RCRA CIVIL PENALTY POLICY

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RCRA CIVIL PENALTY POLICY

I. SUMMARY OF THE POLICY

The penalty calculation system established through EPA's RCRA Civil Penalty Policy consists of (1) determining a gravity-based penalty for a particular violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violation's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance. More specifically, the Revised RCRA Civil Penalty Policy establishes the following penalty calculation methodology:

Penalty Amount =	gravity-based component	+ multiday component	+ adjust- - ments	+ economic - benefit

In administrative civil penalty cases, EPA will perform two separate calculations under this policy: (1) to determine an appropriate amount to seek in the administrative complaint and subsequent litigation, and (2) to explain and document the process by which the Agency arrived at the penalty figure it has agreed to accept in settlement. The methodology for these calculations will differ only in that no downward adjustments (other than those reflecting a violator's good faith efforts to comply with applicable requirements) will usually be included in the calculation of the proposed penalty for the administrative complaint. In those instances where the respondent or reliable information demonstrates prior to the issuance of the complaint that applying further downward adjustment factors (over and above those reflecting a violator's good faith efforts to comply) is appropriate, enforcement personnel may in their discretion (but are not required to) make such further downward adjustments in the amount of the penalty proposed in the complaint.

In determining the amount of the penalty to be included in the complaint, enforcement personnel should consider all possible ramifications posed by the violation and resolve any doubts (e.g., as to the application of adjustment factors or the assumptions underlying the amount of the economic benefit enjoyed by the violator) against the violator in a manner consistent with the facts and findings so as to preserve EPA's ability to litigate for the strongest penalty possible. It should be noted that assumptions underlying any upward adjustments or refusal to apply downward adjustments in the penalty amount are subject to revision later as new information becomes available.

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In civil judicial cases, EPA will use the narrative penalty assessment criteria set forth in the policy to argue for as high a penalty as the facts of a case justify should the case go to trial, and will prepare a calculation which applies this policy to lay out the rationale behind any penalty amount the Agency agrees to accept in settlement.

Two factors are considered in determining the gravity-based penalty component:

- potential for harm; and
- extent of deviation from a statutory or regulatory requirement.

These two factors constitute the seriousness of a violation under RCRA, and have been incorporated into the following penalty matrix from which the gravity-based component will be chosen:

MATRIX

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$25,000 to 20,000	$19,999 to 15,000	$14,999 to 11,000
MODERATE	$10,999 to 8,000	$7,999 to 5,000	$4,999 to 3,000
MINOR	$2,999 to 1,500	$1,499 to 500	$499 to 100

The policy also explains how to factor into the calculation of the gravity component the presence of multiple and multi-day (continuing) violations. The policy provides that for days 2 through 180 of multi-day violations, multi-day penalties are mandatory, presumed, or discretionary, depending on the "potential for harm" and "extent of deviation" of the violations. For each day for which multi-day penalties are sought, the penalty amounts must be determined using the multi-day penalty matrix. The penalty amounts in the multi-day penalty matrix range from 5% to 20% (with a minimum of $100 per day) of the penalty amounts in the corresponding gravity-based matrix cells. Regions also retain discretion to impose multi-day penalties (1) of up to $25,000 per day, when appropriate under the circumstances, and (2) for days of violation after the first 180, as needed to achieve deterrence.

Where a company has derived significant savings or profits by its failure to comply with RCRA requirements, the amount of economic benefit from noncompliance gained by the violator will be calculated and added to the gravity-based penalty amount. The Agency has developed and made available to Agency personnel a computer model that can quickly and accurately calculate economic benefit - BEN. [1]

After the appropriate gravity-based penalty amount (including the multi-day component) has been determined, it may be adjusted upward or downward to reflect particular circumstances surrounding the violation. Except in the unusual circumstances outlined in Section VIII the amount of any economic benefit enjoyed by the violator is not subject to adjustment. When adjusting the gravity-based penalty amount the following factors should be considered:

- good faith efforts to comply/lack of good faith (upward or downward adjustment);
- degree of willfulness and/or negligence (upward or downward adjustment);
- history of noncompliance (upward adjustment);
- ability to pay (downward adjustment);
- environmental projects to be undertaken by the violator (downward adjustment); and
- other unique factors, including but not limited to the risk and cost of litigation (upward or downward adjustment).

These factors (with the exception of (i) upward adjustment factors such as history of noncompliance, and (ii) the statutory downward adjustment factor reflecting a violator's good faith efforts to comply) should usually be considered after the penalty in the complaint has been proposed, i.e., during the settlement stage.

A detailed discussion of the policy follows. In addition, this document includes a few hypothetical cases where the step-by-step assessment of penalties is illustrated. The steps included are choosing the correct penalty cell on the matrix, calculating the economic benefit of noncompliance, where

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[1] For more information regarding the BEN model, call the Office of Enforcement Policy located within the Office of Enforcement, at 475-8777.

appropriate, and adjusting the penalty assessment on the basis of the factors set forth above.

II. INTRODUCTION

To respond to the problem of improper management of hazardous waste, Congress amended the Solid Waste Disposal Act with the Resource Conservation and Recovery Act (RCRA) of 1976. Although the Act has several objectives, Congress' overriding purpose in enacting RCRA was to establish the basic statutory framework for a national system that would ensure the proper management of hazardous waste. Since 1976, the Solid Waste Disposal Act has been amended by the Quiet Communities Act of 1978, P.L. 95-609, the Used Oil Recycling Act of 1980, P.L. 96-463, the Hazardous and Solid Waste Amendments of 1984, P.L. 98-221, the Safe Drinking Water Act Amendments of 1986, P.L. 99-39, the Superfund Amendments and Reauthorization Act of 1988, P.L. 99-499, and most recently, the Medical Waste Tracking Act of 1988, P.L. 100-582. For simplicity and convenience, the Solid Waste Disposal Act, as amended, will hereinafter be referred to as "RCRA."

Section 3008(a) of RCRA, 42 U.S.C. §6928(a), provides that if any person has violated or is in violation of a requirement of Subtitle C, the Administrator of the Environmental Protection Agency (EPA) may, among other options, issue an order assessing a civil penalty of up to $25,000 per day for each violation. Section 3008(a)(3), 42 U.S.C. §6928(a)(3), provides that any order assessing a penalty shall take into account:

- the seriousness of the violation, and
- any good faith efforts to comply with the applicable requirements.

Section 3008(g) applies to civil judicial enforcement actions and establishes liability to the United States for civil penalties of up to $25,000 per day for each violation of Subtitle C.

This document sets forth the Agency's policy and internal guidelines for determining penalty amounts which (1) should be sought in administrative complaints filed under RCRA[2]

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[2] This policy is in no way intended to limit the penalty amounts <u>sought</u> in civil judicial actions. In civil judicial actions brought pursuant to RCRA the United States will at its discretion continue to file complaints requesting up to the statutory maximum civil penalty amount and to litigate for the maximum amount justifiable on the facts of the case.

and (2) would be acceptable in settlement of administrative and judicial enforcement actions under RCRA. This policy also governs civil penalty calculations under the Medical Waste Tracking Act of 1988, 42 U.S.C. § 6922 et seq., and supersedes the guidance document entitled, "Applicability of RCRA Penalty Policy to LOIS Cases (November 16, 1987). It does not, however, apply to penalties assessed under Subtitle I (UST) of RCRA, 42 U.S.C. § 6991 et seq.

The purposes of the policy are to ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

This document does not address whether assessment of a civil penalty is the correct enforcement response to a particular violation. Rather, this document focuses on determining the proper civil penalty amount that the Agency should obtain once a decision has been made that a civil penalty is the proper enforcement remedy to pursue. For guidance on when to assess administrative penalties, enforcement personnel should consult the RCRA Enforcement Response Policy, December 21, 1987. The Enforcement Response Policy provides a general framework for identifying violations and violators of concern as well as guidance on selecting the appropriate enforcement action n response to various RCRA violators.

The 1990 RCRA Civil Penalty Policy is immediately applicable and should be used to calculate penalties sought in all RCRA administrative complaints or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the policy, regardless of the date of the violation. To the maximum extent practicable, the policy shall also apply to the settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the policy is issued.

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to at variance with this policy and to change it at any time without public notice.

III. RELATIONSHIP TO AGENCY PENALTY POLICY

The RCRA Civil Penalty Policy sets forth a system for pursuing penalties consistent with the established goals of the Agency's civil penalty policy which was issued on February 16, 1984. These goals consist of:

- Deterrence;
- Fair and equitable treatment of the regulated community; and
- Swift resolution of environmental problems.

The RCRA penalty policy also adheres to the Agency policy's framework for assessing civil penalties by:

- Calculating a preliminary deterrence amount consisting of a gravity component and a component reflecting a violator's economic benefit of noncompliance; and
- Applying adjustment factors to account for differences between cases.

IV. DOCUMENTATION AND RELEASE OF INFORMATION

A. DOCUMENTATION FOR PENALTY SOUGHT IN ADMINISTRATIVE COMPLAINT/LITIGATION

In order to support the penalty proposed in the complaint, enforcement personnel must include in the case file an explanation of how the proposed penalty amount was calculated. As a sound case management practice in administrative cases, a case "record" file should document or reference all factual information on which EPA will need to rely to support the penalty amount sought in the complaint. Full documentation of the reasons and rationale for the penalty complaint amount is important to expeditious, successful administrative enforcement of RCRA violations. The documentation should include all relevant information and documents which served as the basis for the penalty complaint amount and were relied upon by the Agency decision-maker. In general, only final documents, but not preliminary documents, such as drafts and internal memoranda reflecting earlier deliberations, should be included in the record file. All documentation supporting the penalty calculation should be in the record file at the time the complaint is issued. The documentation should be supplemented to

include a justification for any adjustments to the penalty amount in the complaint made after initial issuance of the complaint, if such adjustments are necessary.

Additionally, Agency regulations governing administrative assessment of civil penalties, at 40 CFR 22.14(a)(5) and (c), require that the complaint contain a statement which sets forth the Agency's basis for requesting the actual amount of the penalty being sought. To ensure that RCRA administrative complaints comply with the statute and the rules, as long as sufficient facts are alleged in the complaint, enforcement personnel may plead the following:

> Based upon the facts alleged in this Complaint and upon those factors which the Complainant must consider pursuant to Section 3008(a)(3) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928(a)(3) (as discussed in the RCRA Civil Penalty Policy), including the seriousness of the violations, any good faith efforts by the respondent to comply with applicable requirements, and any economic benefit accruing to the respondent, as well as such other matters as justice may require, the Complainant proposes that the Respondent be assessed the following civil penalty for the violations alleged in this Complaint:
>
> Count 1 ..... $25,000
> Count 2 ..... $80,000

Enforcement personnel may use the above general language in the complaint, but must be prepared to present at the pre-hearing conference or evidentiary hearing more detailed information reflecting the specific factors weighed in calculating the penalty proposed in the complaint. For example, evidence of specific instances where the violation actually did, could have, or still might result in harm could be presented to the trier of fact to illustrate the potential for harm factor of the penalty. Experience also suggests that the Agency may be called upon, before the hearing, to present to the trier of fact and the respondent the penalty computation worksheet supporting the proposed penalty amount sought in the complaint.[3]

Usually the record supporting the penalty amount specified in the complaint should include a penalty computation worksheet which explains the potential for harm, extent of deviation from statutory or regulatory requirements, economic benefit of non-

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[3] See City of Kalamazoo Water Reclamation Plant, CWA-AO-01-89 (March 16, 1989), where the Administrative Law Judge required EPA to provide its penalty computation worksheet to respondent during the prehearing exchange.

compliance, and any adjustment factors applied (e.g., good faith efforts to comply). Also the record should include any inspection reports and other documents relating to the penalty calculation.

B. DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT

Until settlement discussions or pre-hearing information exchange are held with the respondent, mitigating and equitable factors and overall strength of the Agency's enforcement case may be difficult to assess. Accordingly, preparation of a penalty calculation worksheet for purposes of establishing the Agency's settlement position on penalty amount may not be feasible prior to the time that negotiations with the violator commence. Once the violator has presented the Region with its best arguments relative to penalty mitigation the Region may, at its discretion, complete a penalty calculation worksheet to establish its initial "bottom line" settlement position. However, at a minimum, prior to final approval of any settlement, whether administrative or judicial, enforcement personnel should complete a final worksheet and narrative explanation which provides the rationale for the final settlement amount to be included in the case file for internal management use and oversight purposes only. As noted above enforcement personnel may, in arriving at a penalty settlement amount, deviate significantly from the penalty amount sought in an administrative complaint, provided such discretion is exercised in accordance with the provisions of this policy.

C. RELEASE OF INFORMATION

Release of information to members of the public relating to the use of the 1990 RCRA Civil Penalty Policy in enforcement cases is governed by the Freedom of Information Act (FOIA) 5 USC §552, and the Agency regulations implementing that act, 40 CFR Part 2. FOIA as implemented through Agency regulations, sets forth procedural and substantive requirements governing the disclosure of information by Federal agencies. While the Agency maintains a policy of openness and freely discloses much of what is requested by the public, there are a number of exemptions in FOIA which allow the Agency to withhold and protect from disclosure certain documents and information in appropriate circumstances.

In ongoing enforcement cases, documents and other material that deal with establishing the appropriate amount of a civil penalty (particularly penalty computation worksheets) may be covered by two different FOIA exemptions. Documents that support or relate to the amount of the civil penalty the Agency would be willing to accept in settlement are likely to fall within the scope of these exemptions and in many cases can be withheld. Documents that support or relate to the amount of a penalty the Agency has

proposed in an administrative complaint may also qualify for protection under the exemptions.

FOIA, Exemption 7, as codified at 40 CFR 2.118(a)(7), allows such documents to be withheld if release could reasonably be expected to interfere with an enforcement proceeding. This exemption extends to all stages of law enforcement activities, from initial investigation to completion. Once the enforcement action has been completed, however, this exemption can no longer be used to withhold information. Nonetheless, there is potentially another avenue under FOIA which may be used in appropriate circumstances to protect sensitive documents.

FOIA, Exemption 5, as codified at 40 CFR 2.118(a)(5), protects from disclosure Agency documents and information that are classified as attorney work product, as well as pre-decisional deliberative documents. The attorney work product privilege protects sensitive decisions and recommendations made in analyzing and choosing appropriate enforcement options, and planning legal strategy, in response to violations of legal requirements. Such documents must be prepared in anticipation of litigation by, or at the direction of, an attorney. The purpose of the deliberative process privilege is to preserve the quality of Agency decisions by encouraging honest and frank discussion within the Agency. The process of developing penalty calculations may fall within the parameters of both attorney work product and deliberative process; thus, withholding under FOIA Exemption 5 may be appropriate.

An important distinction between the two exemptions discussed is that the protective scope of Exemption 5 does not end when the enforcement process is completed. Thus, under Exemption 5, penalty calculations may be protected from disclosure at any time.

The Agency may waive the protection afforded by FOIA and release exempt documents in its discretion in appropriate cases, without jeopardizing future use of a FOIA exemption in another case. Such discretionary waivers should be made on a case-by-case basis, balancing the public interest served by allowing the release and the Agency's policy of openness against the harm to the Agency caused by release. Generally, such releases should only be made when settlement will be facilitated. Because issues relating to FOIA and application of its exemptions require special attention, the Regional Freedom of Information Act Officer or appropriate attorney in the Office of Regional Counsel should be consulted whenever any request is made by a member of the public relating to the application of the RCRA Penalty Policy in general or in a specific enforcement action.

The penalty computation worksheet to be included in the case file is attached. (See: Section X, Appendix.)

V. RELATIONSHIP BETWEEN PENALTY AMOUNT SOUGHT IN AN ADMINISTRATIVE COMPLAINT AND ACCEPTED IN SETTLEMENT

When read together, 40 C.F.R. 22.14(a) and (c) suggest that the Agency must include in any administrative complaint filed pursuant to RCRA Section 3008(a) a proposed penalty (the dollar amount of which has been determined in accordance with the applicable Agency penalty policy) and a statement of the reasoning behind this proposed penalty. Indeed, in several cases such a requirement has been imposed on the Agency in administrative enforcement actions subject to the 40 C.F.R. Part 22 hearing procedures.[4] The penalty policy not only facilitates compliance with the cited regulations by requiring that enforcement personnel calculate a proposed penalty (and include this amount and the underlying rationale for adopting it in the complaint), but also establishes a methodology for calculating penalty amounts which would be acceptable to EPA in settlement of administrative and judicial enforcement actions. The Agency expects that the dollar amount of the proposed penalty included in the administrative complaint will often exceed the amount of the penalty the Agency would accept in settlement. This may be so for several reasons.

First, at the time the complaint is filed, the Agency will often not be aware of mitigating factors (then known only to the respondent) on the basis of which the penalty may be adjusted downward. Second, it is appropriate that the Agency have the enforcement discretion to accept in settlement a lower penalty than it has sought in its complaint, because in settling a case the Agency is able to avoid the costs and risks of litigation. Moreover respondents must perceive that they face some significant risk of higher penalties through litigation to have appropriate incentives to agree to penalty amounts acceptable to the Agency in settlement.

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[4] See, Katzson Bros. Inc. v. EPA, 839 F. 2d 1396, (10th Cir. Feb. 22, 1988), in which the court held that administrative reviews of the default penalty amount for a FIFRA violation were inadequate because they failed to analyze the factual basis for the civil penalty; and Environmental Protection Corporation v. Thomas, No.87-447, slip op. (E.D. Cal. July 14, 1988), where the court held that 40 CFR 22.14(a) requires that the Agency provide defendants with the factual basis and rationale for the Agency's penalty determination for a RCRA violation, so as to allow the person being penalized an opportunity to mount a defense in the matter.

Therefore, Agency enforcement personnel should, as necessary, prepare two separate penalty calculations for each administrative proceeding -- one to support the initial proposed penalty included in the complaint and the other to be placed in the administrative file as support for the final penalty amount the Agency accepts in settlement. [5] In calculating the amount of the proposed penalty to be included in the administrative complaint, Agency personnel should total (1) the gravity-based penalty amount (including any multi-day component) and (2) an amount reflecting upward adjustments [6] of the penalty and subtract from this sum an amount reflecting any downward adjustments in the penalty based solely on respondent's "good faith efforts [7] to comply with applicable requirements" about which the Agency is aware. This total should then be added to the amount of any economic benefit accruing to the violator. The result will be the proposed penalty the Agency will seek in its complaint.

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[5] In judicial actions it will generally only be necessary to calculate a penalty amount to support any penalty the Agency is to accept in settlement. The United States is, of course, free to argue to the court in judicial actions that the penalty figure it seeks is consistent with the rationale underlying the penalty policy.

[6] While the Agency may at this early juncture have limited knowledge of facts necessary to calculate any upward adjustments in the penalty it should be remembered that amendments to the complaint (including the amount of the proposed penalty) may be made after an answer is filed only with the leave of the presiding officer. See 40 C.F.R. 22.14(d).

[7] Since Section 3008(a)(3) of RCRA requires that a violator's "good faith efforts to comply with applicable requirements" be considered by the Agency in assessing any penalty, it is appropriate that this factor be weighed in calculating the proposed penalty based on information available to EPA. While Section 3008(a)(3) also requires that the Agency weigh the seriousness of the violation in assessing a penalty, this requirement is satisfied by including a gravity-based component which reflects the seriousness (i.e., the potential for harm and extent of deviation from applicable requirements) of the violation. As noted above, enforcement personnel may in their discretion further adjust the amount of the proposed penalty downward where the violator or information obtained from other sources has convincingly demonstrated prior to the time EPA files the administrative complaint that application of additional downward adjustment factors is warranted.

The methodology for determining and documenting the penalty figure the Agency accepts in settlement should be basically identical to that employed in calculating the proposed penalty included in the complaint, but should also include consideration of (1) any new and relevant information obtained from the violator or elsewhere, and (2) all other downward adjustment factors (in addition to the "good faith efforts" factor weighed in calculating the proposed penalty appearing in the complaint).

It may be noted here that the RCRA Penalty Policy serves as guidance not only to Agency personnel charged with responsibility for calculating appropriate penalty amounts for RCRA violations but also under 40 CFR §22.27(b) to judicial officers presiding over administrative proceedings at which proper penalty amounts for violations redressable under RCRA Sections 3008(a) and (g) are at issue. Such judicial officers thus have discretion to apply most of the upward or downward adjustment factors described in this policy in determining what penalty should be imposed on a violator. However, judgments as to whether a penalty should be reduced in settlement because (1) the violator is willing to undertake an environmental project in settlement of a penalty claim, or (2) the Agency faces certain litigative risks in proceeding to hearing or trial, are decisions involving matters of policy and prosecutorial discretion which by their nature are only appropriate to apply in the context of settling a penalty claim. It is therefore contemplated that decisionmakers in administrative proceedings would not adjust penalty amounts downward based upon their assessment of either the litigative risks faced by the Agency or a violator's willingness to undertake an environmental project in lieu of paying part of a penalty.

VI. DETERMINATION OF GRAVITY-BASED PENALTY AMOUNT

RCRA Section 3008(a)(3) states that the seriousness of a violation must be taken into account in assessing a penalty for the violation. The gravity-based component is a measure of the seriousness of a violation. The gravity-based penalty amount should be determined by examining two factors:

- potential for harm; and
- extent of deviation from a statutory or regulatory requirement.

A. POTENTIAL FOR HARM

The RCRA requirements were promulgated in order to prevent harm to human health and the environment. Thus, noncompliance with any RCRA requirement can result in a situation where there is a potential for harm to human health or the environment. Even violations such as recordkeeping violations create a risk of harm to the environment or human health by jeopardizing the integrity of the RCRA regulatory program. Accordingly, the assessment of the potential for harm resulting from a violation should be based on two factors:

- the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and
- the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program.

1. Risk of Exposure

The risk of exposure presented by a given violation depends on both the likelihood that human or other environmental receptors may be exposed to hazardous waste and/or hazardous constituents and the degree of such potential exposure. Evaluating the risk of exposure may be simplified by considering the factors which follow below.

a. Probability of Exposure

Where a violation involves the actual management of waste, a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of hazardous waste or constituents, or hazardous conditions creating a threat of exposure to hazardous waste or waste constituents. The determination of the likelihood of a release should be based on whether the integrity and/or stability of the waste management unit is likely to have been compromised.

Some factors to consider in making this determination would be:

- evidence of release (e.g., existing soil or groundwater contamination)
- evidence of waste mismanagement (e.g., rusting drums), and
- adequacy of provisions for detecting and preventing

a release (e.g., monitoring equipment and inspection procedures).

A larger penalty is presumptively appropriate where the violation significantly impairs the ability of the hazardous waste management system to prevent and detect releases of hazardous waste and constituents.

b. Potential Seriousness of Contamination

When calculating risk of exposure, enforcement personnel should weigh the harm which would result if the hazardous waste or constituents were in fact released to the environment.

Some factors to consider in making this determination would be:

- o quantity and toxicity of wastes (potentially) released
- o likelihood or fact of transport by way of environmental media (e.g., air and groundwater), and
- o existence, size, and proximity of receptor populations (e.g., local residents, fish, and wildlife, including threatened or endangered species) and sensitive environmental media (e.g., surface waters and aquifers).

In considering the risk of exposure, the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred. The presence or absence of direct harm in a noncompliance situation is something over which the violator may have no control. Such violators should not be rewarded with lower penalties simply because the violations happened not to have resulted in actual harm.

2. <u>Harm To The RCRA Regulatory Program</u>

There are some requirements of the RCRA program which, if violated, may not be likely to give rise directly or immediately to a significant risk of contamination. Nonetheless, all regulatory requirements are fundamental to the continued integrity of the RCRA program. Violations of such requirements may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program. Some examples of this kind of regulatory harm include:

- o failure to notify as a generator or transporter of hazardous waste, and/or owner/operator of a hazardous waste facility pursuant to section 3010
- o failure to comply with financial assurance requirements
- o failure to submit a timely/adequate Part B application
- o failure to respond to a formal information request
- o operating without a permit or interim status
- o failure to prepare or maintain a manifest
- o failure to install or conduct adequate groundwater monitoring.

3. General

a. Evaluating the Potential for Harm

Enforcement personnel should evaluate whether the potential for harm is major, moderate, or minor in a particular situation. The degree of potential harm represented by each category is defined as:

MAJOR (1) the violation poses or may pose a substantial risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or

(2) the actions have or may have a substantial adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MODERATE (1) the violation poses or may pose a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or

(2) the actions have or may have a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MINOR (1) the violation poses or may pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or

(2) the actions have or may have a small adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

The examples which follow illustrate the differences between major, moderate, and minor potential for harm. Just as important as the violation involved are the case specific factors surrounding the violation. Enforcement personnel should avoid automatic classification of particular violations.

b. Examples

1. Major Potential for Harm

40 CFR §265.143 requires that owners or operators of hazardous waste facilities establish financial assurance to ensure that funds will be available for proper closure of facilities. Under §265.143(a)(2), the wording of a trust agreement establishing financial assurance for closure must be identical to the wording specified in 40 CFR §264.151(a)(1). Failure to word the trust agreement as required may appear inconsequential. However, even a slight alteration of the language could change the legal effect of the financial instrument so that it would no longer satisfy the intent of the regulation thereby preventing the funds from being available for closure. Such a facility could potentially become another abandoned hazardous waste site. When the language of the agreement differs from the requirement such that funds would not be available to close the facility properly, the lack of identical wording would have a substantial adverse effect on the regulatory scheme (and, to the extent the closure process is adversely affected, could pose a substantial risk of exposure). This violation would therefore be assigned to the major potential for harm category.

2. Moderate Potential for Harm

Under 40 CFR §262.34, a generator may accumulate hazardous waste on-site for 90 days or less without having interim status or a permit provided that, among other requirements, each container or tank of waste is marked clearly with the words "Hazardous Waste." In a situation where a generator is storing compatible wastes, has labeled half of its containers, and has clearly identified its storage area as a hazardous waste storage area, there is some indication that the unlabeled containers hold hazardous waste. However, because there is a chance that the unlabeled containers could be removed from the storage area, and because it would be difficult to determine whether hazardous waste had been stored for more than 90 days, this situation poses a significant likelihood of exposure to hazardous waste (although

the likelihood is not as great as it would be if neither the storage area nor any of the containers were marked). The moderate potential for harm category would be appropriate in this case.

3. Minor Potential for Harm

Owners or operators of hazardous waste facilities must, under 40 CFR §265.53, submit a copy of their contingency plans to all police departments, fire departments, hospitals, and state and local emergency response teams that may be called upon to provide emergency services. If a facility has a complete contingency plan, including a description of arrangements agreed to by local entities to coordinate emergency services (§265.52), but had failed to submit copies of the plan to all of the necessary agencies, this would create a potential for harm. Enforcement personnel would need to examine the impact that failure to send the plan to the necessary agencies would have on these agencies' ability to respond in an emergency situation. If a complete plan existed and arrangements with all of the local entities had been agreed to, the likelihood of exposure and adverse effect on the implementation of RCRA may be relatively low. The minor potential for harm category could be appropriate for such a situation.

B. EXTENT OF DEVIATION FROM REQUIREMENT

The "extent of deviation" from RCRA and its regulatory requirements relates to the degree to which the violation renders inoperative the requirement violated. In any violative situation, a range of potential noncompliance with the subject requirement exists. In other words, a violator may be substantially in compliance with the provisions of the requirement or it may have totally disregarded the requirement (or a point in between). In determining the extent of the deviation, the following categories should be used:

- MAJOR: the violator deviates from requirements of the regulation or statute to such an 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 deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met.

A few examples will help demonstrate how a given violation is to be placed in the proper category:

Example 1 - Closure Plan

40 CFR §265.112 requires that owners or operators of treatment, storage, and disposal facilities have a written closure plan. This plan must identify the steps necessary to completely or partially close the facility at any point during its intended operating life. Possible violations of the requirements of this regulation range from having no closure plan at all to having a plan which is somewhat inadequate (e.g., it omits one minor step in the procedures for cleaning and decontaminating the equipment while complying with the other requirements). Such violations should be assigned to the "major" and "minor" categories respectively. A violation between these extremes might involve failure to modify a plan for increased decontamination activities as a result of a spill on-site and would be assigned to the moderate category.

Example 2 - Failure to Maintain Adequate Security

40 CFR §265.14 requires that owners or operators of treatment, storage, and disposal facilities take reasonable care to keep unauthorized persons from entering the active portion of a facility where injury could occur. Generally, a physical barrier must be installed and any access routes controlled.

The range of potential noncompliance with the security requirements is quite broad. In a particular situation, the violator may prove to have totally failed to supply any security systems. Total noncompliance with regulatory requirements such as this would result in classification into the major category. In contrast, the violation may consist of a small oversight such as failing to lock an access route on a single occasion. Obviously, the degree of noncompliance in the latter situation is less significant. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In the matrix system this is achieved by choosing the minor category.

C. PENALTY ASSESSMENT MATRIX

Each of the above factors--potential for harm and extent of deviation from a requirement-forms one of the axes of the penalty assessment matrix. The matrix has nine cells, each containing a penalty range. The specific cell is chosen after determining which category (major, moderate, or minor) is appropriate for the

potential for harm factor, and which category is appropriate for the extent of deviation factor. The complete matrix is illustrated below:

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$25,000 to 20,000	$19,999 to 15,000	$14,999 to 11,000
MODERATE	$10,999 to 8,000	$7,999 to 5,000	$4,999 to 3,000
MINOR	$2,999 to 1,500	$1,499 to 500	$499 to 100

The lowest cell (minor potential for harm/minor extent of deviation) contains a penalty range from $100 to $499. The highest cell (major potential for harm/major extent of deviation) is limited by the maximum statutory penalty allowance of $25,000 per day for each violation.

The selection of the exact penalty amount within each cell is left to the discretion of enforcement personnel in any given case. The range of numbers provided in each matrix cell serves as a "fine tuning" device to allow enforcement personnel to better adapt the penalty amount to the gravity of the violation and its surrounding circumstances. In selecting a dollar figure from this range it is appropriate to consider such factors as the seriousness of the violation (relative to other violations falling within the same matrix cell), efforts at remediation or the degree of cooperation evidenced by the facility (to the extent this factor is not to be accounted for in subsequent adjustments to the penalty amount), the size and sophistication of the violator, the number of days of violation, and other relevant matters. For guidance on recalculation of the gravity based penalty based on new information see Section IX A.2.

VII. MULTIPLE AND MULTI-DAY PENALTIES

A. PENALTIES FOR MULTIPLE VIOLATIONS

In certain situations, EPA may find that a particular firm has violated several different RCRA requirements. A separate penalty should be sought in a complaint and obtained in

settlement or litigation for each separate violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other charge in the complaint for which a penalty is to be assessed. A given charge is independent of, and substantially distinguishable from, any other charge when it requires an element of proof not needed by the others. In many cases, violations of different sections of the regulations constitute independent and substantially distinguishable violations. For example, failure to implement a groundwater monitoring program, 40 CFR §265.90, and failure to have a written closure plan, 40 CFR §265.112, are violations which can be proven only if the Agency substantiates different sets of factual allegations. In the case of a firm which has violated both of these sections of the regulations, a separate count should be charged for each violation. For litigation or settlement purposes, each of the violations should be assessed separately and the amounts added to determine a total penalty to pursue.

It is also possible that different violations of the same section of the regulations could constitute independent and substantially distinguishable violations. For example, in the case of a firm which has open containers of hazardous waste in its storage area, 40 CFR §265.173(a), and which also ruptured these or different hazardous waste containers while moving them on site, 40 CFR §265.173(b), there are two independent acts. While the violations are both of the same regulatory section, each requires distinct elements of proof. In this situation, two counts with two separate penalties would be appropriate. For penalty purposes, each of the violations should be assessed separately and the amounts totalled.

Penalties for multiple violations also should be sought in litigation or obtained in settlement where one company has violated the same requirement in substantially different locations. An example of this type of violation is failure to clean up discharged hazardous waste during transportation, 40 CFR §263.31. A transporter who did not clean up waste discharged in two separate locations during the same trip should be charged with two counts. In these situations the separate locations present separate and distinct risks to public health and the environment. Thus, separate penalty assessments are justified.

Similarly, penalties for multiple violations are appropriate when a company violates the same requirement on separate occasions not cognizable as multi-day violations (See Section VII.B.) An example would be the case where a facility fails for a year to take required quarterly groundwater monitoring samples.

In general, penalties for multiple violations may be less likely to be appropriate where the violations are not independent or substantially distinguishable. Where a charge derives from or merely restates another charge, a separate penalty may not be warranted. For example, if a corporate owner/operator of a facility submitted a permit application with a cover letter, signed by the plant manager's secretary, but failed to sign the application, 40 CFR §270.11 (a), and also thereby failed to have the appropriate responsible corporate officer sign the application, 40 CFR §270.11 (a)(1) the owner/operator has violated the requirement that the application be signed by a responsible corporate officer. EPA has the discretion to view the violations resulting from the same factual event, failure to sign the application at all, and failure to have the person legally responsible for the permit application sign it, as posing one legal risk. In this situation, both sections violated should be cited in the complaint, but one penalty, rather than two, may be appropriate to pursue in litigation or obtain in settlement, depending upon the facts of a case. The fact that two separate sections were violated may be taken into account in choosing higher "potential for harm" and "extent of deviation" categories on the penalty matrix.

There are instances where a company's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to the violation of numerous other independent regulatory requirements. Examples are the case where (1) a company through ignorance of the law fails to obtain a permit or interim status as required by Section 3005 of RCRA and as a consequence runs afoul of the numerous other (regulatory) requirements imposed on it by 40 CFR Part 265, or (2) a company fails to install groundwater monitoring equipment as required by 40 CFR §§ 265.90 and 265.91 and is thus unable to comply with other requirements of Subpart F of Part 265 (e.g., requirements that it develop a sampling plan, keep the plan at the facility, undertake quarterly monitoring, prepare an outline of a groundwater quality assessment program, etc.). In cases such as these where multiple violations result from a single initial transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high. Accordingly, in the specifically limited circumstances described, enforcement personnel have discretion to forego separate penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate considering the gravity of the offense and sufficient to deter similar future behavior and recoup economic benefit.

B. PENALTIES FOR MULTI-DAY VIOLATIONS

RCRA provides EPA with the authority to assess in administrative actions or seek in court civil penalties of up to $25,000 per day of non-compliance for each violation of a requirement of Subtitle C (or the regulations which implement that subtitle). This language explicitly authorizes the Agency to consider the duration of each violation as a factor in determining an appropriate total penalty amount. Accordingly, any penalty assessed should consist of a gravity-based component, economic benefit component, and to the extent that violations can be shown or presumed to have continued for more than one day, an appropriate multi-day component. The multi-day component should reflect the duration of the violation at issue, subject to the guidelines set forth in Section VII C., below.

After it has been determined that any of the violations alleged has continued for more than one day, the next step is to determine the length of time each violation continued and whether a multi-day penalty is mandatory, presumed, or discretionary. In most instances, the Agency should only seek to obtain multi-day penalties, if a multi-day penalty is appropriate, for the number of days it can document that the violation in question persisted. However, in some circumstances reasonable assumptions as to the duration of a violation can be made. For example, a violation by an owner/operator of a land disposal facility for operating after it had lost interim status pursuant to RCRA §3005(e)(2) can generally be deemed to have begun on November 8, 1985, and continued at least until the time of the last inspection in which it was determined the facility was being operated without interim status. In the case where an inspection reveals that a facility has no groundwater monitoring wells in place it can be assumed, in the absence of evidence to the contrary, that the facility has never had any wells. Here the violation can be treated as having commenced on the day that waste management operations triggering the Part 265, subpart F requirements began or the effective date of the regulations, whichever is later. A multi-day penalty could then be calculated for the entire period from the date the facility was required to have wells in place until the date of the inspection showing they did not.[8]

Conversely, in cases where there is no statutory or regulatory deadline from which it may be assumed compliance obligations began to run, a multi-day penalty should account only for each day for which information provides a reasonable basis

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[8] Where EPA determines that a violation persists, enforcement personnel may calculate the penalty for a period ending on the date of compliance or the date the complaint is filed, provided documentation (or a reasonable assumption) to support such a finding is available.

for concluding that a violation has occurred. For example, if an inspection revealed that unlabeled drums of hazardous wastes were being stored by a generator for more than 90 days in violation of 40 CFR 262.31 and 262.34, enforcement personnel should allege in the complaint and present evidence as to the number of days each violation lasted. Documentation in a case such as this might consist of an admission from a facility employee that drums were stored improperly for a certain number of days. In such a case, a multi-day penalty would then be calculated for the number of days stated.

C. CALCULATION OF THE MULTI-DAY PENALTY

After the duration of the violation has been determined, the multi-day component of the total penalty is calculated, pursuant to the Multi-Day Matrix, as follows:

(1) Determine the gravity-based designations for the violation, e.g., major-major, moderate-minor, or minor-minor.

(2) Determine, for the specific violation, whether multi-day penalties are mandatory, presumed, or discretionary, as follows:

Mandatory multi-day penalties: Multi-day penalties are mandatory for days 2-180 of all violations with the following gravity-based designations: major-major, major-moderate, moderate-major. The only exception is when they have been waived, in "highly unusual cases" with prior Headquarters (HQ) consultation, as described below. Multi-day penalties for days 181+ are discretionary.

Presumption in favor of multi-day penalties: Multi-day penalties are presumed appropriate for days 2-180 of violations with the following gravity-based designations: major-minor, moderate-moderate, minor-major. Therefore, multi-day penalties must be sought, unless case-specific facts overcoming the presumption for a particular violation are documented carefully in the case files. The presumption may be overcome for one or more days. Multi-day penalties for days 181+ are discretionary.

Discretionary multi-day penalties: Multi-day penalties are discretionary, generally, for all days of all violations with the following gravity-based designations: moderate-minor, minor-moderate, minor-minor. In these cases, multi-day penalties should be sought where case-specific facts support such an assessment. Discretionary multi-day penalties may be imposed for some or all days. The bases for decisions to impose or not impose any discretionary multi-day penalties must be documented in the case files.

(3) Locate the corresponding cell in the following Multi-Day Matrix. Multiply a dollar amount selected from the appropriate

cell in the multi-day matrix (or, where appropriate, a larger dollar amount not to exceed $25,000) by the number of days the violation lasted. (Note: the duration used in the multi-day calculation is the length of the violation minus one day, to account for the first day of violation at the gravity-based penalty rate).

MULTI-DAY MATRIX OF MINIMUM DAILY PENALTIES (in dollars)

		Extent of Deviation		
		MAJOR	MODERATE	MINOR
Potential for Harm	MAJOR	$5,000 to 1,000	$4,000 to 750	$3,000 to 550
	MODERATE	$2,200 to 400	$1,600 to 250	$1,000 to 150
	MINOR	$600 to 100	$300 to 100	$100

The dollar figure to be multiplied by the number of days of violation will generally be selected from the range provided in the appropriate multi-day cell. The figure selected should not be less than the lowest number in the range provided. Selections of a dollar figure from the range of penalty amounts can be made at the Region's discretion based on an assessment of case-specific factors, including those discussed below.

In determining whether to assess multi-day penalties for days 2-180 of violations for which multi-day penalties are presumed appropriate or are discretionary, as well as for days 180+ of all violations, as well as in selecting the appropriate dollar figure from the range of penalty amounts in the multi-day matrix, the Regions must analyze carefully the specific facts of the case to determine that the penalties selected are appropriate. This analysis should be conducted in the context of the penalty policy's broad goals of (1) ensuring fair and consistent penalties which reflect the seriousness (gravity) of violations, (2) promoting prompt and continuing compliance, and (3) deterring future non-compliance.

Additional factors which may be relevant in analyzing these factors in the context of a specific case include the seriousness

of the violation relative to other violations falling within the same matrix cell, efforts at remediation or the promptness and degree of cooperation evidenced by the facility (to the extent not otherwise accounted for in the proposed penalty or settlement amount), the size and sophistication of the violator, the total number of days of violation, and other relevant considerations. All of these factors must be analyzed in light of the overriding goals of the penalty policy to determine the appropriate penalties in a specific case.

As discussed above, this penalty policy permits a Region to waive multi-day penalties, when mandatory for a violation, in a "highly unusual case." Such a waiver may be exercised only with prior Headquarters (HQ) consultation. Because EPA has determined that almost all continuing "major" violations warrant multi-day penalties, it is anticipated that such waivers will be sought very infrequently.

While this policy provides general guidance on the use of multi-day penalties, nothing in this policy precludes or should be construed to preclude the assessment of penalties of up to $25,000 for each day after the first day of any given violation. Particularly in circumstances where significant harm has in fact occurred and immediate compliance is required to avert a continuing threat to human health or the environment, it may be appropriate to demand the statutory maximum.

VIII. EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE

The Agency civil penalty policy mandates the recapture of any significant economic benefit of noncompliance that accrues to a violator. Enforcement personnel shall evaluate the economic benefit of noncompliance when penalties are calculated. A fundamental premise of the policy is that economic incentives for noncompliance are to be eliminated. If violators are allowed to profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all enforcement personnel to calculate economic benefit. In accordance with the goals of the Agency policy, the RCRA Civil Penalty Policy sets forth the RCRA requirements. An "economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator, as defined below.

The following are examples of regulatory areas for which violations are particularly likely to present significant economic benefits: groundwater monitoring, financial requirements, closure/post-closure, surface impoundment retrofitting, improper land disposal of restricted waste, clean-up of discharges, part B submittals, and minimum technology requirements.

For certain RCRA requirements the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time). In the interest of simplifying and expediting an enforcement action, enforcement personnel may forego calculating the benefit component where it appears that the amount of the component is likely to be less than $2,500 for all violations alleged in the complaint. However, this decision should be documented on the Penalty Computation Worksheet.

It is generally the Agency's policy not to settle cases (i.e., the penalty amount) for an amount less than the economic benefit of noncompliance. However, the Agency civil penalty policy explicitly sets out three general ares where settling the total penalty amount for less than the economic benefit may be appropriate. The RCRA policy has added a fourth exception for cases where ability to pay is a factor. The four exceptions are:

- the economic benefit component consists of an insignificant amount (i.e., less than $2,500);
- there are compelling public concerns that would not be served by taking a case to trial;
- it is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation;
- the company has documented an inability to pay the total proposed penalty.

If a case is settled for less than the economic benefit component, a justification must be included on the Penalty Computation Worksheet in Section X, under the heading, "Economic Benefit."

A. ECONOMIC BENEFIT OF DELAYED COSTS AND AVOIDED COSTS

Compliance/enforcement personnel should examine two types of economic benefit from noncompliance in determining the economic benefit component:

- benefit from delayed costs; and
- benefit from avoided costs.

Delayed costs are expenditures which have been deferred by the violator's failure to comply with the requirements. The violator eventually will have to spend the money in order to achieve compliance. Delayed costs are the equivalent of capital costs. Examples of violations which result in savings from delayed costs are:

- o failure to timely install ground-water monitoring equipment;
- o failure to timely submit a Part B permit application; and
- o failure to timely develop a waste analysis plan.

Avoided costs are expenditures which are nullified by the violators's failure to comply. These costs will never be incurred. Avoided costs include the usual operating and maintenance costs which would include any annual periodic costs such as leasing monitoring equipment. Examples of violations which result in savings from avoided costs are:

- o failure to perform annual and semi-annual ground-water monitoring sampling and analysis;
- o failure to use registered medical waste transporters;
- o failure to perform waste analysis before adding waste to tanks, waste piles, incinerators; and
- o failure to install secondary containment around a tank, where such a containment is never installed because the violator chooses closure rather than correction and continued operation.

B. CALCULATION OF ECONOMIC BENEFIT

Because the savings that are derived from delayed costs differ from those derived from avoided costs, the economic benefit from delayed and avoided costs are calculated in a different manner. For avoided costs, the economic benefit equals the cost of complying with the requirements, adjusted to reflect anticipated rate of return and income tax effects on the company. For delayed costs, the economic benefit does not equal the cost of complying with the requirements, since the violator will eventually have to spend the money to achieve compliance. The economic benefit for delayed costs consists of the amount of interest on the unspent money that reasonably could have been earned by the violator during noncompliance. If noncompliance

has continued for more than a year, compliance/enforcement personnel should calculate the economic benefit of both the delayed and avoided costs for each year.

Since the fall of 1984, it has been Agency policy to use the BEN computer model to calculate the economic benefit of noncompliance. The model can perform a calculation of economic benefit based on delayed/avoided costs with as few as only seven data inputs (see first seven below). The rest of the data inputs consist of optional data items and standard values already contained in the program (see Ben Worksheet in Section X). The following is a list and short explanation of each input.

INPUTS

1. CASE NAME - Self explanatory.

** 2. INITIAL CAPITAL INVESTMENT - This is essentially a depreciable investment such as the initial cost of equipment.

** 3. ONE-TIME NONDEPRECIABLE EXPENDITURE - This is an expense that will only be incurred once and does not involve capital investments. It may or may not be tax deductible, but it is not depreciable. Some examples are reporting requirements, purchase of land, or permit application costs and fees.

** 4. ANNUAL OPERATION AND MAINTENANCE - This expense category is for routine annual expenses such as the costs of operating equipment, cost of leasing equipment, or cost of annual insurance premiums.

* 5. FIRST MONTH OF NONCOMPLIANCE - Self explanatory.

* 6. COMPLIANCE DATE - This could be off in the future. The key is to make a reasonable estimate. (For TSD facilities this date could be the date on which the facility certifies closure rather than the date on which compliance is achieved).

* 7. PENALTY PAYMENT DATE - Again, this may be in the future. Enforcement personnel should make a reasonable estimate for date of payment.

+ 8. USEFUL LIFE OF EQUIPMENT - Here the model accounts for the fact that the equipment purchased in input two has a useful life of limited duration. The model assumes it will last 15 years, then it must be replaced, however the model is being adjusted to address this matter.

+ 9. MARGINAL INCOME TAX RATE - This is the rate at which the last dollar of earnings was taxed. It almost always will be the highest tax rate, as most businesses meet the maximum rate quickly.

+ 10. ANNUAL INFLATION RATE - Self explanatory.

+ 11. DISCOUNT RATE - This is the rate of return the violator expects to obtain on its investment. The money needed for pollution control was invested in something else and we assume the rate of return was the discount rate.

+ 12. AMOUNT OF LOW INTEREST FINANCING - This is the amount of subsidized financing for pollution control equipment. This almost always is 0.

* Required Input
** Required if Applicable
\+ Standard Values Available

As noted above, the BEN model may be used to calculate only the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of RCRA and its implementing regulations. There are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Agency to include in its penalty analysis a calculation of economic benefits in a manner other than those provided for in the BEN methodology. A recurring example is the case where an entity unlawfully operated a land disposal facility without interim status and thus has reaped profits as a proximate result of the violation which are greater than the costs the defendant would have incurred by taking the further actions needed to avoid losing interim status. In such a case, the economic benefit component of the penalty calculation would include the profits proximately attributable to the violation of the applicable RCRA requirement. [9] In contrast, consider a large manufacturing facility which, but for the storage of a few drums of wastes over 90 days, is otherwise in compliance with RCRA. The facility's profits, earned almost entirely as a result of lawful activity, would not be considered properly attributable to the facility's noncompliance. Thus, care must be taken to insure that any calculation of profits included in an alternative economic benefit component of the penalty calculation does not include profits attributable to lawful operations of the facility or delayed or avoided costs already accounted for in the BEN calculation.

Enforcement personnel should have a copy of the revised BEN User's Manual (May 1987). The manual describes how to use BEN, a computer program that calculates the economic benefit for any type of entity. It is designed to aid enforcement personnel with

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[9] Of course, penalties may not exceed the statutory maximim of $25,000 per day of noncompliance. 42 U.S.C. § 6928.

procedures for entering data in BEN, and to explain the program's results.[10] BEN supersedes previous methodologies used to calculate the economic benefit for civil penalties.

The economic benefit formula provides a reasonable estimate of the economic benefit of noncompliance. If a respondent believes that the economic benefit it derived from noncompliance differs from the estimated amount, it should present all relevant information documenting its actual savings to enforcement personnel at the settlement stage.

IX. ADJUSTMENT FACTORS AND EFFECT OF SETTLEMENT

A. ADJUSTMENT FACTORS

1. Background

As mentioned in Section VI of this document, the seriousness of the violation is considered in determining the gravity-based penalty component. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are not considered in choosing the appropriate cell from the matrix. However, any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between separate violations of the same provision. RCRA §3008(a)(3) states that in assessing penalties, EPA must take into account any good faith efforts to comply with the applicable requirements. The Agency civil penalty policy sets out several other adjustment factors to consider. These include the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors. This revised RCRA policy also includes an additional adjustment factor for environmental projects undertaken by the respondent.

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10 Enforcement personnel are encouraged to use whatever cost documentation is available to calculate RCRA compliance costs. (e.g., contractors and commercial brochures). If it is disputed, the burden will then shift to the respondent to present cost documentation to the contrary to be entered and run in BEN. Data provided by respondent relating to economic benefit should not be run in BEN unless its accuracy and legitimacy have been verified by the Region. Additionally, OSW's Guidance Manual: Cost Estimates for Closure and Post-Closure Plans, November, 1986, provides information regarding cost estimates for input data for BEN.

2. Recalculation of Penalty Amount

Before EPA considers mitigating the penalty contained in the complaint and applies the adjustment factors, it may be necessary, under certain circumstances, for enforcement personnel to recalculate the gravity-based or economic benefit component of the penalty figure. If new information becomes available after the issuance of the complaint which makes it clear that the initial calculation of the penalty contained in the complaint is in error, enforcement personnel should adjust this figure. Enforcement personnel should document on the Penalty Computation Worksheet the basis for recalculating the gravity-based or economic benefit component of the penalty sought in litigation or obtained in settlement.

For example, if after the issuance of the complaint, information is presented which indicates that much less waste is involved than was believed when the complaint was issued, it may be appropriate to recalculate the gravity-based penalty component. Thus, if enforcement personnel had originally believed that the violator had improperly stored ten barrels of acutely hazardous wastes but it was later determined that only a single container of characteristic hazardous waste was improperly stored, it may be appropriate to recalculate the "potential for harm" component of the gravity-based penalty from "major" to "moderate" or "minor."

On the other hand, if enforcement personnel initially believed a violator had fully complied with a specified requirement but subsequently determine that this is not the case, it would be appropriate to amend the complaint as necessary to add a new count, and revise the total penalty amount upward to account for this previously undiscovered violation. Likewise, if new information shows that a previously known violation is more serious than initially thought, an upward revision of the penalty amount may be required.

Furthermore, if the violator presented new information which established that the work performed was technically inadequate or useless (e.g., the violator drilled wells in the wrong spot or did not dig deep enough), it may be more appropriate to keep the gravity-based penalty as originally calculated and evaluate whether it would be appropriate to mitigate the penalty based on the "good faith efforts" adjustment factor.

When information is presented which makes it clear that the gravity-based or economic benefit penalty component is in error, enforcement personnel may, of course, choose to formally amend

the complaint to correct the original penalty component, as well as carefully document the basis for the recalculation on the Penalty Computation Worksheet in the enforcement file.

3. Application of Adjustment Factors

The adjustment factors can increase, decrease or have no effect on the penalty amount obtained from the violator. Adjustments should generally be applied to the sum of the gravity-based and multi-day components of the penalty for a given violation. Note, however, that after all adjustment factors have been applied the resulting penalty shall not exceed the statutory maximum of $25,000 per day of violation. As indicated previously, all supportable upward adjustments of the penalty amount of which EPA is aware ordinarily should be made prior to issuance of the complaint, while downward adjustments (with the exception of those reflecting good faith efforts to comply) should generally not be made until after the complaint has been issued, at which time the burden of persuasion that downward adjustment is proper should be placed on respondent. Enforcement personnel should use whatever reliable information on the violator and violation is readily available at the time of assessment.

Application of the adjustment factors is cumulative, i.e., more than one factor may apply in a case. For example, if the base penalty derived from the gravity-based and multi-day matrices is $109,500, and upward adjustments of 10% will be made for both history of noncompliance and degree of willfulness and/or negligence, the total adjusted penalty would be $131,400 ($109,500 + 20%).

For any given factor (except ability to pay and litigative risk) enforcement personnel can, assuming proper documentation, adjust the sum of the gravity-based and multi-day penalty components for any given violation up or down (1) by as much as 25% of that sum in ordinary circumstances or (2) from 26% to 40% of that sum, in unusual circumstances. Downward adjustments based on inability to pay or litigative risk will vary in amount depending on the individual facts present in a given case and in certain circumstances may be applied to the economic benefit component.

However, if a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. For these reasons, the Agency should at a minimum, absent the special circumstances enumerated in section VIII, recover any significant economic

benefits resulting from failure to comply with the law. If violators are allowed to settle for a penalty less than their economic benefit of noncompliance, the goal of deterrence is undermined. Except in extraordinary circumstances, which include cases where there are demonstrated limitations on a respondent's ability to pay or very significant litigative risks, the final adjusted penalty should also include a significant gravity-based component beyond the economic benefit component.

Finally, as has been noted above, it is intended that only Agency personnel, as distinct from an administrative law judge charged with determining an appropriate RCRA penalty, will consider adjusting the amount of a penalty downward based on the litigative risks confronting the Agency or the willingness of a violator to undertake an environmental project in settlement of a penalty claim. This is because these factors are only relevant in the settlement context.

The following discussion of the adjustment factors to consider is consistent with the general Agency civil penalty policy issued in 1984.

(a) Good Faith Efforts To Comply/Lack Of Good Faith

Under § 3008(a)(3) of RCRA, good faith efforts to comply with applicable requirements must be considered in assessing a penalty. The violator can manifest good faith by promptly identifying and reporting noncompliance or instituting measures to remedy the violation before the Agency detects the violation. Assuming self-reporting is not required by law and the violations are expeditiously corrected, a violator's admission or correction of a violation prior to detection may be cause for mitigation of the penalty, particularly where the violator institutes significant new measures to prevent recurrence.
Lack of good faith, on the other hand, 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. Moreover, no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent. EPA will also apply a presumption against downward adjustment for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations (failure to undertake such measures may be cause for upward adjustment as well as multi-day penalties), since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA discovery of a violation.

If a respondent reasonably relies on written statements by the state or EPA that an activity will satisfy RCRA requirements and it later is determined that the activity does not comply with RCRA, a downward adjustment in the penalty may be warranted if the respondent relied on those assurances in good faith. Such claims of reliance should be substantiated by sworn affidavit or some other form of affirmation. On the other hand, claims by a respondent that "it was not told" by EPA or the State that it was out of compliance should not be cause for any downward adjustment of the penalty.

(b) Degree of willfulness and/or negligence

While "knowing" violations of RCRA will support criminal penalties pursuant to Section 3008(d), there may be instances of heightened culpability which do not meet the criteria for criminal action. In cases where civil penalties are sought for actions of this type, the penalty may be adjusted upward for willfulness and/or negligence. Conversely, although RCRA is a strict liability statute, there may be instances where penalty mitigation may be justified based on the lack of willfulness and/or negligence.

In assessing the degree of willfulness, and/or negligence, the following factors should be considered, as well as any others deemed appropriate:

- 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;
- whether the violator knew or should have known of the hazards associated with the conduct; and
- whether the violator knew or should have known of the legal requirement which was violated.

It should be noted that this last factor, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied also is relevant in certain circumstances. Specifically, if correction of the environ-

mental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and out of his or her control and that of his or her agents, the penalty may be reduced.

(c) History of noncompliance (upward adjustment only)

Where a party previously has violated RCRA or State hazardous waste law at the same or a 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 that enforcement personnel should consider are the following:

- how similar the previous violation was;
- how recent the previous violation was;
- the number of previous violations; and
- violator's response to previous violation(s) in regard to correction of problem.

A violation generally should be considered "similar" if the Agency's or State's previous enforcement response should have alerted the party to a particular type of compliance problem. A prior violation of the same RCRA or State requirement would constitute a similar violation. Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute.

For purposes of this section, a "prior violation" includes any act or omission for which a formal or informal enforcement response has occurred (e.g., EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree).

It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination,

enforcement personnel should attempt to ascertain who in the organization had control and oversight responsibility for compliance with RCRA or other environmental laws. The violation will be considered part of the compliance history of any regulated party whose officers had control or oversight responsibility.

In general, enforcement personnel should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, enforcement personnel should be wary of a party changing operators or shifting responsibility for compliance to different persons or entities as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance probably should apply unless the violator can demonstrate that the other violating corporate facilities are independent.

(d) Ability to Pay (downward adjustment only)

The Agency generally will not assess penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability of a violator to pay a penalty. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business. It is unlikely, for example, that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances. Thus, a company's inability to pay usually will be considered at the settlement stage, and then only if the issue is raised by the respondent. If the respondent fails to fully provide sufficient information, then compliance/enforcement personnel should disregard this factor in adjusting the penalty.

There are several sources available to assist the Regions in determining a firm's ability to pay. First, the Region should consult the Agency's guidance on Determining a Violator's Ability to Pay A Civil Penalty, Dec 16, 1986. Second, the National Enforcement Investigations Center (NEIC) can help obtain information assessing the ability to pay of publicly held

corporations. ABEL, the Agency's computer model is available to help analyze inability to pay claims. Although ABEL was designed with privately held corporations in mind, it can be used as one possible way to analyze other forms of business entities, including partnerships, and it may serve as an adjunct to other programs available through NEIC (e.g., the Superfund Financial Assessment System).

When EPA determines that a violator cannot afford the penalty prescribed by this policy, or that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which the Agency deems to be more important than the deterrence effect of the penalty (e.g., payment of penalty would preclude proper closure/post-closure), the following options should be considered in the order presented:

- Consider an installment payment plan with interest.
- Consider a delayed payment schedule with interest. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business.
- Consider straight penalty reductions as a last recourse.

As indicated above, the amount of any downward adjustment of the penalty is dependent on the individual facts of the case regarding the financial capability of the defendant/respondent and the nature of the violations at issue.

(e) Environmental Projects (downward adjustment only)

Under certain circumstances the Agency may consider adjusting the penalty amount downward in return for an agreement by the violator to undertake an appropriate environmentally beneficial project. The following criteria are provided to determine the appropriateness of the use of environmentally beneficial mitigation projects in settlements. Mitigation projects serve as an incentive to settlement and shall be allowed only in prelitigation agreements (prior to the actual hearing), except in extraordinary circumstances. EPA will consider on a case-by-case basis accepting only those projects that satisfy all the following criteria.

(i) The activity must be initiated in addition to all statutory and regulatory compliance obligations, and not be used for penalty mitigation in any other enforcement action. The project may not be a substitute for full compliance; rather, it

must be designed to provide an environmental benefit beyond the benefits of full compliance and may not be part of the company's normal business practice or a project the company was already planning to do.

(ii) In order to attain the deterrent objectives of the civil penalty policy, penalty reductions shall reflect the actual cost of undertaking the activity, taking into account the tax benefits that accrue. With consideration of tax benefits, the actual cost of the project to the respondent shall equal or exceed the value of the mitigation. If the respondent fails to complete the agreed upon project, the settlement document should provide that a commensurate amount of any previous downward adjustment of the penalty be reinstated. For more information enforcement personnel should consult the Guidance on Calculating After Tax Net Present Value of Alternative Payments, Oct, 28, 1986, General Enforcement Policy Compendium, GM-51, or the Office of Enforcement Policy.

(iii) The activity must demonstrate a good-faith commitment to statutory compliance and environmental improvement. One test of good faith is the degree to which the violator takes the initiative to identify and propose specific, potential mitigation projects. In addition, the project must be primarily designed to benefit the environment and general public rather than to benefit the violator or any governmental unit.

(iv) Mitigation based on the defendant's activity must not detract significantly from the general deterrent effect of the settlement as a whole. In the settlement context the government should continue to consider mitigation projects as the exception rather than the rule. Efforts should be made to eliminate any potential perception by the regulated community that the government lacks the resolve to impose significant penalties for substantial violations. The government should seek penalties in conjunction with mitigation activities which deter both the specific violator and also the entire regulated community. Accordingly, every settlement should include a substantial monetary penalty component.

(v) Judicially-enforceable consent decrees must meet the statutory and public interest criteria for consent decrees and cannot contain provisions which would be beyond the power of the court to order under the particular statute which had been violated. Additional guidance on the appropriate scope of relief might be found in the statute, the legislative history or the implementing regulations.

(vi) The activity or project must require little EPA oversight. The project should be designed to minimize the need for EPA monitoring of implementation.

(vii) Any settlement which includes a mitigation project shall require that any public statement by the violator regarding the environmental or general public benefits of the project must include a statement that funding for the project is in partial settlement of an enforcement case brought by EPA.

(viii) Qualifying activities must provide a discernable response to the perceptible risk or harm caused by the violations which are the focus of the government's enforcement action. The activity is most likely to be an acceptable basis for mitigating penalties if it closely addresses the environmental effects of the violations.

Other Considerations

The Agency should exercise case-by-case judgment in deciding whether to accept a mitigation project based upon the above criteria and, should consider the difficulty of monitoring the implementation of the proposed project in light of the anticipated benefits of the project. Any final cross-media guidance on environmental projects should be consulted to determine if they supplement or supersede the "Environmental Projects" section of this penalty policy. In particular, the Agency is currently developing cross-media guidance on penalty mitigation projects, to supersede the "Alternative Payments" section of the Agency's February 16, 1984 penalty policy (GM-22). When the final guidance is issued, penalty mitigation projects under all statute-specific penalty policies will be required to conform to the new guidance.

(f) Other unique factors

This policy allows an adjustment for factors which may arise on a case-by-case basis. When developing its settlement position, EPA 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 hearing or trial. The Agency should take into account, inter alia, the inherent strength of the case, considering, for example, the probability of proving violations, the probability that the government's legal arguments will be accepted, the opportunities which exist to establish a useful precedent or send a signal to the regulated community, the availability and potential effectiveness of the government's evidence, including witnesses, and the potential strength of the violator's equitable and legal defenses. Where the Agency determines that significant litigative risks exist, it may also take into account any disproportionate resource outlay involved in litigating a case that it might avoid by entering into a settlement. Downward adjustments of the proposed penalty for settlement purposes may be warranted depending on the Agency's assessment of these litigation considerations. The extent of the adjustments will depend, of course, on the specific litigation considerations presented in any particular case. The August 9, 1990 memorandum, "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions," discusses further the requirements for legal and factual "litigation risk" analyses.

However, where the magnitude of the resource outlay necessary to litigate is the only significant litigation consideration dictating downward adjustment in the penalty amount, the Agency should still obtain a penalty which not only recoups the economic benefit the violator has enjoyed, but includes an additional amount sufficient to create a strong economic disincentive against violating applicable RCRA requirements.

If lengthy settlement negotiations cause the violation(s) to continue significantly longer than initially anticipated, the initial proposed penalty amount should be increased, as appropriate, with a corresponding amendment of the complaint. The revised figure would be calculated in accordance with this policy, and account for the increasing economic benefit and protracted non-compliance.

B. EFFECT OF SETTLEMENT

The Consolidated Rules of Practice for the Assessment of Civil Penalties incorporates the Agency policy of encouraging settlement of a proceeding at any time as long as the settlement is consistent with the provisions and objectives of RCRA and its regulations. 40 CFR §22.18(a). If the respondent believes that it is not liable or that the circumstances of its case justify mitigation of the penalty proposed in the complaint, the Rules of Practice allow it to request a settlement conference.

In many cases, the fact of a violation will be less of an issue than the amount of the proposed penalty. Once the Agency has established a prima facie case, the burden is always on the violator to justify any mitigation of the proposed penalty. The mitigation, if any, of the penalty proposed in the complaint should follow the guidelines in the Adjustment Factors section of this document.

X. APPENDIX

A. PENALTY COMPUTATION WORKSHEET

Company Name _____

Address _____

_____

Requirement Violated _____

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix..... _____

   (a) Potential for harm..... _____
   (b) Extent of Deviation..... _____

2. Select an amount from the appropriate multiday matrix cell..... _____

3. Multiply line 2 by number of days of violation minus 1 [or other number, as appropriate (provide narrative explanation)]..... _____

4. Add line 1 and line 3..... _____

5. Percent increase/decrease for good faith..... _____

6. Percent increase for willfulness/ negligence..... _____

7. Percent increase for history of noncompliance..... _____

8.* Total lines 5 thru 7..... _____

9. Multiply line 4 by line 8 ..... _____

10. Calculate economic benefit..... _____

11. Add lines 4, 9 and 10 for penalty amount..... _____ to be inserted in the complaint

* Additional downward adjustments, where substantiated by reliable information, may be accounted for here.

Company Name _____

Address _____

Requirement Violated _____

SETTLEMENT PENALTY AMOUNT

1. Gravity based penalty from matrix..... _____

   (a) Potential for harm..... _____
   (b) Extent of deviation..... _____

2. Select an amount from the appropriate multiday matrix cell..... _____

3. Multiply line 2 by number of days of violation minus 1 [or other number as appropriate (provide narrative explanation)]..... _____

4. Add line 1 and line 3..... _____

5. Percent increase/decrease for good faith..... _____

6. Percent increase for willfulness/negligence..... _____

7. Percent increase for history of noncompliance ..... _____

8. Percent increase/decrease for other unique factors (except litigation risk) ..... _____

9. Add lines 5, 6, 7, and 8 ..... _____

10. Multiply line 4 by line 9 ..... _____

11. Add lines 4 and 10 ..... _____

12. Adjustment amount for environmental project ..... _____

13. Subtract line 12 from line 11 ..... _____

14. Calculate economic benefit..... _____

15. Add lines 13 and 14 ..... _____

16. Adjustment amount for ability-to-pay ..... _____

17. Adjustment amount for litigation risk....._____

18. Add lines 16 and 17....._____

19. Subtract line 18 from line 15 for....._____
final settlement amount

This procedure should be repeated for each violation.

NARRATIVE EXPLANATION [11]

1. Gravity Based Penalty

(a) Potential for Harm _____

_____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

(b) Extent of Deviation _____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

(c) Multiple/Multi-day _____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith _____

_____

_____

_____

_____

_____

[11] A separate "Narrative Explanation" should be attached to the Penalty Computation Worksheets for both the complaint amount and settlement amount. Where the discussion of a given element of a penalty to be included in the Narrative Explanation supporting the settlement amount will duplicate that appearing in the Narrative Explanation supporting the complaint amount, the earlier discussion may simply be incorporated by reference.

_____
_____
_____
_____(attach additional sheets if necessary)

(b) Willfulness/Negligence _____
_____
_____
_____
_____
_____
_____(attach additional sheets if necessary)

(c) History of Compliance _____
_____
_____
_____
_____
_____
_____
_____
_____(attach additional sheets if necessary)

(d) Ability to pay_____
_____
_____
_____
_____
_____
_____(attach additional sheets if necessary)

(e) Environmental Project _____
_____
_____
_____
_____
_____
_____(attach additional sheets if necessary)

(f) Other Unique Factors _____
_____
_____
_____
_____
_____
_____
_____
_____(attach additional sheets if necessary)

3. Economic Benefit _____

_____

_____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information _____

_____

_____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

B. BEN WORKSHEET [12]

1. Case Name _____

   Requirement Violated _____

2. Initial Capital Investment/Year Dollars _____

3. One Time Expenditure/Year Dollars _____

   a. Tax Deductible
   b. Not Tax Deductible

4. Annual Operating and Maintenance (O&M) Expenses Year Dollars _____

5. Date of Noncompliance _____

6. Date of Compliance _____

7. Anticipated Date of Penalty Payment _____

8.* Useful Life of Pollution Control Equipment _____

9.* Marginal Income Tax Rate (On Time Case) _____

10.* Marginal Income Tax Rate (Delayed Compliance Case) _____

11.* Inflation Rate _____

12.* Discount Rate _____

13.* Low Interest Financing _____

    Low Interest Rate _____
    Corporate Debt Rate _____

---

14. Economic Benefit Penalty Component _____

* See standard value from BEN model

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[12] A separate "BEN Worksheet" should be attached to the Penalty Computation Worksheets for both the complaint amount and settlement amount.

XI. HYPOTHETICAL APPLICATIONS OF THE PENALTY POLICY

A. EXAMPLE 1

(1) Violation

Company A operated a facility at which it was generating one waste and storing a different waste generated by a since discontinued process. These wastes which company A had managed at its facility for years were first listed as hazardous wastes under RCRA in 1987. As a result, Company A became subject to regulation under Subtitle C of RCRA on the effective date of the regulation which was November 5, 1987. In a notification timely provided to EPA pursuant to RCRA Section 3010(a), Company A indicated that it only generated hazardous waste, without mentioning storage. This notification was never amended or supplemented. During an inspection on January 10, 1989, an employee revealed that Company A had also been storing another kind of waste in containers, on site for years. RCRA Section 3010(a) provides that notification of waste management activities must be provided to EPA within 90 days of the promulgation of regulations listing a substance as a hazardous waste subject to Subtitle C of RCRA. 40 CFR 262.34 provides that a generator may only store hazardous waste on-site for 90 days without obtaining a permit or interim status. Thus, beginning on February 3, 1988 (90 days after November 5, 1987), Company A was in violation of (1) the requirement that it notify the Agency pursuant to RCRA Section 3010(a) of its activity as a storer of hazardous waste, and (2) the requirement imposed by RCRA Section 3005 that it obtain interim status or a permit for its storage activity. Failure to notify and operating without a permit or interim status constitute independent or substantially distinguishable violations. Each violation would be assessed separately and the amounts totalled. The inspectors indicated that Company A's storage area was secured and that, in general, the facility was well managed. However, there were a number of violations of the interim status standards. The complaint issued to Company A assessed penalties for the Part 265 violations as well as the statutory violations. For simplification, this example will discuss the §3005 and §3010 violations only. Below is a discussion of the methodology used to calculate the amount of the penalty proposed in the complaint, followed by a discussion of the methodology used to calculate the amount of the penalty to be accepted in settlement.

(2) Seriousness:

(a) Failure to Notify: Potential for Harm. Moderate - EPA was prevented from knowing that hazardous waste was being stored at the facility. However, because Company A notified EPA that it was a generator, EPA did know that

hazardous waste was handled at the facility, but was unaware of the extent of those activities and the risks posed by them. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the RCRA program. Extent of Deviation. Moderate - although Company A did notify the Agency that it was a generator, it did not notify EPA that it stored hazardous waste, and it did not notify EPA as to all of its activities. Company A significantly deviated from the requirement.

(b) Operating without a permit: Potential for Harm. Major - The fact that the facility generally was well managed is irrelevant as to the potential for harm for operating without a permit. This situation may pose a substantial risk of exposure, and may have a substantial adverse effect on the statutory purposes for implementing the RCRA program. Extent of Deviation. Major - substantial noncompliance with the requirement because Company A did not notify EPA that it stored hazardous waste, and did not submit a Part A application.

(3) Gravity-based Penalty

(a) Failure to notify. Moderate potential for harm and moderate extent of deviation lead one to the cell with the range of $5,000 to $7,999. Enforcement personnel selected the mid-point, which is $6,500.

(b) Operating without a permit. Major potential for harm and major extent of deviation lead one to the cell with the range of $20,000 to $25,000. Enforcement personnel selected the midpoint, which is $22,500.

(c) Penalty Subtotal: $6,500 + $22,500 = $29,000

(4) Multi-day Penalty Assessment

(a) Failure to notify. Moderate potential for harm and moderate extent of deviation lead one to presume that multi-day penalties are appropriate. The applicable cell ranges from $250 to $1,600. The mid-point is $925. [Based on an assessment of relevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of days of violation) the mid-point in the range of available multi-day penalty amounts was selected.] EPA was able to document that the violation continued from February 2, 1988, to the date of the inspection on January 10, 1989, for a total of 343 days (minus 1st day). [The inspection prompted the Company to immediately file a Section 3010(a) notification and Part A permit application.] The Region elected not to place a 180 day cap on multi-day penalties. Penalty Subtotal: $925 x 342 = $316,350.

(b) Operating without a permit. Major potential for harm and major extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $1,000 to $5,000. The mid-point is $3,000. [Based on an assessment of such relevant factors as those noted in (4)(a), above, the mid-point in the range of available multi-day penalty amounts was selected.] The violation continued from February 2, 1988, to January 10, 1989, for a total of 343 days (minus one day). The Region elected not to place a 180 day cap on multi-day penalties. Total Penalty Subtotal: $3,000 x 342 = $1,026,000.

(5) Economic Benefit of Noncompliance

The economic benefit obtained by Company A through its failure to notify pursuant to RCRA Section 3010(a) consists of savings on mailing and personnel costs which are negligible. However, the economic benefit the company obtained as a result of its failure to obtain a permit or interim status is not insignificant. This violation allowed the company to avoid or delay the costs of filing a Part A permit application and the costs of complying with regulatory requirements regarding storage of hazardous wastes in containers. In a BEN analysis (copy omitted for purposes of this example), the Region calculated the economic benefit to Company A at $9,000.

(6) Application of Adjustment Factors for Computation of the Complaint Amount

(a) Good faith efforts to comply. Prior to issuing the complaint, EPA had only limited discussions with the facility. Since neither these discussions nor the inspector's observations indicated any effort had been made to correct the violations prior to notification of violations by EPA, no downward adjustment for good faith efforts to comply was made. Similarly no evidence of lack of good faith was apparent.

(b) Degree of willfulness and/or negligence. In the absence of any affirmative presentation by the facility warranting downward adjustment (and consistent with the policy of resolving any uncertainty about the application of downward adjustment factors against the violator when computing the complaint amount), the Region only considered information which might support an upward adjustment. Available information did not support an upward adjustment.

(c) History of noncompliance. No evidence has been produced thus far that Company A has had any similar previous violation at this site. The facility in question is the only facility owned or operated by Company A. Therefore, no upward adjustment shall be made for the violations cited above.

(d) Other adjustment factors. Since this computation was designed to produce a penalty figure to be proposed in the complaint, the Region did not consider any other downward adjustment factors. No additional basis for upward adjustment was uncovered.

(7) Final Complaint Penalty Amount

Gravity base	+	Multiday	+	Economic Benefit	=	Penalty
$29,000		$1,342,350		$9,000		$1,380,350

(8) Settlement Adjustments

During settlement discussions Company A presented information which it felt warranted adjustment of the penalty. After issuance of the complaint no new information came to light which supported recalculation of the gravity-based, multi-day, or economic benefit components of the penalty proposed in the complaint.

After consideration of the seriousness of the violations and in order to set penalties at a level which would allow it to achieve compliance quickly (but nevertheless deter future similar violations), the Region elected to place a 180 day cap on multi-day penalties. Multiday Penalty Subtotal: ($925 + $3000) x 179 = $702,575.

(a) Good faith efforts to comply. At settlement negotiations Company A presented a written but explicitly non-binding opinion dated October 30, 1987 from the Director of EPA's Office of Solid Waste (OSW) indicating that the waste which Company A stored did not come within the ambit of the regulation listing new wastes, which became effective on November 5, 1987. Other information indicated that six months later the Assistant Administrator for Solid Waste and Emergency Response formally renounced the view contained in the Director's opinion, that Company A probably was aware of this action, and that the company had failed to provide EPA with either a Section 3010(a) notification or a Part A permit application even after it likely knew that its storage activities were subject to Subtitle C regulation. In view of these unusual facts - i.e., that the company had for roughly a third of the duration of the violation acted in apparent good faith reliance on the opinion of the Director of OSW indicating its stored wastes were not subject to regulation - the Region decided to adjust the penalty for both violations downward by 30% ($29,000 + $702,575) x 30% = $219,472.50.

(b) Degree of willfulness and/or negligence. No evidence relative to this factor was presented for consideration.

(c) History of non-compliance. No new information relevant to this adjustment factor came to light after issuance of the complaint.

(d) Ability to pay. Company A raised and documented that it has cash flow problems. It did not convince EPA that the penalty should be mitigated. An installment plan was accepted by both parties as a means of payment. Total penalty remained unchanged.

(e) Environmental Projects
The company did not propose any projects.

(f) Other unique factors
No other unique factors existed in this case.

(9) <u>Final settlement penalty amount</u>:

Gravity base	Multi-day	Downward Adjustment	Economic Benefit	Total Penalty
$29,000 +	$702,575 -	$219,472.50 +	$9,000 =	$521,102.50

A. PENALTY COMPUTATION WORKSHEET

Company Name Company A
Address

Requirement Violated 42 U.S.C. 6930(a), Failure to notify of hazardous waste management activities

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix.....$6,500
   (a) Potential for harm.....Moderate
   (b) Extent of Deviation.....Moderate
2. Select an amount from the appropriate multiday matrix cell.....$925
3. Multiply line 2 by number of days of violation minus 1..($925 x 342).....$316,350
4. Add line 1 and line 3.....$322,850
5. Percent increase/decrease for good faith.....N/A
6. Percent increase for willfulness/ negligence.....N/A
7. Percent increase for history of noncompliance.....N/A
8.* Total lines 5 thru 7.....N/A
9. Multiply line 4 by line 8 .....N/A
10. Calculate Economic Benefit.....N/A
11. Add lines 4, 9 and 10 for penalty amount.....$322,850 to be inserted in the complaint

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Moderate - EPA was prevented from knowing that hazardous waste was being stored at the facility. However, because Company A notified EPA that it was a generator, EPA did know that hazardous waste was handled at the facility, but was unaware of the extent of those activities and the risk posed by them. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the RCRA program.

(attach additional sheets if necessary)

(b) Extent of Deviation Moderate - Although Company A did notify the Agency that it was a generator, it did not notify EPA that it stored hazardous waste. While there was partial compliance, Company A significantly deviated from the requirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day Moderate potential for harm and moderate extent of deviation lead one to presume that multi-day penalties are appropriate. There are no case-specific facts which would overcome the presumption. The applicable cell ranges from $250 to $1,600. The midpoint is $925. Based on an assessment of relevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of days of violation), the mid-point in the available range was selected. The violation persisted for 343 days.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith Neither discussions with the facility nor the inspector's observations indicated any effort had been made to correct violations prior to notification of violations by EPA. Thus no downward adjustment for good faith efforts to comply was made. Similarly, no evidence of lack of good faith was apparent.

(attach additional sheets if necessary)

(b) Willfulness/Negligence No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(c) History of Compliance No evidence relative to this adjustment factor was presented for consideration. There is no evidence of similar previous violations at this (the Company's only) facility.

(attach additional sheets if necessary)

(d) Ability to pay No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors

N/A

(attach additional sheets if necessary)

3. Economic Benefit Although there is some economic benefit gained from the above cited violation (i.e., personnel costs and postage for notification forms), such costs are negligible enough not to include in the calculation.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

(attach additional sheets if necessary)

Company Name Company A
Address

Requirement Violated 40 U.S.C. 6930(a), Failure to notify of hazardous waste management activities

SETTLEMENT PENALTY AMOUNT

1. Gravity based penalty from matrix.....$6,500
   (a) Potential for harm .....Moderate
   (b) Extent of Deviation.....Moderate
2. Select an amount from the appropriate multiday matrix cell.....$925
3. Multiply line 2 by number of days of violation minus 1.($925 x 179).....$165,575
4. Add line 1 and line 3.....$172,075
5. Percent increase/decrease for good faith.....-30%
6. Percent increase/decrease for willfulness/negligence.....N/A
7. Percent increase for history of noncompliance.....N/A
8. Percent increase/decrease for other unique factors .....N/A (except litigation risk)
9. Add lines 5, 6, 7, and 8.....-30%
10. Multiply line 4 by line 9.....$51,622.50
11. Add lines 4 and 10.....$120,452.50
12. Adjustment amount for environmental.....-0- project
13. Subtract line 12 from line 11.....$120,452.50
14. Calculate economic benefit.....-0-
15. Add lines 13 and 14.....$120,452.50

16. Adjustment amount for ability-to-pay.....-0-

17. Adjustment amount for litigation risk.....-0-

18. Add lines 16 and 17.....-0-

19. Subtract line 18 from line 15 for.....$120,452.50
final settlement amount

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Moderate - EPA was prevented from knowing that hazardous waste was being stored at the facility. However, because Company A notified EPA that it was a generator, EPA did know that hazardous waste was handled at the facility, but was unaware of the extent of those activities and the risk posed by them. The violation may have a significant adverse effect on the statutory purposes or procedures for implementing the RCRA program.

(attach additional sheets if necessary)

(b) Extent of Deviation Moderate - Although Company A did notify the Agency that it was a generator, it did not notify EPA that it stored hazardous waste. While there was partial compliance, Company A significantly deviated from the requirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day Moderate potential for harm and moderate extent of deviation lead one to presume that multi-day penalties are appropriate. There are no case-specific facts which would overcome the presumption. The applicable cell ranges from $250 to $1,600. The midpoint is $925. Based on an assessment of relevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of days of violation), the mid point in the available range was selected. The violation persisted for 343 days. The Region determined that the total penalty would have sufficient deterrent impact if multiday penalties were assessed only for the minimum 180 day period presumed under the penalty policy, rather than for the full 343 (minus 1) days of violation.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith At settlement negotiations Company A presented a written but explicitly non-binding opinion dated October 30, 1987, from the Director of EPA's Office of Solid Waste (OSW), indicating that the waste which Company A stored did not come within the ambit of the regulation listing new wastes, which became effective on November 5, 1989. Other information indicated that 6 months later the Assistant Administrator for Solid Waste and

Emergency Response formally renounced the view contained in the Director's opinion, that Company A was probably aware of this action, and that the Company had failed to provide EPA with either a §3010(a) notification or a Part A permit application even after it likely knew that its storage activities were subject to Subtitle C regulation. In view of these unusual facts - i.e., that the company had for roughly a third of the duration of the violation acted in apparent good faith reliance on the opinion of the Director of OSW indicating its stored wastes were not subject to regulation - a downward adjustment of 30% in the amount of the penalty is appropriate.

(attach additional sheets if necessary)

(b) Willfulness/Negligence No evidence relative to this factor was presented for consideration. Evidence that Company A knowingly failed to comply with notification/permitting requirements after the Agency had clarified its regulatory interpretation was not deemed so persuasive as to warrant a finding that the company had acted willfully.

(attach additional sheets if necessary)

(c) History of Compliance No new information relevant to this adjustment factor came to light after issuance of the complaint. There is no evidence of similar previous violations at this (the company's only) facility.

(attach additional sheets if necessary)

(d) Ability to pay Company A raised and documented that it has cash flow problems. It did not convince EPA that the penalty should be mitigated. An installment plan was accepted by the Agency.

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors

N/A

(attach additional sheets if necessary)

3. Economic Benefit Although there is some economic benefit gained from the above cited violation (i.e., personnel costs and postage for notification forms), such costs are negligible enough not to include in the calculation.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

N/A

(attach additional sheets if necessary)

A. PENALTY COMPUTATION WORKSHEET

Company Name Company A
Address

Requirement Violated 42 U.S.C. 6925, Operating without a permit or interim status

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix.....$22,500
   (a) Potential for harm.....Major
   (b) Extent of Deviation.....Major
2. Select an amount from the appropriate multiday matrix cell.....$3,000
3. Multiply line 2 by number of days of violation minus 1..($3000 x 342).....$1,026,000
4. Add line 1 and line 3.....$1,048,500
5. Percent increase/decrease for good faith.....N/A
6. Percent increase for willfulness/ negligence.....N/A
7. Percent increase for history of noncompliance.....N/A
8.* Total lines 5 thru 7.....N/A
9. Multiply line 4 by line 8 .....N/A
10. Calculate Economic Benefit.....$9,000
11. Add lines 4, 9 and 10 for penalty amount.....$1,057,500 to be inserted in the complaint

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Major - The fact that the facility generally was well managed is irrelevant as to the potential for harm for operating without a permit. This situation may pose a substantial risk of exposure and may have a substantially adverse effect on the statutory purposes for implementing the RCRA Program.

(attach additional sheets if necessary)

(b) Extent of Deviation Major - Substantial noncompliance with the requirement was found because Company A did not notify EPA that it stored hazardous waste, and did not submit a Part A application.

(attach additional sheets if necessary)

(c) Multiple/Multi-day Major potential for harm and major extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $1,000 to $5,000. The midpoint is $3,000. Based on an assessment of relevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, and the number of days of violation) the mid point in the available range was selected. The violation persisted for 342 days.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith Neither discussions with the facility nor the inspector's observations indicate any effort had been made to correct violations prior to notification of violations by EPA. Thus no downward adjustment for good faith efforts to comply was made. There was also no evidence of a lack of good faith.

(attach additional sheets if necessary)

(b) Willfulness/Negligence No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(c) History of Compliance No evidence has been produced thus far that Company A has had any similar previous violations at this site. The facility in question is the only facility owned or operated by Company A. Therefore, no upward adjustment shall be made on the basis of past compliance history.

(attach additional sheets if necessary)

(d) Ability to pay No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors

N/A

(attach additional sheets if necessary)

3. Economic Benefit By failing to obtain interim status (the least expensive option available to it under the statute) Company A avoided or delayed the costs of filing a Part A permit application and complying with the regulatory requirements relative to storage of hazardous wastes in containers. In a BEN analysis (copy omitted for purposes of this example) the Region found that these costs amounted to $9,000.

attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

N/A

(attach additional sheets if necessary)

Company Name Company A
Address

Requirement Violated 40 U.S.C. 6925, Operating without a permit or interim status

SETTLEMENT PENALTY AMOUNT

1. Gravity based penalty from matrix.....$22,500
   (a) Potential for harm .....Major
   (b) Extent of Deviation.....Major
2. Select an amount from the appropriate multiday matrix cell.....$3,000
3. Multiply line 2 by number of days of violation minus 1..($3,000 x 179).....$537,000
4. Add line 1 and line 3.....$559,500
5. Percent increase/decrease for good faith.....-30%
6. Percent increase/decrease for willfulness/negligence.....N/A
7. Percent increase for history of noncompliance.....N/A
8. Percent increase/decrease for other unique factors .....N/A (except litigation risk)
9. Add lines 5, 6, 7, and 8.....-30%
10. Multiply line 4 by line 9 .....-$167,850
11. Add lines 4 and 10.....$391,650
12. Adjustment amount for environmental.....-0- project
13. Subtract line 12 from line 11 .....$391,650
14. Calculate economic benefit.....$9,000

15. Add lines 13 and 14.....$400,650

16. Adjustment amount for ability-to-pay.....-0-

17. Adjustment amount for litigation risk.....-0-

18. Add lines 16 and 17.....-0-

19. Subtract line 18 from line 15 for.....$400,650
final settlement amount

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Major - The fact that the facility generally was well managed is irrelevant as to the potential for harm for operating without a permit. This situation may pose a substantial risk of exposure and may have a substantially adverse effect on the statutory purposes for implementing the RCRA Program.

(attach additional sheets if necessary)

(b) Extent of Deviation Major - Substantial noncompliance with the requirement was found because Company A did not notify EPA that it stored hazardous waste, and did not submit a Part A application.

(attach additional sheets if necessary)

(c) Multiple/Multi-day Major potential for harm and major extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $1,000 to $5,000. The midpoint is $3,000. Based on an assessment of relevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, and the number of days of violation) the mid point in the available range was selected. The violation persisted for 342 days. The Region determined that the total penalty would have sufficient deterrent impact if multiday penalties were assessed only for the minimum 180 day period mandated by the penalty policy rather than the full 342 days of violation.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applicable.)

(a) Good Faith At settlement negotiations Company A presented a written but explicitly non-binding opinion dated October 30, 1987, from the Director of EPA's Office of Solid Waste (OSW), indicating that the waste which Company A stored did not come within the ambit of the regulation listing new wastes, which became effective on November 5, 1987. Other information indicated that 6 months later the Assistant Administrator for Solid Waste and

Emergency Response formally renounced the view contained in the Director's opinion, that Company A was probably aware of this action, and that the company had failed to provide EPA with either a §3010(a) notification or a Part A permit application even after it likely knew that its storage activities were subject to Subtitle C regulation. In view of these unusual facts - i.e. that the company had for roughly a third of the duration of the violation acted in apparent good faith reliance on the opinion of the Director of OSW indicating its stored wastes were not subject to regulation - it is appropriate to adjust the penalty for this violation downward by 30%.

(attach additional sheets if necessary)

(b) Willfulness/Negligence No evidence relative to this factor was presented for consideration.

(attach additional sheets if necessary)

(c) History of Compliance No new information relevant to this adjustment factor came to light after issuance of the complaint.

(attach additional sheets if necessary)

(d) Ability to pay Company A raised and documented that it has cash flow problems. It did not convince EPA that the penalty should be mitigated. An installment plan was accepted by the Agency.

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors

N/A

(attach additional sheets if necessary)

3. Economic Benefit By failing to obtain interim status (the least expensive option available to it under the statute) Company A avoided or delayed the costs of filing a Part A permit application and complying with the regulatory requirements relative to storage of hazardous wastes in containers. In a BEN analysis (copy omitted for purposes of this example) the Region found that these costs amounted to $9,000.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

N/A

(attach additional sheets if necessary)

A. EXAMPLE 2

(1) Violation

Company B failed to prevent entry of persons onto the active portion of its surface impoundment facility. A portion of the fence surrounding the area had been accidentally knocked down during construction on the new wing of the facility on October 30, 1988, and had never been replaced. Several children have entered the active portion of the facility. 40 CFR §265.14. An inspection by EPA on March 15, 1989, revealed that the damaged area of the fence still needed to be replaced. The complaint issued to Company A assessed penalties for the violation of failing to provide adequate security pursuant to 40 CFR § 265.14. Below is a discussion of the methodology used to calculate the penalty amount proposed in the complaint, followed by a discussion of the methodology used to calculate the penalty amount to be accepted in settlement.

(2) Seriousness: Potential for Harm. Major - Some children already have entered the area; potential for harm due to exposure to waste is substantial because of the lack of adequate security around the site. Extent of Deviation. Moderate - there is a fence, but a portion of it has been knocked down. Significant degree of deviation, but part of the requirement was implemented.

(3) Gravity-based Penalty: Major potential for harm and moderate extent of deviation yield the penalty range of $15,000 to $19,999. The midpoint is $17,500.

(4) Multi-Day Penalty Assessment

(a) Failure to provide security. Major potential for harm and moderate extent of deviation result in mandatory multi-day penalties. The applicable cell ranges from $750 to $4,000. The midpoint is $2,375. [Based on an assessment of relevant factors (e.g., the seriousness of the violation relative to others falling within the same matrix cell, the degree of cooperation evidenced by the facility, the number of days of violation) the mid-point in the range of available multi-day penalty amounts was selected.] EPA documented that the violation continued from October 30, 1988, to March 15, 1989, a total of 136 days (minus one day). Total Penalty: $2,375 x 135 = $320,625.

(b) Penalty Subtotal: $17,500 + $320,625 = $338,125

(5) Economic benefit of noncompliance.

Since Company B reaped an economic benefit by failing to repair the fence, a BEN worksheet should be completed. For information describing each of the inputs see Section VIII.B. For purposes of the above violation, the following input data should be furnished:

1. (EPA v. Company B), the case name
2. ($100,000), the initial capital investment of replacing the fence
3. -0-, there are no one time expenditures
4. -0-, no annual operating and maintenance (O&M expenses have been identified
5. 3/1989, the date of the inspection documenting noncompliance
6. 4/1990, the date of compliance
7. 6/1990, the anticipated date of penalty payment

The above data was entered into the BEN model which yielded an economic benefit amount of $12,743 (see attached BEN worksheet and printout).

(6) Application of Adjustment Factors For Computation of the Complaint Amount

(a) Good faith efforts to comply. At the time of computation of the amount of the penalty to be proposed in the complaint no information (i) relative to the violator's good faith efforts to comply or (ii) indicative of lack of good faith was available.

(b) Degree of willfulness and/or negligence. Little evidence as to application of this factor was available.

(c) History of non-compliance. Company B had on two previous occasions been cited in writing for failure to prevent public access to the active portion of the facility. While such previous violations had been corrected, they indicate that Company B had not been adequately deterred by prior notice of similar violations. The sum of the gravity/multi-day penalty components is adjusted upwards by 15% because of the company's history of noncompliance.

($17,500 + $320,625) x 15% = $50,718.75

(d) Other adjustment factors. Consistent with the general policy of delaying consideration of downward adjustment factors (other than that relating to good faith efforts to comply) until the settlement stage, the Region reviewed available information

only to see if it supported further upward adjustment of the penalty amount. No information supporting further upward adjustment was uncovered.

(7) Final Complaint Penalty Amount

Gravity base		Multiday		Economic benefit		Upward Adj.
$17,500	+	$320,625	+	$12,743	+	$50,718.75

= Total Penalty: $401,586.75

(8) Settlement Adjustments

During settlement discussions Company B presented information which it felt warranted adjustment of the penalty. After issuance of the complaint no new information came to light which supported recalculation of the gravity-based, multi-day, or economic benefit components of the penalty proposed in the complaint.

(a) Good faith efforts to comply. Company B gave evidence at settlement of labor problems with security officers and reordering and delivery delays for a new fence. After issuance of the complaint, Company B was very cooperative and stated that a new fence would be installed and that security would be provided for by another company in the near future. Even though the company was very cooperative, its actions were only those required under the regulations. No justification for mitigation for good faith efforts to comply exists. No change in penalty.

(b) Degree of willfulness and/or negligence. If the evidence presented by Company B with respect to reordering delays had been convincing, it might arguably have served as a basis for finding that the company acted without willful disregard of the regulation (or should not have been charged multi-day penalties at a rate so high as that established during computation of the complaint amount). However, such claims of unavoidable delay are easily made and must be viewed with skepticism. The company's evidence on this point was unconvincing since the security and fencing could have been easily provided by other suppliers.

While the fact that the fence was knocked down accidentally might indicate a lack of willfulness, the company's failure to take remedial action for 136 days argues against a downward adjustment. The violation may even have become a willful one when left uncorrected. But in the absence of more information about precautionary steps the company took prior to the accident and the extent of the violator's knowledge of the regulations, no adjustment was made.

(c) History of non-compliance. The Region was confronted with no reason to rethink the previous upward adjustment of the penalty based on past violations of a similar nature.

(d) Ability to pay. The Company made no claims regarding ability to pay.

(e) Environmental projects. The company did not propose any environmental projects.

(f) Other unique factors. No other unique factors existed in this case.

(9) Final Settlement Penalty Amount

Gravity base		Upward Multi-day		Economic Adjustment		Total Benefit		Penalty
$17,500	+	$320,625	+	$50,718.75	+	$12,743	=	$401,586.75

PENALTY COMPUTATION WORKSHEET

Company Name Company B (DC 5456)
Address 402 M. Street, S.W.
Washington, D.C.20254
Requirement Violated 40 CFR §265.14, failure to prevent entry

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix.....$17,500
   (a) Potential for harm ..... Major
   (b) Extent of Deviation .....Moderate
2. Select an amount from the appropriate multiday matrix cell.....$2375
3. Multiply line 2 by number of days of violation minus 1.($2375 x 135).....$320,625
4. Add line 1 and line 3.....$338,125
5. Percent increase/decrease for good faith.....N/A
6. Percent increase for willfulness/ negligence.....N/A
7. Percent increase for history of noncompliance.....15%
8.* Total lines 5 thru 7.....15%
9. Multiply line 4 by line 8 .....$50,718.75
10. Calculate Economic Benefit.....$12,743
11. Add lines 4, 9 and 10 for penalty amount to be inserted in the complaint.....$401,586.75

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Major - Some children have already entered the area; potential for harm due to exposure to waste is substantial because of the lack of adequate security around the site.

(attach additional sheets if necessary)

(b) Extent of Deviation Moderate - There is a fence, but a substantial portion of it has been knocked down. There is a significant degree of deviation, but part of the requirement has been implemented.

(attach additional sheets if necessary)

(c) Multiple/Multi-day Multi-day penalties are mandatory for major-moderate violations. Based on consideration of relevant factors (e.g., number of days of violation and degree of cooperation evidenced by the facility) the mid-point in the available range in the multi-day matrix was selected. The violation can be shown to have persisted for 135 days.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith. No information indicating a lack of good faith or of good faith efforts by the violator to comply is available.

(attach additional sheets if necessary)

(b) Willfulness/Negligence N/A

(attach additional sheets if necessary)

(c) History of Compliance Company B had on two previous occasions been cited in writing for failure to prevent public access to the active portion of the facility. While such previous violations had been corrected, they indicate that Company B has not been adequately deterred by prior notice of similar violations. Hence, the penalty is adjusted upward 15%.

(attach additional sheets if necessary)

(d) Ability to pay N/A

(attach additional sheets if necessary)

(e) Environmental Project N/A

(attach additional sheets if necessary)

(f) Other Unique Factors N/A

(attach additional sheets if necessary)

3. Economic Benefit Company B has gained an economic benefit from failing to install a new fence. See the BEN Worksheet for the data input into the BEN model which calculated an economic benefit of $12,743.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information ____N/A____

_____

_____

_____

_____

_____

_____

_____

_____

_____(attach additional sheets if necessary)

BEN Worksheet

1. Company B _____
Requirement Violated: 40 CFR §265.14

		BEN Inputs
2.	Initial Capital Investment/ Year Dollars	100,000
3.	One Time Expenditure/Year Dollars a. Tax Deductible b. Not Tax Deductible	-0-
4.	Annual Operating and Maintenance (O&M) Expenses/ Year Dollars	-0-
5.	Date of Noncompliance	3,1989
6.	Date of Compliance	4,1990
7.	Anticipated Date of Penalty Payment	6,1990
8.*	Useful Life of Pollution Control Equipment	_____
9.*	Marginal Income Tax Rate (On Time Case)	_____
10.*	Marginal Income Tax Rate (Delayed Compliance Case)	_____
11.*	Inflation Rate	_____
12.*	Discount Rate	_____
13.*	Low Interest Financing	_____
	Low Interest Rate	_____
	Corporate Debt Rate	_____
14.	Economic Benefit Penalty Component	_____

* See standard value from BEN model

THE ECONOMIC BENEFIT OF A 13 MONTH DELAY AS OF THE PENALTY PAYMENT DATE, 15 MONTHS AFTER THE INITIAL DATE OF NONCOMPLIANCE $ 12743

>>>>>>>>> THE ECONOMIC SAVINGS CALCULATION ABOVE USED THE FOLLOWING VARIABLES: <<<<<<<<<

USER SPECIFIED VALUES

1.	CASE NAME = HYPO		
2.	INITIAL CAPITAL INVESTMENT =	$ 100000	1989 DOLLARS
3.	ONE-TIME NONDEPRECIABLE EXPENDITURE	$ - 0 -	
4.	ANNUAL O&M EXPENSES =	$ - 0 -	
5.	FIRST MONTH OF NONCOMPLIANCE =	$ 3,1989	
6.	COMPLIANCE DATE =	$ 4,1990	
7.	PENALTY PAYMENT DATE =	$ 6,1990	

STANDARD VALUES

8.	USEFUL LIFE OF POLLUTION CONTROL EQUIPMENT =	15 YEARS
9.	MARGINAL INCOME TAX RATE FOR THE ON-TIME CASE =	38.50 %
10.	MARGINAL INCOME TAX RATE FOR THE DELAY CASE	38.50 %
11.	ANNUAL INFLATION RATE =	3.40 %
12.	DISCOUNT RATE =	17.50 %
13.	AMOUNT OF LOW INTEREST FINANCING =	0 %

Company Name Company B (DC 5456)
Address 402 M. Street, S.W.
Washington, D.C.20254
Requirement Violated 40 CFR §265.14, Failure to prevent entry

SETTLEMENT PENALTY AMOUNT

1. Gravity based penalty from matrix.....$17,500
   (a) Potential for harm .....Major
   (b) Extent of Deviation.....Moderate
2. Select an amount from the appropriate multiday matrix cell.....$2,375
3. Multiply line 2 by number of days of violation minus 1 ($2,375 x 135).....$320,625
4. Add line 1 and line 3.....$338,125
5. Percent increase/decrease for good faith.....N/A
6. Percent increase/decrease for willfulness/negligence.....N/A
7. Percent increase for history of noncompliance.....15%
8. Percent increase/decrease for other unique factors .....N/A (except litigation risk)
9. Add lines 5, 6, 7, and 8.....15%
10. Multiply line 4 by line 9.....$50,718.75
11. Add lines 4 and 0.....$388,843.75
12. Adjustment amount for environmental.....N/A project
13. Subtract line 12 from line 11 .....$388,843.75
14. Calculate economic benefit.....$12,743
15. Add lines 13 and 14.....$401,586.75

16. Adjustment amount for ability-to-pay.....N/A

17. Adjustment amount for litigation risk.....N/A

18. Add lines 16 and 17.....- 0 -

19. Subtract line 18 from line 15 for.....$401,586.75
final settlement amount

This procedure should be repeated for each violation.

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Major - Some children have already entered the area; potential for harm due to exposure to waste is substantial because of the lack of adequate security around the site.

(attach additional sheets if necessary)

(b) Extent of Deviation Moderate - There is a fence, but a substantial portion of it has been knocked down. There is a significant degree of deviation, but part of the requirement has been implemented.

(attach additional sheets if necessary)

(c) Multiple/Multi-day Multiday penalties are mandatory for major-moderate violations. Based on consideration of relevant factors (e.g., number of days of violation and degree of cooperation evidenced by the facility) the mid-point in the available range in the multi-day matrix was selected. The violation can be shown to have persisted for 135 days.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith. Company B gave evidence of labor problems with security officer and reordering and delivery delays in obtaining a new fence. After issuing the complaint, Company B stated that a new fence would be installed and that security would be provided by another company in the near future. Even though the Company was very cooperative, its actions were only those required under the regulations. No justification for mitigation for good faith efforts to comply exists.

(attach additional sheets if necessary)

(b) Willfulness/Negligence. While the fact that the fence was knocked down accidentally might indicate a lack of willfulness, the Company's failure to take remedial action for 136 days argues against a downward adjustment. The violation may even have become a willful one when left uncorrected. But in the absence of more information about precautionary steps the company may have taken prior to the accident and the extent of the violator's knowledge of the regulations, no adjustment was made.

(additional sheets if necessary)

(c) History of Compliance Company B had on two previous occasions been cited in writing for failure to prevent public access to the active portion of the facility. While such previous violations had been corrected, they indicate that Company B has not been adequately deterred by prior notice of similar violations. Hence, the penalty is adjusted upward 15%.

(attach additional sheets if necessary)

(d) Ability to pay N/A

(attach additional sheets if necessary)

(e) Environmental Project N/A

(attach additional sheets if necessary)

(f) Other Unique Factors N/A

(attach additional sheets if necessary)

3. Economic Benefit Company B has gained an economic benefit from failing to install a new fence. See the BEN Worksheet for the data input into the BEN model which calculated an economic benefit of $12,743.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information N/A

(attach additional sheets if necessary)

BEN Worksheet

1. Company B _____
Requirement Violated: 40 CFR §265.14

		BEN Inputs
2.	Initial Capital Investment/ Year Dollars	100,000
3.	One Time Expenditure/Year Dollars a. Tax Deductible b. Not Tax Deductible	-0-
4.	Annual Operating and Maintenance (O&M) Expenses/ Year Dollars	-0-
5.	Date of Noncompliance	3,1989
6.	Date of Compliance	4,1990
7.	Anticipated Date of Penalty Payment	6,1990
8.*	Useful Life of Pollution Control Equipment	_____
9.*	Marginal Income Tax Rate (On Time Case)	_____
10.*	Marginal Income Tax Rate (Delayed Compliance Case)	_____
11.*	Inflation Rate	_____
12.*	Discount Rate	_____
13.*	Low Interest Financing	_____
	Low Interest Rate	_____
	Corporate Debt Rate	_____
14.	Economic Benefit Penalty Component	_____

* See standard value from BEN model

THE ECONOMIC BENEFIT OF A 13 MONTH DELAY AS OF THE PENALTY PAYMENT DATE, 15 MONTHS AFTER THE INITIAL DATE OF NONCOMPLIANCE

$ 12743

>>>>>>>>> THE ECONOMIC SAVINGS CALCULATION ABOVE USED THE FOLLOWING VARIABLES: <<<<<<<<<

USER SPECIFIED VALUES

1.	CASE NAME = HYPO		
2.	INITIAL CAPITAL INVESTMENT =	$ 100000	1989 DOLLARS
3.	ONE-TIME NONDEPRECIABLE EXPENDITURE	$ - 0 -	
4.	ANNUAL O&M EXPENSES =	$ - 0 -	
5.	FIRST MONTH OF NONCOMPLIANCE =	$ 3,1989	
6.	COMPLIANCE DATE =	$ 4,1990	
7.	PENALTY PAYMENT DATE =	$ 6,1990	

STANDARD VALUES

8.	USEFUL LIFE OF POLLUTION CONTROL EQUIPMENT =	15 YEARS
9.	MARGINAL INCOME TAX RATE FOR THE ON-TIME CASE =	38.50 %
10.	MARGINAL INCOME TAX RATE FOR THE DELAY CASE	38.50 %
11.	ANNUAL INFLATION RATE =	3.40 %
12.	DISCOUNT RATE =	17.50 %
13.	AMOUNT OF LOW INTEREST FINANCING =	0 %

C. EXAMPLE 3

(1) Violation

Company C, an owner/operator of several permitted commercial treatment facilities, regularly receives a large volume of diverse types of RCRA hazardous wastes at its Evanston facility. Upon receipt of the wastes, Company C's Evanston facility immediately treats them and sends the treatment residues off-site for land disposal at another company's facility, Company Z.

Between December 16, 1988 and December 18, 1989, Company C's Evanston facility received one shipment per month of liquid F002 spent solvent wastes from various generators. Each shipment consisted of two 55-gallon drums, but the composition and concentration level of hazardous constituents in each drum was different due to the highly variable process that generated the waste. The Evanston facility did not test the wastes before or after treating them, and its existing waste analysis plan did not require any such testing or other analysis to determine if wastes are restricted. The Evanston facility properly manifested the 12 monthly shipments of wastes sent off-site to Company Z, but it did not know until June 18, 1989 that it was required by 40 C.F.R. § 268.7 to send a land disposal restrictions (LDR) notification and certification with each shipment of waste. At that time, it began sending § 268.7 forms routinely stating that the treatment residues were eligible for land disposal.

On October 30, 1989, an EPA inspector at Company Z found that 24 drums of Company C's F002 solvents were unlawfully disposed in Company Z's landfill. EPA determined that the unlawfully disposed wastes had been sent to Company Z in 1989 from the Evanston facility. Company Z's landfill did not meet minimum technological requirements and was leaking hazardous constituents into the ground water, the only source of drinking water for the area. The unlawfully disposed drums contained concentrations of F002 solvents in excess of the applicable Part 268 LDR treatment standards.

Although four separate violations are identified in (a) through (d) below, only the first two violations (in (2) (a) and (b) below) are discussed for purposes of this Example. Below is a discussion of the methodology used to calculate the penalty amount for the complaint followed by a discussion of the methodology used to calculate the settlement amount.

(2) Seriousness:

(a) Failure to Send Accurate § 268.7(b) Notifications and Certifications:

Potential for Harm. Major - Because Company C did not notify the receiving facility, Company Z, that the waste was prohibited from land disposal, Company Z was unaware that the wastes were required to be further treated before land disposal. The violation may have a substantial adverse effect on the purposes or procedures for implementing the RCRA program. The violation may also pose a substantial risk of exposure to hazardous waste.

Extent of Deviation. Major - Initially, Company C did not merely prepare and send deficient § 268.7 notifications/ certifications. Rather, it completely failed to prepare and send such forms for the first six months. During the next six months, Company C sent unverified certifications. In each instance, Company C substantially deviated from the applicable requirement.

(b) Failure to Test Restricted Wastes as Required by §§ 268.7(b) and 264.13(a):

Potential for Harm. Major - Company C's complete failure to test the wastes prevented it from determining that the wastes were ineligible for land disposal, which contributed to the actual disposal in a leaking unit above the area's sole source of drinking water. The violation has a substantial adverse effect on the procedures for implementing the LDR program because testing to assure compliance is critically important. The violation may also pose a substantial risk of exposure to hazardous waste.

Extent of Deviation. Major - Company C's waste analysis plan is deficient in not explicitly requiring any testing to determine if wastes are restricted, as evidenced by the resulting shipments from Company C which failed to identify their waste as restricted. Such deficiency is particularly significant where the wastes are very diverse, as is the case here, because in the absence of reliable test results it is very difficult, if not impossible, for Company C to comply with the § 264.13 requirement that the operator obtain "all the information which must be known to [manage] the waste in accordance with . . . Part 268."

(c) Treating Hazardous Waste Prior to Obtaining Adequate Waste Analysis Data as Required by § 264.13(a): Potential for Harm - Major. Extent of Deviation - Major.

(d) Failure to Maintain § 268.7 Paperwork in Operating Record as Required by § 264.73(b): Potential for Harm - Moderate. Extent of Deviation - Major.

(3) Gravity-based Penalty

(a) Failure to Send Accurate § 268.7(b) Notifications and Certifications: Major potential for harm and major extent of deviation leads one to the cell with the range of $20,000 to $25,000. The mid-point is $22,500.

(b) Failure to Test Restricted Wastes as Required by §§ 268.7(b) and 264.13(a): Major potential for harm and major extent of deviation leads one to the cell with the range of $20,000 to $25,000. The mid-point is $22,500.

Total Penalty Per Shipment: $22,500 + $22,500 = $45,000.

Since these violations were repeated once every month for 12 months, the above penalty figure should be multiplied by 12, to yield a total penalty (prior to application of adjustment factors, addition of multi-day component, and addition of economic benefit component) as follows:

Penalty Subtotal: $45,000 x 12 = $540,000.

(4) Multi-day Penalty Assessment - Because each violation is viewed as independent and noncontinuous, no multi-day assessment was made.[13]

(5) Economic Benefit of Noncompliance - Company C avoided a number of costs in committing the violations noted in (2)(a) and (b) above. These included (i) the costs of forms and labor necessary to complete the forms notifying and certifying to Company Z that the wastes were or were not appropriate for land disposal, and (ii) the costs of waste analysis necessary to determine the eligibility of the wastes for land disposal. A BEN analysis (copy omitted for purposes of this example) of these avoided costs was performed and indicated that Company C reaped an economic benefit of $12,500 from its failure to comply with the two requirements in question ($2,500 for the violations

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[13] Where, as here, a facility has through a series of independent acts repeatedly violated the same statutory or regulatory requirement, the violations may begin to closely resemble multi-day violations in their number and similarity to each other. In these circumstances, enforcement personnel have discretion to treat each violation after the first in the series as multi-day violations (assessable at the rates provided in the multi-day matrix), if to do so would produce a more equitable penalty calculation.

specified in (2)(a) and $10,000 for the violations noted in (2)(b)).[14]

(6) Application of Adjustment Factors for Computation of the Complaint Amount

(a) Good faith efforts to comply - As soon as Company C's Evanston facility learned of its obligation to submit § 268.7 forms, it began submitting such forms. However, evidence demonstrates that efforts to comply were weak because Company C made no effort to ensure the accuracy of such submissions. Even if such submissions had been accurate, Company C's actions would have been only those required by the regulations. No justification for mitigation for good faith efforts to comply exists. No change in the $540,000 penalty.

(b) Degree of wilfulness and/or negligence - The prior knowledge of the § 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these facts, an upward adjustment in the amount of the penalty of 10% is justified. $540,000 x 10% = $54,000.

(c) History of noncompliance. No evidence demonstrating that Company C has had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in (6)(b) above, such adjustment will not be duplicated here.

(d) Other adjustment factors. Since this computation was for purposes of determining the amount of the penalty to propose in the complaint, no further consideration was given to possible

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[14] Company C was not itself under a legal obligation to treat the wastes in question to the BDAT levels mandated by the land disposal restrictions; but it nevertheless reaped an economic benefit by misrepresenting to Company Z that these wastes were eligible for land disposal when they were not. Had Company C accurately represented to Company Z the truth - that the wastes needed to be treated before being landfilled -, Company Z would undoubtedly have imposed a higher disposal fee on Company C. EPA could in its discretion include the excess profits Company C earned through misrepresentation in its calculation of the economic benefits enjoyed by Company C as a result of the violations specified in 2(a) and 2(b).

downward adjustments. At the same time no reason to adjust the penalty amount upward based on the remaining adjustment factors was evident.

(7) Final Complaint Penalty Amount

Gravity base		Upward Adjustment		Economic Benefit		Total Penalty
$540,000	+	$54,000	+	$12,500	=	$606,500

Since a penalty of $606,500 would exceed the statutory maximum for 24 violations (24 x $25,000 = $600,000), the penalty amount to be sought in the complaint was adjusted downward to $600,000.

(8) Settlement Adjustments

After issuance of the complaint the Region uncovered no basis for recalculating the gravity-based, multi-day, or economic benefit components of the penalty sought in the complaint. However, based on information available to it (including that provided by Company C) the Region did consider certain downward adjustments in the penalty amount.

(a) Good faith efforts to comply. The company did not present and the Region did not find any grounds for reconsidering its initial conclusion that downward adjustment based on the company's good faith efforts at compliance was not justified.

(b) Degree of willfulness and/or negligence. Although the company argued that its lack of knowledge regarding land ban requirements indicated a lack of willfulness during the first 6 months the violations continued, the Region declined to adjust the penalty downward because to do so would encourage or reward ignorance of the law.

(c) History of non-compliance. No reason was presented to address this issue differently than it had been in computing the complaint amount of the penalty.

(d) Ability to pay. Company C made no claims regarding ability to pay.

(e) Environmental projects. Company C did not propose any environmental projects.

(f) Other Unique Factors. In reviewing its liability case against Company C the Region determined that there were major weaknesses in its ability (i) to tie a number of the 24 drums discovered at Company Z's landfill to Company C, and (ii) to show that all the drums contained F002 solvent. The Region concluded that in light of these evidentiary weaknesses it was unlikely

that it would be able to obtain through litigation the amount of the penalty it had sought in the complaint. Since these evidentiary difficulties adversely affected the Region's ability to prove violations related to 4 of the 12 (or one-third of the) monthly shipments, the Region decided that for settlement purposes it was willing to forego roughly one-third of the total proposed penalty amount. Accordingly, the Region decided to adjust the amount of the penalties sought for the violations identified in 2(a) and (b) above downward by $100,000 each based on litigative risk.

(9) Final Settlement Penalty Amount:

Gravity-Base		Upward Adjustment		Economic Benefit		Downward Adjustment		Total Penalty
$540,500	+	$54,000	+	$12,500	-	$200,000	=	$406,500

A. PENALTY COMPUTATION WORKSHEET

Company Name Company C - Evanston Facility
Address

Requirement Violated 40 CFR §268.7(b) Failure to send accurate notifications and certifications

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix..($22,500 x 12)..$270,000
   (a) Potential for harm.....major
   (b) Extent of Deviation.....major
2. Select an amount from the appropriate multiday matrix cell.....N/A
3. Multiply line 2 by number of days of violation minus 1.....N/A
4. Add line 1 and line 3.....$270,000
5. Percent increase/decrease for good faith.....N/A
6. Percent increase for willfulness/ negligence.....10%
7. Percent increase for history of noncompliance.....N/A
8.* Total lines 5 thru 7.....10%
9. Multiply line 4 by line 8 .....$27,000
10. Calculate Economic Benefit.....$2,500
11. Add lines 4, 9 and 10 for penalty amount.....$299,500 to be inserted in the complaint

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Major - Because Company C did not notify the receiving facility, Company Z, that the waste was prohibited from land disposal, Company Z was unaware that the wastes were required to be further treated before land disposal. The violation may have a substantial adverse affect on the purposes or procedures for implementing the RCRA program. In addition, the violation creates a potential for harm because it hinders Company Z's ability to adequately characterize the waste in order to assure that it is properly managed. (Note, however, that Company Z has an independent regulatory obligation to characterize and properly manage wastes it receives. Thus, Company C's violation is one factor contributing to the potential for harm, rather than the sole factor creating such risks.)

(attach additional sheets if necessary)

(b) Extent of Deviation Major - Initially, Company C did not merely prepare and send deficient §268.7 notifications/ certifications. Rather it completely failed to prepare and send such forms for the first six months. During the next six months Company C sent unverified certifications. In each instance, Company C substantially deviated from the applicable requirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith As soon as Company C's Evanston facility learned of its obligation to submit 268.7 forms, it began submitting such forms. However, evidence demonstrates that efforts to comply were weak because Company C made no effort to ensure the accuracy of such submissions. Even if such submissions had been accurate, Company C's actions would have been only those required

by the regulations. No justification for mitigation for good faith efforts to comply exists.

(attach additional sheets if necessary)

(b) Willfulness/Negligence No evidence of willfulness has been presented but the prior knowledge of the 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these facts, an upward adjustment in the amount of 10% is justified.

(attach additional sheets if necessary)

(c) History of Compliance No evidence demonstrating that Company C has had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in 2.(b) above, we will not duplicate such adjustment here.

(attach additional sheets if necessary)

(d) Ability to pay

N/A

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors

N/A

(attach additional sheets if necessary)

3. Economic Benefit Company C has reaped an economic benefit by avoiding the costs of materials and labor necessary to send proper notifications/certifications to Company Z. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit of this violation amounted to $2,500.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

N/A

(attach additional sheets if necessary)

Company Name Company C - Evanston Facility
Address

Requirement Violated 40 CFR §268.7(b) Failure to send accurate notifications and certifications

SETTLEMENT PENALTY AMOUNT

1. Gravity based penalty from matrix.....$270,000
   (a) Potential for harm .....Major
   (b) Extent of Deviation.....Major
2. Select an amount from the appropriate multiday matrix cell.....N/A
3. Multiply line 2 by number of days of violation minus 1.....N/A
4. Add line 1 and line 3.....$270,000
5. Percent increase/decrease for good faith.....N/A
6. Percent increase/decrease for willfulness/negligence.....10%
7. Percent increase for history of noncompliance.....N/A
8. Percent increase/decrease for other unique factors (except litigation risk) .....N/A
9. Add lines 5, 6, 7, and 8.....10%
10. Multiply line 4 by line 9 .....$27,000
11. Add lines 4 and 10.....$297,000
12. Adjustment amount for environmental project.....N/A
13. Subtract line 12 from line 11 .....$297,000
14. Calculate economic benefit.....$2,500
15. Add lines 13 and 14.....$299,500

16. Adjustment amount for ability-to-pay.....N/A

17. Adjustment amount for litigation risk.....-$100,000

18. Add lines 16 and 17.....N/A

19. Subtract line 18 from line 15 for.....$199,500
final settlement amount

This procedure should be repeated for each violation.

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm. Major - Because Company C did not notify the receiving facility, Company Z, that the waste was prohibited from land disposal, Company Z was unaware that the wastes were required to be further treated before land disposal. The violation may have a substantial adverse affect on the purposes or procedures for implementing the RCRA program. In addition, the violation creates a potential for harm because it hinders Company Z's ability to adequately characterize the waste in order to assure that it is properly managed. (Note, however, that Company Z has an independent regulatory obligation to characterize and properly manage wastes it receives. Thus, Company C's violation is one factor contributing to the potential for harm, rather than the sole factor creating such risks.)

(attach additional sheets if necessary)

(b) Extent of Deviation. Major - Initially, Company C did not merely prepare and send deficient §268.7 notifications/ certifications. Rather it completely failed to prepare and send such forms for the first six months. During the next six months Company C sent unverified certifications. In each instance, Company C substantially deviated from the applicable requirement.

(attach additional sheets if necessary)

(c) Multiple/Multi-day. Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith. As soon as Company C's Evanston facility learned of its obligation to submit 268.7 forms, it began submitting such forms. However, evidence demonstrates that efforts to comply were weak because Company C made no effort to ensure the accuracy of such submissions. Even if such submissions had been accurate, Company C's actions would have been only those required

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by the regulations. No justification for mitigation for good faith efforts to comply exists.

(attach additional sheets if necessary)

(b) Willfulness/Negligence As indicated above, lack of knowledge of the legal requirement is not a basis for reducing the penalty. To do so would encourage ignorance of the law. No evidence of willfulness has been presented but the prior knowledge of the 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these facts, an upward adjustment in the amount of 10% is justified.

(attach additional sheets if necessary)

(c) History of Compliance. No evidence demonstrating that Company C has had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in 2.(b) above, we will not duplicate such adjustment here.

(attach additional sheets if necessary)

(d) Ability to pay

N/A

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors Based on the litigation risk posed by (1) the Agency's inability to show (i) that all 24 drums were Company C's and (ii) that all drums contained F002 solvent, the Region decided to accept in settlement a smaller penalty than that proposed in the complaint. Since the aforementioned evidentiary weaknesses adversely affected one third of the 12 counts in the complaint, the Region reduced the proposed penalty amount by roughly one third or $100,000.

(attach additional sheets if necessary)

3. Economic Benefit Company C has reaped an economic benefit by avoiding the costs of materials and labor necessary to send proper notifications/certifications to Company Z. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit of this violation amounted to $2,500.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

N/A

(attach additional sheets if necessary)

PENALTY COMPUTATION WORKSHEET

Company Name Company C - Evanston Facility
Address

Requirement Violated 40 CFR §264.13(a) & 268.7(b), Failure to test restricted wastes

PENALTY AMOUNT FOR COMPLAINT

1. Gravity based penalty from matrix..($22,500 x 12)..$270,000
   (a) Potential for harm .....major
   (b) Extent of Deviation .....major
2. Select an amount from the appropriate multiday matrix cell.....N/A
3. Multiply line 2 by number of days of violation minus 1.....N/A
4. Add line 1 and line 3.....$270,000
5. Percent increase/decrease for good faith.....N/A
6. Percent increase for willfulness/ negligence.....10%
7. Percent increase for history of noncompliance.....N/A
8.* Total lines 5 thru 7.....10%
9. Multiply line 4 by line 8 .....$27,000
10. Calculate Economic Benefit.....$10,000
11. Add lines 4, 9 and 10 for penalty amount.....$307,000 to be inserted in the complaint

* Additional downward adjustments where substantiated by reliable information may be accounted for here.

NARRATIVE EXPLANATION TO SUPPORT COMPLAINT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Major - Company C's complete failure to test the wastes prevented Company Z from determining that the wastes were ineligible for land disposal, which contributed to the actual disposal in a leaking unit above the area's sole source of drinking water. The violation has a substantial adverse effect on the procedures for implementing the LDR program because testing to assure compliance is critically important.

(attach additional sheets if necessary)

(b) Extent of Deviation Major - Company C's waste analysis plan is substantially deficient in not explicitly requiring any testing to determine wastes are restricted, as evidenced by the resulting shipments from Company C which failed to identify their waste as restricted. Such deficiency is particularly significant where the wastes are very diverse as is the case here, because it is very difficult, if not impossible, to comply with the §264.13 requirement that the operation obtain "all of the information which must be known to [manage] the waste in accordance with ... Part 268."

(attach additional sheets if necessary)

(c) Multiple/Multi-day Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors (good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith No good faith efforts to comply have been made.

(attach additional sheets if necessary)

(b) Willfulness/Negligence No evidence of willfulness has been presented, but the prior knowledge of the 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these factors, an upward adjustment in the amount of 10% is justified.

(c) History of Compliance No evidence demonstrating that Company C has had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in 2.(b) above, we will not duplicate such adjustment here.

(attach additional sheets if necessary)

(d) Ability to pay

N/A

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors

N/A

(attach additional sheets if necessary)

3. Economic Benefit Company C reaped an economic benefit by avoiding the costs of waste analysis needed to determine the eligibility of the wastes for land disposal. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit attributable to these violations is $10,000.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

N/A

(attach additional sheets if necessary)

Company Name Company C - Evanston Facility
Address

Requirement Violated 40 CFR §264.13(a) & §268.7(b) Failure to test restricted wastes

SETTLEMENT PENALTY AMOUNT

1. Gravity based penalty from matrix..($22,500 x 12)..$270,000
   (a) Potential for harm .....Major
   (b) Extent of Deviation.....Major
2. Select an amount from the appropriate multiday matrix cell.....N/A
3. Multiply line 2 by number of days of violation minus 1.....N/A
4. Add line 1 and line 3.....$270,000
5. Percent increase/decrease for good faith.....N/A
6. Percent increase/decrease for willfulness/negligence.....10%
7. Percent increase for history of violation.....N/A
8. Percent increase/decrease for other unique factors .....N/A (except litigation risk)
9. Add lines 5, 6, 7, and 8.....10%
10. Multiply line 4 by line 9 .....$27,000
11. Add lines 4 and 10.....$297,000
12. Adjustment amount for environmental.....N/A project
13. Subtract line 12 from line 11 .....$297,000
14. Calculate economic benefit.....$10,000

15. Add lines 13 and 14.....$307,000

16. Adjustment amount for ability-to-pay.....N/A

17. Adjustment amount for litigation risk.....-$100,000

18. Add lines 16 and 17.....N/A

19. Subtract line 18 from line 15 for final settlement amount.....$207,000

This procedure should be repeated for each violation.

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

1. Gravity Based Penalty

(a) Potential for Harm Major - Company C's complete failure to test the wastes prevented Company Z from determining that the wastes were ineligible for land disposal, which contributed to the actual disposal in a leaking unit above the area's sole source of drinking water. The violation has a substantial adverse effect on the procedures for implementing the LDR program because testing to assure compliance is critically important.

(attach additional sheets if necessary)

(b) Extent of Deviation Major - Company C's waste analysis plan is substantially deficient in not explicitly requiring any testing to determine wastes are restricted, as evidenced by the resulting shipments from Company C which failed to identify their waste as restricted. Such deficiency is particularly significant where the wastes are very diverse as is the case here, because it is very difficult, if not impossible, to comply with the §264(3)(a) requirement that the operation obtain "all of the information which must be known to [manage] the waste in accordance with ... Part 268."

(attach additional sheets if necessary)

(c) Multiple/Multi-day Because each violation is properly viewed as independent and noncontinuous, no multi-day assessment is warranted. Because the violation was repeated 12 times, the gravity-based penalty amount is multiplied by 12.

(attach additional sheets if necessary)

2. Adjustment Factors (good faith, willfulness/negligence, history of compliance, ability to pay, environmental credits, and other unique factors must be justified, if applied.)

(a) Good Faith No good faith efforts to comply have been made.

(attach additional sheets if necessary)

(b) Willfulness/Negligence As indicated above, lack of knowledge of the legal requirement in not a basis for reducing the penalty. To do so would encourage ignorance of the law. No evidence of willfulness has been presented, but the prior knowledge of the 268.7 requirements by Company C's other facilities is evidence of negligence because a prudent company would advise all its facilities of the appropriate requirements, especially after one of the company's other facilities recently had been found liable for similar violations. Based on these factors, an upward adjustment in the amount of 10% is justified.

(c) History of Compliance No evidence demonstrating that Company C has had any similar previous violations at the Evanston facility has been presented. However, Company C operates other commercial treatment facilities, at least one of which recently has been found liable for similar violations. Based on these factors, an upward adjustment in the penalty is justified. However, because the upward adjustment is accounted for in 2.(b) above, we will not duplicate such adjustment here.

(attach additional sheets if necessary)

(d) Ability to pay

N/A

(attach additional sheets if necessary)

(e) Environmental Project

N/A

(attach additional sheets if necessary)

(f) Other Unique Factors Based on the litigation risk posed by the Agency's inability to show (i) that all 24 drums were Company C's and (ii) that all drums contained F002 solvent, the Region decided to accept in settlement a smaller penalty than had been proposed in the complaint. Since the aforementioned evidentiary weaknesses adversely affected the Agency's ability to prove one third of the 12 counts in our complaint, the Region reduced the proposed penalty by roughly one third or $100,000.

(attach additional sheets if necessary)

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3. Economic Benefit Company C reaped an economic benefit by avoiding the costs of waste analysis needed to determine the eligibility of the wastes for land disposal. A BEN analysis (copy omitted for purposes of this example) indicates the economic benefit attributable to these violations is $10,000.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information

N/A

(attach additional sheets if necessary)