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A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS:

IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

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Introduction

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

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

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

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

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

Writing a Program Specific Policy

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

I. Developing a Penalty Figure

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

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

II. Calculating a Preliminary Deterrence Amount

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

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

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

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

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

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

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

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

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

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

- Degree of willfulness and/or negligence

- Cooperation/noncooperation through pre-settlement action.

- History of noncompliance.

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

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

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

IV. Adjusting the Initial Penalty Target During Negotiations

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

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

Use of the Policy In Litigation

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

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

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

Use of the Policy as a Feedback Device

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

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Attachment

APPENDIX

Introduction

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

The Preliminary Deterrence Amount

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

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

I. The Benefit Component

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

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

A. Benefit from delayed costs

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

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

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

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

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

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

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

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

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

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

B. Benefit from avoided costs

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

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

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

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

C. Benefit from competitive advantage

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

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

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

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

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

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

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

1. Benefit component involves insignificant amount

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

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

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

itself, to achieve the goals of this policy.

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

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

2. Compelling public concerns

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

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

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

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

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

3. Litigation practicalities

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

II. The Gravity Component

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

A. Quantifying the gravity of a violation

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

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

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

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

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

B. Gravity Factors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Initial and Adjusted Penalty Target Figure

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

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

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

I. Flexibility-Adjustment Factors

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

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

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

A. Degree of Willfulness and/or Negligence

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

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

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

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

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

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

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

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

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

B. Degree of Cooperation/Noncooperation

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

1. Prompt reporting of noncompliance

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

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

2. Prompt correction of environmental problems

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

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

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

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

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

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

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

3. Delaying compliance

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

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

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

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

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

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

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

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

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

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

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

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

D. Ability to pay

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

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

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

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

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

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

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

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

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

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

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

E. Other unique factors

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

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

II. Alternative Payments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Promoting Consistency

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

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

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

Use of Penalty Figure in Settlement Discussions

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