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

JUN 2 3 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Revisions to the 1990 RCRA Civil Penalty Policy

FROM: John Peter Suarez
Assistant Administrator

TO: Regional Counsel, Regions 1 - 10
Regional Enforcement Division Directors, Regions 1, 2, 4, 6 and 8
Waste Management Division Directors, Regions 1 - 10

This memorandum transmits to you the final revised Civil Penalty Policy ("Penalty Policy") for actions taken under Subtitle C of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq,* for immediate use in RCRA enforcement actions.[1] This document includes numerous revisions to the 1990 Civil Penalty Policy, the most significant of which are referenced below. In developing this document, the Office of Regulatory Enforcement, RCRA Enforcement Division, coordinated with RCRA regional enforcement managers, relevant Headquarters offices and the Department of Justice. These revisions are the result of significant review and comment by these offices, and reflect case law and EPA policy that has evolved over the last twelve years.

I would like to express my appreciation to the workgroup members whose hard work and informative review and consultation is reflected in the revised Penalty Policy. I believe these changes significantly improve the Penalty Policy and make it an up-to-date, practical guide for the assessment of RCRA penalties.

As you know, the Penalty Policy provides guidance on developing penalty amounts that should be sought in administrative actions filed under RCRA and penalty amounts that would be

[1] As stated in the Policy, the Policy is immediately applicable and should be used to calculate penalties sought in all RCRA administrative actions 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 andjudicial enforcement actions instituted prior to but not yet resolved as of the date the Policy is issued.

be acceptable in settlement of administrative and judicial enforcement actions under RCRA. As stressed in the Penalty Policy, this document is only guidance and all penalties associated with RCRA enforcement actions must meet the statutory requirements (42 U.S.C. § 6928).

The revisions that have been made include:

1. The penalty numbers have been adjusted upward by 10% as required by the Debt Collection Improvement Act of 1996 (another potential increase is pending).

2. The amount of economic benefit considered "significant" warranting inclusion in a complaint has been increased as follows: $3,000 for penalties less than $30,000; 10% of penalties between $30,000 and $50,000; and $5,000 for penalties greater than $50,000.

3. The Section on economic benefit has been updated to include "illegal competitive advantage" concept and "rule of thumb" approach (for calculating small EBN penalties).

4. A penalty mitigation factor has been added to allow for consideration of a violator's "cooperative attitude" which may allow further penalty reduction up to 10%.

5. A discussion has been added regarding notice pleading (pleading statutory maximum) in some cases to address concerns raised by amendments to the Equal Access to Justice Act and to match changes to the Consolidated Rules of Practice (40 CFR Part 22).

6. The History of Noncompliance consideration has been expanded to include other state and federal environmental laws.

7. The discussion regarding violations which present harm to the regulatory program has been revised to demonstrate the connection to potential harm to human health and the environment.

8. The Policy has been updated to reflect recent case law developments regarding statute of limitations and continuing violations.

9. A presumption has been added that small non-profit organizations and small municipalities may not be as sophisticated as other regulated entities.

10. A discussion and sample complaint language have been added regarding violations continuing after complaint is filed; alternatives include reserving rights to amend complaint or actually pleading a per day amount to be added to penalty.

11. References have been added-to relevant policies such as the Small Business Compliance Policy, the Incentives for Self-Policing Policy (Audit Policy) and the Supplemental Environmental Projects Policy.

If you would like to discuss this matter further, please contact Rosemarie Kelley of the RCRA Enforcement Division at (202) 564-4014 or your staff can call Pete Raack at (202) 564-4075.

Attachment

cc: Enforcement Coordinators, Regions 1-10
Robert Kaplan, Acting Director, Multimedia Enforcement Division
RCRA Enforcement Branch Chiefs
Walker Smith, Office of Regulatory Enforcement
Karen Dworkin, U.S. Department of Justice
Robert Springer, Office of Solid Waste
Earl Salo, Office of General Counsel
Susan Bromm, Office of Site Remediation Enforcement
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RCRA CIVIL PENALTY POLICY

RCRA Enforcement Division
Office of Regulatory Enforcement
Office of Enforcement and Compliance Assurance
U.S. EPA

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RCRA CIVIL PENALTY POLICY

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I. SUMMARY OF THE POLICY

The penalty calculation system established through U.S. Environmental Protection Agency's RCRA Civil Penalty Policy ("Penalty Policy" or "Policy") is based upon Section 3008 of RCRA, 42 U.S.C. § 6928. Under this section, the seriousness of the violation and any good faith efforts to comply with applicable requirements are to be considered in assessing a penalty. Consistent with this statutory direction, this 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 + multi-day +/- adjustments + economic benefit
component component

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.

In civil judicial cases, EPA will use the narrative penalty assessment criteria set forth in the Policy to explain the penalty amount agreed to in settlement. In litigation, the penalty that is sought should be based on the statutory factors set forth in Section 3008, 42 U.S.C. § 6928 as well as relevant case law.

Under this Policy, 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[1]

Extent of Deviation from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$27,500 to 22,000	$21,999 to 16,500	$16,499 to 12,100
MODERATE	$12,099 to 8800	$8,799 to 5,500	$5,499 to 3,300
MINOR	$3,299 to 1,650	$1,649 to 550	$549 to 110

The Policy also explains how to factor into the calculation of the gravity-based component the presence of multiple and multi-day (continuing) violations. The Policy provides that for days 2 through 180 of multi-day violations, the calculation of penalties using a multi-day component is 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 should 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 $110 per day) of the penalty amounts in the corresponding gravity-based matrix cells. Enforcement personnel also retain discretion to impose multi-day penalties: (1) of up to $27,500 per day, when appropriate under

[1]Although the upper end of the penalty range exceeds the statutory maximum found in RCRA Section 3008, 42 U.S.C. § 6928, a 10% increase in the statutory penalty amount was authorized by Congress in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See footnote 3 for further discussion.

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 several methodologies that can be used to quickly and accurately calculate economic benefit. See Section VIII.A.2.

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:[2]

- good faith efforts to comply/lack of good faith (downward or upward 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 and the cooperation of the facility during the inspection, case development and enforcement process prior to prehearing exchange (upward or downward adjustment).

These factors (with the exception of the upward adjustment factor for history of noncompliance and the statutory downward adjustment factor for a violator's good faith efforts to comply) should usually be considered after the penalty 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 in the matrix, calculating the economic benefit of noncompliance, where appropriate, and adjusting the penalty assessment on the basis of the factors set forth above. Note that these examples are provided merely to illustrate application of the components of this Policy. Actual cases may require consideration of a wider range of facts and conditions in calculating penalties under this Policy. For example, in actual cases, there may be more complex circumstances that should be taken into account in determining the appropriate degree of "potential for harm." Also, the penalty justifications for real cases may require more

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[2]Note that RCRA Section 3008, 42 U.S.C. § 6928, requires consideration of good faith efforts to comply; the additional factors are consistent with the statutory mandate of Section 3008(a)(3) and ensure that penalties are assessed in a manner that treats the regulated community equitably (similar violations are treated similarly) while maintaining case-specific flexibility.

case-specific details supporting the decision from where in the matrix cell range the penalty is taken.

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 the Federal Facility Compliance Act of 1992, P.L. 102-386. 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. This amount has subsequently been increased to $27,500.[3] 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 $27,500 per day for each violation of Subtitle C. This document sets forth the Agency's Policy and internal guidelines for determining penalty amounts that: (1) should be sought in administrative actions filed under RCRA[4] and (2) would be

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[3]The amount that may be sought was adjusted upward from the statutory maximum of $25,000 to $27,500 pursuant to the authority of the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, and regulations implementing that Act found at 40 CFR Part 19. For more information, see the May 19, 1997, Memorandum from Steven A. Herman “Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996).”

[4]This Policy does not limit the penalty amount that may be sought in civil judicial actions. In civil judicial actions brought pursuant to RCRA, the United States may, in its discretion, continue to file complaints requesting a civil penalty up to the statutory maximum amount, and may litigate for the maximum amount justifiable on the facts of the case.

acceptable in settlement of administrative and judicial enforcement actions under RCRA[5]. This Policy 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*, and penalties assessed under the Mercury-Containing and Rechargeable Battery Management Act of 1996 ("Battery Act"), 42 U.S.C. §§ 14301-14336[6].

The purposes of the Policy are to ensure that RCRA civil penalties are assessed in a manner consistent with Section 3008; that 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 Policy does not address whether assessment of a civil penalty is the correct enforcement response to a particular violation. Rather, this Policy 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 Hazardous Waste Civil Enforcement Response Policy, March 15, 1996, and any subsequent amendments to that document. The Enforcement Response Policy provides a general framework for identifying violations and violators of concern as well as guidance on selecting the appropriate enforcement response to various RCRA violations.

While this Policy addresses the calculation of specific penalty amounts for the purposes of administrative enforcement actions, under appropriate circumstances, Agency personnel may plead the statutory maximum penalty. This form of notice pleading, which is allowed under the revised Consolidated Rules of Practice,[7] 40 CFR § 22.14(a)(4), permits the Agency to avoid

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[5]In addition to administrative actions and administrative and judicial settlements brought under RCRA Subtitle C, this Policy applies to penalties sought in administrative complaints and accepted in settlement of administrative and judicial enforcement actions brought pursuant to the authority of RCRA Section 4005(c)(2)(A), 42 U.S.C. § 6945(c)(2)(A). This provision allows for federal enforcement where EPA has determined that the state has not adopted an adequate program.

[6]This Policy does, however, apply to penalties assessed under Section 14323 of the Battery Act relating to the collection, storage or transportation of some types of batteries.

[7]The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("the Consolidated Rules of Practice" or "the Rules") are found at 40

potential issues regarding the proposing of a penalty where information, such as the financial viability of the respondent, cannot be obtained before the complaint is filed. For more information, see the May 28, 1996, Memorandum from Robert Van Heuvelen "Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act" and the preamble to the revised Consolidated Rules of Practice, 64 Fed. Reg. 40137, 40151 (7/23/99).

The RCRA Civil Penalty Policy is immediately applicable and should be used to calculate penalties sought in all RCRA administrative actions 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.[8]

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 act 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 method for calculating penalties consistent with the established goals of the Agency's Policy on Civil Penalties[9] which was issued on February 16, 1984. These goals are:

- deterrence;
- fair and equitable treatment of the regulated community; and
- swift resolution of environmental problems.

CFR Part 22. Revisions to these Rules were published on July 23, 1999, (64 Fed. Reg. 40137), and were effective August 23, 1999.

[8]For more information on the role of Agency penalty policies in administrative litigation and their use by Presiding Officers and the Environmental Appeals Board, see the March 19, 1997, Memorandum from Robert Van Heuvelen "Impact of Wausau on Use of Penalty Policies" and the December 15, 1995, Memorandum from Robert Van Heuvelen "Guidance on Use of Penalty Policies in Administrative Litigation." For EAB discussions on this subject, see In re: Catalina Yachts, 8 E.A.D. 199 (EAB, 3/24/99); In re: Ocean State Asbestos Removal, 7 E.A.D. 522 (EAB, 3/13/98). The Regions are counseled to review current caselaw and policies issued which may affect the role of the Agency's penalty policies in administrative litigation.

[9]Codified as Policy PT.1-1 in the Revised General Enforcement Policy Compendium.

The RCRA Penalty Policy also adheres to the Agency's 1984 Civil Penalty 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 LITIGATION

In order to support the penalty proposed in the administrative enforcement action, 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 enforcement action. 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)(4)(i), require that in cases where a specific penalty demand is included in the complaint, a brief explanation of the rationale for the proposed penalty must be included. The regulations require that in such cases the Agency must additionally explain in the prehearing exchange of information how the proposed penalty was calculated in accordance with any criteria set forth in RCRA. See 40 CFR § 22.19(a)(3). For those penalty cases where the statutory maximum is pled in the complaint, the regulations require that the Agency include in the prehearing exchange all factual information relevant to the assessment of the penalty and that the Agency file, within fifteen days after respondent files its prehearing information exchange, a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in RCRA.[10] See 40 CFR § 22.19(a)(4).

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[10]For those complaints which contain the statutory maximum, the Consolidated Rules of Practice require that the complaints state the number of violations (and where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation

To ensure that RCRA administrative complaints comply with the statute and the rules for those cases where a specific proposed penalty is sought when the complaint is initially issued, as long as sufficient facts are alleged in the complaint, enforcement personnel may plead the following:

> Based upon the facts alleged in this Complaint, upon those factors set forth in Section 3008(a)(3) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a)(3), and the RCRA Civil Penalty Policy, including the seriousness of the violations, any good faith efforts by the respondent to comply with applicable requirements, any economic benefit accruing to the respondent, and 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

Where a specific penalty is sought, enforcement personnel may use the above general language in the complaint and should include a copy of the penalty calculation worksheets or the analogous regional penalty calculation summary as an attachment to the complaint. When the proposed penalty is sent to the respondent in the pre-hearing exchange submission, the penalty calculation worksheets or the analogous regional penalty calculation summary should be included at that time. Enforcement personnel 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.

The record supporting the penalty amount specified in the complaint should include a penalty computation worksheet or the analogous regional penalty calculation summary which explains the potential for harm, extent of deviation from statutory or regulatory requirements, economic benefit of noncompliance, and any adjustment factors applied (*e.g.*, good faith efforts to comply). An example of the worksheet is attached in the Appendix to this Policy. Also, the record should include any inspection reports and other documents relating to the penalty calculation. For more information, see the August 9, 1990, Memorandum from James Strock "Documenting Penalty Calculations and Justifications in EPA Enforcement Actions."

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alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint. See 40 CFR § 22.14(a)(4)(ii).

B. DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT

Until settlement discussions or the pre-hearing information exchanges occur 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 and document a penalty calculation 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 or an analogous regional penalty calculation summary which provides the rationale for the final settlement amount to be included in the case file. 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.

An example of the penalty computation worksheet that may be included in the case file is attached to this Policy in Section X.A.

C. RELEASE OF INFORMATION

Release of information to members of the public relating to the use of the RCRA Civil Penalty Policy in enforcement cases is subject to the Freedom of Information Act (FOIA), 5 U.S.C. § 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 and similar calculation summaries) may be covered by two different FOIA exemptions, 5 U.S.C.§§ 552(b)(5) and (7). 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.[11] It is important to note that the Agency should, under most circumstances, release

[11]If EPA receives a FOIA request relating to the civil penalty in a judicial enforcement action, it must notify and coordinate with the Department of Justice before responding.

the final draft of the penalty computation worksheets or the analogous regional penalty calculation summary at the time a specific penalty amount is proposed. For more information on the Agency's policy of releasing information, see the August 15, 1996, Memorandum from Steven A. Herman "Public Release of EPA Enforcement Information." 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 regional legal office 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. For additional information on FOIA and current Agency FOIA policy, Agency enforcement personnel should consult the 1992 EPA Freedom of Information Act Manual and contact the Office of General Counsel (Finance and Operations Law Office).

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

The Consolidated Rules of Practice for administrative proceedings allow the Agency to include a specific proposed penalty in the complaint or within 15 days after the respondent files its prehearing exchange of information. The Rules require that, in either situation, the Agency must provide the respondent with an explanation of how the penalty was calculated in accordance with any criteria set forth in RCRA.[12] The Penalty Policy not only facilitates compliance with the Rules of Practice by requiring that enforcement personnel calculate a proposed penalty (and include this amount and the underlying rationale for adopting it either in the complaint or within 15 days after the respondent files the prehearing exchange), but also identifies 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 that will be sought in the administrative hearing 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.
Therefore, Agency enforcement personnel should, as necessary, prepare two separate penalty calculations for each administrative proceeding -- one to support the initial proposed penalty and the other to be placed in the administrative file as support for the final penalty amount the

[12]See 40 CFR §§ 22.19(a)(3) and (4).

Agency accepts in settlement.[13] In calculating the amount of the proposed penalty to be sought in an administrative proceeding, Agency personnel should total: (1) the gravity-based penalty amount (including any multi-day component), and (2) an amount reflecting upward adjustments[14] 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[15] to comply with applicable requirements." 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 the administrative proceeding.

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, 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).

It may be noted 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

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[13] 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. Counsel for the United States may point out to the court in judicial actions that the penalty figure it seeks is consistent with the rationale underlying the Penalty Policy. However, counsel should not suggest that the court is bound to follow the Policy in assessing a civil penalty.

[14] 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 CFR § 22.14(c).

[15] 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 generally 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 or the subsequent proposed penalty calculation document (where the statutory maximum is sought in the complaint) that application of additional downward adjustment factors is warranted by the facts.

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, (2) the Agency faces certain litigative risks in proceeding to hearing or trial, or (3) the violator demonstrates a highly cooperative attitude throughout the compliance inspection and enforcement process, 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 any of these three "settlement only" factors in assessing a civil 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 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.

Section VI. sets forth the considerations that should be evaluated in determining the appropriate severity of each factor that will then be used to calculate the initial gravity penalty component based on the circumstances of a single violation or a set of violations. This Section also provides a matrix to be used to arrive at that initial gravity penalty amount based on the chosen level for each of the factors. Lastly, this Section includes a discussion of how to approach the frequently-arising situation of storage violations that result after a failure to meet conditions for exemption at generator facilities.

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. In addition to those violations that involve actual or potential contamination from the release of hazardous wastes, violations such as failure to comply with recordkeeping requirements create a risk of harm to the environment or human health as well as undermine 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 posing 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 or waste management practice 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:

- quantity and toxicity of wastes (potentially) released,
- likelihood or fact of transport by way of environmental media (*e.g.*, air and groundwater), and

- 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).[16]

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. Violators rarely have any control over whether their pollution actually causes harm. Therefore, such violators should not be rewarded with lower penalties simply because the violations did not result in actual harm.

2. Harm To The RCRA Regulatory Program

There are some requirements of the RCRA program which, if violated, may not appear to give rise as directly or immediately to a significant risk of contamination as other requirements of the program. Noncompliance with these requirements, however, directly increases the threat of harm to human health and the environment. Therefore, 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:

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

It should also be clear that these types of requirements are based squarely on protection concerns and are fundamental to the overall goals of RCRA to handle wastes in a safe and responsible manner. For example, preparation and maintenance of manifests are vital to ensure that hazardous waste is not mishandled, responses to information requests are necessary to ensure that crucial information is obtained and, in some cases, immediately acted upon, and groundwater monitoring results must be maintained to ensure releases can be fully addressed and

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[16]In considering this factor, the environmental sensitivity of the receptor areas or populations should be examined. The risk of exposure to a particularly sensitive environmental area, such as a wetlands, a drinking water source, or the habitat of a threatened or endangered species, may be a basis for an upward adjustment of the category chosen for the potential harm (i.e., minor to moderate, moderate to major) or a selection of a higher amount in the range of the chosen penalty matrix cell.

the spreading of contamination is stopped.

3. Applying the Potential for Harm Factor

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

Example 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 40 CFR § 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.

Example 2 - Moderate Potential for Harm

Owners and operators of hazardous waste facilities that store containers must comply with the regulations found at 40 CFR Part 264, Subpart I. One of the regulations found in this Subpart requires owners/operators to inspect, at least weekly, container storage areas to ensure containers are not deteriorating or leaking (40 CFR § 264.174). If a facility was inspecting storage areas twice monthly, this situation could present a significant risk of release of hazardous wastes to the environment. Because some inspections were occurring, it is unlikely that a leak would go completely undetected; however, the frequency of the inspections may allow a container to leak for up to two weeks unnoticed. The moderate potential for harm category would be appropriate in this case.

Example 3 - Minor Potential for Harm

Owners or operators of hazardous waste facilities must, under 40 CFR § 262.23, sign each manifest certification by hand. If a facility was using manifests that had a type-written name where the signature should be, this would create a potential for harm. Enforcement personnel would need to examine the impact that failure to sign the manifest certification would have on the integrity of the manifest system and the validity and reliability of the information indicated on the manifest. If the manifests were otherwise completed correctly and had other indicia that the information was correct, 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

1. Evaluating the Extent of Deviation

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. Examples

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	$27,500 to 22,000	$21,999 to 16,500	$16,499 to 12,100
MODERATE	$12,099 to 8,800	$8,799 to 5,500	$5,499 to 3,300
MINOR	$3,299 to 1,650	$1,649 to 550	$549 to 110

The lowest cell (minor potential for harm/minor extent of deviation) contains a penalty range from $110 to $549. The highest cell (major potential for harm/major extent of deviation) is limited by the maximum statutory penalty allowance of $27,500 per day for each violation.[17]

[17]Note that all references in this Policy to matrix cells consist of the Potential for Harm factor followed by the Extent of Deviation factor (*e.g.*, major potential for harm/moderate extent of deviation is referred to as major/moderate).

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. Enforcement personnel should analyze and rely on case-specific factors in selecting a dollar figure from this range. Such factors include the seriousness of the violation (relative to other violations falling within the same matrix cell), the environmental sensitivity of the areas potentially threatened by the violation, 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,[18] the number of days of violation,[19] and other relevant matters. For guidance on recalculation of the gravity based penalty based on new information, see Section IX A.2.

For some continuing violations, it is possible that circumstances may change during the period of violation in some manner that could affect the Potential for Harm or Extent of Deviation determinations. Enforcement personnel may choose different matrix cells for different periods of the same violation. For example, for a violation that lasts for 100 days, the circumstances during the first 50 days may warrant a penalty from the major/major cell. On day 51, if the violator takes affirmative steps to come into compliance or otherwise address the noncompliance but does not completely end the violation, the Potential for Harm or Extent of Deviation may change enough to warrant a different category (i.e., moderate or minor). In such a case, enforcement personnel should calculate separate penalties for the distinct periods of violation. This adjustment only applies where actions of the violator change the circumstances; natural attenuation or other natural changes in the circumstances should not result in this type of bifurcated penalty calculation.

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[18]When considering the sophistication of the violator, enforcement personnel may presume, in the absence of information to the contrary, that entities such as small non-profit organizations and small municipalities do not possess the same level of sophistication as other regulated entities. This presumption should, in most circumstances, result in a lower penalty amount than would otherwise be selected for similar violations. The sophistication of the violator is also relevant in the case of a small business. Agency personnel should consult the April 5, 2000, “Small Business Compliance Policy” and consider all relevant factors in determining the appropriate enforcement response in these circumstances.

[19]For example, for violations that continue for more than one day, when a multi-day component is not part of the penalty calculation, the number of days can be considered as a factor to select an appropriate penalty from this matrix.

VI. D. PLEADING AND ASSESSING PENALTIES FOR VIOLATIONS OF STORAGE REQUIREMENTS BY GENERATORS

1. Introduction

Many generators of Subtitle C hazardous waste qualify or attempt to qualify for the exemption from the requirement to obtain a hazardous waste permit and the storage facility operating requirements. This exemption is found in 40 C.F.R. Part 262.[20] As a result, RCRA enforcement actions against generators frequently arise when generators fail to meet the conditions for the permit exemption, and the consequent violations of storage facility requirements. This section addresses pleading choices and penalty calculation in this enforcement situation.

2. Generator "Conditions for Exemption"

The RCRA generator regulations (40 CFR Part 262) provide generators who wish to store hazardous waste and obtain an exemption from the storage permit requirements of 40 CFR Part 270, and the storage facility operating requirements of 40 CFR Part 264 or 265, with "conditions for exemption" from those requirements. See 40 CFR §§ 262.14 - 262.17. These conditions for exemption apply only to generators who store hazardous waste at the generating facility. A generator must meet these conditions in order to be exempted from the storage facility permitting and operating requirements.[21] Without this exemption, permit and operating requirements would otherwise apply to generators that choose to store hazardous waste. Similarly, permit and operating requirements would apply to a generator that chooses to engage in disposal or treatment of hazardous waste.

As the 2016 Generator Improvements Rule clearly states, and given the optional nature of the conditional exemption, noncompliance with any condition for exemption from the storage facility permit and operating requirements cannot be cited and penalized as a violation of Part 262. *See* 40 CFR § 262.10(g)(2). Rather, noncompliance with one or more conditions for the exemption means that the generator's storage is not exempt from, and can potentially result in violations of, applicable storage facility permitting and operating requirements in 40 CFR Parts 124, 264 through 267, and 270 and Section 3010 of RCRA.[22]

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[20] While this Section refers to the generator exemption generally as a single exemption, it is important to keep in mind that the generator conditional exemptions in Sections 262.14(a), 262.15(a), 262,16(a) and 262.17(a) are exemptions from multiple distinct requirements, for example the requirement to obtain a storage permit found in Section 3005 and 40 C.F.R. Part 270 and the storage facility operating requirements found in 40 C.F.R. Parts 264 and 265.

[21] There is no statutory or regulatory requirement that a generator must obtain an exemption from those requirements. A generator that fails to meet the conditions of exemption, however, is required to comply with the storage permit requirements of 40 CFR Part 270, and the storage facility operating requirements of 40 CFR Part 264 or 265.

[22] *See, e.g.,* U.S. v. Baytank (Houston) Inc., 934 F.2d 599, 607 (5th Cir.1991) (government can prove a hazardous waste generator's criminal violation of the RCRA storage permit requirement "either by showing unpermitted storage for longer than 90 days . . . or by showing unpermitted storage for any period of time in violation of any of the safe storage conditions of 40 C.F.R. Sec.262.34(a) [re-numbered to Sec. 262.17]").

3. Determining Violations to Plead

EPA retains the discretion to determine appropriate enforcement actions and penalties that are proportionate to the seriousness of the violation(s). Consistent with 40 C.F.R. § 262.10(g)(2), EPA may determine whether and how to take enforcement action stemming from noncompliance with the conditions for exemption. Where generator noncompliance with conditions for exemption results in violation(s) of storage facility permit and operating requirements that merit a penalty, enforcement personnel must determine, on a case-by-case basis, which storage facility requirements to separately plead as violations. The decision as to which violations to plead may have significant impact on the "proportionality" of the overall proposed penalty.

As set out in the bullets below, EPA has broad discretion that is consistent with 40 CFR § 262.10(g) to select the appropriate violation(s) to plead in order to assess a penalty that accurately reflects and is proportionate to the overall seriousness of the violation(s).[23] For example:

- The case team can allege a violation of the corresponding Part 264 or 265 requirement where a condition for exemption has a corresponding requirement in Part 264 or 265. See 40 CFR § 262.10(g)(2). Many of the conditions that ensure safe storage at a generator's exempt storage facility are based on the storage facility operating requirements that serve the same purpose. For example, if a large quantity generator failed to meet the condition found at 40 C.F.R. § 262.17(a)(7) regarding personnel training, the case team could allege a violation of the personnel training requirements found in 40 C.F.R. § 264.16/265.16.

- The case team can allege a violation of Part 264 or 265 operating requirements that does not have a corresponding condition in Part 262, but the violation of which merits a penalty given the circumstances of the case. For example, if the manner in which the facility was storing its waste indicated that the facility was not being diligent enough to minimize the chance for hazardous waste releases, the case team may choose to allege a violation of 40 C.F.R. § 264.31/265.31.

- The case team can allege "storage without a permit" as a violation of the Part 270 storage permit[24] requirement (and/or the statutory prohibition found in RCRA Section 3005(a)). Depending upon the facts of each case, this claim could appropriately be brought in addition to, or in lieu of, alleging a violation of the specific operating requirement(s), with potentially different penalty implications that should be considered when making the pleading decision. It is important to note that cases based on storage violations do not necessarily need to include a formal claim of storage without a permit.

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[23]This includes the discretion to decide which requirements to formally cite as separate violations subject to separate penalties, and which requirements to "compress" within a particular claim or count in the complaint. *See Compression of Penalties for Related Violations*, Section VII.A.2.

[24] References to the "the permit requirement" include the alternative interim status requirement.

However, the pleading documents should include the general or background allegations that failure to meet all the conditions subjected the facility to permitting requirements and should set out the connection between the alleged violations and the requirement to have a permit. The pleading decision should ensure that penalties disproportionate to the violation(s) or insufficient for the violation(s) are avoided.[25]

- The case team can allege a combination of violations from the above options to ensure the enforcement action is representative of the totality and gravity of the circumstances.

4. Calculating Penalties for Generator Storage Permit Violations

RCRA section 3008(a)(3) requires that penalties for RCRA violations reflect the "seriousness of the violation." As already set forth in this Penalty Policy, the seriousness of the violation is measured initially in terms of:

- the potential for harm it poses; and
- its extent of deviation from the applicable requirement(s).

Adjustments are then made to this initial measure, to reflect certain factors that appropriately increase or decrease the penalty. This general approach is appropriate for all generator violations of storage permit and operating requirements. Furthermore, as part of this general approach, it is appropriate to also consider the circumstances and facts related to a generator's compliance as well as its failure to meet the conditions for the exemption from storage permit requirements when determining the seriousness of such violations.[26]

For alleged violations of storage facility operating requirements (found in Parts 264 or 265), the

[25] A decision to include a claim of failure to have a storage permit against a generator does not necessarily mean that settlement of that case must include a requirement to obtain a storage permit in order to return to compliance. While EPA could require a permit, just as it can require closure of the illegal storage facility, in appropriate cases, the facility may be allowed to operate in compliance with the conditions for exemption rather than be required to apply for a permit.

[26] This is consistent with the clarifications regarding enforcement related to the RCRA generator conditional exemption regulations provided by the 2016 Generator Improvements Rule. *See, e.g.*, the preamble to the revisions of 40 C.F.R. § 262.10(g) at 81 Fed. Reg. 85732, 85800 (Nov. 28, 2016). Moreover, considering the extent of the generator's compliance with the conditions for exemption in cases alleging the generator's violation of the storage permit requirement, has been employed in some manner by EPA for many years. One such case is the EAB's decision in *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598 (EAB2002). This Policy expands upon aspects of the EAB's penalty approach in *Bruder*. Whereas the EAB in the *Bruder* decision considered only whether the generator met the conditions for exemption in determining just the 'extent of deviation', this Policy establishes that both the generator's adherence to the conditions for exemption and the circumstances related to the generator's noncompliance should be considered for both factors of the penalty analysis, 'extent of deviation' and 'potential for harm.'

determination of the seriousness of each violation is the same for violations by generators who store hazardous waste as it is for violations by non-generators who store hazardous waste. The potential for harm of the violation is a measure solely of the potential for harm from the violation of the Part 264 or 265 requirement (rather than from not having a permit). Similarly, the extent of deviation is a measure solely of the generator's deviation from the Part 264 or Part 265 requirement alleged to have been violated. In calculating penalties for violations of storage facility operating permits, consideration of whether the generator met a few or most of the conditions for exemption is neither relevant nor appropriate.

For alleged violations of Part 270 and RCRA 3005 storage permit requirements, case teams should similarly calculate a penalty based on consideration of both the potential for harm and extent of deviation. However, in calculating penalties for these violations, case teams should consider how many of the conditions for exemption the generator met and the circumstances related to the generator's noncompliance with the underlying requirement alleged to be violated. Where the generator has met most of the conditions for exemption, the potential for harm element of the penalty evaluation (minor, moderate, or major) should reflect the lower potential for harm from not having a permit as a result of the generator meeting most of the conditions for exemption. This lower potential for harm is based on the presumption that the conditions that the generator met decreased the risk of harm from the storage of waste. Where the generator meets few or none of the conditions, the potential for harm determination should reflect a higher level of potential harm given that the conditions for exemption are designed to ensure safe storage. Similarly, where the generator has met many of the conditions for exemption, the overall "extent of deviation" could be considered low, whereas failure to meet many conditions might be considered a high "extent of deviation." Substantial adherence to many of the conditions for exemption by a generator represents less deviation from a fully compliant operation than a situation where a generator failed to meet many conditions. However, even where there was no effort made to secure a permit, the case team may conclude that the extent of deviation is low if there was substantial compliance with the operational requirements related to storage of hazardous waste.

Because there are numerous conditions and a variety of ways in which noncompliance could occur for each condition, there is a large range of circumstances that may arise between near full compliance and noncompliance with most or all of the conditions. Consideration of the penalty factors for each set of circumstances does not lend itself to any formulaic application; rather the amount of weight given to a generator's efforts to adhere to the conditions for exemption and operate under exempt status should be proportional to those efforts and the objective facts that indicate the nature and extent of the generator's efforts.

After both the potential for harm and the extent of deviation have been examined, the case team should determine the most appropriate Section VI.C matrix categories that best represent the potential for harm and extent of deviation based on all of the relevant facts and circumstances that were considered. As with all other penalty calculations under this Policy, any facts and circumstances not fully accounted for in the analyses described immediately above should be used to 'fine tune' the penalty chosen from the range provided in the applicable matrix cell.

5. Avoiding Duplication of Identical Considerations

In cases where the case team is separately assessing penalties for violations of both Parts 264 or 265 operating requirements and the RCRA Section 3005/Part 270 storage permit requirement, it should not include the same considerations and facts in the determination of the seriousness of the permit violation as those used to support the determination of the seriousness of the alleged Part 264/265 operating violations. This will ensure that each penalty calculation is independently supportable and will avoid 'double-counting' issues and duplicative penalties.

VII. MULTIPLE AND MULTI-DAY PENALTIES

A. PENALTIES FOR MULTIPLE VIOLATIONS

1. Multiple Violations Criteria

In certain situations, EPA may find that a facility has violated several different RCRA requirements. A separate penalty should be proposed in an administrative proceeding 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 claim in the complaint for which a penalty is to be assessed. A given claim is independent of, and substantially distinguishable from, any other claim 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 facility 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 regulated entity 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 totaled.

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. For penalty purposes, each failure to take a groundwater

monitoring sample during the year, which is four total violations, should be assessed separately.

Enforcement personnel are counseled to only calculate penalties for those violations that have occurred within five years of the date of the complaint. Therefore, generally, penalties should not be calculated for one-time violations occurring more than five years before the date the complaint is to be filed and for continuing violations[27] ending more than five years before the date the complaint is to be filed. However, for violations for which injunctive relief is sought, the amount of time elapsed is generally not a relevant consideration.

2. Compression of Penalties for Related Violations

In general, penalties for multiple violations may be less likely to be appropriate where the violations are not independent or not substantially distinguishable. Where a claim derives from or merely restates another claim, 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 violations of numerous other independent

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[27]Continuing violations are those violations that involve an ongoing course of illegal activity (*e.g.*, operating without a permit) or where the violator is under a continuing obligation to meet regulatory requirements (*e.g.*, failure to conduct closure activities). For more discussion on this concept, *see* In re: Harmon Electronics, Inc., 7 E.A.D. 1 (EAB, 3/24/97) (the failure to obtain a permit, the failure to have a groundwater monitoring program in place, the failure to obtain, establish, or maintain closure/post-closure financial assurance and the failure to submit a notification under RCRA Section 3010 were all continuing violations); Harmon Industries, Inc. v. Browner, 19 F.Supp.2d 988 (W.D.Mo. 1998) (affirming the EAB's decision regarding the continuing violations); and Cornerstone Realty, Inc., v. Dresser-Rand Company, 993 F.Supp. 107 (D.Conn. 1997) (the failure to comply with closure requirements while hazardous waste remained at the site was a continuing violation). For violations that are not continuing in nature, *see* In re: Lazarus Inc., 7 E.A.D. 318 (EAB, 9/30/97) (the requirement to prepare and maintain PCB annual documents is not continuing in nature).

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 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 gravity-based and multi-day penalties for certain distinguishable violations, so long as the total penalty for all related violations is appropriate considering the gravity of the offense and is sufficient to deter similar future behavior and recoup economic benefit.

In deciding which penalties should be compressed (i.e., the violations for which separate penalties should not be calculated), enforcement personnel should consider the seriousness of the violation, the importance of the underlying requirement to the regulatory scheme, and the economic benefit resulting from each violation. Violations that involve substantial noncompliance or that result in economic benefit that should be recaptured (see Section VIII below) should be set forth separately in the complaint. For example, a failure to make a hazardous waste determination, 40 CFR § 262.11, should not be compressed because this requirement determines which wastestreams are subject to further regulation.

Even where separate penalties are not calculated for distinguishable violations, all significant violations should still be cited separately in the complaint to demonstrate the magnitude and scope of the violations.[28] The recitation of all significant violations will provide further support for a penalty that is based on a risk of harm and extent of deviation for the totality of the violations.

3. Multiple Violations Treated as Multi-day Violations

As discussed above, multiple violations are appropriate where EPA can demonstrate that independent and substantially distinguishable violations have occurred. As discussed in the next section, violations should be treated as multi-day violations (one penalty with a multi-day component) where the same violation continues uninterrupted for more than one day.

Where a facility has through a series of independent acts or omissions 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. This is particularly true where the

[28]All complaints should cite those violations for which injunctive relief is sought.

violations occur within close proximity in time to each other and are based on similar acts by the violator. 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. For example, if a facility fails to submit four quarterly reports in the same year, the Agency may treat these as four separate violations. However, if a facility is required to conduct daily inspections but fails to do so for an entire month or longer, the Agency may calculate the penalty utilizing the multi-day matrix. In those cases where a series of recurring, separate violations are treated as multi-day violations, enforcement personnel should treat each occurrence as one day for purposes of calculating the multi-day component.

As a matter of policy, in those cases where enforcement personnel are calculating a penalty with a multi-day component for a series of independent acts or omissions, the calculation should be based on those violations that occur within five years of the date the complaint is to be filed.

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 $27,500 [29] 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.[30] 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 Section 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

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[29] See footnote 3.

[30] See footnote 27 for more information on continuing violations.

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.

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 for concluding that a violation has occurred. For example, if an inspection revealed that a generator was storing unlabeled drums of hazardous wastes without complying with 40 CFR § 262.34, the facility would be in violation of the storage requirements for permitted facilities found in 40 CFR Part 264. 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.

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 or, if the complaint references only the statutory maximum, the date the proposed penalty is submitted.

If the calculation is based on the date the complaint is filed, and if the violation continues after that date, the complaint should include language stating that EPA may amend the complaint because the violation may continue to occur after filing. For example, the complaint could state:

> The violation alleged in Count 1 of this complaint is of a continuing nature and continues, to the best of EPA's knowledge and belief, as of the date of the filing of this complaint. EPA, therefore, reserves the right to amend this complaint and the penalty proposed herein to reflect additional days of violation for the violation alleged in Count 1.

Alternatively, enforcement personnel may consider including language in the complaint stating that the penalty will include a specific, additional per day amount until the violation is corrected. The language of the complaint should be clear that the amount chosen is based on the circumstances as they are known at the time the complaint is filed and that if the conditions change, the amount of the penalty sought may change. For example, the complaint could state:

> The violation alleged in Count 1 of this complaint is of a continuing nature and continues, to the best of EPA's

knowledge and belief, as of the date of the filing of this complaint. In addition to the penalty proposed in paragraph___of this complaint, EPA is hereby assessing an additional penalty of $_____for each day after the filing of the complaint that the violation alleged in Count 1 continues. This additional penalty assessment is based on the same factors on which the penalty in paragraph____is based. Should circumstances or conditions relating to the alleged violation change, EPA reserves the right to adjust the continuing penalty amount accordingly.

If the complaint includes only the statutory maximum with a proposed penalty to be submitted after the prehearing exchange, the complaint should include general reservation language similar to the first sample language above. The proposed penalty should then be calculated to the date of the proposed penalty submission (including the days between the date of the complaint and the date of the proposed penalty submission). To account for the continuing violation, the proposed penalty submission should include a per day penalty amount that will be sought at hearing above the proposed amount, similar to the second sample language above.

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 outlined below.

Step 1: Determine the gravity-based designations for the violation, *e.g.*, major-major, moderate-minor, or minor-minor;

Step 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 considered mandatory for days 2-180 of all violations with the following gravity-based designations: major-major, major-moderate. The only exception is when they have been waived or reduced, in "highly unusual cases," as described below.[31] Multi-day penalties for days 181+ are discretionary.

Presumption in favor of multi-day penalties - Multi-day penalties are presumed appropriate for

[31]Because the Regions can make this determination without Headquarters involvement, this Policy supersedes the January 1992 Memorandum "Procedures for Consulting with Headquarters Before Waiving the Mandatory Multi-day Penalties in 'Highly Unusual' RCRA Administrative Actions."

days 2-180 of violations with the following gravity-based designations: major-minor, moderate-major, moderate-moderate. Therefore, multi-day penalties should 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: minor-major, 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.

Step 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 $27,500) 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 from Requirement

Potential for Harm	MAJOR	MODERATE	MINOR
MAJOR	$5,500 to 1,100	$4,400 to 825	$3,300 to 605
MODERATE	$2,420 to 440	$1,760 to 275	$1,100 to 165
MINOR	$660 to 110	$330 to 110	$110

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 and what penaltyamount is appropriate to select from the multi-day matrix, the Regions must analyze carefully the specific facts of the case. 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 Policy goals 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 or reduce multi-day penalties, when otherwise mandatory for a violation, in a "highly unusual case." Because EPA has determined that almost all continuing "major" violations warrant multi-day penalties, it is anticipated that such a waiver will occur very infrequently. As required with the presumptive multi-day violations, when the Region has determined that it will either reduce the number of days of violation or will not use the multi-day matrix for violations that fall into the mandatory category, the case-specific facts justifying the reduction or waiver must be documented in the case file.

Where a violation continues for more than one day, enforcement personnel have the discretion to calculate a penalty for the entire duration of the violation. However, enforcement personnel should first calculate the penalty based on the period of violation occurring within five years of the date the complaint will be filed. If this calculation does not result in an appropriate penalty for the violation, enforcement personnel should then determine the duration of the violation that would result in an appropriate penalty.

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 $27,500 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's 1984 Policy on Civil Penalties mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law. Enforcement personnel shall evaluate the economic benefit of noncompliance when penalties are calculated. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all enforcement personnel to calculate economic benefit. 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. Economic benefit can result from a violator delaying or avoiding compliance costs, or when the violator achieves an illegal competitive advantage through its noncompliance.

The following are examples of regulatory areas for which violations are likely to result in 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 permit application 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 the inclusion of the benefit component where it appears that the amount of the component is likely to be less than the applicable amount shown in the chart below for <u>all</u> violations alleged in the complaint.

When the gravity-based and multi-day total penalty is:	EBN should be pursued if it totals:
$30,000 or less	at least $3,000
$30,001 to $49,999	at least 10% of the proposed penalty
$50,000 or more	$5,000 or more

In order to determine this, a calculation of economic benefit should be conducted for each violation that is estimated to have an economic benefit penalty of greater than $200 unless it is obvious that the relevant EBN total (from the right side of the above chart) will not be reached. The total economic benefit amount (all violations added together) should be compared to the chart to determine whether an economic benefit component should be included in the proposed penalty. Any decision not to seek an economic benefit penalty and the rationale for such a

decision should be documented on the Penalty Computation Worksheet or analogous regional office penalty calculation summary.

In some cases, a corporate entity related to the violating facility (*e.g.*, a parent corporation) may actually realize an economic benefit as a result of noncompliance by the violating facility. For example, a subsidiary company may be able to supply a product to a parent company at a cost significantly below its competitors due to noncompliance with RCRA requirements. The parent company may then sell that product (or utilize it in the manufacturing of a different product) and realize the benefit from reduced costs of the supplier subsidiary. When information to support such a calculation is available, enforcement personnel may consider economic benefits that accrue to related corporate entities in calculating a specific penalty.

It is generally the Agency's policy not to settle cases for an amount less than the economic benefit of noncompliance. However, the Agency's 1984 Policy on Civil Penalties explicitly sets out three general areas where settling the total penalty amount for less than the economic benefit may be appropriate. Since the issuance of the 1984 Policy, the Agency has added a fourth exception for cases where ability to pay is a factor.[32] The four exceptions are:

- the economic benefit component consists of an insignificant amount (see the chart above for the minimum amounts to pursue);
- 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; and
- 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 or in an appropriate section of the analogous regional penalty calculation summary.

A. ECONOMIC BENEFIT FROM DELAYED COSTS AND AVOIDED COSTS

1. Background

This section discusses two types of economic benefit from noncompliance in determining the economic benefit component:

- benefit from delayed costs; and

[32]See Section IX.A.3.d. below.

- 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 either capital costs (essentially equipment) or one-time nondepreciable costs (*e.g.*, cleaning up a spill).[33] Examples of violations which result in savings from delayed costs are:

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

Avoided costs are expenditures which 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:

- failure to perform annual and semi-annual groundwater monitoring sampling and analysis;
- failure to use registered hazardous waste transporters (where the violator will not be responsible for cleaning up the waste);
- failure to perform waste analysis before adding waste to tanks, waste piles, incinerators; and
- 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.[34]

2. Calculation of Economic Benefit from Delayed and Avoided Costs

Since 1984, it has been Agency policy to use either the BEN computer model or "the rule of thumb" approach to calculate the economic benefit of noncompliance.[35] The rule of thumb approach is a straight forward method to calculate economic savings from delayed and avoided

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[33]See BEN Users Manual for further guidance on this subject at pages 3-9 to 3-10.

[34]While this cost is an avoided one, it does not fit into the annual cost category in the BEN model. This is an avoided one-time nondepreciable expense and requires a slightly modified BEN analysis. See BEN Users Manual for further guidance on this subject at page 3-11.

[35]"Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment" November 5, 1984 (Codified as Policy Number PT.1-5 of the General Enforcement Policy Compendium) at pages 2-3.

compliance expenditures. It is discussed more fully in the policy document "A Framework for Statute-Specific Approaches to Penalty Assessments" at pages 7-9.[36] It is now available in a Lotus spreadsheet.[37] Enforcement personnel may use the rule of thumb approach whenever the economic benefit penalty is not substantial (generally under $10,000) and use of an expert financial witness may not be warranted.

For economic benefit penalties that are more substantial (generally more than $10,000), enforcement personnel should use the BEN model to calculate noncompliance economic benefits. The primary purpose of the BEN model is to calculate economic savings for settlement purposes.[38] The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including inputs that consist of optional data items and standard values already contained in the program (see BEN Worksheet in the Appendix, Section X). As discussed in the BEN Users Manual, unless case-specific reasons dictate otherwise, enforcement personnel should rely on the least expensive costs of compliance (i.e., facility expenditures) in calculating economic benefit penalties.

Enforcement personnel should have a copy of the revised BEN User's Manual (September 1999).[39] The User's Manual describes how to use BEN, a computer program that calculates the economic benefit from delayed and avoided costs for any type of entity, including Federal facilities. It is designed to aid enforcement personnel with procedures for utilizing BEN, and to explain the program's results.[40] Except for smaller economic benefit calculations where the "rule

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[36]This document is dated February 16, 1984 (Codified as Policy Number PT.1-2 of the General Enforcement Policy Compendium)

[37]The Rule of Thumb Spreadsheet and information on its use is available to EPA enforcement personnel from the Multimedia Enforcement Division of the Office of Regulatory Enforcement.

[38]While the BEN model can be used to develop a proposed penalty for an administrative hearing, enforcement personnel must be prepared to present a financial expert witness to support the penalty calculation. In the appropriate circumstances, Agency personnel, with the assistance of a financial expert, can use case-specific information, relevant regional knowledge and past experience in the calculation of the economic benefit component. Regardless of which approach is taken, all calculations must be documented in the case file.

[39]Both the BEN model and the BEN User's Manual are downloadable from the Agency's website at www.epa.gov.

[40] In addition to the Manual "Estimating Costs for the Economic Benefits of RCRA Noncompliance" (September 1997), enforcement personnel are encouraged to use whatever cost documentation is available to calculate RCRA compliance costs (*e.g.*, contractors and

of thumb" approach is appropriate, BEN supersedes previous methodologies used to calculate the economic benefit for civil penalties. Enforcement personnel should also consult the Manual "Estimating Costs for the Economic Benefits of RCRA Noncompliance" (September 1997). When using this RCRA Costs Manual, enforcement personnel should ensure that figures set forth in that Manual reflect current figures given the time elapsed since the Manual was first issued.

The economic benefit component should be calculated initially for the maximum period of noncompliance. Enforcement personnel should then determine whether that amount should be reduced for any reasons (*e.g.*, possible application of statute of limitations).[41] However, enforcement personnel should be prepared to support the calculation of economic benefit for the entire period of noncompliance if there is any uncertainty regarding potential reductions that may have been identified.

The economic benefit calculation should also take into account the entire period that a violator enjoys the benefit. In almost all cases, the violator will enjoy the financial benefit until the economic benefit penalty is paid. Therefore, this calculation should be based on a penalty payment date corresponding roughly with the relevant hearing date. At the hearing, Agency personnel should be prepared to argue to the Presiding Officer that the violator will continue to enjoy the economic benefit until the penalty is paid and the relevant time period should include any time periods after the hearing prior to penalty payment.

B. ADDITIONAL INFORMATION ON ECONOMIC BENEFIT

In addition to delayed and avoided costs, an economic benefit may accrue to a violator in the form of an illegal competitive advantage. In this type of economic benefit, the illegal activity results in a financial gain that the violator would not otherwise realize if the violation had not been committed. Illegal competitive advantage cases are fundamentally different from those that routinely rely on BEN-type calculations, and they also arise less frequently. Care should be taken to insure that any calculation of illegal competitive advantage does not include profits attributable to lawful operations of the facility or delayed or avoided costs already accounted for in the BEN calculation. In most cases, a violating facility will realize either benefits from

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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.

[41]Statute of limitations considerations may not be relevant for the calculation of economic benefit where, for example, the benefit results from violations that continue to the time the enforcement action is initiated.

delayed/avoided costs or from an illegal competitive advantage; however, where the circumstances support it, any penalty amount based on benefits due to illegal competitive advantage should be added to any other type of economic benefit that has been calculated. For information regarding methodologies for calculating a penalty based on illegal competitive advantage, EPA enforcement personnel should consult with the Multimedia Enforcement Division in OECA. (Note: As of the date of this Policy, financial technical advice for Agency personnel is available from the Helpline at (888) 326-6778. This service and/or telephone number is subject to change without notice.)

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 Section 3008(a)(3) states that in assessing penalties, EPA must take into account any good faith efforts to comply with the applicable requirements. EPA's 1984 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 RCRA Policy also includes an additional adjustment factor for environmental projects undertaken by the respondent.

2. Recalculation of Penalty Amount

Before EPA considers mitigating the penalty proposed for an administrative hearing 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 proposed penalty which makes it clear that the initial calculation of the penalty is in error, enforcement personnel should adjust this figure. Enforcement personnel should document on the Penalty Computation Worksheet or the analogous regional office penalty calculation summary the basis for recalculating the gravity-based or economic benefit component of the penalty.

For example, if after the issuance of the proposed penalty, information is presented which indicates that less waste is involved than was believed when the proposed penalty 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. In all instances, any recalculation of the penalty should be carefully documented on the Penalty Computation Worksheet or the analogous regional office penalty calculation summary in the enforcement file.

3. Application of Adjustment Factors

The adjustment factors can increase, decrease or have no effect on the penalty amount sought 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 must not exceed the statutory maximum of $27,500 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 proposed penalty, while downward adjustments (with the exception of those reflecting good faith efforts to comply) should generally not be made until after the proposed penalty has been issued, at which time the burden of persuasion that downward adjustment is 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, cooperative attitude 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 the 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. Downward adjustments of up to 10% of the gravity-based and multi-day penalty components can be made based on the cooperative attitude of the respondent.

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, only Agency enforcement personnel, as distinct from an administrative law judge charged with determining an appropriate RCRA penalty, should consider adjusting the amount of a penalty downward based on the litigative risks confronting the Agency, the cooperative attitude of the respondent 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 is consistent with the EPA's Civil Penalty Policy issued in 1984.

a. Good Faith Efforts To Comply/Lack of Good Faith

Under Section 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 provide a basis for mitigation of the penalty, particularly where the violator institutes significant new measures to prevent recurrence. Self-reported violations may be eligible for penalty mitigation pursuant to EPA's Policy "Incentives for Self-Policing: Discovery, Disclosure, and Correction and Prevention of Violations" (65 Fed. Reg. 19617 (4/11/00)). 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 environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and were out of his or her control and the control of his or her agents, the penalty may be reduced.

c. History of Noncompliance (upward adjustment only)

Where a party previously has violated federal or state environmental laws 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 in making this determination are as follows:

- 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 previous 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. Enforcement personnel should examine multimedia compliance by the respondent and, where there are indications of a history of noncompliance, the penalty should be adjusted accordingly.

For the purposes of this section, a "previous 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).[42] The term also

[42]Note that while in the context of this Policy the term “previous violation” may include notices of violation, this Policy does not address the issue of when an enforcement action is initiated in the context addressed in Harmon Industries, Inc., v. Browner, 191 F.3d 894 (8th Cir. 1999). *See* In re: Bil-Dry Corporation, 9 E.A.D. 575 (EAB, 1/18/01).

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, 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 or where the violations of the law are particularly egregious. A long history of noncompliance or gross violations would demonstrate that less severe measures have been 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 of publicly-available information through services such as Dun & Bradstreet. In some circumstances, enforcement personnel should review the financial viability of related entities as those related entities could provide financial support to the respondent.[43]

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[43]*See* In Re New Waterbury, Ltd., 5 E.A.D. 529, 549 (EAB 10/20/94) ("Where, as here, there are several interrelated business entities all involved in the business of the liable party, the Agency may properly look into the assets of those other entities to determine whether a penalty is

Under RCRA, the ability of a violator to pay a proposed penalty is not a factor that the Agency must consider in assessing a penalty. However, because this is a mitigating factor set forth in this Policy, enforcement personnel should be generally aware of the financial status of the respondent in the event that this is raised as an issue in settlement or at a hearing.

The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances.[44] Thus, a company's inability to pay usually will be considered only if the issue is raised by the respondent. If the respondent fails to fully provide sufficient information, then enforcement personnel should disregard this factor in adjusting the penalty.

There are several sources available to assist the Regions in determining a regulated entity's ability to pay. Enforcement personnel should consult the Agency's "Guidance on Determining a Violator's Ability to Pay A Civil Penalty," December 16, 1986 (Codified as Policy PT.2-1 in the Revised General Enforcement Policy Compendium). In addition, the Agency now has three computer models it uses in determining whether violators can afford compliance costs, clean-up costs and/or civil penalties: ABEL, INDIPAY and MUNIPAY. ABEL analyzes inability to pay claims from corporations and partnerships. INDIPAY analyzes those claims from individual taxpayers. MUNIPAY analyzes inability to pay claims from cities, towns, villages, drinking water authorities and sewer authorities.[45] These models are designed for use in the settlement context. Because of that, the models are biased in favor of the violator. If the models indicate an ability to pay, the user can assume that the violator can in fact afford the full penalty, compliance costs and/or cleanup costs.[46]

When EPA determines that a violator cannot afford the penalty prescribed by this Policy or

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appropriate when the liable party claims that it does not have the resources to pay the penalty on its own.") Agency personnel should be aware that while other entities may be able to assist in paying a penalty, unless those parties are named in the complaint and are found liable, the Agency may not be able to require those parties to pay.

[44]The EAB has agreed that in RCRA enforcement cases, the respondent has the burden of persuasion on its alleged inability to pay. *See* In re: Bil-Dry Corporation, 9 E.A.D. 575 (EAB, 1/18/01).

[45]For training or further information about any of the these models, contact the Agency's Helpline at (888) 326-6778 or (888) ECONSPT. (Note: This service and/or telephone number is subject to change without notice.)

[46]Because the models are dependent upon financial data inputs, the models' results are only as current and reliable as the financial data. Enforcement personnel should seek as much specific information from the violator regarding their claim of inability to pay, including whether the documents that are submitted need to be supplemented or updated.

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 (for example, such a schedule might even be contingent upon an increase in sales or some other indicator of improved business; or
- 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 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. All proposals for such projects should be evaluated in accordance with EPA's May 1, 1998, Supplemental Environmental Projects Policy and any subsequent amendments to the SEP Policy.[47]

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 Memorandum signed by James Strock on August 9, 1990,

[47]This Policy can be found on the EPA web site at www.epa.gov.

"Documenting Penalty Calculations and Justifications of 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.

In addition to litigation risks, enforcement personnel can consider, for the purposes of an expedited settlement, the cooperation of the facility throughout the compliance evaluation and enforcement process. Enforcement personnel may reduce the gravity-based portion of the penalty by as much as 10% considering the degree of cooperation and preparedness during the inspection, provision of access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during or after the inspection, and cooperation and preparedness during the settlement process. In addition to creating an incentive for cooperative behavior during the activities listed above, this adjustment factor further reinforces the concept that respondents face a significant risk of higher penalties in litigation than in settlement. This adjustment factor should only be considered in settlements agreed to in principle by the parties before the filing of the prehearing exchange of information.

It is important to note the difference between a penalty adjustment for cooperative attitude and for good faith efforts to comply. While self-reporting and correction of violations qualify as good faith efforts, the cooperation and attitude of the violator throughout the investigation and enforcement process should be the focus under this factor. For example, a violator may qualify for this adjustment if it voluntarily provides information prior to the Agency's use of investigative tools such as information requests under RCRA Section 3007. Similarly, if a violator responds completely to an information request well in advance of the due date and otherwise cooperates fully, a downward adjustment may be appropriate. By contrast, this factor should not be applied to those cases where the violator indicates an interest in settlement and enters into negotiations but does not demonstrate other indications of cooperation. Generally, this adjustment factor should apply to those violators who demonstrate and maintain a high degree of willingness to work with EPA regarding the investigation and resolution of violations.

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.[48]

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[48]Enforcement personnel may include, for those violations that continue beyond the date the complaint is filed, a specific per day penalty amount. See Section VII.B.

B. EFFECT OF SETTLEMENT

The Consolidated Rules of Practice incorporates the Agency's 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(b). 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 Consolidated 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 proposed penalty should follow the adjustment factors guidelines found in Section IX.A. of this document.

X. APPENDIX

TABLE OF CONTENTS

X. APPENDIX

A. PENALTY COMPUTATION WORKSHEETS

PENALTY AMOUNT FOR HEARING[1]

CompanyName: _____

Address: _____

_____

Requirement Violated: _____

1.	Gravity based penalty from matrix	_____
	(a) Potential for harm	_____
	(b) Extent of Deviation	_____
2.	Select an amount from the appropriate multi-day 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[2] ----------.----------	_____
9.	Multiply line 4 by line 8	_____

[1]In those cases where a specific penalty amount will be set forth in the complaint, the worksheet heading can indicate the penalty calculation is for that purpose. Otherwise, the more generic heading shown here can be used which can cover both complaints and submission of a specific penalty after the prehearing exchange.

[2]Additional downward adjustments, where substantiated by reliable information, may be accounted for here.

10. Calculate economic benefit ..... _____

11. Add lines 4, 9 and 10 for proposed penalty amount to be sought at hearing ..... _____

A-3

SETTLEMENT PENALTY AMOUNT

Company Name: _____

Address: _____

_____

Requirement Violated: _____

1.	Gravity based penalty from matrix	_____
	(a) Potential for harm	_____
	(b) Extent of deviation	_____
2.	Select an amount from the appropriate multi-day 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[3]

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 project credits, and other unique factors must be justified, if applied.)

(a) Good Faith: _____

[3] A separate "Narrative Explanation"should be attached to the Penalty Computation Worksheets for both the hearing 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 hearing 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 (e.g., cooperative attitude): _____

_____

_____

_____

_____

_____

_____

_____(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)

BEN WORKSHEET [4]

1. Case Name .....

   Requirement Violated _____

2* Initial Capital Investment/Year Dollars _____
   ___ Check here if costs were avoided, not delayed.

3. One Time Expenditure/Year Dollars _____
   ___ Check here if costs were avoided, not delayed.

   a.. Tax Deductible? YES NO

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 _____

10. State Where Facility is Located _____

11.* Inflation Rate _____

12.* Discount Rate _____

13. Economic Benefit Penalty Component _____

* See standard value from BEN model

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

XL 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 1997. As a r sult, Company A became subject to regulation under Subtitle C of RCRA on the effective date of the regulation which was November 5, 1997. 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, 1999, 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 ofregulations 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 tor 90 days without obtaining a permit or interim status. Thus, beginning on February 3, 1998 (90 days after November 5, 1997), 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 totaled. 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 set forth Part 265 violations as well as the statutory violations. Regional enforcement personnel conducted preliminary research into Company A's financial condition and discovered indications of financial instability. Therefore, the complaint contained the statutory maximum and the Region prepared a proposed penalty to submit after the prehearing exchange. 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 for the hearing, 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 EPA 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

- Failure to notify: Moderate potential for harm and moderate extent of deviation lead one to the cell with the range of $5,500 to $8,799. Enforcement personnel selected the mid-point, which is $7,150.

- Operating without a permit: Major potential for harm and major extent of deviation lead one to the cell with the range of $22,000 to $27,500. Taking into account case-specific factors, enforcement personnel selected the midpoint, which is $24,750.

- Penalty Subtotal: $7,150 + $24,750 = $31,900

(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 $275 to $1,760. The mid-point is $1,018. [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 midpoint in the range of available multi-day penalty amounts was selected.] EPA was able to document that the violation continued from February 2, 1998, to the date of the inspection on January 10, 1999, 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: $1,018 x 342 = $348,156.

(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 $1,100 to $5,500. The mid-point is $3,300. [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, 1998, to January 10, 1999, for a total of 343 days (minus 1st day). The Region elected not to place a 180 day cap on multi-day penalties.
Total Penalty Subtotal: $3,300 x 342 = $1,128,600.

(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.[5]

(6) Application of Adjustment Factors for Computation of the Proposed Penalty 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 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 for the violations cited above.

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

(7) Final Proposed Penalty Amount

Gravity base	+	Multi-day	+	Economic Benefit	=	Penalty
$31,900	+	$1,476,756	+	$9,000	=	$ 1,517,656

(8) Settlement Adjustments

[5] In this case, the Region could have used the "rule of thumb" approach to calculate the BBN given the size of the EBN penalty. Of course, as shown here, BEN can be used for any size BN penalty.

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

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. Multi-day Penalty Subtotal: ($1,018 + $3,300) x 179 =$772,922.

(a) Good faith efforts to comply: At settlement negotiations, Company A presented a written but explicitly non-binding opinion dated October 30, 1997, from the Director ofEPA'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, 1997. 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%.
($31,900 + $772,922) x 30% = $241,447.

(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 proposed penalty.

(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) Final settlement penalty amount:

Gravity base		Multi-day		Downward Adjustment		Economic Benefit	= Total Penalty
$31,900	+	$772,922	-	$241,447	+	$9,000	= $572,375

PENALTY AMOUNT FOR HEARING

Company Name: Company A
Address: 123 Main Street, Anytown, Anystate

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

1.	Gravity based penalty from matrix	$7,150
	(a) Potential for harm	Moderate
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell.	$1,018
3.	Multiply line 2 by number of days of violation minus 1 ($1,018 x 342)	$348,156
4.	Add line 1 and line 3	$355,306
5.	Percent increase/decrease for good faith	NIA
6.	Percent increase for willfulness/negligence	NIA
7.	Percent increase for history of noncompliance	NIA
8.	* Total lines 5 thru 7	NIA
9.	Multiply line 4 by line 8	NIA
10.	Calculate Economic Benefit.	NIA
11.	Add lines 4, 9 and 10 for penalty amount to be proposed for hearing	$355,306

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

NARRATIVE EXPLANATION TO SUPPORT HEARING 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 $275 to $1,760. The midpoint is $1,018. 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 day 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 previous violations at this (the Company's only) facili .

(attach additional sheets if necessary)

(d) Ability to pay: Although the Region initially suspected inability to pay problems (and thus cited only the statutory maximum in the complaint), Company A did not submit any information to support any downward adjustment for this.

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(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)

SETTLEMENT PENALTY AMOUNT

Company Name: -=C=o=m p=a=ny A=----------

Address: 123 Main Street, Anytown, Anystate

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

	Gravity based penalty from matrix	$7,150
	(a) Potential for harm	Moderate
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell	$1,018
3.	Multiply line 2 by number of days of violation minus **1.** **[$1,018** x **(180-1)]**	$182,222
4.	Add line 1 and line 3	$189,372
5.	Percent increase/decrease for good faith	-30%
6.	Percent increase/decrease for willfulness/negligence	*NIA*
7.	Percent increase for history of noncompliance	*NIA*
8.	Percent increase/decrease for other unique factors	*NIA*
9.	Add lines 5, 6, 7, and 8	-30%
10.	Multiply line 4 by line 9	$56,812
11.	Add lines 4 and **10**	$132,560
12.	Adjustment amount for environmental project	0
13.	Subtract line 12 from **11**	$132,560
14.	Calculate economic benefit	0
15.	Add lines 13 and 14	$132,560
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 final settlement amount	$132,560

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 $275 to$ 1,760. The midpoint is $1,018. Based on an assessment ofrelevant 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 midpoint 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 multi-day penalties were assessed only for the minimum 180 day period presumed under the penalty policy, rather then for the full 343 (minus **1)** days of violation. (attach additional sheets if necessary)

2. Adjustment Factors (Good faith, willfulness, 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, 1997, from the Director ofEPA'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, 1999. 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: 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 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:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factor:

NIA

(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:

NIA

(attach additional sheets if necessary)

PENALTY AMOUNT FOR PROPOSED FOR HEARING

Company Name: C o=m~p=an=....y-=-A=----------

Address: 101 Water Street, Somecity, Somestate

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

1.	Gravity based penalty from matrix	$24,750
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell ..	$3,300
3.	Multiply line 2 by number of days of violation minus 1 [$3,300 x (343-1)]	$1,128,600
4.	Add line 1 and line 3	$1,153,350
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	*NIA*
7.	Percent increase for history of noncompliance	*NIA*
8.*	Total lines 5 thru 7	*NIA*
9.	Multiply line 4 by line 8	*NIA*
10.	Catculate Economic Benefit	$9,000
11.	Add lines 4, 9 and 10 for penalty amount to be inserted in the complaint	$1,162,350

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

NARRATIVE EXPLANATION TO SUPPORT PROPOSED PENALTY 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 $1,100 to $5,500. The midpoint is $3,300. 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 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 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 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:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(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:

NIA

(attach additional sheets if necessary)

SETTLEMENT PENALTY AMOUNT

Company Name: .:::;C=o=mp=an=yA.,

Address: _____

Requirement Violated: 40 U.S.C. § 6925, Operating with a permit or interim status

1.	Gravity based penalty from matrix	$24,750
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell.	$3,300
3.	Multiply line 2 by number of days of violation minus 1 **[$3,300 x (180-1)].**	$590,700
4.	Add line 1 and line 3	$615,450
5.	Percent increase/decrease for good faith	-30%
6.	Percent increase/decrease for willfulness/negligence	*NIA*
7.	Percent increase for history of noncompliance	*NIA*
8.	Percent increase/decrease for other unique factors ..... (except litigation risk)	*NIA*
9.	Add lines 5, 6, 7, and 8	-30%
10.	Multiply line 4 by line 9	-$184,635
11.	Add lines 4 and 10	$430,815
12.	Adjustment amount for environmental project	0
13.	Subtract line 12 from line 11	$430,815
14.	Calculate economic benefit	$9,000
15.	Add lines 13 and 14	$439,815
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 final settlement amount	$439,815

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 $1,100 to $5,500 The midpoint is $3,300. Based on an assessment ofrelevant 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 multi-day penalties were assessed only for the minimum 180 day period mandated by the penalty policy rather than the full 343 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, 1997, from the Director ofEPA'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, 1997. 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 proposed penalty.

(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:

NIA

.,attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(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 pur:poses 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:

NIA

(attach additional sheets if necessary)

B. EXAMPLE2

(1) Violation:

Company B failed to prevent entry of persons onto the active portion of its surface impoundment facility located in Seattle, Washington. 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, 1998, and had never been replaced. Several children have entered the active portion of the facility. An inspection by EPA on March 15, 1999, revealed that the damaged area of the fence still needed to be replaced. The complaint issued to Company B 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 $16,500 to $21,999. The midpoint is $19,250

(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 $825 to $4,400. The midpoint is $2,613. [Based on an assessment ofrelevant 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, 1998, to March 15, 1999, a total of 136 days (minus 1st day).

Penalty Subtotal: $2,613 x 135 = $352,755.

Penalty Total: $19,250 + 352,755 = 372,005

(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 purposes of the above violation, the following input data should be furnished:

- (EPA v. Company B). the case name
- ($100,000), the initial capital investment of Replacing the fence (cost estimate from 2/1/2000)
- -0-, there are no one time expenditures
- -0-, no annual operating and maintenance (O&M) expenses have been identified

- 3/1999, the date of the inspection
- 4/2000, the date of compliance
- 6/2000, the anticipated date of penalty payment

The above data was entered into the BEN model which yielded an economic benefit amount of $9,767 (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 this facility. While such previous violations had been corrected, they indicate that Company B had not been adequately deterred by prior notice of violations. The sum of the gravity/multi-day penalty components is adjusted upwards by 15% because of the company's history of noncompliance.

($19,250 + $352,755) x 15% = $55,801

(d) Other adjustment factors: Consistent with the general policy of delaying consideration of downward adjustment factors (other than that relating to good faith effort 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	+	Multi-day	+	Economic Benefit	+	Upward Adjustment	Total Penalty
$19,250	+	$352,755	+	$9,767	+	$55,801	$437,573

(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 efforts to comply were only those required under

theregulations. 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 violators 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.

(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 unigue factors: During EPA's inspection and subsequent settlement discussions, Company B was very cooperative. Company B provided additional documents and other information on several occasions as a result of verbal requests from EPA (thus eliminating the need for the Region to issue a Section 3007 letter). While Company B's efforts to remedy the violation consisted merely of compliance with the requirements (and no downward adjustment was warranted for "good faith efforts to comply"), the Region did decide that Company B's cooperative attitude did warrant a 5% downward adjustment.

(9) Final Settlement Penalty Amount:

Gravity Base	+	Multi-Day	+	Upward Adjustment	+	Downward Adjustment	+	Economic Benefit	Total Penalty
9,250	+	$352,755	+	55,801		$18,600	+	$9,767	$418,973

PENALTY AMOUNT FOR HEARING

CompanyName: C=:o=me:.ip a=n,., y.;B"----------

Address: 1201 Sixth Avenue, Seattle, Washington 98101

Requirement Violated: 40 CFR §265.14, Failure to prevent entry

1.	Gravity based penalty from matrix	$19,250
	(a) Potential for harm	Major
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell.	$2,613
3.	Multiply line 2 by number of days of violation minus **1** **[$2,613 x (136-1)].**	$352,755
4.	Add line 1 and line 3	$372,005
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	*NIA*
7.	Percent increase for history of noncompliance	15%
8.	* Total lines 5 thru 7	15%
9.	Multiply line 4 by line 8	$55,801
10.	Calculate Economic Benefit	$9,767
11.	Add lines 4, 9 and 10 for penalty amount to be proposed for hearing	$437,573

* 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: *NIA*

(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 upward15%.

(attach additional sheets if necessary)

(d) Ability to pay: NIA

(attach additional sheets if necessary)

(e) Environmental Project: NIA

(attach additional sheets if necessary)

(f) Other Unique Factors: NIA

(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 $9,767.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information: N"-'-<....:IA""----------

(attach additional sheets if necessary)

BEN WORKSHEET [6]

1.	Case Name: "Company B"	
	Requirement Violated: 40 CFR §265.94	
2*	Initial Capital Investment/Year Dollars	$100,000
	___ Check here if costs were avoided, not delayed.	
3.	One Time Expenditure/Year Dollars	0
	___ Check here if costs were avoided, not delayed.	
	a.. Tax Deductible? YES NO	
4.	Annual Operating and Maintenance (O&M) Expenses Year Dollars	0
5.	Date of Noncompliance	3/1/1999
6.	Date of Compliance	4/1/2000
7.	Anticipated Date of Penalty Payment	6/1/2000
8.*	Useful Life of Pollution Control Equipment	15 years
9*.	Marginal Income Tax Rate	Washington
10.	State Where Facility is Located	Washington
11.*	Inflation Rate	
12.*	Discount Rate	11.0%
13.	Economic Benefit Penalty Component	

* See standard value from BEN model

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

BEN RUN PRINTOUT

Run Name=	Initial Run
Present Values as ofNoncom11liance Date (NCD)	01-Mar-1999
A) On-Time Capital & One-Time Costs	$92,817
B) Delay Capital & One-Time Costs	$84,249
C) Avoided Annually Recurring Costs	$0
D) Initial Economic Benefit (A-B+C)	$8,568
E) Final Econ. Ben. at Penalty Payment Date,	
01-Jun-2000	**$9,767**
C- *Corporation wl WA tax rates*	
Discount/Compound Rate	11.0%
Discount/Compound Rate Calculated By:	BEN
Compliance Date	01-Apr-2000
Ca11ital Investment	
Cost Estimate	$100,000
Cost Estimate Date	01-Feb-2000
Cost Index for Inflation	PCI
# of Replacement Cycles; Useful Life	I; 15
Projected Rate for Future Inflation	*NIA*
One-Time, Nonde11reciable ExQenditure:	
Cost Estimate	$0
Cost Estimate Date	*NIA*
Cost Index for Inflation	*NIA*
Tax Deductible?	*NIA*
Annual Recurring Costs	
Cost Estimate	$0
Cost Estimate Date	*NIA*
Cost Index for Inflation	*NIA*
User-Customized S11ecific Cost Estimates	NIA
On-Time Compliance Capital Investment	
Delay Compliance Capital Investment	
On-Time Compliance Replacement Capital	
Delay Compliance Replacement Capital	
One-Time Compliance Nondepreciable	

Delay Compliance Nondepreciable

SETTLEMENT PENALTY AMOUNT

Company Name: -=C--=-o=m°"'p=an=y--=B'----------

Address: 1201 Sixth Avenue, Seathle, Washington 98101

Requirement Violated: 40 CFR § 265.14, Failure to Prevent Entry

1.	Gravity based penalty from matrix	$19,250
	(a) Potential for harm	Major
	(b) Extent of Deviation	Moderate
2.	Select an amount from the appropriate multi-day matrix cell .	$2,613
3.	Multiply line 2 by number of days of violation minus 1 **[$2,613 x (136-1)].**	$352,755
4.	Add line 1 and line 3	$372,005
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase/decrease for willfulness/negligence	*NIA*
7.	Percent increase for history of noncompliance	15%
8.	Percent increase/decrease for other unique factors ..... (except litigation risk)	-5%
9.	Add lines 5, 6, 7, and 8	10%
10.	Multiply line 4 by line 9	$37,200
11.	Add lines 4 and 10	$409,205
12.	Adjustment amount for environmental project	0
13.	Subtract line 12 from line 11	$409,205
14.	Calculate economic benefit	$9,767
15.	Add lines 13 and 14	$418,972
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 final settlement amount	$418,972

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: 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 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 oflabor 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 at 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: *NIA*

(attach additional sheets if necessary)

(e) Environmental Project: ----------=-N::..:..IA ----------

(attach additional sheets if necessary)

(f) Other Unique Factors: During EPA's inspection and subsequent settlement discussions, Company B was very cooperative. Company B provided additional documents and other information on several occasions as a result of verbal requests. While Company B's efforts to remedy the violation consisted merely of compliance with the requirements (and no downward adjustment was warranted for "good faith efforts to comply"), Company B's cooperative attitude did warrant a 5% downward adjustment.

(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 $9,767

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Information:

NIA

(attach additional sheets if necessary)

C. EXAMPLE3

(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, 1998, and December 18, 1999, 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, 1999, 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, 1999, 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 concentration 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 waste 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 the 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 40 CFR § 264.13(a):

Potential for Harm: Major
Extent of Deviation: Major

(d) Failure to Maintain§ 268.7 Paperwork in Operating Record as Required by 40 CFR § 264.73(b):

Potential for Harm: Moderate
Extent of Deviation: Major.

3 Gravity-based Penalty

(a) Failure to Send Accurate 40 CFR § 268.7(b) Notifications and Certifications: Major potential for harm and major extent of deviation leads one to the cell with the range of $22,000 to $27,500. The mid-point is $24,750.

(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 $22,000 to $27,500. The mid-point is $24,750.

Total Penalty Per Shipment: $24,750 + $24,750 = $49,500.

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: $49,500 x 12 = $594,000

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

(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 specified in (2) (a) and $10,000 for the violations noted in (2)(b)).[7]

(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 40 CFR § 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 $594,000 penalty.

(b) Degree of wilfulness and/or negligence: The prior knowledge of the 40 CFR § 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.

$594,000 $\times$ 10% = $59,400

(c) History of noncompliance: No evidence demonstrating that Company Chas 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.

In addition, there was evidence that Company C's Evanston facility received one year earlier a notice of violation from the State Environmental Protection Department regarding violations of the State's authorized Clean Air Act program. The violations related to units used to treat the waste involved in this RCRA action. Based on this prior notice, an upward adjustment of 5% is justified. $594,000 x 5% = $29,700

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[7] 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. Enforcement personnel should give serious consideration to the inclusion in the economic benefit calculation those amounts Company C saved in reduced disposal fees as a result of the violations specified in 2(a) and 2(b).

(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 down 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	+ Upward Adjustment	+	Economic Benefit	Total Penalty
$594,000	+ $59,400	+ $29,700	+	$12,500	$695,600

Since a penalty of $695,600 would exceed the statutory maximum for 24 violations (24 x 27,500 = 660,000), the penalty amount to be sought in the complaint was adjusted downward to $660,000.

(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 the 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 $110,000 each based on litigative risk.

(9) Final Settlement Penalty amount:

Gravity Base	+ Upward Adjustment	+ Upward Adjustment	+ Economic Benefit	- Downward Adjustment	=	Total Penalty
$594,000	+ $59,400	+$29,700	+ $12,500	- $220,000	=	$475,600

PENALTY AMOUNT FOR PROPOSED FOR HEARING

Company Name: ..::C=o=m p=a=n.t-y....::C"----------

Address: 101 Yourstreet, Evanston, Illinois

Requirement Violated: 42 CFR § 268.7(b) Failure to send accurate notification and certification.

1.	Gravity based penalty from matrix ($24,750 X 12)	$297,000
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell ..	*NIA*
3.	Multiply line 2 by number of days of violation minus 1 [$3,300 x (343-1)]	*NIA*
4.	Add line 1 and line 3	$297,000
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	10%
7.	Percent increase for history of noncompliance	5%
8.*	Total lines 5 thru 7	15%
9.	Multiply line 4 by line 8	$44,550
10.	Calculate Economic Benefit	$2,500
11.	Add lines 4, 9 and 10 for penalty amount to be inserted in the complaint	$344,050

* 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 40 CFR § 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 40 CFR § 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 40 CFR § 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 ·ustified.

(c) History of Compliance: No evidence demonstrating that Company Chas 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. The Evanston facility did, however, recently receive a notice of violation from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.

(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(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 violations amounted to $2,500.

(attach additional sheets if necessary)

4. Recalculation of Penalty Based on New Infomiation:

NIA

(attach additional sheets if necessary)

SETTLEMENT PENALTY AMOUNT

Company Name: Company C - Evanston Facility

Address: 1001 Yourstreet, Evanston, Illinois 12345

Requirement Violated: 40 CFR § 268.7(b): Failure to send accurate notification and certification.

1.	Gravity based penalty from matrix ($24,750 X 12)	$297,000
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day 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	$297,000
5.	Percent increase/decrease for good faith	N/A
6.	Percent increase/decrease for willfulness/negligence	10%
7.	Percent increase for history of noncompliance	5%
8.	Percent increase/decrease for other unique factors	N/A
9.	Add lines 5, 6, 7, and 8	15%
10.	Multiply line 4 by line 9	$44,500
11.	Add lines 4 and 10	$341,550
12.	Adjustment amount for environmental project	N/A
13.	Subtract line 12 from line 11	$341,550
14.	Calculate economic benefit	$2,500
15.	Add lines 13 and 14	$344,050
16.	Adjustment amount for ability-to-pay	N/A
17.	Adjustment amount for litigation risk	-$110,000
18.	Add lines 16 and 17	-$110,000
19.	Subtract line 18 from line 15 for final settlement amount	$234,050

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 reguirement.

(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: 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 e'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.

(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. The Evanston facility did however recently receive a notice of violation from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.
(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(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 $110,000

(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:

NIA

(attach additional sheets if necessary)

PENALTY AMOUNT FOR PROPOSED FOR HEARING

Company Name: -=C-=o=m:.p=an=y,J.-.:::.C'----------

Address: 101 Yourstreet, Evanston, Illinois

Requirement Violated: 42 CFR § 264.13(a). Failure to test restricted wastes.

1.	Gravity based penalty from matrix ($24,750 X 12)	$297,000
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell ..	*NIA*
3.	Multiply line 2 by number of days of violation minus **1** **[$3,300 x (343-1)]**	*NIA*
4.	Add line 1 and line 3	$297,000
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase for willfulness/ negligence	10%
7.	Percent increase for history of noncompliance	5%
8.*	Total lines 5 thru 7	15%
9.	Multiply line 4 by line 8	$44,550
10.	Calculate Economic Benefit	$10,000
11.	Add lines 4, 9 and 10 for penalty amount to be inserted in the complaint	$351,550

* 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 40 CFR § 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 40 CFR § 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 ·ustified.

(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 violation. 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. The Evanston facility did, however, recently receive a notice of violation

from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.
(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(attach additional sheets if necessary)

(f) Other Unique Factors:

NIA

(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:

NIA

(attach additional sheets if necessary)

SETTLEMENT PENALTY AMOUNT

Company Name: Company C - Evanston Facility

Address: 1001 Yourstreet, Evanston. Illinois 12345

Requirement Violated: 40 CFR § 264. l 3(a): Failure to test restricted waste.

1.	Gravity based penalty from matrix ($24,750 X 12).....	$297,000
	(a) Potential for harm	Major
	(b) Extent of Deviation	Major
2.	Select an amount from the appropriate multi-day matrix cell.	*NIA*
3.	Multiply line 2 by number of days of violation minus 1	*NIA*
4.	Add line 1 and line 3	$297,000
5.	Percent increase/decrease for good faith	*NIA*
6.	Percent increase/decrease for willfulness/negligence	10%
7.	Percent increase for history of noncompliance	5%
8.	Percent increase/decrease for other unique factors	*NIA*
9.	Add lines 5, 6, 7, and 8	15%
10.	Multiply line 4 by line 9	$44,550
11.	Add lines 4 and 10	$341,550
12.	Adjustment amount for environmental project	*NIA*
13.	Subtract line 12 from line 11	$341,550
14.	Calculate economic benefit	$10,000
15.	Add lines 13 and 14	$351,550
16.	Adjustment amount for ability-to-pay	*NIA*
17.	Adjustment amount for litigation risk	-$110,000
18.	Add lines 16 and 17	-$110,000
19.	Subtract line 18 from line 15 for final settlement amount	$241,550

NARRATIVE EXPLANATION TO SUPPORT SETTLEMENT AMOUNT

I. 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(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 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 40 CFR § 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.

(attach additional sheets if necessary)

(c) History of Compliance: No evidence demonstrating that Company Chas 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. The Evanston facility did, however, recently receive a notice of violation from the State Environmental Protection Department regarding violations of the State's air pollution program. The violations concerned treatment units that are utilized for the same waste that Company C was sending to Company Z. An upward adjustment of 5% is warranted.

(attach additional sheets if necessary)

(d) Ability to pay:

NIA

(attach additional sheets if necessary)

(e) Environmental Project:

NIA

(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 $110,000

(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:

NIA

(attach additional sheets if necessary)