UIC Program Judicial and Administrative

Order Settlement Penalty Policy

September 1993

Note: This policy supersedes the UIC Program Administrative Order Settlement Policy issued on January 24, 1992.

Contents

I. Introduction..... 1

II. Economic Benefit Component..... 4

III. Gravity Component..... 7
Calculating the Unadjusted Gravity Component.... 7
Adjustment Factor for the Gravity Component..... 11

IV. Determining the Final Settlement Amount..... 12

Chart

Unadjusted Gravity Component
Calculation Formula..... 10

Appendices

A: Level I, Level II, and Level III Violations
B: UIC Administrative and Judicial Settlement Policy Calculation Worksheet
C: Summary Worksheet
D: Glossary of Terms

I. Introduction

Background

Part C of the Safe Drinking Water Act (SDWA) establishes guidelines for protecting underground sources of drinking water through control of underground injection wells. In the 1986 SDWA amendments, Congress authorized the EPA to issue administrative orders as an enforcement tool to promote compliance with the Act and its associated regulations. The revised Act authorized administrative penalties of up to $125,000. The amendments also provided revised authority for EPA to bring about civil judicial actions as an enforcement and compliance tool; the maximum judicial penalty was set at $25,000 per day per violation with no ceiling.

The SDWA provides EPA with three avenues for seeking penalties for violations of applicable Underground Injection Control (UIC) requirements; administrative actions, civil judicial actions, and criminal judicial actions. Guidance for choosing among the different enforcement avenues can be found in the document, "Choosing Between Criminal, Civil and Administrative Action for UIC Violations." This guidance was released on December 22, 1986, with a memo from Office of Drinking Water Director Michael Cook called, "Transmittal of PWS and UIC Administrative Order Issuance Guidance -- ACTION MEMORANDUM."

This document sets forth the policy of the U.S. Environmental Protection Agency, Office of Ground Water and Drinking Water (OGWDW) and the Office of Enforcement (OE), for establishing appropriate civil judicial and administrative **settlement** penalties in the UIC Program. This applies to all UIC actions initiated after the effective date of this policy and to pending enforcement cases in which the government has not yet transmitted an approved oral or written penalty demand to the alleged violator. This policy provides, based on the circumstances of the case, the lowest penalty figure which the Federal Government is generally willing to accept in settlement; however, there may be circumstances so egregious that the Federal Government should not even consider acceptance of such a figure and should instead seek the statutory maximum. This policy implements EPA's Policy on Civil Penalties (#GM-21) and Specific Approaches to Penalty Assessments (#GM-22).

An appropriate penalty is one that accomplishes three objectives. First, it should deter violations of the law by placing the violator in a worse position financially than those who have complied in a timely fashion. Secondly, there must be fair and equitable treatment of the regulated community. Therefore, the penalty should be consistent with the Agency's penalty policy and promote a more consistent approach to the assessment of civil judicial penalties, while allowing for factors unique to the UIC Program. Thirdly, the penalty should result in expeditious resolution of the identified problem(s). Such resolution can be achieved through an incentive, such as mitigating the penalty for supplemental environmental projects, or a disincentive, such as increasing the penalty figure for recalcitrance or for degree of willfulness if settlement negotiations are drawn out.

This policy is purely for the use of U.S. EPA enforcement personnel in settling cases. EPA reserves the right to change this policy at any time, without prior notice, or to act at variance to this policy. This policy does not create any rights, implied or otherwise, in any third parties. This policy supersedes the UIC Program Administrative Order Settlement Policy issued on January 24, 1992.

Pleading -- Other Types of Penalties

This policy only establishes how the Agency calculates the minimum penalty for which it would be willing to settle a case. The development of the penalty amount to plead in an administrative or judicial complaint is developed independent of this policy, except to the extent the Agency may not seek a settlement penalty in excess of the statutory maximum penalty it is seeking in the complaint. Further, at trial (or in an administrative hearing) the Agency will seek a penalty based on the statutory maximum and the penalty factors which the court is instructed to consider. Of course, the Agency will not use the settlement Penalty Policy in arguing for a penalty at trial or in an administrative penalty hearing. In pleading for penalties in judicial or administrative complaints, please refer to guidance by OE regarding the distinctions among pleading, negotiating, and litigating civil penalties for enforcement cases.[1] Although the guidance was written for cases brought under the Clean Water Act, it is also useful in Safe Drinking Water Act actions.

Documentation

Each component of the settlement penalty calculation (economic benefit, gravity and any adjustments) must be clearly documented with supporting materials and written explanations in the case file and provided to Headquarters for review and approval as required. Special care should be made to fully explain in the case file any adjustments for litigation considerations or ability to pay. Any subsequent recalculations of the penalty based on new information should also be included in the file.

Documentation and explanations of a particular settlement calculation constitute confidential information that is outside the scope of discovery and FOIA requests, which is protected by various privileges, including the attorney-client and attorney work-product. While individual settlement penalty calculations are confidential documents, this penalty policy is a public document and may be released to anyone upon request. Further, as part of settlement negotiations between the parties, EPA may release parts of the case specific settlement calculations. The release of such information may only be used for settlement negotiations in the case at hand and, of course, may not be admitted into evidence in a trial or hearing.

Outline of the UIC Settlement Policy

This policy incorporates, directly or indirectly, each of the statutory concepts listed under Section 1423(c)(4)(B) of the Safe Drinking Water Act, which outlines the factors the Administrator must take into account when determining a civil penalty.

---

[1] See *Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases under the Clean Water Act*, OECM/OW, January 19, 1989.

The remainder of this document provides step-by-step guidance for calculating settlement amounts. A separate calculation should be performed for each violation.. The first step is to calculate the statutory maximum. In administrative actions, the maximum for Class II wells is $5,000 per day per violation and for other Classes of wells the maximum is $10,000 per day per violation. For all well Classes in administrative actions, there is a ceiling of $125,000 per violation. The maximum for civil judicial penalties is $25,000 per day per violation with no ceiling. The statutory maximum serves as a limit which the settlement amount cannot exceed; the case team can always choose to assess the statutory maximum penalty if the circumstances of the case warrant such action. The next step is to calculate the economic benefit of the violation, a process described in Section II. The third step, covered in Section III, is calculation of the gravity component. The final step, described in Section IV, is applying adjustment factors to the combined economic benefit and gravity components.

The appendices provide material to support the settlement penalty calculation process. Appendix A provides a list of common UIC program violations by level of seriousness; this list is a guideline for categorizing violations when calculating the gravity component. Appendix B provides an example worksheet to use for calculating settlement amounts with this policy. A separate worksheet calculation should be carried out for each violation. Appendix C is a Summary Worksheet for recording information on multiple violations. Appendix D is a Glossary of Terms.

II. Economic Benefit Component

Agency civil penalty policy mandates recapturing the economic benefit accrued to the violator as a result of noncompliance. EPA policy states that "penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law." (GM-21). These benefits accrued to a violator as a result of noncompliance are referred to as the Economic Benefit Component. This component serves as the base settlement amount to which the Gravity Component is added. The calculation of economic benefit must be in writing and retained in the case file. It is enforcement privileged material and may only be disclosed upon decision of the case team.

EPA has a standard policy and methodology for calculating economic benefit. This methodology, based on calculation of avoided and delayed costs of noncompliance, is described in detail in the "BEN User's Manual" (revised 1993).[2] Case teams should calculate economic benefit of noncompliance using the BEN model.

The BEN model methodology incorporates three types of costs: initial capital investments, either one-time or recurring; one-time nondepreciable expenditures, either tax deductible or not; and avoided annual expenses. The following paragraphs give examples of each of these costs relevant to the UIC program. For detailed guidance, refer to the "BEN User's Manual," beginning on page III-7.

Initial Capital Investments

Delayed capital investments are either one-time or recurring depreciable expenditures which have been deferred by the violator's failure to comply promptly with regulatory requirements. The violator eventually will have to spend the money in order to achieve compliance, but has accrued economic benefit by using the money for other purposes during the noncompliance period. Depreciable capital expenditures are typically for physical plant or heavy equipment with a limited useful life. Examples of violations which result in savings from delayed capital investments are:

- Delay in installing monitoring equipment
- Delay in properly constructing a well

Capital investments can be either one time or recurring. An example of a recurring capital investment would be a monitoring system, with a predetermined useful life, that must always be replaced at the end of the predetermined period.

If the violator does not just delay capital investments but rather fails to make them altogether, the initial capital investments become avoided rather than delayed costs. The initial investments should then be treated in the economic benefit calculation as avoided costs.

Delayed One-Time Nondepreciable Costs

---

[2] Ben is a computer model used across EPA programs to calculate the economic benefit of noncompliance in settlement calculation amounts. Detailed information about BEN and copies of the "User's Manual" and the "User's Guide" can be obtained from the EPA's Office of Enforcement Policy.

Delayed one-time costs are nondepreciable expenditures which have been deferred by the violator's failure to comply promptly with regulatory requirements. The violator eventually will have to spend the money in order to achieve compliance, but has accrued economic benefit by using the money for other purposes during the noncompliance period. With the exception of land, most one-time nondepreciable costs are tax deductible. Examples of violations which result in savings from delayed one-time, nondepreciable costs are:

- Delay in contracting for brine removal
- Delay in setting up a record-keeping system
- Delay in purchase of land required for compliance
- Delay in repairing a well lacking mechanical integrity
- Delay of plugging and abandonment in accordance with an approved plan
- Initial training of employees (regularly occurring training must be classified as an annual cost, not a one-time cost)

Many of the costs associated with violation of UIC program regulations are one-time nondepreciable expenditures.

If the violator does not just delay one-time nondepreciable expenditures but rather fails to make them altogether, the expenditures become avoided rather than delayed costs. The one-time nondepreciable expenditures should then be treated in the economic benefit calculation as avoided costs.

Annual Expenses

Annual expenses are recurring expenditures that the violator completely avoided through noncompliance. These costs will never be incurred. Annual expenses are the equivalent of operating and maintenance (O&M) costs. Examples of violations which result in savings from avoided annual expenses are:

- Failure to monitor
- Failure to retain records
- Failure to carry out regular training of employees
- Failure to pay costs of alternative disposal when UIC disposal is into an unauthorized well
- Failure to perform required operation and maintenance activities

The case team will often find that the most appropriate avoided annual expense is the cost of alternative (proper) disposal. This is treated as an annual expense or operating cost since it is a necessary cost of a legal operation if the underground injection well may not lawfully be used for injection. To use BEN to calculate alternative cost of disposal, the case team should input this alternative cost as an annual expense in the appropriate year.

Wrongful Profits

Finally, BEN can be used to calculate the present value of wrongful profits. This method of calculating economic benefit may be used if calculation of an economic benefit from delayed and avoided costs is not possible; estimates of wrongful profits are typically very imprecise and this is not the preferred alternative. To determine wrongful profits in each year, the case team calculates either revenue from sales less cost of goods sold or calculates revenue from sales times profit margin. All three of these figures (sales revenue, cost of goods sold, and profit margin) are difficult to determine, making this calculation of economic benefit a last resort. The wrongful profit from each year is then entered into BEN as an annual expense, and BEN will calculate the present value of these wrongful profits. Case enforcement staff should consult with Headquarters for advice on how to perform this analysis.

III. Gravity Component

Introduction

This section of the policy describes the methodology for calculating the gravity component of administrative and civil judicial settlements for violations of applicable UIC requirements. A separate gravity component should be calculated for each violation. Case teams will first calculate an unadjusted gravity component and will then apply the Gravity Component Adjustment Factor to determine the final gravity component.

Calculating the Unadjusted Gravity Component

The unadjusted gravity component incorporates the following variables:

(A) Seriousness of violation

(B) Economic impact on the violator

(C) Duration of violation

(D) Number of wells in violation

The formula incorporating these factors is included on Chart 1 on page 8, the "Unadjusted Gravity Component Calculation Formula." Each of the four component variables is described in more detail below.

A. Seriousness of Violation

The seriousness of violation is the basic factor from which the gravity component is calculated. The seriousness of violation incorporates both the potential or actual harm resulting from the violation and the extent of deviation from UIC program requirements. Violations are placed in one of three levels. Level III infractions are the least serious; they are typically reporting violations that do not threaten the integrity of the program and pose little or no direct threat to the environment. Level II violations may be either reporting or other types of infractions; they are more serious than Level III violations but do not seriously threaten the environment and would not be classified as Significant Noncompliance.[3] Level I violations are the most serious violations; these are violations that threaten human health or the environment and/or that violate crucial provisions of the UIC program. They would be classified as Significant Noncompliance. Appendix A contains lists of common UIC program violations broken down into the three levels. The lists in Appendix A are *intended to serve as guides*

---

[3] Guidance for determining whether violations represent Significant Noncompliance can be found in: (1) "UIC Program Definition of Significant Noncompliance," December 4, 1986; (2) UIC Guidance Number 58, September 9, 1987; (3) "UIC Program SNC Definition," September 16, 1987; and (4) "Clarification of Procedures for Determining Significant Noncompliance: Addendum to UIC Program Guidance #58," February 16, 1990.

only since specific circumstances may dictate that a violation listed in one category may be more or less serious in the particular case under review.

B. Economic Impact on the Violator

Economic impact on the violator is an administrative penalty statutory consideration, from the Safe Drinking Water Act, in UIC penalty cases. To account for different impacts on violators of varying financial capability, the UIC settlement policy incorporates this provision for all types of cases to distinguish between different sized businesses and municipalities. Firms are placed in one of three categories based on their net sales. Net sales is the first line on any corporate tax form and equals gross sales less returns, allowances, and discounts. Case teams should attempt to get reliable information as to violator business size (e.g., from Dun & Bradstreet reports, tax forms, or audited financial statements); in the absence of specific information, case teams should use their judgment based on available information and conservative estimates.

Municipalities are placed in one of three categories based on their population size. Population and per capita income statistics are readily available from sources including the community itself, state data or census books, and the Census Bureau within the U.S. Department of Commerce. Case teams should note that the policy assumes smaller communities are less able to afford penalties than larger communities and therefore are given an adjustment for economic impact. However, small urban or suburban communities often should be treated differently from small rural communities. Small urban or suburban communities may be very wealthy and able to afford a penalty as easily as some larger communities. (The case team may wish to refer to Census Bureau information to determine whether the municipality in question is part of a Metropolitan Statistical Area, the Census Bureau's term for a metropolitan region.) Small rural communities, on the other hand, are typically less financially capable than larger communities.

The economic impact on the violator factor accounts for varying financial capability among firms and municipalities of different sizes. It is intended to relegate the Ability to Pay factor (see p. 11) to a secondary consideration, invoked only when violators conclusively prove that they are unable to pay the calculated penalty and are otherwise able to come into compliance.

In cases where small firms are very profitable or where small communities are very wealthy and where the proposed penalty (without the Economic Impact on the Violator adjustment) will not adversely affect the violator, this provision may be discounted. The case team has the discretion to use a value of "1" under this factor regardless of the violator's business or population size.

C. Duration of Violation

This penalty policy accounts for ongoing violations by escalating the calculated penalty as the length of violation increases. The duration of violation is defined as the time from the first day of noncompliance until the compliance date (the day the violator brings the well into compliance). For the purpose of calculating the length of ongoing violations, a month is defined as 30 days and a partial month beyond the last full month is counted as an additional month (e.g., a 32-day violation is a two-month violation).

D. Number of Wells in Violation

This factor accounts for the fact that a number of wells owned by a single operator may be in violation of the identical UIC requirement; this provision is only to be used when multiple wells are in violation of the *identical requirement*. In these instances, the case team may either calculate a separate penalty for each well or use this multi-well provision to calculate a single penalty. For identical violations at 25 or fewer wells, this factor is equal to the number of wells; only when there are a large number of wells in violation does this factor have an effect.

Chart 1
Unadjusted Gravity Component
Calculation Formula: (A X B) X (C + D)

Input Factors

A. Seriousness of Violation

Violation Category	Multiplier All Classes
Level III	$100-400
Level II	401-1,000
Level I	1,001-25,000

B. Economic Impact on the Violator

Business Size	Municipality Population	Multiplier
Less than $1 Million	Less than 2,500	0.3
$1 Million - $10 Million	2,501 - 50,000	0.7
Greater than $10 Million	Greater than 50,000	1.0

C. Duration of Violation

Length of Violation	Factor
1 day	0
2 days - 1 month	0 - 2
2 - 3 months	2 - 5
4 - 7 months	4 -10
8 - 12 months	8 -15
13 - 18 months	13 - 25
19 - 36 months	19 -40
37 - 60 months	37- 75
60+ months	60 - 125+

D. Number of Wells in Violation

Number	Factor
1-25	Actual number of wells
26 - 50	26 - 50
51 - 100	36 - 100
100+	50 - 100+

Adjustment Factor for the Gravity Component

The gravity component adjustment factor permits increases or decreases in the gravity component to account for a violator's compliance history; level of cooperation/noncooperation; and the willfulness or negligence associated with the violation.

When considering an appropriate figure for gravity component adjustment factor, the case team should consider the following specific factors:

- Number of previous violations
- Similarity of any previous violations
- Violator's response to previous violations and enforcement actions
- The rapidity with which this violation was corrected or damage was mitigated prior to the enforcement action
- The level of effort put forth by the violator to correct the violation and respond to the enforcement action[4]
- Whether the violator delayed release of information or employed other delaying tactics
- Degree of control the violator exercised over the violation
- Foreseeability of events leading to the violation
- Level of precautions that were taken to avoid the violation

Based on these and other appropriate factors, the case team may decide on a gravity component adjustment factor ranging from minus 30 to plus 150 percent. Case teams may not consider a *reduction* of the gravity component based on a history of compliance. The unadjusted gravity component is then multiplied by this factor and the resulting figure is added to the unadjusted gravity component to determine the final (adjusted) gravity component.

---

[4] Good faith does not occur after an enforcement action is commenced.

IV. Determining the Final Settlement Amount

The preliminary settlement amount is the sum of the Gravity and Economic Benefit Components. However, two factors may be used to adjust the preliminary settlement amount: ability to pay and litigation considerations. Both of these factors are external to benefit derived through noncompliance and to the seriousness of the violation and both factors may be used only to adjust proposed settlement amounts downward. Any adjustment must be fully documented and retained in the case file. Such information is typically audited by the General Accounting Office and EPA's Inspector General. This chapter describes the use of the ability to pay and litigation considerations adjustment factors. In addition, this chapter discusses the use of Supplemental Environmental Projects to reduce penalty amounts.

Ability to Pay

The Agency will not generally request penalty settlements that are clearly beyond the means of the violator. The case team typically should seek to settle for as high an amount as the case team believes the violator can afford without seriously jeopardizing the violator's ability to continue operations and to bring the well into compliance. Therefore, EPA may consider the ability to pay a penalty when arriving at a specific final penalty assessment. However, the more serious the violation the greater risk EPA should accept that imposition of a penalty will result in closure of a violator's business. According to the Agency's penalty framework, GM-22, "EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business" (p. 23). Also, where the case team believes the violator will not be able to bring the well operation into compliance no matter what the penalty assessment, the penalty should not be adjusted downward based on ability to pay.

Burden on violator

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the violator. In addition, if the violator fails to provide sufficient information to support a claim of inability to pay a penalty, then the case development team should disregard this factor in adjusting the penalty. At a minimum, the violator must provide three years of Federal tax returns. Where possible, the case team should also have the violator provide a certified financial statement prepared by a Certified Public Accountant. The Agency has developed a computer model called "ABEL" which helps determine the ability of a violator to afford a penalty. If the Region is still unable to judge the validity of the claim, evaluation by an outside expert consultant may be necessary.

When it is determined that a violator cannot afford the penalty prescribed by this policy, the following options may be considered:

- An installment payment schedule with appropriate interest accruing to delayed payments. The first payment must be received within 60 days of final settlement.
- A penalty reduction.
- A suit against the individual violator(s) if the company has no assets.

A reduction in the penalty amount is a less desirable alternative than a delayed payment schedule, although installments beyond three years are strongly discouraged.

No longer than 3 years

Litigation Considerations

Many enforcement cases may have weaknesses or equitable problems that could be expected to persuade a court to assess a penalty less than the statutory maximum amount. The simple existence of weaknesses in a case, however, should not automatically result in a litigation consideration reduction of the preliminary penalty amount (economic benefit + gravity). The government should evaluate every penalty with a view toward the potential for protracted litigation and attempt to ascertain the maximum civil penalty the court (or administrative law judge) is likely to award if the case proceeds to trial (or administrative hearing). The basic rule for litigation considerations is that the government may reduce the amount of the civil penalty it will accept at settlement to reflect these considerations (i.e., weaknesses or equitable issues) where the facts demonstrate a substantial likelihood that the government will not achieve a higher penalty at trial.

Since the settlement penalty is meant to represent a reasonable compromise of EPA's claim for the statutory maximum, before making a settlement offer EPA must determine the statutory maximum penalty and estimate how large a penalty the government might obtain if the case were to proceed to trial. Given the limited number of judicial opinions on the issue of penalties in UIC cases, Agency legal staff must use their best professional judgment in assessing what penalty a court might assess in the case at hand. Any adjustments for litigation considerations must be taken on a factual basis specific to the case.

While there is no universal list of litigation considerations, there is a list of factors that should be considered in evaluating whether the preliminary settlement penalty exceeds the penalty the Agency would likely obtain at trial. Potential litigation considerations could include:

1. Known problems with the government's evidence proving liability or supporting a civil penalty;

2. The credibility, reliability, and availability of witnesses;[5]

3. The informed, expressed opinion of the judge assigned to the case (or person appointed by the judge to mediate the dispute), after evaluating the merits of the case.[6]

---

[5] The credibility and reliability of witnesses relates to their demeanor, reputation, truthfulness, and impeachability. For instance, if a government witness has made statements significantly contradictory to the position he is to support at trial, his credibility may be impeached by the respondent or defendant. The availability of a witness will affect the settlement bottom-line if the witness cannot be produced at trial; it does not relate to the inconvenience or expense of producing the witness at trial.

[6] This factor, except as provided below with respect to the record of the judge or other trier of fact, may not be applied in anticipation, or at the stage of initial referral, and should not be distorted by taking at face value what a judge attempting to encourage a settlement might say. This factor does not apply to cases referred under the pre-referral negotiation guidance, since such PRN settlements occur before the assignment of a judge.

4. The record of the judge assigned to the case in any very similar case or other environmental enforcement penalty case. (In contrast, the reputation of the judge, or the judge's general demeanor, without a specific penalty or legal statement on a similar case, is rarely sufficient as a litigation consideration.)

5. Assurances by Federal, State or local regulators that the respondent or defendant credibly may argue led it to believe it was complying with the federal law under which EPA is seeking penalties.

6. The payment by the defendant of civil penalties for the same violations in a case brought by another plaintiff.[7]

7. The development of new, relevant case law.[8]

8. A blend of troublesome facts and weak legal positions such that the Agency faces a significant risk of obtaining a negative precedent at trial of national significance.

In evaluating the list of possible litigation considerations set forth in 1. - 8. above, the Region should evaluate each consideration for the impact it is likely to have on the Agency's ability to obtain a trial penalty in excess of the preliminary settlement amount. Before a complaint is filed, the application of litigation considerations is often premature, since the Agency generally does not have enough information to fully evaluate litigation risk. Reductions for litigation considerations are more likely to be appropriate after the Agency obtains an informed view, through discovery and settlement activities, of the weaknesses in its case and how the specific court views penalties in the case.

The Agency recognizes that this quantitative evaluation of litigation considerations often reflects subjective legal opinions. Thus, a Regional office may reduce the preliminary penalty amount by up to one-third the gravity amount for litigation considerations without Headquarters approval. Of course, this reduction must be clearly explained in the settlement case file.

In evaluating possible litigation considerations, Agency staff should recognize that litigation considerations do not include:

a. The Region's desire to minimize the resource investment in the case.

---

[7] If the defendant has previously paid civil penalties for the same violations to another plaintiff, this factor may be used to reduce the amount of the settlement penalty by no more than the amount previously paid for the same violations. Because a violator is generally liable to more than one plaintiff, the prior payment of a civil penalty should not generally result in a dollar-for-dollar reduction of the Agency penalty settlement amount. If the previous case included other violations, only a portion of the penalty already paid should be considered in reducing the penalty in the case at hand.

[8] Between the time the Region initiates or refers a case, new case law relating to liability or penalty assessment may affect the strength of the Agency's legal arguments. In that circumstance, the Region may apply litigation considerations to adjust its initial penalty settlement figure. Of course, new positive case law can be used to bolster the preliminary settlement amount.

b. A generalized goal (in opposition to established Agency policies) to avoid litigation or to avoid potential precedential areas of the law.[9]

c. A duplicative statement of elements included or assumed elsewhere in the Penalty Policy, such as inability to pay, "good faith" or a "lack of willfulness" by a respondent or defendant.

d. Off-the-record statements by the court, before it has had a chance to evaluate the specific merits of the case, that large penalties are not appropriate, are generally, by themselves, not a reason to reduce the preliminary settlement penalty amount.

The case team should select a value for litigation considerations between zero and 100 percent, where 100 percent represents the belief that EPA has a strong case and the Presiding Officer or judge is unlikely to reduce the award based on the factors outlined in this section. A zero percent rating would indicate that the case team believes a Presiding Officer or judge would grant no award. Justification for choosing any value other than 100 percent must be documented and included in the case file. The value should then be included in the Settlement Policy Calculation Worksheet (Appendix B) under Step 4, letter (J).

Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are pollution prevention, recycling, or other projects which are not required to bring a violator into compliance but which will result in significant environmental benefit if undertaken. If carried out correctly, these projects can lead to reduction of minimum settlement amounts. EPA's Office of Enforcement has issued a national policy on the use of supplemental environmental projects in EPA settlements, "Policy on the Use of Supplemental Environmental Projects in EPA Settlements," February 12, 1991.

Case teams considering the use of SEPs to mitigate settlement amounts should follow the 1991 Policy and any subsequent revisions. The SEP Policy describes the circumstances under which SEPs can be considered in settlement calculations and how they should be treated when calculating settlement amounts. Note that any administrative order or civil judicial action that has the settlement amount reduced by inclusion of an SEP which involves substitute performance or has a "horizontal" nexus, as that term is defined in EPA policy, must be approved by the Office of Enforcement. Supplemental environmental projects can be used to reduce the cash payment but not to a value below the Economic Benefit component. Also, the reduction can not reduce the total value of the violator's settlement (cash

---

[9] There are times when the Agency and the Department should fully litigate a civil or criminal case as it may create a beneficial precedent for the Federal government. An example is U.S. v. Midway Heights County Water District (695 F. Supp. 1072, 1076, E.D. Cal. 1988), in which the court found that 1) the definition of human consumption extends beyond just ingestion and is broader than merely whether the service population drinks the water, and 2) the presence of organisms that were accepted indicators of the potential for the spread of serious disease presented an imminent (and substantial) endangerment, regardless of whether actual illnesses had been reported.

payment plus the after-tax net present value of the SEP as calculated by BEN) to a value below the Final Settlement Amount calculated using this policy.

Appendix A

Level I, Level II, and Level III Violations

Level I Violations[1]:
Potential for Significant Environmental Contamination

Violation	SDWA or Regulatory Citation
Failure to demonstrate mechanical integrity resulting in potential or actual contamination of a USDW	144.52(a)(8), 146.8, 144.51(p), 144.28(g), and 144.12(a)
Unauthorized injection	144.11, 144.13, 144.14(b), 144.21(a), 144.23(a), and 144.27
Failure to operate properly (e.g., overpressure)	144.28(f), 144.51(e), 144.52(a), and Part 146
Failure to prevent movement into a USDW of fluids that may cause a violation of an MCL	144.12(a) and 1431
Failure to comply with a compliance schedule in a permit	144.53 and 144.51(l)(5)
Failure to comply with an Administrative Order	1423(c)
Falsifying information[2]	144.51(o), 1445(c), and 1431
Failure to construct well properly (casing and cementing)	144.28(e), Part 146, and relevant parts of 147
Failure to plug and abandon in accordance with an approved plan	144.23(b), 144.28(c), 144.51(o), 144.52(a)(6), and 146.10
Unauthorized plugging of a well in an unauthorized manner	144.28(c), 146.10 and 144.51(o)

[1]This list of violations is intended only as guidance. Unique circumstances of individual cases may lead case teams to classify violations not listed here as Level I violations or to classify a violation listed here at a different level.

[2]A unique violation that, although not directly linked to environmental harm, is considered a serious, Level I violation. Case teams should consider criminal prosecution for this violation.

Level II Violations[3]: Critical Program Elements

Violation	SDWA or Regulatory Citation
Failure to show evidence of or to maintain financial responsibility	144.28(d), 144.52(a)(7) and 144.60-144.70
Failure to monitor	144.28(g), Part 146 and 144.51(a) and (j)
Substantial failure to comply with operating requirements	144.28(f), 144.51(a) and (e), and Part 146
Failure to conduct an MIT upon lawful request of the Agency or within legal deadlines and thereby demonstrate Mechanical Integrity	144.28(g)
Failure to submit a plugging and abandonment plan	144.23(b)(2) and 144.28(c)
Failure to allow inspection and entry	144.51(i)
Failure to apply for a permit	144.25, and 144.31
Failure to submit an annual report	144.28(h)
Failure to transfer a permit properly	144.38
Failure to submit 24-Hour report and/or written follow-up	144.28(b) and 144.51(l)(6)
Failure to submit information	144.27

[3]This list of violations is intended only as guidance. Unique circumstances of individual cases may lead case teams to classify violations not listed here as Level II violations or to classify a violation listed here at a different level.

Level III Violations[4]: Other Violations

Violation	SDWA or Regulatory Citation
Failure to retain records	144.28(i) and 144.51(j)(2)
Failure to make required notification	144.23(b)(3), 144.28(j)(1)&(2), 144.28(l), 144.28(g) 144.51(l)&(n), and 144.14(c)(1)
Failure to submit a report, to submit a complete report, to submit a timely report, to submit an accurate report	144.28(h) and 144.28(k)
Failure to submit inventory information in a timely fashion	144.26(d)
Failure to submit information	144.14(c), 144.26, and 146.52

[4]This list of violations is intended only as guidance. Unique circumstances of individual cases may lead case teams to classify violations not listed here as Level III violations or to classify a violation listed here at a different level.

Appendix B

UIC Program Judicial and Administrative Order Settlement
Penalty Policy Calculation Worksheets

UIC Program Judicial and Administrative Order Settlement Penalty Policy
Individual Violation Settlement Calculation Worksheet

Preliminary Information

Name of Person Filling out Form: _____

Date: _____

Operator/Facility Name: _____

Class of Well: _____

Violation: _____

Step 1: Calculate Statutory Maximum (Judicial and Administrative)

(a) Length of violation (in days): _____

(b) Maximum administrative penalty per day: $5,000 (Class II wells) or $10,000 (Class I, III-V)

(c) Number of wells in violation: _____

Judicial Statutory Maximum: (a) * (25,000) * (c) =

_____ * 25,000 * _____ = $_____

Administrative Statutory Maximum: (a) * (b) * (c) =

_____ * _____ * _____ = $_____

Step 2: Calculate Economic Benefit Component

Determine present value of avoided and delayed costs, using BEN model (attach all BEN printouts).

_____

Step 3: Calculate Gravity Component

Refer to Chart 1, Unadjusted Gravity Component Calculation Formula (p. 10 in Policy) to determine appropriate value for each of the four factors (A) through (D).

(A) Seriousness of violation ($100-25,000): $_____

(B) Economic impact on the violator (0.3, 0.7, or 1.0): _____

(C) Duration of violation (0-125+): _____

(D) Number of wells in violation (1-125+): _____

(E) Unadjusted Gravity Component: (A) * (B) * [(C) + (D)] =

_____ * _____ * (_____ + _____) = _____

(F) Gravity Component Adjustment Factor (-30 to +150%): _____%

Gravity Component: (E) + {[(F)/100]*(E)} =

_____ + [(_____/100) * _____] = _____

Step 4: Apply Adjustment Factors to Sum of All Economic Benefit and Gravity Components

(G) Calculate Preliminary Settlement Amount:
Economic Benefit Components + Gravity Components: _____

(H) Maximum Ability to Pay: _____

(I) Adjustment for Ability to Pay: If (H)<(G), then (G)-(H), else zero = _____

(J) Litigation Considerations (0 to 100%): _____%
(0 = very weak case, 100 = good case)

Final Settlement Amount: [(G) - (I)] * [(J)/100]: (_____ - _____) * (_____/100)=

_____

Adjustment Factor for the Gravity Component Calculation Worksheet

Violator or Case Name: _____

Case Team Member Name/Date: _____

Factor	Comment	Adjustment
History of Violation (+ only)		
• Number of previous violations	_____	(+)_____
• Similarity of previous violations	_____	(+)_____
• Response to previous violations and enforcement actions	_____	(+)_____
Degree of Cooperation/Noncooperation		
• Rapidity of violation correction and/or damage mitigation prior to enforcement action	_____	(+/-)_____
• Effort put forth by violator to correct violation in response to enforcement action	_____	(+)_____
• Use of delaying tactics	_____	(+)_____
Willfulness/Negligence		
• Control over violation	_____	(+/-)_____
• Foreseeability of events leading to violation	_____	(+/-)_____
• Precautions taken to avoid violation	_____	(+/-)_____
	TOTAL:	_____ (-30 to +150%)

UIC Settlement Penalty Policy Calculations

Duration:

Start date of violation: _____

End date of violation: _____

Duration of violation: _____

Economic Impact:

Gross sales value: _____

Source of information: _____

_____

Economic impact on the violator (0.3, 0.7, 1.0): _____

Other Calculations:

Appendix C

Summary Worksheet

Summary Worksheet for Multiple UIC Violations

Administrative statutory maximum: _____
($5,000 or $10,000 per day or $125,000 total)

Civil statutory maximum: _____
($25,000 per day)

Total economic benefit component: _____

Total adjusted gravity component: _____

Total final settlement amount: _____

SUMMARY OF COMPONENTS BY INDIVIDUAL VIOLATION

Violation	Economic Benefit	Adjusted Gravity	Final Settlement
Totals:			

Appendix D

Glossary of Terms

Glossary of Terms

Adjusted Gravity Component The end product of applying the Adjustment Factors to the **Unadjusted Gravity Component.**

Adjustment Factors (Preliminary Settlement) These factors are Ability to Pay and Litigation Considerations. The case team has the ability to adjust the **Preliminary Settlement Amount** up or down based on details of the specific violation in the two Adjustment Factor categories.

Annual Expenses Pollution control costs, typically operation and maintenance costs, that the violator completely avoided by delaying compliance or by ignoring the regulatory requirement. Annual expenses are one input used in the EPA's BEN computer model and are a portion of the **Economic Benefit Component.**

Current Dollars The benefit, in current dollars (i.e., dollars at the time the penalty is paid), of violations that have taken place in the past. **Annual Expenses, Delayed One-Time Nondepreciable Costs**, and **Initial Capital Investments** must be escalated to Current Dollars. This calculation is performed by the BEN computer model.

Delayed One-Time Nondepreciable Costs These are nondepreciable expenses that have been delayed by the violator's failure to comply promptly with regulatory requirements. Many of the delayed costs associated with UIC violations will fall into this category which includes land purchase and well repairs. Most of these costs are tax-deductible, although land is not.

Economic Benefit Component The sum of the present, tax-adjusted values of **Initial Capital Investments, Delayed One-Time Nondepreciable Costs**, and **Annual Expenses**. It is calculated using EPA's BEN computer model.

Final Settlement Amount The **Preliminary Settlement Amount** after adjustment according to the **Adjustment Factors (Preliminary Settlement).**

Gravity Component Adjustment Factor The elements incorporated in this factor include the degree of willfulness, good faith efforts to comply, history of violation, and other elements not incorporated into the **Unadjusted Gravity Component.** The case team has the ability to adjust the **Unadjusted Gravity Component** up or down within a fixed range based on details of the specific violation.

Independently Assessable Violations These are dissimilar violations. A separate **Adjusted Gravity Component** and **Economic Benefit Component** must be calculated for each of these violations.