

ENVIRONMENTAL QUALITY

CHAPTER 4

PROCEDURAL RULES

Subchapter 3

Penalty Calculation Procedures

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Subchapter 3

Penalty Calculation Procedures

17.4.301 PURPOSE (1) This subchapter implements 75-1-1001 and 82-4-1001, MCA, which provide factors for calculating penalties assessed under:

- (a) Title 75, chapters 2, 5, 6, 11 and 20, MCA;
- (b) Title 75, chapter 10, parts 2, 4, 5 and 12, MCA;
- (c) Title 76, chapter 4, MCA; and
- (d) Title 82, chapter 4, parts 1, 2, 3, and 4, MCA.

(2) The purpose of the penalty calculation process is to calculate a penalty that is commensurate with the severity of the violation, that provides an adequate deterrent, and that captures the economic benefit of noncompliance. The department shall provide a copy of the penalty calculation to the alleged violator.

(3) The department may not assess a penalty that exceeds the maximum penalty amount authorized by the statutes listed in (1). (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1139, Eff. 5/5/06.)

17.4.302 DEFINITIONS The following definitions apply throughout this subchapter:

(1) "Circumstances" means a violator's culpability associated with a violation.

(2) "Continuing violation" means a violation that involves an ongoing unlawful activity or an ongoing failure to comply with a statutory or regulatory requirement.

(3) "Extent" of the violation means the violator's degree of deviation from the applicable statute, rule or permit.

(4) "Gravity" of the violation means the degree of harm, or potential for harm, to human health or the environment, or the degree of adverse effect on the department's administration of the statute and rules.

(5) "History of violation" means the violator's prior history of any violation, which:

(a) must be a violation of a requirement under the authority of the same chapter and part of the violation for which the penalty is being assessed;

(b) must be documented in an administrative order or a judicial order or judgment issued within three years prior to the date of the occurrence of the violation for which the penalty is being assessed; and

(c) may not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review.

(6) "Nature" means the classification of a violation as one that harms or has the potential to harm human health or the environment or as one that adversely affects the department's administration of the statute and rules. (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1139, Eff. 5/5/06.)

17.4.303 BASE PENALTY (1) As provided in this rule, the department shall calculate the base penalty by multiplying the maximum penalty amount authorized by statute by a factor from the appropriate base penalty matrix in (2) or (3). In order to select a matrix from (2) or (3), the nature of the violation must first be established. For violations that harm or have the potential to harm human health or the environment, the department shall classify the extent and gravity of the violation as major, moderate, or minor as provided in (4) and (5). For all other violations, the extent factor does not apply, and the department shall classify the gravity of the violation as major, moderate, or minor as provided in (5).

(2) The department shall use the following matrix for violations that harm or have the potential to harm human health or the environment:

EXTENT	GRAVITY		
	Major	Moderate	Minor
Major	0.85	0.70	0.55
Moderate	0.70	0.55	0.40
Minor	0.55	0.40	0.25

(3) The department shall use the following matrix for violations that adversely impact the department's administration of the applicable statute or rules, but which do not harm or have the potential to harm human health or the environment:

GRAVITY		
Major	Moderate	Minor
0.50	0.40	0.30

(4) In determining the extent of a violation, the factors that the department may consider include, but are not limited to, the volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit, and the duration of the violation. The department shall determine the extent of a violation as follows:

(a) a violation has a major extent if it constitutes a major deviation from the applicable requirements;

(b) a violation has a moderate extent if it constitutes a moderate deviation from the applicable requirements;

(c) a violation has a minor extent if it constitutes a minor deviation from the applicable requirements.

(5) The department shall determine the gravity of a violation as follows:

(a) A violation has major gravity if it causes harm to human health or the environment, poses a serious potential to harm human health or the environment, or has a serious adverse impact on the department's administration of the statute or rules. Examples of violations that may have major gravity include a release of a regulated substance that causes harm or poses a serious potential to harm human health or the environment, construction or operation without a required permit or approval, an exceedance of a maximum contaminant level or water quality standard, or a failure to provide an adequate performance bond.

(b) A violation has moderate gravity if it:

(i) is not major or minor as provided in (5)(a) or (c); and

(ii) poses a potential to harm human health or the environment, or has an adverse impact on the department's administration of the statute or rules. Examples of violations that may have moderate gravity include a release of a regulated substance that does not cause harm or pose a serious potential to harm human health or the environment, a failure to monitor, report, or make records, a failure to report a release, leak, or bypass, or a failure to construct or operate in accordance with a permit or approval.

(c) A violation has minor gravity if it poses no risk of harm to human health or the environment, or has a low adverse impact on the department's administration of the statute or rules. Examples of violations that may have minor gravity include a failure to submit a report in a timely manner, a failure to pay fees, inaccurate recordkeeping, or a failure to comply with a minor operational requirement specified in a permit. (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1139, Eff. 5/5/06.)

17.4.304 ADJUSTED BASE PENALTY - CIRCUMSTANCES, GOOD FAITH AND COOPERATION, AMOUNTS VOLUNTARILY EXPENDED (1) As provided in this rule, the department may consider circumstances, good faith and cooperation, and amounts voluntarily expended to calculate an adjusted base penalty.

Circumstances may be used to increase the base penalty. Good faith and cooperation and amounts voluntarily expended may be used to decrease the base penalty. The amount of adjustment for each of the above factors is based upon a percentage of the base penalty. The amount of the adjustment is added to the base penalty to obtain an adjusted base penalty.

(2) The department may increase a base penalty by up to 30% based upon the circumstances of the violation. To determine the penalty adjustment based upon circumstances, the department shall evaluate a violator's culpability associated with the violation. In determining the amount of increase for circumstances, the department's consideration must include, but not be limited to, the following factors:

(a) how much control the violator had over the violation;

(b) the foreseeability of the violation;

(c) whether the violator took reasonable precautions to prevent the violation;
(d) the foreseeability of the impacts associated with the violation; and
(e) whether the violator knew or should have known of the requirement that was violated.

(3) The department may decrease a base penalty by up to 10% based upon the violator's good faith and cooperation. In determining the amount of decrease for good faith and cooperation, the department's consideration must include, but not be limited to, the following factors:

(a) the violator's promptness in reporting and correcting the violation, and in mitigating the impacts of the violation;
(b) the extent of the violator's voluntary and full disclosure of the facts related to the violation; and
(c) the extent of the violator's assistance in the department's investigation and analysis of the violation.

(4) The department may decrease a base penalty by up to 10% based upon the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or the impacts of the violation. The amount of a decrease is not required to match the amounts voluntarily expended. In determining the amount of decrease for amounts voluntarily expended, beyond what is required by law or order, the department's consideration must include, but not be limited to, the following factors:

(a) expenditures for resources, including personnel and equipment, to promptly mitigate the violation or impacts of the violation;
(b) expenditures of resources to prevent a recurrence of the violation or to eliminate the cause or source of the violation; and
(c) revenue lost by the violator due to a cessation or reduction in operations that is necessary to mitigate the violation or the impacts of the violation. (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1139, Eff. 5/5/06.)

17.4.305 TOTAL ADJUSTED PENALTY - DAYS OF VIOLATION

(1) The department may consider each day of each violation as a separate violation subject to penalties. The department may multiply the adjusted base penalty calculated under ARM 17.4.304 by the number of days of violation to obtain a total adjusted penalty.

(2) For continuing violations, if the application of (1) results in a penalty that is higher than the department believes is necessary to provide an adequate deterrent, the department may reduce the number of days of violation. (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1139, Eff. 5/5/06.)

17.4.306 TOTAL PENALTY - HISTORY OF VIOLATION (1) As provided in this rule, the department may increase the total adjusted penalty based upon the violator's history of violation. Any penalty increases for history of violation must be added to the total adjusted penalty calculated under ARM 17.4.305 to obtain a total penalty.

(2) The department may calculate a separate increase for each historic violation. The amount of the increase must be calculated by multiplying the base penalty calculated under ARM 17.4.303 by the appropriate percentage from (3). This amount must then be added to the total adjusted penalty calculated under ARM 17.4.305.

(3) The department shall determine the nature of each historic violation in accordance with ARM 17.4.302(6). The department may increase the total adjusted penalty for history of violation using the following percentages:

(a) for each historic violation that, under these rules, would be classified as harming or having the potential to harm human health or the environment, the penalty increase must be 10% of the base penalty calculated under ARM 17.4.303; and

(b) for each historic violation that, under these rules, would be classified as adversely impacting the department's administration of the applicable statute or rules, but not harming or having the potential to harm human health or the environment, the penalty increase must be 5% of the base penalty calculated under ARM 17.4.303.

(4) If a violator has multiple historic violations and one new violation, for which a penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together. This composite percentage may not exceed 30%. The composite percentage must then be multiplied by the base penalty for the new violation to determine the amount of the increase. The increase must be added to the total adjusted penalty for the new violation calculated under ARM 17.4.305.

(5) If a violator has one historic violation and multiple new violations, each with a separate penalty calculation under these rules, the base penalties for the new violations calculated under ARM 17.4.303 must be added together. This composite adjusted base penalty must then be multiplied by the percentage from (3) for the historic violation to determine the amount of the increase. The increase must then be added to the sum of the total adjusted penalties calculated for each new violation under ARM 17.4.305.

(6) If a violator has multiple historic violations and multiple new violations, for which a separate penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together, not to exceed 30%, and the base penalties for each new violation calculated under ARM 17.4.303 must be added together. The composite base penalties must be multiplied by the composite percentage to determine the amount of the increase. The increase must be added to the sum of the total adjusted penalties calculated for each violation under ARM 17.4.305. (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1139, Eff. 5/5/06.)

17.4.307 ECONOMIC BENEFIT (1) The department may increase the total adjusted penalty, as calculated under ARM 17.4.305, by an amount based upon the violator's economic benefit. The department shall base any penalty increase for economic benefit on the department's estimate of the costs of compliance, based upon the best information reasonably available at the time it calculates a penalty under these rules. The economic benefit must be added to the total adjusted penalty calculated under ARM 17.4.305 to obtain the total penalty. (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1379, Eff. 5/5/06.)

17.4.308 OTHER MATTERS AS JUSTICE MAY REQUIRE (1) The department may consider other matters as justice may require to increase or decrease the total penalty. (History: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA; IMP, 75-1-1001, 82-4-1001, MCA; NEW, 2006 MAR p. 1139, Eff. 5/5/06.)

Subchapter 4 reserved

