

*The following is the SWACO Penalty Policy and Matrix to be utilized by SWACO Enforcement Personnel for violations of SWACO District Rules, policies, or agreements. The categories and factors stated herein have been styled after those contained in the U.S. EPA Resource Conservation and Recovery Act Civil Penalty Policy and Ohio EPA Division of Materials and Waste Management (formerly the DSIWM) Civil Penalty Guidance, and subsequently adopted by Ohio courts as an appropriate mechanism for enforcement purposes. See Steeltech, Ltd. v. U.S. E.P.A., 105 F.Supp.2d 760 (W.D.Mich. 2000).*

### **Jurisdiction**

The Solid Waste Authority of Central Ohio (“SWACO”) is charged with the responsibility of maintaining the safe and sanitary management of all solid wastes located within its Solid Waste Management District (“District”), and is granted the authority to adopt or revise rules for the establishment and maintenance of its District pursuant to Ohio Revised Code (ORC) Chapter 343.01(G). Specifically, ORC 343.011(C)(8) provides the board of trustees of the authority shall “do all acts necessary or proper to carry out the duties and responsibilities imposed on or granted to the board under this chapter and sections 3734.52 to 3734.575 of the Revised Code. Further, ORC §3734.53 authorizes a SWMD to issue rules:

(1) Prohibiting or limiting the receipt at facilities located within the solid waste management district of solid wastes generated outside the district or outside a prescribed service area;

(2) Governing the maintenance, protection, and use of solid waste collection, storage, disposal, transfer, recycling, processing, and resource recovery facilities within the district...

R.C. 3734.53(C)(2), 343.01(G)(2). *See also St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 875 N.E.2d 561 (Ohio 2007); *Clark Cty. Solid Waste Mgt. Dist. v. Danis Clarkco Landfill Co.*, 109 Ohio App.3d 19, 671 N.E.2d 1034 (Ohio Ct. App. 2 Dist. 1996).

The concepts of enforcement and regulation within the District are inherent in order for a solid waste management authority such as SWACO to effectuate its statutory purpose; the safe and sanitary management of solid wastes, resource recovery and reuse practices and technologies, and the promotion of sustainable methods of waste management cannot effectively be consistent or implemented throughout the District sans a regulatory framework which allows for enforcement options should a violation occur. The statutory penalty provided for in ORC §343.99 allows for a maximum fine of five thousand dollars (\$5,000.00) for any such violations; this allows for upward/downward adjustments at the discretion of enforcement personnel on a case-by-case basis. It is a long-accepted legal principle that considerable deference should be accorded to an agency's interpretation of its rules and of the statutes which the General Assembly directs it to implement. *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1107, 84 L.Ed.2d 90 (1985); *State, ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St. 3d 377,382 (Ohio 1994); *State, ex rel. Brown, v. Dayton Malleable*, 1 Ohio St. ed 151, 154 (Ohio 1982); *State, ex rel. Brown v. Howard*, 3 Ohio App.3d 189, 444 N.E.2d 469 (Ohio 1981); *State, ex rel. Celebrezze v. Thermal-Tron, Inc. et al.*, 71 Ohio App.3d 11, 592 N.E.2d 912 (Ohio Ct. App. 8 Dist. 1992); *U.S. v. City of Akron*, 2011 WL 1045553 (N.D. Ohio 2011); *Waste Management of Ohio, Inc. v. Board of Health of the*

*City of Cincinnati*, Case Nos. ERAC 315088 & 315234 (2004); *In the Matter of John A. Biewer Company of Ohio, Inc.*, 2009 WL 5851171 (E.P.A. December 2009). Thus, it is imperative that an agency such as SWACO adopt and implement a consistent method and manner of enforcement in order to perform its statutory duties and task of maintaining the health and general welfare of the District. See *State ex rel. Cordray v. Basinger*, 2010 WL 3904152 (Ohio App. 7 Dist. 2010); *Catalina Yachts v. U.S. E.P.A.*, 112 F.Supp.2d 965 (C.D.Cal. 2000); *Steeltech, Ltd. v. U.S. E.P.A.*, 105 F.Supp.2d 760 (W.D.Mich. 2000); *U.S. of America (EPA) v. Environmental Waste Control, Inc.*, 710 F.Supp.1172 (N.D.Ind. 1989).

The penalty matrix sets forth a method for calculating penalties consistent with the goals of the organization – deterrence, equitable treatment of the regulated community, and quick resolution of violations. The proposed penalty calculation system considers the seriousness of the violation and any good faith efforts to comply with applicable requirements when assessing a penalty. *Catalina Yachts, supra*, at 968. See also *Mayes v. E.P.A.*, 2008 WL 65178 (E.D.Tenn. 2008). Specifically, the Matrix is designed to assess civil penalties by calculating a preliminary deterrence amount consisting of a gravity component and a component reflecting a violator’s received economic benefit of noncompliance, then applying relevant adjustment factors to account for differences among cases.

This shall include the following factors:

- (1) a gravity-based penalty for a particular violation, from a penalty assessment matrix,
- (2) a "multi-day" component, as appropriate, to account for a violation's duration,
- (3) potential adjustments of the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and
- (4) the amount of the appropriate economic benefit gained through non-compliance.

Penalty Amount = gravity-based component + multi-day component +/- adjustments + economic benefit. See U.S. EPA, Resource Conservation & Recovery Act (RCRA), 42 U.S.C. §§6901, et seq., *Civil Penalty Policy* (2003); Ohio EPA, Division of Solid & Infectious Waste Management, *Civil Penalty Guidance* (2004).

### **Gravity-Based Penalty Amount**

The gravity-based penalty amount is a measure of the seriousness of the violation. This determination should be made considering (1) the potential for harm, and (2) the extent of deviation from any statutory or regulatory requirements.

#### **The Potential for Harm**

This assessment should be based on:

(a) where the violation involves the actual management of solid wastes, the penalty should reflect the probability that the violation could have resulted in, or has resulted in, the illegal deposit or release of any solid wastes

AND

(b) the adverse effect non-compliance may have on statutory or regulatory purposes or procedures for implementing the Solid Waste Management Plan, Rules, or policies of the District

The Harm to the Regulatory Program – the following factors should be considered:

All regulatory requirements are fundamental to the continued integrity of the organization and the management of the Solid Waste Management Authority. Violations of such requirements may have serious implications and substantial penalties when the violation undermines the statutory or regulatory process or procedures for implementing the Solid Waste Management Plan. Examples of such are:

- (i) failure to notify as a generator or hauler/transporter of solid wastes
- (ii) failure to notify as an owner/operator of a solid waste facility
- (iii) failure to comply with reporting requirements
- (iv) failure to respond to a formal information request
- (v) operating without approved waiver status or in violation of established SWACO District Rules

These types of requirements are based on protection concerns and are fundamental to the overall goals and statutory duties of SWACO, as an agency, to ensure the safe, sanitary, and responsible handling and disposal of solid wastes generated within the District.

Applying Potential for Harm

- |                  |  |
|------------------|--|
| <b>MAJOR:</b>    | the violation poses or may pose a substantial harm to humans, human health, or the environment   |
| AND/OR           | the violator's actions have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the Solid Waste Management Plan for the District |
| <br>             |  |
| <b>MODERATE:</b> | the violation poses or may pose a significant harm to humans, human health, or the environment   |
| AND/OR           | the violator's actions have or may have a significant adverse effect on the statutory or regulatory purposes or procedures for implementing the Solid Waste Management Plan for the District |
| <br>             |  |
| <b>MINOR:</b>    | the violation poses or may pose relatively low harm to humans, human health, or the environment  |
| AND/OR           | the violator's actions have or may have a small adverse effect on the statutory or regulatory purpose or procedures for implementing the Solid Waste Management Plan for the District        |

(2) Extent of Deviation from the Requirement

The extent of the deviation from the requirements of the District Solid Waste Management Plan, SWACO District Rules, and/or SWACO policies could range from the violator being substantially in compliance with the provisions of the requirements or Rules, completely disregarding said, or being at some point in between.

**MAJOR:** the violator significantly deviates from the requirements of the regulation to such an extent that most (or the important aspects) of the requirements are not being met, resulting in substantial non-compliance

**MODERATE:** the violator deviates from the requirements of the regulation, but some of the requirements are implemented as intended

**MINOR:** the violator deviates somewhat from the requirements of the regulation, but most (or all the important aspects) of the requirements are met

These two factors constitute the seriousness of a violation, and have been incorporated in the following penalty matrix from which the gravity-based component will be chosen. The amounts below shall be assessed on a per day, per violation basis.

<b><u>Extent of Deviation from Requirement</u></b>			
<b><u>Potential for Harm</u></b>	MAJOR	MODERATE	MINOR
MAJOR	\$5,000 - \$2,500	\$2,500 - \$1,667	\$1,667 - \$500
MODERATE	\$4,250 - \$2,000	\$2,000 - \$1,300	\$1,300 - \$375
MINOR	\$3,500 - \$1,250	\$1,250 - \$1,167	\$1,167 - \$250

The selection of the exact penalty amount within each category is left to the discretion of the enforcement personnel in any case. *Mayes, supra*, at 22. Enforcement Personnel should analyze and rely on case-specific factors in selecting an amount within the given ranges. Such factors may include the seriousness of the violation (relative to any other violations), efforts at remediation or the degree of cooperation evidenced by the facility (to the extent this is not included in subsequent adjustments), the size and sophistication of the violator, the number of days of the violation, and other relevant issues.

For some continuing violations, it is possible that circumstances may change during the period of violation in some manner that could affect the Potential for Harm or Extent of Deviation from Requirement factors. Enforcement personnel may choose different matrix categories for different periods of the same violation. For example, a violation that lasts for 100 days may warrant a penalty from the major/major category for the first 50 days. However, if on day 51 the violator takes affirmative steps to come into compliance or address the non-compliance but does not completely end the violation, the level of the relevant factors may be adjusted. In that circumstance, enforcement personnel should calculate separate penalties for the distinct periods of violation; said adjustment only applies when the actions of the violator have changed the circumstances.

### **Penalties for Multiple Violations**

In some situations, SWACO enforcement personnel may find a facility/owner/operator has violated several different requirements of the Solid Waste Management Plan or SWACO District Rules. A separate penalty should be proposed and obtained in settlement or litigation for each separate violation resulting from an independent act or omission by the violator and is substantially distinguishable from any other violation for which a penalty is to be assessed. See *RCRA Penalty Policy, supra*, at 20; *OEPA Civil Penalty Guidance, supra*, at 7. A violation is independent of, and substantially distinguishable from, any other violation when it requires an element of proof not needed by the others. *Id.* This penalty shall be enforced if violations of different sections of the regulations or District Rules occur; these are violations which require SWACO enforcement personnel to substantiate different sets of factual allegations. For litigation or settlement purposes, each of the violations shall be assessed separately and the amounts added to determine a total penalty to pursue.

Penalties for multiple violations also shall be obtained in settlement or sought in litigation if a company has violated the same requirement in substantially different locations. This is also appropriate when a company violates the same requirement on separate occasions not cognizable as multi-day violations. An example of this could be if a company repeatedly fails to submit the required monthly Generation Fee or Waiver Fee forms for special or exempt wastes they have been accepting for disposal at a facility other than those designated by SWACO. In this case, each failure to submit when the waste stream has been accepted for disposal should be assessed separately.

However, penalties for multiple violations may not be appropriate when the violations are not independent or substantially distinguishable. If one violation stems from another, a separate penalty may not be warranted. Here, any regulations or Rules violated should be cited, but one penalty may be appropriate to pursue in settlement or litigation, depending on the facts. The violation of two separate regulations should be taken into account when choosing “potential for harm” and “extent of deviation” categories on the penalty matrix.

### **Multiple Violations Treated as Multi-Day Violations**

Violations should be treated as multi-day violations, meaning one penalty with a multi-day component, when the same violation continues uninterrupted for more than one day. If a facility, through a series of independent acts or omissions, has repeatedly violated the same regulatory requirement, the violations may begin to resemble multi-day violations in number and similarity to each other. This may occur if the violations occur within close proximity in time to each other and are based on similar acts by the violator. For example, if a facility has been accepting a certain waste stream for a month in violation of SWACO’s flow control Rules, a penalty may be calculated utilizing the multi-day matrix, or include language in a Notice of Violation letter or complaint that a specific, additional per day amount will be assessed until the violation is corrected.

### **Economic Benefit of Non-Compliance**

This factor considers when a significant economic benefit has accrued to a violator as a result of non-compliance, and can include the costs saved by reaching a settlement and not pursuing litigation. To

determine this, a calculation of the economic benefit should be conducted for each established violation. The total economic benefit of all the violations together should be included in the penalty if it is at least 5-10% of the proposed penalty amount. The general policy of SWACO shall be not to settle cases for an amount less than the economic benefit gained by the violator, unless certain exceptions apply:

- (1) The economic benefit component consists of an insignificant amount
- (2) Compelling public concerns are not served by taking the case to trial
- (3) Based on the facts of the particular case as a whole, it is unlikely SWACO will be able to recover the economic benefit in litigation
- (4) The company has documented an inability to pay the total proposed penalty

*See RCRA Penalty Policy, supra, at 29; OEPA Civil Penalty Guidance, supra, at 14; Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 890 F.Supp. 470 (D.S.C. 1995).*

Economic benefit includes:

- (1) Benefits from delayed costs – expenditures that have been deferred by the violator’s failure to comply with the requirements of the regulation
- AND
- (2) Avoided Costs – expenditures that will never be incurred as a result of the non-compliance; this includes usual operational and maintenance costs such as leasing equipment

This calculation should account for the entire period a violator enjoys the economic benefit, which essentially shall be until the economic benefit penalty is paid. Any penalties based on benefits due to illegal competitive advantage should be added to any other type of economic benefit calculated.

### **Adjustment Factors and Effect of Settlement**

#### *Recalculation of Penalty Amount*

Before consideration of mitigating the proposed penalty, it may be necessary for enforcement personnel to recalculate the gravity-based or economic benefit components. *See RCRA Penalty Policy, supra, at 33; OEPA Civil Penalty Guidance, supra, at 13.* If new information becomes available after the issuance of the proposed penalty which makes clear that the initial calculation of the penalty is in error, enforcement personnel should adjust the amount. *Steeltech, supra, at 766.* For example, if after the issuance of the initial penalty amount, information is presented indicating less waste is involved than what was believed when the proposed penalty was issued, it may be appropriate to recalculate the gravity-based component. However, if enforcement personnel initially believed a violator fully complied with a specific requirement but later determined that was not the case, a new count may be added and the total penalty amount adjusted upward to reflect the previously undiscovered violation. Likewise, if new information demonstrates a previously known violation is more serious than initially thought, an upward revision of the penalty amount would also be appropriate.

#### *Application of Adjustment Factors*

Adjustments should generally be applied to the sum of the gravity-based and multi-day components of the penalty for a violation. All supportable upward adjustments of the penalty amount of which

enforcement personnel is aware should be made prior to the issuance of the proposed penalty. Downward adjustments, except those reflecting good faith efforts to comply, should generally not be made until after the proposed penalty has been issued, at which time the burden of persuasion that downward adjustment is warranted is placed on the violator.

For any given factor, except ability to pay, cooperative attitude, and litigation risk, enforcement personnel can adjust the sum of the gravity-based and multi-day components for any given violation up or down by (1) as much as 25% of the sum in ordinary circumstances, or (2) 26%-40% of the sum in unusual circumstances. Downward adjustments based on inability to pay or litigation risk will vary depending on the factors present in a given case; downward adjustments of up to 10% of the gravity-based and multi-day penalty components can be made based on the cooperative attitude of the violator.

However, if a penalty is to achieve deterrence, both the violator and the general public must be convinced the penalty places the violator in a worse position than those who have complied in a timely manner. Therefore, SWACO should at a minimum, absent special circumstances, recover any significant economic benefits resulting from the non-compliance. The final adjusted penalty should also include a significant gravity-based component beyond the economic benefit component, unless there have been demonstrated limitations as to a violator's inability to pay or significant litigation risks.

#### 1) Good Faith Efforts to Comply/Lack of Good Faith

Good faith efforts to comply with the applicable requirements or regulations should be considered in assessing a penalty. The violator can manifest good faith by promptly identifying and reporting non-compliance or by instituting measures to remedy the violation before SWACO enforcement personnel has identified such. A violator's admission or correction of a violation prior to detection may provide a basis for mitigation of the penalty, especially when the violator institutes significant new measures to prevent recurrence. However, lack of good faith can result in an increased penalty.

No downward adjustment should be made if the good faith efforts to comply primarily consist of coming into compliance. Further, no downward adjustment should be made because the violator lacks knowledge concerning either applicable requirements or violations committed. *Steeltech, supra*, at 766. A presumption against downward adjustment should be applied as to the violator's efforts to comply or correct violations after SWACO enforcement personnel have detected violations; the amount set in the gravity-based penalty component matrix assumes good faith efforts by a violator to comply after the discovery of a violation. Failure to undertake such measures may be cause for upward adjustment as well as multi-day penalties.

If a violator reasonable relies on statements made by SWACO staff that an activity satisfies regulations or SWACO District Rules, and it is later determined said activities do not comply, a downward adjustment in the penalty may be warranted if the violator relied on those assurances in good faith. Said claims of reliance should be substantiated by sworn affidavit or other form of affirmation.

However, claims by the violator that “he/she/it was not told” by SWACO that they were out of compliance is not cause for any downward adjustment of the penalty.

## 2) Degree of Willfulness and/or Negligence

A penalty may be adjusted upward if a violator demonstrates willfulness and/or negligence in their actions. In assessing the degree of willfulness and/or negligence, the following factors should be considered:

- How much control the violator had over the events constituting the violation,
- The foreseeability of the events constituting the violation,
- Whether the violator took reasonable precautions against the events constituting the violation, and
- Whether the violator knew or should have known of the hazards/dangers associated with the actions

The last factor, lack of knowledge of the legal requirement or regulation, should never be used as a basis for reducing the penalty; doing so encourages ignorance of the law. Knowledge of the law and what is required should be considered only to enhance the penalty. The amount of control which the violator had in quickly remedying the violation may also be relevant. Specifically, if the correction was delayed by factors which the violator can demonstrate were clearly not reasonably foreseeable and out of his/her control, or the control of his/her agents, the penalty may be reduced.

## 3) History of Non-Compliance (upward adjustment only)

When a violator has previously contravened requirements or regulations at the same or different site, this is usually clear evidence that the party was not deterred by the previous enforcement response. Unless the current or previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards. Some of the factors SWACO enforcement personnel should consider in making this determination are:

- How similar the previous violation was,
- How recent the previous violation occurred,
- The number of previous violations, and
- The violator’s response to previous violation(s) in regards to correction efforts.

A violation should be considered “similar” if SWACO’s previous enforcement response should have alerted the violator to a particular type of compliance problem. A previous violation of the same requirements or regulations constitutes a similar violation. For the purposes of this section, a “previous violation” includes any act or omission for which a formal or informal enforcement response has occurred, including a warning letter, Notice of Violation, complaint, settlement agreement, etc. This term also includes any act or omission for which the violator had previously been given written notification, however informal, that SWACO enforcement personnel believe a violation exists.



#### 4) Ability to Pay (downward adjustment only)

SWACO enforcement personnel should not generally assess penalties that are clearly beyond the means of the violator; thus, the violator's financial status and ability to pay should be considered. Enforcement personnel should also be generally aware of said in the event it is raised during settlement negotiations or in the course of litigation. The burden to demonstrate inability to pay rests on the respondent, as with other mitigating circumstances. The violator must prove financial status/inability to pay by submitting detailed financial statements and/or other relevant documentation. Examples of information to be submitted to allow enforcement personnel to evaluate an entity's ability to pay compliance costs or penalty:

- Written ability to pay argument that specifically addresses financial reasons why compliance costs cannot be paid (all cases)
- Most recent 5 years audited comprehensive annual financial reports including income statement, balance sheet, cash flow statement, and notes to these financial reports (companies – corporations and partnerships)
- Most recent 5 years company Income Tax Returns including all required forms and schedules (companies – corporations and partnerships)
- Most recent 5 years Income tax Returns including all required forms and schedules for all owners of the business (individuals – sole proprietorships or partnerships)
- List of monthly income and expenses for all owners of the business (individuals)
- Signed, dated, and notarized personal statement of net worth for all owners of the business (individuals)

If it is determined that a violator cannot afford the proposed penalty, or that payment of all or a portion of the penalty will preclude the violator from achieving compliance or carrying out remedial measures, the following options shall be considered in order:

- An installment plan with interest,
- A delayed payment schedule with interest (such a schedule may be contingent upon an increase in sales or other indicator of improved business), or
- As a last recourse, straight penalty reductions.

As stated previously, the amount of any downward adjustment of the penalty is dependent on the individual facts of the case relating to the financial capabilities of the violator and the nature of the violation at issue.

#### 5) Other Factors

This Penalty Policy and Matrix allows adjustments of factors on an individual case basis. When developing a settlement position, SWACO enforcement personnel should evaluate every penalty in light of the potential for protracted litigation and consideration of the maximum civil penalty a judge is likely

to award if the case proceeds to trial. This involves a consideration of the strength of the case, including the probability of proving violations and the acceptance of arguments, the opportunities to establish a useful precedent or send a signal to the regulated community, the availability and potential effectiveness of evidence, and the strength of the violator's defense(s). Downward adjustments of the proposed penalty for settlement purposes may be appropriate depending on the assessment of the aforementioned litigation considerations.

In addition to litigation risks, SWACO enforcement personnel may consider, for the purposes of an expedited settlement, the cooperation of the facility throughout the compliance evaluation and enforcement process. The gravity-based component of the proposed penalty may be reduced by up to 10% depending on the degree of cooperation/preparedness during an inspection, provision of access to records, responsiveness and expeditious provision of requested documentation during and after an inspection, and cooperation/preparedness during any settlement negotiations. In addition to creating an incentive for cooperative behavior, this adjustment factor serves to reinforce the concept that violators face a significant risk of higher penalties in litigation than in settlement. However, this adjustment should only be considered when a settlement has been agreed to in principle by the parties, before the filing of any formal complaints with the court.

SWACO enforcement personnel should note the difference between penalty adjustments for cooperative attitude and those for good faith efforts to comply. While self-reporting and correction of violations qualify as good faith efforts, the cooperation and attitude of the violator throughout any investigation and enforcement process should be the focus for the latter factor. For example, a violator may qualify for this adjustment if it voluntarily provides information prior to any information requests made by SWACO. Similarly, if a violator responds completely to an information request in advance of the deadline and otherwise cooperates fully, a downward adjustment may be appropriate. However, this factor should not be applied to cases in which the violator indicates an interest in settlement, enters into negotiations, but does not demonstrate other indicators of cooperation. Generally, this factor should be applied to those violators who demonstrate and maintain a high degree of willingness to cooperatively work with SWACO enforcement personnel regarding the investigation and resolution of violations.

Again, it should be reiterated that once SWACO enforcement personnel have established a prima facie case, the burden is always on the violator to justify any mitigation of the proposed penalty.