CIVIL PENALTY POLICY

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Civil Penalty Policy

Section I.

Introduction

This document is the Department of Environmental Protection's ["Department"] internal policy for assessing civil penalties for violations of environmental laws, excluding violations of environmental laws for which the Department is seeking administrative civil penalties under '22a-6b of the Connecticut General Statutes ["CGS"]. This policy specifies the method of calculating penalties once it has been determined that a penalty is warranted in a particular case. This policy is to be used in conjunction with the Department's Enforcement Response Policy ["ERP"], which sets forth enforcement response procedures, including a system for classifying violations which are used to determine the cases in which penalties will be assessed.

Penalties are extremely important to the success of each of the Department's programs. The environmental requirements in statutes, regulations, permits and orders exist in order to prevent harm to the environment and public health, and to assure that pollution and potential sources of pollution are properly remediated. The goal of any Department enforcement action is to bring the violator into compliance with these requirements, and to assure that he will stay in compliance. Penalties are critical to this goal, since without penalties the only risk a violator takes is that <u>if</u> he gets caught he will have to do what the law already required him to do. In the meantime he has saved money, time and effort by not complying, and has gained a competitive advantage over others who have incurred the costs necessary to comply with the law. The penalty eliminates the incentive to violate by recouping any money the violator saves by noncompliance, and it creates an additional incentive to comply by adding a "gravity-based" penalty amount which makes noncompliance cost <u>more</u> than compliance would have. Penalties are therefore essential to returning the specific violator to compliance and deterring both that violator and the regulated community as a whole from violating environmental requirements in the future[1].

The purpose of this policy is to assure that penalties for violations of the Department's programs are assessed in a fair and consistent manner; that

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[1] Under certain circumstances, a civil penalty may be offset by a legally binding commitment from the violator to undertake an environmentally beneficial project. The penalty offset shall not exceed the actual costs of such supplemental environmental project, and is not a downward penalty adjustment; refer to the Department=s "Policy on Supplemental Environmental Projects."

economic incentives for noncompliance are eliminated; that penalties are appropriate to the gravity of the violation committed; that no one gains a competitive advantage by violating environmental requirements; and that penalties are sufficient to deter persons from committing violations.

The state may assess a civil or administrative penalty only if authorized by statute. Currently, the Department may pursue a civil penalty through several processes: it can refer a case to the Attorney General to seek a civil penalty in court; it can negotiate payment of a civil penalty under a consent order; and it can assess an administrative civil penalty under CGS Section 22a-6b if civil penalty regulations have been adopted. This Civil Penalty Policy does not apply to administrative civil penalties assessed under CGS Section 22a-6b. The policy applies to penalties assessed in consent orders and recommended in referrals to the Attorney General. Nothing in this policy limits the penalty which the Attorney General decides to pursue. Rather, a penalty calculated under this policy constitutes the range within which the Department will either settle or recommend that the Attorney General seek in litigation.

This policy is intended solely for the guidance of Department employees. It is not intended to, nor does it, constitute Department rulemaking, and it does not create a right or a benefit, substantive or procedural, enforceable at law or in equity, for any person. The Department may assess penalties that are at variance with the policies or procedures contained in this document if appropriate in a specific case, and may change this policy at any time without public notice.

A. Overview Of The Penalty Calculation System.

The penalty calculation system in this policy consists of: (1) calculating the amount of economic benefit associated with each violation, i.e., the amount of money which the violator saved and/or gained by either noncompliance or delayed compliance with the law, (2) determining a basic gravity-based penalty for each violation, (3) adding a "continuing violation" gravity-based penalty to account for the duration of a violation, and (4) adjusting, upward or downward, the sum of the two gravity-based components in light of case-specific circumstances. This system can be represented as follows:

The Civil Penalty Equation

Penalty Amount	=	**Economic Benefit**	+	**Basic Gravity-Based Component**	+	**Continuing Violation Gravity-Based Component**	+/-	**Adjustments to Gravity-Based Components**

In most cases, both economic benefit and a gravity-based penalty should be calculated for each separate violation for which a penalty is sought. If economic benefit or a gravity-based penalty is not calculated for each such violation, the reasons must be clearly documented in the enforcement action summary.

Each factor in the Civil Penalty Equation is summarized below:

1. Economic Benefit

Eliminating any economic benefit of noncompliance is critical to deterring future violations. In general, the civil penalty calculated under this policy must be equal to or greater than the economic benefit of noncompliance. Subsection II.A of this policy describes the types of economic benefit that should be considered, such as delayed or avoided compliance costs.

2. The Basic Gravity-Based Penalty Component

The following two factors shall be considered for each violation in determining the basic gravity-based component of a civil penalty.

- "Extent of Deviation" from the legal requirement violated; this is a measure of the degree to which the violator has deviated from the substance and intent of the requirement, and
- "Potential for Harm" to the environment, to public health, and to the Department's ability, through its regulatory programs, to ensure against actual or potential harm to the environment or public health posed by the violation.

These two factors reflect the seriousness of the violation and have been incorporated into the basic gravity-based penalty matrices that appear in Appendix A.

3. The Continuing Violation Gravity-Based Penalty Component

If a violation continued for more than one day, the gravity-based penalty should increase to account for the duration of the violation. The Department shall apply a continuing violation penalty at an appropriate frequency such as per-day or per-month in which such a violation occurred, in accordance with subsection II.C of this policy. The Department retains full discretion to seek up to the maximum statutory penalty for each day a violation existed.

4. Adjustments To The Gravity-Based Penalty

After the appropriate gravity-based penalty has been determined for each violation, including any continuing violation penalty, the gravity-based penalty may be adjusted upward or downward to reflect the particular circumstances surrounding the violation and the violator. Except in the unusual circumstances discussed in subsection II.A, the amount of any

economic benefit that the violator realized because of the violation is not subject to adjustment. When adjusting the gravity-based penalty, the following factors are considered.

- Good faith efforts, or lack of good faith efforts, to comply prior to the Department's discovery of the violation (downward or upward adjustment).
- Degree of willfulness and/or negligence (upward adjustment).
- History of noncompliance (upward adjustment).
- Ability to pay (downward adjustment).
- Other unique factors, such as the risk and cost of litigation (upward or downward adjustment).

B. Distinct Violations Versus "Grouped Violations."

Under this policy, enforcement staff shall account for each violation when calculating economic benefit and a gravity-based penalty (including any appropriate continuing violation penalty and gravity-based penalty adjustments). A violation may either be characterized as a distinct violation or one of a group of violations as discussed below. A distinct violation is one that results from a violator's independent act or failure to act and is distinguishable from any other violation for which a penalty is being sought. In some situations it may be difficult to determine whether a given violation is distinct from another so as to warrant a separate penalty.

The following are examples of distinct violations:

- Several parameters or emission limits are violated in a single wastewater discharge or stack emission: penalties should be calculated for each parameter or limit which is violated.
- Unpermitted process wastewater discharges occurring from several points at a single facility: penalties should be calculated for each such discharge point.
- At three distinct coating operations within a facility, the coating applied contains VOCs in excess of the permitted concentration: penalties should be calculated for the VOC violation at each operation.
- There are two different types of operations within a single facility, and the air permit establishes emission limits applicable to each such operation as well as to the facility as a whole; three penalties should be individually calculated for noncompliance: a penalty for the emission limit violation at each of the two individual operations and a penalty for violation of the facility-wide emission limit.
- When dredging a marina pursuant to a permit containing conditions requiring (a) that a specific type of dredging equipment be used and (b) that sedimentation be prevented to the extent technically possible,

permittee uses non-authorized dredging equipment and as a result causes unnecessary sedimentation: penalties should be calculated for each of the two permit conditions violated.

- Regulations requiring daily cover and litter pick-up are violated simultaneously at a solid waste facility: penalties should be calculated for the violation of the cover requirement and for the violation of the litter pick-up requirement.
- Violation of permit condition requiring monthly inspection of baghouse to assure that bags are intact; during a month when no inspection takes place, a ripped bag causes emission of sulfur oxides in excess of emission limit: penalties should be calculated for failure to inspect and for violation of an emission limit[2].

In contrast to the above examples, the following are generally deemed "grouped violations," and a single gravity-based penalty calculation is generally appropriate for them:

- A single act or emission that violates identical requirements in more than one legal source (e.g., in a permit and in the regulation which the permit incorporates by reference): a single penalty should be calculated for such grouped violations.
- On a case-by-case basis, and provided that the economic benefit of each violation is included in the total penalty calculation, the following may be grouped for the purpose of a single gravity-based penalty:
  - A violation of a single requirement that derives from or necessarily leads to violations of other requirements [e.g., failure to install a required groundwater monitoring system that results in a failure to sample, analyze, and report monitoring results]: a single gravity-based penalty may be calculated for these grouped violations provided that such penalty is calculated on the basis of the severest violation(s) in the group.
  - A violation that broadens the scope of another violation [e.g., a failure to label more than one hazardous drum] may warrant a single penalty calculation if such violations are considered collectively in evaluating potential for harm and extent of deviation.

C. Specifying The Violations Covered By A Penalty.

When a penalty is assessed in either a consent order or stipulated judgment, the

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[2] Where a regulation or permit specifies required operation and maintenance procedures, failure to carry out any such measure should be penalized regardless of whether that failure resulted in violation of a discharge or emission limit, because the failure poses a potential risk of such harm.

penalty language must specifically reference each violation covered by the penalty. It is not sufficient that the penalty is stated to be for all "known violations" or even "all known violations of a certain requirement." If the Department does this, it may well be waiving the right to collect penalties for any violation in the past, even one which the staff does not know about at the time the consent order or stipulated judgment is drafted.

D. Relationship Between The Calculated Penalty And The Amount Either Sought In Litigation Or Accepted In Settlement.

A civil penalty calculation should yield a penalty range which may be used as a basis for penalty negotiations with the violator. The calculated penalty, at the lowest end of the range, is the minimum amount that the Department will accept in settlement.

It is important to note that, at any point prior to litigation, a calculated penalty may be adjusted downward (but not below the level of economic benefit unless such reduction is approved by management[3] in accordance with subsection II.A) for settlement purposes by the Department based on a demonstrated inability to pay. Additionally, in many cases it is appropriate to update penalty calculations prior to final settlement or litigation to take into account continuing violations and any new information about the case that affects the appropriateness of the initial penalty calculation or the validity of any underlying assumptions.

E. Penalty Assessment If Compliance Was Impossible.

The Department may choose to forego the assessment of a penalty on the ground of impossibility only if the violator demonstrates to the Department's satisfaction that compliance was impossible due solely to an event that was unforeseeable, beyond the violator's control, and the results of which could not have been avoided or repaired in order to prevent the violation.

F. Documentation.

The Department file should contain the factual information and documents on which each penalty calculation is based. It should also contain a Penalty Calculation Worksheet (see Attachment __) for any penalty recommended to the Bureau Chief and proposed to the violator or recommended to the Attorney General, and Penalty Recalculation Worksheets (see Attachment __) for any recalculations done in accordance with subsection II.E of this policy, including the reasons for any adjustments. A Penalty Recalculation Worksheet will be needed in any case in which the Department accepts less in settlement than originally calculated.

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[3] At or above the level of enforcement program director.

If all or part of a calculated penalty does not conform with this policy, or if no penalty is calculated for a violation that warrants a penalty pursuant to the Department's ERP, written justification for such variance shall be included in the Enforcement Action Summary or the Consent Order Data Sheet.

G. Confidentiality.

This Civil Penalty Policy is a public record available for public review. However, any documentation which contains or supports a penalty calculation in a particular case will be held confidential under the Freedom of Information Act ["FOIA"], Section1-210(b), until the enforcement action in that case is finally adjudicated, settled, or abandoned. Therefore, penalty calculations should clearly state at the top of the first page: "Confidential: Pertains to Strategy or Negotiation."

While enforcement action in a case is pending, penalty calculations should be kept in a separate file of confidential documents, but after the enforcement action is finally adjudicated, settled, or abandoned, penalty calculations should be placed in the public file. Until a penalty calculation is placed in the public file, the public file should contain a note indicating the existence of the confidential document and the legal grounds for withholding it, as follows:

> "Penalty Calculation Worksheet, dated [Date], is located in a confidential file because it pertains to strategy or negotiations in a pending litigation."

Similarly, in responding to written requests for information under FOIA, staff should identify any documents withheld and the legal grounds for withholding them. **Before public access to any document under FOIA is denied, staff should confirm the continuing nature of a file marked confidential or seek appropriate legal counsel.**

SECTION II

THE CIVIL PENALTY CALCULATION METHOD

Presented below is the method for calculating a civil penalty under this policy. This method applies to violations for which a decision has been made to seek a penalty in accordance with the Department=s ERP. Nothing in this method shall preclude the assessment of penalties up to the statutory maximum for each day a violation exists.

The Civil Penalty Equation

Penalty Amount	=	**Economic Benefit**	+	**Basic Gravity-Based Component**	+	**Continuing Violation Gravity-Based Component**	+/-	**Adjustments to Gravity-Based Components**

The basic steps for calculating a civil penalty are as follows:

1. Evaluate each violation in the context of the entire case to determine whether any violations may be grouped together [see subsection I.B discussion of distinct versus grouped violations] for purposes of a single penalty calculation.
2. Calculate the economic benefit associated with each violation or group of violations.
3. Calculate a basic gravity-based penalty for each violation or group of violations. If economic benefit or a gravity-based penalty is not calculated for any such violation, the reasons must be clearly documented in the penalty calculation section of the enforcement action summary.
4. If a violation or group of violations continued for more than one day, calculate a continuing violation gravity-based penalty.
5. Adjust the sum of the basic gravity-based and the continuing violation penalties (#3 and #4) for each violation or group of violations based on evaluation of the gravity-based penalty adjustment factors.
6. The total penalty for each violation or group of violations is the sum of #2 and #5; the resulting penalty may not legally exceed the maximum penalty per day provided by statute. The total penalty for a particular case is the sum of the total penalties calculated for each violation and group of violations.

In most cases, a penalty calculation will yield a penalty range which may be used as a basis for the Department=s penalty negotiations with the violator. There are several penalty calculation techniques that may be used to produce a range under this policy; some of these techniques are discussed below.

- In many cases, enforcement staff calculate penalties using a set of

assumptions pertaining to the nature or duration of a violation. At times, staff may consider more than one set of reasonable assumptions about the violation or violating activity. In such instances, a penalty range may be generated based on alternate gravity-based penalty calculations for each set of reasonable assumptions.

- Some cases involve violations that could reasonably be considered as either distinct violations or grouped violations for penalty calculation purposes. In these cases, it may be appropriate to perform alternate gravity-based penalty calculations that consider the violations separately, then as grouped violations, in order to develop a penalty range.
- When calculating economic benefit, enforcement staff need to consider all available compliance cost data. In some cases where these sources provide a range of cost data, it may be appropriate to calculate economic benefit as a range rather than as a single amount.
- For cases involving continuing violations, the gravity-based penalty matrix for continuing violations [Appendix B] establishes a penalty range in each subcell that shall be applied to a continuing violation.

A. Economic Benefit.

One of the purposes of a penalty is to eliminate any economic incentive for noncompliance by assuring that a violator does not profit from violating the law. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage.

Except in rare circumstances discussed at the end of this subsection, adjustment factors shall not be applied to economic benefit. Therefore, the amount of a penalty is almost never less than the amount the violator saved and/or gained through noncompliance. In the interest of simplifying and expediting an enforcement action, enforcement staff may forego calculating economic benefit in cases where it appears that the total economic benefit for all alleged violations is likely to be less than $2,500.

1. Types Of Economic Benefit-

The economic benefit which results from noncompliance can include delayed and/or avoided costs, and it may also include profits directly resulting from noncompliance.

"Delayed costs" are expenditures which have been deferred by the violator's failure to comply; the violator will still eventually have to spend the same amount of money or more in order to come into compliance. The following are examples of violations which result in savings from delayed costs:

- failure to install ground water monitoring wells on time,
- failure to submit a timely permit application,
- failure to develop a spill control plan on time.

"Avoided costs" are expenditures for compliance which the violator did not and will not make. Avoided costs may include operating and maintenance costs for pollution control equipment, and any annual periodic costs such as the cost of leasing monitoring equipment. The following are examples of violations which result in savings from avoided costs:

- failure to perform ground water monitoring sampling and analysis on required occasions,
- failure to use a licensed hazardous waste transporter for a specified time period,
- failure to perform waste analysis under the RCRA program before adding waste to storage tanks.

If there is evidence of delayed or avoided costs derived from noncompliance, the economic benefit calculation shall include each of these types of economic benefit. If the types of economic benefit are not initially known, the penalty may be recalculated in accordance with subsection II.E once information about such economic benefit becomes available.

In addition to any delayed or avoided costs, the Department should consider, to the extent staff is capable of determining them, any profits which may have been earned as a result of the noncompliance. For example, where an entity has operated a landfill without a permit, the profits realized by charging for use of the landfill should be considered in the economic benefit calculation for the violation. In contrast, where a landfill operator fails for several days to properly cover new waste at a landfill, but is otherwise in compliance with the law, the facility's profits, earned almost entirely as a result of lawful activity, would not be considered properly attributable to the facility's noncompliance.

2. Calculating Economic Benefit

The economic benefit of delayed costs roughly equals the amount of return on the unspent money that reasonably could have been realized by the violator during the period of noncompliance. The economic benefit of avoided costs roughly equals the amount of return on the unspent money that reasonably could have been realized by the violator during the period of noncompliance, plus the present value of the avoided compliance costs. The Environmental Protection Agency ["EPA"] computer model BEN will be used by staff to assist in the calculation of economic benefit from delayed

and avoided costs; the BEN model may be accessed through the Department's intranet site or directly through EPA's webpage.

Estimates of costs and profits should be based on whatever information is available to the staff, including contractors and commercial brochures. EPA and other programs within the Department may also have cost information that may be helpful in calculating economic benefit.

3. If The Violator Challenges The Calculation Of Economic Benefit

If a violator claims that the economic benefit of his noncompliance is less than the amount calculated by the Department, the burden is on the violator to present verifiable data on its actual savings and profits. If the accuracy of the violator's data is verified, it can then be used in a recalculation performed by Department staff using BEN.

In rare circumstances, management[4] may approve a penalty assessment which does not recoup all of the violator's economic benefit. Such a decision must be based on one or more of the following reasons, which are expected to occur rarely, and which must be clearly documented on the Penalty Calculation Worksheet:

- The violator has documented that it is unable to pay the total proposed penalty, even in installments, and management has determined, in accordance with the subsection II.D.2 of this policy entitled "Ability to Pay," that even the economic benefit component of the penalty should be lowered.
- There is a compelling public interest that would best be served by settling the case rather than proceeding to a trial.
- It is unlikely, based on the facts of the case as a whole, that the Department will be able to recover economic benefit in litigation. This must be determined with appropriate legal consultation.
- The amount of the calculated penalty, including the adjusted gravity-based penalty and the economic benefit, is not significant enough to warrant the amount of resources necessary to pursue collecting the penalty.

B. Basic Gravity-Based Penalty Component.

The basic gravity-based penalty for each violation or group of violations is calculated by assessing both the "Extent of Deviation" from legal requirements and the "Potential for Harm" posed by the violation, and using the penalty matrix in Appendix A.

1. Extent of Deviation-

The extent of deviation from a requirement is a measure of the degree to

[4] At or above the level of the enforcement program director.

which the violator has deviated from the substance and intent of the requirement without regard to any hazards posed by the violation. (Factors regarding the potential impact on the environment or public health, the toxicity of emissions, discharges and wastes, and the proximity of receptor populations, are evaluated when determining potential for harm.) In determining the extent of the deviation, the following categories are used:

- Major: Substantial noncompliance, in that the violator deviates from the requirement to such an extent that most (or most of the important aspects) of the components of the requirement are not met, or are met after excessive delay.
- Moderate: Significant noncompliance, in that the violator significantly deviates from the requirement but some of the components of the requirement are implemented as intended; or requirements are met after significant delay.
- Minor: Minimal noncompliance, in that the violator deviates somewhat from the requirement but most (or all important aspects) of the components of the requirement are met, or are met after minimal delay.

2. Potential for Harm

The assessment of the potential for harm resulting from a violation should consider **both**:

- Harm to the environment--the risk of human or environmental exposure to pollutants in the air, water or soil, or the risk of harm to natural resources, such as wetlands or fisheries, from the violation, and
- Harm to the regulatory program--the adverse effect noncompliance could have on the Department's ability, through its regulatory programs, to prevent or monitor potential harm to public health or the environment.

In selecting the potential for harm category for each violation or group of violations, choose the higher of the associated regulatory harm or the potential harm to the environment. A written assessment of harm to the regulatory program is only required when such regulatory harm exceeds the potential for harm to the environment.

a. Harm To The Environment

This evaluation considers the potential that humans or the environment may be exposed to pollutants in the air, water or soil; the potential impact of such exposure; and the potential impact to natural resources. The emphasis is on the direct or indirect potential for harm, rather than on whether harm actually occurred.

Under this policy, a scoring system is used to quantify the potential for harm to human health and the environment associated with each violation or group of violations based on the factors discussed below. The resulting score is then used to determine whether the potential for harm is major, moderate or minor.

The following five factors are to be used to evaluate the degree of environmental harm associated with a violation or group of violations. [For some Department programs, more specific environmental harm factors and customized scoring systems have been developed; these appear in Appendix C. Violations that are within the scope of one of these Department programs should be evaluated using the environmental harm factors and scoring systems specific to such program.]

(i) Population at risk

Evaluate the character and degree of actual or potential injury to public health, safety or welfare which is caused or could have been caused by the violation; and the proximity of violating activity or facility to residences, schools, recreational areas, or other areas or facilities used by the public.

(ii) Environment at risk

Evaluate the character and degree of actual or potential injury to or interference with the air, water, land, coastal resources, natural processes and features, fish and wildlife, and other natural resources which is caused or could have been caused by the violation, especially on any rare natural phenomena or sensitive ecosystem; proximity to environmentally sensitive areas or natural resources; and potential pathways for migration of pollutants, including sediments or nutrients, from the site of the violating facility or activity, including ground water, surface water and air pathways.

(iii) The quantity of the discharge, emission, waste, fill or other material, dredging, removal of material, or alteration of or encroachment into natural resources involved in the violation.

(iv) The nature and the physical, chemical, biological, and thermal characteristics of the discharge, emission, waste, fill or other material involved in the violation, including the pollutant concentration, toxicity, fire or explosion hazard, corrosivity, incompatibility, and hazard from direct contact.

(v) **Prior to the violation, the quality of the natural resource that was or could have been affected**. For wastewater discharge, RCRA and solid waste cases, the current ground water and/or surface water quality classification and the classification goal in the area potentially affected by the violation[5]. For cases involving air emissions, the regional air quality will be evaluated. This evaluation may include, but not necessarily be limited to, the current regional attainment status and impact on the ambient air quality.

For each factor listed above, assign a score as follows:

For factors (i) - (iv):

0 = negligible risk
1 = low risk
2 = medium risk
3 = high risk

For factor (v):

VALUE	WATER/WASTE[6]	AIR[7]
0	GC, GB/GC	IN ATTAINMENT
1	SD/SB, D/B, GC/GB, SC/SB, C/B	MODERATE NON-ATTAINMENT
2	GB, SB, B, GB/GA, SB/SA, B/A	SERIOUS NON-ATTAINMENT
3	GA, SA, A, GAA and AA	SEVERE NON-ATTAINMENT

The scores for the five factors are then added to yield the total potential for harm score for each violation or group of violations. The total score dictates the appropriate subcell in the "Potential for Harm" column of the penalty matrix in Appendix A.

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[5] If both surface water and ground water are potentially affected and have different classifications, the more stringent classification is used to score the quality of the natural resource.

[6] There may be circumstances in which the actual water quality is significantly better than that implied by the current classification; in that case, a higher point score should be used. For example, where a fish consumption advisory results in a D/B or C/B classification due to contaminated sediments in an otherwise high-quality stream, the point score for just the classification goal (in this case, B) should be used.

[7] If the impact on the ambient air quality is of a more significant nature, then the evaluation of this factor would take precedence over the attainment status.

b. Harm To The Regulatory Program-

Some violations may not result in a significant direct or immediate risk of exposure. However, such violations may undermine the purposes of or the procedures necessary to implement the Department program ["regulatory harm"] and, therefore, have the potential for indirect impact on human health or the environment and merit significant penalties. Examples include:

- An entity's failure to notify the Department that it is a generator of hazardous waste. Without this notice, the Department cannot monitor the facility and assure that all waste is properly handled.
- Failure to post a required performance bond or obtain other financial guarantee to cover the cost of waste facility closure. Without such a bond, if the permittee abandoned the facility or became insolvent, funding to close the facility and protect the environment might not be available.
- Failure to comply with manifest requirements. In the absence of a manifest, the Department cannot assure that the waste is disposed of at a proper location. Additionally, such failure compromises the cradle-to-grave waste tracking system and inhibits the Department's ability to effectively monitor waste generation and movement in the State.
- Permittee's failure to submit a Discharge Monitoring Report. There could be significant exceedances of effluent limitations which neither the facility nor the Department is aware of and which therefore will not be remedied.
- Permittee's failure to install required continuous emissions monitoring ("CEM") equipment or failure to maintain or make required data available.
- Permittee's failure to prepare a stormwater pollution prevention plan. A permitted facility may have potential sources of stormwater pollution at the site which should be addressed in the pollution prevention plan.
- Failure to submit a notice of change to an alternative operating scenario under a Title V (Clean Air Act) permit.

Each violation or group of violations shall be evaluated in terms of its degree of regulatory harm as described below. The objective of such evaluation is to categorize each violation(s) as either major, moderate or minor.

- Major- The violation has or could have a substantial affect on the Department's ability to prevent or monitor potential harm to public

health or the environment.

- Moderate- The violation has or could have a significant adverse affect on the Department's ability to prevent or monitor potential harm to public health or the environment.
- Minor- The violation has or could have a small affect on the Department's ability to prevent or monitor potential harm to public health or the environment.

C. The Continuing Violation Gravity-Based Penalty Component.

The continuing violation gravity-based penalty applies to each violation or group of violations which continued for more than one day[8]. Continuing violation penalties are required for each violation or group of violations that has:

- a major potential for harm,
- a major extent of deviation, or
- a moderate potential for harm **and** a moderate extent of deviation.

Continuing violation penalties are discretionary for all other violations; however, when the Department decides not to seek a penalty for a continuing violation, the reasons must be clearly documented on the penalty calculation worksheet.

The first step in calculating a penalty for a continuing violation or group of violations is to obtain a penalty range from the appropriate subcell in Appendix B. For most violations, the same categories of potential for harm and extent of deviation used to determine the basic gravity-based penalty under subsection II.B will be used for the continuing violation. If the potential for harm or extent of deviation associated with a continuing violation changes significantly for any period, the violation should be reevaluated in accordance with the methods in subsection II.B, and a new corresponding continuing violation penalty should be obtained from the appropriate matrix in Appendix B and applied over that period.[9]

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[8] Evidence of the duration of a violation may consist of staff observations of a violation, the violator's own acknowledgment, or may be based upon reasonable assumptions deduced from the circumstances (unless the violator demonstrates otherwise). For example, if a violator does not have inspection records for its hazardous waste storage area, as required by RCRA, it is reasonable to assume that inspections have not been conducted for the entire time period in issue.

[9] For example, a discharge of spilled oil to the waters of the state that is subsequently reduced to a discharge of an oil sheen because the violator took timely and appropriate remedial actions may warrant a lower potential for harm score for the period corresponding to oil sheen discharge.

Staff should apply a continuing violation penalty on a per-day basis, but may, upon management's approval[10], apply a continuing violation penalty on an appropriate alternate basis including, but not limited to, per-week or per-month for which such violation(s) existed, or at some other frequency associated with the violating activity. The following guidance should be considered prior to deciding upon the appropriateness of a continuing violation penalty.

- For a violation or group of violations that occurs more than once per month and continues over several months, a corresponding continuing violation penalty should be assessed at least once per-month.
- For a continuing violation that constitutes a major potential for harm to human health or the environment, a continuing violation penalty should be assessed for each day such violation existed.
- For violations of an effluent or emission limitation for which a continuing violation penalty is assessed, a continuing violation penalty should be assessed, at a minimum, for each day the violation continues.

If a continuing violation penalty is applied at a frequency that is less than the frequency of the violating activity, the reasons for such decision shall be clearly documented in the penalty calculation worksheet. Nothing in this policy precludes the assessment of penalties of up to the statutory maximum for each day of violation.

The penalty range chosen from the subcell of the continuing violation penalty matrix will be multiplied by the appropriate number of days, months or other period, that the violation continued after the first day

D. Adjustments To The Gravity-Based Penalty.

The basic gravity-based penalty and any associated continuing violation penalty may be adjusted based on the following factors: the violator=s good faith efforts to comply prior to the Department's discovery of the violation, degree of willfulness and/or negligence, or history of noncompliance. In addition, any gravity-based penalty may be adjusted based upon the violator=s inability to pay or because some other unique factor applies, such as the risk and cost of litigation.

1. Primary Penalty Adjustment Factors-

The gravity-based penalty may be adjusted by as much as 25% in ordinary circumstances, and as much as 40% in unusual or extreme circumstances, based upon evaluation of any of the following adjustment factors which are discussed in detail below.

- Good faith efforts to comply prior to the Department's discovery of the

[10] At or above the level of the enforcement program director.

violation [upward or downward]
- Degree of willfulness and/or negligence [upward]
- History of noncompliance [upward]

A gravity-based penalty may only be adjusted downward for good faith efforts to comply after all three of the above adjustment factors have been evaluated.

a. Good Faith Efforts To Comply-

The violator shall have made good faith efforts to comply before the Department discovered the violation. Such good faith efforts may be present when the violator:

- promptly initiated meaningful compliance efforts in response to the violation and prior to the Department's discovery of the violation, and
- took prompt action to prevent or remediate any harm to the environment or public health from the violation.

Failure to take reasonable and prompt measures to come into compliance upon discovery of a violation is cause for upward adjustment for lack of good faith.

b. Degree Of Willfulness And/Or Negligence-

Negligence shall never be deemed absent merely because the violator was unaware of the legal requirement in question or the fact that the violation existed. Indeed, failure to know the applicable law or to recognize when a violation has occurred is generally, in itself, negligence. If a violation was caused or allowed willfully (i.e. deliberately, intentionally, knowingly), the violator may be subject to criminal penalties as well as civil penalties. Before adjusting any gravity-based penalty on the basis of willfulness or negligence, staff shall confer with program management and Department legal counsel.

c. History Of Noncompliance-

A violator shall be deemed to have a history of noncompliance if, prior to the violation in question, he violated an environmental statute, regulation, order, judgment, or permit administered or issued by the federal government or any state or municipality.

Staff shall utilize the Department's "Enforcement Coordination Plan" to determine whether the violator has a history of noncompliance concerning legal requirements administered by the other Department programs.

If the violating individual, corporation, partnership, or other entity owns more than one facility, the known environmental violations at each such facility shall be attributed to the violator's history of noncompliance.

If the violating corporation has a parent corporation or one or more subsidiary corporations, or is related to one or more other corporations by substantially identical ownership or management, the known environmental violations of such other parent, subsidiary, or related corporation may be attributed to the violator's history of noncompliance[11]. If staff believes that it may not be appropriate under the particular facts to adjust the penalty upward, they shall confer with program management and Department legal counsel.

The percentage of upward adjustment shall depend on:

- the number of previous violations;
- how recent the previous violations were;
- how serious the previous violations were;
- how similar the present violation is to one or more of the previous violations; and
- the number and seriousness of the violations relative to the size and complexity of the operations and the number of facilities being considered.

2. Ability To Pay

A violator shall be deemed "unable to pay" only when his demonstrated financial limitations would, if he were to pay the basic gravity-based penalty, either interfere with his financial ability to come into compliance or reasonably be expected to force him out of business. Inability to pay dividends to shareholders for some finite period does not constitute inability to pay. Loss of employee bonuses or reduction in salaries of managers or officers does not constitute inability to pay. Limited cash flow does not demonstrate inability to pay. A business with limited cash flow may be able to borrow money, sell assets, or take other steps to pay a penalty without incurring extraordinary burdens.

However, the Department may seek penalties regardless of whether they could force a company out of business if the violator refuses to correct a serious violation, or if the violator has a long history of previous violations,

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[11] In addition, if a violator is a business which has undergone a merger, consolidation, transfer of assets or other business change, the compliance history of the "old" business may be attributable to the "new" business; check with Department counsel when such facts are present.

or in other appropriate circumstances. In these situations, the violator has demonstrated that less severe measures are ineffective.

Inability to pay shall be determined solely as follows.

- Violator carries burden of convincingly demonstrating that he is unable to pay.
- That demonstration must be made by written documentation.
- Inability to pay is not demonstrated merely by income tax returns showing a business loss. A business tax loss can be deceptive, as it may result from the fact that the principals or certain employees are receiving very large salaries or bonuses or taking interest-free loans from business funds.

The following EPA computer programs may be used by the Department to help evaluate a violator's claim of inability to pay:

- ABEL, which evaluates a business's cash flow and the financial impact of different amounts of penalty;
- INDIPAY, which evaluates an individual's ability to pay for compliance and a penalty;
- MUNIPAY, which evaluates the financial impact of different amounts of penalty on a municipality.

3. Other Unique Factors-

The Department may assess other factors on a case-by-case basis in determining whether to adjust a gravity-based penalty. In developing each settlement position, the Department, in consultation with the Attorney General, will evaluate:

- the potential for protracted or difficult litigation if settlement is not reached,
- the civil penalty a court would be likely to award,
- the strength of the case on both legal and factual grounds,
- the opportunities to establish a useful precedent,
- the potential strength of the violator's equitable and legal defenses,
- the probability that the government's legal arguments will be accepted, and
- the availability and potential effectiveness of the government's evidence and witnesses.

E. Penalty Recalculation During Settlement Discussions.

Between the time of the initial calculation and the time the penalty is actually agreed to, it may be necessary to recalculate the penalty amount. Recalculation may be necessary for the following reasons:

- Violations have continued or new violations have occurred since the last calculation,
- New information becomes available which adds to or is inconsistent with the information previously used to calculate the gravity-based or economic benefit portion of the penalty,
- A unique adjustment factor (subsection II.D.3) becomes apparent after the initial gravity penalty calculation,
- The violation is more serious or less serious than previously thought, or
- There is an error in the previous calculation.

If a component of the penalty is recalculated, the new calculation and the reason for it shall be recorded on a Penalty Recalculation Worksheet (see Attachment __). The original Penalty Calculation Worksheet is not altered when a penalty is recalculated.

APPENDIX A

Basic Gravity-Based Penalty Assessment Matrices

This appendix contains matrices of basic gravity-based penalties based on statutory programmatic penalty maximums of $25,000, $10,000 and $1,000. Each penalty matrix is divided into nine main cells, each of which is subdivided into five subcells.

Choose the matrix that pertains to the statutory maximum penalty for the violation, and select the appropriate subcell(s) as follows:

When Potential for Harm is expressed as a total score:
Select the appropriate extent of deviation column, based on the evaluation performed in accordance with subsection II.B.1, and then locate the intersection of that column with the appropriate potential for harm row, based on the evaluation performed in accordance with subsection II.B.2. The basic gravity-based penalty is the dollar amount in the corresponding subcell.

When Potential for Harm is expressed as major, moderate or minor:
Select the appropriate extent of deviation column, based on the evaluation performed in accordance with subsection II.B.1, and then locate the intersection of that column with the appropriate potential for harm rows corresponding to the category of harm determined in accordance with subsection II.B.2. The basic gravity-based penalty is the range in dollar amounts among the five subcells.

$25,000 Basic Gravity-Based Penalty Matrix

POTENTIAL FOR HARM		EXTENT OF DEVIATION		
Category	Total Score	Major	Moderate	Minor
Major	15	$25,000	$19,250	$15,000
	14	$23,250	$18,000	$14,250
	13	$21,500	$16,750	$13,500
	12	$19,750	$15,500	$12,750
	11	$18,000	$14,250	$12,000
Moderate	10	$12,000	$ 7,200	$ 4,500
	9	$10,600	$ 6,400	$ 4,000
	8	$ 9,200	$ 5,600	$ 3,500
	7	$ 7,800	$ 4,800	$ 3,000
	6	$ 6,400	$ 4,000	$ 2,500
Minor	5	$ 2,500	$ 1,300	$ 500
	4	$ 2,200	$ 1,100	$ 400
	3	$ 1,900	$ 900	$ 300
	2	$ 1,600	$ 700	$ 200
	1	$ 1,300	$ 500	$ 100

$10,000 Basic Gravity-Based Penalty Matrix

POTENTIAL FOR HARM		EXTENT OF DEVIATION		
Category	Total Score	Major	Moderate	Minor
Major	15	$10,000	$ 7,700	$ 6,000
	14	$ 9,300	$ 7,200	$ 5,700
	13	$ 8,600	$ 6,700	$ 5,400
	12	$ 7,900	$ 6,200	$ 5,100
	11	$ 7,200	$ 5,700	$ 4,800
Moderate	10	$ 4,800	$ 2,880	$ 1,800
	9	$ 4,240	$ 2,560	$ 1,600
	8	$ 3,680	$ 2,240	$ 1,400
	7	$ 3,120	$ 1,920	$ 1,200
	6	$ 2,560	$ 1,600	$ 1,000
Minor	5	$ 1,000	$ 520	$ 200
	4	$ 880	$ 440	$ 160
	3	$ 760	$ 360	$ 120
	2	$ 640	$ 280	$ 80
	1	$ 520	$ 200	$ 50

$1,000 Basic Gravity-Based Penalty Matrix

POTENTIAL FOR HARM		EXTENT OF DEVIATION		
Category	Total Score	Major	Moderate	Minor
Major	15	$ 1,000	$ 770	$ 600
	14	$ 930	$ 720	$ 570
	13	$ 860	$ 670	$ 540
	12	$ 790	$ 620	$ 510
	11	$ 720	$ 570	$ 480
Moderate	10	$ 480	$ 288	$ 180
	9	$ 424	$ 256	$ 160
	8	$ 368	$ 224	$ 140
	7	$ 312	$ 192	$ 120
	6	$ 256	$ 160	$ 100
Minor	5	$ 110	$ 70	$ 50
	4	$ 100	$ 65	$ 45
	3	$ 90	$ 60	$ 40
	2	$ 80	$ 55	$ 35
	1	$ 70	$ 50	$ 35

APPENDIX B

Continuing Violation Gravity-Based Penalty Assessment Matrices

This appendix contains matrices of continuing violation gravity-based penalties based on statutory programmatic penalty maximums of $25,000, $10,000 and $1,000. Each penalty matrix is divided into nine main cells, each of which is subdivided into five subcells. The penalty ranges contained in each subcell below are 10% to 25% of the penalties in the corresponding subcells of the basic gravity-based penalty assessment matrices in Appendix A.

Choose the matrix that pertains to the statutory maximum penalty for the violation, and select the appropriate subcell(s) as follows:

When Potential for Harm is expressed as a total score:
Select the appropriate extent of deviation column, based on the evaluation performed in accordance with subsection II.B.1, and then locate the intersection of that column with the appropriate potential for harm row, based on the evaluation performed in accordance with subsection II.B.2. The continuing violation gravity-based penalty is the range of dollar amounts in the corresponding subcell.

When Potential for Harm is expressed as major, moderate or minor:
Select the appropriate extent of deviation column, based on the evaluation performed in accordance with subsection II.B.1, and then locate the intersection of that column with the appropriate potential for harm rows corresponding to the category of harm determined in accordance with subsection II.B.2. The continuing violation gravity-based penalty is the range of dollar amounts among the five subcells.

$25,000 Continuing Violation Gravity-Based Penalty Matrix

POTENTIAL FOR HARM		***EXTENT OF DEVIATION***		
Category	Total Score	Major	Moderate	Minor
Major	15	$2,500 to $6,250	$1,925 to $4,812.50	$1,500 to $3,750
	14	$2,325 to $5,812.50	$1,800 to $4,500	$1,425 to $3,562.50
	13	$2,150 to $5,375	$1,675 to $4,187.50	$1,350 to $3,375
	12	$1,975 to $4,937.50	$1,550 to $3,875	$1,275 to $3,187.50
	11	$1,800 to $4,500	$1,425 to $3,562.50	$1,200 to $3,000
Moderate	10	$1,200 to $3,000	$ 720 to $1,800	$ 450 to $1,125
	9	$1,060 to $2,650	$ 640 to $1,600	$ 400 to $1,000
	8	$ 920 to $2,300	$ 560 to $1,400	$ 350 to $ 875
	7	$ 780 to $1,950	$ 480 to $1,200	$ 300 to $ 750
	6	$ 640 to $1,600	$ 400 to $1,000	$ 250 to $ 625
Minor	5	$ 250 to $ 625	$ 130 to $ 325	$ 50 to $ 125
	4	$ 220 to $ 550	$ 110 to $ 275	$ 40 to $ 100
	3	$ 190 to $ 475	$ 90 to $ 225	$ 30 to $ 75
	2	$ 160 to $ 400	$ 70 to $ 175	$ 20 to $ 50
	1	$ 130 to $ 325	$ 50 to $ 125	$ 10 to $ 25

$10,000 Continuing Violation Gravity-Based Penalty Matrix

POTENTIAL FOR HARM		EXTENT OF DEVIATION		
Category	Total Score	Major	Moderate	Minor
Major	15	$1,000 to $2,500	$ 770 to $1,925	$ 600 to $1,500
	14	$ 930 to $2,325	$ 720 to $1,800	$ 570 to $1,425
	13	$ 860 to $2,150	$ 670 to $1,675	$ 540 to $1,350
	12	$ 790 to $1,975	$ 620 to $1,550	$ 510 to $1,275
	11	$ 720 to $1,800	$ 570 to $1,425	$ 480 to $1,200
Moderate	10	$ 480 to $1,200	$ 288 to $ 720	$ 180 $ 450
	9	$ 424 to $1,060	$ 256 to $ 640	$ 160 to $ 400
	8	$ 368 to $ 920	$ 224 to $ 560	$ 140 to $ 350
	7	$ 312 to $ 780	$ 192 to $ 480	$ 120 to $ 300
	6	$ 256 to $ 640	$ 160 to $ 400	$ 100 to $ 250
Minor	5	$ 100 to $ 250	$ 52 to $ 130	$ 20 to $ 50
	4	$ 88 to $ 220	$ 44 to $ 110	$ 16 to $ 40
	3	$ 76 to $ 190	$ 36 to $ 90	$ 12 to $ 30
	2	$ 64 to $ 160	$ 28 to $ 70	$ 8 to $ 20
	1	$ 52 to $ 130	$ 20 to $ 50	$ 5 to $ 12.50

$1,000 Continuing Violation Gravity-Based Penalty Matrix

POTENTIAL FOR HARM		***EXTENT OF DEVIATION***		
Category	Total Score	Major	Moderate	Minor
Major	15	$ 100 to $ 250	$ 77 to $ 192.50	$ 60 to $ 150
	14	$ 93 to $ 232.50	$ 72 to $ 180	$ 57 to $ 142.50
	13	$ 86 to $ 215	$ 67 to $ 167.50	$ 54 to $ 135
	12	$ 79 to $ 197.50	$ 62 to $ 155	$ 51 to $ 127.50
	11	$ 72 to $ 180	$ 57 to $ 142.50	$ 48 to $ 120
Moderate	10	$ 48 to $ 120	$ 28.80 to $ 72	$ 18 to $ 45
	9	$ 42.40 to $ 106	$ 25.60 to $ 64	$ 16 to $ 40
	8	$ 36.80 to $ 92	$ 22.40 to $ 56	$ 14 to $ 35
	7	$ 31.20 to $ 78	$ 19.20 to $ 48	$ 12 to $ 30
	6	$ 25.60 to $ 64	$ 16 to $ 40	$ 10 to $ 25
Minor	5	$ 11.00 to $ 27.50	$ 7.00 to $ 17.50	$ 5 to $ 12.50
	4	$ 10.00 to $ 25.00	$ 6.50 to $ 16.25	$ 4.50 to $ 11.25
	3	$ 9.00 to $ 22.50	$ 6.00 to $ 15.00	$ 4 to $ 10
	2	$ 8.00 to $ 20.00	$ 5.50 to $ 13.75	$ 3.50 to $ 8.75
	1	$ 7.00 to $ 17.50	$ 5.00 to $ 12.50	$ 3.50 to $ 8.75