VII. MULTIPLE AND MULTI-DAY PENALTIES

A. PENALTIES FOR MULTIPLE VIOLATIONS

1. Multiple Violations Criteria

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

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

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

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

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

Enforcement personnel are counseled to only calculate penalties for those violations that have occurred within five years of the date of the complaint. Therefore, generally, penalties should not be calculated for one-time violations occurring more than five years before the date the complaint is to be filed and for continuing violations[20] ending more than five years before the date the complaint is to be filed. However, for violations for which injunctive relief is sought, the amount of time elapsed is generally not a relevant consideration.

2. Compression of Penalties for Related Violations

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

There are instances where a company's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to the violations of numerous other independent

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

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

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

Even where separate penalties are not calculated for distinguishable violations, all significant violations should still be cited separately in the complaint to demonstrate the magnitude and scope of the violations.[21] The recitation of all significant violations will provide further support for a penalty that is based on a risk of harm and extent of deviation for the totality of the violations.

3. Multiple Violations Treated as Multi-day Violations

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

Where a facility has through a series of independent acts or omissions repeatedly violated the same statutory or regulatory requirement, the violations may begin to closely resemble multi-day violations in their number and similarity to each other. This is particularly true where the

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

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

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

B. PENALTIES FOR MULTI-DAY VIOLATIONS

RCRA provides EPA with the authority to assess in administrative actions or seek in court civil penalties of up to $27,500[22] per day of non-compliance for each violation of a requirement of Subtitle C (or the regulations which implement that subtitle). This language explicitly authorizes the Agency to consider the duration of each violation as a factor in determining an appropriate total penalty amount. Accordingly, any penalty assessed should consist of a gravity-based component, economic benefit component, and to the extent that violations can be shown or presumed to have continued for more than one day, an appropriate multi-day component. The multi-day component should reflect the duration of the violation at issue, subject to the guidelines set forth in Section VII C., below.

After it has been determined that any of the violations alleged has continued for more than one day, the next step is to determine the length of time each violation continued and whether a multi-day penalty is mandatory, presumed, or discretionary.[23] In most instances, the Agency should only seek to obtain multi-day penalties, if a multi-day penalty is appropriate, for the number of days it can document that the violation in question persisted. However, in some circumstances, reasonable assumptions as to the duration of a violation can be made. For example, a violation by an owner/operator of a land disposal facility for operating after it had lost interim status pursuant to RCRA Section 3005(e)(2) can generally be deemed to have begun on November 8, 1985, and continued at least until the time of the last inspection in which it was determined the facility was being operated without interim status. In the case where an

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[22]See footnote 3.

[23]See footnote 20 for more information on continuing violations.

inspection reveals that a facility has no groundwater monitoring wells in place it can be assumed, in the absence of evidence to the contrary, that the facility has never had any wells. Here the violation can be treated as having commenced on the day that waste management operations triggering the Part 265, Subpart F requirements began or the effective date of the regulations, whichever is later. A multi-day penalty could then be calculated for the entire period from the date the facility was required to have wells in place until the date of the inspection showing they did not.

Conversely, in cases where there is no statutory or regulatory deadline from which it may be assumed compliance obligations began to run, a multi-day penalty should account only for each day for which information provides a reasonable basis for concluding that a violation has occurred. For example, if an inspection revealed that a generator was storing unlabeled drums of hazardous wastes without complying with 40 CFR § 262.34, the facility would be in violation of the storage requirements for permitted facilities found in 40 CFR Part 264. Enforcement personnel should allege in the complaint and present evidence as to the number of days each violation lasted. Documentation in a case such as this might consist of an admission from a facility employee that drums were stored improperly for a certain number of days. In such a case, a multi-day penalty would then be calculated for the number of days stated.

Where EPA determines that a violation persists, enforcement personnel may calculate the penalty for a period ending on the date of compliance or the date the complaint is filed or, if the complaint references only the statutory maximum, the date the proposed penalty is submitted.

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

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

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

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

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

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

C. CALCULATION OF THE MULTI-DAY PENALTY

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

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

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

Mandatory multi-day penalties - Multi-day penalties are considered mandatory for days 2-180 of all violations with the following gravity-based designations: major-major, major-moderate. The only exception is when they have been waived or reduced, in "highly unusual cases," as described below.[24] Multi-day penalties for days 181+ are discretionary.

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

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

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

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

Step 3: Locate the corresponding cell in the following Multi-Day Matrix. Multiply a dollar amount selected from the appropriate cell in the multi-day matrix (or, where appropriate, a larger dollar amount not to exceed $27,500) by the number of days the violation lasted. (Note: the duration used in the multi-day calculation is the length of the violation minus one day, to account for the first day of violation at the gravity-based penalty rate.)

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

Extent of Deviation from Requirement

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

The dollar figure to be multiplied by the number of days of violation will generally be selected from the range provided in the appropriate multi-day cell. The figure selected should not be less than the lowest number in the range provided. Selections of a dollar figure from the range of penalty amounts can be made at the Region's discretion based

on an assessment of case-specific factors, including those discussed below.

In determining whether to assess multi-day penalties and what penalty amount is appropriate to select from the multi-day matrix, the Regions must analyze carefully the specific facts of the case. This analysis should be conducted in the context of the Penalty Policy's broad goals of: (1) ensuring fair and consistent penalties which reflect the seriousness (gravity) of violations, (2) promoting prompt and continuing compliance, and (3) deterring future non-compliance.

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

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

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

While this Policy provides general guidance on the use of multi-day penalties, nothing in this Policy precludes or should be construed to preclude the assessment of penalties of up to $27,500 for each day after the first day of any given violation. Particularly in circumstances where significant harm has in fact occurred and immediate compliance is required to avert a continuing threat to human health or the environment, it may be appropriate to demand the statutory maximum.

VIII. EFFECT OF ECONOMIC BENEFIT OF NONCOMPLIANCE

The Agency's 1984 Policy on Civil Penalties mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law. Enforcement personnel shall evaluate the economic benefit of noncompliance when penalties are calculated. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all enforcement personnel to calculate economic benefit. An "economic benefit" component should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator, as defined below. Economic benefit can result from a violator delaying or avoiding compliance costs, or when the violator achieves an illegal competitive advantage through its noncompliance.

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

For certain RCRA requirements, the economic benefit of noncompliance may be relatively insignificant (*e.g.*, failure to submit a report on time). In the interest of simplifying and expediting an enforcement action, enforcement personnel may forego the inclusion of the benefit component where it appears that the amount of the component is likely to be less than the applicable amount shown in the chart below for <u>all</u> violations alleged in the complaint.

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

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

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

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

It is generally the Agency's policy not to settle cases for an amount less than the economic benefit of noncompliance. However, the Agency's 1984 Policy on Civil Penalties explicitly sets out three general areas where settling the total penalty amount for less than the economic benefit may be appropriate. Since the issuance of the 1984 Policy, the Agency has added a fourth exception for cases where ability to pay is a factor.[25] The four exceptions are:

- the economic benefit component consists of an insignificant amount (see the chart above for the minimum amounts to pursue);
- there are compelling public concerns that would not be served by taking a case to trial;
- it is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation; and
- the company has documented an inability to pay the total proposed penalty.

If a case is settled for less than the economic benefit component, a justification must be included on the Penalty Computation Worksheet or in an appropriate section of the analogous regional penalty calculation summary.

A. ECONOMIC BENEFIT FROM DELAYED COSTS AND AVOIDED COSTS

1. Background

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

- benefit from delayed costs; and

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

- benefit from avoided costs.

Delayed costs are expenditures which have been deferred by the violator's failure to comply with the requirements. The violator eventually will have to spend the money in order to achieve compliance. Delayed costs are either capital costs (essentially equipment) or one-time nondepreciable costs (*e.g.*, cleaning up a spill).[26] Examples of violations which result in savings from delayed costs are:

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

Avoided costs are expenditures which will never be incurred. Avoided costs include the usual operating and maintenance costs which would include any annual periodic costs such as leasing monitoring equipment. Examples of violations which result in savings from avoided costs are:

- failure to perform annual and semi-annual groundwater monitoring sampling and analysis;
- failure to use registered hazardous waste transporters (where the violator will not be responsible for cleaning up the waste);
- failure to perform waste analysis before adding waste to tanks, waste piles, incinerators; and
- failure to install secondary containment around a tank, where such a containment is never installed because the violator chooses closure rather than correction and continued operation.[27]

2. Calculation of Economic Benefit from Delayed and Avoided Costs

Since 1984, it has been Agency policy to use either the BEN computer model or "the rule of thumb" approach to calculate the economic benefit of noncompliance.[28] The rule of thumb approach is a straight forward method to calculate economic savings from delayed and avoided

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

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

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

compliance expenditures. It is discussed more fully in the policy document "A Framework for Statute-Specific Approaches to Penalty Assessments" at pages 7-9.[29] It is now available in a Lotus spreadsheet.[30] Enforcement personnel may use the rule of thumb approach whenever the economic benefit penalty is not substantial (generally under $10,000) and use of an expert financial witness may not be warranted.

For economic benefit penalties that are more substantial (generally more than $10,000), enforcement personnel should use the BEN model to calculate noncompliance economic benefits. The primary purpose of the BEN model is to calculate economic savings for settlement purposes.[31] The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including inputs that consist of optional data items and standard values already contained in the program (see BEN Worksheet in the Appendix, Section X). As discussed in the BEN Users Manual, unless case-specific reasons dictate otherwise, enforcement personnel should rely on the least expensive costs of compliance (i.e., facility expenditures) in calculating economic benefit penalties.

Enforcement personnel should have a copy of the revised BEN User's Manual (September 1999).[32] The User's Manual describes how to use BEN, a computer program that calculates the economic benefit from delayed and avoided costs for any type of entity, including Federal facilities. It is designed to aid enforcement personnel with procedures for utilizing BEN, and to explain the program's results. [33] Except for smaller economic benefit calculations where the "rule

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

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

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

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

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

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

The economic benefit component should be calculated initially for the maximum period of noncompliance. Enforcement personnel should then determine whether that amount should be reduced for any reasons (*e.g.*, possible application of statute of limitations)[34]. However, enforcement personnel should be prepared to support the calculation of economic benefit for the entire period of noncompliance if there is any uncertainty regarding potential reductions that may have been identified.

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

B. ADDITIONAL INFORMATION ON ECONOMIC BENEFIT

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

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

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

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

IX. ADJUSTMENT FACTORS AND EFFECT OF SETTLEMENT

A. ADJUSTMENT FACTORS

1. Background

As mentioned in Section VI of this document, the seriousness of the violation is considered in determining the gravity-based penalty component. The reasons the violation was committed, the intent of the violator, and other factors related to the violator are not considered in choosing the appropriate cell from the matrix. However, any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between separate violations of the same provision. RCRA Section 3008(a)(3) states that in assessing penalties, EPA must take into account any good faith efforts to comply with the applicable requirements. EPA's 1984 Civil Penalty Policy sets out several other adjustment factors to consider. These include the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors. This RCRA Policy also includes an additional adjustment factor for environmental projects undertaken by the respondent.

2. Recalculation of Penalty Amount

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

For example, if after the issuance of the proposed penalty, information is presented which indicates that less waste is involved than was believed when the proposed penalty was issued, it may be appropriate to recalculate the gravity-based penalty component. Thus, if enforcement personnel had originally believed that the violator had improperly stored ten barrels of acutely

hazardous wastes but it was later determined that only a single container of characteristic hazardous waste was improperly stored, it may be appropriate to recalculate the "potential for harm" component of the gravity-based penalty from "major" to "moderate" or "minor."

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

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

When information is presented which makes it clear that the gravity-based or economic benefit penalty component is in error, enforcement personnel may, of course, choose to formally amend the complaint to correct the original penalty component. In all instances, any recalculation of the penalty should be carefully documented on the Penalty Computation Worksheet or the analogous regional office penalty calculation summary in the enforcement file.

3. Application of Adjustment Factors

The adjustment factors can increase, decrease or have no effect on the penalty amount sought from the violator. Adjustments should generally be applied to the sum of the gravity-based and multi-day components of the penalty for a given violation. Note, however, that after all adjustment factors have been applied, the resulting penalty must not exceed the statutory maximum of $27,500 per day of violation. As indicated previously, all supportable upward adjustments of the penalty amount of which EPA is aware ordinarily should be made prior to issuance of the proposed penalty, while downward adjustments (with the exception of those reflecting good faith efforts to comply) should generally not be made until after the proposed penalty has been issued, at which time the burden of persuasion that downward adjustment is proper should be placed on respondent. Enforcement personnel should use whatever reliable information on the violator and violation is readily available at the time of assessment.

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

For any given factor (except ability to pay, cooperative attitude and litigative risk) enforcement personnel can, assuming proper documentation, adjust the sum of the gravity-based and multi-day penalty components for any given violation up or down: (1) by as much as 25% of that sum in ordinary circumstances, or (2) from 26% to 40% of the sum, in unusual circumstances. Downward adjustments based on inability to pay or litigative risk will vary in amount depending on the individual facts present in a given case and in certain circumstances may be applied to the economic benefit component. Downward adjustments of up to 10% of the gravity-based and multi-day penalty components can be made based on the cooperative attitude of the respondent.

However, if a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. For these reasons, the Agency should at a minimum, absent the special circumstances enumerated in Section VIII, recover any significant economic benefits resulting from failure to comply with the law. If violators are allowed to settle for a penalty less than their economic benefit of noncompliance, the goal of deterrence is undermined. Except in extraordinary circumstances, which include cases where there are demonstrated limitations on a respondent's ability to pay or very significant litigative risks, the final adjusted penalty should also include a significant gravity-based component beyond the economic benefit component.

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

The following discussion of the adjustment factors is consistent with the EPA's Civil Penalty Policy issued in 1984.

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

Under Section 3008(a)(3) of RCRA, good faith efforts to comply with applicable requirements must be considered in assessing a penalty. The violator can manifest good faith by promptly identifying and reporting noncompliance or instituting measures to remedy the violation before the Agency detects the violation. Assuming self-reporting is not required by law and the violations are expeditiously corrected, a violator's admission or correction of a violation prior to detection may provide a basis for mitigation of the penalty, particularly where the violator institutes significant new measures to prevent recurrence. Self-reported violations may be eligible for penalty mitigation pursuant to EPA's Policy "Incentives for Self-Policing: Discovery, Disclosure, and Correction and Prevention of Violations" (65 Fed. Reg. 19617 (4/11/00)). Lack

of good faith, on the other hand, can result in an increased penalty.

No downward adjustment should be made if the good faith efforts to comply primarily consist of coming into compliance. Moreover, no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent. EPA will also apply a presumption against downward adjustment for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations (failure to undertake such measures may be cause for upward adjustment as well as multi-day penalties), since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA discovery of a violation.

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

b. Degree of Willfulness and/or Negligence

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

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

- how much control the violator had over the events constituting the violation;
- the foreseeability of the events constituting the violation;
- whether the violator took reasonable precautions against the events constituting the violation;
- whether the violator knew or should have known of the hazards associated with the conduct; and
- whether the violator knew or should have known of the legal requirement which was violated.

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

Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied also is relevant in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and were out of his or her control and the control of his or her agents, the penalty may be reduced.

c. History of Noncompliance (upward adjustment only)

Where a party previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the party was not deterred by the previous enforcement response. Unless the current or previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

Some of the factors that enforcement personnel should consider in making this determination are as follows:

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

A violation generally should be considered "similar" if the Agency's or State's previous enforcement response should have alerted the party to a particular type of compliance problem. A previous violation of the same RCRA or State requirement would constitute a similar violation.

Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute. Enforcement personnel should examine multimedia compliance by the respondent and, where there are indications of a history of noncompliance, the penalty should be adjusted accordingly.

For the purposes of this section, a "previous violation" includes any act or omission for which a formal or informal enforcement response has occurred (*e.g.*, EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree).[35] The term also

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

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

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, enforcement personnel should attempt to ascertain who in the organization had control and oversight responsibility for compliance with RCRA or other environmental laws. The violation will be considered part of the compliance history of any regulated party whose officers had control or oversight responsibility.

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

d. Ability to Pay (downward adjustment only)

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

Enforcement personnel should conduct a preliminary inquiry into the financial status of the party against whom a proposed penalty is being assessed. This inquiry may include a review of publicly-available information through services such as Dun & Bradstreet. In some circumstances, enforcement personnel should review the financial viability of related entities as those related entities could provide financial support to the respondent.[36]

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

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

The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances.[37] Thus, a company's inability to pay usually will be considered only if the issue is raised by the respondent. If the respondent fails to fully provide sufficient information, then enforcement personnel should disregard this factor in adjusting the penalty.

There are several sources available to assist the Regions in determining a regulated entity's ability to pay. Enforcement personnel should consult the Agency's "Guidance on Determining a Violator's Ability to Pay A Civil Penalty," December 16, 1986 (Codified as Policy PT.2-1 in the Revised General Enforcement Policy Compendium). In addition, the Agency now has three computer models it uses in determining whether violators can afford compliance costs, clean-up costs and/or civil penalties: ABEL, INDIPAY and MUNIPAY. ABEL analyzes inability to pay claims from corporations and partnerships. INDIPAY analyzes those claims from individual taxpayers. MUNIPAY analyzes inability to pay claims from cities, towns, villages, drinking water authorities and sewer authorities.[38] These models are designed for use in the settlement context. Because of that, the models are biased in favor of the violator. If the models indicate an ability to pay, the user can assume that the violator can in fact afford the full penalty, compliance costs and/or cleanup costs.[39]

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

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

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

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

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

that payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out remedial measures which the Agency deems to be more important than the deterrence effect of the penalty (*e.g.*, payment of penalty would preclude proper closure / post-closure), the following options should be considered in the order presented:

- consider an installment payment plan with interest;
- consider a delayed payment schedule with interest (for example, such a schedule might even be contingent upon an increase in sales or some other indicator of improved business; or
- consider straight penalty reductions as a last recourse.

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

e. Environmental Projects (downward adjustment only)

Under certain circumstances the Agency may consider adjusting the penalty amount downward in return for an agreement by the violator to undertake an appropriate environmentally beneficial project. All proposals for such projects should be evaluated in accordance with EPA's May 1, 1998, Supplemental Environmental Projects Policy and any subsequent amendments to the SEP Policy.[40]

f. Other Unique Factors

This Policy allows an adjustment for factors which may arise on a case-by-case basis. When developing its settlement position, EPA should evaluate every penalty with a view toward the potential for protracted litigation and attempt to ascertain the maximum civil penalty the court or administrative law judge is likely to award if the case proceeds to hearing or trial. The Agency should take into account, *inter alia*, the inherent strength of the case, considering, for example, the probability of proving violations, the probability that the government's legal arguments will be accepted, the opportunities which exist to establish a useful precedent or send a signal to the regulated community, the availability and potential effectiveness of the government's evidence, including witnesses, and the potential strength of the violator's equitable and legal defenses. Where the Agency determines that significant litigative risks exist, it may also take into account any disproportionate resource outlay involved in litigating a case that it might avoid by entering into a settlement. Downward adjustments of the proposed penalty for settlement purposes may be warranted depending on the Agency's assessment of these litigation considerations. The extent of the adjustments will depend, of course, on the specific litigation considerations presented in any particular case. The Memorandum signed by James Strock on August 9, 1990,

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

"Documenting Penalty Calculations and Justifications of EPA Enforcement Actions," discusses further the requirements for legal and factual "litigation risk" analyses.

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

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

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

If lengthy settlement negotiations cause the violation(s) to continue significantly longer than initially anticipated, the initial proposed penalty amount should be increased, as appropriate, with a corresponding amendment of the complaint. The revised figure would be calculated in accordance with this Policy, and account for the increasing economic benefit and protracted non-compliance.[41]

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

B. EFFECT OF SETTLEMENT

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

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

X. APPENDIX

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