

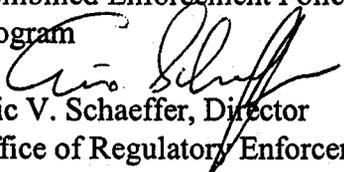


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

AUG 15 2001

SUBJECT: Combined Enforcement Policy for CAA Section 112(r) Risk Management Program

FROM: 
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Office of Regulatory Enforcement

TO: Regional Counsels, Regions I - X
Regional Enforcement Coordinators, Regions I - X
Regional Enforcement Division Directors, Regions I, II, IV, VI, VIII

Over the past year, the Office of Regulatory Enforcement and Regional offices have developed the attached Combined Enforcement Policy for violations of the Clean Air Act Section 112(r)(7) Risk Management Program. The attached Combined Enforcement Policy combines two policies, a penalty policy and enforcement response policy, that will govern civil enforcement actions for violations of the risk management program as found in 40 CFR Part 68. This Combined Enforcement Policy enumerates enforcement responses for violations of Part 68, provides a basis to calculate penalty figures for internal negotiation for civil judicial enforcement actions and for pleading administrative cases alleging violations of Part 68. The Combined Enforcement Policy is effective immediately, but may be evaluated after one year to determine if any modifications are needed.

Thank you for your assistance in developing the Combined Enforcement Policy. If you have any questions please contact Leslie Oif in the RCRA Enforcement Division at (202) 564-2291.

Attachment

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Combined Enforcement Policy
for Section 112(r) of the Clean Air Act

Office of Regulatory Enforcement
Office of Enforcement and Compliance
Assurance
U.S. Environmental Protection Agency

**Combined Enforcement Policy
for § 112(r) of the Clean Air Act**

Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

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I Introduction

In recent years, the large number of catastrophic accidents in the chemical industry (and associated facilities) due to the use, handling, production, or storage of highly toxic or flammable chemicals has drawn attention to the safety of these facilities. In an effort to eliminate or mitigate the consequences of such accidents to public health and the environment, on November 15, 1990, Congress passed the Clean Air Act (CAA) Amendments of 1990. The amendments added section 112(r) to the CAA which required the Environmental Protection Agency ("EPA" or "Agency") to promulgate programs and regulations preventing accidental hazardous chemical releases from stationary sources and minimizing the consequences of the accidental releases that do occur. In accordance with CAA § 112(r)(7) EPA promulgated the Risk Management Program ("Program"). This program established regulations codified at 40 C.F.R. Part 68 that are designed to prevent accidental releases of certain regulated substances from stationary sources.

This document is composed of two policies that govern civil enforcement actions for Program violations: the Enforcement Response Policy and the Penalty Policy. EPA is issuing these policies, jointly referred to as the Combined Enforcement Policy (CEP), to ensure that enforcement actions for the CAA § 112(r) are legally justifiable, uniform and consistent; that the enforcement response is appropriate for the violations committed; and that stationary sources will be deterred from committing such violations in the future. This CEP may be used to develop internal negotiation penalty figures for civil judicial enforcement actions and for pleading administrative cases. This CEP does not constitute a statement of EPA policy regarding the prosecution of criminal violations of CAA.

These policies are effective upon issuance and will assist staff in determining the appropriate response to Program violations, in calculating proposed penalties for civil administrative actions, and for settling actions concerning CAA § 112(r)(7). The policies and procedures set forth herein are intended solely for the guidance of employees of the EPA. They are not intended to, nor do they, constitute a rulemaking by the EPA. They may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA reserves the right to act at variance with these policies and to change them at any time without public notice.

II Summary of Statutory Requirements & Authorities

A. Statutory Requirements

The CAA § 112(r)(7) authorizes the Administrator to promulgate release prevention, detection, and correction requirements which may include monitoring, record keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. These regulations are codified in 40 C.F.R. Part 68, the Chemical Accident Prevention Provisions. The regulations require covered stationary sources to submit a

Risk Management Plan (RMP) that contains three main elements: a hazard assessment, a prevention program, and an emergency response program.

B. Statutory Penalty Authorities

The CAA § 113(d) authorizes the Administrator to issue an administrative order assessing an administrative penalty of not more than \$25,000 per day for each violation of CAA § 112(r) and the implementing regulations found in 40 C.F.R. Part 68. As a result of the Debt Collection Improvement Act of 1996, and the subsequent Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, violations of CAA § 112(r) which occur after January 30, 1997, are subject to the new statutory maximum civil penalty of \$27,500 per day for each violation. The CAA § 113 authorizes EPA to assess civil administrative penalties and establishes penalty factors. These penalty factors are addressed in Section IV of this document and in the CAA Stationary Source Civil Penalty Policy. Both documents take these factors into consideration in the assessment of any penalty.

III Enforcement Response Policy

When an owner or operator¹ is found to be in violation of Program requirements, EPA should take an appropriate course of action. An appropriate response will achieve a timely return to compliance and serve as a deterrent to future non-compliance by eliminating any economic benefit received by the violator. All enforcement responses will follow the established guidelines for timely and appropriate action.² An appropriate enforcement response may include non-penalty actions (warning letter, finding of violation or preliminary determination), penalty actions (civil administrative action, civil judicial referrals) and criminal sanctions.

A. Non-penalty Actions (Warning Letter, Finding of Violation, Preliminary Determination, or Administrative Order)

A warning letter is a document EPA may issue in the event that problems are found with a source's RMP. No additional penalties are attached to a warning letter. Warning letters may be an appropriate response for easily correctable deficiencies which do not warrant further action. In the event that a source does not address the deficiencies noted in a warning letter, EPA will generally pursue an elevated enforcement response.

¹ The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source, including the technician who operates a stationary source, as well as the individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any Agency, department, or instrumentality of the United States who employs the technician or employee.

² See The Timely and Appropriate (T&A) Enforcement Response To High Priority Violations (HPVs), March 16, 1999, <http://www.epa.gov/oeca/ore/aed/comp/bcomp/hpvguide.pdf> This guidance document establishes time periods for addressing violations of certain requirements of the Clean Air Act. For Part 68, the requirement to file an RMP is addressed in this policy.

Similarly, Regions may issue a finding of violation (FOV) when any Program violation is found. FOVs are an appropriate response to violations of a more significant nature but which do not rise to the level of a penalty action. An FOV may be crafted similarly to the notice of violation which is required by CAA § 113(a)(1) to address state implementation plan violations. Failure to address deficiencies identified in an FOV should result in a penalty action.

A preliminary determination is issued as a result of an audit conducted pursuant to 40 C.F.R. § 68.220. This provision requires the implementing agency to periodically audit RMPs in order to review their adequacy and to require necessary revisions. The determination consists of a written notice detailing any deviations from statutory or regulatory requirements, describing deficiencies in a source's RMP and an explanation for the basis of the findings, reflecting, if applicable, industry standards and guidelines. A preliminary determination should only be issued to address discrepancies found as a result of a 40 C.F.R. § 68.220 audit. In the event that the discrepancies uncovered by the audit warrant a more severe enforcement response, Regions may concurrently or subsequently pursue other enforcement options.

An administrative order (AO) pursuant to CAA § 113(a)(3)(B) is a formal action ordering compliance with the CAA. As with an FOV, an AO cites the relevant statutory or regulatory requirements not being met. Similarly, failure to address deficiencies identified in an AO will also result in a penalty action.

EPA's enforcement response may consist only of a warning letter, preliminary determination, FOV or AO, or the response may consist of a combination of these documents in addition to penalty actions. Issuing only a warning letter, preliminary determination, FOV, or AO is the appropriate enforcement response for easily correctable violations including easily correctable violations uncovered during an audit pursuant to 40 C.F.R. § 68.220(f)-(h) if it can be documented that they are likely to have minimal adverse health and safety implications. Owners or operators of facilities who fail to return to compliance following receipt of an FOV or AO (per 40 C.F.R. § 68.220) should have their violations escalated to civil administrative enforcement level.

B. Penalty Actions

Penalty actions are appropriate for owners or operators of facilities which have significant violations of the regulations or of CAA § 112(r)(7). Noncompliance that caused actual exposure or a substantial likelihood of exposure to accidentally released hazardous chemicals is a significant violation. The actual or substantial likelihood of exposure should be evaluated using facility-specific environmental and exposure information whenever possible in order to establish the magnitude of the potential or actual release. This may include evaluating potential exposure pathways and the mobility and toxicity of the released substance. Finally, the litigation team should determine whether owners or operators of Program facilities are chronic or recalcitrant violators.

If the nature of the violation lends itself to be classified as a significant violation then it should be addressed through a penalty action. This response should initiate a civil judicial or administrative process which results in an enforceable agreement or order. The formal enforcement response should ensure that the non-compliant owner or operator of the facility expeditiously returns the facility to full compliance.

The Administrator of EPA, under CAA § 113(b), may refer civil judicial cases to the United States Department of Justice (DOJ) for assessment and/or collection of the penalty in the appropriate U.S. District Court. EPA may also refer to DOJ an action for permanent or temporary injunction. In addition, EPA must refer to DOJ cases which result in penalties greater than \$220,000 or for which the first alleged date of violation occurred more than 12 months prior to initiation of the administrative action. EPA may, however, seek a waiver from DOJ to address these cases administratively.

C. Criminal Sanctions

This policy does not address criminal sanctions EPA may impose. Matters involving possible criminal behavior by individuals or organizations should be referred to the Regional Criminal Enforcement Counsel.

IV Penalty Policy

The factors relevant to setting an appropriate penalty appear in CAA § 113(e). These factors are: the size of the business; the economic impact of the penalty on the business; the violator's full compliance history and good faith efforts to comply; the duration of the violation as established by any credible evidence; payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance; the seriousness of the violation; and other factors as justice may require. The purposes of this Penalty Policy are to ensure that: (1) civil penalties are assessed in accordance with the CAA and in a fair and consistent manner; (2) penalties are appropriate for the gravity of the violation; (3) economic incentives for non-compliance are eliminated; (4) penalties are sufficient to deter persons from committing violations; (5) and compliance is expeditiously achieved and maintained.

Penalties assessed are composed of two components: (1) the amount equal to the economic benefit of the noncompliance, and (2) an amount reflective of the gravity of the violation. These components should be calculated using the most aggressive assumptions supportable (i.e., assumptions most protective of the environment). This policy allows a penalty to be mitigated or aggravated, depending on the circumstances. However, pleading must always include the full economic benefit component. As a general rule, the gravity component of the penalty should not be mitigated, although this policy does allow for mitigation as discussed below.

The proposed penalty amount is the result of the following formula:

Penalty = [Economic Benefit \pm adjustment factors] + [Gravity Component (seriousness of violation + duration of violation + size of violator) \pm adjustment factors]

A. Determination of Economic Benefit

1. Factors for Determining the Economic Benefit

The preliminary economic benefit component is based on the economic savings from delayed and/or avoided costs required to comply with the regulations and any benefits other than cost savings. The economic benefit of delayed compliance and from avoided costs should generally be computed using the methodology given in "Detailed Calculations," Appendix A of the BEN User's Manual, September 1999³. (See also "Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases," 64 FR 32,948 (June 18, 1999)⁴ and "A Framework for Statute-Specific Approaches to Penalty Assessments," #GM-22 (1984), U.S. EPA General Enforcement Policy Compendium.) The benefit other than cost savings should be computed when 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 EPA to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the BEN methodology.

(a) Delayed Cost Benefit

An economic benefit derived from noncompliance is the ability to delay expenditures necessary to achieve compliance. For example, a owner or operator who fails to implement necessary changes to process instrumentation and equipment (e.g., monitoring systems such as high temperature, pressure, level, and flow indicators and alarms) which are necessary to safely operate the facility has achieved an economic benefit by avoiding the costs associated with those changes. The BEN methodology can be used to calculate this figure.

(b) Avoided Cost Benefit

Another type of economic benefit derived from noncompliance is the ability to avoid entirely expenditures necessary to achieve compliance. An owner or operator avoids costs if he or she fails to, for example: train operators on new instrumentation and equipment; update and change piping and instrumentation diagrams; or revise operating procedures. Additionally, an owner or operator of a facility, who fails to establish or follow precautionary procedures (e.g., a pre start-up review [40 C.F.R. § 68.77]), as required by regulations has achieved the avoided cost benefit of less down time and greater production.

³ <http://www.epa.gov/oeca/models/ben.pdf>

⁴ http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=1999_register&docid=fr18jn99-118].pdf

2. Adjustment to the Economic Benefit Component

Normally, general EPA policy is not to adjust for or mitigate the economic benefit component of noncompliance. However, three general circumstances exist where EPA has discretion to mitigate the economic benefit component. The following are the limited circumstances in which EPA can, if determined to be appropriate, mitigate the economic benefit component of the penalty:

- Economic benefit component involves an insignificant amount;
- Compelling public concerns exist; and/or
- Litigation Risks.

The Stationary Source Civil Penalty Policy indicates that the litigation team may elect not to assess an economic benefit component in enforcement actions where the violator's economic benefit is less than \$5,000 (see p. 7 of the general policy). Regions are, however, encouraged to assess an economic benefit component if the circumstances warrant unless the benefit is less than \$500.

B. Determination of the Gravity Component

1. Factors for Determining the Gravity Component

The statutory considerations relevant in determining the gravity component are the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties previously assessed for the same violation, and the seriousness of the violation. Three of the factors (seriousness of the violation, duration of the violation, and size of the violator) are incorporated into Tables I, II, and III. The other statutory factors are discussed below in section IV.B.2., Adjustments To The Gravity Component.

(a) Seriousness of the Violation

The seriousness of a violation depends in part on the risk posed to the surrounding population and the environment as a result of the violation. Risk is a function of the extent of the deviations from the requirements, the likelihood of a release, and the sensitivity of the environment around the facility. The extent of the deviations depends on the degree and nature of the violations of the relevant requirements and their cumulative effect. The greater the extent of deviation the more likely that the owner or operator of the facility has compromised the safe operation of the facility and the safe management of the chemicals. The sensitivity of the environment can be characterized by considering the potential impact of the violation on the surrounding population and the environment from a worst-case release at the facility.

In determining the seriousness component of a penalty, Regions should first determine an initial figure from the following table. Within each range, Regions should choose an appropriate

figure, considering the type of the facility and the extent of deviation only, since other considerations are incorporated in later steps.

Table I
Penalty Assessment Matrix
for violations which occurred after June 22, 1999

		Type of Facility ⁵		
		Program 3	Program 2	Program 1
Extent of Deviation	Major	Not less than \$25,001	\$60,000 \$25,001	\$30,000 \$15,001
	Moderate	\$50,000 \$12,001	\$25,000 \$12,001	\$15,000 \$6,001
	Minor	\$20,000 \$5,000	\$12,000 \$5,000	\$6,000 \$2,000

To determine the extent of deviation from a particular Program requirement use the following guidelines:

Major: Cumulatively, the violations essentially undermine the ability of the facility to prevent or respond to releases through the development and implementation of the RMP.

Moderate: Cumulatively, the violations have a significant effect on the ability of the facility to prevent or respond to releases through the development and implementation of the RMP.

Minor: Cumulatively, the violations have only a minor effect on the ability of the facility to prevent or respond to releases through the development and implementation of the RMP.

Regions should understand that the statutory maximum for penalties under the Clean Air Act is \$27,500 per day per violation. Some of the penalty amounts in the matrix above exceed the statutory maximum. Penalties in excess of the statutory maximum may only be used if the Agency alleges that more than one violation has occurred.

⁵The facilities subject to part 68 fall into one of three categories: Program 1, 2 or 3. The program levels are defined in the RMP regulations and are based upon the level of risk posed by processes subject to the risk management program.

Regions should consider the circumstances surrounding the violation(s) to arrive at a specific penalty within the range for a given cell. Some examples of relevant factors are:

- Amount of pollutant
- Toxicity of the pollutant – Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.
- The potential for emergency personnel, the community, and the environment, to be exposed to hazards;
- The relative proximity of the surrounding population;
- The extent of community evacuation required or potentially required;
- The effect noncompliance has on the community's ability to plan for chemical emergencies; and,
- Any actual problems that first responders and emergency managers encountered because of the facility's violation.

After choosing an appropriate number from Table I, Regions should adjust the number to reflect the actual or potential environmental consequences of the actual or worst-case release. In order to do this, choose the most serious applicable category:

Major Impact: A release would likely have a significant effect on human health, a sensitive ecosystem, or wildlife (especially endangered species). Upward adjustment of 25% to 50%.

Moderate Impact: A release would likely have an effect on the surrounding, non-sensitive ecosystem. Upward adjustment of up to 25%.

Minor Impact: No adjustment.

(b) Duration of Violation

For the purposes of determining the duration of a violation, violations should be assumed to be continuous from the first provable date of the violation until the source demonstrates compliance.⁶ Table II is to be used in determining the duration component of a penalty.

⁶ In accordance with the October 25, 1991, CAA Stationary Source Civil Penalty Policy which intended "continuous" to apply to monitoring, maintenance, and implementing violations.

Table II
Duration of a Violation Component for
Violations Which Occurred after June 22, 1999

Months	Penalty
0-12	\$500/month
13-24	\$1,000/month
25-36	\$1,500/month
37 +	\$2,000/month

For example, if a violation is found to have a duration of 30 months, the duration component would be:
 $\$6,000$ (\$500/month for the first 12 months) + $\$12,000$ (\$1,000/month for the second 12 months) + $\$9,000$ (\$1,500/month for the final 6 months) = $\$27,000$

(c) Size of Violator

EPA will scale the penalty to the size of the violator.⁷ The size of the violator is determined from an individual's or company's net worth. In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, generally only the size of the entity sued should be considered. If the Region is unable to determine a company's net worth, it may determine the size of the violator based on gross revenues from all revenue sources during the prior calendar year. If the revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the prior three years may be used. The case development team should consider reducing the size of violator component if the initial penalty calculation could lead to an inequitable result of a large penalty due to the size of violator component and a comparatively small gravity component. Where the size of the violator figure (as determined in Table III) represents over 50% of the total penalty, the litigation team may, but need not, reduce the size of the violator figure to an amount equal to the rest of the penalty without the size of violator figure included. For example, suppose an initial penalty of \$100,000, with \$70,000 for size of violator and \$30,000 for the remaining penalty elements. Since the \$70,000 size of violator component is more than 50% of the \$100,000 total penalty, the size of violator component can be reduced to \$30,000 -- an amount equal to the rest of penalty (\$30,000). With this reduction, the final resulting penalty will be \$60,000, and the size of violator component will be 50% of this amount. For further information on the size of violator component, see the Clean Air Act Stationary Source Civil Penalty Policy dated October 25, 1991.

⁷Regional personnel should also consult the Small Business Policy and the Policy on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, if applicable, when assessing the size of violator component in penalty calculations.

Table III
Size of Violator Component

Net Worth	Size Adjustment
Under \$1,000,000	\$0
\$1,000,000 – \$5,000,000	\$10,000
\$5,000,001 – \$20,000,000	\$20,000
\$20,000,001 – \$40,000,000	\$35,000
\$40,000,001 – \$70,000,000	\$50,000
\$70,000,001 – \$100,000,000	\$70,000
Over \$100,000,001	\$70,000 + \$25,000 for every additional \$30,000,000

2. Adjustments To The Gravity Component

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of cooperation as specified in the CAA Stationary Source Civil Penalty Policy. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

In order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case, yet must produce results consistent enough to ensure that similarly-situated violators are treated similarly. This is accomplished by identifying the legitimate differences between cases and adjusting the gravity component in light of those facts. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

(a) Degree of Willfulness or Negligence

This factor may only be used to raise the penalty. The CAA is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, some adjustment may be made for a violator's degree of culpability. The violator's willfulness and/or negligence are relevant in assessing an appropriate penalty. The four principal criteria for assessing culpability are:

- The violator's familiarity with the particular requirement;
- The degree of the violator's control over the events constituting the violation;
- The ability to foresee the events constituting the violation; and
- The level of sophistication within the industry in dealing with compliance issues or the availability of appropriate control technology to mitigate the violation.

To arrive at an appropriate adjustment, Regions should consider the degree to which the respondent should have been able to prevent the violation, considering the sophistication of the respondent and the resources and information available to it, and any history of regulatory staff explaining to the respondent its legal obligations or notifying the respondent of violations. Depending upon the degree of culpability, the litigation team may increase the amount from Table 1 by as much as 75%.

In cases where the violator knowingly committed an act that he or she knew to be a violation, potential criminal action may be warranted and should be considered.

(b) Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the gravity component because the source is not making efforts to come into compliance and is negotiating with the Agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance – The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.
2. Prompt correction of noncompliance – The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into

compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.

3. Cooperation during pre-filing investigation – Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

(c) History of Noncompliance

The penalty amounts reflected in the gravity component penalty matrix apply to first time violators. Where a violator has demonstrated a history of prior violations, the penalty may need to be adjusted upward. The need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply by the penalty assessed for the previous violation or not ensuring continuous compliance after a non-penalty informal enforcement response. Another reason for penalizing repeat violators more severely than first time violators is the increased resources that are spent on the same violator. Therefore, this factor may be used only to raise a penalty.

For the purposes of determining the history of noncompliance, the litigation team should check for and consider prior violations of CAA § 112(r)(7) and/or prior violations of any of the provisions of 40 C.F.R. Part 68 that have occurred. In addition, the litigation team is encouraged to check for and consider prior violations under all environmental statutes enforced by EPA in determining the amount of the adjustment to be made under this factor. The following criteria apply in evaluating history of prior violations:

(1) Regardless of whether an owner or operator admits to the violation, evidence of a prior violation may be: a consent agreement and final order/consent order, a federal court judgment, a default judgment, a consent decree, an FOV, an AO, or a warning letter. A prior violation refers collectively to all the violations which may have been described in any of the documents listed above.

(2) Companies with multiple facilities, or wholly or partly owned subsidiaries with a parent corporation, may be considered as one when determining history of prior violations, however, two facilities may not necessarily affect each other's violation history if they are in substantially different lines of business, or if they are substantially independent of one another in their management and in the functioning of their Boards of Directors.

In determining the size of the adjustment, the litigation team should consider the following points: (1) similarity of the violation in question to prior violations; (2) time elapsed since the prior violation; (3) the number of prior violations; (4) violator's response to prior violations with regard to correcting the previous violation and attempts to avoid future violations; and (5) the extent to which the gravity component was already increased to reflect the repeated violation.

A history of noncompliance may reflect an owner's or operator's indifference to protection of the environment. Therefore, upward adjustments to the base penalty are warranted and may be calculated in the following manner: for second or subsequent violations of CAA § 112(r) or 40 C.F.R. Part 68, the gravity based component may be increased up to 100% provided that the final penalty does not exceed the \$27,500 per day per violation statutory maximum.

(d) Environmental Damage

The gravity component already reflects the extent or potential extent of environmental damage, taking into account such factors as the toxicity of the pollutant, the sensitivity of the environment, the length of time the violation continues, and the degree to which the source has deviated from a requirement. However, there may be cases where the actual environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, in the case of a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

(e) Other Adjustment Factors

In settling cases brought under this Penalty Policy, EPA may consider other adjustment factors (besides the gravity adjustment factors above) when establishing an appropriate penalty. Statutory adjustment factors that may apply are the economic impact of the penalty on the business and payments made by the violator of penalties previously assessed for the same violation. In addition, EPA may consider litigation risks and supplemental environmental projects in any potential adjustments.

(i) Economic Impact of the Penalty (Ability to Pay)

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary figure, both gravity component and economic benefit component, using any economic information available at the time⁸. 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, of seeking a penalty that might contribute to a company going out of business. For example, it is unlikely 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.

Enforcement personnel should conduct a preliminary inquiry into the financial status of the party against whom a proposed penalty is being assessed. This inquiry may include a review

⁸ See "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act," 5/28/96.

of publicly available information through services such as Dun & Bradstreet. Should the violator raise the Ability to Pay issue after commencement of negotiations, the litigation team should assess the factor only if the violator provides the necessary financial information to evaluate the claim. If the violator fails to provide sufficient information, then the litigation team should rely on the information it has in adjusting the penalty or disregard this factor entirely (as appropriate). The violator's ability to pay should be determined according to the December 16, 1986, Guidance on Determining a Violator's Ability to Pay a Civil Penalty, codified as PT 2-1 in the General Enforcement Policy Compendium (previously codified as GM-56). The relevant computer models used for determining the ability to pay are ABEL⁹, used for businesses, and INDIPAY¹⁰, used for individuals. In the case of municipalities or other local governmental bodies, the litigation team should assess the ability to pay using the MUNIPAY model.¹¹ Regions may also consider obtaining the services of a financial analyst for assistance in determining a violator's ability to pay.

If an alleged violator raises the ability to pay argument as a defense in its answer, or in the course of settlement negotiations, EPA should request the following types of information:

- 3 -5 years of signed tax returns plus schedules
- Balance sheets
- Income statements
- Statements of changes in financial position
- Statement of operations
- Retained earnings statements
- Loan applications, financing agreements, security agreements, business plans, financial projections
- Annual and quarterly reports to shareholders and the SEC, including 10K reports
- If a closely held corporation, the W-2 for the corporate officers

The burden of proof in ability to pay situations varies depending upon the forum in which the Agency finds itself. In judicial cases, the burden of proof is on the violator. In Administrative Procedures Act (APA) type hearings, the burden is on the Agency.¹² In informal administrative hearings, the burden is arguably on the violator. While discovery is readily

⁹ ABEL is found at <http://www.epa.gov/oeca/models/abel.html>.

¹⁰ INDIPAY is found at <http://www.epa.gov/oeca/models/indipay.html>.

¹¹ MUNIPAY is found at <http://www.epa.gov/oeca/models/munipay.html>.

¹² In re: New Waterbury, Ltd. 5 E.A.D. 529 (1994). In this case, the Environmental Appeals Board (EAB) included a detailed discussion regarding the burdens on the parties to present evidence of the Respondent's ability to pay a penalty. The EAB refined this analysis in In re: Robert Wallin (slip opinion, May 30, 2001) by requiring the Respondent to present specific inability-to-pay information once EPA has satisfied its initial burden of producing general financial information regarding Respondent's financial status (e.g., its sales volume or apparent solvency) sufficient to support the inference that the penalty assessment need not be reduced.

available in federal district court, it is much less available in APA hearings. It is essential that the litigation team make the presiding officer aware of what financial records the Agency needs in order to perform a professional ability to pay analysis early in the proceedings.¹³

Finally, in the event that the violator is a small business, Regions should refer to and apply all relevant factors given in EPA's Small Business Compliance Policy¹⁴. For reference, the Small Business Compliance Policy contains the following definition of a small business:

A small business is a person, corporation, partnership, or other entity that employs 100 or fewer individuals (across all facilities and operations owned by the small business). Entities, as defined under SBREFA, also include small governments and small organizations. Facilities that are operated by municipalities or other local governments may be covered under the Small Communities Policy (see <http://www.epa.gov/oeca/scpolcy.html>). Facilities that are disclosing violations involving multiple facilities should refer to the sections on multiple facilities in the Policy on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (the Audit Policy) of April 11, 2000.

(ii) Litigation Risks

Both the economic benefit and gravity components of the penalty may be mitigated in appropriate circumstances based on the risk of litigation. The following list briefly describes some of the types of litigation risks which should be considered in each case:

- Indications by the Court that it is prepared to recommend a penalty below the minimum settlement amount;
- Credibility of government witnesses;
- Specific facts, equities, evidentiary issues or other legal problems of a particular case; and
- Adverse legal precedent affirmatively argued by the violator which is indistinguishable from the current enforcement action.

Cases raising legal issues of first impression (i.e., new statutory laws or new regulations, such as the Program regulations) should be carefully chosen to present the issues fairly in a factual context EPA is prepared to litigate. Consequently, in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. Mitigation based on litigation risk should be carefully documented and explained in particular detail in each case.

¹³ For further guidance in this area, see Appendix A of the ability to pay case memorandum, available from the Multimedia Enforcement Division of the Office of Regulatory Enforcement, (202) 564-2230.

¹⁴The Small Business Policy can be found at <http://www.epa.gov/oeca/sbcp2000.pdf> and applies to violations which have been disclosed and corrected the by facility.

(iii) Offsetting Penalties Paid to State and Local Governments or Citizen Groups for the Same Violations

Under Section 113(e)(1), the court in a civil judicial action or the Administrator in a civil administrative action must consider in assessing a penalty "payment by the violator of penalties previously assessed for the same violation." While EPA will not automatically subtract any penalty amount paid by a source to a State or local agency in an enforcement action or to a citizen group in a citizen suit for the same violation that is the basis for EPA's enforcement action, the litigation team may do so if circumstances suggest that it is appropriate. The litigation team should consider primarily whether the remaining penalty is a sufficient deterrent.

(iv) Supplemental Environmental Projects (SEPs)

To further the goals of the EPA to protect and enhance public health and the environment, certain environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be included in the settlement.¹⁵ SEPs are environmentally beneficial projects which an owner or operator agrees to undertake in settlement of an environmental enforcement action, but which the violator is not otherwise legally required to perform. In return, some percentage of the cost of the SEP is considered as a factor in establishing the final penalty to be paid by the owner or operator.

EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. The commitment to perform a SEP may indicate an owner's or operator's new or extraordinary efforts to be a good environmental citizen. While SEPs may not be appropriate in settlement of all cases, they are an important part of EPA's enforcement program. EPA's litigation team has the sole discretion to include a SEP as part of a settlement of an enforcement action. EPA should ensure that the inclusion of a SEP in the settlement is consistent with EPA's SEP Policy in effect at the time of the settlement. While the cost of a SEP may be used to mitigate a penalty for the purposes of settlement, it is not to be used as an adjustment factor in litigation.

C. Settlement of Penalties

This Penalty Policy is immediately applicable and should be used to calculate penalties sought in all Program 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.

¹⁵ EPA's May 1, 1998, Supplemental Environmental Projects Policy can be found at <http://www.epa.gov/oeca/sep/sepfinal.html>.

D. Documentation of Penalty Settlement Amount

Until settlement discussions or the pre-hearing information exchanges are held with the owner or operator, mitigating and equitable factors and overall strength of EPA's enforcement case may be difficult to assess. Accordingly, preparation of a penalty calculation worksheet for purposes of establishing EPA'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.

V Other Policies

Regions should consult the following policies, some of which have already been mentioned in this CEP, as appropriate. Also, distributing a SBREFA information sheet is required at the time of the first enforcement action (which includes an inspection):

- CAA Stationary Civil Penalty Policy, October 25, 1991.
- Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (Audit Policy)¹⁶, effective May 11, 2000.
- Small Business Compliance Policy
- Policy on Flexible State Enforcement Responses to Small Community Violations, November 1995¹⁷
- Supplemental Environmental Projects Policy
- Timely and Appropriate (T&A) Enforcement Response To High Priority Violations (HPVs)
- Equal Access to Justice Act

Note that both the audit and the small business policies control where facilities meet the conditions of those policies.

¹⁶ Found at <http://www.epa.gov/oeca/finalpolstate.pdf>

¹⁷ <http://www.epa.gov/oeca/scpolicy.html>

VI Conclusion

Establishing fair, consistent, and sensible guidelines for addressing violators is central to the credibility of the EPA's enforcement effort of the CAA § 112(r) and to the success of achieving the goal of equitable treatment. This policy establishes several mechanisms to promote consistency and flexibility when determining significant violations of the regulations. Also, the systematic methods for calculating the economic benefit and gravity component base penalties, which add up to the preliminary deterrence amount, both have the consistency and flexibility to address any issue fairly (tailored to the specific circumstances of the violation). Furthermore, this policy sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial amount after negotiations have begun.

In order to ensure that EPA promotes consistency, it is essential that each case file contain a complete description of how each penalty was calculated as required by the August 9, 1990, Guidance on Documenting Penalty Calculations and Justification in EPA Enforcement Actions¹⁸. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. Furthermore, it should explain the facts and reasons which support such adjustments.

¹⁸ <http://www.epa.gov/oeca/ore/rcra/cmp/080990.pdf>