# RCRA CIVIL PENALTY POLICY

**RCRA Enforcement Division**
**Office of Regulatory Enforcement**
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# RCRA CIVIL PENALTY POLICY

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## I. SUMMARY OF THE POLICY

The penalty calculation system established through U.S. Environmental Protection Agency's RCRA Civil Penalty Policy ("Penalty Policy" or "Policy") is based upon Section 3008 of RCRA, 42 U.S.C. § 6928. Under this section, the seriousness of the violation and any good faith efforts to comply with applicable requirements are to be considered in assessing a penalty. Consistent with this statutory direction, this Penalty Policy consists of: (1) determining a gravity-based penalty for a particular violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violation's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance. More specifically, the revised RCRA Civil Penalty Policy establishes the following penalty calculation methodology:

Penalty Amount = gravity-based component + multi-day component +/- adjustments + economic benefit

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

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

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

Under this Policy, two factors are considered in determining the gravity-based penalty component:

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

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

MATRIX[1]

Extent of Deviation from Requirement

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

The Policy also explains how to factor into the calculation of the gravity-based component the presence of multiple and multi-day (continuing) violations. The Policy provides that for days 2 through 180 of multi-day violations, the calculation of penalties using a multi-day component is mandatory, presumed, or discretionary, depending on the "potential for harm" and "extent of deviation" of the violations. For each day for which multi-day penalties are sought, the penalty amounts should be determined using the multi-day penalty matrix. The penalty amounts in the multi-day penalty matrix range from 5% to 20% (with a minimum of $110 per day) of the penalty amounts in the corresponding gravity-based matrix cells. Enforcement personnel also retain discretion to impose multi-day penalties: (1) of up to $27,500 per day, when appropriate under

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

the circumstances, and (2) for days of violation after the first 180, as needed to achieve deterrence.

Where a company has derived significant savings or profits by its failure to comply with RCRA requirements, the amount of economic benefit from noncompliance gained by the violator will be calculated and added to the gravity-based penalty amount. The Agency has developed and made available to Agency personnel several methodologies that can be used to quickly and accurately calculate economic benefit. See Section VIII.A.2.

After the appropriate gravity-based penalty amount (including the multi-day component) has been determined, it may be adjusted upward or downward to reflect particular circumstances surrounding the violation. Except in the unusual circumstances outlined in Section VIII, the amount of any economic benefit enjoyed by the violator is not subject to adjustment. When adjusting the gravity-based penalty amount the following factors should be considered:[2]

- good faith efforts to comply/lack of good faith (downward or upward adjustment);
- degree of willfulness and/or negligence (upward or downward adjustment);
- history of noncompliance (upward adjustment);
- ability to pay (downward adjustment);
- environmental projects to be undertaken by the violator (downward adjustment); and
- other unique factors, including but not limited to the risk and cost of litigation and the cooperation of the facility during the inspection, case development and enforcement process prior to prehearing exchange (upward or downward adjustment).

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

A detailed discussion of the Policy follows. In addition, this document includes a few hypothetical cases where the step-by-step assessment of penalties is illustrated. The steps included are choosing the correct penalty cell in the matrix, calculating the economic benefit of noncompliance, where appropriate, and adjusting the penalty assessment on the basis of the factors set forth above. Note that these examples are provided merely to illustrate application of the components of this Policy. Actual cases may require consideration of a wider range of facts and conditions in calculating penalties under this Policy. For example, in actual cases, there may be more complex circumstances that should be taken into account in determining the appropriate degree of "potential for harm." Also, the penalty justifications for real cases may require more

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

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

## II. INTRODUCTION

To respond to the problem of improper management of hazardous waste, Congress amended the Solid Waste Disposal Act with the Resource Conservation and Recovery Act (RCRA) of 1976. Although the Act has several objectives, Congress' overriding purpose in enacting RCRA was to establish the basic statutory framework for a national system that would ensure the proper management of hazardous waste. Since 1976, the Solid Waste Disposal Act has been amended by the Quiet Communities Act of 1978, P.L. 95-609, the Used Oil Recycling Act of 1980, P.L. 96-463, the Hazardous and Solid Waste Amendments of 1984, P.L. 98-221, the Safe Drinking Water Act Amendments of 1986, P.L. 99-39, the Superfund Amendments and Reauthorization Act of 1988, P.L. 99-499, and the Federal Facility Compliance Act of 1992, P.L. 102-386. For simplicity and convenience, the Solid Waste Disposal Act, as amended, will hereinafter be referred to as "RCRA."

Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), provides that if any person has violated or is in violation of a requirement of Subtitle C, the Administrator of the Environmental Protection Agency (EPA) may, among other options, issue an order assessing a civil penalty of up to $25,000 per day for each violation. This amount has subsequently been increased to $27,500.[3] Section 3008(a)(3), 42 U.S.C. § 6928(a)(3), provides that any order assessing a penalty shall take into account:

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

Section 3008(g) applies to civil judicial enforcement actions and establishes liability to the United States for civil penalties of up to $27,500 per day for each violation of Subtitle C. This document sets forth the Agency's Policy and internal guidelines for determining penalty amounts that: (1) should be sought in administrative actions filed under RCRA[4] and (2) would be

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

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

acceptable in settlement of administrative and judicial enforcement actions under RCRA[5]. This Policy supersedes the guidance document entitled, "Applicability of RCRA Penalty Policy to LOIS Cases" (November 16, 1987). It does not, however, apply to penalties assessed under Subtitle I (UST) of RCRA, 42 U.S.C. § 6991, *et seq,* and penalties assessed under the Mercury-Containing and Rechargeable Battery Management Act of 1996 ("Battery Act"), 42 U.S.C. §§ 14301-14336[6].

The purposes of the Policy are to ensure that RCRA civil penalties are assessed in a manner consistent with Section 3008; that penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

This Policy does not address whether assessment of a civil penalty is the correct enforcement response to a particular violation. Rather, this Policy focuses on determining the proper civil penalty amount that the Agency should obtain once a decision has been made that a civil penalty is the proper enforcement remedy to pursue. For guidance on when to assess administrative penalties, enforcement personnel should consult the Hazardous Waste Civil Enforcement Response Policy, March 15, 1996, and any subsequent amendments to that document. The Enforcement Response Policy provides a general framework for identifying violations and violators of concern as well as guidance on selecting the appropriate enforcement response to various RCRA violations.

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

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

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

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

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

The RCRA Civil Penalty Policy is immediately applicable and should be used to calculate penalties sought in all RCRA administrative actions or accepted in settlement of both administrative and judicial civil enforcement actions brought under the statute after the date of the Policy, regardless of the date of the violation. To the maximum extent practicable, the Policy shall also apply to the settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the Policy is issued.[8]

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

## III. RELATIONSHIP TO AGENCY PENALTY POLICY

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

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

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

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

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

The RCRA Penalty Policy also adheres to the Agency's 1984 Civil Penalty Policy's framework for assessing civil penalties by:

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

## IV. DOCUMENTATION AND RELEASE OF INFORMATION

### A. DOCUMENTATION FOR PENALTY SOUGHT IN ADMINISTRATIVE LITIGATION

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

Additionally, Agency regulations governing administrative assessment of civil penalties, at 40 CFR § 22.14(a)(4)(i), require that in cases where a specific penalty demand is included in the complaint, a brief explanation of the rationale for the proposed penalty must be included. The regulations require that in such cases the Agency must additionally explain in the prehearing exchange of information how the proposed penalty was calculated in accordance with any criteria set forth in RCRA. See 40 CFR § 22.19(a)(3). For those penalty cases where the statutory maximum is pled in the complaint, the regulations require that the Agency include in the prehearing exchange all factual information relevant to the assessment of the penalty and that the Agency file, within fifteen days after respondent files its prehearing information exchange, a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in RCRA.[10] See 40 CFR § 22.19(a)(4).

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

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

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

Where a specific penalty is sought, enforcement personnel may use the above general language in the complaint and should include a copy of the penalty calculation worksheets or the analogous regional penalty calculation summary as an attachment to the complaint. When the proposed penalty is sent to the respondent in the pre-hearing exchange submission, the penalty calculation worksheets or the analogous regional penalty calculation summary should be included at that time. Enforcement personnel must be prepared to present at the pre-hearing conference or evidentiary hearing more detailed information reflecting the specific factors weighed in calculating the penalty proposed in the complaint. For example, evidence of specific instances where the violation actually did, could have, or still might result in harm could be presented to the trier of fact to illustrate the potential for harm factor of the penalty.

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

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

## B. DOCUMENTATION OF PENALTY SETTLEMENT AMOUNT

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

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

## C. RELEASE OF INFORMATION

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

In ongoing enforcement cases, documents and other material that deal with establishing the appropriate amount of a civil penalty (particularly penalty computation worksheets and similar calculation summaries) may be covered by two different FOIA exemptions, 5 U.S.C.§§ 552(b)(5) and (7). Documents that support or relate to the amount of the civil penalty the Agency would be willing to accept in settlement are likely to fall within the scope of these exemptions and in many cases can be withheld. Documents that support or relate to the amount of a penalty the Agency has proposed in an administrative complaint may also qualify for protection under the exemptions.[11] It is important to note that the Agency should, under most circumstances, release

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

the final draft of the penalty computation worksheets or the analogous regional penalty calculation summary at the time a specific penalty amount is proposed. For more information on the Agency's policy of releasing information, see the August 15, 1996, Memorandum from Steven A. Herman "Public Release of EPA Enforcement Information." Because issues relating to FOIA and application of its exemptions require special attention, the Regional Freedom of Information Act Officer or appropriate attorney in the regional legal office should be consulted whenever any request is made by a member of the public relating to the application of the RCRA Penalty Policy in general or in a specific enforcement action. For additional information on FOIA and current Agency FOIA policy, Agency enforcement personnel should consult the 1992 EPA Freedom of Information Act Manual and contact the Office of General Counsel (Finance and Operations Law Office).

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

The Consolidated Rules of Practice for administrative proceedings allow the Agency to include a specific proposed penalty in the complaint or within 15 days after the respondent files its prehearing exchange of information. The Rules require that, in either situation, the Agency must provide the respondent with an explanation of how the penalty was calculated in accordance with any criteria set forth in RCRA.[12] The Penalty Policy not only facilitates compliance with the Rules of Practice by requiring that enforcement personnel calculate a proposed penalty (and include this amount and the underlying rationale for adopting it either in the complaint or within 15 days after the respondent files the prehearing exchange), but also identifies a methodology for calculating penalty amounts which would be acceptable to EPA in settlement of administrative and judicial enforcement actions. The Agency expects that the dollar amount of the proposed penalty that will be sought in the administrative hearing will often exceed the amount of the penalty the Agency would accept in settlement. This may be so for several reasons.

First, at the time the complaint is filed, the Agency will often not be aware of mitigating factors (then known only to the respondent) on the basis of which the penalty may be adjusted downward. Second, it is appropriate that the Agency have the enforcement discretion to accept in settlement a lower penalty than it has sought in its complaint, because in settling a case the Agency is able to avoid the costs and risks of litigation. Moreover respondents must perceive that they face some significant risk of higher penalties through litigation to have appropriate incentives to agree to penalty amounts acceptable to the Agency in settlement.
Therefore, Agency enforcement personnel should, as necessary, prepare two separate penalty calculations for each administrative proceeding -- one to support the initial proposed penalty and the other to be placed in the administrative file as support for the final penalty amount the

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

Agency accepts in settlement.[13] In calculating the amount of the proposed penalty to be sought in an administrative proceeding, Agency personnel should total: (1) the gravity-based penalty amount (including any multi-day component), and (2) an amount reflecting upward adjustments[14] of the penalty, and subtract from this sum an amount reflecting any downward adjustments in the penalty based solely on respondent's "good faith efforts[15] to comply with applicable requirements." This total should then be added to the amount of any economic benefit accruing to the violator. The result will be the proposed penalty the Agency will seek in the administrative proceeding.

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

It may be noted that the RCRA Penalty Policy serves as guidance not only to Agency personnel charged with responsibility for calculating appropriate penalty amounts for RCRA violations but also under 40 CFR § 22.27(b) to judicial officers presiding over administrative

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[13] In judicial actions, it will generally only be necessary to calculate a penalty amount to support any penalty the Agency is to accept in settlement. Counsel for the United States may point out to the court in judicial actions that the penalty figure it seeks is consistent with the rationale underlying the Penalty Policy. However, counsel should not suggest that the court is bound to follow the Policy in assessing a civil penalty.

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

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

proceedings at which proper penalty amounts for violations redressable under RCRA Sections 3008(a) and (g) are at issue. Such judicial officers thus have discretion to apply most of the upward or downward adjustment factors described in this Policy in determining what penalty should be imposed on a violator. However, judgments as to whether a penalty should be reduced in settlement because: (1) the violator is willing to undertake an environmental project in settlement of a penalty claim, (2) the Agency faces certain litigative risks in proceeding to hearing or trial, or (3) the violator demonstrates a highly cooperative attitude throughout the compliance inspection and enforcement process, are decisions involving matters of policy and prosecutorial discretion which by their nature are only appropriate to apply in the context of settling a penalty claim. It is therefore contemplated that decisionmakers in administrative proceedings would not adjust penalty amounts downward based upon their assessment of any of these three "settlement only" factors in assessing a civil penalty.

## VI. DETERMINATION OF GRAVITY-BASED PENALTY AMOUNT

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

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

### A. POTENTIAL FOR HARM

The RCRA requirements were promulgated in order to prevent harm to human health and the environment. Thus, noncompliance with any RCRA requirement can result in a situation where there is a potential for harm to human health or the environment. In addition to those violations that involve actual or potential contamination from the release of hazardous wastes, violations such as failure to comply with recordkeeping requirements create a risk of harm to the environment or human health as well as undermine the integrity of the RCRA regulatory program. Accordingly, the assessment of the potential for harm resulting from a violation should be based on two factors:

- the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and

- the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program.

1. Risk of Exposure

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

a. Probability of Exposure

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

Some factors to consider in making this determination would be:

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

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

b. Potential Seriousness of Contamination

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

Some factors to consider in making this determination would be:

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

- existence, size, and proximity of receptor populations (*e.g.*, local residents, fish, and wildlife, including threatened or endangered species) and sensitive environmental media (*e.g.*, surface waters and aquifers).[16]

In considering the risk of exposure, the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred. Violators rarely have any control over whether their pollution actually causes harm. Therefore, such violators should not be rewarded with lower penalties simply because the violations did not result in actual harm.

2. Harm To The RCRA Regulatory Program

There are some requirements of the RCRA program which, if violated, may not appear to give rise as directly or immediately to a significant risk of contamination as other requirements of the program. Noncompliance with these requirements, however, directly increases the threat of harm to human health and the environment. Therefore, all regulatory requirements are fundamental to the continued integrity of the RCRA program. Violations of such requirements may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program. Some examples of this kind of regulatory harm include:

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

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

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

the spreading of contamination is stopped.

3. Applying the Potential for Harm Factor

a. Evaluating the Potential for Harm

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

MAJOR: (1) The violation poses or may pose a substantial risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or
(2) the actions have or may have a substantial adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MODERATE: (1) The violation poses or may pose a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or
(2) the actions have or may have a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MINOR: (1) The violation poses or may pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or
(2) the actions have or may have a small adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

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

b. Examples

Example 1 - Major Potential for Harm

40 CFR § 265.143 requires that owners or operators of hazardous waste facilities establish financial assurance to ensure that funds will be available for proper closure of facilities. Under 40 CFR § 265.143(a)(2), the wording of a trust agreement establishing financial assurance for

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

Example 2 - Moderate Potential for Harm

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

Example 3 - Minor Potential for Harm

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

## B. EXTENT OF DEVIATION FROM REQUIREMENT

### 1. Evaluating the Extent of Deviation

The "extent of deviation" from RCRA and its regulatory requirements relates to the degree to which the violation renders inoperative the requirement violated. In any violative situation, a range of potential noncompliance with the subject requirement exists. In other words, a violator

may be substantially in compliance with the provisions of the requirement or it may have totally disregarded the requirement (or a point in between). In determining the extent of the deviation, the following categories should be used:

| | |
|---|---|
| MAJOR: | The violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance. |
| MODERATE: | The violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended. |
| MINOR: | The violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met. |

a. Examples

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

Example 1 - Closure Plan

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

Example 2 - Failure to Maintain Adequate Security

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

The range of potential noncompliance with the security requirements is quite broad. In a particular situation, the violator may prove to have totally failed to supply any security systems. Total noncompliance with regulatory requirements such as this would result in classification into

the major category. In contrast, the violation may consist of a small oversight such as failing to lock an access route on a single occasion. Obviously, the degree of noncompliance in the latter situation is less significant. With all other factors being equal, the less significant noncompliance should draw a smaller penalty assessment. In the matrix system this is achieved by choosing the minor category.

C. PENALTY ASSESSMENT MATRIX

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

The complete matrix is illustrated below.

Extent of Deviation from Requirement

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

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

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

The selection of the exact penalty amount within each cell is left to the discretion of enforcement personnel in any given case. The range of numbers provided in each matrix cell serves as a "fine tuning" device to allow enforcement personnel to better adapt the penalty amount to the gravity of the violation and its surrounding circumstances. Enforcement personnel should analyze and rely on case-specific factors in selecting a dollar figure from this range. Such factors include the seriousness of the violation (relative to other violations falling within the same matrix cell), the environmental sensitivity of the areas potentially threatened by the violation, efforts at remediation or the degree of cooperation evidenced by the facility (to the extent this factor is not to be accounted for in subsequent adjustments to the penalty amount), the size and sophistication of the violator,[18] the number of days of violation,[19] and other relevant matters. For guidance on recalculation of the gravity based penalty based on new information, see Section IX A.2.

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

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

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