A downward adjustment to the assessment could be made if the operator can clearly show that the assessment is beyond its means to pay.
- Assessment of separate violation for each day. An administrative penalty may be assessed for each day the violation continues. In determining whether to make the assessment, the factors listed in subsection (7)(B) of this rule shall be considered and the extent to which the person to whom the notice or order is issued gained an economic benefit as a result of a failure to comply may be considered.

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 involve 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

Section 260.240 of the Missouri Solid Waste Management Law allows for the assessment of penalties up to \$1,000 per day for each day, or part thereof, that a violation of the Missouri Solid Waste Management Law or Regulations concerning a solid waste processing facility occurred or continues to occur, or both. The law allows for the assessment of penalties up to \$5,000 per day for each day, or part thereof, that a violation of Missouri Solid Waste Management Law or Regulations regarding a solid waste disposal area or a violation of Section 260.330, RSMo (i.e., non-payment of tonnage fees, including by processing facilities) occurred or continues to occur, or both. A penalty is typically calculated after an notice of violation is issued to the responsible party). Penalty calculations must be approved by the Compliance and Enforcement Section chief and program director, and penalty calculations greater than \$20,000 must also receive approval from the director of the Division of Environmental Quality prior to the penalty demand letter being sent to the responsible party.

The penalty is calculated using the Solid Waste Management Program's penalty assessment policy. A penalty may consist of any one or all of three components. The first component is the base penalty which reflects the gravity or seriousness of the penalty. It is determined using a matrix that evaluates the potential for harm created by the violation and the extent the violation deviated from the regulatory requirement. The second component consists of three possible adjustment factors that may be used to either increase or decrease the base penalty. These three potential adjustment factors are the degree of willfulness or negligence demonstrated by the responsible party, the responsible party's history of non-compliance, and good faith efforts or lack thereof demonstrated by the responsible party. The adjusted base penalty is then multiplied by the number of days the violation was observed and documented. This results in the multiday penalty. When applicable, the third penalty component, an economic benefit, is calculated to remove any economic advantage the responsible party gained by violating the Missouri Solid Waste Management Law or Regulations. The three components are then added together to determine the total penalty.

The approved penalty demand letter is sent to the responsible party by certified mail. After the penalty demand letter is received and acknowledged by the responsible party, the case manager enters into negotiations with the responsible party to agree upon any corrective actions required and the penalty amount. The total penalty can be handled several different ways. It may be an upfront paid penalty, a penalty paid in installments, a penalty that is suspended based on the completion of certain agreed-upon and stipulated actions, a penalty that is suspended based on future compliance with the Missouri Solid Waste Management Law or Regulations for a specified period of time, the performance of one or more Supplemental Environmental Performance Projects (see [Chapter 10](#)), or any combination of the above. The total value of the individual methods of handling the penalty should equal the total calculated penalty. During these negotiations additional factors may be considered, for instance, the responsible party's ability to pay an upfront penalty and other case by case factors.

8.6 Water

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