UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

In the Matter of:	)	
	)	
Estell Subdivison, Lot 2	)	Docket No. SDWA-10-2014-0137
Public Water System	)	
(AK# 2216902)	)	**COMPLAINANT'S**
	)	**MOTION FOR DEFAULT**
	)	
Respondent,	)	
	)	

Pursuant to "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaints or Corrective Action Orders, and the Revocation, Termination of Suspension of Permits," 40 C.F.R. Part 22, in particular 40 C.F.R. § 22.17, the United States Environmental Protection Agency Region 10 (EPA) respectfully requests that the Regional Judicial Officer (1) find the Respondent, Estell Subdivision, Lot 2 in default for failure to file an answer in this matter and (2) assess an administrative civil penalty of $34,400 in favor of EPA. A memorandum in support of this motion is being filed with this motion.

Respectfully Submitted,

Robert E. Hartman

Robert E. Hartman
Assistant Regional Counsel
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Certificate of Service

The undersigned certifies that the original of the attached **COMPLAINANT'S MOTION FOR DEFAULT, In the Matter of: Estell Subdivision, Lot 2, Docket No.: CAA-10-2016-0137**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was hand delivered to:

M SOCORRO RODRIGUEZ
Regional Judicial Officer
U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-113
Suite 900
Seattle, WA 98101

Robert Hartman
U.S. Environmental Protection Agency
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Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Trudy Tush
1117 Chugach Way
Anchorage, Alaska 99503

DATED this 19 day of December, 2016

Signature

Teresa Young
EPA Region 10

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF	)	Docket No. SDWA-10-2014-0137
Estell Subdivison, Lot 2 Public Water System PWS ID # AK 2216902	)	**MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT**
Respondent.	)	

INTRODUCTION

This Memorandum supports a Motion for Default filed by the United States Environmental Protection Agency (EPA). As set forth below, the Estell Subdivision, Lot 2 ("Respondent") has failed to answer a complaint that the EPA filed in this matter on June 1, 2015 and has continued to violate the requirements at issue in this proceeding.

BACKGROUND

Respondent owns and/or operates the Estell Subdivision, Lot 2 public water supply system (System), located in Anchorage, Alaska. The System uses one well to access a groundwater source and serves an average of approximately 40 year-round residents through three service connections. As such, the System is a "public water system" as defined in section 1401(4) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f(4), and is a "community water system" within the meaning of 40 C.F.R. § 141.2. Further, the Respondent is a "supplier of water" within the meaning of section 1401(5) of SDWA, 42 U.S.C § 300f(5), and 40 C.F.R. § 141.2. The Respondent is therefore subject to the requirements of Part B of SDWA, 42 U.S.C §

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300g and its implementing regulations, the National Primary Drinking Water Regulations (NPDWRs), 40 C.F.R. Part 141.

This case was referred to the EPA on April 21, 2014 by the Alaska Department of Environmental Conservation (ADEC) due to the Respondent's failure to conduct required monitoring and exceeding the arsenic Maximum Containment Level (MCL) in violation of the requirements of the SDWA. Before referring this case to the EPA, the ADEC took several measures starting in early 2008 to encourage the Respondent to return to compliance, including verbal and written communications regarding the SDWA violations and compliance status.

On April 17, 2009, ADEC issued a Notice of Violation (NOV) to the Respondent which set forth compliance deadlines. The Respondent was unresponsive to the NOV and failed to meet those deadlines, resulting in an ADEC Administrative Penalty on September 24, 2009. On August 24, 2011, the ADEC issued a second Notice of Violation (NOV) to the Respondent that detailed violations and set forth compliance deadlines. The Respondent was again unresponsive to the NOV and failed to meet those compliance deadlines, resulting in a second ADEC Administrative Penalty on April 6, 2012. Finally, on July 7, 2014, ADEC sent a Notice of Referral to the Respondent that the case would be referred to the EPA for formal enforcement.

The EPA attempted to contact the Respondent by telephone and email, but the Respondent failed to respond to the EPA. *See* Attachment 1. The EPA then issued the Respondent an Administrative Order (Order) on August 5, 2014, citing violations of the NPDWRs, including: failure to provide their customers and the ADEC an annual Consumer Confidence Report (CCR) for the years 2009 through 2013; failure to monitor total coliform bacteria during March, April, and May of 2014; failure to annually monitor for arsenic in 2013; failure to meet the arsenic MCL beginning with the compliance period ending December 31,

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2009; and failure to provide public notice that the Respondent was in violation of the arsenic MCL and monitoring requirements. In summary, the Order required the Respondent to: (1) complete and distribute CCRs covering 2009 to 2013; (2) monitor for total coliform bacteria monthly; (3) provide the EPA and implementing state agency a compliance plan and schedule for coming into compliance with the arsenic MCL; (4) achieve compliance with the arsenic MCL by July 31, 2016; and (5) issue a public notice to the Respondent's customers detailing these violations, and provide certification that the public notice requirement has been met to the EPA and implementing state agency.

The Respondent did not comply with the Order. The EPA attempted to notify the Respondent of noncompliance with the Order by telephone and email, but the Respondent failed to respond to the EPA.

The EPA filed a Complaint and Notice of Opportunity for a Hearing (Complaint) with this Court on January 20, 2015. The Complaint charged the Respondent with three counts of multiple NPDWRs and Order violations and proposed a civil administrative penalty of $34,400. The EPA attempted to provide the Respondent the Complaint through certified mail but eventually had to use a process server to verify receipt. After the EPA served the Respondent the Complaint by service of process on May 1, 2015, the Respondent did not file an answer or otherwise respond to the Complaint. *See* Attachment I

STANDARD FOR FINDING DEFAULT

A Respondent may be found in default upon failure to file a timely answer to an Administrative Complaint. A Respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of the Respondent's right to contest such factual allegations, 40 C.F.R. § 22.17(a). Where the EPA

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requests a penalty in a motion for default, the EPA must specify the amount of, and explain the legal and factual grounds for the penalty it seeks, 40 C.F.R. § 22.17(b). When a Presiding Officer finds that a default has occurred, s/he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. The relief proposed in a complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the particular statute authorizing the proceeding at issue, 40 C.F.R. § 22.17(c).

ARGUMENT

I. Respondent Failed to File an Answer

According to 40 C.F.R. §22.15(a), a Respondent must file an answer to a complaint with the Regional Hearing Clerk within 30 days after service of the complaint. The EPA filed the Complaint in this matter on January 20, 2015. The EPA attempted to provide the Respondent the Complaint through certified mail but eventually had to use a process server to verify receipt. As indicated on the return receipt filed with the Regional Hearing Clerk, the EPA served such Complaint to Respondent on May 1, 2015. The Respondent's 30-day timeframe for filing an answer expired on June 1, 2015.

The Respondent failed to file a timely answer. The EPA warned the Respondent of the consequences for failing to file a timely answer in both the Complaint and its accompanying cover letter. *See* Attachment 2. The cover letter provided information regarding the process for the Respondent to file an answer. The Complaint included specific, highlighted language informing the Respondent of its right to request a hearing and file an answer. Additional language specified the potential consequences of not filing an answer, including a possible default judgment and assessment of a penalty. Despite such warnings, the Respondent failed to

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comply with the answer requirements set forth in the Consolidated Rules, and/or failed to seek an order from the Presiding Officer granting an extension of time in which to file the answer. Such failure to respond provides an appropriate basis for finding the Respondent in default.

II. Prima Facie Case of Liability

For a default order to be entered, the EPA must establish a prima facie case of liability against the Respondent. *See*, *Raber, Jr.,* 2004 EPA RJO LEXIS 188 (July 22, 2004). To prove a prima facie case of liability in this matter, the EPA must prove that the Respondent: (1) is a person that owns and/or operates a public water supply system; (2) has been issued an Administrative Order under section 1414(g) of SDWA, 42 U.S.C. § 300g-3(g); and (3) has violated that order. The factual allegations in the Complaint satisfy all three elements necessary to establish a prima facie case of liability:

- Respondent is a "person" as defined in SDWA and owns and/or operates the System, which has at least 15 service connections and/or regularly serves at least 25 individuals at least 60 days out of the year, is a "public water system.";
- On August 5, 2014, the EPA issued an Administrative Order under section 1414(g) of SDWA, 42 U.S.C. § 300g-3(g), to the Respondent; and
- The Respondent has incurred three counts of violations of the Order, as set forth in Section III of the Complaint.

By failing to file an answer, the Respondent has admitted all factual allegations in the Complaint and is liable to the EPA for a civil penalty pursuant to section 1414(g)(3) of SDWA, 42 U.S.C. § 300g-3(g)(3). Respondent should pay a penalty in this matter.

III. Grounds in Support of the Requested Penalty

The SDWA authorizes the EPA to assess a civil penalty of up to $25,000 per day for

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violation of an order issued under section 1414(g), 42 U.S.C. § 300g-3(g)(3). This amount has been adjusted for inflation to $32,500, as provided in 40 C.F.R. Part 19, for violations occurring March 16, 2004, through January 12, 2009, and to $37,500 for violations occurring after January 12, 2009. *See,* Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66643, 66647 (Nov. 6, 2013) (codified at 40 C.F.R. Part 19). The Respondent's violations at issue occurred beginning in 2014, and fall within the most recent inflation adjustment of $37,500 per day of violation.

The EPA does not seek the statutory maximum in its motion for default, but instead it seeks the $34,400 cited in the Complaint. As set forth below and in Attachment 3, the EPA has arrived at the total penalty amount of $34,400 by assigning numeric values to the factors set forth in the SDWA, based on the facts of this case. *See*, e.g., *Serv. Oil, Inc.*, 2008 EPA App. LEXIS 35 (EAB July 23, 2008), vacated, and remanded on other grounds, 590 F.3d 545 (8th Cir. 2009), where the EPA also proposed far less than the statutory maximum. *See also*, *City of Salisbury*, No. CWA-III-219 (February 8, 2000), affirmed, 10 E.A.D. 263 (EAB 2002), where the EPA had not issued any civil penalty guidelines, the Court applied statutory penalty factors alone in assessing the penalty. The statutory factors which the SDWA requires the EPA to take into account in assessing a civil penalty are: the seriousness of the violation, the population at risk, and other appropriate factors, 42 U.S.C § 300g-3(b).

A. Seriousness of Violations

The Respondent has consistently violated the MCL for arsenic, failed to monitor for arsenic and total coliform, and failed to give notice to the System's customers of these violations since 2008.

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Failures to meet the arsenic MCL presents a substantial risk of harm to the public. The nature of a MCL is to set a safe level for human consumption, above which there is a risk of harm to the public. Studies have linked long-term exposure to arsenic in drinking water to cancer of the bladder, lungs, skin, kidney, nasal passages, liver, and prostate. Non-cancer effects of ingesting arsenic include cardiovascular, pulmonary, immunological, neurological, and endocrine (e.g., diabetes) effects. Short-term exposure to high doses of arsenic can cause other adverse health effects, but such effects are unlikely to occur from U.S. public water supplies that are in compliance with the existing arsenic standard. *See* EPA Office of Water's *Fact Sheet: Drinking Water Standard for Arsenic* (Envtl. Prot. Agency Jan. 2001) http://water.epa.gov/lawsregs/rulesregs/sdwa/arsenic/regulations_factsheet.cfm

Failure to monitor is a serious violation and presents substantial risks of harm to the public, as reflected in several Administrative Law Judge decisions. *See, Durham*, 1997 EPA ALJ LEXIS 107 (April 14, 1997), where a public water supply system failed to sample for coliform bacteria for eleven months and the Administrative Law Judge held that the EPA's calculations had understated the seriousness of the violations:

> "Expert testimony at the hearing indicated that coliform analysis involves testing for the presence of coliform bacteria, which are bacteria which come from the gastrointestinal tracts of warm-blooded animals … some coliform organisms can, by themselves, be very dangerous to the health of persons with compromised immune systems. [citation omitted] However, coliform is mainly used as a secondary pathogen, to suggest the presence of other organisms dangerous to the health of humans. [citation omitted] Exposure to such organisms can result in gastrointestinal diseases, nausea, vomiting, dizziness, and convey illnesses like hepatitis, typhoid, giardiasis and cryptosporidiosis. [citation omitted] Mr. Durham's failure to have the water analyzed for months at a time left the health of men, women, and children drinking it exposed to these conditions." *Id.* at 44-45.

Although coliform had been detected in the system in *Durham*, the EPA presented no evidence of anyone becoming sick from drinking the system's water. Nonetheless, the

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Administrative Law Judge found that the system's failures to analyze coliform samples and report the results constituted serious violations:

> "[The violations] directly undermin[ed] the purpose of the SDWA enforcement program, which is the foundation of EPA's ability to generally protect human health by maintaining water potability. Without the results of periodic water analysis the Agency cannot effectively exercise its power under the Act to take measures to prevent the consumption of contaminated water and demand water improvement efforts." *Id.* at 47.

Similarly, in *Village of Glendora*, the Administrative Law Judge observed:

> "Without adequate monitoring and monitoring data supplied by [Glendora], EPA is unable to determine whether [Glendora] is supplying water to the public that does not exceed the maximum contaminant levels established by national primary drinking water regulations. [Glendora's] violations of the AO as they relate to coliform bacteria testing analysis, reporting and public notification are grave."1992 EPA ALJ LEXIS 712, *11-12 (May 20, 1992).

Failure to provide public notice is a serious violation and presents substantial risks of harm to the public. The Respondent failed to issue a Tier 2 public notice for failure to achieve compliance from 2009 to present. Tier 2 public notice is for violations and situations with the potential to have serious adverse effects on human health. Similar to the Consumer Confidence Reports (CCR), the purpose of public notice is to provide the customers of the water systems the information to make educated decisions regarding any potential health risks pertaining to the quality, treatment, and management of their drinking water supply, specifically where a water system has failed to achieve compliance with the SDWA. Because the Respondent has not completed the requirement for public notice, the users may not know that the Respondent is not in compliance with SDWA and NPDWR requirements and that there may be an imminent or possibly imminent threat from drinking the water, specifically the threat of arsenic MLC exceedances.

The Respondent's longstanding failures to meet MCLs, or to monitor and report violations to the public are serious violations. The toxicological risks of harm are referenced in

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the discussion regarding gravity in Section C.2. The seriousness of the Respondent's violations and the associated threats of harm are necessarily interrelated with the number of people exposed to the threat, and the population at risk as discussed below.

B. Population at Risk

The System serves approximately 40 full-time residents through three service connections. As the Respondent has failed to provide the EPA and ADEC with results of testing for arsenic and total coliform, the EPA has been unable to assess whether the Respondent's customers are drinking safe water or to the extent that the customers are at risk of health impacts from arsenic, coliform, or other pathogens. This factor, the number of persons potentially exposed to the contaminants at issue and the associated human health risks, supports the EPA's proposed penalty.

C. Other Appropriate Factors

The EPA has not developed a guidance policy for proposing penalty amounts in pleadings for public water supply enforcement actions. However, the EPA has published a related guidance, *Policy on Civil Penalties*, Envtl. Prot. Agency, *The Policy on Civil Penalties # GM-21* (Feb. 16, 1984), Envtl. Prot. Agency, *A Framework for Statute-Specific Approaches to Penalty Assessment # GM-22* (Feb. 16, 1984), (GM-21 and GM-22, respectively), included as Attachment 4 to this Memorandum. As stated in *Lincoln Road RV Park, Inc.*, 2009 EPA RJO LEXIS 197 (July 30, 2009), although GM-21 cannot be used by itself as a basis for determining an appropriate penalty, the policy is instructive in how to incorporate the statutory factors:

> [GM-21] sets a framework to consider the Respondent's degree of willfulness and/or negligence, history of noncompliance, if any and ability to pay. These are considered the "other appropriate factors" under Section 1414(b) of the Act. 42 U.S.C. § 300g-3(b) *Id.* at n.3.

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The Regional Judicial Officer further states that GM-22 is a sister policy to GM-21, and that it sets forth the actual framework for calculating a penalty. According to GM-21 and GM-22, "other appropriate factors" to consider in calculating a penalty include:

1. Economic benefit; and
2. Gravity, *e.g.*, actual/possible harm, importance to regulatory program.

Additional gravity-related "adjustment factors" (to better distinguish among cases and promote consistency) are:

3. Degree of cooperation/noncooperation
4. Degree of willfulness and/or negligence
5. History of noncompliance
6. Ability to pay (optional)
7. Other unique factors.

These factors are discussed in more detail below.

1. Economic Benefit

Respondent likely saved minimal monies by failing to monitor and report violations, and providing public notice. In similar cases, Administrative Law Judges have found relatively low amounts of economic benefit for these types of violations. *See*, *Glendora*, *supra,* (finding an economic benefit of $25 for each month of failing to sample for coliform bacteria). In the case at hand, the EPA estimated the public notice and consumer confidence report would require an hour each of owner time annually reoccurring since 2009. Using the BEN model at $15 per hour of owner time, the EPA calculated that the Respondent realized an economic benefit of $61 in avoided costs for the public notice and consumer confidence report.

The economic benefit for the arsenic MCL violations, however, is much greater. The EPA utilized a median cost for implementing treatment by two methods, Reverse Osmosis and Iron Oxide adsorption. Based on recently ADEC approved treatment systems with ADEC approval fees included, Reverse Osmosis at a system the size of Estell Subdivision would be between $9,650 and $13,150 (the mean of which is $11,400). Iron Oxide adsorption at a system

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the size of Estell Subdivision would be between $11,900 and $15,400 (the mean of which is $13,650). The mean of these two is $12,525 in 2014 dollars, which is the value utilized by EPA for the avoided cost of compliance. The BEN model calculated that the Respondent realized **$3,767** economic benefit for avoided compliance costs by not complying with the arsenic MCL in 2009. *See* Attachment 3.

2. Gravity

As referenced in GM- 21, a gravity component is central to a penalty that serves to deter people from violating the law:

> "Successful deterrence is important because it provides the best protection for the environment .... The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure the violator is economically worse off than if it had obeyed the law. This additional amount should reflect **the seriousness of the violation** ... [and] **is referred to as the "gravity component"** (emphasis added)." *Id.* at 3-4.

Consideration of deterrence and the gravity component includes an analysis of the seriousness of the violations. Section III.A, above, identifies issues related to this statutory factor, the seriousness of violations, and outlines how the threats of harm posed by the Respondent's violations are significant and serious. The EPA has determined exposure to arsenic in drinking water has both noncarcinogenic and carcinogenic effects. As part of the justification for Aresenic in drinking water rule, the EPA detailed the following:

> "A large number of adverse noncarcinogenic effects have been reported in humans after exposure to drinking water highly contaminated with arsenic. The earliest and most prominent changes are in the skin, *e.g.,* hyperpigmentation and keratoses (calus-like growths). Other effects that have been reported include alterations in gastrointestinal, cardiovascular, hematological (*e.g.,* anemia), pulmonary, neurological, immunological and reproductive/developmental function. Arsenic is also a multi-site human carcinogen by the drinking water route. Asian, Mexican and South American populations with exposures to arsenic in drinking water generally at or above hundreds of micrograms per liter are reported to have increased risks of skin, bladder, and lung cancer. The current

> evidence also suggests that the risks of liver and kidney cancer may be increased following exposures to inorganic forms of arsenic. The weight of evidence for ingested arsenic as a causal factor of carcinogenicity is much greater now than a decade ago, and the types of cancer occurring as a result of ingesting inorganic arsenic have even greater health implications for U.S. and other populations than the occurrence of skin cancer alone. (Until the late 1980s skin cancer had been the cancer classically associated with arsenic in drinking water.) Epidemiologic studies (human studies) provide direct data on arsenic risks from drinking water at exposure levels much closer to those of regulatory concern than environmental risk assessments based on animal toxicity studies." *See* 66 Fed. Reg. 6976,7000 (2001).

The EPA has also determined that exposure to coliform bacteria can present serious health risks, especially for small children, the elderly, and individuals with compromised immune systems. Further, monitoring for coliform bacteria identifies whether the water may be contaminated with organisms that cause disease, including gastrointestinal disorders. *See*, Office of Water, *Water on Tap: What You Need to Know* (Envtl. Prot. Agency Dec. 2009), http://www.epa.gov/ogwdw/wot/pdfs/book_waterontap_full.pdf (last visited Mar. 10, 2015).

The EPA has determined that public notification is an integral part of the SDWA public health protection. Public notice is intended to provide the customers of the water system with the information necessary to make educated decisions regarding any potential health risks pertaining to the quality, treatment, and management of their drinking water supply, specifically where a water system has failed to achieve compliance with the SDWA.

Respondent's violations for failure to monitor for total coliform and related reporting present many of the same risks identified in *Lincoln Road*, *supra*. As the Court noted:

> By not monitoring for this contaminant, Respondent puts water consumers of this System at risk by possibly exposing them, without their knowledge, to harmful levels of coliform bacteria. Also important to the health of consumers of this System is the fact that, in contravention of the Act [and the MPDWRs,] Respondent never provided the public with notification of its failures to conduct the monitoring. If the System is not regularly monitoring and reporting any failures then the regulators, and more importantly, the consumers are unable to determine if the water is safe to drink. Congress clearly intended the Act to provide this information when it stated "...consumers served by the public water systems should be provided with information on the source of the water they are drinking

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and its quality and safety, as well as prompt notification of any violation of drinking water regulations." n7 [Pub. L. 104-182 Section 3(10). (Aug. 6, 1996)]. Respondent's System serves approximately 134 individuals. The violations are significant and need to be available to those who are impacted. These violations cannot be taken lightly. *Id.* At 8.

The Respondent's cumulative violations resulting in multiple years of harmful exposures to the public of health risks with no notice to customers is evidence of a fundamental recalcitrance by the Respondent and deserves a heightened gravity factor for the penalty. The effect of this recalcitrance on the penalty amount is discussed below in the context of the "adjustment factors" identified GM-21 and GM-22.

3. Degree of Cooperation/Noncooperation

The Respondent has a history of noncooperation with the EPA and ADEC's attempts at communication and resolution of these violations. ADEC began to contact the Respondent in 2008 to correct these violations, but the Respondent was unresponsive. ADEC sent the Respondent a letter warning on July 7, 2014 that this case would be elevated to the EPA for enforcement, but again received no response. The EPA issue a Compliance Order on August 5, 2014 and although the Respondent has had over nine months to answer the Complaint and had repeated opportunities to settle this matter with the EPA, the Respondent has failed to do so. To date, the Respondent has been completely uncooperative by failing to respond to any of the ADEC's or EPA's attempts to contact them.

4. Degree of Willfulness or Negligence

The Respondent's violations have occurred since 2008 and continue to occur. As described in the Background section above, the ADEC took several steps to put the Respondent on notice of violations of the SDWA and to bring the Respondent back into compliance, but the Respondent was unresponsive. Similarly, the EPA has taken several steps to notify the Respondent of violations of the SDWA and actions to compel compliance, but the Respondent

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was again unresponsive while continuing to violate provisions of the SDWA designed to protect human health. The Respondent's continued violations in the face of notices from the ADEC and the EPA demonstrate that the Respondent has acted knowingly and willfully in ignoring its responsibilities to meet the requirements of the NPDWRs.

5. History of Noncompliance

The Respondent has continued to violate provisions of the NPDWRs since 2008. As explained in the Background section, the ADEC issued a Notice of Violation of April 17, 2009 and issued an Administrative Order with Penalty on September 24, 2009. Again, the ADEC issued a Notice of Violation on August 24, 2011 and issued an Administrative Order with Penalty on April 6, 2012. The case was referred to the EPA, which issued an Administrative Order on August 5, 2014 and a Complaint on January 20, 2015. The Respondent failed to comply or even respond to any of these actions. The Respondent's history of noncompliance evidences a fundamental recalcitrance, a persistent disregard of the law, and supports the penalty sought herein.

6. Ability to Pay

The Respondent has not raised the issue of inability to pay and the EPA has, therefore, had no basis to consider it. Further, having failed to respond to the Complaint, the Respondent has not appropriately raised this issue to the Court and no information is in the record to indicate that the Respondent is unable to pay the proposed penalty. When a Respondent does not raise the claim that it is unable to pay a proposed penalty there is no reason for a court to consider it. *Taylor*, 1992 EPA ALJ Lexis 713 (August 14, 1992). As stated in GM-21, "[m]itigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to

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mitigations." *Supra,* at 5. The Respondent has not demonstrated an inability to pay and, therefore, there is no reason for the penalty to be reduced for this factor.

7. Other Unique Circumstances

The EPA has spent a significant amount of time and effort in an attempt to resolve this matter. The many years of the Respondent's noncompliance has caused the ADEC and the EPA to expend considerable programmatic resources. In order to deter similar violations by other systems in the future, a penalty in the amount identified immediately below is warranted.

8. Total Penalty Calculation

The EPA considered the two SDWA statutory factors, seriousness of the violations and population at risk, to arrive at an amount representing the gravity of harm presented by the Respondent's violations. As indicated above, the EPA calculated this preliminary gravity penalty amount and adjusted this amount based on the other appropriate factors outlined in GM-21 and GM-22. Adding in the Respondent's obtained economic benefit, the final penalty that the EPA seeks is a total amount of $34,400. *See* Attachment 3.

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CONCLUSION

The Respondent failed to answer the EPA's Complaint. For the reasons as set forth above, the EPA requests that the Regional Judicial Officer find that the Respondent is in default and issue a default order, assessing a penalty of $34,300.

Respectfully submitted,

Robert E. Hartman

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Attachments:

1. Affidavit of Adam Baron
2. Complaint and Notice of Opportunity for Hearing
3. December 4, 2014 Penalty Justification for Administrative Complaint and Notice of Opportunity for Hearing
4. EPA General Enforcement Policies GM-21 and GM-22, February 16, 1984

ATTACHMENT 1

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF Estell Subdivison, Lot 2 Public Water System PWS ID # AK 2216902 Respondent.	Docket No. SDWA-10-2014-0137 **AFFIDAVIT OF ADAM BARON**

Based upon information and belief, I, Adam Baron, state the following under oath:

1. I make this statement in support of the Motion for Default.

2. I am currently employed by the United States Environmental Protection Agency (EPA) as Compliance Officer in the Drinking Water Unit in the Office of Water in Region 10. In the normal course of its business, the EPA issues administrative orders to owners and/or operators of public water supply (PWS) systems that are referred by the state drinking water programs for elevated enforcement. After the EPA issues any such order, the Compliance Officer coordinates with the referring state drinking water program which, in its usual course of business, receives and maintains reports of any monitoring results or public water system upgrades submitted to the state or the EPA under the terms of the order, until that order is closed. Since April 16, 2014, when the Alaska Department of Conservation's(ADEC) Drinking Water Program referred the Estell Subdivision, Lot 2 ("Respondent') who owns and/or operated the Estell Subdivision, Lot2 Public Water System ("System") to the EPA for elevated enforcement,

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my job duties have included establishing contact with the Respondent and taking any necessary enforcement actions to compel Respondent's compliance with the Safe Drinking Water Act (SDWA).

3. Beginning in August 2014, as part of my job duties I attempted to contact Respondent both by email and by telephone multiple times using the contact information provided to me by the state. I received no response to either form of communication.

4. As part of my job duties, I proceeded to draft an Administrative Order (Order) compelling compliance with the SDWA which was signed and issued on August 5, 2014. The EPA never received any of the records required under the Order or any other response by the Respondent. As part of my job duties, I continued to coordinate with the ADEC to confirm if any required monitoring or engineering plans had been submitted to ADEC as required by the Order. The ADEC contact indicated to me that they never received any of the records required under the Order either.

5. As part of my duties, I again attempted to contact Respondent from September through October of 2014 by both email and by telephone multiple times using the contact information provided to me by the state. Again I received no response to either form of communication.

6. As part of my job duties, I then drafted a Complaint and Notice of Opportunity (Complaint) for Hearing which was issued on January 20, 2015 and mailed to the Respondent's address by certified mail. The Complaint was returned as unclaimed on February 14, 2015. As part of my job duties, I then contracted with a process service company who able to serve the

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Complaint in person on May 1, 2015 after two months of multiple attempts. I was never contacted in any form by the Respondent within the 30 days required by the Complaint or at any time since.

Upon penalty of perjury, I hereby swear the foregoing is true to the best of my knowledge.

Adam Baron

Subscribed and sworn to before me this 7 day of December, 2016.

Signature of Notary Public

My commission expires: 10-1-2020

CANDACE H SMITH
NOTARY PUBLIC
COMMISSION EXPIRES
10-01-20
STATE OF WASHINGTON

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-1037

ATTACHMENT 2

Filed
15 JAN 20 PM 2:56

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

In the Matter of:	)	
	)	
Estell Subdivison, Lot 2	)	Docket No. SDWA-10-2014-0137
Public Water System	)	
(AK# 216902)	)	COMPLAINT, NOTICE AND
	)	OPPORTUNITY FOR HEARING
	)	
Respondent.	)	
	)	

I. AUTHORITIES

1.1. This administrative Complaint is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA or "Complainant") by Section 1414(g)(3)(B) of the Safe Drinking Water Act (the SDWA), 42 U.S.C. § 300g-3(g)(3)(B). The Administrator has delegated this authority to the Regional Administrator of EPA Region 10, who has in turn delegated the authority to the Manager of the Drinking Water Unit in Region 10.

1.2. Pursuant to Section 1414(g)(3)(B) of the Safe Drinking Water Act (the SDWA), 42 U.S.C. § 300g-3(g)(3)(B) and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,) 40 C.F.R. Part 22 ("Consolidated Rules of Practice"), Complaint hereby seek the assessment of a civil administrative penalty against Estell Subdivision, Lot 2 (Respondent) for violations of SDWA and the regulations at 40 C.F.R. Part 141.

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92060 553-1037

II. STATUTORY AND REGULATORY BACKGROUND

2.1. In accordance with Section 1413(a) of the SDWA, 42 U.S.C. § 300g-2(a), the State of Alaska (State) has primary enforcement responsibility to ensure that suppliers of water within the state comply with the requirements of the SDWA. The Alaska Department of Environmental Conservation (ADEC) is the state agency that has authority for implementing the drinking water regulations in Alaska.

2.2. According to Section 1414(b) of SDWA, 42 U.S.C. § 300g-3(b), for violations of applicable requirements of the SDWA in a state that has primary enforcement responsibility, the EPA may bring a civil action if requested by the agency of that state with the authority for enforcing such requirements. Further, according to Section 1414(g)(1) of the SDWA, 42 U.S.C. § 300g-3(g)(1), the EPA may issue an administrative compliance order in any case in which the EPA may bring a civil action.

2.3. On behalf of the State, ADEC has requested that the EPA initiate a formal enforcement action to bring the public water system operated by the Respondent into compliance with the SDWA, the regulations at 40 C.F.R. Part 141, and applicable State requirements.

2.4. On August 25, 2014, in accordance with Section 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g), the EPA issued by personal service an Administrative Order, Docket No. SDWA-08-2014-0137 (the Order) to Respondent, citing violations of 40 C.F.R. Part 141 (also known as the National Primary Drinking Water Regulations or NPDWRs).

III. ALLEGATIONS

3.1. Estell Subdivison, Lot 2 is a "person" within the meaning of is a "person" as defined in Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 141.2.

3.2. Respondent operates the Estell Subdivison, Lot 2 Public Water System (the System) located in Anchorage, Alaska that provides water for human consumption to the public through pipes or other constructed conveyances.

3.3. The System serves three service connections and approximately 40 fulltime residents. The System is supplied solely by a groundwater source.

3.4. Because the System has at least 15 service connections used by year-round residents and/or regularly serves at least 25 year-round residents, the System is a "public water system" and a "community water system" as those terms are defined in 40 C.F.R. § 141.2 and Section 1401 of the SDWA, 42 U.S.C. § 300f.

3.5. As an owner and/or operator of a public water system, Respondent is a "supplier of water" as defined in Section 1401(5) of the SDWA, 42 U.S.C. § 300f(5), and 40 C.F.R. § 141.2. Respondent is, therefore, subject to NPDWRs, each of which is an "applicable requirement" as defined in Section 1414(i) of the SDWA, 42 U.S.C. § 300g-3(i).

VIOLATIONS

Count 1
Failure to Provide Timely Consumer Confidence Reports

3.6. According to 40 C.F.R. §§ 141.152-141.154, Respondent is required to distribute to their customers and ADEC an annual Consumer Confidence Report (CCR) containing certain information and to certify to ADEC that the report has been sent within three months of distribution to their customers.

3.7. Paragraph 4.1 of the Order directed Respondent to prepare and deliver a CCR for 2009 through 2013 to the System's customers, the EPA, and ADEC within 60 days of receiving the Order.

3.8. To date, Respondent has not delivered a CCR for 2009 through 2013 to the System's customers, the EPA, and ADEC, in violation of paragraph 4.1 of the Order.

Count II
Failure to Submit Compliance Plan and Schedule within 60 Days of Receiving Order

3.9. Paragraph 3.4 of the Order cited an instance on December 31, 2009 in which the Respondent had violated the Maximum Contaminant Level (MCL) for arsenic, which is set forth in 40 C.F.R. §§ 141.62(b) and 141.23(i)(1).

3.10. Paragraph 4.3 of the Order directed Respondent, within 60 days of receiving the Order, to provide the EPA and ADEC with a compliance plan and schedule for the System to come into compliance with the arsenic MCL.

3.11. To date, Respondent has failed to submit a compliance plan and schedule for attaining the arsenic MCL to either the EPA or ADEC, in violation of paragraph 4.3 of the Order.

Count III
Failure to Provide Timely Public Notice and Certification to ADEC

3.12. Respondent is required to notify the public of certain violations of the Drinking Water Regulations. 40 C.F.R. §§ 141.201-141.211.

3.13. Paragraph 4.6 of the Order required Respondent to provide public notice of its violations as required by 40 C.F.R. §§ 141.201-141.211. Paragraph 4.7 required the Respondent to provide the ADEC with a copy of the public notice and a certification that the water system has fully complied with the public notification regulations no later than the 10th day of the month following the month the public notices were distributed.

3.14. To date, Respondent has not provided public notice of its violation to its customers nor provided a copy and certification to ADEC, in violation of paragraphs 4.6 and 4.7 of the Order.

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IV. PROPOSED PENALTY

4.1. This Complaint proposes that the EPA assess an administrative penalty against Respondent. The EPA is authorized to assess an administrative civil penalty according to Section 1414(g)(3)(B) of the SDWA, 42 U.S.C. § 300g-3(g)(3)(B), for violation of an administrative order issued under Section 1414(g) of the SDWA. The amount of the administrative penalty may not exceed $32,500 per day per violation for violations occurring after January 12, 2009. (The original statutory amount of $25,000 has been adjusted for inflation pursuant to 40 C.F.R. part 19. See 74 Fed. Reg. 626, January 7, 2009.)

4.2. Based on an evaluation of the facts alleged in this Complaint, and after considering the statutory factors of Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), which include the seriousness of the violation, the population at risk, and other appropriate factors, including Respondent's degree of willfulness and/or negligence, history of noncompliance, and ability to pay, as known to the EPA at this time, the Complainant proposes that an administrative penalty not to exceed **$34,400** be assessed against Respondent.

V. OPPORTUNITY TO REQUEST A HEARING

5.1. As provided in Section 1414(g)(3)(B) of the SDWA, 42 U.S.C. § 300g-3(g)(3)(B), Respondent has the right to request a public hearing to contest any material fact alleged in this Complaint, to contest the appropriateness of the proposed penalty, and/or to assert that it is entitled to judgment as a matter of law. Any hearing requested will be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et* seq., and the Consolidated Rules of Practice, 40 C.F.R. Part 22. A copy of the Consolidated Rules of Practice is enclosed with this Complaint.

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5.2. Respondent's Answer, including any request for hearing, must be in writing and must be filed with:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

VI. FAILURE TO FILE AN ANSWER

6.1. To avoid a default order being entered pursuant to 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days after service of this Complaint.

6.2. In accordance with 40 C.F.R. § 22.15, Respondent's answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which the Respondent has any knowledge. Respondent's Answer must also state: (1) the circumstances of arguments which are alleged to constitute the grounds of defense; (2) the facts which the Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested. Failure to admit, deny, or explain any material factual allegation contained herein constitutes an admission of the allegation.

VII. INFORMAL SETTLEMENT CONFERENCE

7.1. Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of the case, the proposed penalty, and the possibility of settling this matter. To request such a settlement conference, Respondent should contact:

Robert Hartman
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10

1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

7.2. Note that a request for an informal settlement conference does not extend the 30 day period for filing a written Answer to this Complaint, nor does it waive Respondent's right to request a hearing.

7.3. Respondent is advised that pursuant to 40 C.F.R. § 22.8, after the Complaint is issued, the Consolidated Rules of Practice prohibit any *ex parte* (unilateral) discussion of the merits of these or any other factually related proceedings with the Administrator, the Environmental Appeal Board or its members, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on this case.

VIII. PAYMENT OF PENALTY

8.1. As provided in 40 C.F.R. § 22.18(a)(1), Respondent may resolve the proceeding at any time by paying the specific penalty proposed in the Complaint and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment (at the address noted in Section V of the Complaint). If the Respondent pays the proposed penalty in full within 30 days after receiving the complaint, no Answer need by filed. Respondent can obtain a 30 day extension to pay the proposed penalty in full without filing an Answer by complying with the requirements of 40 C.F.R. § 22.18(a). Payment of the proposed penalty must be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the proposed penalty in the Complaint to the Following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077

St. Louis, MO 63197-9000

A transmittal letter indicating Respondent's name, complete address, and this case docket number must accompany each payment. A copy of each check should also be provided to Robert Hartman at the address shown in Section VII of the Complaint.

Dated this 20th day of January, 2015.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 10
Complainant

Marie Jennings, Manager
Drinking Water Unit

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
92060 553-1037

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original of the attached **COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING, In the matter of: Estell Subdivision Lot 2, Docket No.: SDWA-10-2014-0137,** was filed with the Regional hearing Clerk and served on the addresses in the following manner on the date specified below:

Robert Hartman
U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, Washington 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States Mail certified/return receipt to:

Trudy Tush
Owner, Estell Subdivision Lot 2 Public Water System
1117 Chugach Way
Anchorage, Alaska 99503
Certified Mail, Return Receipt Number: 7011 0470 0002 9128 2079

DATED this 20th day of January, 2015

By: Sharon Eng
Signature
EPA Region 10

ATTACHMENT 3

ENFORCEMENT CONFIDENTIAL PRIVILEGED - ATTORNEY-CLIENT PRIVILEGED ATTORNEY WORK PRODUCT - EXEMPT FROM FOIA DISCLOSURE

December 4, 2014

MEMORANDUM

To: File

From: Adam Baron
Drinking Water Enforcement Officer

Re: Penalty Justification
Administrative Complaint and Notices of Opportunity for Hearing Docket No. SDWA-10-2014-0317

The purpose of this memorandum is to document the basis for the proposed penalty for assessment against Estell Subdivision Lot 2 (Respondent), who owns and operates the Estell Subdivision Lot 2 Public Water System, PWS ID# AK2216902 (System), which supplies water to the community. Estell Subdivison Lot 2 is owned and operated by Ms. Trudy Tush.

EPA is requesting the assessment of an administrative penalty of **$34,400** for this Complaint. Section 1414(b) of the SDWA sets out certain factors to be taken into account by a district court when determining the amount of a civil penalty. These statutory factors include the seriousness of the violations, the population at risk, and other appropriate factors. In making administrative penalty calculations under the SDWA, EPA also interprets "other appropriate factors" as prior history of such violations, degree of willfulness/negligence, economic benefit and ability to pay as consistent with EPA's general approach to administrative penalty calculation throughout multiple enforcement programs.

The following is the statutory analysis which justifies the **$34,400**.

AO Requirements and Background

Case was referred to EPA from ADEC on April 21, 2014. Adam Baron is the case developer, and Bob Hartman is the attorney. EPA mailed Order to Respondent on August 8, 2014 via certified mail, but it was returned unopened. EPA personally served the Order to Respondent on August 25, 2014. The Order became effective upon receipt. Order is Docket No. SDWA-10-2014-0137.

The Order required the following:

1. Within 60 days of the effective date of this Order, Respondent shall complete and distribute to their consumers an annual Consumer Confidence Report (CCR) covering the years 2009 through 2014.
2. Within 30 days of the effective date of this Order Respondent shall monitor the system's water monthly for total coliform bacteria. Respondent shall continue to monitor for total coliform bacteria monthly for six months of the effective date of the Order.

3. Within 60 days of the effective date of this Order, Respondent shall provide ADEC and the EPA a compliance plan and schedule for the system to come into compliance with the aresenic MCL.
4. By July 31, 2016, Respondent shall achieve compliance with the running annual average MCL for arsenic at every arsenic sampling point in the water system.
5. Within 60 days of the effective date of this Order, Respondent shall issue a Tier 2 public notice for failure to achieve compliance.
6. Respondent shall submit to ADEC, a copy of the public notice and a certification that the water system has fully complied with the public notification regulations no later than the 10th day of the month following the month the public notices were distributed.

Penalty Calculation

(A) Seriousness of the Violations/Risk to Public Health

The SDWA regulations were promulgated to protect public health from exposure to contaminants and pathogens in drinking water through proper operation of drinking water plants. EPA interprets seriousness of the violations and risk to public health to be function of size of the population served at the water system, the type of violation of the SDWA, and the duration of the violation. The Respondent's systems serves approximately 40 full time residents through three service connections. The type and duration of the violations is explained below:

1. Respondent failed to complete and distribute to their consumers a CCR covering the years 2009 to present. The purpose of the requirement for all community water systems to prepare, distribute, and certify accuracy of an annual Consumer Confidence Report is to improve public health protection by providing educational material to allow consumers to make educated decisions regarding any potential health risks pertaining to the quality, treatment, and management of their drinking water supply. The CCR summarizes information regarding the source, any detected contaminants, compliance, and educational information about the water. Because the system has not completed the requirement for a CCR, the users may not know that the system is not in compliance with SDWA and NPDWR requirements and that there may be an imminent or possibly imminent threat from drinking the water, specifically the aresenic MLC violation. Accordingly, EPA will seek a penalty of $500 per year that the respondent failed to complete and distribute a CCR, for total of (5 years x $500) **$2,500**.
2. Respondent achieved compliance with total coliform bacteria monitoring for August and September. The future months cannot yet be determined.
3. The Respondent failed to address the aresenic MCL violation from August 24, 2011 until the present. Studies have linked long-term exposure to arsenic in drinking water to cancer of the bladder, lungs, skin, kidney, nasal passages, liver, and prostate. Non-cancer effects of ingesting arsenic include cardiovascular, pulmonary, immunological, neurological, and endocrine (e.g., diabetes) effects. Short-term exposure to high doses of arsenic can cause other adverse health effects, but such effects are unlikely to occur from U.S. public water supplies that are in compliance with the existing arsenic standard. This is a serious violation that effects human health. Accordingly, EPA will seek a penalty of $500 per month that Respondent failed to address the MCL violation for total of (27 months x $500) **$13,500.**
4. This requirement in the Order had not yet lapsed.
5. The Respondent failed to issue a Tier 2 public notice for failure to achieve compliance from 2009 to present. Similar to the CCR, the purpose of public notice is to the water systems the information to make educated decisions regarding any potential health risks pertaining to the

quality, treatment, and management of their drinking water supply, specifically where a water system has failed to achieve compliance with the SDWA. Because the system has not completed the requirement for public notice, the users may not know that the system is not in compliance with SDWA and NPDWR requirements and that there may be an imminent or possibly imminent threat from drinking the water, specifically the aresenic MLC violation. Accordingly, EPA will seek a penalty of $500 per year that the respondent failed to complete and distribute a CCR, for total of (5 years x $500) **$2,500**.

6. Failure to submit a copy of the public notice to ADEC cannot be tabulated until public notice is issued.

Total penalty based on seriousness of violation and risk to public health equals ($2,500 + $13,500 + $2,500) **$18,500**.

(B) Prior History of Violation

Calculation of prior history includes the following enforcement actions. The penalty will be adjusted up 10% per enforcement action that the Respondent failed to satisfy.

- ADEC Notice of Violation on April 17, 2009 – 10% upward adjustment
- ADEC Administrative Order with Penalty on September 24, 2009 – 10% upward adjustment
- ADEC Notice of Violation on April August 24, 2011 – 10% upward adjustment
- ADEC Administrative Order with Penalty on April 6, 2012 – 10% upward adjustment
- EPA Administrative Order on August 25, 2014 – 10% upward adjustment

Accordingly, total penalty is adjusted upward 50% for a history of violations for a total of ($18,500 x 1.50) **$27,750**.

(C) Degree of Willfulness/Negligence of the Respondents

EPA is increasing the penalty upwards by 10% for willfulness and negligence. This determination is based on several factors: 1) the Respondent has a previous enforcement history with the ADEQ for similar violations; 2) Respondent consistently fails to monitor for multiple SDWA requirements; 3) Respondent has a history of late reporting when samples are collected; and 4) the Respondent consistently refuses to communicate with either EPA or ADEQ on any SDWA issue.

Accordingly, total penalty is adjusted upward 10% for degree of willfulness and negligence of the Respondents for a total of ($27,500 x 1.50) **$30,525**.

(E) Economic Benefit

Utilizing 1 hour of owner/ operator time for public notification work compliance work for the PN and CCR each at $15.00/hr, the total avoided cost of compliance is $15 annually reoccurring cost since 2009 per count. The BEN model calculated that the Respondent realized **$61** in avoided compliance cost per count.

For failure to achieve compliance with the aresenic MCL, EPA utilized median cost for implementing treatment by two methods, Reverse Osmosis and Iron Oxide adsorption. Based on recently ADEC approved treatment systems with ADEC approval fees included, Reverse Osmosis at a system the size of

Estell Subdivision would be between $9,650 and $13,150 (the mean of which is $11,400). Iron Oxide adsorption at a system the size of Estell Subdivision would be between $11,900 and $15,400 (the mean of which is $13,650). The mean of these two is $12,525 in 2014 dollars, which is the value utilized by EPA for the avoided cost of compliance. The BEN model calculated that the Respondent realized **$3,767** economic benefit for avoided compliance costs.

Accordingly, the economic benefit realized by the Respondents for non-compliance will be added to the total penalty ($30,527 + $61 + $61 + $3,767) **$34,416**.

(F) Ability to pay

Respondents have not raised the issue of inability to pay and Complainant has, therefore, had no basis to consider it.

In conclusion, the violations and EPA's application of the statutory factors in 1414(b), as incorporated into actions brought under §1414(g), fully supports the proposed penalty of ($34,416 rounded to nearest hundred) **$34,400** for the Estell Subdivison Lot 2.

ATTACHMENT 4

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Introduction

This document, Policy on Civil Penalties, establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions. These goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - are presented here in general terms. An outline of the general process for the assessment of penalties is contained in Attachment A.

A companion document, A Framework for Statute-Specific Approaches to Penalty Assessments, will also be issued today. This document provides guidance to the user of the policy on how to write penalty assessment guidance specific to the user's particular program. The first part of the Framework provides general guidance on developing program-specific guidance; the second part contains a detailed appendix which explains the basis for that guidance. Thus, the user need only refer to the appendix when he wants an explanation of the guidance in the first part of the Framework.

In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty actions should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented. Documentation for deviations from the Framework in program-specific guidance should be located in that guidance. Documentation for deviations from the program-specific guidance in calculating individual penalties should be contained in both the case files and in any memoranda that accompany the settlements.

The Agency will make every effort to urge administrative law judges to impose penalties consistent with this policy and any medium-specific implementing guidance. For cases that go to court, the Agency will request the statutory maximum penalty in the filed complaint. And, as proceedings warrant, EPA will continue to pursue a penalty no less than that supported by the applicable program policy. Of course, all penalties must be consistent with applicable statutory provisions, based upon the number and duration of the violations at issue.

Applicability

This policy statement does not attempt to address the specific mechanisms for achieving the goals set out for penalty assessment. Nor does it prescribe a negotiation strategy to achieve the penalty target figures. Similarly, it does not address differences between statutes or between priorities of different programs. Accordingly, it cannot be used, by itself, as a basis for determining an appropriate penalty in a specific

action. Each EPA program office, in a joint effort with the Office of Enforcement and Compliance Monitoring, will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework.

Until new program-specific policies are issued, the current penalty policies will remain in effect. Once new program-specific policies are issued, the Agency should calculate penalties as follows:

- For cases that are substantially settled, apply the old policy.

- For cases that will require further substantial negotiation, apply the new policy if that will not be too disruptive.

Because of the unique issues associated with civil penalties in certain types of cases, this policy does not apply to the following areas:

- CERCLA §107. This is an area in which Congress has directed a particular kind of response explicitly oriented toward recovering the cost of Government cleanup activity and natural resource damage.

- Clean Water Act §311(f) and (g). This also is cost recovery in nature. As in CERCLA §107 actions, the penalty assessment approach is inappropriate.

- Clean Air Act §120. Congress has set out in considerable detail the level of recovery under this section. It has been implemented with regulations which, as required by law, prescribe a non-exclusive remedy which focuses on recovery of the economic benefit of noncompliance. It should be noted, however, that this general penalty policy builds upon, and is consistent with the approach Congress took in that section.

Much of the rationale supporting this policy generally applies to non-profit institutions, including government entities. In applying this policy to such entities, EPA must exercise judgment case-by-case in deciding, for example, how to apply the economic benefit and ability to pay sanctions, if at all. Further guidance on the issue of seeking penalties against non-profit entities will be forthcoming.

Deterrence

The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

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. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the "benefit component" of the penalty.

Where the penalty fails to remove the significant economic benefit, as defined by the program-specific guidance, the case development team must explain in the case file why it fails to do so. The case development team must then include this explanation in the memorandum accompanying each settlement for the signature of the Assistant Administrator of Enforcement and Compliance Monitoring, or the appropriate Regional official.

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to

achieve general deterrence. These extra assessments should balance the other goals of this policy, particularly equitable treatment of the regulated community.

This approach is consistent with the civil penalty provisions in the environmental laws. Almost all of them require consideration of the seriousness of the violation. This additional amount which reflects the seriousness of the violation is referred to as the "gravity component". The combination of the benefit and gravity components yields the "preliminary deterrence figure."

As explained later in this policy, the case development team will adjust this figure as appropriate. Nevertheless, EPA typically should seek to recover, at a minimum, a penalty which includes the benefit component plus some non-trivial gravity component. This is important because otherwise, regulated parties would have a general economic incentive to delay compliance until the Agency commenced an enforcement action. Once the Agency brought the action, the violator could then settle for a penalty less than their economic benefit of noncompliance. This incentive would directly undermine the goal of deterrence.

Fair and Equitable Treatment of the Regulated Community

The second goal of penalty assessment is the fair and equitable treatment of the regulated community. Fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility. The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

But any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Methods for quantifying the benefit and gravity components are explained in the Framework guidance. These methods significantly further the goal of equitable treatment of violators. To begin with, the benefit component promotes equity by removing the unfair economic advantage which a violator may have gained over complying parties. Furthermore, because the benefit and gravity components are generated systematically, they

will exhibit relative consistency from case to case. Because the methodologies account for a wide range of relevant factors, the penalties generated will be responsive to legitimate differences between cases.

However, not all the possibly relevant differences between cases are accounted for in generating the preliminary deterrence amount. Accordingly, all preliminary deterrence amounts should be increased or mitigated for the following factors to account for differences between cases:

- Degree of willfulness and/or negligence
- History of noncompliance.
- Ability to pay.
- Degree of cooperation/noncooperation.
- Other unique factors specific to the violator or the case.

Mitigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation.

The preliminary deterrence amount adjusted prior to the start of settlement negotiations yields the "initial penalty target figure". In administrative actions, this figure generally is the penalty assessed in the complaint. In judicial actions, EPA will use this figure as the first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels that it is appropriate. The initial penalty target may be further adjusted as negotiations proceed and additional information becomes available or as the original information is reassessed.

Swift Resolution of Environmental Problems

The third goal of penalty assessment is swift resolution of environmental problems. The Agency's primary mission is to protect the environment. As long as an environmental violation continues, precious natural resources, and possibly public health, are at risk. For this reason, swift correction of identified environmental problems must be an important goal of any enforcement action. In addition, swift compliance conserves Agency personnel and resources.

The Agency will pursue two basic approaches to promoting quick settlements which include swift resolution of environmental problems without undermining deterrence. Those two approaches are as follows:

1. Provide incentives to settle and institute prompt remedial action.

EPA policy will be to provide specific incentives to settle, including the following:

- The Agency will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation.1/ This would be considered in the adjustment factor called degree of cooperation/noncooperation discussed above.

- The Agency will consider accepting additional environmental cleanup, and mitigating the penalty figures accordingly. But normally, the Agency will only accept this arrangement if agreed to in pre-litigation settlement.

Other incentives can be used, as long as they do not result in allowing the violator to retain a significant economic benefit.

2. Provide disincentives to delaying compliance.

The preliminary deterrence amount is based in part upon the expected duration of the violation. If that projected period of time is extended during the course of settlement negotiations due to the defendant's actions, the case development team should adjust that figure upward. The case development team should consider making this fact known to the violator early in the negotiation process. This will provide a strong disincentive to delay compliance.

1/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or

- for judicial actions - when an Assistant United States Attorney files a complaint in court.

Intent of Policy and Information Requests for Penalty Calculations

The policies and procedures set out in this document and in the Framework for Statute-Specific Approaches to Penalty Assessment are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice. In addition, any penalty calculations under this policy made in anticipation of litigation are exempt from disclosure under the Freedom of Information Act. Nevertheless as a matter of public interest, the Agency may elect to release this information in some cases.

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Attachment

ATTACHMENT A

Outline of Civil Penalty Assessment

I. Calculate Preliminary Deterrence Amount

A. Economic benefit component and

B. Gravity component

(This yields the preliminary deterrence amount.)

II. Apply Adjustment Factors

A. Degree of cooperation/noncooperation (indicated through pre-settlement action.)

B. Degree of willfulness and/or negligence.

C. History of noncompliance.

D. Ability to pay (optional at this stage.)

E. Other unique factors (including strength of case, competing public policy concerns.)

(This yields the initial penalty target figure.)

III. Adjustments to Initial Penalty Target Figure After Negotiations Have Begun

A. Ability to pay (to the extent not considered in calculating initial penalty target.)

B. Reassess adjustments used in calculating initial penalty target. (Agency may want to reexamine evidence used as a basis for the penalty in the light of new information.)

C. Reassess preliminary deterrence amount to reflect continued periods of noncompliance not reflected in the original calculation.

D. Alternative payments agreed upon prior to the commencement of litigation.

(This yields the adjusted penalty target figure.)

A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS:

IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Contents Page

Appendix (Con't)

Introduction

This document, A Framework for Statute-Specific Approaches to Penalty Assessment, provides guidance to the user of the Policy on Civil Penalties on how to develop a medium-specific penalty policy. Such policies will apply to administratively imposed penalties and settlements of both administrative and judicial penalty actions.

In the Policy on Civil Penalties, the Environmental Protection Agency establishes a single set of goals for penalty assessment. Those goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - will be substantially impaired unless they are pursued in a consistent fashion. Even different terminology could cause confusion that would detract from the achievement of these goals. At the same time, too much rigidity will stifle negotiation and make settlement impossible.

The purpose of this document is to promote the goals of the Policy on Civil Penalties by providing a framework for medium-specific penalty policies. The Framework is detailed enough to allow individual programs to develop policies that will consistently further the Agency's goals and be easy to administer. In addition, it is general enough to allow each program to tailor the policy to the relevant statutory provisions and the particular priorities of each program.

While this document contains detailed guidance, it is not cast in absolute terms. Nevertheless, the policy does not encourage deviation from this guidance in either the development of medium-specific policies or in developing actual penalty figures. Where there are deviations in developing medium-specific policies, the reasons for those changes must be recorded in the actual policy. Where there are deviations from medium-specific policies in calculating a penalty figure, the case development team must detail the reasons for those changes in the case file. In addition, the rationale behind the deviations must be incorporated in the memorandum accompanying the settlement package to Headquarters or the appropriate Regional official.

This document is divided into two sections. The first one gives brief instructions to the user on how to write a medium-specific policy. The second section is an appendix that gives detailed guidance on implementing each section of the instructions and explains how the instructions are intended to further the goals of the policy.

Writing a Program Specific Policy

Summarized below are those elements that should be present in a program-specific penalty policy. For a detailed discussion of each of these ideas, the corresponding portions of the appendix should be consulted.

I. Developing a Penalty Figure

The development of a penalty figure is a two step process. First the case development team must calculate a preliminary deterrence figure. This figure is composed of the economic benefit component (where applicable) and the gravity component. The second step is to adjust the preliminary deterrence figure through a number of factors. The resulting penalty figure is the initial penalty target figure. In judicial actions, the initial penalty target figure is the penalty amount which the government normally sets as a goal at the outset of settlement negotiations. It is essentially an internal settlement goal and should not be revealed to the violator unless the case development team feels it is appropriate. In administrative actions, this figure generally is the penalty assessed in the complaint. While in judicial actions, the government's complaint will request the maximum penalty authorized by law.

This initial penalty target figure may be further adjusted in the course of negotiations. Each policy should ensure that the penalty assessed or requested is within any applicable statutory constraints, based upon the number and duration of violations at issue.

II. Calculating a Preliminary Deterrence Amount

Each program-specific policy must contain a section on calculating the preliminary deterrence figure. That section should contain materials on each of the following areas:

- Benefit Component. This section should explain:
  - a. the relevent measure of economic benefit for various types of violations,
  - b. the information needed,
  - c. where to get assistance in computing this figure and
  - d. how to use available computer systems to compare a case with similar previous violations.

- Gravity Component. This section should first rank different types of violations according to the seriousness of the act. In creating that ranking, the following factors should be considered:

  a. actual or possible harm,
  b. importance to the regulatory scheme and
  c. availability of data from other sources.

In evaluating actual or possible harm, your scheme should consider the following facts:

- amount of pollutant,
- toxicity of pollutant,
- sensitivity of the environment,
- length of time of a violation and
- size of the violator.

The policy then should assign appropriate dollar amounts or ranges of amounts to the different ranked violations to constitute the "gravity component". This amount, added to the amount reflecting economic benefit, constitutes the preliminary deterrence figure.

III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure (Prenegotiation Adjustment)

Each program-specific penalty policy should give detailed guidance on applying the appropriate adjustments to the preliminary deterrence figure. This is to ensure that penalties also further Agency goals besides deterrence (i.e. equity and swift correction of environmental problems). Those guidelines should be consistent with the approach described in the appendix. The factors may be separated according to whether they can be considered before or after negotiation has begun or both.

Adjustments (increases or decreases, as appropriate) that can be made to the preliminary deterrence penalty to develop an initial penaly target to use at the outset of negotiation include:

- Degree of willfulness and/or negligence
- Cooperation/noncooperation through pre-settlement action.
- History of noncompliance.

- Ability to pay.
- Other unique factors (including strength of case, competing public policy considerations).

The policy may permit consideration of the violator's ability to pay as an adjustment factor before negotiations begin. It may also postpone consideration of that factor until after negotiations have begun. This would allow the violator to produce evidence substantiating its inability to pay.

The policy should prescribe appropriate amounts, or ranges of amounts, by which the preliminary deterrence penalty should be adjusted. Adjustments will depend on the extent to which certain factors are pertinent. In order to preserve the penalty's deterrent effect, the policy should also ensure that, except for the specific exceptions described in this document, the adjusted penalty will: 1) always remove any significant economic benefit of noncompliance and 2) contain some non-trivial amount as a gravity component.

IV. Adjusting the Initial Penalty Target During Negotiations

Each program-specific policy should call for periodic reassessment of these adjustments during the course of negotiations. This would occur as additional relevant information becomes available and the old evidence is re-evaluated in the light of new evidence. Once negotiations have begun, the policy also should permit adjustment of the penalty target to reflect "alternative payments" the violator agrees to make in settlement of the case. Adjustments for alternative payments and pre-settlement corrective action are generally permissible only before litigation has begun.

Again, the policy should be structured to ensure that any settlement made after negotiations have begun reflects the economic benefit of noncompliance up to the date of compliance plus some non-trivial gravity component. This means that if lengthy settlement negotiations cause the violation to continue longer than initially anticipated, the penalty target figure should be increased. The increase would be based upon the extent that the violations continue to produce ongoing environmental risk and increasing economic benefit.

Use of the Policy In Litigation

Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

should account for all the factors identified in the relevant statute and still allow for compromises in settlement without exceeding the parameters outlined in this document. (For each program, all the statutory factors are contained in the Framework either explicitly or as part of broader factors.) For administrative proceedings, the policy should explain how to formulate a penalty figure, consistent with the policy. The case development team will put this figure in the administrative complaint.

In judicial actions, the EPA will use the initial penalty target figure as its first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels it is appropriate. In judicial litigation, the government should request the maximum penalty authorized by law in its complaint. The policy should also explain how it and any applicable precedents should be used in responding to any explicit requests from a court for a minimum assesment which the Agency would deem appropriate.

Use of the Policy as a Feedback Device

Each program-specific policy should first explain in detail what information needs to be put into the case file and into the relevant computer tracking system. Furthermore, each policy should cover how to use that system to examine penalty assessments in other cases. This would thereby assist the Agency in making judgments about the size of adjustments to the penalty for the case at hand. Each policy should also explain how to present penalty calculations in litigation reports.

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Attachment

APPENDIX

Introduction

This appendix contains three sections. The first two sections set out guidelines for achieving the goals of the Policy on Civil Penalties. The first section focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty which reflects the seriousness of the violation. The second section provides adjustment factors so that both a fair and equitable penalty will result and that there will be a swift resolution of the environmental problem. The third section of the framework presents some practical advice on the use of the penalty figures generated by the policy.

The Preliminary Deterrence Amount

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it specifies that any penalty should, at a minimum, remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of economic benefit to reflect the seriousness of the violation. That portion of the penalty which removes the economic benefit of noncompliance is referred to as the "benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section of the document provides guidelines for calculating the benefit component and the gravity component. It will also present and discuss a simplified version of the economic benefit calculation for use in developing quick penalty determinations. This section will also discuss the limited circumstances which justify settling for less than the benefit component. The uses of the preliminary deterrence amount will be explained in subsequent portions of this document.

I. The Benefit Component

In order to ensure that penalties remove any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues

to be considered when computing the benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. This section concludes with a discussion of the proper use of the benefit component in developing penalty figures and in settlement negotiations.

A. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which fails to construct required settling ponds will eventually have to spend the money needed to build those ponds in order to achieve compliance. But, by deferring these one-time nonrecurring costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which result in savings from deferred cost are the following:

- Failure to install equipment needed to meet discharge or emission control standards.
- Failure to effect process changes needed to eliminate pollutants from products or waste streams.
- Testing violations, where the testing still must be done to demonstrate achieved compliance.
- Improper disposal, where proper disposal is still required to achieve compliance.
- Improper storage where proper storage is still required to achieve compliance.
- Failure to obtain necessary permits for discharge, where such permits would probably be granted. (While the avoided cost for many programs would be negligible, there are programs where the the permit process can be expensive).

The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date

compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate. The applicable medium-specific guidance should state what that method is.

The rule of thumb method can usually be used in making decisions on whether to develop a case or in setting a penalty target for settlement negotiations. In using this rule of thumb method in settlement negotiations, the Agency may want to make the violator fully aware that it is using an estimate and not a more precise penalty determination procedure. The decision whether to reveal this information is up to the negotiators.

The "rule of thumb" method only provides a first-cut estimate of the benefit of delayed compliance. For this reason, its use is probably inappropriate in situations where a detailed analysis of the economic effect of noncompliance is needed to support or defend the Agency's position. Accordingly, this "rule of thumb" method generally should not be used in any of the following circumstances:

- A hearing is likely on the amount of the penalty.
- The defendant wishes to negotiate over the amount of the economic benefit on the basis of factors unique to the financial condition of the company.
- The case development team has reason to believe it will produce a substantially inaccurate estimate; for example, where the defendant is in a highly unusual financial position, or where noncompliance has or will continue for an unusually long period.

There usually are avoided costs associated with this type of situation. Therefore, the "rule of thumb for avoided costs" should also be applied. (See pages 9-10). For most cases, both figures are needed to yield the major portion of the economic benefit component.

When the rule of thumb method is not applicable, the economic benefit of delayed compliance should be computed using the Methodology for Computing the Economic Benefit of Noncompliance. This document, which is under development, provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method will largely be a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and Title I of the Clean Air Act. It will also be consistent with the regulations

implementing Section 120 of the Clean Air Act. A computer program will be available to the Regions to perform the analysis, together with instructions for its use. Until the Methodology is issued, the economic model contained in the July 8, 1980, Civil Penalty Policy should be used. It should be noted that the Agency recently modified this guidance to reflect changes in the tax law.

B. Benefit from avoided costs

Many kinds of violations enable a violator to permanently avoid certain costs associated with compliance.

- Cost savings for operation and maintenance of equipment that the violator failed to install.
- Failure to properly operate and maintain existing control equipment.
- Failure to employ sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Improper storage, where commercial storage is reasonably available.
- Improper disposal, where redisposal or cleanup is not possible.
- Process, operational, or maintenance savings from removing pollution equipment.
- Failure to conduct necessary testing.

As with the benefit from delayed costs, the benefit component for avoided costs may be estimated by another "rule of thumb" method. Since these costs will never be incurred, the estimate is the expenses avoided until the date compliance is achieved less any tax savings. The use of this "rule of thumb" method is subject to the same limitations as those discussed in the preceding section.

Where the "rule of thumb for avoided costs" method cannot be used, the benefit from avoided costs must be computed using the Methodology for Computing the Economic Benefit of Noncompliance. Again, until the Metholology is issued, the method contained in the July 8, 1980, Civil Penalty Policy should be used as modified to reflect recent changes in the tax law.

C. Benefit from competitive advantage

For most violations, removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator clearly has gained from noncompliance. But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. Examples of such violations include:

- Selling banned products.
- Selling products for banned uses.
- Selling products without required labelling or warnings.
- Removing or altering pollution control equipment for a fee, (e.g., tampering with automobile emission controls.)
- Selling products without required regulatory clearance, (e.g., pesticide registration or premanufacture notice under TSCA.)

To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transactions (i.e. those transactions which would not have occurred if the party had complied). The case development team is responsible for identifying violations in which this element of economic benefit clearly is present and significant. This calculation may be substantially different depending on the type of violation. Consequently the program-specific policies should contain guidance on identifying these types of violations and estimating these profits. In formulating that guidance, the following principles should be followed:

- The amount of the profit should be based on the best information available concerning the number of transactions resulting from noncompliance.
- Where available, information about the average profit per transaction may be used. In some cases, this may be available from the rulemaking record of the provision violated.
- The benefit derived should be adjusted to reflect the present value of net profits derived in the past.

It is recognized that the methods developed for estimating the profit from those transactions will sometimes rely substantially on expertise rather than verifiable data. Nevertheless, the programs should make all reasonable efforts to ensure that the estimates developed are defensible. The programs are encouraged to work with the Office of Policy, Planning and Evaluation to ensure that the methods developed are consistent with the forthcoming Methodology for Computing the Economic Benefit of Noncompliance and with methods developed by other programs. The programs should also ensure that sufficient contract funds are available to obtain expert advice in this area as needed to support penalty development, negotiation and trial of these kinds of cases.

D. Settling cases for an amount less than the economic benefit

As noted above, settling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount. There are three general areas where settling for less than economic benefit may be appropriate. But in any individual case where the Agency decides to settle for less than enconomic benefit, the case development team must detail those reasons in the case file and in any memoranda accompanying the settlement.

1. Benefit component involves insignificant amount

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is not likely to be significant, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, the case development team has the discretion not to seek the benefit component where it appears that the amount of that component is likely to be less than $10,000. (A program may determine that other cut-off points are more reasonable based on the likelihood that retaining the benefit could encourage noncomplying behavior.) In exercising that discretion, the case development team should consider the following factors:

- Impact on violator: The likelihood that assessing the benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by

itself, to achieve the goals of this policy.

- The certainty of the size of the benefit component: If the economic benefit is quite well defined, it is not likely to require as much effort to seek to include it in the penalty assessment. Such circumstances also increase the likelihood that the economic benefit was a substantial motivation for the noncompliance. This would make the inclusion of the benefit component more necessary to achieve specific deterrence.

It may be appropriate not to seek the benefit component in an entire class of violation. In that situation, the rationale behind that approach should be clearly stated in the appropriate medium-specific policy. For example, the most appropriate way to handle a small non-recurring operation and maintenance violation may be a small penalty. Obviously it makes little sense to assess in detail the economic benefit for each individual violation because the benefit is likely to be so small. The medium-specific policy would state this as the rationale.

2. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider settling a case for less than the benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlements might be appropriate where the following circumstances occur:

- There is a very substantial risk of creating precedent which will have a significant adverse effect upon the Agency's ability to enforce the law or clean up pollution if the case is taken to trial.

- Settlement will avoid or terminate an imminent risk to human health or the environment. This is an adequate justification only if injunctive relief is unavailable for some reason, and if settlement on remedial responsibilities could not be reached independent of any settlement of civil penalty liability.

- Removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business.

Alternative payment plans should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

3. Litigation practicalities

The Agency realizes that in certain cases, it is highly unlikely the EPA will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty in litigation which would remove the economic benefit. The case development team then may pursue a lower penalty amount.

II. The Gravity Component

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should not only remove any economic benefit of noncompliance, but also include an amount reflecting the seriousness of the violation. This latter amount is referred to as the "gravity component." The purpose of this section of the document is to establish an approach to quantifying the gravity component. This approach can encompass the differences between programs and still provide the basis for a sound consistent treatment of this issue.

A. Quantifying the gravity of a violation

Assigning a dollar figure to represent the gravity of a violation is an essentially subjective process. Nevertheless, the relative seriousness of different violations can be fairly accurately determined in most cases. This can be accomplished by reference to the goals of the specific regulatory scheme and the facts of each particular violation. Thus, linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way.

Such a linkage promotes consistency. This consistency strengthens the Agency's position both in negotiation and before a trier of fact. This approach consequently also encourages swift resolution of environmental problems.

Each program must develop a system for quantifying the gravity of violations of the laws and regulations it administers.

This development must occur within the context of the penalty amounts authorized by law for that program. That system must be based, whenever possible, on objective indicators of the seriousness of the violation. Examples of such indicators are given below. The seriousness of the violation should be based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation. In some cases, the seriousness of the risk of harm will exceed that of the actual harm. Thus, each system should provide enough flexibility to allow EPA to consider both factors in assessing penalties.

Each system must also be designed to minimize the possibility that two persons applying the system to the same set of facts would come up with substantially different numbers. Thus, to the extent the system depends on categorizing events, those categories must be clearly defined. That way there is little possibility for argument over the category in which a violation belongs. In addition, the categorization of the events relevant to the penalty decision should be noted in the penalty development portion of the case file.

B. Gravity Factors

In quantifying the gravity of a violation, a program-specific policy should rank different types of violations according to the seriousness of the act. The following is a suggested approach to ranking the seriousness of violations. In this approach to ranking, the following factors should be considered:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required size would not normally be considered as serious.

- Availability of data from other sources: The violation of any recordkeeping or reporting requirement is a very serious

matter. But if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate. (E.g. a customer of the violator purchased all the violator's illegally produced substance. Even though the violator does not have the required records, the customer does.)

- Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by other factors.

The assessment of the first gravity factor listed above, risk or harm arising from a violation, is a complex matter. For purposes of ranking violations according to seriousness, it is possible to distinguish violations within a category on the basis of certain considerations, including the following:

- Amount of pollutant: Adjustments for the concentration of the pollutant may be appropriate, depending on the regulatory scheme and the characteristics of the pollutant. Such adjustments need not be linear, especially if the pollutant can be harmful at low concentrations.

- Toxicity of the pollutant: Violations involving highly toxic pollutants are more serious and should result in relatively larger penalties.

- Sensitivity of the environment: This factor focuses on the location where the violation was committed. For example, improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.

- The length of time a violation continues: In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm.

Although each program-specific policy should address each of the factors listed above, or determine why it is not relevant, the factors listed above are not meant to be exhaustive. The programs should make every effort to identify all factors relevant to assessing the seriousness of any violation. The programs should then systematically prescribe a dollar amount to yield a gravity component for the penalty. The program-specific policies may prescribe a dollar range for a certain category of violation rather than a precise dollar amount within that range based on the specific facts of an individual case.

The process by which the gravity component was computed must be memorialized in the case file. Combining the benefit component with the gravity component yields the preliminary deterrence amount.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. The medium specific policies should address this issue. One possible approach would be to direct the case development team to consider increasing the gravity component within a certain range to achieve general deterrence. These extra assessments should be consistent with the other goals of this policy.

Initial and Adjusted Penalty Target Figure

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the benefit component discussed above in a civil penalty assessment. This approach would prevent violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the preliminary deterrence amount when those facts occur. The application of these adjustments to the preliminary deterrence amount prior to the commencement of negotiation yields the initial penalty target figure. During the course of negotiation, the case development team may further adjust this figure to yield the adjusted penalty target figure.

Nevertheless, it should be noted that equitable treatment is a two-edged sword. While it means that a particular violator will receive no higher penalty than a similarly situated violator, it also means that the penalty will be no lower.

I. Flexibility-Adjustment Factors

The purpose of this section of the document is to establish additional adjustment factors to promote flexibility and to identify management techniques that will promote consistency. This section sets out guidelines for adjusting penalties to account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness and/or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, and other unique factors. Unless otherwise specified, these adjustment factors will apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors.

Within each factor there are three suggested ranges of adjustment. The actual ranges for each medium-specific policy will be determined by those developing the policy. The actual ranges may differ from these suggested ranges based upon program specific needs. The first, typically a 0-20% adjustment of the gravity component, is within the absolute discretion of the case development team. 1/ The second, typically a 21-30% adjustment, is only appropriate in unusual circumstances. The third range, typically beyond 30% adjustment, is only appropriate in extraordinary circumstances. Adjustments in the latter two ranges, unusual and extraordinary circumstances, will be subject to scrutiny in any performance audit. The case development team may wish to reevaluate these adjustment factors as the negotiations progress. This allows the team to reconsider evidence used as a basis for the penalty in light of new information.

Where the Region develops the penalty figure, the application of adjustment factors will be part of the planned Regional audits. Headquarters will be responsible for proper application of these factors in nationally-managed cases. A detailed discussion of these factors follows.

A. Degree of Willfulness and/or Negligence

Although most of the statutes which EPA administers are strict liability statutes, this does not render the violator's

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1/ Absolute discretion means that the case development team may make penalty development decisions independent of EPA Headquarters. Nevertheless it is understood that in all judicial matters, the Department of Justice can still review these determinations if they so desire. Of course the authority to exercise the Agency's concurrence in final settlements is covered by the applicable delegations.

willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:

- How much control the violator had over the events constituting the violation.
- The forseeability 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.
- The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute, where applicable.
- Whether the violator in fact knew of the legal requirement which was violated.

It should be noted that this last point, 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 is also relevent 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 out of its control, the penalty may be reduced.

The suggested approach for this factor is for the case development team to have absolute discretion to adjust the penalty up or down by 20% of the gravity component. Adjustments in the $\pm$ 21-30% range should only be made in unusual circumstances.

Adjustments for this factor beyond ± 30% should be made only in extraordinary circumstances. Adjustments in the unusual or extraordinary circumstance range will be subject to scrutiny in any audit of performance.

B. Degree of Cooperation/Noncooperation

The degree of cooperation or noncooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Such adjustments are mandated by both the goals of equitable treatment and swift resolution of environmental problems. There are three areas where this factor is relevant.

1. Prompt reporting of noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, such behavior should result in the mitigation of any penalty.

The suggested ranges of adjustment are as follows. The case development team has absolute discretion on any adjustments up to ± 10% of the gravity component for cooperation/noncooperation. Adjustments can be made up to ± 20% of the gravity component, but only in unusual circumstances. In extraordinary circumstances, such as self reporting of a TSCA premanufacture notice violation, the case development team may adjust the penalty beyond the ± 20% factor. Adjustments in the unusual or extraordinary circumstances ranges will be subject to scrutiny in any performance audit.

2. Prompt correction of environmental problems

The Agency should provide incentives for the violator to commit to correcting the problem promptly. This correction must take place before litigation is begun, except in extraordinary circumstances.[2/] But since these incentives must be consistent with deterrence, they must be used judiciously.

2/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or
- for judicial actions - when an Assistant United States Attorney files a complaint in court.

The circumstances under which the penalty is reduced depend on the type of violation involved and the source's response to the problem. A straightforward reduction in the amount of the gravity component of the penalty is most appropriate in those cases where either: 1) the environmental problem is actually corrected prior to initiating litigation, or 2) ideally, immediately upon discovery of the violation. Under this approach, the reduction typically should be a substantial portion of the unadjusted gravity component.

In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider. At the discretion of the case development team, the unadjusted gravity component may be reduced up to 50%. This would depend on how long the environmental problem continued before correction and the amount of any environmental damage. Adjustments greater than 50% are permitted, but will be the subject of close scrutiny in auditing performance.

It should be noted that in some instances, the violator will take all necessary steps toward correcting the problem but may refuse to reach any agreement on penalties. Similarly, a violator may take some steps to ameliorate the problem, but choose to litigate over what constitutes compliance. In such cases, the gravity component of the penalty may be reduced up to 25% at the discretion of the case development team. This smaller adjustment still recognizes the efforts made to correct the environmental problem, but the benefit to the source is not as great as if a complete settlement is reached. Adjustments greater than 25% are permitted, but will be the subject of close scrutiny in auditing performance.

In all instances, the facts and rationale justifying the penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement.

3. Delaying compliance

Swift resolution of environmental problems will be encouraged if the violator clearly sees that it will be financially disadvantageous for the violator to litigate without remedying noncompliance. The settlement terms described in the preceding section are only available to parties who take steps to correct a problem prior to initiation of litigation. To some extent, this is an incentive to comply as soon as possible. Nevertheless, once litigation has commenced, it should be clear that the defendant litigates at its own risk.

In addition, the methods for computing the benefit component and the gravity component are both structured so that the penalty target increases the longer the violation remains uncorrected. The larger penalty for longer noncompliance is systematically linked to the benefits accruing to the violator and to the continuing risk to human health and the environment. This occurs even after litigation has commenced. This linkage will put the Agency in a strong position to convince the trier of fact to impose such larger penalties. For these reasons, the Policy on Civil Penalties provides substantial disincentives to litigating without complying.

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the 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.

In deciding how large these adjustments should be, the case development team should consider the following points:

- How similar the previous violation was.
- How recent the previous violation was.
- The number of previous violations.
- Violator's response to previous violation(s) in regard to correction of the previous problem.

Detailed criteria for what constitutes a "similar violation" should be contained in each program-specific policy. Nevertheless a violation should generally be considered "similar" if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.

- A similar act or omission (e.g. the failure to properly store chemicals) was the basis of the violation.

For purposes of this section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g. notice of violation, warning letter, complaint, consent decree, consent agreement, or final order). It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation. In some situations the same persons or the same organizational unit had or reasonably should have had control or oversight responsibility for violative conduct. In those cases, the violation will be considered part of the compliance history of that regulated party.

In general, the case development team should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, the case development team should be wary of a party changing operators or shifting responsibility for compliance to different groups 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 should probably apply unless the violator can demonstrate that the other violating corporate facilities are independent.

The following are the Framework's suggested adjustment ranges. If the pattern is one of "dissimilar" violations, relatively few in number, the case development team has absolute discretion to raise the penalty amount by 35%. For a relatively large number of dissimilar violations, the gravity component can be increased up to 70%. If the pattern is one of "similar" violations, the case development team has absolute discretion to raise the penalty amount up to 35% for the first repeat violation, and up to 70% for further repeated similar violations. The case development team may make higher adjustments in extraordinary circumstances, but such adjustments will be subject to scrutiny in any performance audit.

D. Ability to pay

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The financial ability adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, the case development team should assess this factor after commencement of negotiation with the source.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the case development team should disregard this factor in adjusting the penalty. The National Enforcement Investigations Center (NEIC) has developed the capability to assist the Regions in determining a firm's ability to pay. Further information on this system will be made available shortly under separate cover.

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

- Consider a delayed payment schedule: Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. This approach is a real burden on the Agency and should only be considered on rare occasions.

- Consider non-monetary alternatives, such as public service activities: For example, in the mobile source program, fleet operators who tampered with pollution control devices

on their vehicles agreed to display anti-tampering ads on their vehicles. Similar solutions may be possible in other industries.

- Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the case development team's conclusion as to the size of the necessary reduction should be made a part of the formal enforcement file and the memorandum accompanying the settlement. 3/

- Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is still expected to comply with the law.

E. Other unique factors

Individual programs may be able to predict other factors that can be expected to affect the appropriate penalty amount. Those factors should be identified and guidelines for their use set out in the program-specific policies. Nevertheless, each policy should allow for adjustment for unanticipated factors which might affect the penalty in each case.

It is suggested that there be absolute discretion to adjust penalties up or down by 10% of the gravity component for such reasons. Adjustments beyond the absolute discretion range will be subject to scrutiny during audits. In addition, they will primarily be allowed for compelling public policy concerns or the strengths and equities of the case. The rationale for the reduction must be expressed in writing in the case file and in any memoranda accompanying the settlement. See the discussion on pages 12 and 13 for further specifics on adjustments appropriate on the basis of either compelling public policy concerns or the strengths and equities of the case.

II. Alternative Payments

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to

3/ If a firm fails to pay the agreed-to penalty in an administrative or judicial final order, then the Agency must follow the Federal Claims Collection Act procedures for obtaining the penalty amount.

pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.

In addition, the acceptance of alternative payments for environmentally beneficial expenditures is subject to certain conditions. The Agency has designed these conditions to prevent the abuse of this procedure. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before alternative payments may be accepted:4/

- No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).

- The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.

- The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.

4/ In extraordinary circumstances, the Agency may choose not to pursue higher penalties for "alternative" work done prior to commencement of negotiations. For example, a firm may recall a product found to be in violation despite the fact that such recall is not required. In order for EPA to forgo seeking higher penalties, the violator must prove that it has met the other conditions herein stated. If the violator fails to prove this in a satisfactory manner, the case development team has the discretion to completely disallow the credit project. As with all alternative projects, the case development team has the discretion to still pursue some penalties in settlement.

- EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.5/

In all cases where alternative payments are allowed, the case file should contain documentation showing that each of the conditions listed above have been met in that particular case. In addition when considering penalty credits, Agency negotiators should take into account the following points:

- The project should not require a large amount of EPA oversight for its completion. In general the less oversight the proposed credit project would require from EPA to ensure proper completion, the more receptive EPA can be toward accepting the project in settlement.

- The project should receive stronger consideration if it will result in the abatement of existing pollution, ameliorate the pollution problem that is the basis of the government's claim and involve an activity that could be ordered by a judge as equitable relief.

- The project should receive stronger consideration if undertaken at the facility where the violation took place.

- The company should agree that any publicity it disseminates regarding its funding of the project must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.

5/ This limitation does not apply to public awareness activities such as those employed for fuel switching and tampering violations under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these violations are often the result of public misconceptions about the economic value of these violations. Consequently, the public awareness activities can be effective in preventing others from violating the law. Thus, the high general deterrent value of public awareness activities in these circumstances obviates the need for the one-to-one requirement on penalty credits.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds which are to be spent at EPA's discretion unless the relevant statute specifically provides that authority. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe as precisely as possible the credit project the violator is expected to perform.

III. Promoting Consistency

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for settlement and for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial penalty target prior to beginning settlement negotiations or an adjusted penalty target after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the Policy on Civil Penalties.

To facilitate the use of this information, Office of Legal and Enforcement Policy will pursue integration of penalty information from judicial enforcement actions into a computer system. Both Headquarters and all Regional offices will have access to the system through terminals. This would make it possible for the Regions to compare the handling of their cases with those of other Regions. It could potentially allow the Regions, as well as Headquarters, to learn from each others' experience and to identify problem areas where policy change or further guidance is needed.

Use of Penalty Figure in Settlement Discussions

The Policy and Framework do not seek to constrain negotiations. Their goal is to set settlement target figures for the internal use of Agency negotiators. Consequently, the penalty figures under negotiation do not necessarily have to be as low as the internal target figures. Nevertheless, the final settlement figures should go no lower than the internal target figures unless either: 1) the medium-specific penalty policy so provides or 2) the reasons for the deviation are properly documented.

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GM-22

A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Contents Page

Appendix (Con't)

Introduction

This document, A Framework for Statute-Specific Approaches to Penalty Assessment, provides guidance to the user of the Policy on Civil Penalties on how to develop a medium-specific penalty policy. Such policies will apply to administratively imposed penalties and settlements of both administrative and judicial penalty actions.

In the Policy on Civil Penalties, the Environmental Protection Agency establishes a single set of goals for penalty assessment. Those goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - will be substantially impaired unless they are pursued in a consistent fashion. Even different terminology could cause confusion that would detract from the achievement of these goals. At the same time, too much rigidity will stifle negotiation and make settlement impossible.

The purpose of this document is to promote the goals of the Policy on Civil Penalties by providing a framework for medium-specific penalty policies. The Framework is detailed enough to allow individual programs to develop policies that will consistently further the Agency's goals and be easy to administer. In addition, it is general enough to allow each program to tailor the policy to the relevant statutory provisions and the particular priorities of each program.

While this document contains detailed guidance, it is not cast in absolute terms. Nevertheless, the policy does not encourage deviation from this guidance in either the development of medium-specific policies or in developing actual penalty figures. Where there are deviations in developing medium-specific policies, the reasons for those changes must be recorded in the actual policy. Where there are deviations from medium-specific policies in calculating a penalty figure, the case development team must detail the reasons for those changes in the case file. In addition, the rationale behind the deviations must be incorporated in the memorandum accompanying the settlement package to Headquarters or the appropriate Regional official.

This document is divided into two sections. The first one gives brief instructions to the user on how to write a medium-specific policy. The second section is an appendix that gives detailed guidance on implementing each section of the instructions and explains how the instructions are intended to further the goals of the policy.

Writing a Program Specific Policy

Summarized below are those elements that should be present in a program-specific penalty policy. For a detailed discussion of each of these ideas, the corresponding portions of the appendix should be consulted.

I. Developing a Penalty Figure

The development of a penalty figure is a two step process. First the case development team must calculate a preliminary deterrence figure. This figure is composed of the economic benefit component (where applicable) and the gravity component. The second step is to adjust the preliminary deterrence figure through a number of factors. The resulting penalty figure is the initial penalty target figure. In judicial actions, the initial penalty target figure is the penalty amount which the government normally sets as a goal at the outset of settlement negotiations. It is essentially an internal settlement goal and should not be revealed to the violator unless the case development team feels it is appropriate. In administrative actions, this figure generally is the penalty assessed in the complaint. While in judicial actions, the government's complaint will request the maximum penalty authorized by law.

This initial penalty target figure may be further adjusted in the course of negotiations. Each policy should ensure that the penalty assessed or requested is within any applicable statutory constraints, based upon the number and duration of violations at issue.

II. Calculating a Preliminary Deterrence Amount

Each program-specific policy must contain a section on calculating the preliminary deterrence figure. That section should contain materials on each of the following areas:

- Benefit Component. This section should explain:
  - a. the relevent measure of economic benefit for various types of violations,
  - b. the information needed,
  - c. where to get assistance in computing this figure and
  - d. how to use available computer systems to compare a case with similar previous violations.

- Gravity Component. This section should first rank different types of violations according to the seriousness of the act. In creating that ranking, the following factors should be considered:

  a. actual or possible harm,
  b. importance to the regulatory scheme and
  c. availability of data from other sources.

In evaluating actual or possible harm, your scheme should consider the following facts:

- amount of pollutant,
- toxicity of pollutant,
- sensitivity of the environment,
- length of time of a violation and
- size of the violator.

The policy then should assign appropriate dollar amounts or ranges of amounts to the different ranked violations to constitute the "gravity component". This amount, added to the amount reflecting economic benefit, constitutes the preliminary deterrence figure.

III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure (Prenegotiation Adjustment)

Each program-specific penalty policy should give detailed guidance on applying the appropriate adjustments to the preliminary deterrence figure. This is to ensure that penalties also further Agency goals besides deterrence (i.e. equity and swift correction of environmental problems). Those guidelines should be consistent with the approach described in the appendix. The factors may be separated according to whether they can be considered before or after negotiation has begun or both.

Adjustments (increases or decreases, as appropriate) that can be made to the preliminary deterrence penalty to develop an initial penaly target to use at the outset of negotiation include:

- Degree of willfulness and/or negligence
- Cooperation/noncooperation through pre-settlement action.
- History of noncompliance.

- Ability to pay.
- Other unique factors (including strength of case, competing public policy considerations).

The policy may permit consideration of the violator's ability to pay as an adjustment factor before negotiations begin. It may also postpone consideration of that factor until after negotiations have begun. This would allow the violator to produce evidence substantiating its inability to pay.

The policy should prescribe appropriate amounts, or ranges of amounts, by which the preliminary deterrence penalty should be adjusted. Adjustments will depend on the extent to which certain factors are pertinent. In order to preserve the penalty's deterrent effect, the policy should also ensure that, except for the specific exceptions described in this document, the adjusted penalty will: 1) always remove any significant economic benefit of noncompliance and 2) contain some non-trivial amount as a gravity component.

IV. Adjusting the Initial Penalty Target During Negotiations

Each program-specific policy should call for periodic reassessment of these adjustments during the course of negotiations. This would occur as additional relevant information becomes available and the old evidence is re-evaluated in the light of new evidence. Once negotiations have begun, the policy also should permit adjustment of the penalty target to reflect "alternative payments" the violator agrees to make in settlement of the case. Adjustments for alternative payments and pre-settlement corrective action are generally permissible only before litigation has begun.

Again, the policy should be structured to ensure that any settlement made after negotiations have begun reflects the economic benefit of noncompliance up to the date of compliance plus some non-trivial gravity component. This means that if lengthy settlement negotiations cause the violation to continue longer than initially anticipated, the penalty target figure should be increased. The increase would be based upon the extent that the violations continue to produce ongoing environmental risk and increasing economic benefit.

Use of the Policy In Litigation

Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

should account for all the factors identified in the relevant statute and still allow for compromises in settlement without exceeding the parameters outlined in this document. (For each program, all the statutory factors are contained in the Framework either explicitly or as part of broader factors.) For administrative proceedings, the policy should explain how to formulate a penalty figure, consistent with the policy. The case development team will put this figure in the administrative complaint.

In judicial actions, the EPA will use the initial penalty target figure as its first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels it is appropriate. In judicial litigation, the government should request the maximum penalty authorized by law in its complaint. The policy should also explain how it and any applicable precedents should be used in responding to any explicit requests from a court for a minimum assesment which the Agency would deem appropriate.

Use of the Policy as a Feedback Device

Each program-specific policy should first explain in detail what information needs to be put into the case file and into the relevant computer tracking system. Furthermore, each policy should cover how to use that system to examine penalty assessments in other cases. This would thereby assist the Agency in making judgments about the size of adjustments to the penalty for the case at hand. Each policy should also explain how to present penalty calculations in litigation reports.

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Attachment

APPENDIX

Introduction

This appendix contains three sections. The first two sections set out guidelines for achieving the goals of the Policy on Civil Penalties. The first section focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty which reflects the seriousness of the violation. The second section provides adjustment factors so that both a fair and equitable penalty will result and that there will be a swift resolution of the environmental problem. The third section of the framework presents some practical advice on the use of the penalty figures generated by the policy.

The Preliminary Deterrence Amount

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it specifies that any penalty should, at a minimum, remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of economic benefit to reflect the seriousness of the violation. That portion of the penalty which removes the economic benefit of noncompliance is referred to as the "benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section of the document provides guidelines for calculating the benefit component and the gravity component. It will also present and discuss a simplified version of the economic benefit calculation for use in developing quick penalty determinations. This section will also discuss the limited circumstances which justify settling for less than the benefit component. The uses of the preliminary deterrence amount will be explained in subsequent portions of this document.

I. The Benefit Component

In order to ensure that penalties remove any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues

to be considered when computing the benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. This section concludes with a discussion of the proper use of the benefit component in developing penalty figures and in settlement negotiations.

A. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which fails to construct required settling ponds will eventually have to spend the money needed to build those ponds in order to achieve compliance. But, by deferring these one-time nonrecurring costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which result in savings from deferred cost are the following:

- Failure to install equipment needed to meet discharge or emission control standards.
- Failure to effect process changes needed to eliminate pollutants from products or waste streams.
- Testing violations, where the testing still must be done to demonstrate achieved compliance.
- Improper disposal, where proper disposal is still required to achieve compliance.
- Improper storage where proper storage is still required to achieve compliance.
- Failure to obtain necessary permits for discharge, where such permits would probably be granted. (While the avoided cost for many programs would be negligible, there are programs where the the permit process can be expensive).

The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date

compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate. The applicable medium-specific guidance should state what that method is.

The rule of thumb method can usually be used in making decisions on whether to develop a case or in setting a penalty target for settlement negotiations. In using this rule of thumb method in settlement negotiations, the Agency may want to make the violator fully aware that it is using an estimate and not a more precise penalty determination procedure. The decision whether to reveal this information is up to the negotiators.

The "rule of thumb" method only provides a first-cut estimate of the benefit of delayed compliance. For this reason, its use is probably inappropriate in situations where a detailed analysis of the economic effect of noncompliance is needed to support or defend the Agency's position. Accordingly, this "rule of thumb" method generally should not be used in any of the following circumstances:

- A hearing is likely on the amount of the penalty.
- The defendant wishes to negotiate over the amount of the economic benefit on the basis of factors unique to the financial condition of the company.
- The case development team has reason to believe it will produce a substantially inaccurate estimate; for example, where the defendant is in a highly unusual financial position, or where noncompliance has or will continue for an unusually long period.

There usually are avoided costs associated with this type of situation. Therefore, the "rule of thumb for avoided costs" should also be applied. (See pages 9-10). For most cases, both figures are needed to yield the major portion of the economic benefit component.

When the rule of thumb method is not applicable, the economic benefit of delayed compliance should be computed using the Methodology for Computing the Economic Benefit of Noncompliance. This document, which is under development, provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method will largely be a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and Title I of the Clean Air Act. It will also be consistent with the regulations

implementing Section 120 of the Clean Air Act. A computer program will be available to the Regions to perform the analysis, together with instructions for its use. Until the Methodology is issued, the economic model contained in the July 8, 1980, Civil Penalty Policy should be used. It should be noted that the Agency recently modified this guidance to reflect changes in the tax law.

B. Benefit from avoided costs

Many kinds of violations enable a violator to permanently avoid certain costs associated with compliance.

- Cost savings for operation and maintenance of equipment that the violator failed to install.
- Failure to properly operate and maintain existing control equipment.
- Failure to employ sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Improper storage, where commercial storage is reasonably available.
- Improper disposal, where redisposal or cleanup is not possible.
- Process, operational, or maintenance savings from removing pollution equipment.
- Failure to conduct necessary testing.

As with the benefit from delayed costs, the benefit component for avoided costs may be estimated by another "rule of thumb" method. Since these costs will never be incurred, the estimate is the expenses avoided until the date compliance is achieved less any tax savings. The use of this "rule of thumb" method is subject to the same limitations as those discussed in the preceding section.

Where the "rule of thumb for avoided costs" method cannot be used, the benefit from avoided costs must be computed using the Methodology for Computing the Economic Benefit of Noncompliance. Again, until the Methology is issued, the method contained in the July 8, 1980, Civil Penalty Policy should be used as modified to reflect recent changes in the tax law.

C. Benefit from competitive advantage

For most violations, removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator clearly has gained from noncompliance. But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. Examples of such violations include:

- Selling banned products.
- Selling products for banned uses.
- Selling products without required labelling or warnings.
- Removing or altering pollution control equipment for a fee, (e.g., tampering with automobile emission controls.)
- Selling products without required regulatory clearance, (e.g., pesticide registration or premanufacture notice under TSCA.)

To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transactions (i.e. those transactions which would not have occurred if the party had complied). The case development team is responsible for identifying violations in which this element of economic benefit clearly is present and significant. This calculation may be substantially different depending on the type of violation. Consequently the program-specific policies should contain guidance on identifying these types of violations and estimating these profits. In formulating that guidance, the following principles should be followed:

- The amount of the profit should be based on the best information available concerning the number of transactions resulting from noncompliance.
- Where available, information about the average profit per transaction may be used. In some cases, this may be available from the rulemaking record of the provision violated.
- The benefit derived should be adjusted to reflect the present value of net profits derived in the past.

It is recognized that the methods developed for estimating the profit from those transactions will sometimes rely substantially on expertise rather than verifiable data. Nevertheless, the programs should make all reasonable efforts to ensure that the estimates developed are defensible. The programs are encouraged to work with the Office of Policy, Planning and Evaluation to ensure that the methods developed are consistent with the forthcoming Methodology for Computing the Economic Benefit of Noncompliance and with methods developed by other programs. The programs should also ensure that sufficient contract funds are available to obtain expert advice in this area as needed to support penalty development, negotiation and trial of these kinds of cases.

D. Settling cases for an amount less than the economic benefit

As noted above, settling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount. There are three general areas where settling for less than economic benefit may be appropriate. But in any individual case where the Agency decides to settle for less than enconomic benefit, the case development team must detail those reasons in the case file and in any memoranda accompanying the settlement.

1. Benefit component involves insignificant amount

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is not likely to be significant, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, the case development team has the discretion not to seek the benefit component where it appears that the amount of that component is likely to be less than $10,000. (A program may determine that other cut-off points are more reasonable based on the likelihood that retaining the benefit could encourage noncomplying behavior.) In exercising that discretion, the case development team should consider the following factors:

- Impact on violator: The likelihood that assessing the benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by

itself, to achieve the goals of this policy.

- The certainty of the size of the benefit component: If the economic benefit is quite well defined, it is not likely to require as much effort to seek to include it in the penalty assessment. Such circumstances also increase the likelihood that the economic benefit was a substantial motivation for the noncompliance. This would make the inclusion of the benefit component more necessary to achieve specific deterrence.

It may be appropriate not to seek the benefit component in an entire class of violation. In that situation, the rationale behind that approach should be clearly stated in the appropriate medium-specific policy. For example, the most appropriate way to handle a small non-recurring operation and maintenance violation may be a small penalty. Obviously it makes little sense to assess in detail the economic benefit for each individual violation because the benefit is likely to be so small. The medium-specific policy would state this as the rationale.

2. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider settling a case for less than the benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlements might be appropriate where the following circumstances occur:

- There is a very substantial risk of creating precedent which will have a significant adverse effect upon the Agency's ability to enforce the law or clean up pollution if the case is taken to trial.

- Settlement will avoid or terminate an imminent risk to human health or the environment. This is an adequate justification only if injunctive relief is unavailable for some reason, and if settlement on remedial responsibilities could not be reached independent of any settlement of civil penalty liability.

- Removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business.

Alternative payment plans should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

3. Litigation practicalities

The Agency realizes that in certain cases, it is highly unlikely the EPA will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty in litigation which would remove the economic benefit. The case development team then may pursue a lower penalty amount.

II. The Gravity Component

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should not only remove any economic benefit of noncompliance, but also include an amount reflecting the seriousness of the violation. This latter amount is referred to as the "gravity component." The purpose of this section of the document is to establish an approach to quantifying the gravity component. This approach can encompass the differences between programs and still provide the basis for a sound consistent treatment of this issue.

A. Quantifying the gravity of a violation

Assigning a dollar figure to represent the gravity of a violation is an essentially subjective process. Nevertheless, the relative seriousness of different violations can be fairly accurately determined in most cases. This can be accomplished by reference to the goals of the specific regulatory scheme and the facts of each particular violation. Thus, linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way.

Such a linkage promotes consistency. This consistency strengthens the Agency's position both in negotiation and before a trier of fact. This approach consequently also encourages swift resolution of environmental problems.

Each program must develop a system for quantifying the gravity of violations of the laws and regulations it administers.

This development must occur within the context of the penalty amounts authorized by law for that program. That system must be based, whenever possible, on objective indicators of the seriousness of the violation. Examples of such indicators are given below. The seriousness of the violation should be based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation. In some cases, the seriousness of the risk of harm will exceed that of the actual harm. Thus, each system should provide enough flexibility to allow EPA to consider both factors in assessing penalties.

Each system must also be designed to minimize the possibility that two persons applying the system to the same set of facts would come up with substantially different numbers. Thus, to the extent the system depends on categorizing events, those categories must be clearly defined. That way there is little possibility for argument over the category in which a violation belongs. In addition, the categorization of the events relevant to the penalty decision should be noted in the penalty development portion of the case file.

B. Gravity Factors

In quantifying the gravity of a violation, a program-specific policy should rank different types of violations according to the seriousness of the act. The following is a suggested approach to ranking the seriousness of violations. In this approach to ranking, the following factors should be considered:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required size would not normally be considered as serious.

- Availability of data from other sources: The violation of any recordkeeping or reporting requirement is a very serious

matter. But if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate. (E.g. a customer of the violator purchased all the violator's illegally produced substance. Even though the violator does not have the required records, the customer does.)

- Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by other factors.

The assessment of the first gravity factor listed above, risk or harm arising from a violation, is a complex matter. For purposes of ranking violations according to seriousness, it is possible to distinguish violations within a category on the basis of certain considerations, including the following:

- Amount of pollutant: Adjustments for the concentration of the pollutant may be appropriate, depending on the regulatory scheme and the characteristics of the pollutant. Such adjustments need not be linear, especially if the pollutant can be harmful at low concentrations.

- Toxicity of the pollutant: Violations involving highly toxic pollutants are more serious and should result in relatively larger penalties.

- Sensitivity of the environment: This factor focuses on the location where the violation was committed. For example, improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.

- The length of time a violation continues: In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm.

Although each program-specific policy should address each of the factors listed above, or determine why it is not relevant, the factors listed above are not meant to be exhaustive. The programs should make every effort to identify all factors relevant to assessing the seriousness of any violation. The programs should then systematically prescribe a dollar amount to yield a gravity component for the penalty. The program-specific policies may prescribe a dollar range for a certain category of violation rather than a precise dollar amount within that range based on the specific facts of an individual case.

The process by which the gravity component was computed must be memorialized in the case file. Combining the benefit component with the gravity component yields the preliminary deterrence amount.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. The medium specific policies should address this issue. One possible approach would be to direct the case development team to consider increasing the gravity component within a certain range to achieve general deterrence. These extra assessments should be consistent with the other goals of this policy.

Initial and Adjusted Penalty Target Figure

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the benefit component discussed above in a civil penalty assessment. This approach would prevent violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the preliminary deterrence amount when those facts occur. The application of these adjustments to the preliminary deterrence amount prior to the commencement of negotiation yields the initial penalty target figure. During the course of negotiation, the case development team may further adjust this figure to yield the adjusted penalty target figure.

Nevertheless, it should be noted that equitable treatment is a two-edged sword. While it means that a particular violator will receive no higher penalty than a similarly situated violator, it also means that the penalty will be no lower.

I. Flexibility-Adjustment Factors

The purpose of this section of the document is to establish additional adjustment factors to promote flexibility and to identify management techniques that will promote consistency. This section sets out guidelines for adjusting penalties to account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness and/or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, and other unique factors. Unless otherwise specified, these adjustment factors will apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors.

Within each factor there are three suggested ranges of adjustment. The actual ranges for each medium-specific policy will be determined by those developing the policy. The actual ranges may differ from these suggested ranges based upon program specific needs. The first, typically a 0-20% adjustment of the gravity component, is within the absolute discretion of the case development team. 1/ The second, typically a 21-30% adjustment, is only appropriate in unusual circumstances. The third range, typically beyond 30% adjustment, is only appropriate in extraordinary circumstances. Adjustments in the latter two ranges, unusual and extraordinary circumstances, will be subject to scrutiny in any performance audit. The case development team may wish to reevaluate these adjustment factors as the negotiations progress. This allows the team to reconsider evidence used as a basis for the penalty in light of new information.

Where the Region develops the penalty figure, the application of adjustment factors will be part of the planned Regional audits. Headquarters will be responsible for proper application of these factors in nationally-managed cases. A detailed discussion of these factors follows.

A. Degree of Willfulness and/or Negligence

Although most of the statutes which EPA administers are strict liability statutes, this does not render the violator's

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1/ Absolute discretion means that the case development team may make penalty development decisions independent of EPA Headquarters. Nevertheless it is understood that in all judicial matters, the Department of Justice can still review these determinations if they so desire. Of course the authority to exercise the Agency's concurrence in final settlements is covered by the applicable delegations.

willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:

- How much control the violator had over the events constituting the violation.
- The forseeability 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.
- The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute, where applicable.
- Whether the violator in fact knew of the legal requirement which was violated.

It should be noted that this last point, 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 is also relevent 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 out of its control, the penalty may be reduced.

The suggested approach for this factor is for the case development team to have absolute discretion to adjust the penalty up or down by 20% of the gravity component. Adjustments in the $\pm$ 21-30% range should only be made in unusual circumstances.

Adjustments for this factor beyond ± 30% should be made only in extraordinary circumstances. Adjustments in the unusual or extraordinary circumstance range will be subject to scrutiny in any audit of performance.

B. Degree of Cooperation/Noncooperation

The degree of cooperation or noncooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Such adjustments are mandated by both the goals of equitable treatment and swift resolution of environmental problems. There are three areas where this factor is relevant.

1. Prompt reporting of noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, such behavior should result in the mitigation of any penalty.

The suggested ranges of adjustment are as follows. The case development team has absolute discretion on any adjustments up to ± 10% of the gravity component for cooperation/noncooperation. Adjustments can be made up to ± 20% of the gravity component, but only in unusual circumstances. In extraordinary circumstances, such as self reporting of a TSCA premanufacture notice violation, the case development team may adjust the penalty beyond the ± 20% factor. Adjustments in the unusual or extraordinary circumstances ranges will be subject to scrutiny in any performance audit.

2. Prompt correction of environmental problems

The Agency should provide incentives for the violator to commit to correcting the problem promptly. This correction must take place before litigation is begun, except in extraordinary circumstances.2/ But since these incentives must be consistent with deterrence, they must be used judiciously.

2/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or
- for judicial actions - when an Assistant United States Attorney files a complaint in court.

The circumstances under which the penalty is reduced depend on the type of violation involved and the source's response to the problem. A straightforward reduction in the amount of the gravity component of the penalty is most appropriate in those cases where either: 1) the environmental problem is actually corrected prior to initiating litigation, or 2) ideally, immediately upon discovery of the violation. Under this approach, the reduction typically should be a substantial portion of the unadjusted gravity component.

In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider. At the discretion of the case development team, the unadjusted gravity component may be reduced up to 50%. This would depend on how long the environmental problem continued before correction and the amount of any environmental damage. Adjustments greater than 50% are permitted, but will be the subject of close scrutiny in auditing performance.

It should be noted that in some instances, the violator will take all necessary steps toward correcting the problem but may refuse to reach any agreement on penalties. Similarly, a violator may take some steps to ameliorate the problem, but choose to litigate over what constitutes compliance. In such cases, the gravity component of the penalty may be reduced up to 25% at the discretion of the case development team. This smaller adjustment still recognizes the efforts made to correct the environmental problem, but the benefit to the source is not as great as if a complete settlement is reached. Adjustments greater than 25% are permitted, but will be the subject of close scrutiny in auditing performance.

In all instances, the facts and rationale justifying the penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement.

3. Delaying compliance

Swift resolution of environmental problems will be encouraged if the violator clearly sees that it will be financially disadvantageous for the violator to litigate without remedying noncompliance. The settlement terms described in the preceding section are only available to parties who take steps to correct a problem prior to initiation of litigation. To some extent, this is an incentive to comply as soon as possible. Nevertheless, once litigation has commenced, it should be clear that the defendant litigates at its own risk.

In addition, the methods for computing the benefit component and the gravity component are both structured so that the penalty target increases the longer the violation remains uncorrected. The larger penalty for longer noncompliance is systematically linked to the benefits accruing to the violator and to the continuing risk to human health and the environment. This occurs even after litigation has commenced. This linkage will put the Agency in a strong position to convince the trier of fact to impose such larger penalties. For these reasons, the Policy on Civil Penalties provides substantial disincentives to litigating without complying.

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the 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.

In deciding how large these adjustments should be, the case development team should consider the following points:

- How similar the previous violation was.
- How recent the previous violation was.
- The number of previous violations.
- Violator's response to previous violation(s) in regard to correction of the previous problem.

Detailed criteria for what constitutes a "similar violation" should be contained in each program-specific policy. Nevertheless a violation should generally be considered "similar" if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.

- A similar act or omission (e.g. the failure to properly store chemicals) was the basis of the violation.

For purposes of this section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g. notice of violation, warning letter, complaint, consent decree, consent agreement, or final order). It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation. In some situations the same persons or the same organizational unit had or reasonably should have had control or oversight responsibility for violative conduct. In those cases, the violation will be considered part of the compliance history of that regulated party.

In general, the case development team should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, the case development team should be wary of a party changing operators or shifting responsibility for compliance to different groups 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 should probably apply unless the violator can demonstrate that the other violating corporate facilities are independent.

The following are the Framework's suggested adjustment ranges. If the pattern is one of "dissimilar" violations, relatively few in number, the case development team has absolute discretion to raise the penalty amount by 35%. For a relatively large number of dissimilar violations, the gravity component can be increased up to 70%. If the pattern is one of "similar" violations, the case development team has absolute discretion to raise the penalty amount up to 35% for the first repeat violation, and up to 70% for further repeated similar violations. The case development team may make higher adjustments in extraordinary circumstances, but such adjustments will be subject to scrutiny in any performance audit.

D. Ability to pay

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The financial ability adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, the case development team should assess this factor after commencement of negotiation with the source.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the case development team should disregard this factor in adjusting the penalty. The National Enforcement Investigations Center (NEIC) has developed the capability to assist the Regions in determining a firm's ability to pay. Further information on this system will be made available shortly under separate cover.

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

- Consider a delayed payment schedule: Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. This approach is a real burden on the Agency and should only be considered on rare occasions.

- Consider non-monetary alternatives, such as public service activities: For example, in the mobile source program, fleet operators who tampered with pollution control devices

on their vehicles agreed to display anti-tampering ads on their vehicles. Similar solutions may be possible in other industries.

- Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the case development team's conclusion as to the size of the necessary reduction should be made a part of the formal enforcement file and the memorandum accompanying the settlement. 3/

- Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is still expected to comply with the law.

E. Other unique factors

Individual programs may be able to predict other factors that can be expected to affect the appropriate penalty amount. Those factors should be identified and guidelines for their use set out in the program-specific policies. Nevertheless, each policy should allow for adjustment for unanticipated factors which might affect the penalty in each case.

It is suggested that there be absolute discretion to adjust penalties up or down by 10% of the gravity component for such reasons. Adjustments beyond the absolute discretion range will be subject to scrutiny during audits. In addition, they will primarily be allowed for compelling public policy concerns or the strengths and equities of the case. The rationale for the reduction must be expressed in writing in the case file and in any memoranda accompanying the settlement. See the discussion on pages 12 and 13 for further specifics on adjustments appropriate on the basis of either compelling public policy concerns or the strengths and equities of the case.

II. Alternative Payments

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to

3/ If a firm fails to pay the agreed-to penalty in an administrative or judicial final order, then the Agency must follow the Federal Claims Collection Act procedures for obtaining the penalty amount.

pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.

In addition, the acceptance of alternative payments for environmentally beneficial expenditures is subject to certain conditions. The Agency has designed these conditions to prevent the abuse of this procedure. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before alternative payments may be accepted:4/

- No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).

- The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.

- The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.

4/ In extraordinary circumstances, the Agency may choose not to pursue higher penalties for "alternative" work done prior to commencement of negotiations. For example, a firm may recall a product found to be in violation despite the fact that such recall is not required. In order for EPA to forgo seeking higher penalties, the violator must prove that it has met the other conditions herein stated. If the violator fails to prove this in a satisfactory manner, the case development team has the discretion to completely disallow the credit project. As with all alternative projects, the case development team has the discretion to still pursue some penalties in settlement.

- EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.5/

In all cases where alternative payments are allowed, the case file should contain documentation showing that each of the conditions listed above have been met in that particular case. In addition when considering penalty credits, Agency negotiators should take into account the following points:

- The project should not require a large amount of EPA oversight for its completion. In general the less oversight the proposed credit project would require from EPA to ensure proper completion, the more receptive EPA can be toward accepting the project in settlement.

- The project should receive stronger consideration if it will result in the abatement of existing pollution, ameliorate the pollution problem that is the basis of the government's claim and involve an activity that could be ordered by a judge as equitable relief.

- The project should receive stronger consideration if undertaken at the facility where the violation took place.

- The company should agree that any publicity it disseminates regarding its funding of the project must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.

5/ This limitation does not apply to public awareness activities such as those employed for fuel switching and tampering violations under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these violations are often the result of public misconceptions about the economic value of these violations. Consequently, the public awareness activities can be effective in preventing others from violating the law. Thus, the high general deterrent value of public awareness activities in these circumstances obviates the need for the one-to-one requirement on penalty credits.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds which are to be spent at EPA's discretion unless the relevant statute specifically provides that authority. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe as precisely as possible the credit project the violator is expected to perform.

III. Promoting Consistency

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for settlement and for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial penalty target prior to beginning settlement negotiations or an adjusted penalty target after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the Policy on Civil Penalties.

To facilitate the use of this information, Office of Legal and Enforcement Policy will pursue integration of penalty information from judicial enforcement actions into a computer system. Both Headquarters and all Regional offices will have access to the system through terminals. This would make it possible for the Regions to compare the handling of their cases with those of other Regions. It could potentially allow the Regions, as well as Headquarters, to learn from each others' experience and to identify problem areas where policy change or further guidance is needed.

Use of Penalty Figure in Settlement Discussions

The Policy and Framework do not seek to constrain negotiations. Their goal is to set settlement target figures for the internal use of Agency negotiators. Consequently, the penalty figures under negotiation do not necessarily have to be as low as the internal target figures. Nevertheless, the final settlement figures should go no lower than the internal target figures unless either: 1) the medium-specific penalty policy so provides or 2) the reasons for the deviation are properly documented.